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Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy

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One of the legacies of *Brown v. Board of Education* is its endorsement of affirmative remedial action to enforce constitutional rights.¹ In *Brown I* and *Brown II*, the United States Supreme Court rejected mere declaratory or prohibitory relief in favor of a mandatory injunction that would compel the constitutionally-required change.² Disputes over the parameters of this active remedial power and compliance with the ordered remedies have dominated the ensuing decades of post-*Brown* school desegregation cases.³ These enforcement disputes have overshadowed the importance of *Brown*’s establishment of a remedial norm embracing affirmative judicial action to provide meaningful relief. This article seeks to salvage that remedial norm by grounding it in the Due Process Clause of the Fourteenth Amendment. Arguing that the right to a remedy is a fundamental right, this article suggests that a strict scrutiny analysis must be used to justify the denial of a remedy.


² *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); *Brown v. Board of Education*, 349 U.S. 294, 299, 301 (1955) (rejecting a remedy that would simply prohibit the racial assignment of students in the schools and requiring the affirmative "transition to a system of public education freed of racial discrimination" "with all deliberate speed.").

Disputes over remedies provide a convenient way for dissenters to resist conformance with legal guarantees. Courts can declare rights, but then default in the remedy to avoid a politically unpopular result. The same pull and tug of Brown’s remedial norm seen in the desegregation cases is present today in the school funding cases. While plaintiffs have been generally successful in these cases challenging the financial disparities between poor and rich school districts, “[w]inning the case has not been the same as winning the remedy.”

Defendants continue to balk at declarations of unconstitutional behavior, and courts struggle with the proper scope of their remedial power. One important consequence of anchoring Brown’s remedial norm in the Due Process Clause would be to counter situations like that of the school funding cases where courts have omitted the issuance of meaningful remedies.

A case in point is the saga of DeRolph v. State of Ohio. In 1997, the Ohio Supreme Court found that the state’s system of funding public schools primarily on the basis of local property taxes violated the Ohio Constitution’s guarantee of a “thorough and efficient education system.” To address the systemic violation, the Ohio court issued an affirmative, structural

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4 Frank H. Easterbrook, The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies, 14 HARV. J.L. & PUB. POL’Y 103 (1991) (“Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements.”); Gewirtz, supra note 1, at 588 (“Criticism of a remedy, therefore, may reflect criticism of the underlying right.”).

5 See Molly McUsic, The Future of Brown v. Board of Education: Economic Integration of the Public Schools, 117 HARV. L. REV. 1334, 1335 (2004) (discussing the school funding cases and efforts to equalize education spending as the “cousins” or “indirect descendants” of Brown); Quentin A. Palfrey, The State Judiciary’s Role in Fulfilling Brown’s Promise, 8 MICH. J. RACE & L. 1 (2002) (applying the lessons of the past five decades of education reform litigation since Brown to third wave school funding cases based on state constitutional provisions).

6 McUsic, supra note 5, at 1347.

7 See Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326 (N.Y. 2003) (“[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them. Surely there is a remedy more promising, and ultimately less entangling for the courts, than simply directing the parties to eliminate deficiencies, as the State would have us do.”); e.g., Tennessee Small School Systems v. McWherter, 91 S.W.3d 232, 233 (Tenn. 2002); DeRolph v. Ohio, 754 N.E.2d 1184 (Ohio 2001); Abbott v. Burke, 575 A.2d 359, 385-91 (N.J. 1990); Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989).

8 DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997) (DeRolph I); DeRolph v. Ohio, 678 N.E.2d 886 (Ohio 1997); DeRolph v. Ohio, 728 N.E.2d 993 (Ohio 2000) (DeRolph II); DeRolph v. Ohio, 754 N.E.2d 1184 (Ohio 2001) (DeRolph III); DeRolph v. Ohio, 758 N.E.2d 1113 (Ohio 2001); DeRolph v. Ohio, 780 N.E.2d 529 (Ohio 2002) (DeRolph IV); State ex rel. State of Ohio v. Lewis, 789 N.E.2d 195 (Ohio 2003) (DeRolph V).

9 DeRolph I, 677 N.E.2d at 747; OH. CONST. ART. VI, § 2 (1851).
injunction requiring the General Assembly to “fix the system” and undergo a “complete systematic overhaul” to “create an entirely new school financing system” consistent with the Ohio Constitution.\(^\text{10}\) In a second 2000 decision, the court clarified the meaning of a “thorough and efficient” education system and repeated its injunctive command that the state legislature undertake a “complete systematic overhaul” of the school funding system.\(^\text{11}\) The State of Ohio, however, failed to respond to the judicial order. In frustration, the Ohio Supreme Court subsequently commanded specific funding levels, and when that failed, referred the case to mediation.\(^\text{12}\) When mediation failed, the Ohio Supreme Court in 2002 reaffirmed its general structural injunction:

> The General Assembly has not focused on the core constitutional directive of DeRolph I: “a complete systematic overhaul” of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient.\(^\text{13}\)

Then in 2003, the Ohio Supreme Court abruptly issued a writ of prohibition preventing the trial court from enforcing the injunctive decrees.\(^\text{14}\) After twelve years of litigation and six years of ordered and expected systemic relief, the Ohio court simply abandoned all remedial mechanisms needed to effectuate the state’s actual compliance with the constitution.

Thus, it may be true, as others have argued that since the time of Brown, institutional defendants have won the remedial battle.\(^\text{15}\) Defendants have learned that delay and defiance of

\(^{10}\) DeRolph I, 677 N.E.2d at 747.
\(^{11}\) DeRolph II, 728 N.E.2d at 993.
\(^{13}\) DeRolph IV, 780 N.E.2d at 529.
\(^{14}\) DeRolph V, 789 N.E.2d 195.
court orders work. The U.S. Supreme Court has adopted a standard for ordering injunctive relief that significantly defers to defendant wrongdoers at the plaintiffs’ expense.\(^\text{16}\) And epithets of “activist courts” and “judicial legislation” have colored the existing scholarship and portrayed affirmative structural remedies as an illegitimate and excessive use of judicial power.\(^\text{17}\)

This essay attempts to swing the pendulum in the other direction by suggesting that remedial action like that of \textit{Brown} and its progeny is not only acceptable, but indeed, required judicial action. It argues that a remedy is more than a legal maxim. Rather, this essay argues that the right to a meaningful remedy is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.\(^\text{18}\) Stated simply: \textit{Ubi jus, ibi remedium}. Where there’s a right, there must be a remedy.\(^\text{19}\)

\section{The Right to a Remedy is a Fundamental Right.}

The due process guarantees in the federal constitution protect fundamental rights against arbitrary abridgement.\(^\text{20}\) The right to a remedy is one of these fundamental rights historically recognized in our legal system as central to the concept of ordered liberty.\(^\text{21}\) “The principle that

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  \item [\textit{Court Judges,} 81 N.C. L. REV. 1623 (2003); Wendy Parker, \textit{The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities,} 50 HASTINGS L. J. 475 (1999).]
  \item [\textit{Parker, Public Law Remedies, supra note 15, at 475; Parker, School Desegregation Judges, supra note 15, at 1623.}]
  \item [\textit{E.g. John Choon Yoo, Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts,} 84 CALIF. L. REV. 1121 (1996) (arguing that structural and prophylactic injunctions violate principles of judicial restraint); Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) (criticizing the imposition a “Court-made code” upon Congress and the states).]
  \item [\textit{I presented this argument to the United States Supreme Court in an amicus brief written in support of certiorari in the Ohio school funding case of DeRolph v. Ohio. Brief of Amici Curia Ohio School Board Assoc., et. al., in Support of Petitioners, DeRolph v. Ohio, No. 03-245 (filed Sept. 11, 2003), cert. denied, (Oct. 20, 2003).}]
  \item [\textit{3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND} 23 (1768).]
  \item [\textit{Troxel v. Granville,} 530 U.S. 57, 65 (2000) (“The Fourteenth Amendment provides that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.”) (citations omitted).]
  \item [\textit{Cf. Washington v. Glucksberg,} 521 U.S. 702, 720-21 (1997) (stating that Supreme Court identifies fundamental rights based on whether the right has been historically recognized or is central to the concept of ordered liberty).]
\end{itemize}
rights must have remedies is ancient and venerable. In 1703, the right to a remedy was
expressly recognized in Anglo-American law. In *Ashby v. White*, the Chief Justice of the King’s
Bench stated:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it,
and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain
thing to imagine a right without a remedy; for . . . want of right and want of remedy are
reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he
loses his right.23

Similarly, the United States Supreme Court from its earliest time has recognized the
bedrock principle that deprivations of law require remedies. In *Marbury v. Madison*, Chief
Justice Marshall endorsed the common law requirement mandating a remedy for every wrong:

It is a general and indisputable rule, that where there is a legal right, there is also a legal
remedy by suit or action at law, whenever that right is invaded. . . . For it is a settled and
invariable principle in the laws of England, that every right, when withheld, must have a
remedy, and every injury its proper redress.24

As the *Marbury* Court acknowledged, the right to a remedy is a core component of ordered
liberty:

The very essence of civil liberty certainly consists in the right of every individual to
claim the protection of the laws, whenever he receives an injury. One of the first duties
of government is to afford that protection. . . . The government of the United States has
been emphatically termed a government of laws, and not of men. It will certainly cease
to deserve this high appellation, if the laws furnish no remedy for the violation of a
vested legal right.25

Additional support for the historical presence of the right to a remedy is found in the state
constitutions of three fourths of the states which contain express remedial guarantees.26 These

(2001); see Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 689-90
(2001) (explaining that the notion of a remedy as a necessary part of any legal substantive right is not a new idea).
24 5 U.S. (1 Cranch) 137, 163-66 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23).
25 *Id.* at 161, 163; see also United States v. Loughrey, 172 U.S. 206 (1898) (“The maximum ‘ubi jus, ibi remedum,’
lies at the very foundation of all systems of law.”).
guarantees requiring the right to a remedy in open court derive from Lord Coke’s interpretation of the Magna Carta.\textsuperscript{27} First appearing in the late 1700s, the state constitutional rights to a remedy were adopted to ensure the independence of the judiciary against corruption and control by the other political branches.\textsuperscript{28} For example, in Ohio, the right to a remedy is a fundamental right guaranteed by the state constitution.\textsuperscript{29} The Ohio Constitution provides: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”\textsuperscript{30} Ohio, like other states, has interpreted this provision to require among other things, a “meaningful remedy.”\textsuperscript{31}

Furthermore, even assuming that the right to a remedy has not been historically recognized, it is a fundamental right that should be newly identified. Remedies perform two critical functions in the law: they define abstract rights and enforce otherwise intangible rights.\textsuperscript{32} Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees.\textsuperscript{33} For example, in the school desegregation cases, the right was the right of school students to be given equal protection of the law.\textsuperscript{34} The ordered remedies

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\textsuperscript{27} David Schuman, \textit{The Right to a Remedy}, 65 Temp. L. Rev. 1197, 1199 (1992); Phillips, \textit{supra} note 26, at 1320.
\textsuperscript{29} OH. CONST. ART. I § 16.
\textsuperscript{30} Id. (adopted in current form in 1851 based on 1802 predecessor).
\textsuperscript{31} Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994) (interpreting constitutional guarantee as encompassing the fundamental right to a “meaningful remedy” that provides satisfaction for injuries sustained); Gaines v. Pre-Term Cleveland, Inc., 514 N.E.2d 709, 716 (1987) (“Denial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse.”).
\textsuperscript{32} Fiss, \textit{Justice, supra} note 1; Daryl Levinson, \textit{Rights Essentialism and Remedial Equilibration}, 99 Colum. L. Rev. 857, 885-97 (1999); Gewirtz, \textit{supra} note 1, at 587 (stating that remedies generally “give meaning to ideals” in order that they be “effective in the real world”).
\textsuperscript{33} Gewirtz, \textit{supra} note 1, at 587; Thomas, \textit{Remedial Rights, supra} note 22.
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defined this right by providing meaningful contours to the right by prohibiting the racial assignment of students, requiring integrated schools, and redressing realities causally related to segregation.

Without remedies, rights are mere ideals, promises, or pronouncements that may or may not be followed. As Justice Holmes expressed, “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp.” Like manners, rights simply become something that one should do, but not something that one is compelled to do.

The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something a legal rather than moral or natural right. As expressed in the Federalist Papers, the definition of a claim as a “legal” right depends upon the availability of this enforcement:

It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions of commands which pretend to be laws will, in fact amount to nothing more than advice or recommendation.

A remedy is thus the integral part of each right that is ultimately necessary to the effectuation of the rule of law. For without a remedy, judicial decisions are merely advisory opinions,

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37 These realities include causal contributors of segregation redressed by prophylactic measures and causal consequences redressed by reparative injunctions. E.g., Swann, 402 U.S. at 1 (remediing housing segregation contributing to segregation by ordering quotas, busing, and gerrymandering); Milliken v. Bradley, 433 U.S. 267 (1977) (remediing educational deficiencies caused by segregation); see Levinson, supra note 32, at 890 (describing how prophylactic remedies in school desegregation context defined right against de jure segregation to include right against de facto segregation); see Tracy A. Thomas, The Prophylactic Remedy, 52 BUFFALO L. REV. ___ (manuscript at 64-66 (forthcoming 2004) (describing how prophylactic remedies respond to the definitional need to translate abstract rights).
38 Zeigler, Rights Require Remedies, supra note 26, at 678.
41 THE FEDERALIST NO. 84, AT 110 (A. Hamilton).
hypothetical undertakings with no practical effect. Without remedies, the law simply has no force in society. Individuals need not conform their behavior and established rights may simply be ignored.

The ultimate danger from court action that denies meaningful relief is that rights will be effectively nullified. Our judicial system – both federal and state – is premised on the universally-accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law. “The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium.* Not that it be a mere ‘favor to be granted or withheld by any litigant.’” The enforcement component of a remedy is its critical aspect that distinguishes it from an idea and actualizes the right in a tangible manner. As the Supreme Court stated in the 1838 case of *Kendall v. United States:*

> The power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.

Neutralizing a right by eliminating its remedy and converting it into a mere description of favored behavior effectively nullifies the attendant right and deprives the courts of the ability to protect our legal rights.

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42 Thomas, *Remedial Rights, supra* note 22, at 659-60.
43 *DeRolph II,* 728 N.E.2d at 1002 (“[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.”).
44 *Florida v. Georgia,* 58 U.S. 478 (1854); *see also* Thomas, *Remedial Rights, supra* note 22, at 687-94.
II. **Supreme Court Endorsement of the Due Process Right to a Remedy.**

This normative description of the equitable principle of *ubi jus, ibi remedium* finds doctrinal grounding that elevates it above a mere maxim to the status of a legal entitlement. The Due Process Clause of the Fourteenth Amendment provides a basis for finding that the right to a remedy is a fundamental right which cannot be abridged absent compelling circumstances. This notion of a due process right to a meaningful remedy is supported by two strands of U.S. Supreme Court precedent in the disparate contexts of tax remedies and punitive damages.\(^{46}\)

First, in the tax cases of *Reich v. Collins*, *Harper v. Virginia Dep’t of Tax*, and *McKesson Corp. v. Division of Alcoholic Beverages*, the Supreme Court has held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally-adequate remedy that provides “meaningful” relief.\(^{47}\) In these cases, the Court established a constitutional right to a meaningful remedy by requiring the retroactive remedy of a tax refund for a tax determined to be unconstitutional.\(^{48}\) While a trial court has flexibility to choose among appropriate equitable and monetary remedies, it cannot, consistent with federal due process, select a remedy that fails to provide meaningful relief to the plaintiff.\(^{49}\) In so holding, the Court established a constitutional floor entitling the plaintiff to a modicum of minimally-adequate relief.\(^{50}\)

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\(^{47}\) *Reich*, 513 U.S. at 108, 114; *Harper*, 509 U.S. at 100-102; *McKesson*, 496 U.S. at 31, 39.


\(^{49}\) Id.; *Harper*, 509 U.S. at 101-02 (“Virginia is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined. State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.”).

\(^{50}\) *McKesson*, 496 U.S. at 39.
Secondly, in the punitive damages cases, the Supreme Court has found arbitrary and unreasonable state court remedies to violate the Due Process Clause. These cases evaluating excessive state court remedies are grounded in the core concern of federal due process regarding the unreasonableness of state action. "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." Where state court remedies are arbitrary and unreasonable, the Court has found a violation of Due Process. While the punitive damages cases address excessive remedies, their analytical foundation highlighting the right to a reasonable and non-arbitrary remedy under both substantive and procedural due process implicates deficient remedies as well.

The basic fairness guarantees of the Due Process Clause therefore mandate the right to a meaningful remedy. A meaningful remedy is one that is minimally adequate and effective at ensuring the protection of the attendant right. A meaningful remedy ensures a base minimum requiring some modicum of relief in a case beyond the simple statement of a violation of law. It requires an adequate remedy that is satisfactory, although it need not be complete relief, or the

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52 *State Farm*, 538 U.S. at 416-17; *Gore*, 517 U.S. at 587 (Breyer, J., concurring); see also *Haslip*, 499 U.S. at 59 (O’Connor, J., dissenting) (“[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process--of the law in general--is to allow citizens to order their behavior.”).
53 *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 560.
54 *Reich*, 513 U.S. at 108, 114; *Harper*, 509 U.S. at 100-02; *McKesson*, 496 U.S. at 31, 39.
55 Smith v. Robbins, 528 U.S. 259 (2000) (holding that an adequate remedy is one that “reasonably ensures the protection of a right”). Where Congress has created the right by statute, it may also designate the correlative “adequate” remedy. Thomas, *Remedial Rights*, supra note 22, at 756-66. The courts will generally defer to the legislative remedy for a statutory right as long as it provides some minimally-adequate relief. *Id.*; e.g., *Gebster v. Lago Vista Indp’d School Dist.*, 524 U.S. 274, 284 (1998). This is because Congress has the greater power to eliminate the right and therefore may take the lesser restrictive measure of narrowing the definition of the statutory right through the assigned remedy. Thomas, *supra* note 22, at 756-57.
56 *Harper*, 509 U.S. at 102; cf. *U.C.C. § 2-719* (stating that liquidated damages are not a minimally adequate substitute for general contract damages if they fail to provide a fair quantum of relief). This was the heart of the issue in *DeRolph* where the Ohio Supreme Court failed to provide even the most minimal of relief by prohibiting all remedies and instead concluding the case with only a statement of the violation of law. *DeRolph V*, 789 N.E.2d. at 195.
plaintiff’s preferred relief. By definition, a “remedy” is limited to the confines of the case to redress wrongdoing by the identified defendants. Yet working within those judicial confines, a meaningful remedy must be actualized – it must actually work to effectuate the purpose of the right. The remedy must match the purpose of the declared right by returning the plaintiff to her rightful position or keeping the government within the bounds of the law.

III. Strict Scrutiny for the Denial of the Fundamental Right to a Remedy.

As a fundamental right, however, the right to a remedy can still be denied if that denial is necessary to a compelling state interest. State action that abridges a fundamental right, including the right to a remedy, is subjected to strict scrutiny analysis that balances the interests of the state against the fundamental interest. Strict scrutiny analysis thus provides a calculus through which courts can access the denial of remedy which sometimes occurs, for example in the instance of sovereign immunity. This result, however, of the restriction of a remedy in

57 Harper, 509 U.S. at 102; Thomas, Remedial Rights, supra note 22, at 761.
58 Milliken v. Bradley, 418 U.S. 717 (1974) (reversing injunctive relief ordering suburbs to assist in desegregation of Detroit city schools where the suburbs were not named in the lawsuit or implicated in the segregative wrongdoing).
59 Thomas, Remedial Rights, supra note 22, at 764.
60 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390-98 (1971) (awarding damages for violation of plaintiff’s Fourth Amendment rights, in part, because an injunction did not actually rectify the plaintiff’s situation as there was no pending prosecution and no threat of future illegal action); Harper, 509 U.S. at 100-02 (finding denial of a meaningful remedy where court issued injunction against future unconstitutional taxation rather than awarding compensatory damages to plaintiff who had already paid illegal tax).
61 Fallon & Meltzer, supra note 48, at 1736 (arguing that remedies are required to keep government officials within the bounds of constitution); Alden v. Maine, 527 U.S. 706 (1999) (discussing the necessity of injunctive relief to make government conform to standards of federal constitution).
62 Cf. Roe v. Wade, 410 U.S. 113 (1973) (stating in dicta that the compelling interest of viability of fetus justifies restriction of abortion at later stages of pregnancy even under strict scrutiny); Burson v. Freeman, 504 U.S. 191 (1992) (holding that ban on electioneering within 100 feet of polling place denial fundamental right to free speech survives strict scrutiny); Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978) (holding that application of strict scrutiny analysis to denial of fundamental right to marry would still validate state restrictions on marriage due to age or relation).
63 Fallon & Meltzer, supra note 48, at 1778; Gewirtz, supra note 1, at 602 (arguing that competing costs should not be excluded completely from the remedial calculus and that the calculus must assess the extent to which other social interests should play a role in limiting plaintiff’s remedies).
exceptional situations does not negate the existence of the fundamental right to a remedy, as Justice Scalia has suggested; instead, the exceptions support the existence of such a right. 64

Justice Scalia, dissenting from the decision in Webster v. Doe, 65 argued: “In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation.” 66 He supported this conclusion with examples of the unavailability of relief due to sovereign immunity, political question, and the public interest. 67 However, these contextual examples can be explained as the routine operation of strict scrutiny for fundamental rights. First, the example of political question is distinguishable because in those cases the court does not have a cognizable legal right that the judiciary is competent to declare. 68 Without a right declared by the court, there is no right or need for a remedy. 69 The other examples Justice Scalia identifies are simply examples of compelling interests that in some cases have trumped the fundamental right to a remedy. In some cases, there are countervailing constitutional commands, such as in the case of Eleventh Amendment sovereign immunity. 70 In other cases, there are important historical and structural policies such as federalism and that have been found to outweigh the right to a remedy. 71

64 Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting); see also Zehner v. Trigg, 952 F. Supp. 1318 (S.D. Ind. 1997) (agreeing with Justice Scalia’s argument that the existence of sovereign immunity proves that there is no right to an individualized remedy).

65 In Webster v. Doe, the Supreme Court held that judicial review must lie for a plaintiff’s colorable claims of employment discrimination based on his homosexuality. 486 U.S. at 603. In so doing, the majority of the Court recognized that remedies must be available to enforce important constitutional rights. Id.

66 Webster, 486 U.S. at 612.

67 Id. at 612-13.

68 Similarly, the explicit constitutional prohibitions on judicial remedies in Article I, §§ 5 & 6 of the U.S. Constitution (the House as judge of the election of its members and the prohibition on questioning any speech or debate of Congress) cited by Justice Scalia are situations where there is no legal right for the court to declare or remedy. See id. at 612.

69 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803)

70 Gewirtz, supra note 1, at 603.

71 See, e.g., Webster, 486 U.S. at 604-06 (majority opinion and concurring opinion of Justice O’Connor) (suggesting national security issues might trump the plaintiffs’ right to a remedy for employment discrimination by the CIA); Nixon v. Fitzgerald, 457 U.S. 731, 768-69 (1982) (holding that absolute immunity of president bars remedy that is otherwise required under Marbury v. Madison).
However, applying an express strict scrutiny analysis might in fact alter some of the balancing decisions the Court has previously made resulting in the denial of remedies.\textsuperscript{72} For example, the Court has denied remedies for past constitutional violations when declaring new law in the case.\textsuperscript{73} These retroactivity cases suggest the kind of balancing of compelling state interests against the plaintiff’s fundamental right to a remedy reminiscent of a strict scrutiny type analysis.\textsuperscript{74} Yet, the significance and determinative weight of the interest might change when subjected to strict scrutiny as opposed to an equitable balancing test. For example, the concerns supporting the official immunity retroactivity decisions of deterring public service and proliferating public lawsuits might not rise to the level of a “compelling” interest on the level of a constitutional command as seen in the Eleventh Amendment immunity.\textsuperscript{75} Or the concern with fairness in imposing consequences for new law, such as that supporting the Court’s denial of a \textit{McKesson} tax refund remedy in \textit{American Trucking},\textsuperscript{76} might not suffice as a compelling interest outweighing the fundamental right to a remedy, as the four dissenting Justices in \textit{American Trucking} recognized.\textsuperscript{77} At the very least, the strict scrutiny analysis provides the courts with a

\textsuperscript{72} \textit{See McKesson}, 496 U.S. at 44 (“The Florida Supreme Court cites two ‘equitable considerations’ as grounds for providing petitioner only prospective relief, but neither is sufficient to override the constitutional requirement that Florida provide retrospective relief. . . . ”).

\textsuperscript{73} Fallon & Meltzer, \textit{supra} note 48, at 1733; \textit{see, e.g.}, \textit{Harlow v. Fitzgerald}, 457 U.S. 800 (1982) (using doctrine of qualified immunity to shield officials from damages liability whenever the plaintiff relies on new law); \textit{American Trucking Associations, Inc. v. Smith}, 496 U.S. 167, 194 (1990) (denying retroactive relief of tax refund to plaintiff based on new law of unconstitutionality of tax articulated in case).

\textsuperscript{74} Cf. \textit{American Trucking}, 496 U.S. at 194 (“Once a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered.”).

\textsuperscript{75} \textit{See Fallon & Meltzer, supra} note 48, at 1749, 1820.

\textsuperscript{76} \textit{American Trucking}, 496 U.S. at 183 (denying remedy due to retroactivity concerns that would produce “inequitable results,” “burden the State’s operations,” against the state’s reliance interests). The plurality opinion in \textit{American Trucking} seemed to equate its decision denying relief to the plaintiff on retroactivity grounds with the political question type denial of relief (discussed \textit{supra} in text accompanying notes 67-68) in which the plaintiff does not have a substantive right for the court to remedy. \textit{See id.} at 195.

\textsuperscript{77} \textit{Id.} at 224.
clear calculus through which to resolve these remedial decisions and weigh important interests that compete against the right to a remedy. 78

Thus, the exceptional cases in which a remedy is denied weave into a legal justification for the fundamental right to a remedy under Due Process. Rather than denying the existence of a right to a remedy, these instances confirm that meaningful remedies are fundamentally required, absent some compelling competing interest.

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Through its remedial opinion and example, Brown signified the beginning of the understanding of the power of injunctive remedies. As this paper has argued, Brown’s legacy therefore reaches beyond the confines of its school segregation setting into all areas of law through its establishment of this remedial norm. Embedding this norm into constitutional jurisprudence will ensure that Brown’s legacy is not lost to the future.

78 See Fallon & Meltzer, supra note 22, at 1778 (suggesting the use of the law of remedies to provide a calculus to make sense of the retroactivity cases); Cf. American Trucking, 496 U.S. at 167 (in which the absence of a clear analysis produced split decision as to whether retroactivity concerns trumped fundamental right to a remedy).