Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process

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Introduction

The focus of this Article is on the dualism of constitutional remedies. It proposes that courts should take a private remedy perspective leading to a priority of private remedies over public remedies. This would help ensure that those injured as a result of constitutional violations would receive as adequate a remedy as "due process" will allow.[1]

The analysis stresses two primary points. First, remedies designed to vindicate public values, such as general deterrence of public officials or restructuring of public institutions, should not supplant private remedies but instead should act to supplement them.[2] Similarly, public values which serve to restrict or confine remedies should not affect the scope of a private remedy.[3] Second, the private remedy should be as complete as possible, either repairing or preventing the harm resulting from a constitutional violation.

This Article first discusses the current status of private remedies for constitutional wrongs, focusing on the dual nature of constitutional

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1. Suggesting a priority for private remedies does not mean that private remedies should replace public ones. In any given case, once the private remedy is secure, it is a separate issue whether a public remedy should also be given. In short, this Article is in favor of private remedies, but it is not against public ones.

2. Any remedy may be either public or private. Its status depends upon its purpose and its scope. Thus, the shorthand phrases "public remedy" and "private remedy" refer to the reasons for and against the remedy and its role in regard to the nature of the remedy. The shorthand phrases "public policies," "public values," and the like are meant to include negative as well as affirmative policies. The remedial phrase "victim specific" is avoided because it suggests too narrow a perspective. No effort is made to *define* "public" or "private" remedy because "definition" is a straight jacket. After analysis, a definition may be attempted, but not before.

3. For example, if a plaintiff is in need of an injunction to secure relief from a state violation, then doctrines such as abstention and comity, designed to foster respect for state institutions, should not be applied to limit the appropriate relief.

rights—public versus private, the traditional remedies afforded by the courts for constitutional wrongs, and specific situations which suggest the availability of both public and private remedies.[4] The Article then proposes an approach that would give private remedies priority in cases in which an individual has been wronged as a result of a constitutional violation. Finally, it discusses the proposal's advantages from both a procedural and a practical perspective.

I. The Current Priority Status of Private Remedies

A. The Background

Constitutional rights are public benefits, established by society's basic charter of values and protected from interference by public officials.[5] They exist not as a gift from the sovereign to the individual, who thereafter possesses them as private rights, but as essential limitations on the government for the benefit of all.

At the same time, however, constitutional rights are private rights.[6] Only if a real injury is established are constitutional violations affecting individual or private interests redressable in court.[7] Abstract excesses in violation of constitutional restraints are simply not correctable by courts.[8]

Some of the procedural limitations the United States Supreme Court imposes on itself regarding its acceptance of cases on certiorari[9] or its

4. See, e.g., *infra* notes 123-152 and accompanying text, discussing the exclusionary rule and desegregation.

5. Most constitutional rights are not protected from infringement by private actors. The Thirteenth Amendment is one clear exception, because its prohibition of slavery is geographic and applies to any party whether public or private.

6. For historical support, see *infra* note 34 and accompanying text. An illustrative case of the private right perspective is Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

7. In Flast v. Cohen, 392 U.S. 83 (1968), and Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court took a relaxed view of Article III standing requirements. However, recently the Court has been more demanding, requiring actual or threatened injury-in-fact plus causation as irreducible minimum constitutional requirements. For two conflicting views of the standing issue, see the opinions of Justices Rehnquist and Brennan in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

8. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (Internal Revenue ruling allowing hospitals to deny indigents service was held not subject to challenge by indigents because the connection between the ruling and essential injury-in- fact was too speculative).

9. All of the "[c]onsiderations governing review on certiorari" specified in Rule 17 of the Supreme Court Rules concern public values, e.g., conflicts among courts or importance of federal law. Stating this differently, nothing in Rule 17 is directed at private or individual concerns. *See* SUP. CT. R. 17.

limited scope of review on appeal,[10] reflect the Court's emphasis on the nature of constitutional litigation. The same is true for the limitations it imposes on itself and other federal courts through doctrines such as political questions,[11] comity,[12] and abstention.[13] On the other hand, procedural doctrines such as standing,[14] ripeness,[15] and mootness[16] indicate the Court's concern with the private character of a controversy.[17]

The private/public dualism has presented a dilemma for both the Supreme Court and other courts in deciding whether private rights are implicated in a given violation, and whether a particular remedy is appropriate. One question that arises concerns the litigant's role in distin-

10. Guidance by the Supreme Court concerning potentially relevant considerations is not very helpful, requesting only "[a] statement of the reasons why the questions presented are so substantial as to require plenary consideration . . . ." SUP. CT. R. 15.1(h).

11. In Baker v. Carr, 369 U.S. at 217, this limitation was narrowly confined. Prior to *Baker*, the political question doctrine was the foremost Court-created means used by the Supreme Court for keeping federal courts out of sensitive public issues. *Baker* reviewed the earlier cases, consolidated them, and then condensed them into six categories—all related to "separation of power" issues. Arguably only two of the categories, prior discretion in another agency, and textual commitment to another decisionmaker, have any significant meaning and thus confining impact on the lower federal courts.

12. Comity reflects the respect the federal judiciary has for its judicial cousins in state courts. This public policy is implemented in decisions rejecting interference by federal courts in ongoing state procedures, and in injunctions against state officials. Younger v. Harris, 401 U.S. 37 (1971), supports both propositions. Comity has also been extended in several cases. *See, e.g.*, Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

13. Abstention is based upon several factors: (1) the avoidance of unnecessarily deciding constitutional issues; (2) the avoidance of an injunction applied to state officials; and (3) the avoidance of useless litigation. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

14. Even where a constitutional violation is clear and intentional, and even where public values unanimously favor litigation, without injury-in-fact to the complainant there is no constitutional standing. *See supra* note 7.

15. When courts decide that an issue is not ripe, it means that either an injury-in-fact has not yet occurred or that the threat of it occurring is not yet real. Ripeness is an inherent problem in cases in which an injunction or declaratory judgment is sought, because both are anticipatory remedies. Significantly, ripeness determinations are often based on public factors, thus reflecting a public and not a private perspective. *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961). In *Poe*, it is unclear whether the ripeness question is constitutionally or policy based.

16. Mootness suggests that a dispute has become overripe and therefore is no longer real. However, as with ripeness, to some extent it may not be a constitutional doctrine. *See supra* note 15.

17. Although standing, ripeness, and mootness all have constitutional roots, the Court has a great deal of discretion in invoking them. Furthermore, the determinations are often policy based. *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961). In this case, Justice Frankfurter for the plurality, and Justice Harlan in dissent, disagreed on how the policy of ripeness should be applied to the particular facts. It should also be noted that the private factors of limitation can be overcome by exceptions. However, the exceptions are not well defined and often appear to be result oriented. For example, because intangible interests of almost unlimited variety qualify under the injury-in-fact test, the Court has a great deal of discretion in deciding standing issues. *See, e.g.*, United States v. SCRAP, 412 U.S. 669 (1973).

guishing between public and private remedies. It often appears that the remedy's characterization depends upon the pleadings. Requests for damages, for example, indicate a private remedy whereas an injunction or declaratory judgment could be classified as either public or private.[18] A class action suit suggests a public remedy, whereas a single plaintiff often prefers customized relief. A pattern and practice allegation also suggests a public remedy.[19] To a great degree, then, the plaintiff may control the remedy.

In *Scheuer v. Rhodes*,[20] the Supreme Court addressed a related question of whether a damage claim brought against a government employee was of a private or public nature. The Court concluded that the pleadings controlled, thus leaving the choice to the plaintiff.

Specificity by a plaintiff has both advantages and drawbacks. In *Regents of the University of California v. Bakke*,[21] for example, the plaintiff's strategy was to seek a limited private remedy and avoid a class action suit.[22] The strategy proved successful in that it allowed four of the Justices finding in Bakke's favor to decide the case narrowly.[23] However, in *De Funis v. Odegaard*,[24] the strategy to sue only on behalf of the plaintiff backfired. The Court was able to dodge the merits of the claim by interposing the mootness doctrine—a procedure that would not have been available had the plaintiff brought a class action suit.[25]

A plaintiff may be hesitant to be specific in pleading because the identity and scope of the constitutional wrong, the procedural require-

18. When an injunction or a declaratory judgment is sought against an unconstitutional governmental practice, it may take on both public and private dimensions. A plaintiff may seek specific redress and general relief simultaneously.

19. When an individual complains that an unconstitutional governmental practice is being applied to him repeatedly, this can be viewed as a pattern and practice situation. Usually, however, the pattern and practice challenged is directed to a wider audience. In Rizzo v. Goode, 423 U.S. 362 (1976), a pattern and practice challenge to Philadelphia police official policies failed because it was viewed by the Court as too public—too much oriented toward future police practices in the abstract and not enough oriented toward actual injuries to the plaintiffs.

20. 416 U.S. 232 (1974).

21. 438 U.S. 265 (1978).

22. *See* J. DREYFUSS & C. LAWRENCE III, THE BAKKE CASE 37, 195-96 (1979).

23. Justice Stevens, writing for himself, Chief Justice Burger, and Justices Stewart and Rehnquist, interpreted Title VI of the 1964 Civil Rights Act to prohibit exclusion of any person from a federally funded program because of race. For them, any broader question was out of order. 438 U.S. at 408-21 (Stevens, J., concurring and dissenting).

24. 416 U.S. 312 (1974).

25. The result in *DeFunis* was not predictable during the early stages of its planning. Moreover, the Court's finding of mootness did little to settle the issue. *See DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting). However, a few years later, the Court attempted to clarify the mootness question. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397-401 (1980).

ments, and the range of available remedies are often dependent on this step. However, approaching a case in its several alternatives has its own perils. A plaintiff, through nonspecificity, relinquishes both control and particularity to the court. In such instances, the court will determine on its own the public or private nature of the remedy. Thus, the dualism underlying constitutional remedies must be considered throughout all stages of constitutional litigation.[26]

The Constitution is neither careful nor consistent in its creation of rights.[27] Although the text of the Bill of Rights allows selected rights to be classified as private, it does not support a conclusion that all or the majority of rights stated there are private. On the contrary, the casual and inconsistent phrasing, the repeated use of the term "people,"[28] and the failure to designate a private right holder in the context of speech,[29] religion,[30] excessive bail,[31] and cruel and unusual punishment[32] suggests a public perspective for the litigation of these rights. Further, when dealing with remedies the Constitution is less supportive of private interests. With the exception of the "just compensation" mandate for eminent do-

26. In Warth v. Seldin, 422 U.S. 490 (1975), the plaintiffs included a very wide assortment of injured persons and groups, but the lower federal courts and the Supreme Court found that no one had standing. No matter how carefully a plaintiff structures and steers his case toward a private remedy, the courts may ultimately characterize it as public.

27. Within the Bill of Rights, the language used to identify the right holder varies from clause to clause, and includes "accused," "person," "people," and "owner." For instance, the Sixth Amendment reads "the accused shall enjoy the right . . . ," and all following rights are related to the "accused." "Person" is the key word in the Fifth Amendment. It is used twice and all rights are connected to this term. "People" is the only word used in more than one of the Amendments—the First, Second, Fourth, Ninth, and Tenth Amendments. The First, Second, and Fourth Amendments refer to the "right of the people." The Ninth Amendment speaks of "rights . . . retained by the people." The Tenth Amendment reserves certain "powers . . . to the people." In addition, "We the People . . ." begins the preamble to the Constitution. Finally, "Owner" appears in the Third Amendment.

28. The word "people" is ambiguous. By the term, the Framers could have intended it to mean: (1) like the word "persons," a plural of person; (2) persons of a selected kind, e.g., citizens; or (3) the public persons as in the notion "the people are sovereign," or "We the people." The Oxford English Dictionary establishes that in 1787, the word "people" already had so many meanings that no definitive single meaning can be identified. It is interesting to note that the Fourth Amendment could have easily substituted the phrase "every person" for "the people." This would have achieved consistency with the language of the Fifth Amendment except that the first part of the Fourth would still have been phrased affirmatively and the Fifth negatively.

29. Although the First Amendment refers to "people," the reference is limited to the "right . . . to assemble . . . ." When the Amendment speaks of speech, religion, and press it is phrased as a prohibition and one against Congress only.

30. *Id.*

31. The Eighth Amendment simply provides, "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

32. After prohibiting excessive bail, the Eighth Amendment then states, "nor cruel and unusual punishments inflicted." *Id.*

main, the document is almost silent.[33]

Based on common-law principles, it is likely that the Drafters presumed that constitutional rights and remedies were, for the most part, private.[34] Thus, the Drafters perceived no need to distinguish between public and private rights and remedies. The Supreme Court, as the referee for constitutional disputes, has made it clear that although public parameters are a relevant concern in private litigation under the Constitution, the bottom line is that constitutional rights and wrongs are private.[35]

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33. The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." Other remedy references include the prohibition against the suspension of habeas corpus. U.S. CONST. art. 1, § 9.

34. Although natural law, with its emphasis on individual rights, was losing its preeminence, in the late eighteenth century it was still the prevailing legal thought in the United States. Furthermore, Blackstone's theories were highly influential in the United States in 1787. According to Blackstone, individuals were endowed with three great rights: life, liberty, and property. These three rights were augmented by five "auxiliary subordinate rights" promulgated to protect the basic ones. Central importance was given to the right of every Englishman to apply to the courts for redress of injuries. BLACKSTONE, COMMENTARIES 70, 74-76 (Gavit ed. 1941). The four other rights which were to serve as barriers to protect the basic rights were: (1) the right of the Constitution (Parliament); (2) the right of limitations on the King's prerogative; (3) the right of petition for redress; and (4) the right of bearing arms. *Id.*

By 1787, the case for private rights in the United States was much stronger. By then the people were recognized as sovereign. Constitutional rights were thus not public rights of the people against themselves; rather, they were private rights of individuals against the people acting through their agents, governmental officials. "[P]ublic or political liberty . . . lost its significance . . . . The liberty . . . now emphasized was personal or private . . . ." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 609 (1969).

It is worth observing that even with right and remedy considered private, the Supreme Court had trouble from the beginning enforcing the private remedy on behalf of an individual against public institutions. In the famous case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court found the State of Georgia's conviction (and sentence of 4 years confinement) of Samuel Worcester to be unconstitutional. Felix Cohen reports what proceeded:

> It was of the decision in *Worcester v. Georgia* that President Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." As a matter of history, the State of Georgia, unsuccessful defendant in the case, never did carry out the Supreme Court's decision, and the "successful" plaintiff, a guest of the Cherokee Nation, continued to languish in a Georgia prison, under a Georgia law which, according to the Supreme Court decision, was unconstitutional.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), is an even earlier example of the Court's trouble enforcing private remedies against public agencies. In that case, enforcement was against a state court.

35. In most cases in which a plaintiff loses because of a public policy, the Supreme Court's point is not that the right or remedy is public only, but rather that the public policy has not been satisfied in the instance. The plaintiff is in effect told that he is the wrong person to complain, or he is too premature (or too late), or in the wrong court, or the remedy he has selected is too broad, misdirected, or irrelevant. Occasionally, however, a claimed constitutional right may vanish under a rubric such as "political question," where the right and the issue it creates are held to be nonjusticiable. What looked like a private right is not one.

From *Marbury v. Madison*[36] to *Bush v. Lucas*,[37] the Supreme Court has supported the general rule that for every legal wrong there is a legal remedy. Although this notion has survived long enough to have developed a specific framework, it still retains its original vagueness. It does not indicate whether the remedy for the person whose constitutional right has been violated is to be exclusively private, exclusively public, or a mix. Nor does it clarify what elements go into determining the scope of an appropriate legal[38] remedy. Analysis would be simplified if the notion of constitutional remedy were more closely related to the idea of constitutional wrong so that the remedial result were more or less automatic.[39]

In *Davis v. Passman*,[40] an individual sought damages for an alleged due process violation under the Fifth Amendment.[41] Justice Brennan, writing for five members of the Court, made an effort to distinguish between "right," "cause of action," "standing," and "relief." The opinion demonstrated that all four concepts are rooted in the same claim of injury for which the plaintiff was seeking redress.[42] It is thus natural to define one concept by reference to another. For example, in the 1974 companion cases of *Schlesinger v. Reservists Committee to Stop the War*[43] and *United States v. Richardson*,[44] Chief Justice Burger, writing for the Court, observed that a lack of standing indicated, in most cases, an absence of a right.[45] It has also been argued that the lack of a remedy may indicate the lack of a right.[46] At other times, however, the *Davis* analysis has prevailed, thus attaching to each concept a separate meaning.

Consequently, in a situation in which the plaintiff asserts third party rights, the inquiry into constitutional standing relates to injury of the

36. 5 U.S. (1 Cranch) 137, 162-63 (1803).

37. 462 U.S. 367, 373 (1983).

38. "Legal" as used in the phrase "legal remedy" is not meant to exclude equitable remedies. Rather the word is used to tie "legal right" to judicial remedies.

39. Simplification, however, would not necessarily improve the situation. An "automatic remedy" might lead to an inflexible, stultified approach. *See infra* notes 179, 185 and accompanying text.

40. 442 U.S. 228 (1979).

41. The plaintiff sought damages for alleged sex discrimination by Representative Passman when he discharged her from her job as an administrative aide.

42. *See Davis*, 442 U.S. at 240 n.18; *see generally id.* at 236-49.

43. 418 U.S. 208 (1974).

44. 418 U.S. 166 (1974).

45. *Richardson*, 418 U.S. at 177-78; *Schlesinger*, 418 U.S. at 225-26. The same point was reaffirmed in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 489 (1982). In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), a divided Court made a connection between standing and remedy. *See infra* notes 167-175 and accompanying text.

46. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

litigant;[47] the constitutional right violated, however, belongs to a third person.[48] Suppose, to carry this illustration a bit further, the third party requires only prospective relief—a declaration that the law is unconstitutional or an injunction to prevent future administration—but the plaintiff needs, in addition, compensation for past injury. Should only an injunction be granted, or should damages be granted as well? In other words, is injury-in-fact not only essential to standing but automatically a factor in determining the remedy; is injury-in-fact merely an essential procedural trigger and not relevant to the remedy determination; or is the scope of the remedy to be determined by policy considerations relevant to it, but which may or may not include the injury-in-fact?

The answers to these questions are not yet settled. If the plaintiff wins on the merits, due to a violation of a third party's constitutional right, perhaps the plaintiff's recovered remedy should not be greater than the third party's relief. On the other hand, the plaintiff, although relying upon a third party's right to win his own case, ought to be entitled to a remedy that satisfies his needs.[49]

This uncertainty suggests that right, standing, and cause of action, although serving as prerequisites to reaching the remedy issue, are not necessarily dispositive or even relevant to resolving remedial problems. This state of affairs reflects the law's continuing ambivalence toward constitutional litigation. Rights have a tendency to expand from private to public—to be seen as belonging to all. Procedures, on the other hand, retain their close allegiance to the private perspective. And remedies? They float free—as though the law did not know what to do with them.

B. Private Remedies on a Leash

1. Traditional Relief

Although it is fairly easy to plead a remedy in federal court, it is more difficult to get it.[50] This difficulty is due to the Court's maintenance of uncertain standards for obtaining each type of relief. Leaving aside both the immunity defenses[51] and the role of Congress in creating reme-

47. *See* Warth v. Seldin, 422 U.S. 490 (1975).

48. *See* Singleton v. Wulff, 428 U.S. 106 (1976).

49. Similarly, the exclusionary rule in criminal cases has a split personality. The current rationale supporting it is the public deterrence of police illegality; yet standing to complain is reserved to those with a private injury. *See* Rakas v. Illinois, 439 U.S. 128 (1978).

50. Federal Rule of Civil Procedure 8(a)(3) calls for the claim for relief to include "a demand for judgment for the relief to which [t]he [claimant] deems himself entitled." FED. R. CIV. P. 8(a)(3). For a discussion of what this means, see C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2662 (1983).

51. *See infra* notes 77-85 and accompanying text.

dies,[52] the Court has historically preferred the injunction to either damages or declaratory relief.[53] The Court has approved the use of damages so infrequently, that Justice Rehnquist in his dissent in *Carlson v. Green*,[54] noted that "[n]o . . . authority of federal courts to award damages for violations of constitutional rights had ever been recognized prior to *Bivens*."[55]

a. Injunction

The preferred status of the injunction has diminished in recent years because the Court has insisted that "irreparable injury" must be shown before an injunction could be issued.[56] In 1983, in *City of Los Angeles v. Lyons*,[57] the Court further curtailed the availability of injunctive relief. The Court denied an injunction because standing, for purposes of obtaining an injunction, could not be shown.[58] Moreover, the Court appeared to[59] increase the height of the "irreparable injury"[60] hurdle by adding a requirement of "great and immediate" harm to the standard

52. *See infra* notes 86-122 and accompanying text.

53. See *Ex parte* Young, 209 U.S. 123 (1908), in which the Court affirmed a federal injunction against a state attorney general. The Court, in discussing the propriety of the equitable injunction, aside from the eleventh amendment issue, found it preferable to either a state criminal action or civil penalty suit as a means of challenging the constitutionality of the state law. *See* Carlson v. Green, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting). Furthermore, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Court provided for federal district courts to use their equitable powers to remedy school segregation. Thus, *Swann* indicates that where the government has committed complex constitutional violations, only equitable remedies, including injunctions, are flexible enough to provide sufficient relief to those injured by the activity.

54. 446 U.S. 14 (1980).

55. *Id.* at 43 (Rehnquist, J., dissenting).

56. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 483-84 (1965). In *Dombrowski*, Justice Brennan, writing for the Court, traced the federal injunction back to the "fountainhead" case of *Ex parte* Young, 209 U.S. 123 (1908). He then discussed the gradual decline in its use. Prior to *Dombrowski*, "irreparable injury" was not a serious requirement, at least concerning injunctions against threatened prosecution. *See* Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979).

57. 461 U.S. 95 (1983).

58. Prior to *Lyons*, the Court had never determined standing by reference to the specific remedy. Standing, regardless of remedy, had been tied to the wrong.

59. "Appeared to" is a needed qualification for two reasons: (1) the part of the opinion containing the term "great and immediate" may be considered only dicta since the Court had earlier in the opinion concluded that the plaintiff had no standing; and (2) the context of the phrase is ambiguous enough to allow the Court in the future to disclaim that it was trying to change simple injunction requirements. *See* 461 U.S. at 112.

60. The Court failed to clarify the meaning of "irreparable injury" in *Lyons*. In fact, it avoided the question entirely. Thus, the meaning of the phrase in the constitutional litigation context remains unclear. Arguably, because constitutional rights are very important and yet of very uncertain value, each of them when violated presents an "irreparable injury." *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 7.4 (1973).

injunction requirements.[61]

b. Damages

The Court has also moved slowly in clarifying the extent of damage remedies. In *Carey v. Piphus*,[62] two students brought an action under 42 U.S.C. § 1983 against officials at their schools. The students asserted that they were suspended from school without procedural due process. The district court found that the students had been denied due process, but declined to award damages because the extent of their actual injury was too difficult to ascertain. The court of appeals reversed and remanded, noting that even if the plaintiffs could not show actual individualized injury, they would be entitled to recover substantial "nonpunitive" damages based upon the denial of due process.[63]

The Supreme Court in a startling opinion reversed the court of appeals. The Court held that regardless of whether or not the suspensions were justified, the plaintiff was entitled to a damage award for the constitutional violation. However, if it was determined that the suspensions were justified, the plaintiffs should recover "nominal damages not to exceed one dollar . . . ."[64]

Carey, however, left unanswered the question of how to measure the harm incurred by a constitutional wrong.[65] This problem is compounded by the dichotomy in distinguishing between procedural and substantive rights, the variety of protected rights, and by the Supreme Court's classification of certain constitutional rights as fundamental.[66]

In *Memphis Community School District v. Stachura*,[67] the Court confronted the issue of measuring constitutional wrongs. The majority flatly rejected the notion that damages could be based on the abstract

61. 461 U.S. at 112. The "great and immediate" language comes from the Court's *comity* cases that preclude federal courts from enjoining certain on-going state judicial proceedings.

62. 435 U.S. 247 (1978).

63. *Id.* at 252.

64. *Id.* at 268.

65. The Court in *Carey* addressed the issue of measuring damages. As an "appropriate starting point," the Court applied principles derived from the common law of torts. However, the Court was careful to note that in many instances, the application of tort damage principles to damages for constitutional violations were insufficient. *Id.* at 257-58. For example, the Court refused to equate procedural due process wrongs with defamation wrongs, and thus allow damages without proof of injury. The Court also acknowledged that the compensation rules can vary depending on the constitutional right infringed. *Id.* at 259, 264-65. Further, the Court recognized but refused to approve lower court decisions which based damages on a presumption of injury without actual proof in instances in which the rights violated included racial equality, voting, and fourth amendment privacy. *Id.* at 264.

66. The Court in *Carey* recognized but did not solve these problems.

67. 106 S. Ct. 2537 (1986).

value of a constitutional right. However, Justice Marshall's concurring opinion, joined by three other Justices, emphasized that the majority was not ruling out damages based solely upon a constitutional wrong. Instead, damages will only be recoverable when tied to a wrong actually suffered.[68] Another way of viewing the distinction is to say that private, but not public constitutional wrongs may be compensable.[69] To put it still differently and more in keeping with the approach taken in this Article, damages are available as a private remedy but not as a public one. The significance of both *Carey* and *Stachura* is not that the right violated is any less private but that the remedy should be customized so as to fit the wrong. Unfortunately, the Court views a constitutional wrong as if it were just another tort wrong. Instead of evaluating a wrong at zero because abstract, or at maximum one dollar, the Court could as easily conclude that a constitutional wrong—every constitutional wrong—is a substantial or significant or meaningful injury to the person affected. One factor that could provide specificity to the formula for damages would be the idea that the costs of litigation should be compensable. These could include not only the usual trial and attorney expenses but the costs associated with time, inconvenience, and mental stress of the plaintiff in carrying the burden of repairing a constitutional violation. After all, if only persons injured in fact can bring law suits to keep the governments within constitutional boundaries, some reason for the plaintiff to sue must exist.

c. Declaratory Relief

Constitutional litigants often seek relief in the form of a declaratory

68. If no compensable injury to a constitutional right is established, then damages are limited to traditional factors including "emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish." Hobson v. Wilson, 737 F.2d 1, 62 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2547 (1985). The concurring opinion in *Stachura* expressly approves *Hobson*. 106 S. Ct. 2537, 2547 (Marshall, J., concurring). The majority opinion cites *Hobson* twice in an approving manner but without an express commitment. 106 S. Ct. at 2541 n.5, 2544 n.13.

69. It remains unclear to what extent or in what situations, if any, the remedial law of the state in which the federal court is sitting should be relevant or determinative. The Court in *Carey* quoted language authorizing federal courts to look to the common law of the states where "necessary to furnish suitable remedies." Carey v. Piphus, 435 U.S. at 258 n.13 (citing 42 U.S.C. § 1988). The Court, however, did not use this section in its analysis. Furthermore, the footnote reference is inaccurate to the extent it suggests that the common law of the states act as a national norm to be consulted. The statute ties the common law to the state in which the federal court is sitting and limits it by stating that the applicable law is to be the "common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held . . . ." 42 U.S.C. § 1988 (1982).

judgment.[70] Because it is a statutory remedy,[71] it is theoretically free from the "at law" or "in equity" restrictions that delimit damages and injunctions.[72] Recently, however, Justice Rehnquist, writing for the Court, has hinted that "equitable considerations" may be vital in determining the propriety of a declaratory judgment.[73]

Even though its *sui generis* status, if it remains, would seem to give declaratory relief a favorable position among judicial remedies, the Court in *Steffel v. Thompson*[74] turned it into a "now you see it, now you don't" remedy. The declaratory judgment denied by the lower court in *Steffel* was reversed by the Supreme Court but given nonbinding effect.[75] Presumably this result was acceptable to Justice Brennan on the one hand, because he assumed that the states would routinely abide by such judg-

70. Although not a traditional remedy in the sense of lengthy historical use, declaratory relief can be traced back to the Middle Ages and then forward through the Scottish practice of "declarator" beginning around 1540. However, it is primarily a twentieth century device in the United States. The first seemingly effective statute in the United States was passed in 1915 in New Jersey. *See* E. BORCHARD, DECLARATORY JUDGMENTS 237-45 (1934).

71. 28 U.S.C. §§ 2201-2202 (1982).

72. Lower federal courts differ regarding the classification of declaratory judgments. As one court phrased it: "A declaratory judgment action cannot be termed as either inherently at law or in equity." Wallace v. Norman Indus., 467 F.2d 824, 827 (5th Cir. 1972). Probably most courts view declaratory judgment as "partially equitable," or "in the nature of equity," or "based on equity." Even disregarding its statutory base "[i]t is not, however, either strictly equitable or legal relief, and whatever its historical affinity with equity, the proceeding is special and sui generis, disregarding the distinctions between law and equity and the technical limitations of both." E. BORCHARD, *supra* note 70, at 172.

73. Green v. Mansour, 106 S. Ct. 423, 428 (1985).

74. 415 U.S. 452 (1974).

75. Justice Brennan writing for a "unanimous" Court and quoting his separate opinion in Perez v. Ledesma, 401 U.S. 82, 125 (1971), stated that "the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed . . . ." Steffel v. Thompson, 415 U.S. at 470. Intriguingly, Justice Brennan in quoting himself omitted the only footnote in *Perez* which accompanied the quote. In the *Perez* footnote, he quoted the Senate Report on the federal declaratory judgment law: "The declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights." Perez v. Ledesma, 401 U.S. 82, 125 n.16 (quoting S. REP No. 1005, 73d Cong., 2d Sess. 5 (1934)).

Although the opinion in *Steffel* appears to be unanimous (the only question is whether Justice White is "concurring" in the opinion as well as in the judgment), it is clearly not unanimous on the res judicata point. Three views are alive: (1) the majority's ambiguous position; (2) Justice White's view that "[a]t this writing at least . . ." the judgment is res judicata (Steffel v. Thompson, 415 U.S. at 477(White, J., concurring)); and (3) Justice Rehnquist's view that a federal declaratory judgment may be raised later in a state court "for whatever value it may prove to have." (*Id.* at 482 (Rehnquist, J., concurring)). Although Justice Rehnquist claims in a footnote to be expressing "no opinion" on the res judicata point, his position hardly qualifies as "no opinion." *Id.* at 482 n.3.

Justice White expressly notes that Professor Borchard anticipated that the declaratory judgment would be res judicata. *Id.* at 477 (White, J., concurring).

ments, and to Justice Rehnquist on the other hand, because he assumed that the states would freely ignore them.

The significance of the current status of declaratory relief is that the Court not only has interpreted the federal declaratory judgment statute to provide the judiciary with discretion rather than providing the litigant with a right, but also has been reluctant to let the federal courts use this discretion.[76]

Because of the Supreme Court's failure to define and delineate the rules of traditional remedies, the constitutional litigant seeking such relief faces a confusing and formidable situation. The common sense expectation that upon reaching the remedy stage in litigation, an appropriate remedy would automatically follow is not the law.

2. *Immunities*

A complainant injured as a result of a constitutional violation who seeks damages or monetary compensation[77] confronts a major hurdle in the form of immunity defenses. These defenses are available to both governments and their employees. Government employees, especially those in an executive or administrative capacity, only have a conditional immunity.[78] Although the Constitution for the most part is silent regarding immunities,[79] the Court has repeatedly endorsed the common-law immunity defenses.[80]

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76. *See* Green v. Mansour, 106 S. Ct. at 428-29.

77. In Edelman v. Jordan, 415 U.S. 651, 668 (1974), the monetary compensation was characterized as "equitable restitution." The Court treated it the same as damages. A distinction is drawn, however, between money for accrued wrongs and money for "prospective-compliance." Milliken v. Bradley, 433 U.S. 267, 289 (1977).

78. *See* Davis v. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

79. Article I of the United States Constitution protects members of Congress by providing that "for any Speech or Debate in either House, [the senators and representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. See Hutchinson v. Proxmire, 443 U.S. 111, 123-33 (1979), in which Chief Justice Burger summarizes the cases brought under that clause.

In Nixon v. Fitzgerald, 457 U.S. 731, 755-57 (1982), the Court read into the Constitution an absolute immunity from damages liability for the President acting within the "outer perimeter" of his office.

80. The Court has recently restated its position that immunities for legislative, judicial, and executive officers—at least in § 1983 cases—are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Tower v. Glover, 467 U.S. 914, 920 (1984) (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)). Sovereign immunity for the states, aside from the Eleventh Amendment, is also common-law based. Further, it has not fully protected the states from liability. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the state was held subject to suit in federal court. In Nevada v. Hall, 440 U.S. 410 (1979), the state was held subject to suit in another state's court. Furthermore, Article III of the United States Constitution authorizes suits in

Of course, the "sovereign" may always elect to waive its immunity; however, a waiver of sovereign immunity will rarely be implied.[81] More importantly, the fact that the plaintiff loses his case because of the immunity defense does not make the action by the government or its employee constitutional.

The Eleventh Amendment must also be considered along with the immunity defenses.[82] Although conceived as a limitation on the power of federal courts, it has been construed by the Supreme Court to function as a limitation on sovereign immunity.[83] To what extent the common-law sovereign immunity and the eleventh amendment sovereign immunity have merged is questionable.[84] However, the Court's policies of immunity have the effect, if not the purpose, of undercutting any priority

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federal court against states by other states and by the United States. What remains, aside from the Eleventh Amendment, is an immunity from suit in the state's own courts.

As for federal sovereign immunity, the Court announced the defense in United States v. McLemore, 45 U.S. 286 (1846), saying that "the government is not liable to be sued, except with its own consent, given by law." *Id.* at 288. Presumably this rule is based on the common law, because the Court takes its validity for granted. Nowhere in *McLemore* or other early cases supporting the rule is there a discussion of its source or scope.

81. Waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969) (federal government). This phrase was quoted again in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978) (Indian Tribe). As for waiver of a state's immunity under the Eleventh Amendment the Court has said: "[W]e will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

82. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. 11.

83. In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98 (1984), the Court noted that "the [Eleventh] Amendment's language overruled the particular result in *Chisholm*, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."

84. In the Special Master's Memorandum and Report on Preliminary Issues in *Arizona v. California* (dated August 28, 1979), the issue of intervention by Indian tribes was decided in favor of the tribes over sovereign immunity objections by the state parties. Footnote 29 of the memorandum is relevant:

> There is some uncertainty whether the States' immunity beyond the terms of the Eleventh Amendment is incorporated constitutionally into the amendment or rests solely on judicially protected sovereign immunity. *Compare Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 280 n.1 (1973), *and id.* at 290-94 (Marshall, J., concurring) *with id.* at 309-15 (Brennan, J., dissenting). *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972). The question does not affect this decision and the terms "Eleventh Amendment," "Eleventh Amendment immunity," and "sovereign immunity" are used interchangeably to refer to the concepts those terms embody.

that a private remedy of damages may have.[85]

3. *The Role of Congress*

Although Congress has a degree of authority over federal courts,[86] nothing in the Constitution authorizes Congress, once it grants authority to the courts, to regulate remedies essential to correct a constitutional wrong.[87] However, Congress, in authorizing actions in federal court for constitutional violations, often includes statutory remedial provisions.[88] In numerous cases, the Supreme Court has considered the legal significance of these statutory remedies.[89] The issue, however, is generally not framed as a remedy question; instead, the Court focuses on whether a claim may be brought for a constitutional violation absent any statute

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Id. at 17-18 n.29.

The Supreme Court agreed with the Special Master's position on intervention and stated in a footnote: "There are suggestions in the papers that the states' sovereign immunity is in some respect distinct from the immunity afforded by the Eleventh Amendment. Insofar as the question of intervention posed here is concerned, we appreciate no such difference." Arizona v. California, 460 U.S. 605, 614 n.4 (1983).

85. If both government and employee are protected from liability by immunity, the remedy of damages is illusory except to the degree that the immunity does not apply.

86. The Constitution expressly provides that Congress has the authority to create—or not create—federal courts. U.S. CONST. art III, § 1. Congress also has explicit authority in Article III to regulate and make exceptions to the Supreme Court's appellate jurisdiction. *Id.* at § 2.

87. Although from the power that Congress has to create lower federal courts one might assume that Congress may also regulate the jurisdictional and remedial scope of these courts, this result is not self-evident. The language of Article III states that "[t]he judicial Power of the United States shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish." One implication that could be drawn from this language is that although no lower federal courts need be established, if they are, then the judicial power of the United States vests—in short, the Constitution and not Congress is the source of the power. As one commentator has observed, however, "I am aware of no one who argues that article III jurisdiction automatically extends to lower federal courts upon their creation." Sager, *Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 n.22 (1981).

88. For example, the civil rights statutes passed following the Civil War illustrate a variety of approaches taken by Congress. While 42 U.S.C. §§ 1981 & 1982 (1982) contain no remedies at all, 42 U.S.C. § 1983 (1982) contains an open ended approach, authorizing "an action at law, suit in equity, or other proper proceeding for redress." Title 42 U.S.C. § 1985 (1982) allows only damages. The modern approach by Congress is to provide a greater variety of remedies, including governmental involvement in administrative monitoring of the statute and in initiating enforcement litigation in the courts. The Voting Rights Act of 1965 is an example. The Court upheld many of the Act's remedial provisions in South Carolina v. Katzenbach, 383 U.S. 301 (1966).

89. The issue is not whether the courts are free on constitutional or policy grounds to refuse to use a remedy authorized by Congress. Rather, it is whether the courts are bound by limited remedies sometimes specified by Congress in statutes authorizing suit for a constitutional violation.

authorizing a cause of action.[90]

While Congress may fail to include a constitutional right in its array of federal statutory protections, the omission does not preclude federal court jurisdiction. Several Supreme Court cases support the conclusion that given the validity of both jurisdiction and remedy, the substantive right may be based solely upon the Constitution.[91]

The primary issue facing the Court regarding the role of the legislature is whether damages can be given by a federal court when jurisdiction and a rights violation are found, but where Congress has been silent or ambiguous as to the remedy.[92] In *Bivens v. Six Unknown Federal Narcotics Agents*,[93] the Court allowed a federal action for damages on the alleged facts that agents of the Federal Bureau of Narcotics had engaged in an illegal search and seizure resulting in "great humiliation, embarrassment, and mental suffering . . . ."[94] Although no federal law covered the matter, the Court was not deterred. Instead, the Court took a step by step approach. First, it identified the Constitution as the sole source of the right;[95] second, it emphasized the individual's "personal" or private

90. Congressional failure to authorize a cause of action generally takes two forms. First, Congress may fail to provide a jurisdictional statute. The most obvious example of this is Congress' failure to authorize federal courts to hear federal questions prior to 1875. Second, it may fail to make the alleged constitutional violation a substantive wrong. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Procedurally, so long as some forum remains open and available, Congress may completely deny the federal trial forum to constitutional litigants. For example, the Emergency Price Control Act of 1942, creating the emergency price control scheme during World War II, closed all federal and state courts to actions challenging the law's validity, funneling them instead to a specialized court. Thus, Congress, in effect, removed from the federal courts the power to rule on the constitutionality of the legislation. The Supreme Court upheld this action in a series of cases. *See* Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943).

91. Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (Fourth Amendment). For a discussion of *Bivens* and the use of constitutionally based rights as a "sword," see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

92. The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. § 1331 (1976), the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, Bell v. Hood, 327 U.S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.

Bush v. Lucas, 462 U.S. 367, 374 (1983).

93. 403 U.S. 388 (1971).

94. *Id.* at 389-90.

95. *Id.* at 392-94.

injury rather than the public wrong;[96] and third, it empowered the federal courts to use any available remedy to repair the wrong committed.[97]

The question of congressional silence concerning remedy was not ignored by the Court in *Bivens*. Justice Brennan noted that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[98]

In *Davis v. Passman*,[99] decided eight years after *Bivens*, Justice Brennan again wrote for the Court majority in a five to four decision. He in essence repeated his three propositions from *Bivens*: (1) that the Fifth Amendment by itself is a sufficient basis for finding a right;[100] (2) that the equality demand of the Fifth Amendment is a "personal" right and not simply a standard for gauging the performance of public officials;[101] and (3) that damages are an appropriate "remedial mechanism normally available in the federal courts."[102]

Less than a year after *Davis*, the Court in *Carlson v. Green*[103] further clarified its view of the role of Congress. Unlike *Bivens* and *Davis*, *Carlson* concerned an injury that was arguably compensable under a recent amendment to the Federal Tort Claims Act ("FTCA");[104] thus, the Court was not dealing with congressional silence. The plaintiff, however, ignoring the statute, sought damages directly under the Eighth Amendment.[105]

Justice Brennan, in writing again for five members of the Court, did not posit that the FTCA was the appropriate law for the plaintiff to invoke, thereby removing the burden on the plaintiff to justify his failure to rely upon it. Instead, he noted that the right to sue under the Constitution must be given priority. The opinion further stressed that Congress did not intend for the FTCA to be a "substitute" remedy,[106] and that several factors present suggested that the *Bivens* remedy was more effec-

96. *Id.* at 394-95.

97. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. at 684).

98. *Id.* at 397.

99. 442 U.S. 228 (1979).

100. *Id.* at 244.

101. *Id.* at 235 n.10. At footnote 10, the Court added: "This right is personal; it is petitioner, after all, who must suffer the effects of such discrimination." *Id.*

102. *Id.* at 248 (quoting *Bivens*, 403 U.S. at 397).

103. 446 U.S. 14 (1980).

104. 28 U.S.C. § 2680(h) (1974).

105. Instead of suing the government under the FTCA, the plaintiff sued the public officials under the Constitution. Carlson v. Green, 446 U.S. at 16.

106. *Id.* at 18-20.

tive than the FTCA remedy.[107] The Court indicated that these circumstances supported its conclusion that Congress did not intend to oust direct action under the Constitution.[108]

Resistance in *Carlson* from four members of the Court was strong. Justice Powell,[109] in concurrence with the Court's judgment only, objected to placing the "threshold burden" on the defendant.[110] He also objected to the rigidity of requiring congressional intent to be "clothed" in the Court's "prescribed linguistic garb."[111] Finally, he objected to the implication in the majority's analysis that a right to sue was replacing judicial discretion concerning whether a plaintiff could sue directly under the Constitution.[112] This shift, he concluded, was "inconsistent with the Court's long-standing recognition that Congress is ultimately the appropriate body to create federal remedies."[113]

Chief Justice Burger's dissent in *Carlson* stated his view that the "adequacy" of a congressional remedy, and not the intent of Congress, was the proper test for determining whether a remedy framed directly under the Constitution survived.[114] Justice Rehnquist's dissent conceded that the federal courts have the power to "fashion equitable remedies,"[115] however he indicated that absent congressional authorization, the Court was powerless to create damages remedies in the face of congressional silence. Justice Rehnquist maintained that only Congress had the power to establish damages remedies for constitutional violations.[116]

In *Bush v. Lucas*,[117] the latest case in the series, the Supreme Court unanimously denied the damages action brought under the Constitution by a federal civil service employee alleging a violation of first amendment rights by his superior. The Court assumed that the civil service remedies established by Congress were not intended to be, and were not in fact,

107. The Court identified four factors to support its conclusion that the FTCA was not intended to preclude an action brought under the Constitution: (1) a *Bivens* remedy is a more effective deterrent; (2) punitive damages may be available under *Bivens*; (3) under *Bivens* a jury is available; and (4) *Bivens* liability is based on uniform federal law whereas FTCA liability is tied to state law. *Id.* at 20-23.

108. *Id.* at 19.

109. Joined by Justice Stewart.

110. 446 U.S. at 27 (Powell, J., concurring). With the FTCA amended to include a remedy, Justice Powell could not see the wisdom of requiring the defendant to refute the plaintiff's choice to go directly under the Constitution and ignore the statute.

111. *Id.*

112. *Id.* at 28.

113. *Id.* at 27.

114. *Id.* at 31 (Burger, C.J., dissenting).

115. *Id.* at 42 (Rehnquist, J., dissenting).

116. Justice Rehnquist made this point several times. *Id.* at 34, 38, 41, 44.

117. 462 U.S. 367 (1983).

equally effective as an individual damages remedy.[118] If an equally effective congressional remedy were the only basis for denying a constitutionally rooted remedy, the plaintiff would have prevailed. However, the Court, relying upon *Bivens*, recognized a second limitation to constitution-based actions. It phrased this limitation as "special factors counselling hesitation"[119] which arise when Congress has not spoken. The Court then analyzed the federal civil service system, and concluded that congressional involvement with it was so longstanding and comprehensive that the Court should defer to congressional decisionmaking in this special context. Thus, even though "existing remedies do not provide complete relief"[120] and one must add, "do not even provide equally effective relief," the special factors compelling inaction govern.

The Court's opinion can be interpreted as meaning that special factors, when present, will prevail regardless of the inadequacy of remedies. However, in a footnote the Court stated, "We need not reach the question whether the Constitution itself *requires* a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right . . . ."[121] It further added: "The existing civil service remedies for a demotion in retaliation for protected speech are clearly *constitutionally* adequate."[122] Thus, it appears possible that the Court in the future will find "special factors" only when constitutionally minimal damages, or perhaps other remedies, are also present.

As this summary of the role of Congress reveals, the current status of congressional power over constitutional remedies is murky and unsettled. Congress has a role to play, but what that role is and what the limits are remain unclear. The ideal suggested in this Article, that an appropriate private remedy should have top priority among remedies and should function as a due process minimum, is not reality. Consequently, it does not presently serve as a restriction on Congress.

C. A Private Remedy Overlooked: The Exclusionary Rule

The role of the exclusionary rule[123] as it relates to fourth amendment violations brings into focus the tension present in determining

118. *Id.* at 372-73.

119. *Id.* at 378 (quoting *Bivens*, 403 U.S. at 396).

120. *Id.* at 388.

121. *Id.* at 378 n.14 (emphasis added).

122. *Id.* (emphasis added).

123. In 1914, the Supreme Court decided Weeks v. United States, 232 U.S. 383 (1914), in which it applied the exclusionary rule remedy to federal prosecutions to bar evidence obtained in violation of the search and seizure safeguards of the Fourth Amendment.

whether a remedy should be public or private.[124] The traditional rationale for the exclusionary rule, announced in *Weeks v. United States*,[125] was to preserve the integrity of the federal courts.[126] The absence of any effective private remedy against police excesses compelled the Court to extend the exclusionary rule to the states in *Mapp v. Ohio*.[127]

In recent years, the question of exclusion has turned on whether or not the rule sufficiently deters law enforcement personnel. Chief Justice Burger has argued that the rule does not sufficiently deter, frequently allows the guilty to go free, and provides no remedy in situations where the search proves unsuccessful.[128]

The argument that the rule does not deter has been challenged by Justice Brennan. He argues that while the rule may lack specific deterrence value, it serves the purpose of general deterrence—deterrence of police practices at the department level rather that at the individual officer level.[129]

The significance of the debate concerning the exclusionary rule for the purposes of this Article is that until 1984 in *United States v. Leon*,[130] no member of the Court argued that exclusion was required to correct the state's violation of an individual's constitutional right. All the values previously discussed related only to public concerns. In his *Leon* dissent in support of the exclusionary rule, however, Justice Brennan makes a strong private rights argument.[131] Nevertheless, if exclusion is to con-

124. For example, United States v. Leon, 468 U.S. 897 (1984) and Segura v. United States, 468 U.S. 796 (1984), are the current Supreme Court battlefield.

125. 232 U.S. 383 (1914).

126. *Weeks* stressed that the Fourth Amendment applied to the courts as well as to the police and that the courts were not free to contribute to a violation. *Id.* at 391-92. Actually, *Weeks* was not an exclusionary rule case at all, but a return of evidence case. The Court's primary concern was enforcing the Fourth Amendment for the benefit of the individual. Somehow over the years, the significance of the case shifted from the individual to the court. *See* United States v. Calandra, 414 U.S. 338, 358-60 (1974) (Brennan, J., dissenting).

127. 367 U.S. 643, 660 (1961).

128. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. at 418 (Burger, C.J., dissenting).

129. *See* United States v. Peltier, 422 U.S. 531, 556 (1975) (Brennan, J., dissenting). The "good faith" inquiry which the Supreme Court has recently partially resolved also is directed at specific and not general deterrence. Although Justice White includes general deterrence references in his opinion in United States v. Leon, 468 U.S. at 918 (*e.g.*, "If exclusion . . . is to have any deterrent effect . . . it must alter the behavior of individual law enforcement officers or the policies of their departments"), elsewhere in his opinion he omits reference to general deterrence (*e.g.*, "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."). *Id.* at 921. In his dissent, Justice Brennan argues that the majority "overlooks" the general deterrence perspective. *Id.* at 953 (Brennan, J., dissenting).

130. 468 U.S. 897 (1984).

131. *Id.* at 943 (Brennan, J., dissenting):

tinue to endure, it will *not* be because priority has been granted it as a private remedy.[132]

D. A Private Remedy Unleashed—Almost

The Supreme Court's remedial approach in school desegregation illustrates a private remedy achieving and maintaining high priority status. In its second hearing in *Brown v. Board of Education,*[133] the Court began its remedial journey ambiguously with its now famous oxymoronic message that desegregation shall proceed with "all deliberate speed."[134] That the message was sent to a part of the nation reluctant to change made it clear—at least in retrospect—which of the contradictory options would be followed.[135] In addition, ambiguity also surrounded the identity of the parties deserving the remedy. Was *Brown* a class action suit?[136] If so, did this transform the nature of the remedy from private to public?[137]

The remedial situation languished until the Court in the late

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By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties. I share the view, expressed by Justice Stewart for the Court in *Faretta v. California*, 422 U.S. 806 (1975), that "[p]ersonal liberties are not rooted in the law of averages." *Id.* at 834. Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed 70 years ago in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.

132. The Court has recently reiterated its position that exclusion is not a private remedy. Kimmelman v. Morrison, 106 S. Ct. 2574, 2583-84 (1986).

133. 349 U.S. 294 (1955).

134. *Id.* at 301.

135. As one observer has phrased it, "Throughout the balance of the Fifties, the South interpreted 'all deliberate speed' to mean 'any conceivable delay.' " R. KLUGER, SIMPLE JUSTICE 752-53 (1977).

136. It should be recalled that *Brown* was decided before the 1966 modernization of Federal Rule of Civil Procedure 23, on class actions. In the first *Brown* opinion, Chief Justice Warren called the actions "class actions." 347 U.S. 483, 495 (1954). It has also been said that "[t]he school desegregation cases that led to the decision in *Brown* and virtually every school suit since then have been filed as class actions." Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505 n.115 (1976).

137. Because a constitutional violation is public, it is easy to think of the remedy as public. A class action also supports the public perspective. Both a public and private remedy would correct the situation, e.g., an illegally constructed educational system. If the remedy is viewed first as private, this would support desegregation in a smaller context, such as the school which the plaintiffs attend. Potts v. Flax, 313 F.2d 284 (5th Cir. 1963), illustrates these contending views.

1960's[138] and early 1970's changed the message to require immediate action plus an effective remedy—public or private. *Swann v. Charlotte-Mecklenburg Board of Education*[139] demonstrated a major effort by the Court to guide both courts and school boards. Chief Justice Burger's unanimous opinion was apparently an effort to walk the line between granting the lower federal courts full remedial authority and limiting the exercise of the courts' broad equity powers. Although a compromise opinion, *Swann* reads more easily as an expansive grant of authority to the courts. So long as the lower courts were redressing a wrong,[140] they were given the full array of equitable tools. No particular remedy or mixture was mandated but all were authorized.

Aside from a few detours,[141] the Court has maintained its position even though some remedial schemes have been so intrusive[142] that in other contexts they would have been stricken as violative of the Court's concern with a balanced federalism. The Court has continued to be steadfast, despite strong political pressure directed at stopping busing: congressional prohibition of the administrative use of busing[143] and congressional bills to deny the federal courts authority to use the remedy.[144] The Court's remedial position has also weathered both the empirical studies suggesting that blacks do as well or better educationally in separate school settings,[145] and the criticism that the courts should stress ed-

138. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

139. 402 U.S. 1 (1971).

140. The idea of "wrong" seemed to be the Supreme Court's control mechanism over lower courts. The lower courts were not to frame a remedy until a wrong had been found and the scope and duration of the remedy had been limited by the wrong.

141. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (the Court ordered the district court to relinquish jurisdiction over one function of the school district even though the district as a whole was not in full compliance); Milliken v. Bradley, 418 U.S. 717 (1974) (interdistrict remedy invalidated even though, arguably, the wrong was properly being corrected by the remedy).

142. *See* Milliken v. Bradley (Milliken II), 433 U.S. 267, 293 (1977) (Powell, J., concurring) (the State of Michigan was ordered to pay about $5,800,000 to the Detroit School Board).

143. 42 U.S.C. §§ 2000C-2006a (1982), passed in 1972, prohibits the use of federal funds to aid in any program for busing to desegregate.

144. For a discussion of the Nixon proposals to Congress, see R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS (1972). For a list of bills in the 1981, 97th Congress, see Sager, *supra* note 87, at 18 n.3.

145. A review of research findings through September, 1977, discovered a mixed bag. "It has taken us a long time to realize what probably should have been obvious in the first place—that moving children around like checkers will not in itself improve matters. . . . To date, because social scientists have studied the effect on children of 'mere desegregation,' their findings appear inconclusive." St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, in RACE AND SCHOOLING IN THE CITY 84, 98-99 (1981).

ucational quality and not desegregation.[146]

The reason that the private remedy has remained so durable in school desegregation cases may be due to the unique nature of racial segregation. Given the *Brown* Court's recognition that a civil war had been fought over racial issues, that the Constitution had been amended to correct that problem, and that constitutional equality did not mean comparability—as if the issue were one of mathematics—but sameness, it is understandable that the Court would persevere in its efforts to achieve its goal and not let the variety of public values stand in its way. The priority given to private remedies in school desegregation cases shows its feasibility.

One might argue, however, that the dispute among Justices of the Supreme Court regarding remedies in public law litigation concerns the intrusiveness of the public remedy and the illegitimacy and incompetence of federal courts to fashion it—and that there is no dispute over whether a private remedy should be given. This oversimplifies the situation for several reasons: First, private remedies can be very intrusive;[147] second, policies against the expansive public remedy can be stretched and applied to the point that not only the public but the private remedy as well is emasculated;[148] and third, similar to the second, policies against the public remedy may adversely affect the private remedy by being used to narrow wrongs,[149] tighten procedures,[150] and redefine rights.[151] Thus, that the private remedy remains not only alive but vigorous in school desegre-

146. *See* Bell, *supra* note 136, at 515-16. Columnist William Raspberry in his newspaper columns and Professor Thomas Sowell in his books and articles also make the argument. The "quality" of formal education is a policy, however, that is arguably irrelevant to the remedial goal of "equality" of persons.

147. An injunction on behalf of one individual, issued by a federal court against a state official ordering that official to cease a particular practice vis-à-vis the individual, is as intrusive as an order to stop the practice, period. It also can be more offensive because it may appear less objective and impartial than an across-the-board prohibition.

148. Because the remedies for a public remedy and a private remedy are the same, a policy based on public values that negates the public remedy may automatically negate the private remedy unless a conscious effort is made to distinguish the public and the private remedies and to accommodate both.

149. Milliken v. Bradley, 418 U.S. 717 (1974), is illustrative of the point. In *Milliken*, the wrong was narrowly defined so as to preclude an interdistrict remedy that would have intruded upon the structure of local government.

150. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court tightened procedures, making it more difficult for an individual trying to protect his rights to obtain an injunction.

151. Schall v. Martin, 467 U.S. 253 (1984), illustrates the point in the juvenile law context. The pretrial detention of a juvenile was upheld after the liberty interest of the child was redefined into almost oblivion by the Court's legal premise "that juveniles . . . are always in some form of custody." *Id.* at 260.

gation litigation is no mean accomplishment. None of this is to say, however, that the private remedy, either alone or in conjunction with the public remedy, has been completely successful.[152]

II. A Private Remedy Proposal: Perspective, Priority, and Process

A. Private Remedy Perspective

The Supreme Court should promote an approach to constitutional litigation that gives priority to private remedies. First, when an action presents both private and public remedy options, a court should satisfy the private remedial claims before the others. Second, public policies of limitation or deference should not be applied to the private remedy. Third, where a private remedy and a public remedy overlap, public policies of accommodation, not limitation, should be employed. While the public remedy may lie beyond the private remedy, current public policy concerns[153] should not affect the priority of the private remedy.

A problem arises in that it is sometimes difficult to distinguish between public and private remedies. In circumstances where a private remedy cannot be isolated, the "appropriate relief" variable would simply be added to the cauldron of public policies. However, a private remedy in any given case should not be readily surrendered.

Assuming for the moment the priority of the private remedy, an analysis from a private remedy perspective of two recurring remedial problems—the exclusionary rule and the injunction—can be instructive.

1. Exclusionary Rule

When a fourth amendment violation has occurred, a significant wrong has taken place. Given that a right of great magnitude has been violated, a remedy of comparable magnitude should be available. Furthermore, because the violation infringes upon an identifiable private interest, the available remedy should be private.

A complete remedy generally places the individual in the position in which he would have been had the violation not occurred. However, in the fourth amendment context, such a remedy is often not sensible. Returning to the victim of an illegal search and seizure the dead body, the

152. Impressions are suspect, and empirical data are difficult to obtain and become outdated quickly. For a fairly recent and optimistic account of busing in the Charlotte-Mecklenburg North Carolina school district, see Daniels, *In Defense of Busing*, N.Y. Times, April 17, 1983, at 34.

153. A "loophole" or "safety valve" use of public policy in conjunction with the private remedy must be conceded. *See infra* note 163 and accompanying text.

kilo of drugs, or the cache of hand grenades, in most circumstances would hardly be acceptable.[154] In some instances, however, a return of the seized items would present no problems and could be accomplished under current federal procedures.[155]

To the extent that return of the seized items is not feasible, the evidence should be completely excluded from official channels. Not only would this entail exclusion at trial but, contrary to current practices, exclusion from any official use. For example, it would mean exclusion from serving as a basis for questioning before a grand jury,[156] pressuring forth a guilty plea,[157] cross-examining a defendant,[158] or using as a lead to locate a witness.[159]

Although return and exclusion both seek to redress constitutional violations, they are ultimately imperfect remedies. They lack any value when the illegal search turns up nothing to seize;[160] and they are incomplete remedies because they do not address the intangible and more abstract yet real injuries that often manifest themselves as a result of an illegal search and seizure.[161] In many instances, money compensation will still be necessary to compensate a plaintiff for intangible injuries. Furthermore, when the police repeat the same illegal conduct, or the risk

154. While this is generally true, there are instances when the return might be appropriate. For example, suppose the body is seized from a mortuary, the drugs from a research scientist, or the grenades from a licensed manufacturer.

155. Federal Rule of Criminal Procedure 41(e) distinguishes exclusion from return. It provides in part: "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property on the ground that he is entitled to lawful possession of the property . . . . If the motion is granted the property shall be restored . . . ." FED. R. CRIM. P. 41(e). Federal Rules of Criminal Procedure 41(f) and 12 govern motions to suppress evidence.

156. United States v. Calandra, 414 U.S. 338 (1974) (permitted witness to be questioned about evidence unconstitutionally seized).

157. McMann v. Richardson, 397 U.S. 759 (1970) (coerced confession which may have motivated plea was not enough to get plea set aside). The Court has held that the invalidity of a confession or a search is not grounds for upsetting a guilty plea because "the conviction does not rest in any way on evidence that may have been improperly seized." Haring v. Prosise, 462 U.S. 306, 321 (1983). The plea process, especially with the assistance of counsel, is viewed as a distinct process free from the pressures of prior events. *Id.* However, the conclusion that the illegal evidence does not influence the guilty plea is a legal conclusion and not necessarily a factual one.

158. Walder v. United States, 347 U.S. 62 (1954) (permitted questioning the defendant regarding unlawfully seized evidence solely for the purpose of attacking the defendant's credibility).

159. United States v. Ceccolini, 435 U.S. 268 (1978) (permitted, but qualified).

160. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. at 411 (Burger, C.J., dissenting).

161. These include mental distress, embarrassment, humiliation, physical inconvenience and discomfort, and last but not least, injury to the right of privacy itself.

of repetition is high, injunctive relief may also be necessary to fully compensate the wronged party.

The public interests that support exclusion, such as judicial purity and police deterrence, hold no relevance when framing the private remedy. However, as previously mentioned, there will be instances where the public interest is so compelling that a compromise between the public and private remedies must be sought.[162] Therefore, a public interest escape valve must be built into the private remedial scheme. Although the safety valve may reduce the scope of the private remedy, its main function should be as a mechanism to allow adjustments among private remedies.[163]

2. *Injunction*

For a federal injunction against state or local officials to prevail, it must satisfy the requirements of equity,[164] abstention,[165] and ripeness.[166] In *City of Los Angeles v. Lyons*,[167] the Supreme Court has added another hurdle: standing with a comity twist.[168]

In *Lyons*, the plaintiff sought an injunction to prevent the Los Angeles police department from making further use of the "chokehold," a dangerous physical restraint.[169] The Supreme Court permitted the plain-

162. *See, e.g., supra* text accompanying note 154.

163. "Safety valve" means simply that certain public values must be considered relevant to the private remedy to keep it from being applied improperly. At the same time, these public values should not be used as a pretext to preclude the private remedy, but only as an aid to finding a workable private remedy alternative.

164. It is unclear why equity requirements, especially irreparable injury, derived from an outdated English procedure, should automatically be applied to twentieth century constitutional litigation in the United States. Equity may be a convenient source for doctrines that the Court could use to fashion a remedy under the related notion of comity. If this is true, then "irreparable injury" ought not be a requirement for an injunction against federal officers where comity does not apply; and it ought not be a requirement for a "statutory injunction" unless the Court finds that Congress intended comity factors to enter into the Court's selection of a remedy.

165. *See supra* note 13.

166. *See supra* note 15.

167. 461 U.S. 95 (1983).

168. *See supra* notes 57-61 and accompanying text. When an injunction is sought against a state official after a state judicial action has begun, comity precludes a federal court from issuing it—unless "great and immediate" irreparable injury is shown. *See* Younger v. Harris, 401 U.S. 37, 46 (1971).

169. Four Los Angeles police officers stopped the plaintiff for having a burned-out taillight. Without apparent reason one of the officers applied a chokehold which caused the plaintiff to blackout. Upon regaining consciousness he was ticketed and allowed to go. The plaintiff contended that the Los Angeles Police Department had a policy of allowing the chokehold even in routine cases and that it had caused serious injury and death in numerous instances.

tiff to pursue a claim in damages, but denied injunctive relief.[170] The injunction sought by the plaintiff asked the court to bar the practice completely as a per se unconstitutional technique;[171] however, the plaintiff also framed the request for relief in a private context.[172]

Despite countervailing policy considerations, a number of moderate injunction options were available to the Court.[173] For example, the Court might have fashioned a remedy that would have prohibited the "chokehold" in situations involving routine, minor traffic offenses.[174] In any event, the Court in fashioning an injunction should consider factors relevant to both the plaintiff and the particular situation occasioning the cause of action.[175]

In *Lyons* it was not possible to customize the injunction into a private remedy, detached from public considerations. Although some spillover into the public realm was not unexpected, this should not serve to foreclose the injunction altogether. The Court in *Lyons* could have fashioned a remedy that would have served both the public and private interests involved. For example, a prohibition against the chokehold in routine traffic stops would have guaranteed the plaintiff freedom from possible recurring episodes, while ensuring an accommodation with countervailing public values by producing a narrow but meaningful restriction on public authorities.

An alternative approach, which would also preserve the private remedy and protect public values, is to have the parties cooperate in pro-

170. The denial was based on a lack of standing: the plaintiff could not show that he would be subjected to the chokehold in the future—the possibility was too speculative.

171. The plaintiff also sought declaratory relief on this ground.

172. *See Lyons*, 461 U.S. at 98.

173. Public policy considerations against the use of the injunction seem to be rooted in federalism concerns—whether phrased as no standing, no irreparable injury, a hesitancy to order state officials to refrain from acting, fear that federal court orders will go unenforced, confidence in state institutions, especially the courts, to monitor state agents, or reluctance to interfere in state proceedings once underway.

174. Because a traffic offense can be committed without any awareness by the offender, and because the use of the chokehold is unpredictable in the hands of the stopping police officer, a private remedy that addresses the future worries and fears of the plaintiff ought to be available.

The Court, in the past, has not been sympathetic to claims challenging governmental responses that the Court deems uncertain and unclear, even though the plaintiff is "chilled" in the exercise of his rights. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972) (chill based on uncertain future use of army surveillance records; relief denied). However, the Court should distinguish cases in which the "chill" is combined with a potentially lethal governmental response.

175. The significance or minor character of a crime is sometimes relevant in determining the propriety of a police response. The Court recently has used this factor in deciding that a drunkeness offense was not serious enough to allow police to make an "exigency" entry into a dwelling without a warrant to arrest a suspect. Welsh v. Wisconsin, 466 U.S. 740 (1984). *See also supra* note 174.

ducing an acceptable consensual solution upon reaching the remedial stage in the litigation. However, the court would need to monitor the negotiations to assure that the private remedy will not be sacrificed.[176]

Because neither the private remedy of exclusion nor the private injunction works in a vacuum, they cannot be sustained by reference to exclusively private remedial concepts. Public policies always hover nearby and serve both to soften the private remedy[177] and to support extension of the private remedy into the public arena.[178] In both situations, however, it is the private perspective and the private remedy that should remain paramount.

Although one might insist that the Constitution mandates an effective judicial remedy for violations of individual rights, that is not the rigid position of this Article. It is preferable that the Supreme Court develop flexible constitutional remedial principles of "appropriate relief." The reason for not reading remedy into right[179] is that the pairing tends to become formalistic and the remedy automatic. Thus, as discussed above, a safety valve policy of limitation must in some instances come into play.[180]

In addition to the accommodation policies previously discussed, an accommodation of competing private interests must also be considered.[181] Affirmative action solutions often present the dilemma of the private remedy of one interest adversely affecting the private rights of another.[182] Similarly, other concerns may have to be accepted as an ac-

176. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1301 (1976); *see also* Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986). The Court rejected a remedy proposed by the offending party, pointing out that "the task of fashioning a proper remedy is one that should be performed by the District Court after all interested parties have had an opportunity to be heard." *Id.* at 1077 n.22. In that case, the Court added, "The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *Id.*

177. For example, as with the exclusionary rule.

178. For example, as with the injunction.

179. Actually the remedy should be tied to the wrong, with the right serving as a mere trigger. Even with this clarification, however, the wrong/remedy idea can become formal, leading to a result in which the remedy is considered a perfect fit and thus the maximum quantum of relief. Justice Rehnquist, dissenting in Hutto v. Finney, 437 U.S. 678, 710-15 (1978), elaborates this point.

180. *See supra* note 163 and accompanying text.

181. These cases sometimes are difficult because all of the clashing private interests have a preferred constitutional status. *See, e.g.*, United Jewish Organization v. Carey, 430 U.S. 144 (1977) (religion versus racial minority); Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973) (free press versus women's rights).

182. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Bakke* was a contest between a minority applicant and Mr. Bakke, a white applicant. Unless the Davis Medical School enlarged its entering class by one, somebody was left out. Whatever happened to the person Bakke displaced?

commodation. For example, where a remedy requires nonparty cooperation, public recalcitrance may have to be considered.[183]

This Article takes the position that a presumption should operate against all safety valve and accommodation factors.[184] Such a presumption would exclude from the remedies analysis policies such as administrative convenience, judicial restraint, separation of powers, and comity.[185]

B. The Role of the Court

In order for the private remedy priority to be implemented, the track leading to specific private relief must not be cluttered with public obstacles. These obstacles are now promoted by the Court's approach to traditional remedies, immunities, and the role of Congress.[186] In each category, the Court needs to modify current doctrines to ensure a priority for the private remedy.

1. Traditional Remedies

The Court should permit claimants to litigate an alleged constitutional wrong without being forced to specify a remedy at the outset. This suggestion is in keeping with both the common law[187] and Federal Rule 54,[188] as neither approach considers the remedy critical to the validity of the pleadings.

If this approach were adopted, several consequences would follow. First, the Court would have to relinquish its practice of using remedies as a means of pretermitting the issue of wrong. Further, it would force abandonment of procedural doctrines such as abstention and irreparable injury that are inextricably tied to specific remedies.[189] Similarly, the connection between standing and injunction created by the Court in *Ly-*

183. *See* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). Whether one takes an "interest balancing" or "rights maximizing" approach, the author argues, public recalcitrance cannot be ignored, and, at times, must be weighed as a practical factor in determining the most effective remedy. *Id.* at 608-09.

184. What this translates into is that initially as complete a private remedy as possible should be posited. Then, movements away from this because of policies of accommodation or necessity may be raised by the other party or the court. For the presumption to be maintained, however, a conservative approach to the selection and the use of public policies is required.

185. A potential problem that arises from this approach is that it may lead to the result where the private remedy becomes the maximum allowed, thus precluding the public remedy altogether.

186. *See supra* notes 50-122 and accompanying text.

187. *See* E. BORCHARD, *supra* note 70, at 162.

188. *See* FED. R. CIV. P. 54(c).

189. Both are current limitations on the federal injunction. *See supra* notes 13, 56 and accompanying text.

ons would have to be cut.[190] Second, declaratory judgments, as Congress intended, could be treated as real judgments.[191] Third, the questions regarding the priority of traditional remedies would be eliminated.[192]

2. *Immunities*

The immunity doctrines of the Supreme Court serve primarily as restrictions on the remedy of damages. The current doctrine protects both government and its employees from damage actions. Whether viewed under existing law, where the plaintiff may allege damages as a desired remedy, or under the suggested approach, in which the plaintiff would seek simply appropriate relief, the current across the board immunity structure effectively eliminates damages as a constitutional remedial alternative.

Aside from the Eleventh Amendment, the several immunity defenses are Supreme Court created and could be abolished or limited as the Court did in *Nevada v. Hall*,[193] and more recently in *Pulliam v. Allen*.[194] However, a policy determination by the Supreme Court leading to abolishment of common-law sovereign immunity would not serve to eliminate the restriction of the Eleventh Amendment.[195] Because most constitutional violations committed by states violate the Fourteenth Amendment, and because that Amendment was passed with the purpose of restricting states in their unconstitutional actions, it is a sound conclusion that the Eleventh Amendment does not restrict causes of action brought under the Fourteenth Amendment. The Supreme Court has supported this view where Congress, pursuant to section five of the Fourteenth Amendment, has made it clear that it wants that result.[196] Fur-

190. *See supra* notes 167-172 and accompanying text.

191. "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201 (1982).

192. When a constitutional injury has occurred, the relief should depend on what is an effective private remedy—be it damages, injunction, declaratory judgment, restitution, mandamus, the appointment of a special monitor, a creative remedy to fit the occasion, or some mix.

193. 440 U.S. 410 (1979) (federal law does not mandate that a state's sovereign immunity be recognized by the courts of another state).

194. 466 U.S. 522 (1984) (neither absolute nor conditional immunity protects judge from prospective injunction or award of attorney fees).

195. The Eleventh Amendment is phrased as a power restriction on the federal courts' jurisdiction to hear certain cases in which a state is a party defendant. It has been construed by the Supreme Court, however, to be only a sovereign immunity restriction. The effect is to constitutionalize the common law immunity. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 49-55 (3d ed. 1986).

196. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In this case, the Court held that a damage action in federal court against a state, brought under Title VII of the Civil Rights Act of 1964, did not violate the Eleventh Amendment. "[T]he Eleventh Amendment . . . [is] necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456.

thermore, commentators have argued—and it is now accepted by four members of the Supreme Court—that the Eleventh Amendment was intended to preclude actions against states in federal court only in diversity situations, and not in actions based on federal questions.[197]

The Supreme Court thus should remove common law immunities from public officials and from the federal government, and it should limit the scope of the eleventh amendment protection of state government. The goal should be to place the ultimate financial burden on government[198] except in rare instances, for example, where the public official is acting clearly beyond his office or in deliberate violation of another person's rights. Sovereign immunity, in addition to being a misnomer,[199] is not a concept whose validity is self-evident. Why should the representatives or agents of the sovereign have a defense when sued by a member of the sovereign? Of course, whenever government is required to pay damages it uses the sovereign's resources. The question then becomes: Did the people intend to prevent a person from recovering financial reimbursement from them for the constitutional excesses committed by their agent? Historically, even under a regime where a king was sovereign, evidence suggests that the sovereign was not immune from damages actions.[200] Sovereign immunity should be abolished so that courts can use damages where necessary to provide an appropriate private remedy.

3. *Role of Congress*

If the courts are to have the responsibility of fashioning "appropriate relief" for private constitutional injuries, then it is important that Congress not be allowed to limit available remedial options. Thus, the

197. *See* Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUS. L. REV. 1 (1967); see also the dissent of Justices Brennan, Marshall, Blackmun, and Stevens in Green v. Mansour, 106 S. Ct. at 429-32.

198. *See* P. SCHUCK, SUING GOVERNMENT 184 (1983) ("The remedial system of the future should look to an expanded governmental liability for damages as its first and basic line of defense against public torts.").

199. In this country the people are sovereign, not their governments or the persons who make the governments function. The uniqueness and importance of this concept is discussed in G. WOOD, *supra* note 34, at 593-615.

200. That well-known phrase "the king can do no wrong" has at least two meanings: (1) the king is above the law and cannot be held to wrongdoing by traditional legal norms; and (2) the king is the perfect embodiment of the law. To the extent that he should on occasion fall below the standard, a remedy will be given to bring the king back to perfection. The "petition of right" procedure for suing the king reflects both positions—that traditional procedures will not suffice and that ultimately the sovereign will pay for his illegalities—even though his consent, whether actual or fictional, must be obtained. *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-5 (1963); P. SCHUCK, *supra* note 198, at 30-32.

position stated by Justice Powell that "Congress is ultimately the appropriate body to create federal remedies,"[201] however valid when applied to a Court-Congress dispute over remedies for the protection of nonconstitutional federal rights, and even when applied to public remedies for protecting constitutional rights, ought not be applicable to private remedies for constitutional violations. The Supreme Court has not decided any cases that would clearly preclude the adoption of the proposal made in this Article—that constitutional private remedies be protected from Congress' powers to dilute. However, the Court has shown a deference to the legislature that might be considered preclusive. For example, in *Bivens* the Court acknowledged that Congress had neither "explicit[ly]" denied a damages remedy nor created an "equally effective"[202] alternative remedy. In *Carlson,*[203] the Court stressed the intent of Congress in creating a "substitute" remedy.[204] Further, in 1983, in *Bush v. Lucas,*[205] the Court actually denied a damages action brought under the Constitution because "special factors counsel[ed] hesitation."[206]

All three cases, *Bivens*, *Carlson*, and *Bush*, show support of a strong congressional role. In *Bush*, however, the Court left the door open for a possible judicial check on Congress. In a footnote the Court noted, "We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right . . . ."[207] The Court, however, finally decided that the congressional civil service remedies were "clearly constitutionally adequate."[208]

The Court needs to rethink the role of Congress concerning private remedies for constitutional wrongs. Ideally, the Court should protect remedies from congressional restrictions—whether they take the form of jurisdictional, substantive right, or remedy limitation. For example, if the Court held that an individual whose constitutional right has been violated is constitutionally entitled to appropriate relief, congressional options would be automatically limited. At the same time, the dichotomy between private and public would make it clear that in the area of public remedies for constitutional wrongs, Congress' role would probably

201. Carlson v. Green, 446 U.S. 14, 27 (1980) (Powell, J., concurring).

202. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971).

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

204. *Id.* at 18.

205. 462 U.S. 367 (1983).

206. *Id.* at 378.

207. *Id.* at 378 n.14.

208. *Id.*

preempt the courts[209] whereas the Court may preempt Congress to some degree in the private remedial context.

The suggested limitation on Congress is only directed to its power to reduce private remedies below a due process minimum of appropriate relief. It is conceivable, therefore, that Congress could legislate appropriate relief in such a way that the Supreme Court would defer to congressional judgment in establishing an orderly remedial package. Also, nothing would preclude Congress from enhancing remedial options by making available to courts remedies not traditionally created or administered by courts. Of course, any remedial scheme[210] created by Congress could be rescinded by Congress, but the courts' residual constitutionally based power to utilize judicial remedies to achieve the minimum goal would remain.

C. The Advantages of the Private Remedy Priority

The proposal suggested by this Article has three primary advantages. First, a remedies perspective focusing on private remedies gives the injured person his or her due compensation. From the individual's perspective, it makes sense to provide an effective judicial remedy to correct the constitutional wrong done by the state. This merely comports with the individual's probable and reasonable expectations. Private redress also encourages the notion that the legal system is fair and just. It reminds all of us that no person is so insignificant that his or her constitutional rights may be ignored by the governments of the United States.[211]

The second advantage to the proposal is that it will make the discretionary remedial decisions of trial courts more manageable than when

209. If the public remedy, like the private, were found to be based on the Constitution, this would serve to limit Congress.

210. For example, an elaborate administrative-judicial system of remedies.

211. *See, e.g.*, Thompson v. Louisville, 362 U.S. 199 (1960). The holding of *Thompson*, that due process is violated where a criminal conviction is had without any evidence of guilt, is hardly remarkable. However, certain other aspects of the case are worth recalling. The defendant was convicted in the police court in Louisville, Kentucky, of loitering by solo dancing a slow shuffle in a local cafe, and he was fined $10. Because fines of less than $20 were not reviewable in any Kentucky court, he appealed directly to the only court open to him, the United States Supreme Court. The Justices not only listened to his story but unanimously reversed his conviction. Although the case is unusual—generally a person who claims that he or she was injured by an unconstitutional governmental decision and who believes that he or she will take the case "all the way to the Supreme Court," is not being realistic— such beliefs are valuable as a symbol of faith. Furthermore, reality may not be that far removed because the chances are fair that some appellate court will hear the complaint and consider the constitutional challenge.

judges are faced with what has been called the "non-legal polycentric"[212] variables which are so often present in public institution-type remedial situations. Although a request for "appropriate relief" enlarges the judge's remedial choices as compared to a request for a specific remedy, it reduces discretion by focusing on the private remedy and omitting public remedies and their affirmative and negative public policies.[213]

Related to the second advantage is a third. If a private remedy is given, public remedies in that case or in future cases may be unnecessary. The logic is similar to the Supreme Court's stance in allowing declaratory judgments more readily than injunctions. If the former is effective, the latter, a more intrusive remedy, may never be needed. The private remedy solution, if successful, sidesteps the criticisms that courts lack both competence and legitimacy to issue wide ranging public remedies.

Conclusion

This Article has tried to isolate and highlight the private interest in constitutional litigation. It has argued that for constitutional wrongs, private injuries should be repaired before public remedies and their attendant difficulties are faced. It has been suggested that a private remedy perspective be adopted, a priority principle be established, and a due process minimum standard be devised. To accomplish these goals, this Article has suggested that: (1) pleading requirements be relaxed to an allegation of simple "appropriate relief;" (2) there be no priority among traditional remedies; (3) Congress' remedial role be reidentified and redefined so that it not be permitted to reduce the range of available remedial options needed by courts; and (4) government "sovereign" immunity be abolished.

The advantages of these changes include justice to the individual, control over judicial remedial discretion, and the possibility of avoiding or minimizing the use of the public remedy.

212. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-49 (1982).

213. With public policies made irrelevant to the private remedy, the Supreme Court may be more inclined to use them in the process of creating rights. Logically this is where they belong. Also, public visibility would be improved. Thus the criminal law debate on the exclusionary rule ought not be on the excessiveness of the remedy but on the excessiveness of the right.