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Remedies Symposium, Remedial Discretion in Constitutional Adjudication: A Codicil

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REMEDIAL DISCRETION IN CONSTITUTIONAL ADJUDICATION: A CODICIL

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I. INTRODUCTION

In 2014, I published a paper titled *Remedial Discretion in Constitutional Adjudication*.[1] The paper responded to scholarly calls for the revival of a strand of the Warren Court's non-retroactivity jurisprudence.[2] That strand, known as "selective prospectivity," held that path-breaking rulings establishing new constitutional rights must apply to the parties in the cases in which they are announced but need not apply to parties in other cases pending on direct review.[3] Scholars favoring a revival of selective prospectivity argued that it would enable more constitutional innovation by providing the Supreme Court with an important tool for managing the costs of legal change.[4] My paper argued, in response, that the Court's untheorized but de facto practice of developing doctrines that sometimes withhold relief in cases where the Constitution permits constitutional violations to go without a remedy—e.g., the qualified-immunity doctrine, exceptions to the exclusionary rule,

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1. John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881 (2014).

2. The Supreme Court rejected non-retroactivity in *Griffith v. Kentucky*, 479 U.S. 314, 320-28 (1987) (rejecting non-retroactivity for criminal cases on direct review), and *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94-99 (1993) (rejecting non-retroactivity for non-habeas civil cases).

3. *See* Stovall v. Denno, 388 U.S. 293, 296-301 (1967).

4. *See* Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 596-97 (2012); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 972 (2006); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, & Constitutional Remedies*, 104 HARV. L. REV. 173, 1733-38 (1991).

harmless-error rules—was both sufficient to manage the costs of constitutional change and preferable to reviving selective prospectivity, which is inconsistent with important rule-of-law values.[5]

Of necessity, the paper also developed and defended a theory of when and how courts may withhold remedies for constitutional violations.[6] It sought to demonstrate that the Court has properly confined its practice of developing doctrines that withhold relief for constitutional wrongs to claims for the sub-constitutional remedies—i.e., money damages, the suppression of unconstitutionally obtained evidence, and the vacatur of tainted judgments—that function as *substitutes* for constitutional interests irretrievably lost as a result of *wholly-concluded* rights-violations.[7] In contrast, when faced with justiciable, properly raised and preserved, and meritorious claims for *specific* relief from *ongoing* constitutional violations, the Court has properly regarded relief as obligatory.[8]

In this paper, I elaborate on two important questions raised by my argument that deserve a bit more attention. First, is there a correct way to define constitutional violations as "ongoing" or "wholly-concluded"? Second, can I reconcile the argument that a remedy for an ongoing constitutional violation is mandatory with cases such as *Brown v. Board of Education II*[9] and *Brown v. Plata*,[10] where the Supreme Court did not provide the plaintiffs with immediate relief from systematic constitutional violations? These two questions will be the topics of Parts III and IV of this essay. Part II contextualizes the discussion in Parts III and IV by concisely summarizing my argument as to when courts may withhold remedies for constitutional violations, and when they may not.

II. WHEN MAY COURTS WITHHOLD REMEDIES FOR CONSTITUTIONAL VIOLATIONS?

Judges and lawyers typically use the historical terms "legal" and "equitable" when classifying remedies. But the use of these terms in the

5. *See* Greabe, *supra* note 1, at 919-32.

6. The theory had been hypothesized in earlier work. *See* John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857 (2013).

7. *See* Greabe, *supra* note 1, at 912-17.

8. *See id.* at 917-19.

9. Brown v. Board of Education, 349 U.S. 294 (1955) ("*Brown II*"). *Brown II* addressed the issue of remedy left unanswered in the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), which held unconstitutional racial discrimination in assigning students to public schools.

10. Brown v. Plata, 563 U.S. 493 (2011) (addressing unconstitutional prison overcrowding).

context of remedies for constitutional violations obscures some basic truths. Consider that when law students learn the conventional account of our remedial tradition, they learn that courts may exercise equitable powers to withhold remedies that would undermine the public interest. Yet equity is typically associated with *specific* remedies. And, as we shall see, in the context of constitutional litigation, the withholding of remedies as a consequence of public-interest balancing occurs primarily within the context of claims for *substitutionary* remedies, not claims for specific relief. Thus, it is far more useful to classify remedies for constitutional violations in terms of how they *function*—viz., either as vehicles for "specific" relief or as "substitutes" for constitutional interests lost as a result of constitutional wrongs. For unlike the law/equity divide, the line between specific and substitutionary remedies marks a boundary of constitutional significance in constitutional litigation.[11]

In using the term "specific" to describe one class of remedies for constitutional violations, I refer to those remedies that enable a right-holder either to halt an ongoing-deprivation, or to avoid an imminent deprivation, of a constitutionally protected interest.[12] Specific remedies thus provide or restore to the right-holder an interest that the Constitution protects.[13] Specific remedies for constitutional violations include court rulings that nullify unconstitutional statutes or rules by which the government brings criminal charges or other coercive enforcement proceedings; rulings enjoining coercive enforcement proceedings where the statute or rule authorizing the proceeding cannot constitutionally be applied on the facts of the case; injunctions and declarations that enjoin or prohibit ongoing or imminent rights-violations occasioned by government actions other than coercive enforcement proceedings; the provision of access to a judicial office by means of the Great Writ of habeas corpus (so long as Congress has not lawfully suspended it); the provision of just compensation for a government taking; and make-whole relief for the imposition of unconstitutional taxes, duties, or fees.[14]

In using the term "substitutionary" to describe the other class of remedies for constitutional violations, I refer to those remedies that provide "something else" after a constitutional violation has caused a right-holder to suffer an irretrievable loss of a constitutionally protected

11. *See id.* at 903-05.
12. *See id.* at 905.
13. *See id.*
14. *See id.* at 909-10.

interest.[15] The quintessential substitutionary remedy is a monetary damage award of the sort authorized by 42 U.S.C. § 1983 and the cause of action recognized in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.[16] But in the context of constitutional litigation, two other substitutionary remedies are commonplace. The first is the exclusion of evidence at trial obtained by means of a prior violation of procedural rights protected by the Fourth, Fifth, Sixth, and Fourteenth Amendments. The second is the vacatur of a court judgment when constitutional error occurred during, or in relation to, the judicial proceedings that led to the judgment.[17]

There is a fundamental difference in the nature of constitutional violations that ground claims for specific relief and those that ground claims for substitutionary remedies.[18] Specific remedies are possible only when the underlying constitutional violation is, in a meaningful sense, *ongoing* when challenged in court.[19] And such ongoing violations are almost inevitably grounded in unconstitutional government policies or customs such as statutes, rules, regulations, practices, broadly applicable understandings, and the decisions of those who function as government policymakers.[20] Substitutionary remedies, in contrast, usually involve the wholly completed, discretionary actions of persons entrusted with government power who must exercise that power in dynamic and varying circumstances according to general norms provided by the Constitution and constitutional precedent.[21]

In the context of challenges to ongoing violations rooted in unconstitutional policies or customs, the Supreme Court has regarded a remedy as obligatory—at least so long as the claim targeting the violation is justiciable, properly preserved, and brought at a proper time and in a proper forum.[22] But in the context of challenges to wholly completed violations that give rise to claims for substitutionary relief, the Court has developed remedy-limiting doctrines such as qualified immunity,

15. *See id.* at 905-06.
16. 403 U.S. 388, 390 (1971).
17. *See* Greabe, *supra* note 1, at 908-09.
18. *See id.* at 910-12.
19. *See id.* at 911-12.
20. *See id.*
21. *See id.* at 910-11. The qualifier "usually" is necessary because wholly-completed rights invasions can be rooted in an unconstitutional government policy and custom that remains in effect when a remedy is sought. In such circumstances, the victimized right-holder may obtain both a specific remedy directed at the policy and custom and a substitutionary remedy for the harm actually suffered. *See id.* at 911 n.155.
22. *See id.* at 917-19.

exceptions to the exclusionary rule, and harmless-error principles.[23] Such doctrines permit courts to take account of the public interest and withhold remedies in circumstances where (according to the Court) the equitable balance so dictates.[24]

Although the Supreme Court has never explained its actions in these terms, it has appropriately regarded specific relief addressed to ongoing constitutional violations rooted in government policy or custom as obligatory while simultaneously regarding substitutionary relief addressed to wholly completed wrongs as contingent and subject to being withheld when a provision of a remedy would undermine the public interest.[25] Specific relief is more clearly rooted in the text and structure of the Constitution than substitutionary relief.[26] The Constitution explicitly requires access to a judicial officer through the Great Writ of habeas corpus and the provision of just compensation for a taking.[27] Moreover, specific relief more directly operationalizes claims brought to enforce structural values such as federal supremacy, federalism, the separation of powers, and non-interference by government with individual rights.[28] After all, as just noted, specific relief acts to stop ongoing unconstitutional conduct at the *lawmaking* level, where the effects of the constitutional transgression are broadly applicable and capable of victimizing others. Thus, it serves as the means by which courts perform the quintessential function of judicial review, which is to impose the constitutional rule of law on the political branches of government.[29]

Substitutionary remedies, by contrast, lack the same direct link to the text or structure of the Constitution.[30] They inherently provide less narrowly tailored relief than specific remedies deliver, for they fail to prevent, halt, or undo the constitutional violations to which they respond.[31] Moreover, substitutionary remedies such as money damage awards, suppression orders that can lead to the release of dangerous criminals, and a repeated trial can generate significant social costs that third parties not involved in the right-violating event must bear.[32] To be sure, they are crucial for ensuring adherence to constitutional norms.

23. *See id.* at 912-17.
24. *See id.*
25. *See id.* at 919-23.
26. *See id.* at 921.
27. *See id.* at 921-22.
28. *See id.* at 921.
29. *See id.* at 922.
30. *See id.* at 920.
31. *See id.*
32. *See id.* at 920-21.

Eliminating them without replacing them with effective alternatives would invite an intolerable level of constitutional under-enforcement.[33] But while substitutionary remedies are essential to our constitutional order as a class, the Supreme Court has reasonably regarded them as individually contingent and susceptible to legislative or judicial expansion, contraction, or replacement in light of the perceived public interest.[34]

III. IS THERE A CORRECT WAY TO DEFINE CONSTITUTIONAL VIOLATIONS AS "ONGOING" OR "WHOLLY- CONCLUDED"?

As should be clear, the argument outlined in Part II is not a built-from-scratch, normative account of when courts *should* withhold remedies for constitutional violations. Rather, it is a largely descriptive account that seeks to elaborate on the groundbreaking work of Professors Richard H. Fallon, Jr., and Daniel J. Meltzer by rationalizing what the Supreme Court has done and suggesting that its approach is more principled than may appear.[35] But in moving beyond unhelpful classifications like "legal" and "equitable" and stressing the need to focus on remedial function, the argument needs some additional definitional work. For the difference between an "ongoing" and "wholly-concluded" constitutional violation is not always evident.

This point was driven home to me when I wrote my most recent article, which argued for comprehensive reform of harmless-error doctrines.[36] My harmless-error argument required, at the threshold, acceptance of the premise that there is no constitutional barrier to the doctrinal reforms I would be proposing. This, in turn, required acceptance that the harmless-error test applied to constitutional trial errors—the rule of *Chapman v. California*[37]—is not constitutionally mandated. Put more simply, my argument required acceptance that, as a matter of

33. *See id.*

34. *See id.*

35. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, & Constitutional Remedies*, 104 HARV. L. REV. 173, 1787-91 (1991). In their influential 1991 article, Professors Fallon and Meltzer argued that (1) there should be a strong but not always unyielding presumption in favor of individually effective relief for every constitutional violation; and (2) there must exist a sufficient scheme of available remedies to ensure that constitutional rights do not become nullities and that government officials remain answerable as a systemic matter to the demands of the law. The argument sketched in Part II sought to put some meat on the bones of this persuasive but somewhat abstract two-part proposition.

36. *See* John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59 (2016).

37. 386 U.S. 18, 22-24 (1967) (holding that at least some constitutional trial errors may be found to be harmless if the government can establish their harmlessness beyond a reasonable doubt).

constitutional law, appellate courts *can* withhold remedies for constitutional trial errors under some standard other than *Chapman*'s beyond-a-reasonable-doubt formulation.

Under the theory outlined in Part II, there is no constitutional barrier to arguing for a change in applicable harmless-error rules—at least so long as one accepts my characterization of new trial orders responsive to constitutional trial errors as substitutionary remedies responsive to wholly-concluded constitutional violations. That characterization seemed clearly correct to me. After all, at least superficially, an appellate ruling vacating a lower court judgment and ordering a new trial provides "something else"—i.e., a substitute form of relief—to one victimized by a constitutional error during an earlier trial.

But this characterization is not self-evident. In an excellent paper published shortly after I advanced the theory outlined in Part II, Professor Richard M. Re posited that the entry of a criminal judgment tainted by a constitutional trial error that cannot be said to have been harmless beyond a reasonable doubt constitutes a violation of due process *separate and apart* from the constitutional error that tainted the conviction.[38] What's more, Professor Re argued, it works a deprivation of due process that is *ongoing* and therefore requires the provision of an appellate remedy as a matter of constitutional law.[39]

In my harmless-error paper, I responded to Professor Re's argument and defended my characterization of constitutional trial error as wholly-concluded once it occurs and of a new trial order responsive to a constitutional trial error as a substitutionary remedy that is not required as a matter of constitutional law.[40] I argued that, while normatively attractive, Re's theory is difficult to reconcile with the doctrines and practices that inform the law of constitutional remedies. First, the right that Re posits could only be vindicated on appeal. And yet, the Supreme Court has repeatedly stated that there is no constitutional right to appeal from a criminal judgment.[41] Moreover, it is difficult to see how the right might be located within some doctrine that places constitutional limits on the government's decision to provide constitutionally gratuitous procedures.[42]

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38. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912 (2014).

39. *See id.* at 1915-17.

40. *See* Greabe, *supra* note 36, at 93-95.

41. *See, e.g.*, Martinez v. Ct. of App. of Cal., 528 U.S. 152, 160 (2000); M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996); Goeke v. Branch, 514 U.S. 115, 119 (1995) (per curiam).

42. *See* Greabe, *supra* note 36, at 94.

Second, the appellate judgment-call that vindication of the right would entail only rarely curbs a more broadly applicable policy or custom that, if left unaddressed, might also deprive others of their rights.[43] Rather, such a judgment-call usually requires an appeals court only to decide on a unique set of facts whether, at a discrete point in time, the trial judge failed to enforce a constitutional norm and, if so, whether the error was harmless. The underlying ruling—the unconstitutional actus reus—is typically a discretionary, fact-dependent judgment-call that government actors must make all the time. Within our system, remedies for "mistakes" (in the view of the appeals court) made in the course of such judgment-calls are not regarded as mandatory. Rather, remedy-withholding principles allow for some room to breathe and decline to impose costly remedies without some additional showing that the remedy is worth the cost.

Third, principles governing the provision of remedies on collateral review are inconsistent with viewing the victim of a constitutional trial error as enduring a separate, ongoing constitutional violation when the government cannot satisfy the *Chapman* test.[44] A habeas court that disagrees with a state appeals court's determination that a constitutional trial error was harmless under *Chapman* does not simply grant the writ. Rather, federal law requires the court to accord an extra measure of deference and withhold a remedy unless the state appeals court's ruling was patently unreasonable.[45] Contrast this remedy-withholding rule with how habeas courts deal with cases involving undoubtedly ongoing violations—those where the statute under which the petitioner was convicted is determined by the Supreme Court to be unconstitutional. In such cases, habeas courts are under an obligation to provide relief.[46]

All of that said, while I continue to believe that it is more natural and consistent with applicable doctrines to characterize constitutional trial errors as wholly-concluded once made and new-trial orders as substitutionary, I acknowledge that the question is not one that can be answered ontologically. Natural reality would not preclude the Supreme

43. *See id.*

44. *See id.* at 95.

45. *See* 28 U.S.C. § 2254(d)(1) (1996) (prohibiting a grant of habeas relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"); Mitchell v. Esparza, 540 U.S. 12, 17-18 (2003) (per curiam) (holding that § 2254(d)(1) applies to state-court determinations that a constitutional violation is harmless under *Chapman*).

46. *See* Teague v. Lane, 489 U.S. 288, 307-10 (1989) (O'Connor, J.,) (plurality opinion) (requiring a habeas court to provide a remedy when the Supreme Court issues a new rule that makes previously punishable conduct constitutionally protected).

Court from recognizing an individual due-process right to be free from criminal convictions tainted by constitutional trial errors that cannot be said to have been harmless beyond a reasonable doubt. Nor would it preclude the Court from characterizing such a constitutional violation as ongoing, even though such a characterization would give rise to a number of inconstancies and tensions with the doctrines presently governing remedies for constitutional violations.

But the key point is this: a descriptive theory of the sort I advanced does not require ontologically unassailable premises in order to be persuasive. Rather, it requires only that its premises be *reasonable*. So, the first part of the codicil that I would like to add to the argument set forth in *Remedial Discretion in Constitutional Adjudication* is simply this: it is *reasonable* to understand qualified immunity, exceptions to the exclusionary rule, and harmless-error rules as doctrines that withhold substitutionary remedies for wholly-concluded constitutional wrongs—wrongs typically committed by actors vested with government power who must enforce the law according to constitutional norms, as they understand them, in varying and dynamic circumstances. Moreover, if one accepts that these characterizations are reasonable, then it also is reasonable to say that, under our system of constitutional remedies, the Supreme Court has confined its practice of developing doctrines that withhold any relief for constitutional wrongs to claims for remedies that function as substitutes for constitutional interests irretrievably lost as a result of wholly-concluded rights-violations. In contrast, when faced with justiciable, properly raised and preserved, and meritorious claims for specific relief from ongoing constitutional violations, the Court has regarded a remedy as obligatory.

IV. WHAT RELIEF MUST COURTS PROVIDE FOR ONGOING CONSTITUTIONAL VIOLATIONS?

But if, as I claim, the Supreme Court has regarded a remedy for ongoing constitutional violations as obligatory—at least when such violations are established by means of justiciable claims properly raised and preserved in a proper forum—how should one understand rulings such as *Brown v. Board of Education II*[47] and *Brown v. Plata*?[48] In *Brown II*, of course, the Court did not require the immediate desegregation of facially segregated public schools; it required only that such

47. 349 U.S. 294 (1955).
48. 563 U.S. 493 (2011).

desegregation proceed "with all deliberate speed."[49] And in *Plata*, the Court upheld an injunction requiring only that the State release convicts from unconstitutionally overcrowded prisons within two years.[50] Should we not understand these cases to support the proposition that courts sometimes may withhold remedies even for ongoing violations?

My answer to this question—the second part of this codicil—posits a constitutionally significant difference between the act of declaring unconstitutional a government policy or custom that is causing the claimant ongoing harm, and the provision of additional relief designed to ameliorate the present and future *effects* of the invasion of rights on the claimant.[51] My argument is that only the former is constitutionally required; courts retain remedial discretion to engage in public-interest balancing with respect to the latter. And this sometimes leads courts to impose time, place, and manner limits on requests for the provision of tangible relief that goes beyond law declaration.

In this respect, consider how the rulings in *Brown II* and *Plata* differ from cases where courts deny substitutionary remedies under doctrines such as qualified immunity, exceptions to the exclusionary rule, and harmless-error principles. In cases involving the denial of substitutionary remedies, courts often do not even reach the question whether a constitutional violation occurred. Rather, the unavailability of a remedy is deemed to be sufficient grounds for rejecting the claim.[52] Moreover, even if the court does decide whether a constitutional violation occurred, it typically decides nothing more than that a government agent violated a constitutional norm in the course of enforcing the law in unique and idiosyncratic circumstances. While such statements have precedential value in future cases that must decide, for example, whether government agents have violated "clearly established" rights,[53] they do not have the effect of declaring unconstitutional a government policy or custom that, if left undisturbed, could be applied to invade the rights of others.

In *Brown II* and *Plata*, in contrast, the Supreme Court at least implicitly declared unconstitutional and rendered prospectively unlawful—and therefore at least subject to enforcement by means of the contempt power—governmental customs and policies that either were

49. *Brown II*, 349 U.S. at 301.

50. *Plata*, 563 U.S. at 500-01, 509-10.

51. *See* Greabe, *supra* note 1, at 905 n.133.

52. *See Teague*, 489 U.S. at 316 (1989) (O'Connor, J.,) (plurality opinion) (praising the practice of bypassing constitutional rulings in situations where no remedy is available).

53. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining the requirements of the qualified-immunity doctrine).

affecting, or had the potential to affect, numerous parties not before the Court. From the point of view of the claimants who brought suit, an implicit declaration of this sort might be little consolation for the lingering effects of the unconstitutional custom or policy that continue after the judgment is entered. But it is not entirely without value. For at a minimum, by stating the prospective rights and duties of the parties, it therefore can serve as the basis of future, additional relief from the court.[54]

But beyond this, law declarations of this sort operationalize the promise that persons seeking remedies for constitutional violations act not only for themselves, but also for the benefits of the rest of us. They act, in other words, as private attorneys general enforcing constitutional norms. And, even for those who embrace a modest, "private rights" view of the role of courts within our constitutional system, declarations that government policies and customs violate the Constitution undeniably have played, and continue to play, a critical role in keeping the coordinate branches of the federal government, and the states, within constitutional bounds. Courts have discretion in determining the timing and scope of injunctive relief. But they cannot abstain from making the required choice-of-law determination when a party asserts a justiciable and otherwise properly presented claim that a government policy or custom conflicts with the Constitution.

V. CONCLUSION

Courts must have the power to engage in public-interest balancing, and sometimes to withhold remedies, when claimants request remedies for constitutional violations *other than* declarations that a properly challenged government policy or custom is unconstitutional (or is being unconstitutionally applied). This power is necessary for courts to manage the costs of constitutional innovation and otherwise to balance the rights of constitutional claimants against the interests of the public, who must bear the often significant costs generated by such remedies. But this power to withhold remedies other than declaratory relief is also sufficient for performing these necessary tasks. Courts should therefore decline to embrace selective prospectivity or other doctrines that countenance even more withholding of remedies for constitutional violations. Such doctrines are unnecessary and undermine important rule-of-law values that the present approach leaves undisturbed.

54. *See* Greabe, *supra* note 1, at 905 n.133.