

Congress' Section 5 Power and Remedial Rights

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INTRODUCTION

During the past few years, there has been an increasing conflict building between the legislative and judicial branches regarding the authority of Congress to enact remedies for the violation of constitutional rights. Armed with the assumption that it has unlimited authority to define remedies, Congress has sought to enact legislation to alter constitutional remedies imposed by the courts.¹ At the same time, the Supreme Court has narrowly interpreted the scope of Congress' so-called "remedial" or enforcement power under Section 5 of the Fourteenth Amendment.² The legal question explored in this article is how to balance this conflict of power and resolve the respective roles of each branch in dictating remedial rights for constitutional violations.³ Four Supreme Court cases from this past term – *Dickerson v. United*

¹ *E.g.*, Voluntary Confessions, 18 U.S.C. § 3501 (1994); Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (1994 & Supp. V 1999), 42 U.S.C. § 1997e (1994 & Supp. V 1999) (PLRA); Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (1994 & Supp. V 1999) (AEDPA). This legislative effort to alter judicial remedies is part of a larger trend in Congress to direct the actions of the courts through legislation that changes legal standards, restricts judicial review, or modifies remedies. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(a)(2)(B), (e)(1)(A), (f) (1994); AEDPA, 28 U.S.C. §§ 2244, 2253-55, 2261-66 (1994 & Supp. V 1999); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 to -4 (1994) (RFRA); Telecommunications Act of 1996, 47 U.S.C. § 152 (1994 & Supp. V 1999).

² *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 2001 WL 1735561 (2001); *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court's interpretation of Section 5 is part of a trend in recent jurisprudence that has similarly confined the scope of Congress's legislative powers. For example, this last term, the Supreme Court invalidated four acts of Congress. *See Dickerson v. United States*, 530 U.S. 428 (2000) (voluntary confession law); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (Telecommunications Act); *Morrison*, 120 S. Ct. 1740 (Violence Against Women Act); *Kimel*, 528 U.S. 62 (Age Discrimination in Employment Act as applied to states). In the three years of 1995-1997, the Supreme Court issued twelve opinions invalidating acts of Congress, the most since 1934-1936. *See* John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1248 nn.148-49 (1998) (listing cases).

³ I define "remedial rights" as the entitlements individuals have to the effectuation of a descriptive legal interest. *See infra* notes 81-88 and accompanying text.

States,⁴ *Miller v. French*,⁵ *United States v. Morrison*,⁶ and *Kimel v. Florida Board of Regents*⁷ – provide insight as to how to resolve this question.

The question of Congress's power over remedial rights has been little explored in the scholarship or the case law.⁸ In the early 1980s, a variety of congressional attempts to restrict remedies for abortion and desegregation triggered some commentary about Congress's proper role in dictating such remedies.⁹ But those legislative proposals never passed into law, and thus the remedial issue remained academic. The last five years, however, have brought a new era of congressional activity, like the Prison Litigation Reform Act (PLRA), in which Congress has acted upon what it perceives to be the collateral issue of remedies rather than the direct substantive right.¹⁰ Acts like the PLRA that curtail judicial remedies are being heralded as model examples of legislation to properly confine overzealous judges.¹¹ There is therefore a great

⁴ 530 U.S. 428 (2000).

⁵ 530 U.S. 327 (2000).

⁶ 529 U.S. 598 (2000).

⁷ 528 U.S. 62 (2000).

⁸ *United States v. Dickerson*, 166 F.3d 667, 687 (4th Cir. 1999) ("Interestingly, much of the scholarly literature on Miranda deals not with whether Congress has the legislative authority to overrule the presumption created in Miranda, but whether it should."); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 736 n.4 (1992) (observing relatively little written on subject of constitutional remedies as compared with writing on constitutional rights).

⁹ See Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, The Courts, and Congress*, 27 VILL. L. REV. 988, 992 n.18 (1982) (listing over twenty legislative proposals to curtail remedies for abortion, education discrimination, or school prayer); Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976) (arguing legislative proposals to prohibit courts from ordering busing to remedy unconstitutionally segregated schools are invalid); Lawrence Sager, *The Supreme Court, 1980 Term – Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

¹⁰ See PLRA, 18 U.S.C. § 3626 (1994 & Supp. V 1999), 42 U.S.C. § 1997e (1994 & Supp. V 1999) (restricting remedies for cases arising from prison conditions); see also 18 U.S.C. § 3501 (1994) (passed in 1969, but not enforced or applied until 1996, see *Dickerson*, 166 F.3d at 686, which provided remedy for involuntary confessions); AEDPA, 28 U.S.C. § 2254(d)(1) (1994 & Supp. V 1999).

¹¹ 141 CONG. REC. S14418-19 (1995) (observing certain judges were believed to see violations of constitutional rights in every prisoner complaint); 141 CONG. REC. S14414 (1995) (statement of Sen. Dole) (noting PLRA enacted in order to "restrain liberal Federal judges" who had "gone too far in exercising their remedial powers to micromanage the nation's prisons"); see Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 790-93 (1998); David Schoenbrod & Ross Sandler, *By What Right do Judges Run Prisons*, WALL ST. J., Aug. 31, 1998, at A19 (arguing in favor of preventing federal judges from micromanaging prisons); Sarah Vandenbraak, *PLRA: A Step in the Right Direction*, CORR. TODAY, Aug. 1, 1998, at 21.

likelihood that there will be increased efforts to pass similar laws restricting judicial remedies in the future.¹² Thus, it is now time to explore the issue of Congress's remedial power, armed with the new understanding from the Supreme Court that much of Congress's constitutional authority over such matters, heretofore considered expansive, is in fact limited.

There have been three sources of legislative power identified as authority for Congress to enact constitutional remedies: the Article I and III powers over the lower federal courts;¹³ the necessary and proper clause of Article I authorizing Congress to execute the judicial power;¹⁴ and Section 5 of the Fourteenth Amendment authorizing Congress to enforce the provisions of that amendment.¹⁵ This article will focus on the question of Congress's enforcement power under Section 5 of the

¹² See Meese, *supra* note 11, at 790-93 (calling for more legislative strategies like the PLRA to enable Congress to change the policies and practices resulting from judicial decision); Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 402-05 (1998) (identifying current trend and predicting future legislative trend of legislation on collateral matters such as remedies).

¹³ U.S. CONST. art. I, § 8, cl. 9 ("to constitute tribunals inferior to the supreme Court"); U.S. CONST. art. III, § 1 ("the judicial power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish"); see *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish."); *Taylor v. United States*, 181 F.3d 1017, 1021 (9th Cir. 1999) (en banc) (stating Department of Justice's position that Article I authorizes legislative remedies); *Benjamin v. Jacobson*, 172 F.3d 144, 163 (2d Cir. 1999) (en banc) (holding that Congress's power to limit remedial authority of federal courts is well established and is grounded in its power to "ordain and establish" inferior federal courts under Article III of Constitution), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (stating that Congress has authority to control remedial powers of Article III courts); *Walter Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1546 (1972) (suggesting that power of Congress to implement constitutional remedies may be inferred from judiciary clauses of Articles I and III); *Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) (stating that power of Congress to regulate jurisdiction grants it wide choice in selecting remedies).

¹⁴ U.S. CONST. art. I, § 8, cl. 18; *Dellinger, supra* note 13, at 1546; *David E. Engdahl, Intrinsic Limits of Congress's Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 94-104, 172.

¹⁵ U.S. CONST. amend. XIV, § 5; *John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L. J. 2513, 2515, 2519 n.17 (1998) (stating PLRA arguably justified under Section 5); *Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984) (issue of restricting judicial remedies raises questions, that article ignores, pertaining to Section 5 power).

Fourteenth Amendment.¹⁶ Section 5 expressly authorizes Congress "to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment.¹⁷ This article concludes that Congress is limited under Section 5 to enacting prophylactic and proportional remedies that are adequate substitutes for judicial remedies that give meaning and life to judicially-defined constitutional guarantees. In fleshing out this thesis, it derives a framework from the recent proliferation of Supreme Court cases related to this question of congressional determination of remedial rights. The framework is more descriptive than normative, as it attempts to review the recent cases and the glimmers of suggestions provided by the Court in order to discern a more workable approach to reconciling the judicial and legislative remedial powers.

In describing the scope of Congress's power over remedial rights, this article begins by examining the true nature of remedies. Remedies are not mere procedural mechanisms that are subject to the manipulation of Congress. This long-accepted theory of remedies as a secondary right to the primary substantive right, or what has recently been termed "rights essentialism,"¹⁸ simply does not explain the real way in which remedies operate to define the legal right. Indeed, as set forth more fully in Part I, a more accurate description of the role of remedies recognizes that a remedy is not a distinct and secondary right, but rather is an intrinsic part of the underlying right at issue because it operates to give life and meaning to what otherwise would be only a descriptive guarantee. This theory, which I call the "unified right theory," rejects classic rights essentialism and identifies a remedy and the underlying substantive interest as two parts of a unified whole; the definitional right is the inert skeletal matter and the remedial right is the life-giving operative matter.

¹⁶ I intend to address elsewhere the question of Congress's power under Articles I and III to dictate remedies pursuant to its jurisdictional or procedural power over federal courts. See Tracy A. Thomas, *Congress's Jurisdictional Power Over Remedies* (unpublished manuscript, on file with author). The cases and commentary concluding that Articles I and III justify legislative constitutional remedies are based on the same premises that underlie the Section 5 issue, and which I dispute here: that a remedy is procedural, that statutory remedies are the same as constitutional remedies, and that Congress's remedial power is unlimited. See, e.g., *Taylor*, 181 F.3d at 1026-40 (en banc) (Wardlaw, J., dissenting); *Benjamin*, 172 F.3d at 163; *Gavin*, 122 F.3d at 1081. My ultimate conclusion with respect to the Article I power is the same as my conclusion here under Section 5: Congress is limited to enacting remedies that fit within the confines of its enumerated powers over "jurisdiction" and "procedure" and it must not enact remedies that are inadequate substitutes for judicial remedies.

¹⁷ U.S. CONST. amend. XIV, § 5.

¹⁸ Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999).

Characterizing remedies in this way demonstrates that any legislative authority over remedies must derive from the substantive right. As set forth in Part II, therefore, it is clear that Congress will have power to dictate the remedy when it has power to define the underlying descriptive right. The legislative remedial power is merely a derivative one that stems from Congress's enumerated power over the underlying interest. This remedial power is straightforward with respect to statutory rights as Congress has the power to define or redefine the statutory right it has created, and thus, under the unified right doctrine, the power to define and redefine all corresponding remedies. This statutory power, however, does not justify legislative creation of constitutional remedies, as too many courts have incorrectly assumed.

As for constitutional rights, Congress has no power to alter a definitional guarantee short of the amendment process, and thus it has no derivative power to alter the constitutional remedies. However, as discussed in Part III, express power over constitutional remedies is found in Section 5 of the Fourteenth Amendment which authorizes Congress to enact "appropriate" "enforcing" legislation for the rights embodied in that amendment. Several recent Supreme Court cases beginning with *City of Boerne* and continuing with *Morrison* and *Kimel* have fleshed out this constitutional standard of appropriate enforcement legislation. First, "enforcing" legislation must not effect a direct and primary change upon the substantive right, but must be designed to redress and respond to an identified constitutional violation. Second, Section 5 legislation must be "appropriate" legislation, that is, it may be broadly prophylactic in character, but its measure of relief must be proportional to the constitutional violation.

The Court has summarized this two-prong standard by holding that Congress may enact "remedial," but not "substantive" language. This test, however, has caused great confusion among courts and legislators due to the Court's inability to provide clear definitions to distinguish remedial from substantive acts of Congress.¹⁹ Nor can the Court overcome this definitional problem because as the unified rights theory reveals, the remedy and substance are intertwined rather than distinct. The Court's confusion, however, appears to be in articulation rather than in understanding. Its recent Section 5 cases conceptually are grounded

¹⁹ Such confusion should come as no surprise to scholars at the forefront of the study of Remedies, who have recently demonstrated how remedies and substance are not separable, but rather, are closely interrelated. Levinson, *supra* note 18; Donald Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665 n.1 (1987).

in rationale akin to the unified rights theory, even if the Court has tended to frame those concepts in rights-essentialist terms. Part III of this article thus also seeks to redefine the Court's basic analysis of the Section 5 power utilizing the framework of the unified rights theory.

Yet, even when Congress correctly follows the dictates of Section 5, there is a further restraint upon its ability to create constitutional remedies if the legislative remedy conflicts with a remedy imposed by the courts. Part IV explores this question of how to reconcile a legislative substitute with the judicial remedy it seeks to replace. Last term's case of *Dickerson v. United States* and its resolution of Congress's power to overrule the *Miranda* remedy,²⁰ support the conclusion that courts should defer to legislative remedies only if those substitutes are adequate, or equally effective at remedying the constitutional violation. The meaning of "adequate" and the way in which the courts have analyzed whether substitute remedies are equally effective in redressing constitutional violations is further explored in Part IV.

I. THE UNIFIED THEORY OF REMEDIES AND RIGHTS

The starting premise for this article is to understand what a remedy is, before delving into the question of which branch of government is empowered to craft remedies for constitutional rights. What is a remedy? Traditionally, a remedy is defined as the enforcement provision of a right: it is what a plaintiff receives to cure the legal wrong committed against her.²¹ Remedies commonly are defined by example, as it is easier to say that remedies are damages, injunctions, and restitution, rather than coming up with a comprehensive definition of "remedy."²² But broadly understood, remedies are the rules for implementing rights and preventing or punishing their violation.²³

Remedies have traditionally been given short shrift in legal jurisprudence.²⁴ They are considered the poor cousin of the affluent core

²⁰ 530 U.S. 428 (2000).

²¹ DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1 (2d ed. 1994) ("A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged.").

²² See, e.g., DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 1.1, at 2 (2d ed. 1993); LAYCOCK, *supra* note 21, at 1; DOUG RENDLEMAN, *REMEDIES* 1-2 (6th ed. 1999); RUSSELL L. WEAVER ET AL., *MODERN REMEDIES* 1-7 (1997).

²³ Levinson, *supra* note 18, at 861.

²⁴ HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 124 (William Eskridge, Jr. & Philip Frickey eds., 1994) (stating that systematic study of remedies is one of most neglected fields in science of law); Friedman, *supra* note 8, at 735 n.4 (noting that writings on constitutional remedies are

substantive rights. Remedies are called the "secondary right" to the primary substantive right thus denoting their assumed status as mere procedural mechanisms tangentially related to the pure substantive value.²⁵ This inclination to relegate remedies to second-class rights has left a gaping hole in the legal discourse as to the nature of remedies. In particular, the failure to address the true nature of remedies has led the courts to ignore the crucial questions of identifying the source of legislative power to dictate constitutional remedies to the courts.

Indeed, there is tremendous confusion over the nature of a remedy – is it a substantive right or is it a procedural mechanism? The leading remedies scholars like Professors Laycock and Dobbs are inconclusive, describing remedies as a hybrid of both substance and procedure.²⁶ Professor Laycock in his preeminent text, *Modern American Remedies*, states that "remedies law is neither procedural nor substantive, but somewhere in between."²⁷ He explains:

The court decides whether the litigant has been wronged under the substantive law; it conducts its inquiry in accordance with the procedural law. The Law of Remedies falls somewhere between substance and procedure, distinct from both but overlapping with both Such a body of law is not sensibly thought of as procedural. But remedies law does not change [the] underlying obligation, so it is not easily thought of as substantive either. It is something in between; it is the means by which substantive rights are given effect.²⁸

Others, such as Justice Souter concurring in the recent case of *Miller v. French*, express a theory that a remedy can derive from one of three different sources: the underlying substantive right, the rules of procedure, or the remedial rules defining the scope or requirements for relief.²⁹ And yet others, like Justice Scalia in his majority opinion in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, demonstrate a schizophrenic view of remedies, waxing poetic on the substantive

noticeably sparse in comparison to writings on constitutional rights).

²⁵ See *infra* text accompanying notes 33-49.

²⁶ DOBBS, *supra* note 22, § 1.1; LAYCOCK, *supra* note 21, at 8.

²⁷ LAYCOCK, *supra* note 21, at 8.

²⁸ *Id.* at 1-2.

²⁹ *Miller v. French*, 120 S. Ct. 2246, 2260-61 (2000) (Souter, J., concurring); see also *Guar. Trust Co. v. York*, 326 U.S. 99, 115 (1945) (Rutledge, J., dissenting) (discussing "the border between procedure or remedy and substance, where the one may or may not be in fact but another name for the other" and also referring to non-substantive rights as "adjective").

attributes of remedies, yet treating the remedy as mere procedure.³⁰ In *Grupo Mexicano*, Justice Scalia recognized that a remedy of a preliminary injunction freezing assets in a diversity case for contract damages was not "merely a question of procedure," but rather "goes to the substantive rights of all property owners."³¹ Nonetheless, Scalia treated the preliminary injunctive remedy as a procedural issue by applying the federal Law of Remedies in the diversity action rather than applying the state substantive law as the respondent argued was required under *Erie v. Tompkins*.³²

An understanding of the nature of remedies, however, is a crucial starting point for evaluating the limits of Congress's power to dictate these remedies to the courts. A remedy is not a lesser, secondary right, but rather, it is an intrinsic component of every substantive guarantee. Under the "unified right theory," remedies can best be understood as the living component of the unified body of the legal right. As part of the unified right, it is clear that a remedy is indeed substantive and directly defines the scope of the legal interest. Understanding remedies as substance is thus the first step towards an analysis that then looks for a basis of legislative power authorizing substantive enactments.

A. Remedy as a Secondary Right

The virtually unquestioned theory of remedies has been that the remedy is something secondary to -- something lesser than the primary substantive right. This theory of remedial rights, which continues to date was articulated by Professors Hart and Sacks in the 1950s.³³ Hart and Sacks set forth a dichotomy distinguishing primary from secondary

³⁰ *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1968 n.3, 1970 (1999); see John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173 (1999) (suggesting legal analysis that parallels Court's reasoning in *Grupo Mexicano*).

³¹ *Grupo Mexicano*, 119 S. Ct. at 1970.

³² *Id.* at 1968 n.3. The Court reached a contrary result in *Guaranty Trust Co. v. York*, where it concluded that under the Erie doctrine, it must apply as substantive law the state remedial statute of limitations, despite the Court's discussion of equitable remedies generally as procedural rules governed by federal law. 326 U.S. at 105-06, 112.

³³ HART & SACKS, *supra* note 24, at 122-34; see Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249 (1991) (defining primary rules as those that govern persons independently of litigation, and remedial rights same as Hart and Sacks); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 101 (1997) (expressly utilizing terminology of "remedial rights" coined by Professors Hart and Sacks); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (relying heavily upon Hart and Sacks' distinction between primary and remedial rights).

rights.³⁴ They defined a primary right as something that is expected or hoped for when a private arrangement or other legal guarantee works successfully.³⁵ This primary right includes legal duties owed to others, individual liberties, and powers to exclude or control the actions of others.³⁶ They defined a remedial right as the law that directs that a certain consequence or sanction follow upon non-compliance or deviation from the primary right.³⁷ Their analysis of the fundamental elements of the legal process focused on the importance of understanding the primary right, and as an afterthought, cautioned that "remedial powers and remedial duties are by no means unimportant."³⁸ In this regard, Hart and Sacks emphasized the importance of sharply distinguishing between primary and remedial rights in analyzing all areas of law.³⁹ Indeed, they castigated those who did not subscribe to this theory of the separate nature of remedial rights. In particular, they criticized Professors Hohfeld and Corbin for suggesting that right and remedy necessarily go together, such that if there is no remedy, there is no primary right in a genuine sense:⁴⁰

A system of analysis which permits confusion between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance is dangerous at best. . . . Lots of people have tried to think backwards in this way. It is the essence of clear analysis to see that it *is* backwards, and instead to think frontwards.⁴¹

Others have applied a similar dichotomy between right and remedy, but use the terms primary and secondary rights, with "secondary right" connoting the remedy.⁴² H.L.A. Hart defined what he called "secondary rules" broadly to include not only those relating to remedial rights, but

³⁴ HART & SACKS, *supra* note 24, at 122-34.

³⁵ *Id.* at 122.

³⁶ *Id.* at 130-34.

³⁷ *Id.* at 122.

³⁸ *Id.* at 130.

³⁹ *Id.* at 124, 129.

⁴⁰ Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, and Other Legal Essays*, 23 YALE L.J. 16 (1913), and 26 YALE L.J. 710 (1917).

⁴¹ HART & SACKS, *supra* note 24, at 136.

⁴² JOHN AUSTIN, *LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW* 44-45 (4th ed. 1873); H.L.A. HART, *THE CONCEPT OF LAW* 95 (1961); Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 407 (1992) (using similar distinction between primary rights and secondary rights).

also rules about how primary rules were to be recognized, promulgated, and modified.⁴³ John Austin defined secondary or "sanctioning" rights to mean rights that are consequences of acts, forbearances, and omissions, which are violations of rights or duties.⁴⁴ More recently, Carlos Vazquez defined "secondary right" to refer to both the right to enforce primary rights in advance of a violation (preventive remedies) and the right to obtain remedies after a violation (compensatory remedies).⁴⁵ These labels of the secondary right are based on the same Hart and Sacks' premise that there is a separate, lesser right tangentially related to the true, primary right.

This theory of the primary substantive right and the lesser remedial right has been readily adopted into analyses of constitutional law. The primary rights are viewed as the core, "pure" values, the "true meaning" contained within the constitutional provisions.⁴⁶ The remedial rights are those tangential, practical questions of how to implement those core values into society.⁴⁷ The implications of this right/remedy distinction in constitutional law are to insulate the judicially recognized rights, but to relegate judicially mandated remedies to political challenge and claims of illegitimacy.⁴⁸ In other words, "rights and remedies are made of different stuff—and the rights stuff is better."⁴⁹ Professor Levinson has

⁴³ HART, *supra* note 42, at 95.

⁴⁴ AUSTIN, *supra* note 42, at 45.

⁴⁵ Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1090 n.26 (1992).

⁴⁶ Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 52-58 (1979); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

⁴⁷ Fiss, *supra* note 46, at 46, 54-55, 57; Sager, *supra* note 46, at 1213.

⁴⁸ Fiss, *supra* note 46, at 46, 54-55, 57 (noting that legitimacy of judicial action requires judges to act objectively and independently of politics and moral preferences in defining primary right and discovering true meaning of constitutional values; but judge was to discard that objectivity at remedial stage to be adaptive and strategic in order to obtain most relief possible in politically-charged world that limited ability of courts to implement primary values); Levinson, *supra* note 18, at 861 (stating that right/remedy dichotomy results in belief that courts have special power to interpret meaning of constitutional rights, but have no special ability to make types of policy decisions that remedies require, and so courts should defer to political branches about issues of implementing or enforcing rights); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1176 (1996) (observing that courts have no legitimate power to craft prophylactic remedies in structural reform cases); *see, e.g., Dickerson v. United States*, 530 U.S. 428 (2000) (noting argument by party advocating that prophylactic remedy of Miranda warning is illegitimate exercise of court's power to interpret constitutional values).

⁴⁹ Levinson, *supra* note 18, at 858; *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678 (1983) (describing right/remedy distinction in constitutional law as "pure

termed this thinking about constitutional rights "rights essentialism."⁵⁰ Rights essentialism assumes a pure constitutional value that is then corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of a real world.⁵¹ That translation process inevitably distorts and dilutes the core value, and thus, the argument goes, judges and scholars should always distinguish the true constitutional right from the judicial application of the right.⁵²

A good example of rights essentialism at work is the recent line of cases addressing the remedy restricting provisions of the Prison Litigation Reform Act. The PLRA restricts a variety of remedies – damages, injunctive relief, consent decrees, special masters, and attorney's fees – for constitutional cases arising out of prison conditions.⁵³ In classic rights-essentialist style, the courts have uniformly found that the PLRA's restrictions on constitutional remedies are permissible because the Act "changes the Law of Remedies, not the substantive law of prison conditions."⁵⁴ In other words, the law is valid because it alters the lesser right of the remedy, which does not affect the primary constitutional right of the Eighth, First, or Fourteenth Amendment.

To assume the remedy is in fact a separate, secondary right raises the question as to the character or nature of this secondary right. Yet, attempting to characterize remedies as either substantive or procedural has confounded many. The label "procedural" generally refers to the

rights, dirty remedies").

⁵⁰ Levinson, *supra* note 18, at 858.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 18 U.S.C. § 3626 (1994 & Supp. V 1999) (describing appropriate remedies with respect to prison conditions: restricting injunctive relief, restricting preliminary injunctive relief, prohibiting prisoner release orders except in exceptional cases, terminating prospective relief after 2 years, immediately terminating all injunctive relief that does not comply with PLRA standards, prohibiting consent decrees, automatically staying injunctive relief upon filing of motion to terminate, prohibiting special masters); 28 U.S.C. § 1346 (1994 & Supp. V 1999) (prohibiting civil action against United States for mental or emotional injury without showing of physical injury); 42 U.S.C. § 1997e (1994 & Supp. V 1999) (limiting recovery in suits by prisoners, requiring exhaustion of administrative remedies, restricting attorney's fees under § 1988, and prohibiting damages for mental or emotional injury without showing of physical injury).

⁵⁴ *Benjamin v. Jacobson*, 172 F.3d 144, 151 (2d. Cir. 1999) (en banc) (finding that PLRA does not alter scope of substantive rights); *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996) (holding that PLRA did not amend substance of Eighth Amendment but rather amended applicable law of court awarding relief greater than that required by Constitution), *cert. denied*, 520 U.S. 1277 (1997); *Benjamin v. Jacobson*, 935 F. Supp. 323, 349 (S.D.N.Y. 1996) (observing that Congress did not amend substantive law of prison conditions but rather merely changed law governing district court's remedial powers), *rev'd*, 172 F.3d 144 (2d Cir. 1999) (en banc).

judicial process for enforcing rights and duties, whereas "substantive" generally refers to the interests, guarantees, and duties recognized by law.⁵⁵ Some, like Professor Laycock, have merely conceded that a remedy is a little of both and a little of neither.⁵⁶ However, the characterization of the remedy is often important, as in the context of the *Erie* doctrine or the Rules Enabling Act when a federal court sitting in diversity must decide whether to apply federal or state law.⁵⁷ Thus, the critical question in these cases is whether the remedial law is one of substance or procedure.

Sometimes, the Supreme Court has found the remedial law to be substantive. In *Monessen Southwest Railway v. Morgan*, the Court found the remedy of prejudgment interest to be part of the federal substantive law that could not be altered by state courts.⁵⁸ In *Gasperini v. Center for Humanities*, the Court held that judicial limits upon excessive compensatory damages were likewise substantive law.⁵⁹ The Court also found the remedial defense of the statute of limitations to be substantive law in *Guaranty Trust v. York*.⁶⁰ And, in *Chambers v. NASCO*, the Court explained that statutes shifting the burden of attorney's fees to the loser as a remedy for the prevailing party were substantive laws.⁶¹

However, at other times, the Supreme Court has found remedial law to be procedural. So, in *Chambers*, while the remedy of attorney's fees under fee-shifting statutes was held to be substantive, fees awarded as sanctions for bad-faith litigation were held to be procedural.⁶² In *Burlington Northern Railroad Co. v. Woods*, the Court found that a ten-percent increase in compensatory damages for frivolous or dilatory appeals was procedural.⁶³ And in *Grupo Mexicano*, the Court treated the remedy of a preliminary injunction freezing assets pending resolution of

⁵⁵ *Hanna v. Plummer*, 380 U.S. 460, 464 (1965).

⁵⁶ LAYCOCK, *supra* note 21, at 1, 2-8.

⁵⁷ The Rules Enabling Act, 28 U.S.C. § 2072 (1994); *Plummer*, 380 U.S. at 464-66 (holding that federal court must apply federal rules of procedure); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal court sitting in diversity action must apply state substantive law and procedural law of federal forum).

⁵⁸ *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 335-36 (1988).

⁵⁹ *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 416 (1996).

⁶⁰ *Guar. Trust Co. v. York*, 326 U.S. 99, 112 (1945).

⁶¹ *Chambers v. NASCO*, 501 U.S. 32, 52 (1991); *Marek v. Chesny*, 473 U.S. 1, 35 (1985) (holding that right to attorney's fees under section 1988 is "substantive" under any reasonable definition of that term); *Sioux County v. Nat'l Sur. Co.*, 276 U.S. 238, 241-42 (1928).

⁶² *Chambers*, 501 U.S. at 53-54.

⁶³ *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 3 (1987).

the damages suit as a rule of procedure determined by federal law.⁶⁴ The Court in *Guaranty Trust* went even further, declaring in dicta that equitable remedies could never be substance dictated by state law in diversity actions.⁶⁵

This notion that remedies are simply procedural mechanisms has been advocated by those seeking to overturn the exclusionary remedies adopted by the Court for constitutional violations.⁶⁶ In particular, they have argued that the exclusionary remedies for violations of the Fourth and Fifth Amendment are procedural rules of evidence subject to Congress's control.⁶⁷ The argument is that a remedy is a procedural mechanism over which Congress has plenary power pursuant to its Article I and III powers to create and control the lower federal courts.⁶⁸ Indeed, the Supreme Court seemingly has adopted the substantive/procedural dichotomy to determine whether an exclusionary remedy is primarily the responsibility of the judiciary or the legislature.⁶⁹ In the recent case of *Dickerson v. United States*, the Court stated that the "law in this area is clear": Congress retains the ultimate authority to modify rules of procedure and evidence for the federal

⁶⁴ *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1970 n.3 (1999).

⁶⁵ *Guar. Trust Co.*, 326 U.S. at 105-07. The Court stated that the requirement that federal courts apply state substantive law in diversity actions does not mean that federal courts cannot apply their own choice of equitable remedy. It went on to state that state law cannot define the remedies that a federal court must give, nor is a federal court limited in its remedial capacity by state law.

⁶⁶ See *United States v. Dickerson*, 166 F.3d 667, 667, 687, 691-92 n.22 (4th Cir. 1999); Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 226-27 (1999) (noting that Congress may trump Supreme Court rule as long as rule is not required by Constitution).

⁶⁷ See Cassell, *supra* note 66, at 226-27; Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 855 (1999) (arguing for judicial deference to legislative reform efforts regarding exclusionary remedy for Fourth Amendment).

⁶⁸ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937) (validating Declaratory Judgment Act and noting that Congress may create, improve, abolish, or restrict remedies in federal court); *Turner v. McMahon*, 830 F.2d 1003, 1009 (9th Cir. 1987) (stating that Congress has power under Article III of Constitution to fashion new remedies, such as Declaratory Judgment Act, or limit traditionally available judicial remedies, such as Anti-Injunction Act), *cert. denied*, 488 U.S. 818 (1988); *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997) (discussing PLRA); see, e.g., *Anti-Tax Injunction Act*, 28 U.S.C. § 1341 (1994 & Supp. V 1999) (prohibiting district courts from enjoining collection of any tax under state law where "plain, speedy and efficient remedy is available in state courts"); *Anti-Injunction Act*, 28 U.S.C. § 2283 (1994) (stating that federal court may not grant injunction to stay proceedings in state court, except as expressly authorized by Congress, or as necessary to aid its jurisdiction, or to protect or effectuate its judgements).

⁶⁹ *Dickerson v. United States*, 120 S. Ct. 2326, 2332 (2000).

courts; but the Court retains the final authority interpreting and applying the Constitution.⁷⁰ Accordingly, the Court resolved the *Dickerson* conflict between the judicially created *Miranda* remedy and a legislative act overruling *Miranda* as one turning on whether the exclusionary remedy was a substantive constitutional rule or merely a rule of procedure.⁷¹ The Court easily concluded that the *Miranda* remedy was a constitutional rule of decision.⁷² In reaching this conclusion, the Court relied on the fact that it had required state courts to apply the remedy.⁷³ Since federal courts have no authority to issue rules of procedure for state courts, the *Miranda* rule must in fact be a substantive rule related to enforcing the commands of the Constitution.⁷⁴

Thus, the Court has been inconsistent in its conclusion as to whether a remedy is procedural or substantive. As we have seen, the status of remedies as substance or procedure seems to vary depending on the particular case and the particular type of remedy. This inconclusive characterization of the nature of a remedy triggers additional confusion on causally connected legal issues, such as the *Erie* question of the choice of state or federal law, or the question of Congress's power to dictate the remedy. More fundamentally, this dichotomy of segregating rights and remedies into two separate camps of substance and procedure is futile because it simply contradicts reality. For remedies are not isolated secondary rights that differ in nature from the related substantive right. Rather, remedies are an inherent part of every substantive right – and as such, are merely one characteristic of the substantive unified right.

B. *The Unified Right Theory*

This article rejects any theory of remedies that segregates right from remedy. "As form cannot always be separated from substance in a work of art, so adjective or remedial aspects cannot be parted entirely from substantive ones. . . ."⁷⁵ Instead, it suggests that the "unified right theory" of remedies – in which the remedy and the definitional guarantee are

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2332-34. Recently, the Court has also characterized other evidentiary rules, such as burdens of proof, as substantive aspects of a case. See *Raleigh v. Ill. Dep't of Revenue*, 120 S. Ct. 1951, 1955 (2000) (citing *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959)) (holding that burdens of proof are substantive for purposes of *Erie* doctrine).

⁷³ *Dickerson*, 120 S. Ct. at 2333.

⁷⁴ *Id.*; *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 335 (1988) (holding that measure of FELA damages is substantive, not procedural, issue).

⁷⁵ *Guar. Trust Co. v. York*, 326 U.S. 99, 116 (1945) (Rutledge, J., dissenting).

two components of the unified substantive whole - more appropriately describes the real interrelationship between these two legal concepts. As Professor Gewirtz recognized almost twenty years ago, while the duality of the ideal and practical implementation exist as distinct conceptual matters,

the two-sidedness is not conveniently deposited in the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely "ideal." There is a permeable wall between rights and remedies.⁷⁶

He rejected the rights-essentialist theory that remedies are separate, lesser rights that do not affect the core substance value.⁷⁷ Similarly, Professor Levinson in his recent groundbreaking work, *Rights Essentialism and Remedial Equilibration*, describes the real process of constitutional adjudication, and concludes that "rights and remedies operate as part of a single package."⁷⁸ In *Remedial Equilibration*, Levinson initiates a new scholarship of the right/remedy relationship. He rejects the traditional rights essentialism of remedies, and advocates "remedial equilibration," his theory describing the symbiotic relationship between right and remedy.⁷⁹ Thus, those concentrating on understanding remedies (as opposed to those who come to them as an afterthought) have concluded that the nature of a remedy is that it is somehow connected to the core substantive right.

Under the theory of the unified right, the remedy is not just closely connected with the right, but rather, is an intrinsic part of the right itself. The unified legal right can be conceptualized as containing two types of matter: the inert skeleton of the descriptive guarantee or interest providing the framework for the right, and the living matter of the operative remedy that gives life to the inert matter. The descriptive interest is the component of the unified right that sets forth a legal guarantee, duty, or moral assertion.⁸⁰ The remedy is the component of the unified right that imposes an active requirement as a consequence of

⁷⁶ Gewirtz, *supra* note 49, at 678-79.

⁷⁷ *Id.*; see also Zeigler, *supra* note 19, at 665-66 (rejecting rights-essentialist notion that Congress can dilute remedies without affecting substantive rights).

⁷⁸ Levinson, *supra* note 18, at 904.

⁷⁹ *Id.* at 884.

⁸⁰ See W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-38 (W. Cook ed. 1919) (explaining that legal right is one that imposes correlative duty on another to act or refrain from acting for benefit of person holding right); Zeigler, *supra* note 19, at 665 n.1 (utilizing Hohfeldian notion of right in discussing rights and remedies).

the violation of that descriptive duty.⁸¹ The remedy thus effectuates the inert description of legal duties by giving life to an otherwise dormant provision.⁸² In this way, both the remedy and the guarantee are two subparts of the unified whole legal right.⁸³

Indeed, the remedy is a *necessary* part of any legal substantive right. For without the remedy, the legal "right" is merely a hope or a wish.⁸⁴ If a duty cannot be enforced, then it is not really a duty, but instead, is merely a voluntary obligation that a person may or may not follow.⁸⁵ However, hopes and wishes are not properly part of the judicial domain. A required part of every federal court action is that there be a redressable injury – that is, a need for a remedy to be awarded in order for a claimant to have standing.⁸⁶ It is the remedy that authorizes the judicial debate over the descriptive right. The absence of a remedy deprives the

⁸¹ J. FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 141 (1980), *cited in* Zeigler, *supra* note 19, at 678 n.73 ("Why is the right to demand recognition of one's rights so important? The reason, I think, is that if one begged, pleaded, or prayed for recognition merely, at best one would receive a kind of beneficent treatment easily confused with the acknowledgement of rights, but in fact altogether foreign and deadly to it."); M. GINSBERG, ON JUSTICE IN SOCIETY 74 (1965), *cited in* Zeigler, *supra* note 19, at 678 n.73 ("Legal rights are claims enforceable at law."); I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 247, 254-55 (1980), *cited in* Zeigler, *supra* note 19, at 678 n.73 ("The doctrine of legal rights teaches us that declarations of rights are vain without an effective apparatus to implement them. . . Natural rights are merely claims, regardless of the intellectual justification and emotional fervor with which they are pressed. Legal rights give title, backed by force.").

⁸² Gewirtz, *supra* note 49, at 587 ("The function of a remedy is to 'realize' a legal norm, to make it a 'living truth.'" (quoting *Cooper v. Aaron*, 358 U.S. 1, 20 (1958))). Professor Gewirtz provides the example of *Brown v. Board of Education*, where the legal norm against separate but equal races identified in *Brown I* became more than an abstract utopian ideal by the Court's decision in *Brown II* discussing the specific remedies that made that legal right real in our society. Gewirtz, *supra*, at 676.

⁸³ Fiss, *supra* note 46, at 52 ("A remedy . . . is an effort of the court to give meaning to a public value in practice . . . [I]t constitutes the actualization of the right.").

⁸⁴ Zeigler, *supra* note 19, at 678.

⁸⁵ *Ex parte United States*, 257 U.S. 419, 433 (1922) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."); *cf.* *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920) (Cardozo, J.) ("A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an opinion to conform.").

⁸⁶ U.S. CONST. art. III, § 2 (limiting judicial power of federal courts to "cases and controversies"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (observing that redressable injury, along with injury in fact and causation, are "irreducible constitutional minimum" requirements of standing); *Warth v. Seldin*, 422 U.S. 490, 505, 508 (1975) (noting that standing question is whether plaintiff personally would benefit in tangible way from court's intervention); *Marye v. Parsons*, 114 U.S. 325, 328-29 (1885) (alleged breach of contract claim does not seek relief because there is no remedy to compel the state to pay its debt).

courts of constitutional power to hear the dispute.⁸⁷ Therefore, "[i]f constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation."⁸⁸ That measurable consequence is the remedy, which is the life-giving force that animates the legal description which otherwise provides only the skeletal matter for the right. Thus, if anything, the remedial component of the right is the more important or primary part of every legal right.

The notion that a remedy is an inherent part of the unified right is not a new idea. From the founding of our Constitution, the assumption of our democracy has been that a remedy is a necessary part of the right, or as the maxim goes, "where there is a right, there must be a remedy."⁸⁹ In *Marbury v. Madison*, Chief Justice Marshall implied a remedy for violation of a federal statute even where that statute contained no specified remedy.⁹⁰ The Chief Justice cited Blackstone for the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."⁹¹ He continued: "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."⁹² Similarly, one

⁸⁷ *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 102-06 n.7 (1998) (holding that citizen group had no standing because of lack of redressability); *see also* *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (finding habeas petition to be moot once prisoner released from prison because court was deprived of power to act, as there was nothing for court to remedy); *McCarthy v. United States*, 944 F. Supp. 9, 11 (D.D.C. 1996) (denying plaintiff standing for failure to demonstrate actual injury because without injury, court's decision as to constitutionality of PLRA would have no binding effect).

⁸⁸ *United States v. Calandra*, 414 U.S. 338, 366 (1974) (Brennan, J., dissenting); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, J., dissenting) ("I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric.").

⁸⁹ DAVID SCHOENBROD, *REMEDIES: PUBLIC AND PRIVATE* 9-12 (2d ed. 1996); Richard Fallon, Jr., & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

⁹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-66 (1803).

⁹¹ *Id.* at 163 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES 23).

⁹² *Marbury*, 5 U.S. (1 Cranch) at 163. Marshall apparently believed the right to a remedy principle to be a self-evident matter. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 11 (1969); *see also* *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) (granting mandamus relief requiring Postmaster General to deliver mail, stating "the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable

hundred years before, Chief Justice Holt sitting on the King's Bench in the case of *Ashby v. White* held that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, . . . indeed, it is a vain thing to imagine a right without a remedy . . ." ⁹³ Take for example the descriptive legal right against trespass. The common law describes a guarantee that a property owner holds the right to exclude trespassers from her land. Yet if there is no remedy for that right, then trespassers can freely enter upon the land without consequence for damage caused or without fear of future prohibition. As such, the property owner has no real right to exclude others from her property as there is no alteration in the social obligations between the owner and the trespasser. ⁹⁴ Chief Justice Holt thereby concluded that the relationship between right and remedy is reciprocal in that each defines the other. ⁹⁵

Professor Levinson has elaborated upon this conclusion of reciprocity between right and remedy in *Rights Essentialism and Remedial Equilibration*. ⁹⁶ He describes three different causative effects that demonstrate the symbiotic relationship between right and remedy: remedial substantiation, incorporation, and deterrence. ⁹⁷ First, under this theory of "remedial substantiation," the practical value of a right is determined by its associated remedies. ⁹⁸ This theory embodies the legal realist theory that the cash value of a right is nothing more than what the courts will do if that right is violated. Rights therefore can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies. ⁹⁹ Second, under what he calls "remedial incorporation," the substantive rights are redefined by the use of prophylactic remedies that become incorporated into the definition of the right. ¹⁰⁰ Prophylactic remedies are those remedies which reach beyond the limits of the legal violation to prohibit conduct that itself is permissible, but nevertheless must be restricted in order to prevent

right should be shown to exist.").

⁹³ 92 Eng. Rep. 126, 136 (K.B. 1703).

⁹⁴ Cf. LAYCOCK, *supra* note 21, at 1-2 (listing owner's possible remedies); *Pardee v. Camden Lumber Co.*, 73 S.E. 82, 83 (W. Va. 1911) (noting that if there is no injunctive remedy available, trespasser can continue taking timber from forest and property owner has no enforceable right to prevent it).

⁹⁵ 92 Eng. Rep. at 136.

⁹⁶ Levinson, *supra* note 18, at 884.

⁹⁷ *Id.* at 884-89.

⁹⁸ *Id.* at 887, 904-12.

⁹⁹ *Id.* at 887.

¹⁰⁰ *Id.* at 885, 899-904.

future violations.¹⁰¹ These remedies are used by courts to provide a tangible and workable definition to the otherwise amorphous constitutional proscription, and in this way are incorporated into the normative criteria by which violations are then judged.¹⁰² And finally, Levinson argues that rights and remedies are inseparable because of "remedial deterrence."¹⁰³ His theory is that the threat of undesirable consequences from imposed remedies motivates the court to construct the right in a way so as to avoid those remedial consequences. So for example, the threat of political and social consequences from busing in the suburbs to remedy unconstitutional educational segregation in metropolitan areas led to a redefinition of the constitutional right that avoided that consequence.¹⁰⁴ Or in the example of the retroactivity cases, the Court has refused to extend a new constitutional decision retroactively to avoid the undesired consequences of reversing criminal convictions, or imposing huge damages liability upon the government.¹⁰⁵

Professor Levinson argues that his theory of remedial equilibration for constitutional rights parallels the accepted understanding of the right/remedy relationship in private law.¹⁰⁶ The advent of the legal realist movement and the subsequent law and economics movement resulted in the understanding of private law as one in which the

¹⁰¹ LAYCOCK, *supra* note 21, at 272 -76; Levinson, *supra* note 18, at 885; *see infra* text accompanying notes 261-69.

¹⁰² Levinson, *supra* note 18, at 885-87. So for example, in the case of *Hutto v. Finney*, the Supreme Court held that the prison conditions in an Arkansas prison violated the Eighth Amendment. 437 U.S. 678, 681 (1978). Part of the remedy upheld by the Court was a prohibition of solitary confinement longer than 30 days. While the solitary confinement itself did not violate the constitution, the Court found that it contributed to the conditions that caused the Eighth Amendment violation, and accordingly the solitary confinement could be restricted as a prophylactic remedy. In this way, Levinson explains, the Eighth Amendment right against cruel and unusual punishment now is understood to preclude lengthy solitary confinements. Levinson, *supra* note 18, at 879-80.

¹⁰³ Levinson, *supra* note 18, at 884-85, 889-99.

¹⁰⁴ Gewirtz, *supra* note 49, at 588-89, 665-66 (arguing that courts should use candor to reveal that fear and costs of desegregation remedies reaching white flight motivate their decisions limiting scope of constitutional right against segregated education); Levinson, *supra* note 18, at 885.

¹⁰⁵ Fallon & Meltzer, *supra* note 89, at 1809-11, 1828-30 (discussing cases in which Court defines substantive right as prospective only to avoid remedial consequences of retroactive application of right in context of conviction reversals and unconstitutional taxes); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that this remedial gap is advantageous consequence because it encourages court to be innovative and advance constitutional interpretation of true rights).

¹⁰⁶ Levinson, *supra* note 18, at 858-60 ("the basic private law insight that rights and remedies are integrally connected does translate to constitutional law in a number of interesting ways that are habitually overlooked or underappreciated").

remedial rules determine the nature of the right.¹⁰⁷ Justice Holmes in 1897 criticized those who viewed the primary right or duty as something existing apart from and independent of the consequences of its breach.¹⁰⁸ Rather, he argued that a "legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court, and so of a legal right."¹⁰⁹ In other words, the remedial consequences dictate the parameters of a legal right.¹¹⁰

The efficient breach theory of contract demonstrates the private law concept that the obligation to comply with a private contract (the substantive right) is solely defined by the remedy (the amount of compensatory damages).¹¹¹ If damages for a breach of a contract are less than the profits to be made from breaching the agreement, then the party will not conform to the contract obligation, but instead will breach and pay the damages.¹¹² In other words, the substantive obligation is only as good as the remedy that will back it up, for if the remedy is an inadequate deterrent, the legal obligation will impose no duty upon the actor. Thus, law and economics theorists hold that remedies are the essence of substance because legal rights depend on the actual

¹⁰⁷ EDWIN N. GARLAN, *LEGAL REALISM AND JUSTICE* 44 (1941) ("Absence of remedy is absence of right."); Guido Calabresi, *Remarks: The Simple Virtues of the Cathedral*, 106 *YALE L.J.* 2201, 2205 (1997) ("Of course, the so-called remedy defines the nature of the right. . . . Indeed, I (probably incorrectly) thought I had said as much in the article itself."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 *YALE L.J.* 2149 (1997); see Zipursky, *supra* note 33, at 43-44.

¹⁰⁸ Oliver Wendell Holmes, *The Path of the Law*, 110 *HARV. L. REV.* 991, 991-92 (1997) (reprinting address delivered by Mr. Justice Holmes of Supreme Judicial Court of Massachusetts at dedication of new hall of Boston University School of Law on January 8, 1897); see Levinson, *supra* note 18, at 858-59 (identifying Holmes' theory as starting point for recognizing that rights and remedies are functionally inseparable).

¹⁰⁹ Holmes, *supra* note 108, at 991-92.

¹¹⁰ Holmes supports his theory by the example of the bad man, who does not find his reasons for conduct in the moral duties of the law, but rather cares only for the material consequences of actions that allow him to predict the consequences of his own behavior. *Id.* 993-94; see also LAYCOCK, *supra* note 21, at 8 ("It is certainly true that some individuals will obey the law only if the consequences of violation are more painful than obedience.").

¹¹¹ Levinson, *supra* note 18, at 858-59 & n.4 (noting that in private law, contractual obligation is choice between its performance and breach); see also LAYCOCK, *supra* note 21, at 8-9 (acknowledging that important aspect of remedies is that they force individuals to obey law only because consequences of violation are more painful than obedience).

¹¹² The possibility of specific performance, and the cost of buying out that remedy, also effect the scope of the contract right. Levinson, *supra* note 18, at 859 n.4; see LAYCOCK *supra* note 21, at 365-72 (discussing specific performance and efficient breach of contract).

consequences, that is, the remedies available to enforce them in the real world.¹¹³

Professor Levinson concludes that remedies and rights are intertwined, and that remedies clearly define substantive rights. His conclusion parallels results that could be reached under traditional rights essentialist notions of a right/remedy dichotomy. For example, in the *Erie* cases, frustration with the substance/procedural labels led to the outcome-determinative test that examines whether a law, such as a remedial law, "significantly affect[s] the result" of a case.¹¹⁴ It would seem that a remedy, as the actual outcome of the case, would satisfy the definition of this outcome-determinative test because any change in remedy would significantly alter the result of the case.¹¹⁵ Similarly, the Rules Enabling Act exempts federal courts from applying federal procedural law if the law is substantive in nature because it "abridge[s], modify[ies], or enlarge[s]" substantive rights.¹¹⁶ Professor Levinson's work aptly demonstrates the variety of ways in which the remedy abridges, modifies, or enlarges the underlying right and is thereby substantive in effect.¹¹⁷ Thus, the traditional approaches to demarcating substance from procedure have evolved to a point of understanding that there is a symbiosis between procedure and substance that can effect the scope of the definitional right in a substantive manner.

The unified right theory takes this evolution further to conclude that the remedy is in fact a part of the whole legal right. A remedy is not a separate, lesser right but instead is the intrinsic, operative component activating the descriptive component of all unified substantive rights. Concluding that a remedy is part of the substantive right then directs the

¹¹³ Holmes, *supra* note 108, at 995 ("the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it; - and nothing else."); see RICHARD A. POSNER, *OVERCOMING LAW* 207-14 (1995); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 82-83 (1996).

¹¹⁴ Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

¹¹⁵ Sims Snowboards v. Kelly, 863 F.2d 643, 646-47 (9th Cir. 1988) (noting that if federal court ruling in diversity case awarded remedy not available in state court, then result would be significantly altered); Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254, 263 n.16 (E.D. La. 1967) (observing that remedies might be held procedural except for inquiry as to whether remedy significantly alters result in litigation); Cross, *supra* note 30, at 176 (conceding that change in remedy satisfies outcome-determinative test for purposes of *Erie*, but arguing that state law regarding equitable remedies still should not be applied by federal court).

¹¹⁶ 28 U.S.C. § 2072 (1994).

¹¹⁷ Levinson, *supra* note 18, at 889-912. *But see* LAYCOCK, *supra* note 21, at 8-9 (stating that remedy is not substantive because it does not change substantive right which has normative value).

analysis in resolving the question of Congress's power to determine judicial remedies. First, this conclusion eradicates prior assumptions that the legislature had free reign over all remedies. Rights essentialist theorists who rigidly departmentalized remedies as separate, secondary rights easily concluded that Congress could recreate remedies because they left the true constitutional values intact and subject to sole definition by the Judiciary.¹¹⁸ Yet these rights essentialist conclusions have been rejected by recent Supreme Court cases, thereby altering academic conclusions that Congress can permissibly legislate to overturn the prophylactic remedy of Miranda warnings,¹¹⁹ or to expand the prophylactic remedies in areas where the Court has refused constitutional protection.¹²⁰ Perhaps the Court is slowly, albeit implicitly, adopting remedial equilibration in deciding constitutional issues.

Second, and more directly, the conclusion that remedies are part of the whole substantive right means that Congress's power to dictate remedies will depend upon its corresponding power over the definitional right. The question of remedial authority thus depends on the existence of an enumerated power granting Congress affirmative power over the substance of the remedial legislation. As explored in Part II, that power may be broad with respect to federal statutory rights, but as explained in Part III, that legislative power is much narrower with respect to constitutional rights.

¹¹⁸ Levinson, *supra* note 18, at 861 (explaining that rights essentialist theory is that courts have special and unique permission and capability to interpret meaning of constitutional rights; but courts have no special license or ability to make types of policy decisions that remedies require, and because political branches possess democratic legitimacy and superior fact-finding and interest-balancing capacities, courts should defer to legislature about issues of implementing and enforcing rights); *see also* Katzenbach v. Morgan, 384 U.S. 641, 667-71 (1966) (Harlan, J., dissenting) (arguing for judicial supremacy in defining constitutional rights, but deference to Congress for "legislative facts" that bear on implementation of rights).

¹¹⁹ Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9 n.45 (1975). The Court overturned the premises of this article in *Dickerson v. United States*, by holding that Congress does not have the power to overrule the Court's Miranda exclusionary remedy for Fifth Amendment violations. 120 S. Ct. 2326 (2000); *see discussion supra* Part I.A, notes 70-74 and *infra* Part IV, notes 378-87.

¹²⁰ Sager, *supra* note 46, at 1213. The Court overturned the premises of this article in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See discussion infra* Part III, notes 197-199.

II. DISTINGUISHING CONGRESS'S POWER OVER STATUTORY REMEDIES

It is often broadly asserted that Congress has plenary power over all remedies.¹²¹ "Congress, of course, enjoys considerable freedom to choose remedies for violations of federal law, including constitutional violations."¹²² Yet, those who advocate this broad power of Congress to legislate all remedies support their conclusion simply with examples of Congress's power to create statutory rights and corresponding remedies.¹²³ These examples, however, are limited to the non-shocking conclusion that where Congress has created the statutory right it may also create the statutory remedy. Congress's power over constitutional remedies is another matter.

A. Congressional Power to Legislate Statutory Remedies

It is axiomatic that the authority of Congress to legislate remedies must be based on a specific constitutional grant of power, for the U.S. Constitution is one of enumerated powers.¹²⁴ Where Congress enacts a statute based upon an enumerated power, such as the Commerce Clause, then it may also legislate the corresponding remedies for the statutory rights. Courts in fact prefer that Congress clearly define the remedies, as they recognize that the remedy defines the right, and the original creator is the proper entity to define the intended scope of the right.¹²⁵ If Congress has created a statutory right, then it can redefine that right or eliminate the right altogether:

¹²¹ *Miller v. French*, 120 S. Ct. 2246, 2261 (2000); *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1979 (1999) (Ginsburg, J., dissenting); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997); *Friedman*, *supra* note 8, at 751; *Hart*, *supra* note 13, at 1366; *Sager*, *supra* note 9, at 85.

¹²² *Sager*, *supra* note 9, at 85.

¹²³ *Grupo Mexicano*, 119 S. Ct. at 1979 (Ginsburg, J., dissenting) (citing *Yakus v. United States*, 321 U.S. 414, 442 n.8 (1944) and listing statutes regulating federal equity powers with respect to statutory rights); *Gavin*, 122 F.3d at 1087 (citing *Norris-LaGuardia Act*); Brief of Amici Curiae Prof. Cassell, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) [hereinafter *Cassell Brief*]; *Friedman*, *supra* note 8, at 751 n.72 (citing statutory example of *Federal Tort Claims Act*); *Hart*, *supra* note 13, at 1363-70 & nn.20 & 21 (citing statutory remedial examples of *Norris-LaGuardia Act*, *Oil and Price Control Act*).

¹²⁴ The Federal Government "can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." *Alden v. Maine*, 527 U.S. 706, 739 (1999) (quoting *Martin v. Hunter's Lessee*, (1 Wheat.) 304, 326 (1816)); see also *City of Boerne*, 521 U.S. at 516.

¹²⁵ If Congress fails to enact corresponding remedies, then the courts will apply the traditional remedies available to the courts. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992); *J.I. Case v. Borak*, 377 U.S. 426, 433-34 (1964).

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; . . . Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created.¹²⁶

Thus, the remedial power is derivative of the substantive power over the definitional right. Congress's power to define statutory remedies, however, is not unlimited, as external constitutional limitations confine the use of power.¹²⁷

The Court has reiterated this principle that Congress may define the remedies for the statutory rights it has created. For example, in the Norris-LaGuardia Act, Congress prohibited courts from imposing a labor injunction.¹²⁸ Such a remedial limitation was authorized because Congress created the statutory labor and antitrust rights implicated in the case and therefore Congress could narrow the antitrust rights and expand the labor rights by restricting injunctive relief.¹²⁹

¹²⁶ *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80 & 83 (1982) ("[I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated."); *see also* *Davis v. Passman*, 442 U.S. 228, 241 (1979) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner.");

¹²⁷ *E.g.*, *Alden*, 527 U.S. 706 (holding that sovereign immunity of Eleventh Amendment limits Congress's power under Commerce Clause). So, for example, in *Reno v. American-Arab Anti-Discrimination Committee*, the Court eluded in dicta to these outer limits of legislative authority over statutory remedies. 525 U.S. 471 (1999). In *American-Arab*, the court addressed a challenge to the Immigration Act that limited judicial review, thereby prohibiting any judicial remedies for executive branch denials of the statutory right to immigrate. *Id.* at 472. The Court upheld the legislation, which corresponds to the general theory of statutory remedies, that where Congress has created the statutory immigration right, it can alter or narrow that right by restricting the available remedies for those rights. Justice Scalia writing for the majority did suggest that "outrageous discrimination" in the execution of the laws might suffice to overcome deference to Congress's remedies. *Id.* at 491. And three other justices noted that if Congress totally deprived the courts of all power to review constitutional claims under the immigration laws, such action would "raise serious constitutional questions" presumably implicating due process concerns of arbitrarily depriving an individual of liberty and or property interests. *Id.* at 508 (Souter, J., dissenting); *id.* at 495 (Ginsburg & Breyer, JJ., concurring); *see also* *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting invalidity of federal statute that denied any judicial forum for colorable constitutional claim (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))).

¹²⁸ 29 U.S.C. § 101 (1994).

¹²⁹ *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (upholding validity of Norris-LaGuardia Act); *see* FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

Similarly, through the 1995 Emergency Salvage Timber Sale Program, Congress limited the reach of environmental laws protecting endangered species and natural resources by prohibiting injunctions that would have protected endangered spotted owls at the expense of logging activity.¹³⁰ A federal district court in Georgia upheld the legislative restriction on remedies, holding simply that Congress can permissibly limit the kinds of remedies available to enforce a given statute.¹³¹ In other words, where Congress has created the statutory rights of protection for endangered species and the environment, it can narrow those federal rights by restricting the available injunctive remedies.

Congress certainly may have believed that it was empowered to take this remedy-restricting action based on the Supreme Court's affirmance a few years earlier of other environmental directives to the courts related to the same dispute over the spotted owl. In *Robertson v. Seattle Audubon Society*, the Supreme Court upheld the Northwest Timber Compromise that did not address remedies, but established a comprehensive set of rules regarding quantities and locations to govern lumber harvesting within certain geographic areas.¹³² Through the Northwest Timber Compromise, Congress expressly intended to direct the court as to how to resolve the statutory questions at issue in *Robertson* regarding the balance of logging activity and protection of the spotted owl.¹³³ The plaintiffs claimed that Congress overstepped its power by violating the separation of powers principles embodied in *United States v. Klein*, prohibiting the legislature from prescribing rules of decision for the court to follow in pending cases.¹³⁴ The Supreme Court, however, held

¹³⁰ Rescissions Act of 1995, Pub. L. No. 104-19, § 2001, 109 Stat. 240-47 (1995) (codified in 16 U.S.C. § 1611); Bloom, *supra* note 12, at 402-05.

¹³¹ *Armuchee Alliance v. King*, 922 F. Supp. 1541, 1550-51 (N.D. Ga. 1996).

¹³² 503 U.S. 429 (1992).

¹³³ *Id.* at 439.

¹³⁴ 13 Wall. 120 (1872). In *Klein*, the administrator of the estate of a pardoned Confederate soldier sought compensation for cotton sold by the U.S. government during the Civil War. A federal statute permitted compensation for the proceeds of the sale by noncombatant Confederate owners, and the Supreme Court had held that loyalty could be established by presidential pardon. Klein won in the lower courts, and while the case was pending, Congress enacted a law prohibiting a presidential pardon from being admissible evidence of loyalty, and in fact requiring that such pardon serve as conclusive evidence of disloyalty. The Supreme Court held that Congress violated separation of powers by dictating the result the court must reach in the *Klein* case. The precise meaning of *Klein* has been subject to much debate. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law."); Bloom, *supra* note 12, at n.97 (and sources cited therein). *Klein* may stand for the broad principle that Congress has no power to prescribe rules of decision for the judiciary. See *French v.*

that the Compromise did not compel findings or results under the old law, but instead changed the substantive environmental law, and therefore did not violate *Klein*.¹³⁵ Thus, the Court reaffirmed that where Congress has created the statutory right, it may change all aspects of that right.¹³⁶

Robertson also provided the basis for the Supreme Court's decision this past term in *Miller v. French*.¹³⁷ In *Miller*, the Supreme Court addressed the automatic stay provision of the Prison Litigation Reform Act which would have stayed continuing existing injunctive relief ordered to remedy violations of the Eighth Amendment arising out of prison living conditions.¹³⁸ Much of the *Miller* decision focused on Congress's power to reopen final judgments, which is not relevant to the discussion of remedies in this article.¹³⁹ But, as in *Robertson*, the plaintiffs also argued, and the Court of Appeals for the Seventh Circuit held, that the automatic stay provision violated the *Klein* principle by directing a rule of decision for the court by prohibiting it from ordering injunctive relief against the government.¹⁴⁰ While framed in the narrow parlance of *Klein*, this argument essentially questions whether Congress can dictate the remedy to the court. The Court cryptically resolved the question by simply concluding that the PLRA was not unconstitutional because "Congress has altered the underlying law."¹⁴¹ As in *Robertson*, the Court held that

Duckworth, 178 F.3d 437 (7th Cir. 1999), *rev'd sub nom.* *Miller v. French*, 530 U.S. 327 (2000). Or, it may stand for the narrower proscription against Congress dictating a rule of decision in a pending case in a manner that requires the courts to decide the controversy in the Government's favor. *E.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980).

¹³⁵ Of course, in *Klein*, Congress similarly had created the statutory right to compensation, and thus, under the theory of *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), the subsequent legislation defining loyalty should have been a permissible change to the law rather than directing a finding or result under old law. *See* William P. Araiza, *The Trouble With Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1056 (1999).

¹³⁶ Not all agree *Robertson* was rightly decided. *See* Araiza, *supra* note 135, at 1056 (arguing that even when Congress has established right to recovery in first place, as in *Klein*, it is still limited in its ability to refine requirements for that recovery); Bloom, *supra* note 12, at 402-05.

¹³⁷ *Miller v. French*, 530 U.S. 327 (2000).

¹³⁸ 18 U.S.C. § 3626(e)(2) (Supp. V 1999) (providing for automatic stay of all existing injunctive relief 90 days after filing of defendant's motion while court considers whether continuing relief satisfies new 1996 PLRA standards for prospective relief, 18 U.S.C. § 3626(b) (1994 & Supp. V 1999)).

¹³⁹ *Miller*, 120 S. Ct. at 2256-59.

¹⁴⁰ *French v. Duckworth*, 178 F.3d 437, 446 (7th Cir. 1999).

¹⁴¹ *Miller*, 120 S. Ct. at 2258 ("By establishing new standards for the enforcement of prospective relief in 3626(b), Congress has altered the relevant underlying law."); *id.* at 2259

where Congress has amended the applicable law, it does not violate *Klein* by directing a specific decision for the court under prior law.¹⁴²

Significantly though, the Court in *Miller* did not discuss whether Congress had the authority to amend the applicable Law of Remedies for prison conditions.¹⁴³ Nor did Justice Souter address the issue in his concurrence in *Miller* where he simply concluded that Congress has the authority to change remedial rules.¹⁴⁴ Yet, if the effect of changing the law is the key to the constitutionality of congressional action directing the court, then certainly the authority for Congress to change the underlying law is a critical question that must be answered.

The law of prison conditions is both statutory and constitutional. Statutes like Section 1983 and the Federal Tort Claims Act apply, as well as the Eighth, First, and Fourteenth Amendments to the Constitution. But *Robertson* and the other cases upholding Congress's power to dictate remedies support legislative remedial action only for statutory rights.¹⁴⁵

(reading automatic stay provision in context of whole PLRA as an amendment of legal standard).

¹⁴² *Id.* at 2258-60.

¹⁴³ *Id.* at 2258 ("[W]e note that the constitutionality of 3626(b) [setting standards for issuance of injunctive relief] is not challenged here; we assume, without deciding, that the new standards it pronounces are effective."). Perhaps the Court assumed that the automatic stay was a procedural mechanism, as it is codified under the statutory heading "Procedure for motions affecting prospective relief." 18 U.S.C. § 3626(e)(2) (Supp. V 1999). Accordingly, it may have assumed that Congress has the power to dictate procedures to the federal courts pursuant to its Article I power to create the lower federal courts. See *Dickerson v. United States*, 120 S. Ct. 2326, 2332 (2000) (explaining that law is clear that Congress retains ultimate authority to modify rules of procedure that are not required by Constitution); *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Palermo v. United States*, 360 U.S. 343, 353, n.11 (1959). But see *Hadix v. Johnson*, 144 F.3d 925, 943 n.15 (6th Cir. 1998) (distinguishing routine procedural rules issued by Congress from PLRA's automatic stay provision that intrudes upon Judiciary's substantive decisional role). However, as I have argued elsewhere, Congress's Article I power is not unlimited, especially with respect to constitutional rights. Tracy A. Thomas, *Congress's Jurisdictional Power Over Remedies* (manuscript on file with author). Even under the Article I "procedural" power, Congress is limited to providing adequate substitutes for judicial remedies. See *Hadix*, 144 F.3d at 942 (Congress cannot use its Article I power to diminish the power of the courts to an extent which renders the courts unable to meet their obligation of providing adequate remedies); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498, 527 (1974) (Congress may enact any jurisdictional statute that does not prevent vindication of constitutional right); see also discussion *infra* note 381.

¹⁴⁴ *Miller*, 120 S. Ct. at 2661. The only authority Justice Souter cited was to contrast *Plaut v. Spindthrift Farm, Inc.*, 514 U.S. 211 (1995), where Congress was prohibited from resurrecting the statute of limitations for securities law cases (involving statutory rights) that had been dismissed as final judgments.

¹⁴⁵ *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938); see *Benjamin v. Jacobson*, 172 F.3d 144, 163 (2d Cir. 1999) (justifying PLRA's remedy restrictions based upon cases of statutory remedies); *Gavin v. Branstad*,

Constitutional remedies, unlike statutory remedies, cannot be authorized as a derivative power based on the legislature's power over the substantive law because Congress has no power over the substance of constitutional rights. Thus, Congress can dictate the remedy for a prison condition case based on statutes like Section 1983 or the Federal Tort Claims Act (FTCA) because Congress is the creator of the statutory right and thus can modify or restrict the protections of that right. But it cannot dictate an equitable remedy for violations of the Eighth Amendment, as it did in the PLRA.¹⁴⁶ The *Miller* Court, however, ignored this key distinction in the nature of the underlying right and its effect on the ultimate determination of the legitimacy of the PLRA remedy.

B. *The Difference Between Statutory and Constitutional Remedies*

Congress's power over statutory remedies derives from its power over the underlying substantive guarantee. However, Congress cannot derive such remedial power for constitutional remedies in the same manner because it has no power to proscribe or alter those constitutional guarantees. Constitutional rights are "superior paramount law, unchangeable by ordinary means" and thus are not on the same level as ordinary legislative acts that can be altered at the will of the legislature.¹⁴⁷ Congress clearly has no power to alter the rights contained in the Constitution except by constitutional amendment.¹⁴⁸ This strenuous amendment process guarantees that core constitutional values will remain stable unless a supermajority of the populace determines that a change is mandated.¹⁴⁹

122 F.3d 1081, 1087 (8th Cir. 1997).

¹⁴⁶ *French v. Owens*, 538 F. Supp. 910 (S.D. Ind. 1982).

¹⁴⁷ *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁴⁸ U.S. CONST. art. V; *see, e.g.*, U.S. CONST. amend. XXVI (amending Constitution to provide for voting rights at age 18 in response to *Oregon v. Mitchell*, 400 U.S. 112 (1970), which invalidated federal law setting voting age based on authority of Section 5); *see also* Crime Victims' Amendment, 146 CONG. REC. S2966-01 (daily ed. Apr. 27, 2000) (stating that constitutional amendment is needed because Congress is without power under Section 5 to enact statutory protections for victims' rights; such statutory proposal "insofar as it assumes broad congressional power to act under Section 5 of the Fourteenth Amendment, it is simply ignorant of the series of decisions in the 1990s and reaching into 2000, beginning with the invalidation of the Religious Freedom Restoration Act and continuing with the invalidation of the Patent Reform Act and the Age Discrimination in Employment Act, in which the modern Supreme Court has dramatically curtailed the legislative authority of Congress to use its Section 5 power to protect interests that Congress, but not yet the Court, is prepared to recognize as constitutional rights").

¹⁴⁹ *Marbury*, 5 U.S. (1 Cranch) at 177; *City of Boerne*, 521 U.S. at 529.

Since Congress is unable to alter the substantive constitutional right, it does not have derivative power to dictate corresponding remedies. Applying this basic tenet to *Miller*, it is clear that Congress could not change the applicable law of the Eighth Amendment through the PLRA.¹⁵⁰ It therefore could not alter the law of the remedial component of that constitutional right under a derivative power theory like that upholding the statutory remedies in *Robertson*.

There is a significant difference between Congress's power to change remedies for statutory rights and its power to change remedies for constitutional rights.¹⁵¹ The Supreme Court has previously recognized this critical distinction between rights created by federal statute and rights recognized by the Constitution. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁵² a plurality of the Court emphasized that this distinction is necessary to accommodate the principle of separation of powers reflected in Article III which provides a constitutional system of checks and balances designed to guard against encroachment by Congress on the judiciary.¹⁵³ As we have seen, when Congress creates a statutory right, it clearly has discretion in prescribing remedies for that right.¹⁵⁴ As Justice Brennan discussed in *Northern Pipeline Construction*:

No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress's power to define rights that it has

¹⁵⁰ See *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). In *Plyler*, the plaintiff inmates argued that *Klein* was violated by the PLRA because Congress did not have the power to change the applicable law of the Eighth Amendment, and therefore could not require the termination of consent decrees. The United States Court of Appeals for the Fourth Circuit held that "[t]he inmates fail to understand that the applicable law is not the Eighth Amendment, but rather is the authority of the district court to award relief greater than that required by federal law." *Id.*

¹⁵¹ George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs: Have the Bivens Dissenters Prevailed?* 64 IND. L. J. 263 (1989) (arguing that *Bivens* cases highlight difference between remedial questions when source of right is a statute and when source is Constitution); Theodore K. Cheng, *Invading An Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969 (1999); Henry J. Friendly, *A Postscript on Miranda*, in BENCHMARKS 266, 269 (1967) ("if the people don't like [judicial interpretations of a statute], Congress can change them if only it gets around to doing so. But if the people don't like *Miranda*, Congress can do nothing except promote an amendment to the Constitution").

¹⁵² 458 U.S. 50, 83-84 (1982) (plurality opinion).

¹⁵³ *Id.* at 83.

¹⁵⁴ *Id.*; Cheng, *supra* note 151, at 1011.

created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Article III courts.¹⁵⁵

Thus, Congress does not have the power to effect a change in the substantive constitutional law of prison conditions by defining the scope and nature of the remedy.¹⁵⁶ A panel of the Ninth Circuit Court of Appeals in *Taylor v. United States* agreed.¹⁵⁷ It held unconstitutional another provision of the PLRA which immediately terminated existing injunctive relief in prison cases on grounds that the provision violated *Klein* since Congress could not effectuate a change in the underlying constitutional law and therefore was directing a rule of decision for the court under existing law.¹⁵⁸ Accordingly, the *Miller* Court's claim that Congress could change the law of prison conditions, while potentially correct with respect to statutory prison condition remedies, could not be correct with respect to Congress's power to change the constitutional law of the Eighth Amendment adjudicated directly through a *Bivens* type claim.¹⁵⁹

This approach of limiting legislative remedial restrictions to statutory rights has been the way in which the Court has often avoided declaring remedy-restricting legislation unconstitutional. In *Carlson v. Green*, the Court refused to apply the Federal Tort Claims Act's remedial prohibitions against damages to a direct *Bivens* claim under the Eighth Amendment.¹⁶⁰ The Supreme Court held that courts were empowered under their general jurisdiction and judicial power to award necessary relief for violations of the Eighth Amendment that was not limited by the

¹⁵⁵ 458 U.S. at 84.

¹⁵⁶ *Taylor v. United States*, 143 F.3d 1178, 1183 (9th Cir. 1998).

¹⁵⁷ *Id.*, affirmed en banc on other grounds, 181 F.3d 1017 (9th Cir. 1999) (holding that motion to terminate relief was moot, and that consent decree was final judgment not subject to PLRA termination provision).

¹⁵⁸ *Id.* The inmates challenged 18 U.S.C. § 3626(b)(2) that provides for immediate termination of injunctive relief in civil actions respecting prison conditions if the relief was granted in the absence of findings now required by other standards set forth in the PLRA.

¹⁵⁹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-95 (1971) (finding damages available to remedy violation of Fourth Amendment regardless of lack of statutory authorization for claim); see also *Carlson v. Green*, 446 U.S. 14 (1980) (holding remedy available directly under Constitution for violation of Eighth Amendment rights even when allegations also supported Federal Tort Claims Act suit that would have precluded such relief); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1985).

¹⁶⁰ *Carlson*, 446 U.S. 14. In *Carlson*, the administrator of a prisoner's estate brought an Eighth Amendment claim for personal injuries to the prisoner arising out of medical mistreatment for asthma that caused the prisoner's death.

statutory restrictions under the FTCA.¹⁶¹ More recently, in *Felker v. Turpin*, the Supreme Court similarly limited the remedy-stripping legislation to statutory claims for habeas corpus relief rather than limiting the court's remedial powers under its original jurisdiction.¹⁶²

Congress, therefore, does have authority to dictate remedies for statutory rights. This remedial power derives from the legislature's authority to define the substantive statutory guarantee. But this derivative theory does not justify the legislating of remedies for constitutional violations for which Congress does not have power over the definitional guarantee. Instead, Congress needs an affirmative grant of power to address remedies for constitutional violations. That source is often identified as Section 5 of the Fourteenth Amendment. But as discussed in Part III, Congress' Section 5 power has significant internal and external limitations that narrow the range of remedial legislation Congress may enact.

III. CONGRESSIONAL POWER TO LEGISLATE CONSTITUTIONAL REMEDIES

Since Congress has no derivative power to mandate remedies for constitutional rights, any authority for Congress to enact remedial legislation for constitutional rights must therefore stem from an alternative, enumerated constitutional source. It has been assumed that Section 5 of the Fourteenth Amendment provides Congress with such plenary power to legislate constitutional remedies.¹⁶³ Section 5 is an

¹⁶¹ *Id.* at 41-44.

¹⁶² *Felker v. Turpin*, 518 U.S. 651 (1996). In *Felker*, the Supreme Court was presented with the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244 (1994 & Supp. V 1999), that prohibited courts from awarding the specialized injunctive remedy of the writ of habeas corpus in a subsequent petition unless there were new facts discovered or new law. The concurring justices suggested that the Court retained alternative sources of power to issue subsequent writs in the All Writs Act and its general federal question jurisdiction. The case presented the constitutional question of Congress's power to restrict judicial remedies, but the Court avoided the issue by construing the Act to only limit statutory judicial power. This "jurisprudence of avoidance" is used in order to refuse to address serious constitutional questions by means of statutory interpretation. *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) (explaining that Court's guiding principle is "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2506-12 (1998); Note, *The Avoidance Of Constitutional Questions And The Preservation Of Judicial Review: Federal Court Treatment Of The New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998).

¹⁶³ *French v. Duckworth*, 178 F. 3d 437, 450 (7th Cir. 1999) (Easterbrook, J., dissenting) (noting, in dissent from denial of rehearing en banc, that Section 5 of Fourteenth Amendment underlies § 3626 of PLRA); Archibald Cox, *The Role of Congress in*

affirmative grant of power to Congress "to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment.¹⁶⁴ Since the Fourteenth Amendment has been held to incorporate the protections of the first eight amendments to the Constitution in addition to its textual guarantees of due process and equal protection, Section 5 is actually a congressional power to enforce the Bill of Rights against the states.¹⁶⁵ This breadth of coverage has led some courts and commentators to assume that Section 5 provides broad power for Congress to legislate remedies for a multitude of constitutional rights.¹⁶⁶

However, this traditional and unchallenged presumption of broad remedial power under Section 5 has been eradicated by the Supreme Court's recent barrage of cases striking down legislation that deviates from the narrow grant of power in Section 5. The Supreme Court cases invalidating the Violence Against Women Act, the Religious Freedom Restoration Act, and the Patent and Trademark Remedy Clarification

Constitutional Determinations, 40 U. CIN. L. REV. 199, 199-200 (1971); Harrison, *supra* note 15, at 2515, 2523 n.33 (explaining that Section 5 may authorize PLRA and its restriction of remedies); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 245 (observing that Section 5 authorizes Religious Freedom Restoration Act).

¹⁶⁴ U.S. CONST. amend. XIV, § 5.

¹⁶⁵ *But see* Dellinger, *supra* note 13, at 1545-46 (suggesting that Enforcement Clause of Fourteenth Amendment does not authorize Congress to create remedies for first eight amendments of Bill of Rights). In addition, the Thirteenth and Fifteenth Amendments to the Constitution have their own corresponding enforcement provisions. U.S. CONST. amends. XIII & XIV, § 2. These differ from Section 5 of the Fourteenth Amendment because they grant power to Congress to legislate remedies for federal in addition to state encroachment upon the constitutional right. Marci C. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 377 (1994).

¹⁶⁶ *Sasnett v. Sullivan*, 91 F.3d 1018, 1020-21 (7th Cir. 1996) (Posner, J.) (holding that RFRA does not exceed Section 5 power because scope of Section 5 is not limited to strictly remedial aim; instead, Congress may permissibly create right whenever it passes law under authority of Section 5), *vacated*, 521 U.S. 1114 (1997); *Cone Corp. v. Fla. Dep't of Trans.*, 1989 WL 205230 *11 (N.D. Fla. 1989) (comparing Congress's broad power to fashion remedies pursuant to Section 5 of Fourteenth Amendment to limited remedial powers of federal court), *vacated*, 921 F.2d 1190 (11th Cir. 1991), *cert. denied*, 500 U.S. 942; David Cole, *The Value of Seeing Things Differently: City of Boerne and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 52 (stating that *City of Boerne* decision and other Supreme Court decisions since *The Civil Rights Cases*, at best, reflect confusion about how far Congress's power should extend, and at worst, are disingenuous); Laycock, *supra* note 162, at 245 (arguing that broad "necessary and proper" type power authorized by Section 5 gives Congress power to enact RFRA in order to provide statutory protection for constitutional values that Supreme Court is unwilling or unable to protect on its own authority); Victoria F. Nourse, *Where Violence, Relationship and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 22-23 (1996) (arguing that Section 5 supports VAWA because it permits Congress to enforce Fourteenth Amendment appropriate private remedies even though amendment itself applies only to state action).

Acts as applied to the states, raise the question as to whether the Court has nullified Section 5 by its restrictive decisions. However, a careful analysis of these cases reveals that the Supreme Court has not nullified Section 5 but, instead, has provided a clear definition of the scope of this enforcement power.

The Supreme Court has defined the scope of Section 5 to permit "remedial" but not substantive legislation.¹⁶⁷ In this way, the Court uses classic rights-essentialist language to distinguish between permissible and impermissible Section 5 legislation. This distinction, however, is unworkable because as discussed in Part I, the remedial is substantive - each and every substantive right has a remedial component, and that remedial component defines the scope of the underlying interest.¹⁶⁸ Furthermore, while the Court may use rights-essentialist labels, it has in fact adopted the unified right theory in conceptualizing the scope of the Section 5 power. The Court in *City of Boerne* recognized that legislation that facially addresses only remedies can nevertheless be substantive "in operation and effect" when it strays from the parameters of the descriptive right as determined by the Court.¹⁶⁹ In other words, a remedy will redefine the right when its contours do not match the contours of the judicially defined right. The Court's requirement that remedial legislation under Section 5 be "congruent and proportional" thus ensures that the legislature has not redefined the right by creating a remedy that does not overlap with the definitional interest. For when it does, Congress exceeds its enforcement powers and entrenches upon the powers of the federal courts to define constitutional rights.¹⁷⁰

Following the Court's lead, this article provides a framework to evaluate the legitimacy of Section 5 legislation that rejects rights essentialist terminology and fleshes out the characteristics of congruent and proportional enforcement legislation. The text of Section 5 itself provides the broad framework through which to define the standard for evaluating legislative remedies. First, legislation under Section 5 must be "enforcing" legislation, rather than defining legislation.¹⁷¹ Enforcing

¹⁶⁷ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 638-39, 119 S. Ct. 2219, 2224 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁶⁸ See discussion *supra* notes 75-117.

¹⁶⁹ *City of Boerne*, 521 U.S. at 520.

¹⁷⁰ Marci C. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 *CARDOZO L. REV.* 469, 472 (1999) (arguing that requirement of proportional relief is mechanism that allows Court to flesh out unconstitutional legislation masquerading as valid remedial legislation).

¹⁷¹ U.S. CONST. amend. XIV, § 5; *City of Boerne*, 521 U.S. at 519.

legislation, or what the Supreme Court calls "remedial" legislation, is that legislation which does not effect a direct and primary change upon the constitutional interest, and which reacts to an identified constitutional violation.¹⁷² Second, Section 5 mandates that such enforcing legislation must be "appropriate" legislation.¹⁷³ Appropriate legislation may be quite broad in that it may create a prophylactic remedy that sweeps beyond the actual violation itself and seeks to prevent constitutional violations by redressing the causes or effects of constitutional violations.¹⁷⁴ But any legislative remedy must be proportional in measure to the contours of the constitutional right and cannot operate to redefine or limit the constitutional interest in breach of the separation of powers.¹⁷⁵

The Supreme Court has acknowledged that the line between appropriate enforcing legislation and substantive redefinition of the Fourteenth Amendment is a fine one, and one that is difficult to discern.¹⁷⁶ But nevertheless, that is the distinction the text and legislative compromise of Section 5 require the courts and Congress to make.

A. Enforcing Legislation

The first, seemingly elementary point is that legislation properly enacted under Section 5 must be enforcing, not definitional as the text and legislative history of Section 5 require.¹⁷⁷ The drafters of the Fourteenth Amendment rejected a proposed draft of Section 5 that would have given Congress power "to make all laws which shall be necessary and proper to secure" the protections of the Fourteenth Amendment.¹⁷⁸ This initial draft of Section 5 giving Congress

¹⁷² See discussion *infra* notes 187-250.

¹⁷³ U.S. CONST. amend. XIV, § 5.

¹⁷⁴ See discussion *infra* notes 260-313.

¹⁷⁵ See discussion *infra* notes 314-42. Professors Marci Hamilton and David Schoenbrod explore the origins of the proportionality standard in detail in their article, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, *supra* note 170. They argue that the Court's proportionality analysis is "rooted in bedrock constitutional principles" and explain that the proportionality requirement is justified because (1) it was an essential component of constitutional precedent long before [*City of Boerne*]; (2) Section 5 draws its content from the Law of Remedies, which requires that a remedy respond proportionally to the wrong, and (3) it is consistent with the Court's close attention to the Constitution's structural protections of liberty and democracy inherent in the separation of powers and federalism. Hamilton & Schoenbrod, *supra* note 170, at 472.

¹⁷⁶ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000); *City of Boerne*, 521 U.S. at 519-20.

¹⁷⁷ *City of Boerne*, 521 U.S. at 521.

¹⁷⁸ Representative John Bingham proposed the first draft of Section 5: "The Congress

definitional powers was rejected, and instead, Congress was given a more limited grant of power to enforce rather than secure the Fourteenth Amendment guarantees.¹⁷⁹

This limited grant of power also prevented Congress from usurping the judiciary's constitutional power and duty to interpret and define constitutional rights.¹⁸⁰ Some of the drafters raised horizontal federalism concerns that giving Congress primary responsibility for defining legal equality under the Fourteenth Amendment would take that power from the judiciary and place it in the hands of changing congressional majorities.¹⁸¹ Such action contradicts constitutional ideals of ensuring that constitutional rights are stable, core values that protect equally the minority against the majoritarian will.¹⁸² Commentators and courts have noted that such action contradicts the constitutional design of vesting the judiciary with primary authority to interpret the constitutional prohibitions.¹⁸³ These concerns with both horizontal and vertical federalism resulted in the compromise power of Section 5 authorizing merely the enactment of enforcement, not plenary, legislation to make the substantive constitutional guarantees effective against the states.

The text of Section 5 therefore provides both the authorization and the limitation for Congress's unique powers to enact remedies.¹⁸⁴ Congress is

shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

¹⁷⁹ See *City of Boerne*, 521 U.S. at 520; *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (stating that Congress is not authorized to adopt general legislation upon rights of citizen, but only corrective legislation, that is, such as may be necessary and proper for counteracting state laws that violate Fourteenth Amendment).

¹⁸⁰ *City of Boerne*, 521 U.S. at 524.

¹⁸¹ CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866), Statement of Rep. Hale (noting that Bill of Rights, unlike Bingham proposal, "provide safeguards to be enforced by the courts, and not to be exercised by the Legislature"); see also *id.* at App. 151 (observing that many of leading House Republicans would not consent to such radical change in Constitution).

¹⁸² CONG. GLOBE, 39th Cong., 1st Sess. App. 133 (1866) (statement of Rep. Hotchkiss).

¹⁸³ *City of Boerne*, 521 U.S. at 523-24 ("[t]he design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary"); *id.* at 536 (stating that allowing Congress to define constitutional rights "contradicts vital principles necessary to maintain separation of powers and federal balance"); H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 64 (1908); Bandes, *supra* note 159.

¹⁸⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000); see *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting) (opining that Congress has considerable latitude when exercising its "unique remedial powers" under Section 5); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (O'Connor, J.) (characterizing Section 5 as embodying Congress's "unique remedial powers").

limited by the text to enforcing rather than defining the protections of the Fourteenth Amendment.¹⁸⁵ As the Supreme Court has emphasized, "the term 'enforce' is to be taken seriously—that the object of Section 5 legislation must be the carefully delimited remediation of constitutional violations."¹⁸⁶ The Court has identified the parameters of true enforcing legislation by circumscribing both what it must do and what it cannot do. First, enforcing legislation may not make a direct and primary change on the substantive component of the right by defining the protections of that right. Second, enforcing legislation must be responsive to a constitutional violation, and cannot properly exist in the absence of an identifiable provision to enforce against actual or threatened violation.

1. Avoids Direct and Primary Substantive Change

The first important parameter of the Section 5 power is that legislation enacted pursuant to this power must be corrective – it may not make a "direct and primary" change to the substance of a right.¹⁸⁷ Or in unified right terms, the legislation cannot alter the nature or scope of the core guarantee provided by the skeletal framework of the constitutional right. The Court has made clear that authorization to enforce the protections of the Fourteenth Amendment does not include the power to redefine or alter those protections:

Legislation which alters the meaning of the [Constitution] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes

¹⁸⁵ *City of Boerne*, 521 U.S. at 519. To "enforce" means to compel, strengthen, implement, effectuate or constrain. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996); BLACK'S LAW DICTIONARY 474 (5th ed. 1979) ("to put into execution; to cause to take effect; to make effective; to compel obedience to"); WEBSTER'S REVISED UNABRIDGED DICTIONARY (1996). The word "enforce" had the same meaning to "strengthen; invigorate; give effect; and fortify" at time of its adoption in Section 5. THE CENTURY DICTIONARY (1899); ROBERT GORDON LATHAM, A DICTIONARY OF THE ENGLISH LANGUAGE (1882); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1852). Thus, Section 5's mandate to enforce the Fourteenth Amendment authorizes Congress to compel compliance with the obligations of the amendment by implementing those obligations, or to strengthen or fortify those obligations by constraining violations and exerting pressure to reach conformance.

¹⁸⁶ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2224 (1999).

¹⁸⁷ *City of Boerne*, 521 U.S. at 524 ("remedial not substantive"); *The Civil Rights Cases*, 109 U.S. 3 (1883).

a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of the Fourteenth Amendment.'¹⁸⁸

The Court has summarized this interpretation of Section 5 with the shorthand phrase that Congress can enact remedial but not substantive legislation.¹⁸⁹ In using these rights-essentialist terms, the Court suggests superficially that any remedial enactment is permissible. Its decisions, however, impose more narrow limits upon congressional legislation and implicitly recognize that remedies can and do alter the substantive components of rights.

Indeed, applying the Court's basic principle of remedial or enforcing legislation has produced confusion, or at least great disagreement.¹⁹⁰ The disagreement began with *City of Boerne v. Flores* and the Religious Freedom Restoration Act (RFRA).¹⁹¹ RFRA was Congress's response to *Employment Div. v. Smith*.¹⁹² In *Smith*, the Supreme Court held that neutral laws of general applicability that impact religious practices do not have to be justified by a compelling governmental interest or be the least restrictive means available.¹⁹³ The Court therefore upheld a law denying unemployment benefits to Native American Church members who used peyote. Congress vehemently disagreed with the holding of

¹⁸⁸ *City of Boerne*, 521 U.S. at 519.

¹⁸⁹ *Id.*

¹⁹⁰ Congress continues to propose legislation pursuant to Section 5 that arguably exceeds that provision's affirmative grant of enforcement power. *See, e.g.*, Right to Bear Arms Protection and Privacy Act of 2000, S. 2270, 146 CONG. REC. S1596-03, S1600 (daily ed. Mar. 22, 2000) (stating that purpose of Act is to protect and guarantee rights of gun manufacturers by, *inter alia*, prohibiting causes of action against gun manufacturers); Ten Commandments Defense Act, 145 CONG. REC. H4364-02, H4457-59 (declaring rights to religious liberty contrary to court decisions holding posting of Ten Commandments by state actors to be unconstitutional); Bankruptcy Reform Act of 1999, 145 CONG. REC. S11138-01, S11144 (daily ed. Sept. 21, 1999) ("to promote the purposes of the 14th amendment by protecting the civil and economic rights of victims of domestic violence and by furthering the equal opportunity of women for employment and economic self-sufficiency"). *Compare* Right to Life Act, 145 CONG. REC. E164-01 (daily ed. Feb. 9, 1999) ("This legislation does what the Supreme Court refused to do in *Roe v. Wade* . . . The Right to Life Act will protect millions of future children by prohibiting any state or federal law that denies the personhood of the unborn, thereby effectively overturning *Roe v. Wade*."), *with* Family Planning and Choice Protection Act of 1999, 145 CONG. REC. S8875-02, S8884 (daily ed. July 19, 1999) (act intended to "achieve the same limitations on State action as were provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in the *Roe v. Wade* decision.").

¹⁹¹ 521 U.S. 507 (1997).

¹⁹² *Employment Div. v. Smith*, 494 U.S. 872 (1990).

¹⁹³ *Id.* at 881-82.

Smith, and reacted by passing RFRA. RFRA contradicted *Smith*, and required that neutral laws of general applicability, such as land-use, fair housing, and employment be justified under a pre-*Smith* strict scrutiny analysis.¹⁹⁴ Under RFRA, a Catholic church in Texas alleged a violation of the statute when its request to expand its physical facility was denied under local land use and historic preservation laws. Commentators, most notably Professor Laycock, quickly concluded that Section 5 authorized Congress to pass RFRA and to "create a statutory right where the Court declined to create a constitutional right."¹⁹⁵ The presumption was that Section 5 authorized Congress to do everything that is necessary and proper to carrying out the objects of the First Amendment, including enacting more expansive statutory protections of constitutional rights.¹⁹⁶

In *City of Boerne*, however, the Supreme Court, viewed RFRA as Congress's attempt to redefine the constitutional right within a statutory rule.¹⁹⁷ The Court said the First Amendment right does not protect religious practices against neutral laws of general applicability like drug or zoning laws. Congress attempted, through RFRA, to redefine First Amendment Rights to protect religious practices against such neutral laws. In this way, Congress impermissibly altered the legal standard from rational basis review to strict scrutiny review for these types of cases. Moreover, *City of Boerne* was an easy case because Congress expressly stated that it intended to change the Court's interpretation of the First Amendment and provide broader substantive protections.¹⁹⁸ In RFRA, Congress was legislating in a direct and primary manner upon the subject of the constitutional right – religious liberty – by defining what guarantees are encompassed within that right.¹⁹⁹

¹⁹⁴ RFRA, 42 U.S.C. § 2200bb-1 (1994).

¹⁹⁵ Laycock, *supra* note 163, at 246.

¹⁹⁶ Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67 (1998) (finding result in *City of Boerne v. Flores*, 521 U.S. 507 (1997), surprising because of thought that RFRA was clearly constitutional because Congress had repeatedly passed similar legislation in civil rights and voting rights in past); Laycock, *supra* note 163, at 245-46. Not everyone, however, agreed that RFRA was authorized by Section 5. Hamilton, *supra* note 165, at 377.

¹⁹⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁹⁸ RFRA, 42 U.S.C. § 2000bb(b)(1); *City of Boerne*, 521 U.S. at 512, 515.

¹⁹⁹ For precisely the same reason, the post-*City of Boerne* attempt to redraft RFRA, the Religious Liberty Protection Act (RLPA) may be an invalid enactment under Section 5. See 145 CONG. REC. H5580-02 (daily ed. July 15, 1999). In RLPA, Congress has first tried to justify its substantive rule changes under the Commerce Clause and Spending Clause, which avoids the Section 5 problem. RLPA § 2. However, it continues to justify section 3 of the Act entitled "Enforcement of Constitutional Rights" as appropriate remedial

This direct and primary action upon the subject of the right is a hallmark of legislation that the Court has found invalid under Section 5. In *The Civil Rights Cases*, the Court in fact distinguished enforcing or corrective legislation from illegitimate legislation, which is "primary and direct" and "takes immediate and absolute possession of the subject of the right."²⁰⁰ The Court found such direct and primary action in the Patent Remedy Clarification Act in *Florida Prepaid v. College Savings Bank*.²⁰¹ The *Florida Prepaid* case focused on the Act's abrogation of state sovereign immunity, which extended the Act's substantive and remedial guarantees to the states.²⁰² The Supreme Court previously held that patent infringement can constitute a due process violation when the infringement is intentional and the state denies the patent owner adequate relief for that infringement.²⁰³ In contrast, the Patent Act provides remedies for the statute's substantive guarantees against mere negligent and inadvertent patent infringement and regardless of whether there is arbitrary deprivation by the states. The Patent Act thereby impermissibly changed the standard for whether due process is violated in patent infringement cases from intentional infringement with

measures under section 5. 145 CONG. REC. H5587 (daily ed. July 15, 1999). Part three of RLPA provides for the burden of proof in a RLPA case, requires the full faith and credit be given to RLPA decisions, and contains a non-preemption clause. However, the Supreme Court has characterized burdens of proof as a "substantive" aspect of a claim, "given its importance to the outcome of cases." *Raleigh v. Ill. Dep't of Revenue*, 120 S. Ct. 1951, 1955 (2000) (discussing burden in tax case). In addition, Section 3 of RLPA also includes a provision, "Limitation on Land Use Regulation" which requires a government to justify land use regulations that substantially burden a person's religious exercise by demonstrating that the regulation is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The statements from the legislatures are clear that this provision is intended to reverse the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). 145 CONG. REC. H5587, H5581 (daily ed. July 15, 1999). Such legislation clearly continues to violate the parameters of the Section 5 authorization, unless Congress can demonstrate that prohibiting burdensome land use regulations is an appropriate prophylactic remedy for violations of the First Amendment as defined by the Supreme Court. See discussion *infra* notes 191-199, 211-13.

²⁰⁰ 109 U.S. 3, 27 (1883).

²⁰¹ 35 U.S.C. §§ 271(h), 296(a) (1994); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

²⁰² The patent laws in general are authorized by the Patent Clause, U.S. CONST. art. I § 8, cl. 8, and the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. However, Congress may not abrogate state sovereign immunity pursuant to its Article I powers, see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996), and thus the Patent Remedy Act could not be sustained as applied to the states under either of those powers. *Fla. Prepaid*, 527 U.S. at 633.

²⁰³ *Fla. Prepaid*, 527 U.S. at 643 (citing *Parratt v. Taylor*, 451 U.S. 527, 539-41 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984)).

arbitrary deprivation to negligent infringement.²⁰⁴

Most recently, in *Kimel v. Florida Board of Regents*, the Supreme Court addressed the validity of the *Age Discrimination in Employment Act (ADEA)* as applied to state employers.²⁰⁵ As in *Florida Prepaid*, the express statutory provisions at issue were those abrogating the states' sovereign immunity, which thereby imposed the substantive requirements of the ADEA upon the states. The Supreme Court invalidated the ADEA as applied to states, in part, because the Act prohibits substantially more state conduct than would likely be held unconstitutional under the Fourteenth Amendment.²⁰⁶ Under the constitutional equal protection clause, age is not a suspect class, and thus only employment practices based on age that are arbitrary and fail the rational basis standard will be unconstitutional.²⁰⁷ In contrast, the ADEA

²⁰⁴ See also *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 ("To sweep within the Fourteenth Amendment the elusive property interest that are 'by definition' protected by unfair competition law would violate our frequent admonition that the Due Process Clause is not merely a 'font of tort law.'). But see *College Sav. Bank*, 527 U.S. at 693-94 (Stevens, J., dissenting) (arguing that Trademark Remedy Clarification Act was valid exercise of Section 5 power, even if alleged false advertising in that case did not violate Constitution, because Congress had reasonable basis for concluding that remedies were necessary to prevent other violations of Due Process Clause).

²⁰⁵ 528 U.S. 62, 73-74 (2000). The Court had previously held that Congress validly enacted the ADEA pursuant to its Commerce Clause powers, and properly extended the Act to state and local employers. See *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). But, in *Kimel v. Fla. Bd. of Regents*, the state employers claimed that the Eleventh Amendment barred the suits against them because under the Court's decisions in *Seminole Tribe* and *Alden v. Maine*, 527 U.S. 706, 755-56 (1999), Congress could not abrogate the states' sovereign immunity under the Commerce Clause power. Thus, Kimel and the Department of Justice sought to defend the ADEA under Congress' Section 5 power since that provision authorizes Congress to abrogate state sovereign immunity. See *Alden*, 527 U.S. at 755-56 (explaining that ratification of Fourteenth Amendment "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement powers"); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (stating that Congress may provide for private suits against states under Section 5 which are constitutionally impermissible in other contexts).

²⁰⁶ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 85-86 (2000) (explaining that Act, through its broad restriction on use of age as discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under applicable equal protection, rational basis standard).

²⁰⁷ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (considering whether statute requiring retirement of municipal judges at age seventy violates ADEA); *Vance v. Bradley*, 440 U.S. 93 (1979) (determining whether Congress violated Equal Protection Clause when it required retirement of federal employees covered by foreign service retirement but not civil service retirement at age sixty); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (reviewing law that requires uniformed police officers to retire at 50).

makes illegal all employment decisions based on age, and in this way, changes the substance of the equal protection guarantees based on age.²⁰⁸

Thus, where legislation affects a direct and primary change upon the subject of a right, it is not enforcement legislation authorized by Section 5. The cases decided to date have established that Congress causes a direct and primary change if it protects more conduct than that protected by the Court's constitutional interpretation, as in *City of Boerne* and *Kimel*, or if it changes the legal standards for the courts to apply in determining violations of constitutional guarantees, as in *Florida Prepaid* and *Kimel*.

This determination of whether the legislation acts directly and primarily upon the substantive guarantee is, however, only the starting point for evaluating the legitimacy of legislation enacted under Section 5.²⁰⁹ For Congress may be able to prohibit otherwise constitutional conduct if it is necessary to remedy causally related unconstitutional conduct.²¹⁰ So for example, the Court held in *Morgan* that Congress could prohibit an otherwise-constitutional literacy test for voting where it was necessary to prevent racial discrimination against the Puerto Rican community in voting and in the provision of governmental services.²¹¹ As discussed further in Section III(B)(1), constitutionally permissible conduct like the literacy test may be substantively altered by statute if it is a part of a prophylactic remedy appropriately aimed at remedying an identified constitutional violation. This is the key point that distinguishes *City of Boerne* from *Morgan* and other voting rights cases which some have assumed contradict the Supreme Court's holdings in the recent Section 5 cases prohibiting direct substantive changes.²¹²

2. Reactive to Unconstitutional Behavior

Thus, Congress's action will first fail to qualify as enforcement legislation if it directly alters the primary constitutional right. However,

²⁰⁸ *Kimel*, 528 U.S. at 87-88.

²⁰⁹ *See id.* at 88 ("That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination.").

²¹⁰ *Id.* at 88-89; *see also Katzenbach v. Morgan*, 384 U.S. 641 (1966).

²¹¹ 384 U.S. at 652-53.

²¹² *See Laycock, supra* note 196, at 245 (asserting that RFRA is clearly constitutional because Congress had repeatedly passed similar legislation in which Congress went well beyond judicial interpretation of constitutional provision being enforced).

it is not enough to merely say that legislation is enforcing because it is not definitional. "Remedial" legislation must also be responsive to some legislative belief of actual or threatened constitutional illegality.²¹³ A remedy corrects, counteracts or prevents a wrong.²¹⁴ Thus, a remedy is quintessentially a reaction to an existing or threatened harm.

Congress must therefore, first identify a violation that it believes has or is likely to occur in order to justify any remedial legislation.²¹⁵ This identification of a violation is the predicate requirement to justifying any legislative reaction, and thus it is a fundamental requirement for all Section 5 legislation.²¹⁶ The violation may be an actual one perceived by Congress. Or, it may be a violation threatened in the future. A remedy includes both action to redress existing violations as well as action to prevent future harms of a similar type.²¹⁷ Commensurate with its power to remedy, Congress may therefore act to prevent violations just as it may act to remedy past violations of the Constitution.

This identification of a violation, however, need not take the form of a judicial determination of an actual violation.²¹⁸ In *Morgan*, the Supreme

²¹³ See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (stating that RFRA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior); see also *The Civil Rights Cases*, 109 U.S. 3, 12-13 (1883) (analogizing Section 5 to contract clause and stating that "some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case"); cf. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) (stating that decree must be remedial in nature in that it must be designed as nearly as possible to restore victims of discriminatory conduct to position they would have occupied in absence of such conduct).

²¹⁴ See *The Civil Rights Cases*, 109 U.S. at 17 (finding that remedy must be corrective in character, adapted to counteract and redress operation of prohibited state laws or action); see also *AMERICAN HERITAGE DICTIONARY* (3d ed. 1996) (defining "remedy" as "to set right; remove, rectify, or counteract"); *BLACK'S LAW DICTIONARY* 1163 (5th ed.) (defining remedy as being "the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated"); *LAYCOCK*, *supra* note 21, at 1-8; *WEBSTER'S REVISED UNABRIDGED DICTIONARY* (1996) (defining remedy as to relieve, cure, correct, counteract an evil, redress a wrong).

²¹⁵ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88-91 (2000); *College Sav. Bank*, 119 S. Ct. at 2207; *Fullilove v. Klutznick*, 448 U.S. 448, 510 (Powell, J., concurring) (stating that appropriate test in Section 5 arena is whether "means selected are equitable and reasonably necessary to the redress of identifiable discrimination"); see also *Hamilton & Schoenbrod*, *supra* note 170, at 472 (explaining that Section 5 legislation presupposes that violation occurred).

²¹⁶ *The Civil Rights Cases*, 109 U.S. at 18.

²¹⁷ See *id.*

²¹⁸ See, e.g., *Kimel*, 528 U.S. at 90-91; *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) (stating that judicial determination would depreciate both congressional resourcefulness and responsibility for implementing Amendment); cf. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 2001 WL 1735561, at *13-*16 (2001) (Breyer, J., dissenting) (criticizing majority for imposing upon Congress strict, judicially created evidentiary standard for

Court rejected the claim that Congress could only react to violations determined by a court.²¹⁹ That understanding of Section 5 would constrain Congress to acting in place of the judiciary, rather than increasing Congress's powers to enforce the amendment. Yet, in the 2001 case of *Board of Trustees v. Garrett*, the Supreme Court expressly reaffirmed that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."²²⁰ Thus, Congress need not wait for a judicial determination of a constitutional harm.²²¹ Nor must it conduct court-like hearings with admissible evidence designed to satisfy a judicial burden of proof. Rather, Congress may use its fact finding powers that are more lenient than a court's to evaluate whether it perceives that an actual or threatened constitutional violation exists.²²² That is not to say that Congress needs no evidence of the violation, for if Congress is to defend its action in court, it will need to demonstrate its belief in some documented way.²²³

Congress's failure to satisfy this predicate of identifying a constitutional violation lead to the invalidation of the Americans with Disabilities Act (ADA) as it applies to state employers in the recent *Garrett* case.²²⁴ Congress, in considering passage of the ADA, appointed a special task force to assess the need for comprehensive legislation, and the task force collected numerous examples of general discrimination by states against the disabled in a variety of non-employment contexts.²²⁵ However, in the final legislative findings supporting the ADA legislation, Congress made no findings whatsoever with respect to the

identifying constitutional violations); Linda Greenhouse, *The High Court's Target: Congress*, N.Y. TIMES, Feb. 25, 2001, sect. 4, at 3 ("court is acting as if Congress were just a bad lower court").

²¹⁹ *Morgan*, 384 U.S. at 648-49.

²²⁰ *Garrett*, 2001 WL 1735561, at *6.

²²¹ *Cf.* *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (finding that Congress may properly prescribe remedies for voting discrimination under Fifteenth Amendment enforcement power without any need for prior adjudication).

²²² *United States v. Morrison*, 120 S. Ct. 1740, 1760-63 (2000) (Souter, J., dissenting) (detailing legislative history of VAWA related to "effects of violence on women generally" and effects of violence against women on interstate commerce).

²²³ *College Sav. Bank*, 527 U.S. at 639-40; *City of Boerne v. Flores*, 521 U.S. 507, 531-32 (1997); Ruth Colker, *The Section 5 Quagmire*, 47 UCLA L. REV 653, 667-69 (2000) (describing the importance of fact finding to valid Section 5 legislation); *see also* Hamilton & Schoenbrod, *supra* note 169, at 471 (stating that Congress must identify conduct transgressing Fourteenth Amendment); *cf.* *Katzenbach*, 383 U.S. at 329 (observing that Congress began work on Voting Rights Act with reliable evidence of actual voting discrimination).

²²⁴ *Garrett*, 2001 WL 1735561.

²²⁵ *Id.* at *13-14 (Breyer, J., dissenting); *id.* at *21; Appendix C.

specific context of states discriminating in employment on the basis of disability.²²⁶ The Supreme Court held that this dearth of legislative findings was "strong evidence" reflecting Congress's "judgment that no pattern of unconstitutional state action had been documented."²²⁷ Thus, Congress in the state employment provisions of the ADA failed to meet the predicate requirement for enacting Section 5 remedial legislation in two ways. First, it failed to actually identify the violation by making an express legislative finding or determination.²²⁸ Second, it failed to make sufficient findings addressing the specific problem of discrimination in state employment as opposed to general acts of discrimination by private employers and by states in other contexts.²²⁹ *Garrett* therefore emphasizes the dictates of prior cases that Section 5 imposes a meaningful requirement upon Congress to identify its belief of an actual or threatened violation prior to launching remedial legislation that can only be designed to react to a legal problem.²³⁰

Moreover, Section 5 requires that Congress identify a constitutional violation. The context of the enforcement power contained as one provision within the Fourteenth Amendment, constrains Congress to acting only in response to constitutional violations falling within the purview of that amendment.²³¹ The courts have the duty, and the sole power, to define these constitutional protections.²³² Thus, the problems identified by Congress must be likely to violate the constitution as interpreted by the courts.²³³ Problems that Congress thinks should

²²⁶ *Id.* at *8-9 (the legislative record contained six examples of state employer discrimination, yet none of these were cited by Congress or incorporated into the legislative findings).

²²⁷ *Id.* at *9.

²²⁸ *Id.*; Colker, *supra* note 223, at 667 (suggesting that sufficient findings of fact by Congress will overcome other constitutional difficulties under Section 5.)

²²⁹ *Garrett*, 2001 WL 1735561, at *9. Congress similarly relied upon general findings of violence against women, rather than specific findings of state discrimination against women in enacting the VAWA, which contributed to the invalidation of that Act. See *United States v. Morrison*, 120 S. Ct. 1740, 1760-63 (2000) (Souter, J., dissenting) (detailing legislative history of VAWA related to "the effects of violence on women generally" and the effects of violence against women on interstate commerce).

²³⁰ *Garrett*, 2001 WL 1735561, at *9-*11; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (stating that lack of support in legislative record is not determinative of Section 5 inquiry, but Congress failed to identify any reason to believe that state governments were unconstitutionally discriminating against their employees on basis of age).

²³¹ U.S. CONST. amend. XIV, §§ 1 & 5.

²³² *City of Boerne v. Flores*, 521 U.S. 507, 531-32 (1997) (explaining that court, alone, has power to interpret provisions); *cf.* Bandes, *supra* note 159, at 303 (describing traditional role of courts in constitutional context).

²³³ *City of Boerne*, 521 U.S. at 527 (stating that prior decisions by Supreme Court rejected

violate the constitution, as in the case of RFRA, will not suffice to establish the predicate constitutional violation.²³⁴

Yet Congress has failed to confine its Section 5 legislation to identifying and responding to perceived or threatened constitutional violations. In RFRA, it simply identified problems it believed should violate the constitution, rather than identifying problems with religious discrimination that would likely violate the First Amendment as defined by the courts.²³⁵ In *Kimel*, the Court found that Congress "had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age," and therefore, "had no reason to believe that broad prophylactic legislation was necessary in this field."²³⁶ The scant evidence Congress claimed to rely upon in the ADEA at issue in *Kimel* consisted of a few assorted sentences from floor statements, and one 1966 California report of age discrimination in public agencies which actually revealed, contrary to the legislation, that the most prevalent age limits used were permissible under the ADEA.²³⁷ Rather, Congress seemed to focus on the states' violation of the ADEA, which would not violate the equal protection clause as interpreted by the courts. Thus, the downfall of the legislation in *Kimel* was Congress's failure to identify any constitutional violations by the states.²³⁸

Furthermore, non-constitutional violations are not proper concerns to which Congress can react pursuant to its Fourteenth Amendment enforcement powers.²³⁹ The most recent challenge to Congress' Section 5

position that Section 5 endows Congress with power to establish meaning of constitutional provisions); see also *Colker*, *supra* note 223, at 669-76 (surveying caselaw that has recognized this principle); cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (explaining that rare occasions when Court has found unconstitutional exercise of enforcement power under Fifteenth Amendment was where "Congress had attacked evils not comprehended by the Fifteenth Amendment.").

²³⁴ *City of Boerne*, 521 U.S. at 529-36; *Colker*, *supra* note 223, at 669-76.

²³⁵ See *City of Boerne*, 521 U.S. at 534-35 (finding that most laws which RFRA applies to will not have been motivated by religious bigotry).

²³⁶ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

²³⁷ *Id.* at 89-90 ("Like the assorted sentences petitioners cobble together from a decade's worth of congressional reports and floor debates, the California study does not indicate that the State had engaged in any unconstitutional age discrimination.").

²³⁸ Similarly, in *Board of Trustees of the University of Alabama v. Garrett*, the Court held that Congress in enacting the state employment provisions of the ADA failed to identify constitutional violations by the states, and rather simply identified instances where state employers failed to make reasonable accommodations as required by the ADA and many state laws. 121 S. Ct. 955, 2001 WL 1735561, at *7 & n.5 (2001).

²³⁹ See *United States v. Morrison*, 120 S. Ct. 1740, 1758 (2000); *College Savings Bank*, 527 U.S. at 674 (striking down Trademark Remedy Clarification Act, 15 U.S.C. § 1125, because

powers in the Violence Against Women Act (VAWA), *United States v. Morrison*, demonstrates this point.²⁴⁰ The civil provisions of the VAWA at issue provided a cause of action and civil remedies for victims of gender-based violence against their attackers.²⁴¹ Congress first attempted to justify the statute under the Commerce Clause, and when that failed, argued that Section 5 of the Fourteenth Amendment authorized the law.²⁴² Congress argued that its findings that the states failed to take seriously claims of domestic violence resulted in discrimination against female victims of assault, and accordingly, justified the VAWA and its remedies for such sex discrimination.²⁴³

The problem with the VAWA according to the Supreme Court was its failure to identify a harm that would constitute a violation of the Constitution. The VAWA provided a federal remedy for victims of domestic violence. Yet, private conduct by individual perpetrators cannot violate the Fourteenth Amendment, which prohibits only state action. Thus, the VAWA, like the Civil Rights Act one hundred years before it, exceeded the scope of Congress' Section 5 power by remedying conduct that could not constitute a violation of the Fourteenth Amendment due to the absence of state action.²⁴⁴ The VAWA also provided a federal remedy for state law violations involving domestic violence rather than constitutional harms. The text and context of Section 5 limit Congress's power to the enforcement of constitutional rights, not state law.²⁴⁵ But as Justice Breyer readily admitted in his dissent, the VAWA sought to provide a federal remedy for "private conduct that is,

protected property interests under Act are those property interests protected by unfair competition law and not Due Process Clause).

²⁴⁰ 120 S. Ct. 1740 (2000).

²⁴¹ VAWA, 42 U.S.C. § 13981 (1994).

²⁴² *Morrison*, 120 S. Ct. at 1756-58; Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the VAWA: A Defense*, 37 HARV. J. ON LEGIS. 1, 28 (2000).

²⁴³ H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 29, 42, 49 (1993); S. REP. NO. 102-197, at 33 (1991); Biden, *supra* note 242, at 4-5.

²⁴⁴ *Morrison*, 120 S. Ct. at 1756-58; *The Civil Rights Cases*, 109 U.S. at 11; *see also* *United States v. Wilson*, 880 F. Supp. 621, 635 (E.D. Wisc. 1995) (concluding that Freedom of Access to Clinic Entrances Act is invalid enactment under Section 5 because it reaches private conduct not state action). In addition, legislation that targets conduct by federal officials does not fall within the purview of the Fourteenth Amendment. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 605-06 (1990) (O'Connor, J., dissenting); *see also* Hamilton, *supra* note 165, at 371-73 (stating that nowhere in Fourteenth Amendment is Congress empowered to enforce rights embodied in First Amendment against federal government).

²⁴⁵ *The Civil Rights Cases*, 109 U.S. at 11 (explaining that Section 5 does not invest Congress with power to legislate upon subjects that are within domain of state legislation, but only to provide modes of relief against state action that violates Fourteenth amendment).

in the main, already forbidden by state law."²⁴⁶ Section 5, however, does not authorize Congress interstitially to interject federal remedies for state causes of action.²⁴⁷

The impetus behind the VAWA, however, was the states' neglect and failure to prosecute effectively claims of domestic violence made primarily by women. This type of state neglect of the rights of a suspect class formed the foundation for Section 1983, perhaps the most famous remedy enacted pursuant to Section 5.²⁴⁸ Unlike Section 1983, however, the VAWA did not identify perceived or likely discrimination by the states against female victims of domestic violence.²⁴⁹ Had Congress identified such a constitutional violation, it may have been able to address the related ancillary conduct of individual domestic violence if that ancillary conduct had a sufficient causal nexus to the constitutional violation.²⁵⁰ As discussed in Part III(B)(1), ancillary conduct can be brought within the purview of Congress's prophylactic remedy, but only if the legislature first identifies and evidences its belief of a likely constitutional violation. For without that violation, no legislation can be a reaction or a response, but instead is an affirmative standard setting law that is impermissible under Section 5.

B. *Appropriate Relief*

Thus, while Section 5 legislation must be enforcing, the enforcing nature of legislation alone will not validate an attempted Section 5 enactment. For Section 5 authorizes Congress to enforce the Fourteenth Amendment only by appropriate legislation.²⁵¹ Section 5 is not a broad

²⁴⁶ *Morrison*, 120 S. Ct. at 1779 (Breyer, J., dissenting).

²⁴⁷ Historically, the federal courts did in fact interject federal common law remedies into state law causes of action through diversity jurisdiction. Woolhandler, *supra* note 33, at 83-84. Professor Woolhandler argues that this was necessary in order for the courts to ensure the adequacy of constitutionally compelled remedies. *Id.*

²⁴⁸ See 42 U.S.C. § 1983 (1994 & Supp. V 1999).

²⁴⁹ Instead, Congress identified the general effects of domestic violence upon women, and the effects of that violence upon interstate commerce. *Morrison*, 120 S. Ct. at 1760-63 (Souter, J., dissenting). Claims of constitutional violations, however, have been made with respect to state inaction against domestic violence. See, e.g., *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1990) (concluding that police officers' failure to investigate and arrest in claim of domestic violence by wife against husband may properly show equal protection violation, given officers' actions demonstrating intent to treat domestic abuse cases less seriously than other assaults and showing animus against abused women).

²⁵⁰ See *The Civil Rights Cases*, 109 U.S. at 11 (stating that Fourteenth Amendment authorizes Congress to provide redress when state action is subversive to rights specified in amendment); see also discussion *infra* 287-300.

²⁵¹ U.S. CONST. amend. XIV, § 5.

grant of power to Congress to legislate any and all remedies, for an inappropriately designed remedy may become substantive in operation and effect by expanding or diluting the substantive right.²⁵² Rather, Congress is limited to enacting appropriate measures of enforcing legislation.

The accepted interpretation of Section 5 is that it grants Congress the same powers as the Necessary and Proper Clause of Article I.²⁵³ Thus, Congress can do all things necessary and proper to enforce the provisions of the Fourteenth Amendment. The classic formulation of the reach of those necessary and proper powers was established in *McCulloch v. Maryland*, and provides:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.²⁵⁴

Therefore, the ends of the Section 5 legislation must be legitimate and within the scope of the Constitution; Congress must enact legislation that enforces, rather than defines constitutional rights. The means chosen must not be prohibited, in that, the actual remedial form itself cannot violate the Constitution.²⁵⁵ And the means must be consistent with the letter and spirit of the Constitution – it must actually enforce or enhance, rather than dilute constitutional rights.²⁵⁶

²⁵² See Levinson, *supra* note 18, at 919 ("merely limiting Congress to remedies will not prevent it from eviscerating rights . . . What matters is the size and shape of the whole right-remedy package."); see also David Cole, *The Value of Seeing Things Differently: City of Boerne and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 68 ("If the Court were to defer symmetrically to Congress on questions of remedy under Section 5, Congress would have the same power to dilute and eviscerate substantive rights protections in the name of adjusting 'remedies'").

²⁵³ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

²⁵⁴ *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

²⁵⁵ See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995) (applying strict scrutiny to remedy of racial gerrymandering of voting districts); *Adarand Const. v. Pena*, 515 U.S. 200 (1995) (applying strict scrutiny to remedy of minority set asides); *Katzenbach*, 383 U.S. at 328-29 (finding that enactment authorizing states to racially segregate education would not be measure to "enforce" Equal Protection Clause because that clause of its own force prohibits such state laws); cf. *Schenk v. Pro-Choice Network*, 519 U.S. 357, 375 (1997) (holding that judicial prophylactic remedy must be tailored so as not to infringe on defendants' First Amendment rights).

²⁵⁶ To enforce means to enhance, to effectuate, or to empower. See *supra* note 185 and accompanying text. This textual term suggests a one-way ratchet that Congress may enhance or empower the constitutional provisions, but it may not limit, dilute, or reduce those constitutional rights. The Supreme Court so held in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). "Section 5 does not grant Congress power to exercise discretion in the

The measure or amount of the remedy or means must also be appropriate, or in necessary and proper terms, it must be "adapted to the end" goal of enforcing constitutional rights. An appropriate measure, as defined by the Court, is legislation whose scope is prophylactic and proportional.²⁵⁷ First, Congress has broad power to do what is necessary and proper to enforce constitutional rights by effectuating prophylactic remedies that sweep beyond the actual violation in order to remedy that violation or prevent future violations. At the same time, that prophylactic remedy must be congruent and proportional to the constitutional right as defined by the courts.²⁵⁸ Just as with a judicial remedy,²⁵⁹ the appropriate Section 5 remedy must be of an appropriate type and measure – a prophylactic remedy that is congruent and proportional to the constitutional right.

1. Prophylactic Character

The Supreme Court's clear directive is that Section 5 of the Fourteenth Amendment authorizes Congress to create a prophylactic remedy for a violation of the Fourteenth Amendment.²⁶⁰ While some may view the

other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id.*; see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (Congress's reasons for taking legislative action are important in assessing proportionality of statute); Vicki C. Jackson, *Symposium: Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2464 n.95 (1998) (stating that power like Section 5 that is "remedial" in nature may not include power to restrict remedies without providing equally effective remedies, "for it is hard to see how such remedy-restricting legislation would be to 'enforce' provisions of Fourteenth Amendment.").

²⁵⁷ *Kimel*, 528 U.S. at 80-81; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 638 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

²⁵⁸ I disagree with Professor Harrison's view that the Court's congruent and proportional test contrasts with a more permissive approach under the necessary and proper clause. Harrison, *supra* note 15, at 2513 n.1. Both the necessary and proper standard and the proportionality standard are seeking to define the limits of appropriate Section 5 legislation. "Necessary and proper" embodies the permissible breadth of prophylactic Section 5 remedies, whereas "congruent and proportional" limits of the scope of that response. Thus, the standards are two sides of the same coin.

²⁵⁹ *DOBBS*, *supra* note 22, § 1.1. Every remedy has a character or type and a measure that must be determined by a court in awarding an appropriate remedy. A remedy can be of a general type – legal or equitable—or one of a specific type from the traditional remedial arsenal of damages, injunctions, restitution, or declaratory relief. *Id.* § 1.1, at 1-7. Each remedy than has its proper measure – such as the appropriate amount of damages, or the reach of the injunctive provisions. *Id.*

²⁶⁰ *Kimel*, 528 U.S. at 81; *City of Boerne v. Flores*, 521 U.S. 507, 531-32 (1997) (citing cases

Court's recent interpretations of Section 5 as overly restrictive of congressional power, this interpretation does in fact provide Congress with very broad authority to redress unconstitutional conduct. A prophylactic remedy is defined as one that may impose supplemental precautions to repair the consequences of past harm or to prevent similar harm in the future.²⁶¹ These precautions are the hallmark of prophylactic relief. They address conduct which itself does not violate the constitution, but which is necessary to curtail in order to eliminate the causes or effects of a constitutional violation.²⁶² In this way, it is often said that prophylactic remedies may be "aimed broadly at conduct which itself is not unconstitutional."²⁶³

The prophylactic relief may be directed at ancillary conduct on either side of the violation, that is, toward ancillary conduct that is a contributing cause of the violation or ancillary conduct that is a continuing effect of that violation. There are numerous examples of courts and the legislature adopting prophylactic remedies aimed at the contributing causes of violations in order to prevent and deter similar

in which Court has approved Congress's prophylactic remedy); *The Civil Rights Cases*, 109 U.S. at 18, 23 (indicating that Section 5 authorizes "corrective" remedy that counteracts past harm or protects against future exigency); cf. *College Sav. Bank*, 527 U.S. at 675 (explaining that because of absence of any constitutional violation, no need to pursue key question of "whether the prophylactic measure taken under purported authority of Section 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment").

²⁶¹ AMERICAN HERITAGE DICTIONARY (3d ed. 1996) (defining "prophylactic" as to prevent or defend against something, especially disease; protective); LAYCOCK, *supra* note 21, at 272 (defining prophylactic injunctive relief as type of reparative relief designed to repair or undo past harm by ordering additional precautions or to order precautions to prevent future harm); SCHOENBROD, *supra* note 89, at 124 ("The court still *aims* for the plaintiff's rightful position, but the *terms* of the injunction go beyond that position as prophylaxis against falling short of that position."); WEBSTER'S REV. UNABRIDGED DICTIONARY (defining "prophylactic" as "preventive, to guard against"). *But see* Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926-28 & 926 n.6 (1999) (rejecting limited definition of "prophylactic" as preventive remedial measure, and instead, using term "prophylactic rules" to refer to "those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules").

²⁶² *Kimel*, 528 U.S. at 81 ("Congress's power 'to enforce' the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."); *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

²⁶³ *See* *United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000); *Kimel*, 528 U.S. at 80; *City of Boerne*, 521 U.S. at 518; *Fitzpatrick*, 427 U.S. at 455.

violations in the future. In sexual harassment cases, courts order the creation and dissemination of sexual harassment policies and sexual harassment training.²⁶⁴ In the abortion protest cases, the Supreme Court has authorized no-protest or "buffer" zones around clinics to prevent the blockading of access to the clinics.²⁶⁵ In the prison case of *Hutto v. Finney*, the Supreme Court upheld a remedy limiting punitive isolation, even while holding that punitive isolation itself does not violate the Constitution, because that isolation contributed to causing cruel and unusual punishment in violation of the Eighth Amendment.²⁶⁶ In *Morgan*, the Court upheld a statute prohibiting the use of literacy tests in voting, finding that the tests caused potential race discrimination in voting and in the provision of governmental services.²⁶⁷ Congress was permitted to curtail the use of literacy tests, even though the Court had held that literacy tests themselves did not violate the Constitution.²⁶⁸ In another series of cases, the Court upheld a statute requiring federal government preclearance of all voting changes in jurisdictions with past voting rights violations, as a legitimate remedy to address the potential causes of future discrimination contained in discriminatory changes in the law.²⁶⁹

Prophylactic relief may also properly encompass ancillary conduct resulting from the violation. Appropriate ancillary relief thus includes

²⁶⁴ See, e.g., *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (explaining that Title VII's primary objective is prophylactic one and that it aims to avoid harm of sexual harassment by facilitating creation of anti-harassment policies and education of personnel); *Women Prisoners v. Dist. of Columbia*, 968 F. Supp. 744 (D.D.C. 1997) (ordering prophylactic remedies for sexual assault and harassment of female inmates by guards to include adoption of departmental policy against such conduct, development of training materials for staff, and education of staff and inmates); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (ordering government agency to remedy sexual harassment by explaining policy against sexual harassment in posted notices, individual letters to employees, and training programs).

²⁶⁵ See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 361 (1997) (upholding provisions imposing "fixed buffer zone" limitations); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 757 (1994) (holding that 36-foot buffer zone on public street that excludes demonstrators passes muster under First Amendment).

²⁶⁶ 437 U.S. 678, 687 (1978).

²⁶⁷ 384 U.S. 641, 647 (1966).

²⁶⁸ *Id.* at 649-50.

²⁶⁹ See, e.g., *McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1980) (stating that prophylactic purposes of preclearance remedy are furthered by Court's holding that normal preclearance procedures must be followed); *City of Rome v. United States*, 446 U.S. 156, 161 (1980) (upholding seven year extension of preclearance requirement); see also *Everard's Breweries v. Day*, 265 U.S. 545 (1924) (upholding ban on physician's prescriptions of intoxicating liquors to prevent violation of Eighteenth Amendment's prohibition against manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

providing a remedy for the consequences of continuing effects of the violation. This principle was articulated early in the Section 5 cases, when in *The Civil Rights Cases*, the Court emphasized that Section 5 allows Congress to adopt legislation for "correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous."²⁷⁰ Similarly, judicial prophylactic relief may be appropriately aimed at the resulting consequences of a violation. In *Vasquez v. Hillery*, the court remedied racial discrimination by the grand jury in the defendant's case by addressing the resulting consequence of his criminal conviction and reversing that conviction.²⁷¹ In *Milliken v. Bradley II*, the Court similarly focused its remedies on the detrimental effects of the racial discrimination in education.²⁷² The Court approved remedies imposing the additional precautions of training for teachers in working in integrated environments, counseling for students harmed by the inferiority effects of segregation, and remedial education and testing for students. This lack of training and counseling itself did not rise to the level of a constitutional violation, but this ancillary conduct was necessary to include within a remedy in order to negate the consequences of prior segregation, and thus was appropriately prophylactic.²⁷³

Often, it is necessary to address ancillary conduct in a remedy in order to redress fully the violation. The Court's shorthand for this notion is that "difficult and intractable problems often require powerful remedies."²⁷⁴ But Professor Schoenbrod has explained the theory behind the legitimacy of including ancillary conduct within a prophylactic remedy.²⁷⁵ In any given case, the goal of any remedy is to return a plaintiff to her rightful position - the position she would have been in but for the constitutional wrong.²⁷⁶ The rightful position ensures that the

²⁷⁰ 109 U.S. 3, 11 (1883).

²⁷¹ 474 U.S. 254, 260-62 (1985).

²⁷² 433 U.S. 267, 287-88 (1977).

²⁷³ *Milliken v. Bradley*, 433 U.S. 267, 287-88 (1977) (*Milliken II*). The Court found the "need for educational components flowed directly from constitutional violations by both state and local officials." *Id.* at 282.

²⁷⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000); see also *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997) (acknowledging necessity of using strong remedial and preventative measures).

²⁷⁵ SCHOENBROD, *supra* note 89, at 36-41, 124-73; Hamilton & Schoenbrod, *supra* note 170, at 469; David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 678-79 (1988); see DOBBS, *supra* note 22, at 181-82 (identifying this remedial formulation as "Schoenbrod principle"); see also LAYCOCK, *supra* note 21, at 272-73.

²⁷⁶ Schoenbrod, *supra* note 275, at 664. Defining the rightful position, however, is often

plaintiff will not gain a windfall and be better off than she otherwise would have been, but also that she has suffered no detriment and has not been left worse off than in the absence of the wrong.²⁷⁷ Thus, the aim of the relief must be the plaintiff's rightful position. But often, the terms of a remedy need to sweep beyond the rightful position in order to avoid falling short of that position.²⁷⁸ For example, in the case of segregation in education, the Court held that school children were not returned to their rightful position by simply ordering the segregation to end or requiring integration.²⁷⁹ That constitutional violation had continuing effects on the students' educational and social attributes that needed to be remedied by training and counseling in order to restore them to the position they would have been in but for the constitutional violation.²⁸⁰

The question, however, arises as to whether there is any limit on the ability to sweep ancillary conduct within the scope of a prophylactic remedy. Justice Breyer in his dissent in *Morrison* suggests not.²⁸¹ He argued that the Violence Against Women Act is a proper remedy that is aimed at conduct that itself does not violate the Constitution.²⁸² He acknowledged that the statutory remedy of the VAWA addresses private conduct that is forbidden by state law, and creates a federal remedial substitute for state remedies.²⁸³ But he argued that this legislative remedy was proper relief because Congress is permitted to prohibit conduct which itself is not unconstitutional.

tricky. For example, in the desegregation context, the rightful position of the African-American students could be the position of being free from official segregative policies, e.g., *Milliken v. Bradley*, 418 U.S. 717, 744-47 (1974) (*Milliken I*) and *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), or the position of being in a school that is racially unified and integrated, e.g., *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), or in a position they would have been in if there had not been fifty years of segregation. *Milliken I*, 418 U.S. at 779 (White, J., dissenting).

²⁷⁷ LAYCOCK, *supra* note 21, at 272-73; SCHOENBROD, *supra* note 89.

²⁷⁸ LAYCOCK, *supra* note 21; SCHOENBROD, *supra* note 89, at 124-25. Professor Schoenbrod provides several examples of when an injunction geared precisely to plaintiff's rightful position may fail to achieve that position, such as when the defendant can disobey the order without being detected, or other remedies are unable to achieve plaintiff's rightful position. Schoenbrod, *supra* note 275, at 678-79.

²⁷⁹ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Milliken v. Bradley*, 433 U.S. 267, 287-88 (1977) (*Milliken II*).

²⁸⁰ *Milliken II*, 433 U.S. at 287-88.

²⁸¹ *United States v. Morrison*, 120 S. Ct. 1740, 1778-80 (2000) (Breyer, J., dissenting); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 975-76 (2001) (Breyer, J., dissenting) (making similar argument).

²⁸² *Morrison*, 120 S. Ct. at 1778-80.

²⁸³ *Id.* at 1779.

Breyer's argument, however, demonstrates the need for limits on the ancillary conduct that can be swept within the guise of prophylactic relief. Without a limit on the permissible scope of ancillary conduct that is properly prophylactic, virtually all conduct including the tort and criminal claims of domestic violence at issue in *Morrison*, would fall within the scope of Congress' Section 5 powers. This would allow Section 5 to become a catchall power that would enable Congress to create federal remedies for state law rights in direct contravention of the vertical federalism principles underlying Section 5 and the federal Constitution.²⁸⁴ And, it would allow Congress to enact federal remedies for legitimate conduct, thereby impermissibly expanding the definition of constitutional rights.²⁸⁵

Section 5 does, however, impose limits on the scope of Congress's enforcement power.²⁸⁶ The limits on Congress's power to reach conduct ancillary to the violation come from the contextual limits of Section 5. The remedy must be confined to the purpose of the Fourteenth Amendment. The ultimate limitation of the context of the source of power controls the exercise of remedial legislation and limits Section 5 remedies to those addressing conduct that is somehow related to a constitutional violation. In this way, ancillary conduct encompassed in legislative prophylactic relief must have an appropriate nexus or causal connection to the identified constitutional violation.²⁸⁷ Prophylactic relief can be aimed at legitimate conduct that does not violate the constitution only where that conduct is part of the chain of causation leading to or away from a constitutional violation.²⁸⁸ The entire pretext of a remedy is to correct an existing violation or prevent a future violation. Thus, Congress may address conduct that itself is legitimate, but only if that

²⁸⁴ Hamilton & Schoenbrod, *supra* note 170, at 487-90.

²⁸⁵ *Id.* at 489.

²⁸⁶ *Morrison*, 120 S. Ct. at 1755. The *Morrison* Court emphasized that there are "several limitations inherent in Section 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted . . . These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.* at 1754; *City of Boerne v. Flores*, 521 U.S. 507, 520-24 (1997).

²⁸⁷ *Cf.* *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 495 (1989) (stating that in adopting race-based distinctions as remedy, government must prove nexus between scope of its remedy and factual basis on which it rested); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (*Milliken II*) (holding that federal remedies must be related to condition alleged to offend Constitution).

²⁸⁸ *Lewis v. Casey*, 518 U.S. 343 (1996); *Milliken II*, 433 U.S. at 282, 287-88; *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

conduct is a contributing cause or resulting consequence of the constitutional violation.²⁸⁹

Limiting prophylactic remedies based on the causal links has been the approach taken by the Supreme Court in circumscribing the proper scope of judicial prophylactic remedies. The Court has focused on causation, and establishing through proof or presumptions, that the affected ancillary conduct caused or was caused by the proven constitutional violation.²⁹⁰ Where that causation link is missing, the Court has overturned remedies that encompass legitimate ancillary conduct.²⁹¹ In a sense, the Court is simply limiting injunctive relief to that conduct causing or being caused by the violation in the same way compensatory damages are commonly limited to those consequential damages proximately caused by the wrong.²⁹² While consequential damages focus only on the aftermath of the wrong rather than considering the contributing causes of the harm, the damages focus on the causal nexus between the conduct and the wrong is the same focus used in the judicial prophylactic cases; the conduct addressed by the prophylactic remedy must be causally linked to the established violation.

This same causal nexus between remedy and violation has also been required by the Supreme Court for Section 5 remedies. *Morgan* demonstrates this required nexus between the constitutional violation and the ancillary conduct reached by the prophylactic relief. In *Morgan*, the Court upheld Congress's enactment of legislation that prohibited literacy tests for voting despite the Court's holding in another case that

²⁸⁹ *Lewis*, 518 U.S. 343 (explaining why nine justices agreed to strike down precautionary relief aimed at prison conduct toward deaf and Spanish-speaking prisoners where only constitutional violation proven related to illiterate prisoners).

²⁹⁰ *Dayton II*, 443 U.S. 526 (holding that remedy for segregation in few education programs may be citywide if chain of presumptions shows those acts cause citywide segregation in education); *Milliken II*, 433 U.S. at 282, 287-88 (upholding remedies of training, education, and testing properly aimed at detrimental educational effects caused by segregation in education); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that remedy for school segregation properly includes zoning and quotas related to residential segregation because housing segregation caused educational segregation).

²⁹¹ *E.g.*, *Lewis*, 518 U.S. 343, 351 (holding that remedies addressing Spanish speaking inmates, hearing-impaired inmates, noise levels in library, and access to law materials not appropriate because not causally linked to the proven violation of two inmates' denial of access to court due to their illiteracy and failure of prison to provide paralegal-type assistance to them).

²⁹² LAYCOCK, *supra* note 21, at 56-75. Consequential damages must also be foreseeable, not avoidable, and not too remote from the wrong. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

such literacy tests themselves did not violate the Constitution.²⁹³ Congress had found, however, that the literacy tests imposed by the state were contributing causes that lead to potential discrimination in voting and in the provision of governmental services.²⁹⁴ Thus, Congress was empowered under Section 5 to take precautions to prohibit the legitimate conduct of literacy tests that had a causal nexus to the constitutional violations resulting from voting and service discrimination against Puerto Ricans.

This causal nexus between the ancillary conduct and the constitutional violation is missing in the VAWA. According to Justice Breyer, there was evidence of gender discrimination by the state courts against victims of domestic violence.²⁹⁵ His argument, and that of the federal government defending the law, was that since the states had discriminated against women by failing to provide adequate (or any) state remedies for women injured by domestic violence, Congress may create a federal remedy to substitute for these constitutionally inadequate state remedies.²⁹⁶ To fit this point within the parameters of the analysis set forth in this article, the argument would be that the consequence of gender discrimination in twenty-one states by the state actors is the inadequate remediation of domestic violence. A supplemental precaution to correct this resulting harm would be the federal legislative requirement of certain minimally adequate remedies for domestic violence.

However, there is still a causative disconnect between the alleged constitutional violation and the ancillary conduct by private actors. And this disconnect is absent in past cases where prophylactic relief such as that argued for in the case of VAWA has been approved.²⁹⁷ The private domestic violence between family members does not cause gender discrimination in the same way that the state's literacy test in *Morgan* caused the state's voting discrimination. Rather, the domestic violence is merely the setting for the state's discrimination. The ancillary conduct of private domestic violence is disconnected from the primary violation because it is committed by third-party actors who cannot be a part of the

²⁹³ 384 U.S. 641 (1966).

²⁹⁴ *Id.* at 654.

²⁹⁵ *United States v. Morrison*, 120 S. Ct. 1740, 1777 (2000) (Breyer, J., dissenting) (citing Souter, J., dissenting, n.7, collecting evidence of reports on gender bias from task forces in 21 states).

²⁹⁶ *Id.* at 1778-79.

²⁹⁷ *Id.* at 1758 (asserting that VAWA is not directed at any state or state actor, and therefore is "unlike any of the other § 5 remedies that we have previously upheld").

constitutional violation to be remedied.²⁹⁸ What Congress could do in this situation is to provide a federal remedy for discrimination by state officials who inadequately prosecute or remedy domestic violence.²⁹⁹ In other words, Congress could follow the model of the classic Section 5 remedy, Section 1983. Section 1983 provides a federal remedy against state officials that violate the constitution because the states failed to provide adequate remedies for those constitutional violations. Under this analogy, Congress could adopt a federal remedy against the state officials who provide inadequate remedies for the gender discrimination against women victims of domestic violence.³⁰⁰

This leads back to the argument as to how it is possible to save legislation that otherwise appears to act directly and primarily upon the subject of a right.³⁰¹ If legislation acts directly upon a subject that itself is not a constitutional violation, but which is ancillary conduct causally connected to a constitutional violation, then the legislation may be valid. This was the point made by the Supreme Court in *Kimel* when it said: "That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry."³⁰² The Court recognized that "[d]ifficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."³⁰³

This debate between legislation that is appropriately prophylactic and legislation that makes a direct and primary change to a substantive right is the precise debate raging in the recent line of cases addressing the legitimacy of the Family Medical Leave Act (FMLA). At issue has been one provision of the FMLA that grants all employees leave for their own serious health condition.³⁰⁴ Every federal court that has considered the

²⁹⁸ *Id.* (noting that VAWA "visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault"); see *Milliken v. Bradley*, 418 U.S. 717, 744-47 (1974) (*Milliken I*) (explaining that cannot bring third party suburbs into remedy even though white flight to suburban areas created opportunity or setting for racial discrimination within city limits).

²⁹⁹ See *Morrison*, 120 S. Ct. at 1758.

³⁰⁰ This assumes, of course, that if Congress identifies a perceived or threatened equal protection violation that would be considered a constitutional wrong as defined by the courts, it may then address causally connected conduct within a prophylactic remedy. See *supra* text accompanying notes 288-299.

³⁰¹ See *supra* text accompanying notes 209-12.

³⁰² *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000).

³⁰³ *Id.*; *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

³⁰⁴ U.S.C. § 2612(a)(1)(D) (1994) ("an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition

matter since 1998 (and the advent of *City of Boerne*) has agreed that Congress exceeded its Section 5 authority when it applied the FMLA to the states and required state employers to grant leave to all employees for their own serious health conditions.³⁰⁵ The common reasoning in these cases is that Congress made substantive changes in state employee rights by granting universal health leave despite the absence of discrimination with respect to such leave,³⁰⁶ and by altering the legal standards for finding an equal protection violation with respect to medical leave.³⁰⁷ Yet one lone dissenting judge recognized, as the Supreme Court held in *Kimel* and *Morgan*, that evidence of substantive change in rights is not the stopping point of the Section 5 analysis, for such substantive change may be valid if it is an appropriate prophylactic remedy.³⁰⁸

that makes the employee unable to perform the functions of the position of such employee.").

³⁰⁵ *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Garrett v. Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999); *Laro v. New Hampshire*, 2000 WL 700264 (D.N.H. 2000); *Philbrick v. Univ. of Conn.*, 90 F. Supp. 2d 195 (D. Conn. 2000); *Cohen v. Nebraska*, 83 F. Supp. 2d 1042 (D. Neb. 2000); *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S.D. Miss. 1999); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Sims v. Univ. of Cincinnati*, 46 F. Supp. 2d 736 (S.D. Ohio 1999); *Driesse v. Fla. Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); see *Thompson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998) (allowing FMLA leave for family member's serious health condition); see also *Schall v. Wichita State Univ.*, 7 P.3d 1144 (Kan. 2000). *Contra Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997) (rendering decision after *City of Boerne*, but making no reference to that case); *Biddlecome v. Univ. of Tex.*, 1997 WL 124220 (S.D. Tex. 1997).

³⁰⁶ *Hale*, 219 F.3d at 70; *Garrett*, 193 F.3d at 1220; *Philbrick*, 90 F. Supp. 2d at 201 ("the legislative record of the FMLA does not clearly identify widespread and pervasive evidence of gender-based leave discrimination in the workplace"); *Laro*, 2000 WL 700264, at *5 ("the legislation is not merely remedial; it goes well beyond addressing gender discrimination in the provision of employment benefits, creating and vesting state employees with substantive leave rights"); *Thompson*, 5 F. Supp. 2d at 579 ("The creation by statute of an affirmative entitlement to leave distinguishes the FMLA from other statutory provisions designed to combat discrimination . . . Congress . . . is attempting to dictate that the Equal Protection Clause of the Fourteenth Amendment requires that employees be furnished leave . . . [T]he FMLA does not merely make it illegal for employers to treat requests for leave differently on the basis of gender, but instead mandates that employers provide employees with a new and valuable benefit.").

³⁰⁷ *Philbrick*, 90 F. Supp. 2d at 200 (noting that FMLA eliminates state of mind element of intent to discriminate previously required under the Equal Protection Clause by mandating statutory entitlement to health leave without regard to employer's intent); accord *McGregor*, 18 F. Supp. 2d at 209.

³⁰⁸ *Garrett*, 193 F.3d at 1228, 1232 (Cook, Senior District Judge sitting by designation, dissenting) ("Contrary to the district court's holding, the FMLA is a valid exercise of Congress's Fourteenth Amendment powers because it is a justified enforcement measure to address sex and disability discrimination.").

The personal health condition provision of the FMLA arguably is a permissible prophylactic remedy for the gender and pregnancy discrimination that triggered the FMLA. Congress identified widespread sex discrimination against women in employment due to pregnancy and child and family care responsibilities.³⁰⁹ It responded by creating a remedy to prevent gender discrimination by granting leave to all employees, including those who are not pregnant.³¹⁰ Congress deliberately chose this gender-neutral remedy, rather than a pregnancy or child-related remedy, because of fear of backlash against women employees.³¹¹ For if women of childbearing age or of caretaking status get special leave that others do not, there exists an economic disincentive for employers to hire these women.³¹² In order to prevent further pregnancy discrimination, Congress purposefully chose a gender-neutral remedy to address contributing causes of potential future gender discrimination of the same type identified as the impetus for the FMLA.³¹³

³⁰⁹ *Id.* at 1229-30 nn.9-11 (citing legislative history).

³¹⁰ 29 U.S.C. § 2601(b)(4) (1994) (stating that goal is to provide entitlement to leave under FMLA "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis").

³¹¹ *Id.* § 2601(a)(6) ("employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender"); *Garrett*, 193 F.3d at 1230-31; S. REP. NO. 103-3, at 16 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 18 ("A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk."); S. REP. NO. 102-68, at 35 (1991) ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.").

³¹² H.R. REP. NO. 100-511, pt. 2, at 26-27 (1988) ("Since all employees who are temporarily unable to work due to serious health conditions are treated the same under the bill, it does not create the risk of discrimination against pregnant women which is posed by legislation which provides job protection only for pregnant women. Legislation for pregnant women only gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.").

³¹³ Moreover, Congress found that this broad prophylactic remedy was necessary due to the past failures of the state employers to follow general proscriptions in Title VII and the Pregnancy Discrimination Act against pregnancy and gender discrimination. *See Garrett*, 193 F.3d at 1230 (Cook, J., dissenting) (citing legislative record and findings that Title VII and PDA had proven inadequate to remedy gender discrimination). *But see Thompson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574, 579 (S.D. Ohio 1998) (finding that FMLA was unnecessary because Congress has already met legitimate goals of remedying

The FMLA example thus demonstrates that Section 5's grant of power to Congress to enact prophylactic remedies is really quite broad and empowers Congress to enact strong responses to persistent constitutional problems. As long as Congress confines its broad sweep to ancillary conduct that has a causal nexus to the identified constitutional violation, its prophylactic remedy will be valid. Thus, legislative remedies addressing contributing causes or resulting consequences of identified constitutional violations will constitute appropriate legislation as mandated by Section 5 so long as the ultimate aim of Congress is to cure a constitutional violation.

2. Proportional Measure of Relief

Thus far in evaluating the appropriateness of Section 5 relief, it has been shown that legislation may appropriately include a type of prophylactic relief that is quite broad in its ability to reach legitimate conduct necessary to remedy a perceived constitutional violation. In addition, appropriate enforcing legislation under Section 5 must provide the proper amount or measure of relief. According to the Supreme Court, the proper amount of relief is that relief which is "congruent and proportional" to the violation.³¹⁴ Others have described this proportionality requirement as directing that the legislative means must fit the remedial ends.³¹⁵ In applying the congruent and proportional test, the Court has provided examples of when a remedy might be appropriately proportional, and it has criticized Congress for enacting disproportionate, uniform laws that are not confined to the predicate harm necessitating the legislative remedies.

This requirement of a proportional measure of legislative relief applies a standard concept of the Law of Remedies.³¹⁶ For judicial remedies, the Supreme Court has often said that the scope of relief must match the scope of the violation.³¹⁷ This is sometimes referred to as the "right/remedy connection"; that is, the right and remedy should connect in an overlapping fashion. The theory behind the right/remedy connection is that any significant divergence between the contours of the

and preventing constitutional violations by passage of prior legislation).

³¹⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

³¹⁵ *Hamilton & Schoenbrod*, *supra* note 170, at 473.

³¹⁶ *Id.* at 479.

³¹⁷ *United States v. Virginia*, 518 U.S. 515 (1996); *Milliken v. Bradley*, 418 U.S. 717, 744-47 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

entitlement and the relief granted represents an improper exercise of judicial power.³¹⁸ Such a divergence, it is argued, would violate an inherent limitation upon judicial power by departing from the rule of law and engaging in legislation.³¹⁹ The right/remedy connection therefore is violated when the remedy fails to equalize the harm and instead, falls short of or extends beyond the contours of the violation creating general rules beyond the parameters of the individual case.³²⁰

The cases exploring the right/remedy connection therefore emphasize that the ultimate goal of remedies is equalization, nothing more or nothing less.³²¹ However, there is more variation in the applicability of the maxim that the remedy must be equal to the scope of the right than there is standardization. Take for example the desegregation cases. The mantra is always that the scope of the remedy should match the scope of the right.³²² Yet in some cases this rule results in relief broadly addressing the economic discrimination causing de facto educational segregation,³²³ while in other cases the remedy is confined more narrowly to the effects of the educational segregation.³²⁴

³¹⁸ HART & SACKS, *supra* note 24, at 668; Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 47-51 (1981).

³¹⁹ Chayes, *supra* note 318, at 46-47; Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925 (1999) (stating that judicially created prophylactic rules of general applicability are problematic because they most resemble legislation, they may intrude on state prerogatives, and lack clear textual warrant in Constitution); *cf.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762 (1994) ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public").

³²⁰ In the injunction context, this has meant that remedies to cure desegregation may not be imposed upon third party suburbs, which were not causally involved with the segregation in the city limits. *Milliken I*, 418 U.S. at 744-47. Or, it has meant that remedies for prison conditions denying inmates their right of access to the court cannot extend beyond the circumstances of the violation resulting from lack of assistance to illiterate inmates to include peripheral conditions related to noise levels in the library and Spanish-speaking inmates. *Lewis v. Casey*, 518 U.S. 343 (1996). In the damages context, the right/remedy connection means that the plaintiff should get exactly as much as she needs to restore her to her rightful position, for if she gets more she gains an unmerited windfall, or if she gets less than the defendant gets a windfall. LAYCOCK, *supra* note 21.

³²¹ *Madsen*, 512 U.S. at 765 (recognizing that general rule is that "injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs").

³²² *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Swann*, 402 U.S. 1.

³²³ *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Swann*, 402 U.S. 1.

³²⁴ *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*); *Milliken I*, 418 U.S. 717; *see* Chayes, *supra* note 318, at 47-51 (discussing wide variations in desegregation remedies based on rule that remedy must derive from right).

In particular with prophylactic remedies, the nature of those remedies is to sweep broadly to extend beyond the parameters of the actual violation in order to remedy causes or effects necessary to remedy past violations or prevent future violations. Thus, it is not true that a prophylactic type of remedy will always exceed the parameters of a properly congruent and proportional remedy.³²⁵ The requirement of a proportional measure of relief does not prohibit the entire category of prophylactic remedies, but rather, ensures that the scope or measure of prophylactic remedies will be properly matched to the scope of the causes and effects of the violation supporting such relief. Indeed, it is a general precept of remedies law that the power to enact prophylactic remedies is at its greatest, and remedies may be at their broadest measure, when there is a history of past misconduct by the defendants, where other remedial alternatives are ineffective, or where there is some pernicious evil to redress.³²⁶ Specifically, in the context of prophylactic remedies under Section 5, the Supreme Court has acknowledged that the remedy should be evaluated in light of the evil presented, and some broader remedy may be needed if there is a greater evil.³²⁷

To aid Congress in creating appropriately proportional remedies under Section 5, the Court has provided some guidelines as to how to properly tailor a legislative remedy. The Court emphasized that Congress does not have to adopt these limitations, but where a

³²⁵ The counter argument that prophylactic relief always is disproportionate has been argued in a variety of cases. *Lewis*, 518 U.S. at 357-59 (Scalia, J., opining in Part II) (stating that remedy should not extend beyond the actual violation); *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999); Cassell Brief, *supra* note 123.

³²⁶ See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (holding that abortion demonstrators' history of harassment and violation of prior orders justified broad prophylactic measure); *Vasquez v. Hillery*, 474 U.S. 254, 260-62 (1972) (upholding remedy of setting aside final judgment of conviction because race discrimination in grand jury justified because race discrimination is so pernicious, other remedies are impractical, and reversal is necessary to deter future discrimination). See generally *SCHOENBROD*, *supra* note 89, at 124-26.

³²⁷ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."); accord *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, (2000); see *Garrett v. Univ. of Ala.*, 193 F.3d 1214, 1231 (11th Cir. 1999) (holding that breadth of Congress's gender-neutral remedy in FMLA granting leave to all employees for serious health conditions was justified by findings that employers failed to comply with existing laws prohibiting gender and pregnancy discrimination); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 2001 WL 1735561 (2001) (observing appropriateness of Voting Rights Act supported by Congress's determination that litigation had proved ineffective); *City of Boerne*, 521 U.S. at 533 (explaining that prophylactic remedies in voting rights cases necessary, given ineffectiveness of existing voting rights laws).

congressional enactment pervasively prohibits constitutional state action, "limits of this kind tend to ensure Congress's means are proportionate to ends legitimate."³²⁸ So, Congress can adopt termination dates, as it did in the law upheld in *South Carolina v. Katzenbach*, in which Congress terminated coverage of the voting remedy where the danger of voting discrimination had not materialized within the preceding five years.³²⁹ Or it could impose geographic restrictions, again as Congress did in *South Carolina v. Katzenbach*, confining the remedy to regions of the country where there was demonstrated discrimination in voting.³³⁰ Or, Congress could develop the egregious predicates of a long history of notorious discrimination necessary to sustain a broad, widespread remedy.³³¹

In addition to providing guidelines delineating appropriately proportional relief, the Court has also circumscribed specific examples of legislation that are not congruent and proportional. In particular, the Court has focused on Congress's attempt to pass uniform acts under Section 5 that resemble regular legislation under other enumerated powers, but which are not tailored responses to a problem.³³² The Court

³²⁸ *City of Boerne*, 521 U.S. at 533.

³²⁹ 383 U.S. 301, 331 (1966) (recognizing that Voting Rights Act of 1965 suspending literacy tests and other similar voting qualifications terminates if danger of substantial voting discrimination has not materialized within preceding five years); *Garrett*, 193 F.3d at 1222-23 (Cook, J., dissenting) (holding that provision of FMLA was appropriately tailored because, among other things, it created Commission that would review viability of provision every two years).

³³⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 312, 315, 328 (1966) (finding that Voting Rights Act of 1965 confined remedy of prohibiting literacy tests and similar voting qualifications to those geographic areas, like Alabama, Louisiana, and Mississippi, with demonstrated racial discrimination in voting); cf. *Garrett*, 193 F.3d at 1233 (noting FMLA's other limited measures that assure congruence with problem Act sought to remedy and deter, including applying law only to large employers, to employees working full-time for more than one year, guaranteeing only unpaid leave, requiring advance notice, requiring certification of condition, and excluding high-ranking employees, all of which accommodate legitimate interests of employers).

³³¹ *Katzenbach*, 383 U.S. at 308, 316 (finding that Voting Rights Act of 1965 "creates stringent new remedies for voting discrimination where it persists on a pervasive scale," including broadly prohibiting use of voting rules to abridge exercise of voting right on basis of race, strengthening existing procedures for attacking voting discrimination by litigation, and excusing citizens educated in American schools conducted in foreign language from passing English-language literacy tests); *Garrett*, 193 F.3d at 1232-33 (observing that FMLA provision assures its congruence with problem Congress sought to remedy and deter, "given Congress's legislative findings as to the pervasive problem of sex discrimination in the offering of employee leave time, and lack of success with prior efforts to effectuate anti-discriminatory legislation on that issue").

³³² E.g., *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) (noting that VAWA is different from previously upheld Section 5 remedies in that VAWA applies uniformly

has cautioned that legislative remedies under Section 5 must be tailored responses. Only, if a constitutional problem is widespread and pervasive, can the legislative remedial response be widespread and pervasive.³³³

So, for example, in *Florida Prepaid*, the Supreme Court found that the Patent Remedy Act was not narrowly tailored to the perceived constitutional problem.³³⁴ The legislative history revealed only eight examples of patent suits against the states in 110 years, and thus, according to the Court, any legislative remedy against the states would need to be tailored to the scope of this narrow, and virtually non-existent, problem.³³⁵ Moreover, even if the Court accepted the possibility that a Due Process violation might exist if states failed to provide adequate remedies for patent infringement, the legislative remedy should be confined to those problematic situations.³³⁶ The Patent Remedy Act did nothing to limit its coverage to respond to cases of inadequate or questionable state remedies for patent infringement.

Similarly, in *Morrison*, the Court found that the legislature failed to confine the remedy to the perceived problem. The problem with the civil remedies of the Violence Against Women Act was that it was "indiscriminate in scope"; for even assuming the identification of some constitutional violation, Congress did not confine its law to the perceived problem.³³⁷ The Court held that the federal remedies for gender violence, at most, could be applied in the instance where states demonstrated gender bias and failed to provide adequate remedies for that discrimination and the causally related ancillary conduct.³³⁸ There was

throughout United States); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 646 (1999).

³³³ So for example, the national remedy of Section 1983 was justified because the legislature found a pervasive problem throughout the Southern states of states ignoring the dictates of the Fourteenth Amendment, and the responsive legislation that created federal remedies to enforce the provisions of the Amendment.

³³⁴ 527 U.S. at 646.

³³⁵ *Id.* In *Board of Trustees of the Univ. of Alabama v. Garrett*, the Supreme Court treated the scant evidence of only six examples of discrimination by state employers as a problem with identifying the predicate violation, see discussion *infra* notes 215-23, rather than treating it as a proportionality or tailoring problem as it did in *Florida Prepaid*. *Garrett*, 2001 WL 1735561 (2001), *8, *11.

³³⁶ *Fla. Prepaid*, 527 U.S. at 646-47 ("Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed.")

³³⁷ *Morrison*, 120 S. Ct. at 1759.

³³⁸ *Id.* at 1758-59.

evidence in the legislative record on the VAWA that twenty-one states demonstrated evidence of gender bias denying victims of domestic violence adequate relief. The Court seems to be saying that first, this bias and evidence would have to constitute a violation of equal protection as defined by the Court. Then, Congress should have tailored its VAWA remedies to those twenty-one states, or in those states with demonstrated discrimination, in order to conform to the requirement of the right/remedy connection.³³⁹

However, the question is whether this proportionality limitation upon legislative remedies makes sense given that it is theoretically derived from the limitation upon courts not to act like legislatures.³⁴⁰ Indeed, the potential benefit of legislative as opposed to judicial remedies would be the ability to address constitutional problems in a uniform and widespread manner rather than to have individualized remedies that bind only a few individuals in cases that come before the courts.³⁴¹ So in the desegregation cases, had Congress ordered busing or quotas, segregation may have ended more quickly than it did by the judicial remedial process through which one case result merely exemplified consequences to other potential defendants from continuing to engage in such behavior. In other words, it would seem to be the strength of a Section 5 legislative remedy that it could reach beyond the specific constitutional violation shown, to provide uniform remedies for all similarly situated cases. Indeed, that is what happened in the case of the Section 1983 remedy. Only the Southern states failed to enforce the new equality amendments, yet the 1983 remedy was applicable to all states, even those which honored and enforced the amendments. Accordingly,

³³⁹ See Caroline E. Kuerschner, Comment, *Our Vulnerable Constitutional Rights: The Supreme Court's Restriction of Congress's Enforcement Powers in City of Boerne v. Flores*, 78 OR. L. REV. 551, 577 (1999) (arguing that VAWA fails proportionality prong by stretching law to cover women who are not victims of state discrimination).

³⁴⁰ Cf. Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 156 (1997) (Congress "is not bound under Section 5 by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation of the Constitution").

³⁴¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (noting that in enacting remedies of Voting Rights Act, Congress found that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome obstructionist tactics invariably encountered in these lawsuits"); Hamilton & Schoenbrod, *supra* note 170, at 486-87 (stating that Congress may be better able to formulate remedies because it is better able to gather facts showing need for prophylactic remedies, it is not limited by evidentiary rules and findings on record, it has more latitude in crafting remedies narrowly tailored to threat presented, and its remedies are more powerful because they can bind whole country).

if the legislative record of the VAWA demonstrated an equal protection violation in almost half of the states, it seems that evidence of a widespread and pervasive problem, if compared to Section 1983, should justify a nationwide remedy.³⁴²

Indeed, not everyone agrees that even in the judicial context the right and remedy must always be proportional. Abram Chayes argues that the traditional view that the right and remedy are linked does not logically apply to the contemporary model of public law litigation involving structural injunctions.³⁴³ Instead he argues that in public law litigation, "right and remedy are pretty thoroughly disconnected" as remedies are constructed by the discretionary elements of balancing the equities and shaping the exact contours of the relief.³⁴⁴ This view is even more applicable to Congress who within the confines of its Section 5 power could balance the equities and shape the contours of remedies needed to correct public law violations.

The Court, however, has not adopted this approach. Instead, it has interpreted Section 5 as confining Congress to remedying identified constitutional violations in the same way as a court imposes remedies by tailoring the remedial response to the scope of the violation. Perhaps it comports with the Court's general theory that Section 5 merely authorizes remedial responses to identified problems rather than generalized legislation which runs afoul of creating new substantive rights.

IV. CONCURRENT REMEDIAL POWERS

There is one final piece of the enforcement power puzzle: how to reconcile two remedies for the same constitutional violation where there is both an available judicial remedy and a valid Section 5 legislative remedy. As previously discussed, Section 5 provides Congress with the power to enact prophylactic remedies that are congruent and proportional to the constitutional right at issue. However, the judiciary also has the power to award remedies for constitutional violations.³⁴⁵

³⁴² See, e.g., *Katzenbach*, 383 U.S. at 309 (finding that "insidious and pervasive evil" in certain parts of country justified new remedies applicable in any area of country to prevent voting discrimination).

³⁴³ Chayes, *supra* note 318, at 5; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

³⁴⁴ Chayes, *supra* note 343, at 1293.

³⁴⁵ In her work, Professor Bandes deals extensively and decisively with arguments that the courts have no power to create remedies for constitutional violations. Bandes, *supra* note 159. For historical arguments that the courts have no power to create constitutional

This judicial remedial power stems from Article III of the Constitution, which vests the judiciary with authority over cases arising out of the Constitution in the federal courts.³⁴⁶ The judicial power includes not only the power to interpret the Constitution and rule on interesting questions of constitutional law, but also to resolve the constitutional cases by making the descriptive decision operative through the imposition of a remedy.³⁴⁷

First, it may be easy to reconcile the two remedies if they can be harmonized or if they do not conflict. For example, the Supreme Court has required that Congress be explicit in its intent to provide a substitute remedy before a court will be limited in its imposition of judicial remedies.³⁴⁸ Thus, in the absence of a remedial conflict expressly intended by Congress, the courts will resort to their own remedies.³⁴⁹ Alternatively, the courts have attempted to harmonize the legislative remedy and judicial remedy by finding they can exist side by side. In the

remedies, see *Carlson v. Green*, 446 U.S. 14 (1980) (Rehnquist, J., dissenting) (arguing that neither Constitution nor equitable powers of Court authorize Court to infer civil damages remedy from Eighth Amendment), and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Burger, C.J., dissenting) (stating that ultimate authority over constitutional remedies lies with Congress).

³⁴⁶ *Bivens*, 403 U.S. at 398-411 (Harlan, J., concurring); Dellinger, *supra* note 13, at 1541 (locating source of Court's power to create remedies in Article III and its extension of judicial power to all cases arising under Constitution); Fallon & Meltzer, *supra* note 89 (finding that Court's power to award effective remedies stems directly from Constitution and explaining that "the Constitution clearly has remedial implications" based on cases upholding injunctions and damages directly upon constitutional provisions, and based on Supreme Court decisions compelling state courts to provide constitutional remedies).

³⁴⁷ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1994); James Liebman & William Ryan, *Some Effectual Power: The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998) (stating that judicial power to "decide" includes power to impose remedy that effectuates federal law).

³⁴⁸ See *Miller v. French*, 530 U.S. 327, 333-34 (2000); *Carlson*, 446 U.S. at 17 (observing that question is whether Congress has provided alternative remedy that it explicitly declared to be substitute for recovery); *Bivens*, 403 U.S. at 397. Even in the case of statutory rights, the Supreme Court will defer to Congress's choice of remedy only when that legislative choice is clear. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 70-71 (1992) (stating that general rule is that absent clear direction to contrary by Congress, federal courts have power to award any appropriate relief); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (recognizing comprehensiveness of courts' equitable jurisdiction not to be denied or limited in absence of clear legislative command (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946))).

³⁴⁹ See *Bivens*, 403 U.S. at 397 (holding that petitioners are entitled to relief normally available in federal courts absent explicit congressional declaration regarding remedy); Betsy Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087 (1992) (arguing that since *Bivens*, Supreme Court has "automatically preempted" judicial implied constitutional remedy where Congress has been explicit in its choice of remedy).

recent cases on the automatic stay provision of the Prison Litigation Reform Act,³⁵⁰ several courts initially held that Congress was not clear that it intended the PLRA to displace the judicial remedy of injunctive relief to enjoin the operation of the stay.³⁵¹ Thus, they held that the judicial remedy could coexist with the PLRA remedy, and the court could stay the legislative remedy when appropriate. Indeed, it is certainly possible that a legislative remedy could supplement rather than displace judicial remedies. A classic example is Section 1988 in which the legislature has provided an additional remedy of attorney's fees for the prevailing plaintiff in a civil rights case.³⁵² This legislative remedy of attorney's fees does not conflict with any judicial remedy, but rather supplements the general menu of available judicial remedies in civil rights actions. Yet in other circumstances, the legislative remedy will often conflict with the judicial remedy otherwise employed by the courts. In that case of conflicting remedies, what remedy should the court award?

When conflicts have occurred with respect to statutory rights, the courts have uniformly deferred to the legislative remedy.³⁵³ Such deference makes sense, as explained in Part II of this article, because Congress has created the right and therefore can define all contours of that right, including the remedy. Indeed, the judiciary often says that it prefers that the legislature define the scope of the statutory right by identifying the appropriate remedies.³⁵⁴ Thus, true to the unified right theory, the courts acknowledge that delineating the remedy defines the substantive right. In fact, the Supreme Court has rigidly conformed to this deference theory for legislative remedies for statutory rights even in the extreme case as in *Seminole Tribe of Florida v. Florida*, where the

³⁵⁰ 18 U.S.C. § 3626(e)(2)-(3) (Supp. V 1999) (stating that motion to terminate prospective relief "shall operate as a stay" of that relief during period beginning 30 days after filing of motion, extendable up to 90 days for good cause and ending when court rules on motion).

³⁵¹ *Ruiz v. Johnson*, 178 F.3d 385, 392-95 (5th Cir. 1999); *Hadix v. Johnson*, 144 F.3d 925, 933-35 (6th Cir. 1998). The Government made the same argument in *Miller v. French*, and Justice Breyer indicated in his dissent in *Miller* that he would have accepted that construction. 530 U.S. at 347.

³⁵² 42 U.S.C. § 1988 (1994 & Supp. V 1999).

³⁵³ *E.g.*, *Kosak v. United States*, 465 U.S. 848, 862 (1984) (holding that Petitioner should address Congress, rather than Court, to extend remedy under Federal Tort Claims Act); *United States v. Muniz*, 374 U.S. 150, 165-66 (1963) (holding that the Court will not narrow remedies provided in FTCA because only Congress can alter Act); *Couch v. Steel*, 118 Eng. Rep. 1193 (K.B. 1854) (holding that when statute provides one mode of compensation for private wrong, court will not authorize another).

³⁵⁴ LAYCOCK, *supra* note 21, at 647.

legislative remedy was found unconstitutional.³⁵⁵ Despite striking down the congressional remedy, the *Seminole Tribe* Court refused to award the judicial remedy of an *Ex Parte Young* injunction to compel the governor to comply with the Indian Gaming Act.³⁵⁶ The Court held that Congress had designed a complex remedial scheme to enforce the Act (albeit an unconstitutional one) and it would be improper for the Court to supplant Congress's judgment by adding an additional remedy.³⁵⁷

As for constitutional remedies, the traditional, and largely unquestioned, assumption has been that Congress can freely provide substitute constitutional remedies, and courts must defer to those substitutes.³⁵⁸ Indeed, the Supreme Court itself has often asserted a broad command that the "courts must heed Congress's command" with respect to remedies.³⁵⁹ Professor Henry Hart in his 1953 dialectic stated that "Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint about the substitution of one remedy for another that is preferred by the claimant can rarely be of constitutional dimension."³⁶⁰ Yet this assumption of Congress's plenary power over constitutional remedies is supported only by reference to cases involving statutory rights.³⁶¹ As we have seen, Congress's power is dramatically

³⁵⁵ 517 U.S. 44, 75-76 (1996).

³⁵⁶ *Id.* at 74; see David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 548 (1997) (observing "nothing startling" about Court's conclusion in *Seminole Tribe* that statute providing remedy for violation of federal law impliedly precludes other forms of relief).

³⁵⁷ *Seminole Tribe*, 517 U.S. at 74.

³⁵⁸ See Hart, *supra* note 13, at 1366; Sager, *supra* note 9, at 85 ("Congress, of course, enjoys considerable freedom to choose remedies for violations of federal law, including constitutional violations.").

³⁵⁹ *Miller v. French*, 530 U.S. 327, 345 (2000) (addressing PLRA's restriction of remedies for constitutional violations and stating that Congress has authority to change remedial rules and to require courts to apply new rules to their orders); *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsburg, J., dissenting) (explaining that Congress can instruct federal courts to issue certain remedies or instruct them not to, and "courts must heed Congress's command"); *Guar. Trust Co. v. York*, 326 U.S. 99, 105 (1945) ("Congressional curtailment of equity powers must be respected.").

³⁶⁰ Hart, *supra* note 13, at 1366. Hart's work, however, lends little guidance on when the substitution of remedies might raise a constitutional question, as his remedial conclusion was a mere side note to his article focused primarily upon congressional limitation of federal court jurisdiction. See Fallon & Meltzer, *supra* note 89, at 1787 n.300.

³⁶¹ *Miller*, 530 U.S. at 351 (Souter, J. dissenting) (citing statutory example in *Plaut* of Congress's remedial power in securities law); *Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., dissenting) (citing *Guar. Trust Co.*, 326 U.S. at 105, which provides statutory example of Norris-LaGuardia Act, and citing *Yakus v. United States*, 321 U.S. 414, 442 n.8 (1944), which catalogues statutes regulating federal equity powers with respect to federal statutory rights); Friedman, *supra* note 8, at 751 (citing statutory examples of Federal Tort Claims

different with respect to statutory versus constitutional rights. It is necessary, therefore to construct an alternative theory to reconcile legislation and judicial remedies for constitutional rights.

One traditionally suggested exception to the presumption of the legitimacy of constitutional remedies was for judicial remedies that were constitutionally required.³⁶² Under this theory, if the judicial remedy were constitutionally required, it would trump Congress' selection of an alternative remedy.³⁶³ This traditional approach was utilized by the Fourth Circuit Court of Appeals in *Dickerson v. United States*, when it held that Congress had the authority to overturn the remedy of Miranda warnings on the grounds that the judicial remedy was not constitutionally required.³⁶⁴ The problem with this approach to reconciling legislative and judicial remedies is that no remedy, except the just compensation required by the Takings Clause, is expressly required by the Constitution.³⁶⁵ The only implicit remedial requirement derived from the Constitution as explicated in *Marbury v. Madison* is that there is a right to some remedy in order to bring life to the otherwise inert

Act); Hart, *supra* note 13 (citing statutory remedial examples of Norris-LaGuardia Act, Oil and Price Control Act).

³⁶² Dellinger, *supra* note 13, at 1534; see Fallon & Meltzer, *supra* note 89 (arguing that remedy is required to make government conform its conduct to requirements of Constitution); Harrison, *supra* note 15, at 2518-23 (asserting that only constitutionally required remedy is "sanction of nullity" of prohibited state action); Daniel J. Meltzer, *Congress, Courts and Constitutional Remedies*, 86 GEO. L.J. 2537, 2565 (1998) (applying constitutional mandate to context of immigration law); cf. *Alden v. Maine*, 527 U.S. 706, 747 (1999) (holding that injunction, but not damages, is necessary to guaranteeing constitutional rights and ensuring that Constitution remains "supreme law of the land"); Cassell Brief, *supra* note 123 ("Congress may substitute a different remedial regime so long as that regime honors what the Constitution requires.").

³⁶³ *United States v. Dickerson*, 166 F.3d 667, 687-88 (4th Cir. 1999).

³⁶⁴ *Id.*; see also Brief of Amici Curiae U.S. Senators at Part IA, *Dickerson v. United States*, 530 U.S. 428 (2000) [hereinafter Senators Brief] ("The Miranda Rules are Not Mandated by the Constitution"); Cassell Brief, *supra* note 123, at 1-2 ("Because Miranda's exclusionary rule was in this sense judicially improvised, rather than constitutionally required, Miranda necessarily accommodates legislative modification.").

³⁶⁵ Fallon & Meltzer, *supra* note 89; see *Smith v. Robbins*, 120 S. Ct. 746 (2000) (holding that no particular procedure or remedy for ineffective assistance of appellate counsel is mandated by the Constitution); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (stating that Fourth Amendment does not in so many words provide for its enforcement by award of monetary damages for consequences of its violation); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (specifically recognizing that the Constitution requires no "particular solution" for the regulation of police interrogations). Some have also characterized the Suspension Clause of Article I as another constitutionally required remedy against unlawful detention. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998).

constitutional guarantees.³⁶⁶ In other words, there is no specific remedy that will ever be mandated by the Constitution. The constitutional mandate is simply that some remedy, not any particular remedy, must be applied by the courts in the exercise of their judicial power to effectuate constitutional rights. Thus, focusing on the question of what is constitutionally required simply does not advance a resolution of this remedial conflict.

Alternatively, one possible resolution of the conflict would be that the Congressional remedy always trumps under the theory of enumerated powers. The argument would be that the Constitution grants an express power over remedies to Congress pursuant to Section 5, and in so doing, removes that remedial power from the authority of the court.³⁶⁷ This theory of an intended horizontal balance of remedial powers, however, does not comport with the primary force behind the enactment of Section 5 which is to correct inadequacies of state, not federal, court enforcement of the amendment.³⁶⁸ Moreover, Congress's exercise of power is always limited by the other constitutional dictates, including separation of power principles placing the power to interpret the constitutional guarantees in the judiciary.³⁶⁹ Thus, this rule of automatic primacy for legislative remedies cannot be the answer to reconciliation.

The conflict of remedies could also be resolved by the opposite rule that the judicial remedy for constitutional violations always trumps. The argument would be that courts have the ultimate duty to define and interpret the Constitution.³⁷⁰ Since the remedy is part of the

³⁶⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803).

³⁶⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (holding that Enforcement Clause of Fifteenth Amendment made Congress "chiefly responsible for implementing the rights created"); cf. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (deferring to legislative remedy for military race discrimination claims because Constitution gives Congress express, plenary authority over control of military). But see *United States v. Stanley*, 483 U.S. 669, 682 (1987) (agreeing with *Chappell*, but clarifying that not all matters within congressional power are exempt from implied judicial Bivens remedy).

³⁶⁸ Rotunda, *supra* note 9.

³⁶⁹ Sager, *supra* note 46; see William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (arguing that judicial deference to congressional interpretation of Constitution would stand *Marbury* "on its head"); William Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 312-14 (1996) (arguing that deference to Congress's interpretation of constitutional clause as necessary predicate for its enactment of legislation would put end to Supreme Court judicial review of the Constitution).

³⁷⁰ See SCHOENBROD, *supra* note 89, at 20-21 n.7. Professor Schoenbrod briefly explores the question of the exact relationship between Congress and the Court with respect to remedies. He suggests five possible scenarios reconciling the remedial conflict, including one option that the Constitution implicitly requires the courts to recognize appropriate

interpretation of the unified right, the courts have the sole responsibility for defining the unified right by determining the remedy as well as the definitional guarantee.³⁷¹ This approach, however, would seem to render meaningless the express dictates of Section 5 which empower Congress to have some role in the enforcement of constitutional rights.

Both of these extremes requiring that the remedy of one branch or the other must always trump the other have generally been rejected by the Supreme Court.³⁷² In the *Bivens* cases, the Supreme Court has clearly contemplated that both Congress and the Judiciary will have roles in designing remedies for constitutional violations.³⁷³ In the absence of a bright line rule, the question becomes what standards will govern the balance of concurrent remedial powers.

Three recent cases of the Supreme Court, *Dickerson v. United States*, *Miller v. French*, and *Smith v. Robbins*, provide examples of potential ways to resolve this remedial conflict. In these cases, the Supreme Court has reconciled legislative and judicial remedies, but with radically different results. In *Dickerson*, the Court held that its judicial remedy for constitutional violations would trump legislative acts.³⁷⁴ Yet in *Miller*³⁷⁵ and *Smith*,³⁷⁶ the Court held that the federal judiciary must defer to the substitute remedy. The Supreme Court's schizophrenic reconciliation of remedial rights stems from the Court's failure to flesh out the remedies

remedies, and that the Supreme Court has the last word on remedies even if Congress has spoken. See *Bivens*, 403 U.S. 388 (Brennan, J.); Brown, *supra* note 151; Joan Steinman, *Backing Off Bivens and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 279-84 (1984).

³⁷¹ Cf. *Begay v. Hodel*, 730 F. Supp. 1001, 1007 (D. Ariz. 1990) (holding that deference to legislature for constitutional remedies "appears to be inconsistent with the underlying principles of judicial review, for it is clear that when constitutional liberties are at stake, the Constitution and our historical governmental traditions indicate that the judicial branch must have the final say"); Bades, *supra* note 159; Dellinger, *supra* note 13 (arguing that constitutional amendments themselves carry "a self-executing force that not only permits but requires the courts to recognize remedies appropriate for their violation").

³⁷² *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (Brennan, J., dissenting) ("I agree that in appropriate circumstances we should defer to a congressional decision to substitute alternative relief for a judicially created remedy."); *Bush v. Lucas*, 462 U.S. 367, 373 (1983); *Bivens*, 403 U.S. 388; cf. *Katzenbach*, 383 U.S. at 326 (holding that Congress, in addition to courts, has full remedial powers to effectuate constitutional prohibition against racial discrimination in voting).

³⁷³ See Brown, *supra* note 151, at 10; Dellinger, *supra* note 13, at 1532, 1548 n.89 (interpreting Court's statement in *Bivens* as providing conditions under which courts should defer to congressional judgment); Gene Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1143 (1989).

³⁷⁴ 530 U.S. 428, 120 S. Ct. 2326 (2000).

³⁷⁵ 530 U.S. 327, 120 S. Ct. 2246 (2000).

³⁷⁶ 528 U.S. 259, 120 S. Ct. 746 (2000).

issues as suggested in this article. Admittedly, each case arises in a distinct context,³⁷⁷ and none directly addresses the question of Congress's legitimate power to enact a substitute constitutional remedy, or limitations upon that power. However, the Supreme Court's analyses provide glimmers of support for what is the proper approach for addressing this remedial clash. Once a constitutional remedial conflict is presented, a court may defer to legislative remedies only where those remedies are adequate to effectuate constitutional rights. *Dickerson*, *Miller*, and *Smith* help demonstrate this approach to reconciliation.

A. The Primacy of Judicial Remedies

In *Dickerson*, the Court emphasized the primacy of judicial remedies for curing constitutional violations. *Dickerson* addressed the question of whether Congress can override the Supreme Court's prophylactic remedy of pre-interrogation Miranda warnings by enacting a statute (18 U.S.C. § 3501) which provides the sole exclusionary remedy for involuntary confessions.³⁷⁸ The clear intent of Congress in enacting Section 3501 was to overrule the judicial remedy that the legislature viewed as too expansive.³⁷⁹ A seven-justice majority of the Court easily concluded that Congress could not legislatively supersede the Court's constitutional rule announced in *Miranda*.³⁸⁰

The Court assumed without discussion that Section 3501 was a valid legislative enactment.³⁸¹ It properly rejected the approach of the Fourth

³⁷⁷ In *Dickerson v. United States*, the Court approaches the question as one of whether Congress can dictate a constitutional rule of decision. 120 S. Ct. 2326, 2333 (2000). In *Miller v. French*, the Court confines its analysis to whether the legislative remedy is an unconstitutional rule of decision for the Court. 530 U.S. 327 (2000). And in *Smith*, the Court addressed the question of whether a state judicial remedy was an adequate substitute for a federal judicial remedy. 528 U.S. 259 (2000).

³⁷⁸ Section 3501 was enacted just two years after *Miranda* and sets forth a list of factors to take into consideration to determine whether the totality of the circumstances, including compliance with Miranda warnings, demonstrates an involuntary confession. The Department of Justice refused to enforce the statute since its enactment in 1968, and argued against its constitutionality in the *Dickerson* case. *United States v. Dickerson*, 166 F.3d 677, 681-83 & 681 n.14 (4th Cir. 1999). In the Supreme Court, Professor Cassell from the University of Utah was appointed as amicus curie to defend the statute. *Dickerson*, 120 S. Ct. at 2335 n.7.

³⁷⁹ *Dickerson*, 120 S. Ct. at 2332; *Dickerson*, 166 F.3d at 686 (holding that statutory language of 3501 is perfectly clear); S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112 ("the intent of the bill is to reverse the holding of *Miranda v. Arizona*").

³⁸⁰ *Dickerson*, 120 S. Ct. at 2329-30.

³⁸¹ The Fourth Circuit Court of Appeals and Professor Cassell assumed that 3501 was a valid law pursuant to Congress's Article I and III powers over evidence and procedure. *But see* Tracy A. Thomas, *Congress's Jurisdictional Power over Remedies* (manuscript on file

Circuit and defenders of the law to evaluate the Miranda remedy on the basis of whether or not it was constitutionally required.³⁸² Instead, the Court portrayed the issue as one of a conflict between the judicial remedy of Miranda and the legislative remedy of Section 3501.³⁸³ The Court believed that the law was clear, and identified the reconciliation question as a rights-essentialist inquiry of whether the judicial remedy is procedural or substantive and whether the remedy is constitutional or non-constitutional.³⁸⁴ According to the Court, Congress retains the ultimate authority to modify judicially created procedural rules not required by the Constitution.³⁸⁵ Yet, the Court stated that Congress may not legislatively supersede judicial decisions interpreting the Constitution.³⁸⁶ Thus, as this article has proposed, the key points for reconciling remedies are to understand that the remedy for constitutional rights is in fact substantive, and then to decide whether that remedy seeks to enforce a statutory or constitutional right.

The *Dickerson* Court easily concluded that the Miranda warnings were part and parcel of the substantive constitutional rule.³⁸⁷ Thus, as this article concluded in Part I, remedies are in fact part of the unified

with author). Other amicus in *Dickerson* suggested that 3501 was motivated by Section 5, although they argued that 3501 exceeded the scope of Section 5 because it redefined rather than enforced the constitutional right. Brief of Amici Curiae Rutherford Institute at 14-21, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525). Moreover, Section 3501, in designating the admissibility of confessions in federal criminal cases, applies to the conduct of federal, not state conduct. As discussed in note 165, such federal conduct would not fall within the purview of the Fourteenth Amendment, and thus would be an impermissible act under Section 5.

³⁸² See *Dickerson*, 166 F.3d at 687; see also Cassell Brief, *supra* note 123, at 1-2 (asserting that *Miranda* requires legislative modification); Senators Brief, *supra* note 364, Part I.A (arguing *Miranda* rules are not mandated by Constitution).

³⁸³ *Dickerson*, 120 S. Ct. at 2331.

³⁸⁴ *Id.* at 2332-33.

³⁸⁵ *Id.* The Court cites the following cases in support of this assertion: *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (explaining that court cannot extend time for filing motion for post verdict motion for acquittal in conflict with Federal Rules of Criminal Procedure 29(a)); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (stating that Congress may dictate presumption and rule of evidence in expatriation case); *Palermo v. United States*, 360 U.S. 343, 354-55 (1959) (holding that court must follow new statutory procedure directing when witness statements to government will be produced in criminal prosecution); *Funk v. United States*, 290 U.S. 371, 381-82 (1933) (determining that in absence of legislative rule, court may set procedure for when wife may testify for defendant husband). For a discussion of the argument that Congress's power over procedures is not unlimited, see Tracy A. Thomas, *Congress's Jurisdictional Power Over Remedies* (manuscript on file with author).

³⁸⁶ *Dickerson*, 120 S. Ct. at 2332 (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997)).

³⁸⁷ *Id.* at 2333-35.

substantive right. Chief Justice Rehnquist in his majority opinion goes to great lengths to emphasize that the Miranda warnings are not "prophylactic remedies" but rather are constitutional "rules" and "guidelines," perhaps incorrectly assuming that labeling Miranda as "prophylactic" would defeat his argument. Regardless of terminology, Rehnquist's analysis demonstrates an implicit acceptance of the unified right theory. He recognizes that the remedial component of the constitutional right, in this case the pre-interrogation warnings and waiver, redefine and interpret the constitutional rights against self-incrimination and due process.³⁸⁸ As Professor Levinson has detailed in his work, *Remedial Equilibration*, in this manner, the Miranda remedy has redefined the constitutional right.³⁸⁹ This is what Rehnquist means by asserting that Miranda is a "constitutional rule," and a "decision based on constitutional underpinnings," even though Miranda warnings themselves are admittedly not rights protected by the Constitution. The Court's decision as to the remedy actually defines and interprets the scope of the substantive Fifth Amendment right. Therefore, since Miranda is a rule of decision with respect to constitutional rights, the Court's interpretation should trump any legislative definition of constitutional rights.

Despite Rehnquist's attempts to avoid the label "prophylactic remedy," the Supreme Court has on numerous occasions correctly characterized the Miranda warnings as a prophylactic remedy.³⁹⁰ The Miranda warnings are simply prophylactic remedies necessary to protect against future constitutional violations of the Fifth Amendment. Recall that a prophylactic remedy is one that may be properly aimed at constitutional

³⁸⁸ Nichol, *supra* note 373, at 1142-45 (arguing that remedial development is essential element of constitutional interpretation). In the same way, the exceptions to the Miranda warnings for impeachment, fruits of an illegal confession, or public safety adjust the contours of the prophylaxis by limiting the scope of the constitutional right. Petitioner's Brief at 25, *Dickerson v. United States*, 530 U.S. 438 (2000); *see New York v. Quarles*, 467 U.S. 649 (1984) (creating narrow public safety exception to Miranda); *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that defendant's statement taken in violation of Miranda yet was voluntary could be used at trial for impeachment purposes); *Michigan v. Tucker*, 417 U.S. 433 (1974) (stating that exclusion of fruits of Miranda violation not required).

³⁸⁹ Levinson, *supra* note 18, at 909-10.

³⁹⁰ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (expressing concern with "adequate safeguards to protect precious Fifth Amendment rights"); *see also Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) (characterizing Miranda rights as procedural safeguards); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (describing "prophylactic rules to insulate the exercise of Fifth Amendment rights"); *Tucker*, 417 U.S. 433, 444 (1974); *Oregon v. Elstad*, 470 U.S. 298 (1985) (explaining that "Miranda rule sweep[s] more broadly than the Fifth Amendment itself"); *New York v. Quarles*, 467 U.S. 649, 653 (1984).

conduct in order to protect against violations of constitutional rights.³⁹¹ Thus, the prophylactic remedy of the Miranda warning may permissibly sweep within its gambit constitutional conduct – the pre-interrogation warnings and waiver as necessary to protect and safeguard against the violation of Fifth and Fourteenth Amendment rights. There is no reason, therefore, to avoid the label "prophylactic remedy," as Rehnquist appears to find important. "Prophylactic is not a synonym for non-constitutional."³⁹² A prophylactic remedy is a rule of decision regarding the remedial component of a definitional constitutional guarantee. Therefore, labeling the Miranda warnings what they really are – prophylactic remedies – will not alter the conclusion that they are a constitutional substantive rule of decision that will trump any attempted legislative substitute.

This holding in *Dickerson*, however, does not simply mean that judicial remedies will always trump legislative remedies. *Dickerson* instead departs from the rights-essentialist inquiry of procedure and substance, and reiterates the invitation of Miranda to Congress and state legislatures to create other equally effective pre-interrogation remedies.³⁹³ In other words, Rehnquist accepts that there may be some situations in which the Court would defer to legislative remedial substitutes. The Court cautions, however, that these substitutes must be adequate protective devices. *Dickerson* reiterates that legislative remedies must be "equally as effective in preventing coerced confessions."³⁹⁴ Professor

³⁹¹ Two of the dissenting views attack *Miranda* on grounds that it is overbroad in scope. Professor Cassell argued that judicial prophylactic relief of *Miranda* failed to meet *City of Boerne's* "congruent and proportional" requirement curtailing the breadth of legislative prophylactic relief. Cassell Brief, *supra* note 123, at 4, 41-49. Justice Scalia in his dissent in *Dickerson* argues that the prophylactic remedies of *Miranda* exceed the proper scope of prophylactic relief by protecting foolish rather than coerced confessions. 120 S. Ct. at 2340 (Scalia, J., dissenting). Justice Scalia has previously alluded to his anti-prophylactic relief sentiment. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996) (arguing against prophylactic relief that addresses anything other than actual constitutional injury). There has been debate over the years as to whether prophylactic relief and its cousin structural relief are permissible exercises of judicial power. Professor Yoo and Schoenbrod argue that such relief exceeds the scope of judicial power, whereas Professors Chayes and Fiss argue courts have a duty to impose such relief in public law litigation. Compare Yoo, *supra* note 48 (explaining that prophylactic relief is beyond scope of judicial power), with Chayes, *supra* note 318 (arguing that court has duty to impose prophylactic relief), and Fiss, *supra* note 46 (asserting that imposition of prophylactic relief is court's duty).

³⁹² Petitioner's Brief at 27, *Dickerson v. United States*, 530 U.S. 428 (2000). *Contra Dickerson*, 120 S. Ct. at 2340-43 (Scalia, J., dissenting); Cassell Brief, *supra* note 123, at 5-7; *but cf.* Krent, *supra* note 67, at 859 (stating that court-created remedy of exclusionary rule is opposite that of constitutionally mandated rule).

³⁹³ *Dickerson*, 120 S. Ct. at 2334-35.

³⁹⁴ *Id.* at 2335. Indeed, the proponents of the original § 3501 themselves acknowledged

Cassell defended Section 3501, in part, by arguing that its voluntariness test, supplemented by the available damages actions against police officers, was equally effective in securing the constitutional rights.³⁹⁵ The Fourth Circuit Court of Appeals agreed, and held that Section 3501 does not lessen the protections of the Constitution because it merely eliminates the harmful effects of the overbroad Miranda remedy.³⁹⁶

The Supreme Court, however, quickly disposed of the claim that the Section 3501 remedy is equally effective to Miranda. After thirty years of experience prior to Miranda with a common-law voluntariness standard akin to Section 3501, the Court easily concluded that such post-violation remedies addressing effects rather than causes of Fifth Amendment violations are not adequate.³⁹⁷ Indeed, in initially crafting the Miranda prophylactic remedy, the Court rejected the totality of the circumstances test precisely because it created an inadequate remedy by presenting an "unacceptably great" risk of overlooking an involuntary confession.³⁹⁸ Moreover, the *Dickerson* Court found Section 3501's totality test inadequate because it was more difficult than Miranda to apply for both courts and law enforcement officers.³⁹⁹ The Court decided in *Miranda* and reiterated in *Dickerson*, therefore, that prophylactic measures addressing the causes of Fifth Amendment violations rather than the consequences of such violations, are necessary to adequately safeguard the right against self-incrimination.⁴⁰⁰ Congress may provide substitute remedies for violations of the Fifth Amendment only if those measures are aimed at the pre-violation causes, as a pre-violation remedy is needed to protect the constitutional values.

Indeed, the requirement of *Dickerson* that a legislative remedy for constitutional violations be equally as effective as a judicial constitutional remedy is the same standard employed by the Court in

that any legislation displacing Miranda warnings would be unconstitutional if it failed to provide some suitable substitutes that were at least as effective as those imposed by the *Miranda* court. See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 910 (2000) (collecting floor statements and legislative reports related to Section 3501).

³⁹⁵ 120 S. Ct. at 2335.

³⁹⁶ *United States v. Dickerson*, 166 F.3d 667, 691 (4th Cir. 1999).

³⁹⁷ Government's Brief at 40-41, *Dickerson v. United States*, 530 U.S. 428 (2000); see Kamisar, *supra* note 394, at 913 ("It is hard to see how anyone can seriously argue that the Miranda Court encouraged or invited Congress to abolish Miranda in favor of the very test the Court had explicitly and emphatically found inadequate to protect the rights of suspects.").

³⁹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁹⁹ *Dickerson*, 120 S. Ct. at 2336.

⁴⁰⁰ *Id.* at 2335-36; *Miranda*, 384 U.S. at 467, 490-91.

implying constitutional remedies directly under the Constitution in *Bivens* cases. In the *Bivens* cases, the Court will not defer to a legislative remedy for constitutional violations if that remedy is inadequate, or not as equally as effective as the judicial *Bivens* remedy could be. Thus, in *Bivens* itself, the Court found that judicial remedies were necessary due to the inadequacy of statutory remedies under Section 1983 provided by Congress.⁴⁰¹ Similarly, in *Carlson v. Green*, a case of Eighth Amendment violations arising out of prison conditions, the Court held that judicial constitutional remedies were paramount because they were more effective at remedying the harm than the legislative substitutes provided in the Federal Tort Claims Act.⁴⁰²

Thus, the *Dickerson* case and the *Bivens* cases suggest a theory of the primacy of judicial remedies for constitutional violations. Because the remedy defines the substantive constitutional guarantee, the courts must have prime responsibility for creating the remedy. Congress cannot seek to redefine the scope of the constitutional right by way of an alternative remedy that is not as effective as the judicial remedy at enforcing the constitutional guarantee.

B. Deference to Legislative Remedies

The *Dickerson* theory of the primacy of judicial remedies, however, was strikingly absent in a second key case arising last term raising the same question of conflicting remedial powers. In *Miller v. French*, decided just one week before *Dickerson*, the Court ignored the theory of remedial rights and Congress's power over such remedies. In *Miller*, the Supreme Court was asked to resolve the conflict between the judicial remedy of preliminary injunctive relief and the PLRA's legislative remedy of an automatic stay of previously ordered injunctive relief upon the filing of a motion to vacate the relief filed by the prison defendants.⁴⁰³ The Court

⁴⁰¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

⁴⁰² *Carlson v. Green*, 446 U.S. 14 (1980).

⁴⁰³ 18 U.S.C. § 3626(e)(2)-(3) (Supp. V 1999) (codifying automatic stay provision). The PLRA's "automatic stay provision" provides that a motion to terminate prospective relief "shall operate as a stay" of that relief during the period beginning 30 days after the filing of the motion, extendable up to 90 days for good cause and ending when the court rules on the motion. Section 3626(b)(2) of the Act entitles defendants to "immediate termination" of prospective relief if an existing injunction does not satisfy the PLRA's standards for entry of prospective relief in prison condition cases. Beginning in 1996, the PLRA required that any prospective relief be narrowly drawn, extend no further than necessary to correct a violation of a federal right, and be the least intrusive means necessary to correct the violation of a federal right. *Id.* § 3626(a)(1)(A).

simply concluded that Congress had the authority to change the Law of Remedies for prison condition cases, and that therefore, the courts were required to follow the legislative limitation upon their equitable remedial powers.⁴⁰⁴ This holding is supported by the Court's citation and brief reference to the *Robertson* and *Wheeling Bridge* cases, which suggest that the Court assumed that Congress's derivative power to alter remedies for statutory rights equally applied to this case allowing Congress to change a constitutional remedy.⁴⁰⁵ The Court also reasoned that the PLRA merely changed the "rules" or "standards" for issuing injunctive relief, thereby hinting that it viewed the remedy as merely procedural.⁴⁰⁶

The juxtaposition of *Miller* and *Dickerson* is striking in that both raise the same question of Congress's power to dictate remedies for constitutional rights, yet the Court utilized very different approaches and reached opposite results in the two cases. In *Dickerson*, the Court exactly applied the unified rights theory in holding that the Miranda remedy is part of the overall constitutional right and, therefore, Congress is without power to change that remedy.⁴⁰⁷ However, in *Miller*, the Court resorted to the simplistic conclusion that Congress has broad power to change the Law of Remedies, either because they are procedures or because it can change statutory remedies.⁴⁰⁸ This is classic rights essentialism that portrays the remedy as separate from the core substantive right. But as discussed in this article, that is a flawed assumption.⁴⁰⁹

Indeed, *Miller* is precisely the type of case in which an explicit adoption of the unified rights theory would change the outcome of the decision. Had the Court applied the unified rights theory, as it did in *Dickerson*, it first would have recognized that the injunctive remedy at issue in *Miller* was part of the court's ability to effectuate the plaintiff's constitutional Eighth Amendment right to be free of cruel and unusual punishment. In this way, the injunctive remedy itself was part of the court's rule of decision on the constitutional right. Such a constitutional judicial decision, according to *Dickerson* and *City of Boerne*, cannot be legislatively superseded by Congress. Indeed, while Section 5 clearly provides Congress with some role in enforcing the constitutional

⁴⁰⁴ *Miller v. French*, 120 S. Ct. 2246, 2258(2000).

⁴⁰⁵ *Id.* at 2258-59.

⁴⁰⁶ *Id.* at 2258. However, Justice Souter in his concurrence viewed the PLRA standards at issue in the case as falling somewhere between substance and procedure. *Id.* at 2260-61.

⁴⁰⁷ *Dickerson v. United States*, 120 S. Ct. 2326, 2333-35 (2000).

⁴⁰⁸ *Miller*, 120 S. Ct. at 2258-60.

⁴⁰⁹ *See supra* text accompanying notes 75-120.

amendments,⁴¹⁰ it does not create a bright line rule that permits Congress to eliminate the judiciary's authority to enforce constitutional rights in the manner that it believes is appropriate to give meaning to the constitutional guarantee.

Thus, the second prong of *Dickerson*, whether the legislative remedy is adequate, would be important to analyzing whether the courts should defer to the legislative substitute of the PLRA. This adequacy analysis is precisely how Justice Souter, concurring in *Miller*, argued that the case should have been decided.⁴¹¹ He argued that the adequacy of the legislative substitute remedy needed to be resolved in order to avoid serious separation of powers issues raised by the PLRA provision that prevented the judicial branch from exercising its decisional judicial power.⁴¹² If the legislative remedies are inadequate to protect or redress constitutional rights, then the court may not defer to those remedies. The specific question of whether the 90 day stay of the automatic stay of relief was adequate was not addressed in the case as the lower courts had invalidated the provision as unconstitutional.⁴¹³ But in other cases, the courts clearly found the 90 day period inadequate to protect constitutional rights.⁴¹⁴ Accordingly, these courts refused to defer to the statutory remedy and imposed their own judicial remedy, staying the stay and continuing the effect of the preexisting injunctive relief.

In addition to *Miller*, the Supreme Court has, in other contexts, suggested that the courts should defer to legislative remedies for constitutional violations. Indeed, the Court seems to believe that it is in fact required to follow the legislative remedial dictates.⁴¹⁵ This judicial theory of automatic deference, however, originated from the now defunct theory that the courts have no power to imply remedies for

⁴¹⁰ And it has been suggested that Section 5 authorizes the PLRA. See *French v. Duckworth*, 178 F.3d 437, 450 (7th Cir. 1999) (Easterbrook, J., dissenting from denial of rehearing en banc); *Harrison*, *supra* note 15, at 2515, 2519 n.33.

⁴¹¹ *Miller*, 120 S. Ct. at 2260-62; see also *Hadix v. Johnson*, 144 F.3d 925, 942-43 (6th Cir. 1998) (addressing PLRA automatic stay provision and holding that "Congress cannot then diminish the power of the courts to an extent which renders the courts unable to meet their obligation of providing adequate remedies.").

⁴¹² *Miller*, 120 S. Ct. at 2260-62, 2262 n.3. Justice Souter opined that while potential due process and *Klein* problems could arguably be raised by an inadequate legislative remedy, "[t]he constitutional question inherent in these possible circumstances does not seem to be squarely addressed by any of our cases." *Id.* at 2261 n.3. Instead, the constitutional issue was one of the legislature creating the inability for the courts to exercise their judicial power of determining the law. *Id.*

⁴¹³ *Id.* at 2261.

⁴¹⁴ *Ruiz v. Johnson*, 178 F.3d 385, 388-95 (5th Cir. 1999); *Hadix*, 144 F.3d at 435-37.

⁴¹⁵ See cases cited *supra* note 353.

constitutional violations. Justice Rehnquist's articulation of this theory in his dissent in *Carlson v. Green*, argued that in the absence of a directive by Congress, the courts have no power within their Article III power to impose remedies.⁴¹⁶ The Supreme Court, however, has now clearly rejected this theory: "The federal courts' power to grant relief not expressly authorized by Congress is firmly established."⁴¹⁷ And the Court has used that authority to fashion a wide variety of nonstatutory remedies for constitutional violations including, among others, damages, injunctive relief, ejectment, and exclusion of evidence.⁴¹⁸ Thus, the basis for automatic deference no longer exists, and the question rather is what factors should guide the courts in deciding whether to defer to the legislative remedial alternative.

One common setting in which the Courts have uniformly deferred to legislative constitutional remedies is in the so-called "*Bivens* special factors" cases. In these cases, the courts have deferred to legislative remedies for constitutional violations rather than implying the *Bivens* damages remedy otherwise awarded by the court.⁴¹⁹ These cases are commonly cited for the general proposition that courts must always defer to remedies crafted by the legislature, even in constitutional cases.⁴²⁰ But this assumption fails to appreciate the analytical steps leading to the conclusion that the legislative remedy in these cases trumps the judicial constitutional remedy. First, these special factors

⁴¹⁶ *Carlson v. Green*, 446 U.S. 14, 31-54 (1980); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 424-30 (1971) (Burger, C.J., Black & Blackmun, JJ., dissenting).

⁴¹⁷ *Bush v. Lucas*, 462 U.S. 367, 374 (1983). Indeed, it was rejected long ago. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-80 (1803).

⁴¹⁸ See, e.g., *Davis v. Passman*, 442 U.S. 228, 248 (1979) (damages); *Bivens*, 403 U.S. at 422-24 (damages); *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15-16 (1971) (injunction); *Miranda v. Arizona*, 384 U.S. 436, 503-04 (1966) (exclusion); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (exclusion); *Ex parte Young*, 209 U.S. 123, 167-68 (1908) (injunction); *Wiley v. Sinkler*, 179 U.S. 58, 64-65 (1900) (damages); *United States v. Lee*, 106 U.S. 196 (1882) (ejectment).

⁴¹⁹ *Schweiker v. Chilicky*, 487 U.S. 412, 425-29 (1988) (deferring to congressional remedies for denial of social security disability benefits); *United States v. Stanley*, 483 U.S. 669, 681-86 (1987) (deferring to Congress, and absence of any legislative remedy, for constitutional violation arising from military service); *Bush*, 462 U.S. at 374-90 (deferring to legislative, civil service remedies for alleged violation of First Amendment rights in civil service employment); *Chappell v. Wallace*, 462 U.S. 296, 297-305 (1983) (deferring to legislative remedies for race discrimination in military).

⁴²⁰ E.g., *Harris v. Garner*, 190 F.3d 1279, 1288 (11th Cir. 1999), *rehearing en banc and opinion reinstated in part*, 216 F.3d 970 (2000); *La Compania Ocho, Inc. v. United States Forest Serv.*, 874 F. Supp. 1242, 1245-46 (D.N. Mex. 1995); Cassell Brief, *supra* note 123, at 10-11; Nichol, *supra* note 373, at 1150-53.

cases are in fact different. They all resemble a hybrid of statutory and constitutional cases, and thus, mandate treatment akin to statutory rights cases in which the court will defer to legislative remedies.⁴²¹ In all of these cases, the plaintiffs have alleged a constitutional deprivation stemming from some governmental benefit, such as civil service employment, military service, or social security benefits.⁴²² They are quasi-constitutional in a sense because the core issue in the case is an abridgement of a federal statutory right with an overlying claim of constitutional infringement of that statutory right. Congress could, if it chose to do so, eliminate the entire statutory benefit, and thus, it should also be able to narrow or limit that right by redefining it though the remedial component.⁴²³ Thus, these cases make sense as a category of cases in which to defer to the legislative remedy because they border on pure statutory right cases in which Congress holds the exclusive statutory power, and where the courts will defer to the legislature's choice of statutory remedy.⁴²⁴

Second, it is important to note that in the *Bivens* special factor cases, the Court has not blindly followed the remedies chosen by the legislature, but rather has insisted that the legislative remedy be an adequate substitute.⁴²⁵ The Court has generally based its decision to

⁴²¹ See *supra* text accompanying notes 353-57.

⁴²² *Schweiker*, 487 U.S. at 425-29 (social security benefits); *Stanley*, 483 U.S. at 681-86 (military service); *Bush*, 462 U.S. at 374-90 (civil service employment); *Chappell*, 462 U.S. at 297-305 (military service).

⁴²³ See *Schweiker*, 487 U.S. at 443 (Brennan, J., dissenting) ("Congress, of course, created the disability insurance program and obviously may legislate with respect to it."); *id.* at 429 (majority opinion) (stating that whether or not court believes legislative remedy is best response, Congress is body charged with designing complex welfare benefits program); *cf.* *Bush*, 462 U.S. at 390 (declining to create new substantive legal liability by awarding *Bivens* remedy).

⁴²⁴ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citing *Bivens* special factor case of *Schweiker* for the proposition that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have . . . refused to supplement that scheme with one created by the judiciary") (emphasis added)); *cf.* Brown, *supra* note 151, at 264-66 (noting that Court's emphasis in special factors cases on statutory component of remedial issues tends to obscure and downgrade their constitutional dimension and treats remedial problem as if it only involved judiciary's role in Article I legislative scheme).

⁴²⁵ The Court has refused to defer to legislative remedies where those remedies deny a plaintiff any effective relief. *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 949 (1999) (Ginsburg & Breyer, JJ., concurring) (noting that if courts could not review constitutional claims upon review of final order, it would raise "serious constitutional question."); *id.* at 955 (Souter, J., dissenting) (stating that complete preclusion of judicial review of any kind for claims brought by aliens would raise "serious constitutional questions whether Congress may block every remedy for enforcing a constitutional right"

defer to the legislative remedy on grounds that Congress has provided a comprehensive remedial scheme that provides constitutionally adequate remedies.⁴²⁶ Indeed, in summarizing its special factor test, the Court has emphasized the test as an appropriate rule of judicial deference, when Congress has provided what the Court determines to be adequate remedial mechanisms.⁴²⁷ Thus, just as in *Dickerson*, the ultimate decision of whether to select the legislative or judicial remedy is based upon the question of whether the legislative remedy is an adequate substitute.

C. The Adequate Substitute Remedy

The key to reconciling legislative and judicial remedies is therefore, the evaluation of whether the legislative remedy is an adequate substitute. In *Dickerson*, the Court rejected the legislative remedial substitute because it was not an adequate substitute for the judicial *Miranda* remedy. In the *Bivens* special factors cases, the Court has deferred to the legislature when it has found that the legislative remedy is an adequate substitute.⁴²⁸ Similarly, in the general *Bivens* cases, the courts have refused to award judicial remedies and deferred to legislative remedies for constitutional violations only where Congress has provided an "equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution."⁴²⁹ Thus, the key issue raised is what constitutes an adequate or effective substitute remedy.

Is it possible that a court would ever find that any replacement remedy is an adequate substitute for a judicial constitutional remedy? The

to due process); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (discussing civil service employment and total denial of judicial review); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (examining Medicare benefits).

⁴²⁶ *Schweiker*, 487 U.S. at 425 (emphasizing that Congress has not failed to provide meaningful remedies for rights of persons receiving social security disability benefits); *Bush*, 462 U.S. at 378 n.14, 385-86 (explaining that comprehensive system of civil service employment remedies gives employees meaningful remedies that are "clearly constitutionally adequate."); *Chappell*, 462 U.S. at 302 (noting that Congress has established comprehensive system of remedy for complaints). *But see Stanley*, 483 U.S. at 683 ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries. The 'special facto[r]' that 'counsels hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.").

⁴²⁷ *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992); *Schweiker*, 487 U.S. at 423.

⁴²⁸ *Schweiker*, 487 U.S. at 424; *Bush*, 462 U.S. at 378 n.14, 384-85.

⁴²⁹ *McCarthy*, 503 U.S. at 151; *Carlson v. Green*, 446 U.S. 14, 16-30 (1980); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

Supreme Court did so in *Smith v. Robbins*.⁴³⁰ In *Smith*, the Court was presented with a conflict of remedies, although the conflict was between a federal judicial remedy and a state judicial remedy.⁴³¹ The Court's resolution of the related conflict, however, sheds light on how the Court will resolve questions of adequate remedies. For in *Smith*, the Court was asked to reconcile the differing remedies of the federal *Anders* brief and the state *Wende* brief. Both remedies are prophylactic, pre-violation safeguards aimed at protecting against the deprivation of the constitutional right to appellate counsel in the event that appellate counsel withdraws from representation because she believes that the appeal is frivolous.⁴³² In *Anders*, the Supreme Court set forth a series of procedures for counsel to follow, including the preparation of a brief outlining the arguable legal issues in the case.⁴³³ In contrast, the California judicial remedy requires counsel only to outline the procedural and factual history of the case, and allows her to omit any discussion of legal issues.

The debate in the close 5-4 decision was whether the state's chosen prophylactic remedy was an adequate substitute for the federal remedy. Justice Thomas, writing for the majority, held that the California withdrawal procedures were adequate because they did not suffer from the same infirmities that had plagued other withdrawal procedures reviewed by the Court.⁴³⁴ He also found the substitute remedy adequate because it offered comparable protections to those set forth in *Anders* cases.⁴³⁵ The dissent adamantly disagreed with this determination.⁴³⁶ Justice Souter, writing for the dissent, found that the legislative remedy was inadequate because it omitted a requirement that counsel brief the arguable legal issues in a case and placed any protections in the non-adversarial office of the court.⁴³⁷

Obviously then, legal minds can differ on what constitutes an adequate remedy. So how exactly should a court go about assessing the adequacy of remedies in order to resolve a conflict between remedies for constitutional rights? The *Smith* majority defined adequacy as those

⁴³⁰ 120 S. Ct. 746, 752-67 (2000).

⁴³¹ *Id.* The conflict between federal and state interpretation of constitutional rights raises federalism concerns under the Supremacy Clause not addressed by this article.

⁴³² *Smith*, 120 S. Ct. at 752-53.

⁴³³ *Id.*

⁴³⁴ *Id.* at 760.

⁴³⁵ *Id.* at 762-63.

⁴³⁶ *Id.* at 770 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

⁴³⁷ *Id.*

remedies which reasonably ensure the protection of the constitutional right,⁴³⁸ or those which are rationally related to the right.⁴³⁹ Adequacy is not, the Court held, evaluating whether the legislative remedy is better or worse than the judicial remedy as a matter of policy.⁴⁴⁰ This definition suggests a rather minimal level of judicial scrutiny as to the acceptability of the legislative substitute. This view of adequacy, however, diverged from prior articulations of adequacy.

Instead, the common articulation of the adequacy standard is that the substitute remedy must be an "equally effective substitute" remedy. This more scrutinizing inquiry was the standard demanded by the four dissenting Justices in *Smith*.⁴⁴¹ This "equally effective" language was the test utilized by the Supreme Court in *Dickerson* to evaluate whether the legislative remedy of Section 3501 was an effective means of remedying the constitutional violation. It is the test employed by the Court in the *Bivens* cases, where the Court has evaluated whether the legislative remedies for constitutional violations were as equally effective as a judicial *Bivens* damages remedy.⁴⁴²

What does it mean, however, to say that a remedy is equally effective or adequate?⁴⁴³ Effective or adequate at doing what? At a minimum, the substitute remedy must effectuate the purposes and dictates of the constitutional guarantee.⁴⁴⁴ Just how completely it must effectuate these

⁴³⁸ *Id.* at 753.

⁴³⁹ *Id.* at 759.

⁴⁴⁰ *Id.* at 762 n. 13.

⁴⁴¹ *Id.* at 766-70.

⁴⁴² *Carlson v. Green*, 446 U.S. 14, 18 (1980) (comparing alternative legislative remedy of Federal Tort Claims Act to determine if it is equally effective substitute for recovery); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (noting absence of any explicit congressional remedial declaration that would necessitate evaluation of whether legislative remedy was equally effective).

⁴⁴³ "Adequate" is defined as that which is "sufficient to satisfy a requirement or meet a need," but may also imply the bare minimum needed to satisfy a requirement. THE AMERICAN HERITAGE DICTIONARY, *supra* note 185; WEBSTER'S REVISED UNABRIDGED DICTIONARY, *supra* note 185 (defining adequate as to make equal; fully sufficient); WORDNET 1.6 (1997) (defining adequate as "about average," "enough to meet a purpose"). "Effective" means to make something operative in a manner that produces a desired result. THE AMERICAN HERITAGE DICTIONARY, *supra* note 185; WEBSTER'S REVISED UNABRIDGED DICTIONARY, *supra* note 185.

⁴⁴⁴ In *Smith v. Robbins*, the majority and dissent disagreed on the scope of the guarantee itself. The majority characterized the due process-based constitutional guarantee as the right to have the appeal resolved in a way that is related to the merit of that appeal. *Smith*, 120 S. Ct. at 753-66. The dissent defined the protection demanded by the Constitution as the right to "representation by counsel with the adversarial character." *Id.* at 766-73. Where there is disagreement as to the definition of the right, there will certainly be resulting disagreement as to the adequacy of a substitute remedy.

guarantees, however, is the question. In *Smith*, the Court suggested a minimal threshold where the remedy simply must reasonably correlate to the right.⁴⁴⁵ Whereas in *Dickerson* and *Bivens*, the Court seemed to demand that the substitute remedy be more fully protective of the guarantees.⁴⁴⁶ The use of the qualifying standard of adequacy, however, suggests something less than full complete remediation. Indeed, such full and complete remediation is likely impossible.⁴⁴⁷ As Profess Gewirtz has explained, remedies often create a deficiency because there is a gap between that which is lost in the violation of the right and the remedial mechanisms used to substitute for that loss.⁴⁴⁸ Thus, the adequacy or equally effective test provides a realistic rather than an idealized approach to evaluating when a substitute remedy will be good enough to receive recognition by the court. But precisely how are the courts to make this determination of adequacy?

At times, the Supreme Court has suggested that the equally effective test requires a selection of the better remedy as between the judicial and legislative remedies. For example, the four dissenters in *Smith* would have compared the substitute *Wende* remedy with the efficacy of the judicial remedy of the Anders brief, and found the legislative substitute lacking.⁴⁴⁹ In *Carlson v. Green*, the Court compared the judicial *Bivens* remedy with the Federal Tort Claims Act remedy, and concluded that the judicial remedy was more effective or better than the legislative alternative.⁴⁵⁰ Indeed, this comparative approach of evaluating the legislative remedy in comparison to the judicial remedy was the exact analysis employed by the Supreme Court in *Dickerson* and its predecessor *Miranda*. There, the Court measured the adequacy of the legislative remedy by evaluating whether it was at least as effective as judicial means of remedying constitutional violations. Thus, the *Dickerson* Court, contrary to *Smith*, held that adequacy was based on a comparison of the legislative remedy to the judicial remedy.⁴⁵¹

⁴⁴⁵ *Id.* at 770.

⁴⁴⁶ See *Bivens*, 403 U.S. at 397; *Dickerson v. United States*, 120 S. Ct. 2326, 2335 (2000) (stating that Section 3501 does not comply with requirement that legislative alternative to *Miranda* be equally as effective in preventing coerced confessions).

⁴⁴⁷ John Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87-88 (1999).

⁴⁴⁸ Gewirtz, *supra* note 49, at 1427.

⁴⁴⁹ *Smith*, 120 S. Ct. at 770-73.

⁴⁵⁰ *Carlson v. Green*, 446 U.S. 14, 20 (1980).

⁴⁵¹ *Dickerson*, 120 S. Ct. at 2329-36. In the *Bivens* special-factors cases, though, the Court has seemingly adopted a less demanding standard of effectiveness. These cases require only that Congress provide "meaningful" relief in its remedial replacement. *Schweiker v.*

To evaluate whether a substitute remedy is as fully protective as a judicial remedy, the courts have sometimes utilized factors to evaluate the merits of each remedy. In *Carlson v. Green*, the Court identified four factors weighing in favor of the judicial *Bivens* damages remedy over the legislative Federal Tort Claims Act remedy.⁴⁵² It held that the judicial damages remedy was the more effective remedy because of its deterrent value, the availability of punitive damages, the availability of a jury trial, and the need for national uniformity of remedies for constitutional violations.⁴⁵³ In other cases, the Court has balanced the advantages and disadvantages of each potential remedy. In *Bush v. Lucas*, for example, the concurrence compared the legislative remedies provided for demotion from civil service employment to the judicially-available *Bivens* remedy.⁴⁵⁴ It found that the civil service remedy was "substantially [as] effective" as a *Bivens* damage action because it provided full compensation for loss of employment, and was designed to put the employee in the same position he would have been had the unjustified personnel action not taken place.⁴⁵⁵ Moreover, the Concurrence noted that the civil service remedy had advantages over the judicial remedy in that the burden of proof was on the government, qualified immunity did not bar suit, and the process was speedier and less costly.⁴⁵⁶ The Concurrence did not believe that the unavailability of emotional distress damages as a civil service remedy rendered the legislative remedy less effective, even though such damages were the main remedy sought by the plaintiff in the lawsuit.⁴⁵⁷ The concurrence also found that the "obvious and significant disadvantages of the civil service remedy" that denied an option for jury trial and limited judicial review did not outweigh these other findings of effectiveness of the civil

Chilicky, 487 U.S. 412, 425 (1988); *Bush v. Lucas*, 462 U.S. 367, 372-89 (1983). "Meaningful" relief, the courts have said, does not mean as complete or as effective as a judicial remedy for which it is substituted. *Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 378. However, this standard of the "meaningful" remedy has only appeared in the special-factors cases, and thus, perhaps, the Court has crafted a lesser standard of adequacy for these quasi-constitutional cases which the Court has treated more like true statutory rights cases.

⁴⁵² *Carlson v. Green*, 446 U.S. 14, 20-23 (1980); see *Bush*, 462 U.S. at 372 n.8 (arguing legislative remedy inadequate under factors of *Carlson*).

⁴⁵³ *Carlson*, 446 U.S. at 20-23.

⁴⁵⁴ *Bush*, 462 U.S. at 390-91.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ The plaintiff had been granted full compensation and back pay in the amount of \$30,000 in a civil service action. He claimed defamation and violation of his First Amendment rights in the lawsuit, and sought remedies of emotional distress damages and attorney's fees. *Id.* at 371, 372 n.9.

service substitute.⁴⁵⁸

These cases, however, fail to provide definitive answers as to what adequacy means when evaluating the merits of a substitute remedy. Rather, the definition seems dependent upon the whims of the individual case, as sometimes a factor, such as the availability of mental distress damages under the judicial remedy, merits application of the judicial remedy, whereas at other times it is insufficient to prevent deference to the legislative substitute.⁴⁵⁹ The law and commentaries on the Law of Remedies, may, however, provide some further insight into the evaluation of an adequate remedy.

Commentators commonly suggest that an adequate remedy must be one that provides individualized redress to the plaintiff in the case.⁴⁶⁰ An individualized remedy requires first, that the remedy be directed to the particular plaintiff and to those similarly situated.⁴⁶¹ It is not adequate to provide remedies that have no relation to the violation proven by that individual plaintiff. This does not mean that the plaintiff is entitled to the most relief, or to her choice of relief. But rather, it does mean that the court must have available a remedial choice that is effective to remedying the harm to this particular individual. Professor Steinman has described this individualized requirement in terms that the remedy must be "facing in the right direction."⁴⁶² Thus, if a plaintiff is seeking damages for past harm, it is insufficient that an injunctive remedy is generally available for that constitutional violation.⁴⁶³ This plaintiff is no longer suffering continued harm, and thus injunctive relief is not facing

⁴⁵⁸ *Id.* at 391; see also *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2225 (1999) (suggesting that standard is whether prophylactic measure enacted under Section 5 is "genuinely necessary to prevent violation of the Fourteenth Amendment").

⁴⁵⁹ Compare *Carlson v. Green*, 446 U.S. 14, 20-21 (1980), with *Bush*, 462 U.S. at 372 n.9.

⁴⁶⁰ *Bandes*, *supra* note 159, at 322-25; *Dellinger*, *supra* note 13, at 1549-51; *Fallon & Meltzer*, *supra* note 89, at 1778-91; *Steinman*, *supra* note 370, at 282-84.

⁴⁶¹ *Dellinger*, *supra* note 13, at 1551 (arguing that fact that persons in other situations may have access to remedies that will vindicate their rights under constitutional provision in question should not preclude court from creating judicial remedy for particular plaintiff who is without effective means of redress); *Steinman*, *supra* note 370, at 282 (stating that court should carefully judge adequacy of remedy for plaintiff "in determining whether congressionally afforded relief is constitutionally adequate"); see *J.I. Case Co. v. Borak*, 377 U.S. 426, 427-35 (1964) (permitting judicial damages remedy for statutory violation where securities law provided remedy of SEC review of proxy statements, but did not provide effective remedy for investors like plaintiff harmed by statement).

⁴⁶² *Steinman*, *supra* note 370, at 283.

⁴⁶³ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390-98 (1971) (holding that plaintiff's Fourth Amendment rights were violated in past, but no pending prosecution to enjoin, and no threat of future action to mandate injunction).

in the right direction of providing retroactive relief for a past constitutional violation.

This point can best be demonstrated by examining another provision of the PLRA that prohibits mental distress damages for Eighth Amendment violations.⁴⁶⁴ In general, the courts have upheld this remedial restriction on individual plaintiffs seeking only mental distress damages on grounds that there are a variety of other remedies – damages for physical injury and reparative injunctive relief – available to other plaintiffs in different types of prison conditions cases.⁴⁶⁵ However, in these circumstances, the legislative remedy fails to satisfy the requirement of providing an individualized remedy to this plaintiff, or others similarly situated, who have proven a violation of the Eighth Amendment resulting in only emotional harm.⁴⁶⁶ The availability of injunctive relief faces in the wrong direction, as plaintiff has no need to enjoin future action. The denial of any type of relief for the proven constitutional violation denies the individual the personal guarantee of the Eighth Amendment.⁴⁶⁷

⁴⁶⁴ 28 U.S.C. § 1346(b)(1) (1994 & Supp. V 1999); 42 U.S.C. § 1997e(e) (1994 & Supp. V 1999).

⁴⁶⁵ E.g., *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1345-49 (D.C. Cir. 1998); *Zehner v. Trigg*, 952 F. Supp. 1318, 1321-35 (S.D. Ind. 1997).

⁴⁶⁶ See *Carlson v. Green*, 446 U.S. 14, 21 (1980) (holding that mental distress damages awarded for constitutional violation even though FTCA limits mental distress damages); *Helling v. McKinney*, 509 U.S. 25, 27-37 (1993) (finding that prisoner has valid Eighth Amendment claim seeking damages for fear of future health threat caused by exposure to environmental tobacco smoke in prison).

⁴⁶⁷ The other provisions of the PLRA, not at issue in these cases involving mental distress damages not implicated in *Miller v. French*, 530 U.S. 327 (2000), raise even greater questions of adequacy. Take for example the Act's provisions limiting prospective relief to that which is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1) (1994 & Supp. V 1999). This provision limits injunctive relief to narrow reparative relief, and precludes preventive, structural, and prophylactic relief designed to prevent future harm (rather than correct past harm) by imposing broader rather than narrower requirements. Yet many courts have found such broad, structural and prophylactic relief appropriate to remedying Eighth Amendment violations in prison, suggesting that the Act's requirement of narrower remedies would be inadequate. E.g., *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 370-406 (1992) (consent decree); *Hutto v. Finney*, 437 U.S. 678, 681-704 (1978) (prophylactic relief); *Women Prisoners v. Dist. of Columbia*, 968 F. Supp. 744, 745-51 (D.D.C. 1997) (prophylactic, structural, and preventive relief). On the other hand, the Act's limitation of remedies parallels some court decisions similarly confining the reach of injunctive relief in prison cases. *Lewis v. Casey*, 518 U.S. 343, 346-63 (1996) (prophylactic and structural relief); *Women Prisoners v. Dist. of Columbia*, 93 F.3d 910, 919-46 (1996) (appointment of special master); *Inmates at Occoquan v. Barry*, 844 F.2d 828, 829-44 (D.C. Cir. 1988) (finding that court exceeded its equitable remedial powers by ordering prison population cap when

Many have argued that there cannot be a right to an individually effective remedy. Justice Scalia has argued that the existence of sovereign immunity often denying relief in cases proves that there is no right to individualized relief in constitutional cases.⁴⁶⁸ Similarly, Professors Fallon and Meltzer admit that individually effective remedies are not required because they often give way to sovereign immunity and retroactivity decisions that bar relief for the actual plaintiff.⁴⁶⁹ Yet these arguments confuse the choice of the appropriate remedy with the legal entitlement to a remedy. There are at least three key decisions in a legal case: (1) is there a violation of a definitional interest; (2) does this plaintiff have a legal entitlement to a remedy; and (3) what is the appropriate

overcrowding itself did not violate Constitution). Indeed, some proponents of the PLRA intended to codify these like-minded judicial decisions by enacting the PLRA. H.R. 21, 104th Cong., 1st Sess. 25 (1995); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: 1999 SUPPLEMENT 46 (noting that PLRA standards are no different than remedial standards of court). If the legislative substitute remedy is the same as the chosen judicial remedy, then it will not be found to be an inadequate substitute. Alternatively, perhaps the PLRA itself answers the question as to its own adequacy with respect to prospective relief. The Act's plain language allows the court to award relief which it deems "necessary," but no further. Thus, the Second Circuit Court of Appeals, has held that the PLRA does not restrict judicial remedies at all, because the court is authorized to award any prospective relief it deems necessary. *Benjamin v. Jacobson*, 172 F.3d 144, 163-64 (1999) (en banc) ("the Act forbids forward-looking relief in excess of what the court finds is necessary . . . The court remains authorized to adjudicate the controversies before it and to order such relief as is necessary to remedy the federal violations it finds established."). This interpretation, however, ignores the other limitations of the PLRA that restrict even necessary relief to corrective, narrowly drawn remedies.

⁴⁶⁸ *Webster v. Doe*, 486 U.S. 592, 613-14 (1988) (Scalia, J., dissenting); *Zehner*, 952 F. Supp. at 1329 (agreeing with Justice Scalia's argument that existence of sovereign immunity proves that there is no right to individualized remedy).

⁴⁶⁹ Fallon & Meltzer, *supra* note 89, at 1789 ("the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command"). Because the remedial value of providing effective individual redress sometimes gives way, Professors Fallon and Meltzer argue that there is a second core value guiding the determination of "adequate" constitutional remedies. They assert that "adequate" constitutional remedies are those which keep government within the bounds of law. In other words, that injunctions are always necessary, and therefore adequate, to remedying a constitutional violation. *See also Alden v. Maine*, 119 S. Ct. 2240, 2262-63 (1999) (denying legislative damages award against government, but asserting necessity of *Ex Parte Young* injunction to make government conform to standards of federal constitution); Sager, *supra* note 46 (arguing that availability of anticipatory relief is essential to providing reasonably effective remedy for certain constitutional claims including abortion and desegregation). This focus on the defendant is not unusual in the law of Remedies, as punitive damages are awarded to punish the defendant and restitutionary measures are utilized to require a defendant to disgorge his unjust enrichment. LAYCOCK, *supra* note 21. But the constitution provides a personal right to the individual plaintiff, and while it may also have some structural normative value upon defendants, its prime focus is to guarantee individual liberties. Bandes, *supra* note 159, at 310.

remedy.⁴⁷⁰ Once a violation of a constitutional guarantee is shown, there are still a variety of issues to consider in determining whether this plaintiff will be entitled to relief. So, questions regarding the statute of limitations, governmental immunity, or remedial defenses such as unclean hands, all come in to play to determine whether in fact a remedy should be awarded.⁴⁷¹ If any of these issues is decided against the plaintiff, then she will not be entitled to any relief. These are the cases Justice Scalia and Professors Fallon and Meltzer are describing as situations in which individuals are denied relief. But once the determination of legal entitlement to relief is made, then the question becomes one of the choice of remedy. This is the point at which the adequacy of substitute remedies is evaluated. And this is the point at which the ability of the substitute remedy to provide an individualized remedy becomes an important factor in evaluating the feasibility of one of the potential remedial choices.

In addition to being directed at the individual plaintiff, an individualized remedy must be one that is actualized, that is, it must actually work to remedy the wrong. If it is a damages remedy, it must be capable of being computed and collected.⁴⁷² It must be a proper measure of relief that does not fail to provide a fair quantum of relief.⁴⁷³ Professor Steinman also defines a workable remedy as one that provides meaningful access to the process for obtaining remedies.⁴⁷⁴ She emphasizes that an adequate remedy must be meaningful, not just symbolic. In this way, she agrees that an adequate remedy must actually work to return the plaintiff to her rightful position.⁴⁷⁵ Indeed, this was one of the redeeming characteristics of the legislative substitute remedy in *Bush v. Lucas*. The Court deferred to the substitute civil service

⁴⁷⁰ Bandes, *supra* note 159, at 302 (noting that questions of legal entitlement to relief and appropriate remedies are separate issues, yet are consistently conflated).

⁴⁷¹ See Zeigler, *supra* note 19, at 680-81 (observing that in some situations rights cannot have remedies, as when two rights conflict, enforcement interferes with an important governmental interest, or there is affirmative defense such as *res judicata* or statute of limitations).

⁴⁷² LAYCOCK, *supra* note 21, at 345-48; RESTATEMENT (SECOND) OF CONTRACTS § 360(a) (explaining that difficulty of proving damages with reasonable certainty is first factor affecting adequacy of damages).

⁴⁷³ U.C.C. § 2-719 (stating that liquidated damages are not minimally adequate substitute for general contract damages if they are unconscionable, one-sided, or fail to provide fair quantum of relief.)

⁴⁷⁴ Steinman, *supra* note 370, at 283-84 (arguing that plaintiff must have meaningful access to procedural prerequisites to recovery, which would be denied by unreasonable procedural hurdles or breakdowns in statutory procedural system due to human frailties).

⁴⁷⁵ *Id.*

remedies for demotion of a government employee, in part, because the legislative substitute remedy was designed to restore the employee to his rightful position by awarding all backpay lost.⁴⁷⁶

Thus, the cases and commentaries from the Law of Remedies have attempted to give the requirement of an adequate remedy more definition than that provided by the courts reconciling conflicting constitutional remedies. The requirement of an adequate remedy at least must provide individualized relief to the particular plaintiff, and provide her with a remedial mechanism that actually works. In addition, it may be that the two alternative remedies should be compared, contrasting disadvantages and advantages. But regardless of the merits of the remedy in relation to a second choice, the remedy ultimately chosen still must accomplish its purpose to effectuate the guarantees of the constitutional right for each individual. If Congress is able to provide such adequate constitutional substitutes, then the courts can and should defer to those legislative choices. Such substitute legislative remedies may certainly be advantageous as a matter of policy, as the Court in *Smith* noted.⁴⁷⁷ It may be that the legislature is better able to weigh the facts, interests, and policies inherent in creating remedies that will define

⁴⁷⁶ *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (noting that legislative remedy designed to put employee in same position he would have been in had unjustified or erroneous personnel action not taken place).

⁴⁷⁷ The *Smith* court detailed the advantages of substitute remedies in that their availability encourages experimentation and improvement of remedial solutions to constitutional problems. For example, in *Smith*, the Anders remedial procedures were established in 1967, and had received tremendous criticism in the ensuing thirty years. One common complaint is that the remedy conflicts with a lawyer's rules of ethics and places the lawyer in ethical dilemma by requiring actions that may be unethical. Refinement and improvement of the prophylactic measures enable the courts to evaluate the efficacy of past relief, and allow them to tailor relief to a permissible form. In addition, the *Smith* court pointed out that substitute legislative remedies are necessary for imposing broad-based relief for resolving legal problems outside the context of a particular case. Courts are not rulemaking bodies, but rather consider cases and remedies on a singular basis, thereby leaving room for reconsideration of appropriate relief in each case. This indeed is one key criticism of *Miranda* – that it is judicial rulemaking by establishing a prophylactic remedial rule for all cases. Such rulemaking is the hallmark of legislative remedial action, as judicial action is meant to be confined to the case and may not extend to third parties. The majority in *Dickerson v. United States*, 530 U.S. 428 (2000), however, answers this criticism by underscoring that it has allowed for adequate substitutes. Alternative pre-interrogation procedures are permissible substitutes as long as the Court deems them adequate. It is simply as a matter of constitutional decision that the Court has determined that prophylactic measures addressing the causes of the constitutional harm, rather than measures addressing the consequences of the harm, are necessary relief. *Dickerson v. United States*, 120 S. Ct. 2326, 2334-51 (2000); see Dellinger, *supra* note 13, at 1556 (noting that Congress has "superior ability to make the careful calculations necessary to adjust competing policy considerations" necessary for selecting among remedies).

constitutional rights.

But adequate substitute remedies are more than advantageous; they are constitutionally required. While Section 5 permits Congress to have some part in the enforcement of constitutional rights, the Judiciary has the ultimate responsibility to enforce and interpret the Constitution in individual cases. And the political process is not likely the best arena for preserving the constitutional rights of the minority and unpopular citizens. Thus, the requirement of the adequate substitute remedy creates a line at which the concurrent remedial powers of the legislature and the judiciary are balanced.⁴⁷⁸ And at the end of the day, it is the Court that must determine the adequacy of the remedy.⁴⁷⁹ While *Bivens* suggests that Congress's own view of the adequacy of the substitute remedy is relevant, this view is merely the starting point of the reconciliation analysis when Congress has intended to replace rather than supplement a judicial constitutional remedy.⁴⁸⁰ This replacement remedy can be enforced by the courts only if the court finds that the legislative remedy is equally effective to effectuating, protecting, or redressing constitutional rights. Thus, the practical result of the theory of the adequate remedy may be that Congress can safely legislate to enforce the Fourteenth Amendment only by supplementing or adding to the remedial arsenal traditionally available to the federal court.

CONCLUSION

This article has addressed the convergence of two important legal trends in the U.S. Supreme Court as the Court seeks to curtail increasingly expansive legislative attempts by Congress. These trends affect remedies, though few if any acknowledge the full implications of the case holdings on the Law of Remedies. This article attempted to cull out the remedies law and piece it together in an analytical framework to guide the future resolution of questions of Congress's power to create

⁴⁷⁸ *Hadix v. Johnson*, 144 F.3d 925, 942-43 (6th Cir. 1998) (holding that court has obligation to provide adequate remedy which cannot be diminished by Congress); *Bandes*, *supra* note 159.

⁴⁷⁹ *Dellinger*, *supra* note 13, at 1548 n.89 ("The ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review."); *Nichol*, *supra* note 373, at 1145 ("But the Court's traditional role as ultimate arbiter of the Constitution necessitates that the final determination of adequacy be a judicial one. If a proposed alternative remedy falls short of that standard, the demands of the constitutional implementation remain lodged in the judiciary.").

⁴⁸⁰ *Carlson v. Green*, 446 U.S. 14, 22 n.10 (1980).

legislative remedies under Section 5. Based on existing trends, it clearly provides a necessary, more comprehensive framework and should be applied in future cases to resolve these difficult issues of determining constitutional remedies.
