December, 2007

Proportionality and the Supreme Court's Jurisprudence of Remedies

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INTRODUCTION

The evolution of the Supreme Court's remedial jurisprudence evinces a quest for the ultimate judicial measure of appropriate relief, emerging as a norm of remedial proportionality.[1] The Court's decisions since 2000 on punitive damages, injunctions, and remedial legislation, all mandate a strict balance and precise measurement in the formulation of civil remedies. These cases have often fallen below the radar of general interest or have been ignored for their remedial significance.[2] However, these cases demonstrate, somewhat surprisingly, the manner in which the Court has ventured into the arena of common-law remedies to unexpectedly alter the foundational principles of crafting remedies. This article exposes and critiques the extent to which proportionality dominates the remedial decisions of the United States Supreme Court in the new millennium.

"Proportionality" is fast becoming a universal standard of rationality in the international public law context.[3] Indeed, "[t]he concept has received far more elaboration and evaluation outside of the United States."[4] Proportionality is a general legal principle for avoiding excess and "reviewing the conformity to the law of any public discretionary action."[5] It is a "yardstick for measuring the appropriate relationship between the ends and the means of discretionary action."[6] International jurists use proportionality to evaluate the extent to which government intrudes on the paramount individual rights of citizens.[7] However, American legal scholars have not embraced the advent of this new test because it "sounds unfamiliar, dangerous for the protection of civil rights, and illustrative of the conservatism of the Court."[8] These fears appear well-founded as the Supreme Court has co-opted proportionality as its own

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[1] A purist's definition of "remedies" is used here to mean only questions regarding the civil sanction assessed in the case whether in the form of monetary relief or official directive. Excluded from the definition of remedy are other legal issues interrelated to remedies, such as immunity, private rights of action, preemption, and justiciability. *See* Donald H. Zeigler, *Rights, Rights of Action, and Remedies,* 76 WASH. L. REV. 67 (2001).

[2] *See, e.g., The Supreme Court, 2004 Term, Leading Cases*, 119 HARV. L. REV. 169 (2005); Charles H. Whitebread, *Going Out With a Whimper: A Term of Tinkering and Fine Tuning, The Supreme Court's 2004-05 Term*, 27 WHITTIER L. REV. 77 (2005).

[3] *See* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 803-04 (2004) (reviewing DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004)); *see also* T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465 (2005); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L. J. 567, 568 (2003); D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 322 (1994).

[4] Jackson, *supra* note 3, at 803-04; Gunn, *supra* note 3, at 465; Zoller, *supra* note 3, at 568.

[5] Zoller, *supra* note 3, at 581-82.

[6] *Id*. at 582.

[7] *See* Jackson *supra* note 3, at 804; *see, e.g., R. v. Oakes*, [1986] S.C.R. 103 (Can.).

[8] Zoller, *supra* note 3, at 568 ("From a comparative law perspective, the new test is not as bad as it sounds. . . . [I]t introduces into American constitutional law a standard of judicial review that has proved to be useful in many continental European countries. . . .").

standard for protecting governmental and corporate interests against the individual plaintiff.

The article begins by taking a positivist view to describe how the Court has utilized proportionality in its remedial decisions. It first explains the Court's theory of remedial essentialism, which forms the foundation for the rule of remedial proportionality. The theory of remedial essentialism formalistically separates the remedy from the right, and it is this binary concept that establishes the premise of balance inherent in proportionality. This notion of balance or equilibrium draws on theories from Aristotle and law and economics mandating a precise remedial balance as a proxy for justice. Practically speaking, the rule of proportionality engages the court in a type of "Three Bears" analysis under which it evaluates whether the remedy is too big, too small, or just right. The article synthesizes the most recent Supreme Court cases on remedies to flesh out the principles of proportionality driving the Court's decisions. These remedial decisions emanate from a wide variety of factual contexts, including abortion, water rights, insurance, patents, and tribal immunity. Yet, the decisions coalesce in transsubstantive fashion around the assumed foundational truth of remedial proportionality as the ultimate measure of civil justice.

After tracing the development of strict proportionality in the Supreme Court, the article then engages in a normative analysis to evaluate whether proportionality should in fact be the guiding principle of remedies law. It begins with the identification of the Court's justifications for the rule. The Court seems to value proportionality for its rationality and objectivity, judicial restraint and minimalism, and reciprocal response. However, the article reveals these claims of rationality, restraint, and reciprocity as myths. Proportionality is not an objective standard. Continued reliance upon these myths creates significant legal dangers by obscuring the subjective framing issues inherent in a rule of comparison and unduly deferring to the interests of the wrongdoers. When the rule of proportionality is deconstructed, it becomes apparent that proportionality is not a rule of restraint, but rather one of activism. The article ultimately rejects the continued use of remedial proportionality and its fostering of judicial activism by the highest Court. Instead, it recommends a return to the traditional judicial review of remedies deferring to the initial factfinders in each case.

1. PROPORTIONALITY AS REMEDIAL EQUILIBRIUM

In the Supreme Court's recent remedial decisions, the Court appears to be searching for the perfect measure of relief in each case. The series of important remedial decisions reveals that the Court has seized upon proportionality as its foundational principle of objectivity to resolve questions of remedy.[9] The Court has not articulated its reasons for the adoption of proportionality as the governing principle nor explored its theoretical underpinnings. Reading between the lines, the Court (except for Justice Scalia) seems to view the proportionality rule as an objective rule that can consistently enforce the norm of fairness in crafting judicial remedies. The Court

[9] Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 479 (1999).

assumes it has adopted a neutral principle of law that constrains the power of judicial interpretation. This formalistic and mechanical rule of law now appears to be the governing principle upon which most of the Court's remedial decisions will be based.

A. Remedial Essentialism

Remedial essentialism, the theoretical premise that a remedy is conceptually isolated from the underlying substantive right, is the necessary predicate to the Court's principle of remedial proportionality. This formalistic separation of remedy from right provides the foundation for proportionality, for without two separate interests, the notion of balancing carries little meaning.

The Court's legal formalism depicts rights as primary and remedies as secondary.[10] A primary right is a legal duty, guarantee, or expectation, whereas the remedial right is the consequence or sanction following the non-compliance with the primary right.[11] "Rights essentialism" isolates the core legal principle of right from the translation of that right through facts and policy in the real world.[12] For judges, this means that remedial decisions imposing tangible consequences for the right leave the right inviolate rather than diminished or enhanced by the practical reality.[13] Rights essentialism establishes a binary concept of right and remedy that subordinates remedies to the more valuable core legal value. In other words, "rights and remedies are made of different stuff—and the rights stuff is better."[14] Remedial essentialism is the necessary corollary that segregates the inferior remedy in judicial decisionmaking to immunize the right.

Examples of remedial essentialism are apparent throughout the Court's remedial jurisprudence. Take, for example, the Court's 2006 decision in *Ayotte v. Planned Parenthood of Northern New England.*[15] In *Ayotte*, New Hampshire appealed the invalidation of its Parental Notification Prior to Abortion Act, which the lower courts struck down in its entirety due to the absence of a medical emergency exception.[16] Justice O'Connor, writing for a unanimous Court repeatedly stated that the decision was simply a "question of remedy" and not one of legal rights.[17] In the decision's opening

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[10] *See* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 122-34 (William Eskridge, Jr. & Philip Frickey eds., 1994) (creating dichotomy between primary and remedial rights); H.L.A. HART, THE CONCEPT OF LAW (1961) (distinguishing between primary rights of substantive claim and secondary rights of remedy).

[11] Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 684 (2001) [hereinafter "*Remedial Rights*"].

[12] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 900 (1999).

[13] Levinson, *supra* note 12, at 900 (arguing that normative theories about constitutional rights should not be separated from the positive realities of their remedial enforcement).

[14] *Id.* at 858; *see* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678 (1983) (describing the right/remedy distinction in constitutional law as "pure rights, dirty remedies").

[15] 126 S. Ct. 961 (2006).

[16] *Id.* at 964.

[17] *Id.* at 964, 967; Linda Greenhouse, *Court Walks Fine Line on Teenage Abortions*, INT'L HERALD TRIB. 2 (Jan. 2, 2006) ("The studiously bland 10-page opinion carefully sidestepped the abortion debate that has been such a prominent feature of public discourse about the Court's future.").

line, Justice O'Connor emphasized: "We do not revisit our abortion precedents today, but rather address a question of remedy."[18] The Court went on to vacate the invalidation of the abortion statute, holding that "invalidating a statute entirely is not always necessary or justified, for lower courts may be able to render narrow declaratory and injunctive relief."[19] Thus, the Court asserted that as a remedial decision, the *Ayotte* opinion had no impact upon its abortion jurisprudence.[20]

The Court's essentialist view of remedies is also seen in *City of Sherrill v. Oneida Indian Nation*.[21] In *Sherrill*, the Court explicitly emphasized that the right is very different from the remedy: "The substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is."[22] The *Sherrill* Court reiterated the right of the Oneida tribe to ownership of ancient tribal lands it had purchased on the open market, but applied the remedial doctrine of laches to deny the requested declaratory and injunctive relief exempting the tribal owners from county taxes.[23] The Court raised the remedial issue *sua sponte* and decided the case under "standards of federal equity practice," refusing to consider the substantive questions of tax immunity and definitions of "Indian country" decided below and argued by the parties.[24] The eight-Justice majority[25] rested its

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[18] *Id.* at 964. *See* Tony Mauro, *High Court Sidesteps Dispute Over Parental Notification for Abortion*, 183 N.J.L.J. 197 (Jan. 23, 2006) (stating that Justice O'Connor avoided a major showdown on abortion rights in her valedictory writing which was based on the narrower remedial ground).

[19] *Ayotte*, 126 S.Ct. at 964.

[20] However, as the Court admitted, this holding does in fact revisit past precedents by contradicting the decision in *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000), invalidating an abortion statute in its entirety. *Ayotte*, 126 S.Ct. at 969. *See also* Note, *After* Ayotte: *The Need to Defend Abortion Rights With Renewed "Purpose,"* 119 HARV. L. REV. 2552 (2006) (noting that courts have traditionally used a broad, facial invalidation remedy for unconstitutional abortion statutes, but that *Ayotte* suggests the Court may be rethinking their approach as to the function that broad abortion remedies have served); Mauro, *supra* note 19 (quoting opinion that *Ayotte* "can be read as almost an explicit invitation for states to revive or repass restrictions that previously have been struck down in toto.").

[21] 544 U.S. 197 (2005).

[22] *Id.* at 213 (citing D. DOBBS, LAW OF REMEDIES § 1.2 p. 3 (1973)).

[23] *Id.* at 216-17. Laches is an equitable defense that bars a remedy when plaintiffs have unreasonably delayed in prosecuting the action causing prejudice to the other side. DOBBS, *supra* note 22. Here, the Court said that the long lapse of time (200 years) during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the dramatic changes in the character of the property from reservation to city during that time precluded the tribe "from gaining the disruptive remedy it now seeks." *Sherrill*, 544 U.S. at 199.

[24] *Id.* at 214 n.8. While the Court claimed that its remedial decision did not address the underlying substantive rights, the precedential effect of the case has been to the contrary. *See* Amy Borgman, Note, *Stamping Out the Embers of Tribal Sovereignty: City of Sherrill v. Oneida Indian Nation and Its Aftermath*, 10 GREAT PLAINS NAT. RES. J. 59, 60 (2006) ("*Sherrill* has dramatically altered the legal landscape against which courts will consider tribes' claims. . . . [T]he message is clear: the American Court system will no longer sympathize with tribes seeking retribution for past wrongs."); Leading Cases, *Availability of Equitable Relief*, 119 HARV. L. REV. 347 (2005) (arguing that the Court correctly ruled given its inability to adjudicate the type of reparative justice claim raised by the Indians that is properly left to the political branches).

[25] Justice Stevens dissented on grounds that the Court's decision could not be squared with its prior decision authorizing damages for the same claim, stating that the "Court's reliance on the distinctions

decision solidly upon the distinction between right and remedy: the tribe had a "right" to tribal property ownership, but no remedial mechanism to enforce that right prospectively.[26]

Again, in *eBay, Inc. v. MercExchange* the Court held that "a right is distinct from the provision of remedies for violations of that right."[27] The Court of Appeals for the Federal Circuit had held that a patent holder's right to exclude competitors from practicing an invention was sufficiently strong to merit a presumption of qualifying for an injunction in every case.[28] This categorical rule altered the common-law principle of injunctive relief which requires a showing of the inadequacy of plaintiff's monetary remedies and a balancing of hardships between the parties, court, and public.[29] In reversing the Federal Circuit's remedial decision, a unanimous Supreme Court disaggregated right from remedy in the patent context and remanded the decision with clear instructions that the right not dictate the appropriate balance for equitable relief.[30] In other words, the injunctive remedy is an absolute legal principle which should not be diluted by the interaction with the attendant legal right.

This right/remedy dichotomy has been criticized by scholars, including me, who have illustrated how the measure or enforcement of a remedy, or lack thereof, significantly alters the effective meaning of the substantive legal right.[31] It was the American legal realists who believed that it was erroneous to view a legal right abstracted from the remedy available in the legal system.[32] "As form cannot always be separate from substance in a work of art, so adjective or remedies aspects cannot be

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between law and equity and between substantive rights and remedies is indefensible." 544 U.S. at 226. He also challenged the Court's use of laches to resolve the case since the issued had not been briefed and the tribe could avoid the equitable defense of laches by reasserting their claim for immunity as a defense in a state tax collection action. *Id.* at 224-26.

[26] *Id.* at 221. On remand, the district court held that New York state law precludes county taxation of property owned by Indian tribes. Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2005).

[27] 126 S. Ct. 1837, 1840 (2006).

[28] MercExchange v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005).

[29] 126 S. Ct. at 1841.

[30] *Id.* at 1840. Similarly, in *MedImmune, Inc. v. Genetech, Inc.*, 127 S.Ct. 764 (2007), the Court, in an opinion joined by all of the Justices except Justice Thomas, overturned the Federal Circuit's attempt to carve out a special rule of declaratory relief in patent cases. The Federal Circuit denied jurisdiction on a declaratory judgment claim where the party to the patent licensing agreement had not yet breached the agreement. *Id.* at 768. The Court reaffirmed the rule that a party need not subject itself to penalty prior to seeking declaratory relief. *Id.* at 772.

[31] Thomas, *Remedial Rights, supra* note 11, at 687-88 (arguing for the "unified right theory" of remedies in which the remedy and its definitional guarantee are two components of one unified whole); Levinson, *supra* note 12, at 858 (arguing that normative theories of constitutional rights cannot be separated from realities of remedial enforcement); David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 66 (1997) (discussing the "inextricable relationship" between right and remedy in the context of congressional remedies for immigration under Section 5 of the Fourteenth Amendment); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. REV. 735 (1992) (viewing constitutional rights through the prism of remedies).

[32] *See* Friedman, *supra* note 31, at 736; *see, e.g.,* Karl N. Llewellyn, *Some Realism About Realism--Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1244 (1931).

parted entirely from substantive ones."[33] For example, a contractual promise is only as good as the remedy that backs it up; for if the law sustains an efficient breach, a contracting party is not in fact required to honor his legal promise.[34]

Scholars have thus criticized the overly formalistic conceptualization of rights that minimizes the importance of remedies, and masks the effect of remedial decisions.[35] Professor Levinson articulated how the "deeply embedded and deeply misleading" theory of rights essentialism provides an "oversimplified picture of the relationship between rights and remedies."[36] Instead, Levinson and others have demonstrated how remedies are functionally related, and inextricably intertwined with rights.[37] Remedies are the practical, real, and functional component that actualizes the right and makes it operational between the parties.[38]

Despite this academic insight, the Court seems mired in the formalistic belief that remedies are isolated legal concepts that should be adjudicated apart from the connected substantive right. Adopting a modernist philosophy, the Court has constructed an allegedly objective rule of proportionality to reconcile the binary right/remedy construct and constrain the power of judicial interpretation.[39] This foundational assumption of remedial essentialism effectively minimizes the significance of the Court's remedial decisions by subordinating the ancillary remedy to the important foundational right.[40]

It is the binary thinking of remedial essentialism that makes proportionality possible as a formalist rule. However, it is also this essentialist thinking that begins the Court's detour in the jurisprudence of remedies.

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[33] Guar. Trust Co. v. York, 326 U.S. 99, 116 (1945) (Rutledge, J., dissenting).
[34] LON L. FULLER, BASIC CONTRACT LAW (1947); Thomas, *Remedial Rights*, supra note 11, at 693.
[35] Levinson, *supra* note 12, at 858; Thomas, *supra* note 12; Zeigler, *supra* note 1, at 67; Friedman, *supra* note 31, at 738.
[36] Levinson, *supra* note 12, at 858.
[37] *Id.*; *see* Friedman, *supra* note 31, at 735; Gewirtz, *supra* note 14, at 678-79; Thomas, *Remedial Rights*, *supra* note 11, at 687-88; Donald Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665-66 (1987).
[38] Thomas, *Remedial Rights*, *supra* note 11, at 687-88.
[39] *Cf.* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 3, 5-6, 41 (1995) (describing the tenets of legal modernism as belief in rules of law that embody universal truths, core essences, and foundational theories that provide for objective and consistent decisionmaking to discover the "right answers" in every case).
[40] Following the formalist remedial binary and ignoring the unified nature of right and remedy leads to difficult decisions. For example, in the case of *Town of Castle Rock v. Gonzales*, the Court misdiagnosed a case involving the failure to enforce a remedy as a case of substantive right. 545 U.S. 748, 125 S. Ct. 2796 (2005). The plaintiff sought damages under the Due Process Clause for the police department's repeated failure to enforce a restraining order against her husband. *Id.* at 2800. The failure ultimately led to her ex-husband's horrific murder of their three children. *Id.* at 2802. In divorcing right from remedy, the Court was able to avoid addressing the impotence of an abstract right.

B. A Balanced Measure of Justice

"Proportionality" is most easily understood to be a standard that requires the judicial sanction to "fit" the legal harm.[41] While no clear definition of proportionality emerges from the Supreme Court cases, the basic meaning is balance or equilibrium.[42] Proportionality addresses the measure, degree, or magnitude of the remedy and prohibits extreme measures that do not fit the harm.[43] Metaphorically, proportionality holds that "one should not use a sledge hammer to crack a nut when a nutcracker will suffice."[44] As explained in the Magna Carta, "a free man shall not be fined for a small offence, except in proportion to the measure of offence; and for a great offence he shall be fined in proportion to the magnitude of the offence."[45] The same concept appears even earlier in the Code of Hammurabi and the Old Testament as the principle of *lex talionis*—an eye for an eye, tooth for a tooth.[46] Proportionality thus seeks the perfect balance between right and remedy.

In the remedial context, proportionality generally is applied in a mechanical way to require that a judicial remedy be properly related in size or degree to the wrong. The decisionmaker searches for the precise balance between the defendant's harm and the plaintiff's remedy in order to avoid excess, gain, or windfall on either side. Equilibrium thus emerges as the hallmark of proportionality, evoking visions of the balanced scales of justice.[47] As Justice Scalia so aptly noted, it is the balanced scale, and not the seesaw, that has come to serve as the icon of neutral and rational decisionmaking.[48]

Proportionality analysis at times resembles cost-benefit analysis, whereby the court weighs the benefits and burdens between the parties. In this utilitarian sense, proportionality searches for a proper fit or relationship between ends and means.[49]

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[41] Gunn, *supra* note 3, at 466.

[42] *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 573-74 (2004) ("Indeed, no clear definition of proportionality can be found in any of the Court's non-capital cases."); Gunn, *supra* note 3, at 468 ("The word 'proportionality' has been adopted to encapsulate core values with broad implications, but whose actual meaning can be maddeningly vague and even incoherent."); *accord* Zoller, *supra* note 3, at 580.

[43] *See, e.g.*, BMW v. Gore, 517 U.S. 559, 575, 596, 600 (1996) (discussing the proportionality standard as an assessment of the proper degree and measure of punitive damages); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993) (citing case from 1813 addressing the moderate remedy "proper to the magnitude and manner of that offence") (O'Connor, J., dissenting).

[44] Gunn, *supra* note 3, at 466-67; Zoller, *supra* note 3, at 580 (noting the nutcracker metaphor of proportionality in the British courts and the cannon metaphor from a Swiss jurist: "You must not shoot sparrows with cannons.").

[45] Magna Carta, Art. 20.

[46] *See infra* discussion at 44.

[47] Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L. J. 263, 280 (2005) (quoting Emmanuel Kant: "But what kind and what degree of punishment does justice take as its principle and its norm? None other than the principle of equality in the movement of the pointer on the scales of justice.").

[48] Patterson v. Shumate, 504 U.S. 753, 766-67 (1992).

[49] Frase, *supra* note 42, at 595-97. Utilitarianism searches for the greatest happiness for the greatest number, and thus will balance to incorporate the interests of all concerned. *See* Ristroph, *supra* note 47, at 272.

Costs and benefits are weighed by considering the gravity of the harm and the alternative governmental responses. A governmental measure may be disproportionate in a utilitarian sense when the measure's costs and burdens outweigh the likely benefits, or when the measure is more burdensome than some alternative means.[50] However, proportionality is a standard of judicial review "that is more elaborate and sophisticated, but also more intrusive and aggressive, than the traditional means-end test."[51] Thus, it may consider a range of other issues like federalism, institutional competencies, and the appropriateness of judicial deference to other institutions.[52]

Theoretical notions of balance as justice are evident in legal theories ranging from the very earliest to the most recent of times. Justice, as envisioned by both Aristotle and law and economics theorists, focuses on balance as a proxy for fairness and appropriate judicial action. Aristotle considered justice as a concept of balance between the extremes of excess and deficiency that equalizes the positions of the parties.[53] Equality between the parties is determined by a "mean," or intermediate state, which lies between the extreme vices of deficiencies or excess.[54] "Justice is a certain kind of mean condition, . . . concerned with a mean quantity, while injustice is concerned with extreme quantities."[55] Justice is thereby portrayed as a norm of fairness achieved through a mathematical function.[56] "What is just in transactions is something equitable, . . . according to an arithmetic proportion."[57] Justice is accomplished by finding the right mean between gain and loss that achieves an arithmetic ratio of one to one.[58] This arithmetic ratio of justice requires the judge to "even things up" by adjusting unbalanced gain and loss into equal halves.[59] "Whenever neither more nor less results," each party has what is justly theirs.[60] Thus, Aristotle's philosophy focuses on striking a careful balance and equilibrium between the parties to achieve justice. Excess or gain to either side is considered the antithesis of a just or fair result.[61]

Aristotle's vision of corrective justice as a restoration of proportion between parties after a wrong is one justification offered in support of the proportionality rule in the area of compensatory damages.[62] "Corrective justice theory is based on a simple and elegant idea: when one person has been wrongfully injured by another, the injurer

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[50] Frase, *supra* note 42, at 595-97.
[51] Zoller, *supra* note 3, at 571.
[52] Gunn, *supra* note 3, at 466-67.
[53] ARISTOTLE, NICHOMACHEAN ETHICS, Book V, Ch. 5 (Joe Saches, trans. 2002); *see* Sarah Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1642 (2005).
[54] ARISTOTLE, *supra* note 53, Book V, Ch. 5, 1134a; *see* Ernst J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).
[55] ARISTOTLE, *supra* note 53, Book V, Ch. 5, 1134a ("And injustice is the opposite in relation to what is unjust, and this is excess and deficiency of what is beneficial or harmful, contrary to proportion.").
[56] *Id.* at 1132a; *see* Weinrib, *supra* note 54, at 404 ("In Aristotle's account, fairness as a norm is inseparable from equality as a mathematical function.").
[57] ARISTOTLE, *supra* note 53, Book V, Ch. 4, 1132a.
[58] *Id.* at 1132al18-20.
[59] *Id.* at 1132a25-32.
[60] *Id*. at 1132bl13-15.
[61] *Id.* at 1134al1-12.
[62] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 17 (3d ed. 2002).

must make the injured party whole."[63] The corrective justice principle of equilibrium, sometimes referred to as the "rightful position," requires that damages return the plaintiff to the position she would have been but for the harm.[64] To do less would leave part of the harm unremedied, whereas doing more would confer a windfall gain to the plaintiff.[65] The bipolarity of corrective justice requires that the "defendant must pay not just any amount, but the amount of the plaintiff's injury, because the payment is not a penalty per se, but the rectification of an injury that the defendant inflicted."[66]

Theoretical support for a proportionality rule of remedies is also found in modern law and economics. The Coase Theorem reduces the question of balance to a level of bargaining between the parties.[67] Parties should bargain freely to resolve legal disputes based on economic efficiency. A rule of precise remedial measurement creates incentives for defendants to act efficiently. The basic principle is that to achieve appropriate remedial goals, "injurers should be made to pay for the harm their conduct generates, not less, not more."[68] If the remedy is "higher or lower than the harm, various undesirable social consequences will result."[69]

> If injurers pay less than for the harm they cause, underdeterrence may result—that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.[70]

Thus, the law should seek a perfect balance between parties to achieve economic efficiency.

Balancing to achieve economic efficiency operates similarly in the context of preliminary injunctions. "The traditional preliminary injunction rule employs a balancing of irreparable harm designed to minimize expected error costs."[71] The court compares "the harm to plaintiff if preliminary relief is erroneously denied and the harm to defendant if preliminary relief is erroneously granted."[72] If there is an excess of harm to plaintiff, the preliminary injunction will be granted. Prior to the entry of a final judgment, "individual incentives to behave efficiently are distorted by uncertain legal

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[63] Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L. J. 695, 695 (2003).
[64] LAYCOCK, *supra* note 62, at 17.
[65] *Id.*
[66] Zipursky, *Civil Recourse*, *supra* note 63, at 701.
[67] R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 56-58 (5th ed. 1998).
[68] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 871 (1998).
[69] *Id.* at 878.
[70] *Id.; see also* POSNER, *supra* note 67, at 197-99.
[71] Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 396 (2005).
[72] *Id.*; *see* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

entitlements."[73] When rights are uncertain, parties discount the harm caused to others.[74] Preliminary injunctions correct this distortion by counteracting the bias toward infringement, realigning the balance to promote efficiency.[75] Proportionality or equivalence between the parties under the law creates the proper incentives for parties to operate economically efficiently.

C. The Three Bears Theory of Redress

The proportionality principle of remedies and its search for balance can be thought of as the "Three Bears" theory of redress: the proper remedy is that which is not too big, not too small, but just right. Like Goldilocks searching for the perfect bowl of porridge, courts search for the perfect remedy by trying out different remedial choices. This version of proportionality resonates with the Supreme Court, which has utilized it as the guiding principle in deciding remedial questions over the past five years.

For example, in *Kansas v. Colorado*,[76] Justices Thomas and Stevens used Three Bears language to describe their dissenting opinions regarding the proper measure of damages computed as prejudgment interest. The case, on its fourth appeal to the Court, involved Colorado's breach of the Arkansas River Compact beginning in 1950, and the proper determination of the principal upon which prejudgment interest would be computed.[77] In a prior appeal, "Colorado attacked the award of *any* prejudgment interest, while Kansas called for *full* prejudgment interest."[78] The Court adopted the special master's "equitable compromise," awarding prejudgment interest beginning in 1985, when Colorado first filed its complaint.[79] Kansas then sought post-1985 interest computed upon all damages since 1950, which the Court dismissed as an attempt to convert a "modest adjustment" of prejudgment interest into a windfall to the plaintiff.[80] The majority thus held that prejudgment interest applied only to damages incurred after 1985.[81] Justice Stevens dissented, stating that "[t]he fact that Kansas' request represents too large a measure of damages does not convince me that Kansas is entitled to no interest for damages prior to 1985."[82] Justice Thomas, in a separate dissent, criticized the Court for its "equitable compromise" of the past that created the further uncertainty in the pending case: "The Court must again decide what is *too little* or *too much* compensation for Colorado's depletion of the Arkansas."[83]

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[73] *Id.* at 382.
[74] *Id.*
[75] *Id.* at 393-94.
[76] 543 U.S. 86 (2004).
[77] *Id.* at 90.
[78] *Id.* at 96; *see* Kansas v. Colorado, 533 U.S. 1, 14 (2001).
[79] 543 U.S. at 96.
[80] *Id.* Kansas' argument would have converted the $38 million damages into an award of $53 million.
[81] *Id.* at 98.
[82] *Id.* at 109 (Stevens, J., dissenting). Stevens would have computed interest from 1969 forward, representing the time Colorado knew, or should have known, it was violating the compact.
[83] *Id.* at 107 (Thomas, J., dissenting) (emphasis added). Justice Thomas thought that no prejudgment interest should be available because neither the contract nor the common law at the time of the contract formation authorized such relief. *Id.* at 106.

Justice Thomas utilized Three Bears reasoning again, this time writing for the Court, in *eBay, Inc. v. MercExchange, LLC*.[84] In *eBay*, the Court overturned a permanent injunction issued by the appellate court to protect a business-method patent that defendant eBay had infringed on its successful auction website.[85] The Court was concerned that each party sought extreme positions as plaintiffs argued patent holders were always entitled to equitable relief in addition to damages and defendants argued injunctions were never appropriate.[86] Thomas criticized the Federal Circuit for granting too much relief by establishing a categorical rule under which patent holders were always entitled to an injunction.[87] He also chastised the district court for erring "in the opposite direction" by awarding too little relief by holding that business-method patent holders never need an injunction because they could always remedy their loss with damages.[88] The Supreme Court in *eBay* thus eschewed the "broad classifications" and "expansive principles" at the far ends of the remedial spectrum, reiterating the importance of balance between interests as necessary to determining the remedy that is just right in each case.[89]

Three Bears reasoning appeared more subtly in the Court's analysis of equitable restitution.[90] In *Great-West Life & Annuity Ins. Co. v. Knudson*, the Court, in a 5-4 decision, limited the Employee Retirement Income Security Act's statutory authorization of "equitable" relief to claims for constructive trust and equitable lien.[91] Justice Scalia, writing for the majority, used a historical approach to interpret "equitable" in the text of the federal benefits statute to include only those equitable remedies "typically available in equity . . . during the days of the divided bench."[92] The effect of this decision was to preclude reimbursement to the company from its insured for funds advanced for medical treatment and then later recovered by the insured from a

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[84] 126 S. Ct. 1837 (2006).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1839. The American Bar Association in its amicus brief in *eBay* asked the high court to uphold the Federal Circuit's automatic rule for injunctions. *See* Steve Seidenberg, *Troll Control*, ABA J. 51, 53 (Sept. 2006).
[88] *eBay*, 126 S. Ct. at 1840.
[89] *Id.* at 1840-41. However, the remaining Justices indicated in two separate concurrences that they differed on how that balance should be applied in the case. Chief Justice Roberts thought the balance tipped in favor of the patent holders. *Id.* at 1841-42. Justice Kennedy thought the balance was in favor of the company commercializing the process. *Id.* at 1842. For more on the *eBay* concurrences see discussion infra at 28.
[90] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).
[91] *Id.* at 214. Justice Scalia admitted that "our cases have not previously drawn this fine distinction between restitution at law and restitution in equity. . . ." *Id.*
[92] *Id.* at 210, 212. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003) (arguing that Congress intended ERISA to incorporate the long history of trust remedy law authorizing reimbursement actions); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003) [hereinafter *Reinvents Restitution*] (criticizing Scalia's historical approach and creation of an unworkable standard); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1616-22 (2002) (arguing that the Court incorrectly classified the relief requested as restitution, misread historical practice, and suggesting that a claim for specific money in defendant's possession like Great-West brought was always equitable restitution).

third-party tortfeasor.[93] Scalia was not moved by pleas from the insurance company that his narrow historical rule left plan providers with too little relief.[94] Due to the operation of federal preemption laws, the insurance company would be left with no alternative remedy under state law, thus making standard insurance subrogation clauses unenforceable.[95] The Court's restriction on the statutory remedial power was motivated by the perception that the plaintiff insurance company was overreaching by arguing for a definition of "equitable" relief that acted as a catchall provision for all monetary relief.[96] Justice Stevens, on the other hand, criticized the majority's "current reluctance to conclude that wrongs should be remedied."[97]

These cases thus demonstrate the machinations of balance inherent in the proportionality standard. The proportionality rule seeks a precise balance between the right and remedy as a proxy for fairness and justice. Applying this rule consistently and clearly, however, has proved elusive.

II. THE EVOLUTION OF REMEDIAL PROPORTIONALITY

A journey through the Supreme Court's decisions since 2000 reveals a mishmash of cases on remedies. These cases, addressing punitive damages, injunctions, and legislative remedies, share a governing rule of proportionality, which the Court applies to curtail the remedies available to courts and petitioners.[98] As Professor Andrew Siegel has noted, "the Court's ire falls indiscriminately on those advocating for the availability of a remedy."[99] This section explores the Court's reasoning in remedial proportionality decisions, and synthesizes the opinions to reveal the common principles guiding proportionality analysis.

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[93] *Id.* at 208-09.
[94] *Id.* at 220
[95] *Id.* at 220-21. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 347-48 (2002) ("Some may not be greatly concerned about the inability of a benefits plan to enforce its right to subrogation against a woman left quadriplegic by a serious accident. But as a result of this decision, benefit plans under ERISA may in the future be reluctant to make payments to injured individuals because of the uncertainty that subrogation rights will be enforceable.").
[96] *Great-West*, 534 U.S. at 210.
[97] *Great-West*, 534 U.S. at 223. Justice Ginsburg also dissented, and joined by Justices Stevens, Souter and Breyer, criticized the majority for its "antiquarian inquiry" that needlessly obscured the meaning and application of the statute and which was "better left to the legal historians." *Id.* at 224, 233-34. Four years later, a unanimous Court in *Sereboff v. Mid-Atlantic Medical Services, Inc.*, quietly reversed positions and granted the insurance company the right to seek reimbursement. 126 S. Ct. 1869 (2006). In a technical opinion by Chief Justice Roberts, the Court authorized reimbursement for most insurance companies by labeling the subrogation action as one for "equitable lien." *Id.* at 1875. The *Sereboff* Court did not address the conflict with its prior holding in *Department of the Army v. Blue Fox*, 525 U.S. 255, 264-65 (1999), that equitable liens are essentially actions for money and thus are "legal" rather than equitable claims. *See* Thomas, *Reinvents Restitution*, *supra* note 72, at 1074 (addressing the inconsistency between *Great-West* and *Blue Fox*).
[98] Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1115, 117 (2006).
[99] Siegel, *supra* note 101, at 1126.

As initially applied by the Court, remedial proportionality was an outer limit used to guard against extreme remedial measures or "gross disproportionality."[100] This gross excessiveness standard was a variant of the "I know it when I see it" or "shocks the judicial conscience" tests used to catch extreme remedial outliers.[101] In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court's first foray into federal substantive review of state punitive awards, it applied a "gentle rule" of common-law reasonableness to uphold a punitive award 200 times the amount of pecuniary damages.[102] The Court held that the award did not "cross the line into the area of constitutional impropriety" because state law assured the jury award was not grossly disproportionate to the severity of the offense or the compensatory damages."[103] Under this "weak" remedial proportionality standard, the Court intervened sparingly to keep a check on excessive remedies, but otherwise gave due deference to the decisionmaker's expertise and experience. Judicial review of remedies looked only for extreme disproportionality that pushed the limits of legal redress.[104]

In contrast, the proportionality standard of the modern Court has emerged as a heightened standard of judicial review that demands conformity to a precise remedial measurement. Rather than cursory oversight to catch excessive remedies at the periphery of reasonableness, modern proportionality affirmatively requires reviewing courts to demand a more exact remedial fit. Borrowing from the Court's terminology in criminal punishment cases, this heightened review might be labeled "strict proportionality" in that it demands a close fit between harm and remedy. The remedial strict proportionality test requires a close nexus in both *method* and *magnitude* between the governmental remedial action and operative legal right. That is, the court's remedy must correspond to the right in both type (method or subject) and amount (magnitude or scope).

An early example of the development of the Court's remedial proportionality principle can be seen in *City of Riverside v. Rivera.*[105] In *Rivera*, the plurality and the concurring Justice Powell explicitly adopted a proportionality standard for assessing the reasonableness of attorney fees in civil rights cases, requiring that fees be proportionate to "the results" obtained in the case.[106] This fee standard evaluates the magnitude of the success, including equitable relief, and furtherance of the "public interest" in balancing

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[100] *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

[101] Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903 (2004).

[102] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 12, 20 (1991). In *Haslip*, the insureds sued their insurance company for the fraud of its agent in pocketing payments for insurance that had lapsed. The lead plaintiff, Haslip, recovered compensatory damages of $200,000, including $4,000 of pecuniary damages for out-of-pocket losses for uninsured medical bills. *Id.* at 23.

[103] *Id.* at 24.

[104] *See* Karlan, *supra* note 104, at 903; *see, e.g., TXO*, 509 U.S. at 443; *Haslip*, 499 U.S. at 18; St. Louis, Iron Mtn. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909).

[105] 477 U.S. 561 (1986).

[106] *Rivera*, 477 U.S. at 579; *see* Thomas H. McDonough, *Recent Decisions, Civil Rights: Third Circuit Disallows Use of Proportionality Analysis in Awarding Attorney's Fees Pursuant to the Federal Civil Rights Attorney's Fees Awards Act of 1976*, 71 TEMP. L. REV. 449, 468 (1998).

the reasonableness of the fees.[107] Applying this standard, the Court upheld a fee award of $245,456.25 in *Rivera* where the plaintiffs obtained only $33,350 in compensatory and punitive damages[108] because the successful race discrimination claim against the police department advanced the public interest sufficiently to justify the award.[109] Five Justices expressly rejected the defendants' request for a strict mathematical proportionality formula that would have limited fees to $11,100, 33% of the monetary recovery.[110] The Court held that while it was concerned about potential windfalls to plaintiffs' attorneys, there were adequate safeguards in place to protect against such excess.[111] Thus, while the Court rejected a strict proportionality standard demanding a close fit between fees and relief, it also moved away from a weak review of gross excessiveness advanced by the plaintiffs. The Court thus began to demand heightened judicial oversight measuring the scope of relief.

Reviewing the most recent Supreme Court cases on remedies demonstrates to a striking degree how the Court has converted proportionality from a limited rule of thumb to a universal standard of remedial measurement. The following section traces the evolution of the proportionality standard through the Court's most recent pronouncements.

A. Mathematical Proportionality in Punitive Damages

Over the last decade, the Supreme Court has been newly troubled by state court awards of punitive damages, finding them, in classic Three Bears fashion, to be simply

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[107] *Rivera*, 477 U.S. at 579. A similar standard appears in the Prison Litigation Reform Act of 1995 (PLRA), which requires that attorney fees be proportionate to the "court ordered relief" in the case. 42 U.S.C. § 1997e(d)(1)(B)(i). The PLRA thus eliminates from the proportionality rule consideration of the advancement of the public interest, otherwise permitted by *Rivera*, and removes consideration of success derived from private settlements. *See* Lynn S. Branham, *Toothless In Truth? The Ethereal Rational Basis Test and The Prison Litigation Reform Act's Disparate Restrictions On Attorney's Fees*, 89 CAL. L. REV. 999, 1010-11 (2001).

[108] 477 U.S. at 579. *But see id.* at 587 (Burger, J., dissenting) ("[I]t would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages.").

[109] *Id.* at 579. However, Justice Powell, the concurring fifth Justice in the case, opined that:

> Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. . . . It probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.

Id. at 585, 586 n.3 (Powell, J., concurring). *See* Farrar v. Hobby, 506 U.S. 103 (1992) (applying the proportionality rule of attorney's fees to strike down a fee of $280,000 in a case where the plaintiff obtained only nominal damages of $1)

[110] 477 U.S. at 576, 580 (plurality opinion); *id.* at 585 (Powell, J., concurring).

[111] *Id.* at 580. These adequate safeguards included a legal standard permitting only "reasonable" fee awards, judicial discretion to deny fees in appropriate cases, and preclusion of fees incurred after a pretrial settlement offer greater than the amount recovered at trial. *Id.* at 580-81.

"just too big."[112] Punitive damages are a discretionary monetary remedy imposed to punish a defendant's unlawful conduct and to deter its repetition.[113] The Court has expressed concerns with "monstrous awards"[114] of punitive damages that "run wild"[115] or are "skyrocketing."[116] The Court is suspicious of state juries and their threat of awarding punitives based on "prejudice, bias, and caprice" against big business.[117] In response, the Court has imposed a rule of proportionality to limit excessive punitive awards.

This modern rule of strict, mathematical proportionality alters the longstanding gross excessiveness standard to now require an affirmatively reasonable award, one that is just right. In *Honda Motor Co. v. Oberg*, the Court discussed the common-law standard from early English times that reviewed damages, both compensatory and punitive, for "gross excessiveness," looking for damages that were so "outrageous" that "all mankind at first blush must think so."[118] The *Oberg* Court struck down an Oregon state law that prohibited common-law judicial review and deferred solely to the jury.[119] Since then, the Court's federal oversight of state punitive awards has developed a more demanding measure of punitive relief, requiring a court to pinpoint the precise measure on the remedial spectrum that is "reasonable," rather than merely striking down those awards at the unreasonable extremes.[120] The practical effect of this stricter standard is to overturn more jury awards of punitive damages.

1. Strict Proportionality for Punitives

[112] *See* BMW v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting).
[113] RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); State Farm v. Campbell, 538 U.S. 408, 416 (2003); *Gore*, 517 U.S. at 569; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).
[114] *TXO*, 509 U.S. at 473 (O'Connor, J., dissenting) ("Rather than producing a judgment founded on verifiable criteria, they produced a monstrous award – 526 times actual damages and over 20 times greater than any punitive award in West Virginia history.")
[115] *Gore*, 517 U.S. at 598 (Scalia J., dissenting joined by Thomas, J.) ("Today we see the latest manifestation of this Court's recent and increasingly insistent 'concern about punitive damages that 'run wild.'"'); *TXO*, 509 U.S. at 475 (O'Connor, J., dissenting); *Haslip*, 499 U.S. at 18 ("We note once again our concern about punitive damages that 'run wild.').
[116] Browning-Ferris Indus. v. Kelco, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part, joined by Stevens, J.); *see also TXO*, 509 U.S. at 500 (O'Connor, J., dissenting) ("Recently, however, the frequency and size of such awards have been skyrocketing.").
[117] *TXO*, 509 U.S. at 492 (O'Connor, J., dissenting); *Campbell*, 538 U.S. at 417 ("Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").
[118] 512 U.S. 415, 421-22 (1994) (citing Huckle v. Money, 95 Eng. Rep. 768 (CP 1763)); Karlan, *supra* note 101, at 903 (identifying *BMW v. Gore* as "transforming the longstanding constitutional principle that civil damages awards cannot be 'grossly excessive').
[119] *Oberg*, 512 U.S. at 430.
[120] *Id.* at 437 (Ginsberg, J. dissenting, joined by Rehnquist, C.J.) (arguing that the Constitution only imposes an "outer limit on remedies" and does not guarantee a "right to a correct determination of the reasonableness of a punitive award," and noting that a violation of "reasonableness" does not establish that the award is "grossly excessive.").

The Court's proportionality rule for punitives requires that the measure of punitive damages correspond to the wrongfulness of the conduct: "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[121] Proportionality is determined by use of "three guideposts," directing judges to examine the reprehensibility of the defendant's action, the amount of harm caused, and the societal indication of wrong embodied in other sanctions.[122] The ultimate balance between the harm caused and appropriate measure of punitives must satisfy a precise mathematical ratio between compensatory and punitive damages.[123]

This proportionality rule demanding predictable computation of punitives is a departure from the common-law theory that punitives should be indeterminate in order to effectively punish or deter a defendant.[124] The common-law theory ensured that defendants could not calculate punitives into the cost of doing business and thereby continue to engage in socially undesirable behavior. [125] Punitives internalize the costs of reprehensible conduct where the market has failed to deter the rational economic actor because the wrongdoing creates only external costs.[126] Lack of predictability was the true force behind punitive damages, because it prevented reprehensible conduct from becoming a rational economic choice.

Courts traditionally reviewed punitive damages for extreme results falling at the outer limits of reasoned judgment. Using a type of "I know it when I see it" approach, courts looked to whether punitive awards "shocked the judicial conscience" or "jarred constitutional sensibilities" in deciding whether to overturn the traditional deference to the finders of fact.[127] In the modern era, however, the Supreme Court has rejected this longstanding norm of weak judicial oversight, and instead has adopted a rule of precise measurement for punitive damages affirmatively mandating "reasonable" measures.

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[121] *Campbell*, 538 U.S. at 426.
[122] *Id.* at 418; BMW v. Gore, 517 U.S. 559, 575 (1996).
[123] *Campbell*, 538 U.S. at 424-25 (requiring that punitives be within a range of 2 to 9 times as large as compensatory damages). *See* discussion *infra* at 20.
[124] *Cf. Haslip*, 499 U.S. at 58-59 (O'Connor, J., dissenting) (advocating proportionality for punitives and rejecting argument that proper deterrence of corporate wrongdoing necessitates unpredictable and disproportionate punitive awards from jury).
[125] Man v. Raymark Indus., 728 F. Supp. 1461, 1467 (D. Haw. 1989) ("Punitive damages serve to deter manufacturers as, unlike with compensatory damages, the defendant is prevented from making the 'coldblooded calculation' that it is more profitable to pay claims than correct a defect."); Palmer v. A.H. Robins Co., 684 P.2d 187, 218 (Colo. 1984) ("If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect."); *see* Walter Lucas, Op-ed, *Punitives Cap Makes Injury a Cost of Doing Business,* 138 N.J. L.J. 789, 804 (1994); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1430 (1993).
[126] Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 251 (2005).
[127] *See TXO*, 509 U.S. at 443 (plurality opinion); *Haslip*, 499 U.S. at 18.

Glimmers of a strict proportionality rule first appeared in 1993, in *TXO Production Corp. v. Alliance Resources Corp.*[128] In *TXO*, the plurality rejected the parties' request for an absolute test or mathematical bright line that would determine the excessiveness of punitive awards.[129] The Court rejected each side's argument as too extreme in Three Bears fashion, finding that the plaintiffs asked for too much in seeking to uphold any punitive award that legitimately sought to punish or deter, and that defendants sought too little relief in seeking to subject all punitives to heightened scrutiny.[130] Instead, the plurality adopted what has since been labeled a "narrow" proportionality test under which it reviewed the punitive damages award for "gross excessiveness."[131] The narrow proportionality standard does not mandate a particular measure of punitive damages, but rather operates to strike down awards outside the zone of reasonableness. Under this cursory check for excessiveness, a divided Court in *TXO* upheld an award of $10 million in punitives for $19,000 in compensatory damages.[132] While the actual loss to the plaintiff was low, the Court found that the potential loss threatened was several million dollars, and this potential harm, coupled with the defendant's egregious bad faith of bringing false lawsuits against innocent business parties, made such an award reasonable.[133]

Justice O'Connor, however, criticized this weak standard of review and argued for a more principled guide to lower courts as to the arbitrariness of punitive damages.[134] It was O'Connor's dissent in *TXO*, joined by Justices White and Souter, that raised the specter of proportionality for punitive damages.[135] O'Connor argued that the notion of proportionality was implicit in due process as the antithesis of arbitrary state action.[136] She observed that the "requirement of proportionality is 'deeply rooted and frequently repeated in common-law jurisprudence.'"[137] Strict judicial review of punitive damages, O'Connor said, ensured that the "ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense."[138]

The proportionality rule from O'Connor's dissent emerged as the majority rule just three years later in *BMW v. Gore.*[139] With little explanation, the three split

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[128] 509 U.S. 443 (1993).
[129] *Id.* at 459.
[130] *Id.* at 456.
[131] *Id.* at 458.
[132] *Id.* at 450, 456. Justice Stevens, writing for the plurality and its invocation of a narrow proportionality standard, was joined by Chief Justice Rehnquist and Justice Blackmun. Justice Kennedy wrote a concurrence criticizing the use of a quantitative rather than qualitative analysis for excessiveness. *Id.* at 466. Justices Scalia and Thomas, also concurring in the judgment upholding the award, rejected the premise that the Constitution grants any power to the Supreme Court to review awards of punitive damages. *Id.* at 470.
[133] *Id.* at 462.
[134] *Id.* at 480 ("In Solomonic fashion, the plurality rejects both petitioner's and respondents' proffered approaches, instead selecting a seemingly moderate course. But the course the plurality chooses is, in fact, no course at all.").
[135] *Id.* at 478-79 (O'Connor, J., dissenting).
[136] *Id.* at 479.
[137] *Id.* at 478.
[138] *Id.*
[139] 517 U.S. 559 (1996).

opinions of *TXO* combined to form a rule endorsing a strict proportionality standard for punitive damages incorporating both qualitative and quantitative factors.[140] In *Gore*, the plaintiff was awarded $2 million dollars for BMW's fraud of selling a car as new, failing to disclose it had been repainted.[141] The plaintiff's damages from the fraud were $4,000, the amount of the reduced market value of a "used" car.[142] The Court reacted to the plaintiff's windfall for such an inconsequential economic harm by adopting the "three guideposts" to guide the courts' decisions as to a proper measure of punitive damages: punitives must be proportional to 1) the reprehensibility of the defendant's misconduct; 2) the amount of compensatory damages awarded; and 3) the amount of other civil sanctions.[143] In *Gore*, like *TXO*, disproportionality between punitives and the amount of harm indicated that the judge should "rais[e] a suspicious eyebrow."[144]

While the Court found it important to adopt a new, heightened standard of proportionality in *Gore*, the result did not depend upon this standard. *Gore* was an easy case, as Justice Breyer explained:

> [T]he severe disproportionality between the award and the legitimate punitive damages objectives reflects a judgment about a matter of degree. I recognize that it is often difficult to determine just when a punitive award exceeds an amount reasonably related to a State's legitimate interests, or when that excess is so great as to amount to a matter of constitutional concern. Yet whatever the difficulties of drawing a precise line, once we examine the award in this case, it is not difficult to say that this award lies on the line's far side. The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category of "gross excessiveness" set forth in the Court's prior cases. [145]

Nonetheless, the Court emerged from *Gore* with a stricter standard of proportionality requiring the Court to choose a more precise point along the remedial spectrum as to reasonable relief. Rather than merely identifying an award as so severe and oppressive as to fall within the zone of arbitrariness as had been done in the past,[146] courts were now instructed to more closely approximate a "reasonable" measure of punitive damages. Subsequently, the Court adopted a de novo standard of review for punitive awards in order to facilitate the exacting inquiry needed to apply strict

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[140] Justice O'Connor's position in *TXO* quietly won the day as her dissent and Kennedy's concurrence in *TXO* combined into a five-Justice majority for strict proportionality in the *Gore* opinion authored by the same writer as in *TXO*, Justice Stevens.
[141] *Gore*, 517 U.S. at 567.
[142] *Id.* at 564.
[143] State Farm v. Campbell, 538 U.S. 408, 418 (2003); *Gore*, 517 U.S. at 575.
[144] *Gore*, 517 U.S. at 583; *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting).
[145] *Gore*, 517 U.S. at 596 (Breyer, J., concurring).
[146] *See, e.g*, St. Louis Iron M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909); *see* Karlan, *supra* note 101, at 903.

proportionality and avoid the more deferential narrow proportionality standard of outlying excessiveness.[147]

In 2003, the Court refined the strict proportionality standard as a mathematical ratio in *State Farm v. Campbell*.[148] In *State Farm*, the Court overturned an award of punitive damages in the amount of $145 million for State Farm's bad faith and intentional infliction of emotional distress against one of its insureds.[149] State Farm covered up the liability of its insured in a fatal car accident, refused to settle for the policy limits, and then threatened its own insured, the Campbells, with bankruptcy and losing their home.[150] The Court identified the legal problem in the case as the "imprecise manner" of measuring punitive damages.[151] The six-Justice majority had "no doubt that there is a presumption against an award that has a 145 to 1 ratio."[152]

In the past, the Court had consistently rejected pressure to set a concrete mathematical formula for the proper measure of punitives.[153]

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and *potential* damages to the punitive award. . . . We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.[154]

Nevertheless, in *State Farm* the Court identified a range of concrete ratios of appropriate proportional measures of punitive damages.[155] The Court suggested that "single-digit" multipliers of damages are more likely to comport with due process, and that ratios of 4 to 1 were generally defensible.[156] It also noted with favor a long legislative history of adopting ratios of double, triple, or quadruple damages.[157] Thus, punitives were largely restricted to 2 to 9 times the amount of compensatory damages awarded in a case.[158]

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[147] *Campbell*, 538 U.S. at 418; Cooper Industries Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).
[148] 538 U.S. 408, 425 (2003).
[149] *Id.*
[150] *Id*. at 413.
[151] *Id.* at 417.
[152] *Id.* at 426. Chief Justice Rehnquist crossed over in *Campbell* to embrace the strict proportionality he had previously rejected. *Id.* The three dissenters, Justices Scalia, Thomas, and Ginsburg continued to believe that proportionality analysis and federal court review of punitive damages was not mandated under the Constitution. *See id.* at 429-30.
[153] BMW v. Gore, 517 U.S. 559, 582 (1996); *TXO*, 509 U.S. at 458.
[154] *Gore*, 517 U.S. at 582 (citing *TXO*, 509 U.S. at 458).
[155] *Campbell*, 538 U.S. at 424-25.
[156] *Id.* at 425.
[157] *Id.*
[158] There are some exceptions to the mathematical ratio, such as when the conduct is clandestine and capable of evading detection, when the compensatory measure is particularly substantial, or when the compensatory measure is low but the defendant's act is egregious. *Campbell*, 538 U.S. at 425; *see also*

State Farm, like *Gore*, was "neither close nor difficult."[159] The application of a narrow proportionality standard of gross excessiveness would have sufficed to invalidate the extreme punitive award. Nevertheless, the Court took the opportunity to craft a more stringent standard of proportionality necessitating a careful assessment of punitive damages. The concern with precise, careful measurement and close quantitative nexus are all indicative of a strict proportionality standard.

2. Proportionality as a Constitutional Mandate for Fairness

The Supreme Court has located the requirement of proportionality for punitive damages in the Due Process Clause of the Fourteenth Amendment.[160] The Court has expressly stated that both procedural and substantive due process guarantees are implicated in an excessive punitive award.[161] The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments: "The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[162] Grounding proportionality in constitutional notions of fairness has potentially broad implications, as all remedies, not just punitives, may be said to require constitutionally fair results.[163]

Excessive punitive awards are unfair to defendants, according to the Court, because they fail procedurally to provide adequate notice to the defendant of the rule of law.[164] A proportionality rule thus promotes consistency in awards and provides the constitutionally-required notice of the potential legal consequences of reprehensible conduct.[165] Excessive punitives are also unfair to defendants in the arbitrariness of the amount of the award.[166] Proportionality reins in excess and avoids arbitrary governmental action that violates substantive due process. Conceptualized as a due

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Matthias v. Accor Lodging Inc., 347 F.3d 672 (7th Cir. 2003) (Posner, J.) (discussing the economic bases for deviating from a strict mathematical ratio for punitives).

[159] *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 596 (Breyer, J., concurring).

[160] *Campbell*, 538 U.S. at 416; *Cooper*, 532 U.S. at 433-34; *Gore*, 517 U.S. at 559; *TXO*, 509 U.S. at 443. *But see* A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 SO. CAL. L. REV. 1085 (2006) (arguing that the Court's proportionality rule for punitives has no basis in the Due Process Clause).

[161] *Campbell*, 538 U.S. at 416. Not all Justices, however, agree that the Constitution embodies this proportionality principle. *Id.* at 429 (Scalia., J., and Thomas, J., dissenting). Justice Ginsburg additionally argues that proportionality review is an unjustified intrusion into the province of the state governments and thus is not sanctioned by the Constitution. *Gore*, 517 U.S. at 607; *accord id.* at 598 (Scalia, J., dissenting).

[162] *Campbell*, 538 U.S. at 416.

[163] *See* Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975 (2006) [hereinafter *Tort Remedies*] (arguing that the Due Process Clause requires a floor of a minimally adequate measure of tort damages for plaintiffs); Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1093-94 (2005) (endorsing expanded substantive due process review to limit tort damages); *accord* Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231 (2003).

[164] *Id.* at 417.

[165] *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

[166] *Campbell*, 538 U.S. at 416.

process issue, proportionality becomes a tool used to prevent encroachment on individual rights.[167]

The individual right at issue is the property interest of the defendant.[168] Of prime concern is when the property interest of the defendant is used to create a windfall for the plaintiff. Justice Kennedy, writing for the majority in *State Farm*, was particularly troubled by the potential duplication of awarding both punitives and emotional distress damages: "Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element."[169] In other words, a plaintiff's emotional indignation and the defendant's reprehensible conduct are merely two sides of the same coin: one (the distress) is simply the reaction to the other act (the reprehensible conduct). Thus, the Court intimates that damages based on the intentional infliction of emotional distress already compensate for the defendant's wrongful act.[170]

Ultimately, the Court is concerned about the constitutional rights of the defendants, particularly those of big corporate defendants that might bear the brunt of jurors' animosity and bias. The excessive size of many punitive awards, the Court states, can be "explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state corporate defendant."[171]

> Corporations are mere abstractions and, as such are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.[172]

The Court justifies its concern for corporate wrongdoers as economically based, finding that a corporation's "status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue

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[167] Ristroph, *supra* note 47, at 292-93.
[168] *Id.* at 298.
[169] *Campbell*, 538 U.S. at 426.
[170] In concluding that punitive damages were redundant with compensatory non-economic damages, Justice Kennedy relied upon the *Restatement (Second) of Torts*, which states: "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both." *Id.* § 908, cmt. c (1977); *see* Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1430 (2004) (explaining how punitive damages originated as a way to justify jury awards that exceeded tangible losses, and that such a need disappeared when the law began to compensate for insult, indignity, and distress).
[171] *TXO*, 509 U.S. at 468 (*Kennedy*, J., concurring).
[172] *Id.* at 491 (O'Connor, J., dissenting).

burdens on interstate commerce."[173] Among other concerns, Justice O'Connor noted how the threat of enormous punitive damage awards has a detrimental effect on the research and development of new products.[174] These national concerns, as well as concerns under the fairness guarantees of the Due Process Clause, thus weigh in favor of protecting defendants from untoward remedial consequences.

B. Reining in Injunctions

In the context of injunctions, proportionality again operates to limit the remedial power of the court. Proportionality is explained as a mechanism to rein in the expansive power of lower court outlaws who engage in judicial policymaking through broad injunctive relief. The proportionality principle manifests itself as a doctrinal rule requiring that the scope of the injunction match the scope of the harm.[175] Proportionality for injunctive relief, the Court has stated, derives from the inherent concept of fairness embodied in equity that balances all of the interests in a remedial calculation.[176] However, proportionality is a one-way street: it is used to protect defendants against disproportionate remedies, but plaintiffs do not receive comparable protection.

1. Developing Standards of Proportionality

As with punitive damages, proportionality for injunctions has evolved from weak oversight to a strict standard of review. The Court developed its rule of proportionality for injunctions in the school desegregation cases.[177] Law professors summarizing these cases view the structural injunctions as "the most untailored remedy imaginable"[178] and assumed that the Court had abandoned any effort to cabin equitable

[173] BMW v. Gore, 517 U.S. 559, 585 (1996).

[174] Browning-Ferris, 492 U.S. at 282 (O'Connor, J. dissenting) ("Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.").

[175] Lewis v. Casey, 518 U.S. 343 (1996); United States v. Virginia, 518 U.S. 515 (1996); Missouri v. Jenkins, 515 U.S. 70, 84 (1995).

[176] *See, e.g*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971) ("However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern.").

[177] Milliken v. Bradley, 418 U.S. 717 (1974); *Swann*, 402 U.S. at 16.

[178] *See* Abram Chayes, *The Supreme Court 1981 Term--Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 55 (1982) (noting the Court has "more or less given up the effort" of forming any "systematic substantive limitations on the scope of relief"); Owen M. Fiss, *The Supreme Court 1978 Term – Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 46 n.94 (1979); Friedman, *supra* note 31, at 747 (arguing that the right-remedy test is "vague and somewhat indeterminate" and permits courts "to do pretty much what they want"); John Leubsdorf, Completing the Desegregation Remedy, 57 B.U. L. REV. 39, 83- 85 (1977); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 715 (1978) (critiquing the right-remedy connection as "indeterminate"). Professor Fiss supported this type of untailored relief, calling for judges to exercise their discretion and flexibility for the public good. Fiss, *supra*, at 46.

remedial discretion within the right-remedy proportionality nexus.[179] What was at play, however, was a weak proportionality standard under which the Court cursorily reviewed lower court injunctions for excess. The Court utilized a weak proportionality or "right-remedy" standard which gave great weight to the lower court's factfinding expertise and determination of a fair remedy.[180] Under this weak standard, most, but not all, of the school desegregation case challenges were upheld.[181]

The watershed change in the application of the proportionality standard for injunctions came in *Missouri v. Jenkins*.[182] The four dissenting Justices, led by Justice Souter, struggled to retain the weak proportionality standard under which injunctions would be reviewed only for "exceptional circumstances" or "obvious error."[183] The majority, however, in an opinion by Chief Justice Rehnquist adopted a stronger proportionality standard under which it overturned the lower court injunction, ordering salary increases for school personnel and state funding for remedial achievement programs.[184] Justice Thomas, concurring in *Jenkins*, revealed the extent to which the Court's holding departed from its past application of weak proportionality in the injunction context. He argued that remedial decrees had gotten out of hand, and that "the time has come for us to put the genie back in the bottle."[185] Thomas argued that the Court should "demand that remedial decrees be more precisely designed" to avoid the type of "hit-or-miss method" of shaping remedies that had been employed in the past.[186] This demand for a reasonable, carefully tailored remedy signaled the advent of strict remedial proportionality. Applying this strict standard, it appears that defendants usually win.

2. <u>The Good, the Bad, and the Ugly</u>

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[179] Chayes, supra note 177, at 55.

[180] *See* Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 540 (1999) [hereinafter *Public Law Remedies*] (discussing the Court's adoption of an indeterminate right-remedy test); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 859-60 (1991) (discussing the weak standard of review for injunctions under which "[r]emedies are reviewed deferentially only to determine if there was an abuse of discretion and the trial judge is allowed to balance all the competing equities that are presented in the circumstances of the particular case.").

[181] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1988) (*Milliken II*) (upholding remedial education programs to remedy school segregation); *Swann*, 402 U.S. at 16 (permitting federal courts to order busing, student ratios, and attendance zones to desegregate schools); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding mathematical ratios to desegregate faculty and staff); *but see* Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) (invalidating desegregation injunction that reached non-party suburban school districts).

[182] 515 U.S. 70 (1995).

[183] *Id.* at 138-39, 157 (Souter, J., dissenting).

[184] *Id*. at 73, 78-79.

[185] *Id.* at 123 (Thomas, J., concurring).

[186] *Id.* at 135, 137 (Thomas, J., concurring). In arguing for a strict proportionality standard, Justice Thomas pointed out the lack of teeth in a weak proportionality standard: "If the standard reduces to what one believes is a 'fair' remedy, or what vaguely appears to be a good 'fit' between violation and remedy, then there is little hope of imposing the constraints on the equity power that the Framers envisioned and that our constitutional system requires." *Id.* at 134.

In the new millennium, the injunctive proportionality tale told by the Supreme Court is a story of good defendants, bad overreaching plaintiffs, and ugly overzealous courts. In this narrative, plaintiffs, often aided by the courts, reach for the moon, seeking social justice and windfall gains at the expense of overtaxed defendants. Concerns about the consequences of the injunction for the defendants, who are more often than not institutional actors, drive the decisions. Inverting the normal balance of plaintiffs deserving vindication from wrongdoing defendants, these cases portray proportionality as a tool to restore justice for defendants.

The Good: Overburdened Defendants: Remedial injunctive proportionality cases are striking due to the Court's concern for the interests of the established wrongdoer. The individual freedom of the defendants emerges as a key factor in measuring the appropriate proportion of injunctive relief. The theoretical origins of such a heightened standard are left unstated. Perhaps it is merely a doctrinal leftover from the First Amendment overbreadth context. Proportionality for injunctions originated in the prior restraint cases of overbreadth, in which the Court sought to protect the First Amendment rights of the defendant.[187] Perhaps it is the unique status of injunctive relief which operates prospectively to restrict the future freedom of the defendant. The restriction on behavior that may or may not be illegal, the potential for contempt penalties, and the possible curtailment of defendants' otherwise efficient behavior may counsel in favor of respecting their interests in the remedial calculus.[188]

The Court's explanation for its heightened standard is based on pragmatic concerns for the institutional actors who serve as defendants in these cases. At times this institutional concern manifests as practical management issues governing the expertise of the defendant in handling the day-to-day affairs of the institution.[189] At other times the institutional concern is translated as one of federalism, both horizontal and vertical, when courts assume responsibilities granted to another branch of government.[190] It is clear that the Court is reluctant to direct the activities of institutional and corporate defendants, despite their proven wrongdoing.

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[187] *See* Zoller, *supra* note 3, at 50 ("If an analogy to the [international] proportionality principle had to be found in current American law, the closest would be the overbreadth doctrine that comes into play to invalidate laws that sweep in too much speech."). For example, in the recent case of *Tory v. Cochran*, the Court used proportionality to invalidate an injunction in a defamation action preventing all future speech about the infamous lawyer, Johnnie Cochran, by a former client. 544 U.S. 734, 736 (2005). After Cochran's death, the Court found the injunction to be "an overly broad prior restraint upon speech, lacking plausible justification." *Id.* at 738; *see also* Madsen v. Women's Health Ctr. Inc., 512 U.S. 753 (1994) (invalidating parts of injunction restricting behavior of abortion protestors on grounds that injunction interfered with protestors' First Amendment rights).

[188] *See* LAYCOCK, *supra* note 62.

[189] *See, e.g.*, *Sherrill*, 544 U.S. at 220.

[190] *See, e.g.*, *Jenkins*, 515 U.S. at 131-35 (Thomas, J., concurring); Parker, *supra* note 179, at 540 (stating that most often federalism is shown by deference to the defendants in school desegregation cases); *but see* Siegel, *supra* note 98 (suggesting that Court's main theme is not driven by federalism, despite the frequent cites to federalism concerns, but instead by hostility to litigation).

The Court began to develop this tale of the good defendant in the school desegregation cases.[191] In these cases, it began to establish the doctrinal rules embodying the juridicial concern for defendants. Under these rules, defendants are given the first opportunity to remedy the harm or to craft an appropriate remedial plan.[192] If the defendants fail in that voluntary effort, then the court must weigh carefully the interests of the institutional defendants in managing their own affairs in the remedial process.[193] For example, in *Lewis v. Casey*, the detailed prison law library injunction failed not just because it was overbroad, but also because it failed to accord proper deference to the judgment of prison administrators and to give them a first opportunity to correct their errors.[194]

Modern cases of remedial proportionality in injunctions demonstrate continued deference to defendants and a heightened concern for their interests. For example, in *Sherrill*, the Court highlighted the interests of the city from whom the Oneida tribe was seeking tax immunity as a basis for denying the injunctive relief.[195] The Court was concerned about the impact of a contrary decision upon the city, which had relied upon the non-Indian status of the land for more than 200 years, building its city, developing its zoning, and relying upon the tax base.[196] Technically, the Court effectuated this concern through the doctrinal vehicle of laches, reasoning that New York's two centuries of continuous regulatory jurisdiction created "justifiable expectations" on the part of the city, buttressed by the Oneida's delay in asserting their claims: "The long history of state sovereign control precludes the Oneida from rekindling embers of sovereignty that long ago grew cold."[197] The majority stated that allowing tax immunity for the Oneida's parcels would "seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches."[198] The Court framed this as an "impracticality" defense to the injunction, finding that it was impractical to return to Indian control land that generations earlier passed into numerous private hands.[199]

Similarly, in *Ayotte*, the Court relied upon the interests of the defendant to deny the broad injunction.[200] The proportionality calculus was driven by the Court's overriding concern for the institutional defendant, the New Hampshire legislature. It identified "three interrelated principles informing its decision," all of which pertained to the defendant.[201] First, the Court stated, it tries not to nullify more of a legislature's

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[191] *See* Parker, *supra* note 189, at 534-35 (exploring the dominant deference to defendants in school desegregation cases).
[192] Lewis v. Casey, 518 U.S. 343, 362 (1996); Hutto v. Finney, 437 U.S. 678, 687 (1978).
[193] "[F]ederal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Jenkins*, 515 U.S. at 88; Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).
[194] *Jenkins*, 518 U.S. at 361-62.
[195] 544 U.S. 197, 220 (2005).
[196] *Id.* at 220-21.
[197] *Id.* at 214.
[198] *Id.* at 220.
[199] *Id.* at 219.
[200] 126 S. Ct. 961 (2006).
[201] *Id.* at 967.

work than is necessary, for such a ruling frustrates the intent of the elected representatives of the people.[202] Second, the Court attempts to avoid devising a judicial remedy that essentially rewrites state law, "mindful that our constitutional mandate and institutional competence are limited." [203] It held that such remedial "line-drawing" was "inherently complex" and a "serious invasion of the legislative domain."[204] Third, the Court held that the "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature."[205] Ultimately, the Court viewed its most important remedial restraint as the proper respect of a federal court for the institutional functioning of the state legislature, despite the unconstitutional actions of that legislature.

The Bad: Overreaching Plaintiffs: The second character in the Court's tale of injunctive proportionality is the overreaching plaintiff. The Court is often explicit in stating its belief that plaintiffs overreach by requesting excess relief. Such excess relief produces windfalls to plaintiffs or society beyond what justice requires. The doctrinal rule that an injunctive remedy return a plaintiff to the position she would have occupied in the absence of the defendant's illegal conduct restricts the plaintiff's ability to receive a remedial windfall.[206] Plaintiffs are not to obtain an advantage in excess of this position, nor is the remedy to benefit third parties not harmed by the conduct at issue. Beyond this mechanical doctrinal rule, however, lies a greater suspicion of plaintiffs and a distrust of their motivations in the litigation.[207]

For example, underlying the Court's decision in *Jenkins*, in which it struck down an overbroad school desegregation degree, was a belief in the suspect motives of some of the parties. The Court noted the collusion between the parties and the school district in using the litigation to leverage funding for improved education. The school district initially filed as a plaintiff along with the parents, though it was later realigned as a nominal defendant. "The KCMSD, which has pursued a 'friendly adversary' relationship with the plaintiffs, has continued to propose ever more expensive programs."[208] The Court accused the parties of bypassing the normal process of collective bargaining by colluding in the litigation to obtain higher salaries funded by the state.[209]

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[202] *Id.* at 968.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] United States v. Virginia, 518 U.S. 515, 547 (1996); *Jenkins*, 515 U.S. at 87.
[207] The converse is also true. Where the Court finds the motives of the plaintiff to be in good faith, it is more likely to grant injunctive relief. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1220-21 (2006) (upholding preliminary injunction permitting religious sect's continued use of a controlled substance due to their good faith beliefs).
[208] *Jenkins*, 515 U.S. at 79.
[209] *Id.* at 82 (quoting the dissenting opinion in the appellate court which "characterized the current effort by KCMSD and the American Federation of Teachers aided by the plaintiffs to bypass the collective bargaining process as uncalled for and probably not an exercise reasonably related to the constitutional violations found by the court").

This collusion led the plaintiffs to continually seek "extravagant," "elaborate" programs designed to obtain one of the best public educations in the nation.[210] The plaintiffs obtained public schools with air conditioning, a planetarium, greenhouses, a model United Nations room, an art gallery, an animal farm, and movie screening rooms.[211] "The District Court candidly has acknowledged that it has 'allowed the District planners to dream and provide the mechanism for those dreams to be realized.'"[212] This overreaching was clearly beyond the pale and triggered the conclusion of disproportionate relief.

The same belief in the corrupt motives of overreaching plaintiffs guided Justice Kennedy's concurrence in *eBay*.[213] Plaintiff MercExchange won $35 million in damages after a jury trial for eBay's infringement of its business method patent in creating the eBay on-line auction company.[214] MercExchange then sought an injunction prohibiting eBay's use of the patent in the future.[215] The parties had previously tried to reach a licensing agreement permitting eBay's use of the on-line method, but were unsuccessful.[216]

Four concurring justices wrote separately to express concerns over the the potential overreaching of the plaintiff.[217] These Justices identified the plaintiff as one of a new breed of "patent trolls," who seek to enforce a patent in area where it does not actively compete with a product or process.[218] In his concurrence, Justice Kennedy recognized that "[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees."[219] He expressed concerns about a remedial rule that created windfalls to these plaintiffs in cases where the patent was only a business method patent, and "when the patented invention is but a small component of the product the defendant company seeks to produce."[220] For in these cases, the "injunction is employed simply for undue leverage in negotiations" by threatening to close down the defendant's entire business.[221] For

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[210] *Id.* at 98-99.
[211] *Id.* at 79, 92.
[212] *Id.* at 80.
[213] *eBay*, 126 S.Ct. at 1842-43 (Kennedy, J., concurring). In contrast, the concurrence by Chief Justice Roberts noted the respect with which plaintiff patent holders were historically treated under the law in generally having their requests for injunctive relief granted. *Id*. at 1841-42 (Roberts, C.J., concurring).
[214] MercExchange, LLC v. eBay, Inc., 275 F. Supp. 3d 695, 698 (E.D. Va. 2003).
[215] *eBay*, 126 S.Ct. at 1839; *see also MercExchange*, 275 F. Supp. at 710-11.
[216] The district court noted the acrimony between the parties, commenting that 'this case has been one of the more, if not the most, contentious cases that this court has ever presided over." *MercExchange*, 275 F. Supp. 2d at 714.
[217] *Id*. at 1843 (Kennedy, J., concurring, joined by Stevens, J., Souter, J., and Breyer, J.).
[218] *See* Seidenberg, *supra* note 64, at 51, 53. A "patent troll" is a "nefarious term for businesses that produce no products or services and have the sole purpose of obtaining money by licensing patents they own and winning infringement lawsuits against others." The term was first used in 2001 by in-house counsel for Intel Corp. to describe the small companies that were suing Intel for patent infringement. *Id.*
[219] *eBay*, 126 S.Ct. at 1842 (Kennedy, J., concurring).
[220] *Id.; see* Seidenberg, *supra* note 64, at 54.
[221] *eBay*, 126 S.Ct. at 1842; *see* Seidenberg, *supra* note 64, at 54. However, the flip side of this concern with overreaching is the recognition that many "patent trolls" are small inventors whose methods and processes have been appropriated by large companies like Microsoft and Intel. Seidenberg, *supra*, at 51-54. Small inventors often enter into negotiations with large companies to license their inventions. When

Kennedy, this misuse of injunctive relief to garner excessive power in the economic arena militated against the issuance of injunctions to future patent trolls.[222]

The character of the overreaching plaintiff appears again in *Sherrill.*[223] The Oneida Indian tribe brought a series of cases over several decades trying to reclaim ancient tribal lands wrongfully taken by the government. In a prior decision, the Supreme Court held that the tribe had a right to assert damages as compensation for lands wrongfully taken.[224] Subsequently, the Oneida sought tax immunity for several parcels of land the tribe had reacquired from private owners on the open market. One senses that the Court thought the Indian tribe was seeking more than its fair share of relief by following a successful bid for damages on a novel claim with yet another request for prospective relief. The Oneida had gone one step too far, and the Court would no longer be a willing player in the claim for restorative justice more properly addressed in the legislative arena.[225] The lone dissenter in *Sherrill*, Justice Stevens, challenged the notion of the excessive plaintiff, stating that "the majority's fear of opening a Pandora's box of tribal powers is greatly exaggerated."[226] He pointed out the inconsistency of previously recognizing the Oneidas as the owners of the land, and their attendant right to collect damages for that land, but not permitting them to assert injunctive relief as owners of the same land.[227] The majority, however, drew a line, permitting legal but not equitable relief to prevent an excessive award to the tribe.

The Ugly: Overzealous Courts: As the narrative continues, the Supreme Court rides in with its white hat of remedial proportionality to save us all from the tyranny of overzealous courts. In this tale, the lower courts are the ugly villains who inflict harm with their remedial weapons, using their remedial powers for purposes other than to make the plaintiff whole. The rule of proportionality thus becomes a restriction of the equitable power of the courts, rather than a mere balancing of the equities between the parties. It is a rule of restraint limiting the remedial authority of the lower courts.

The assumption of the overzealous court gone astray is clear in *Jenkins*, where the majority takes the lower court to task for its indulgence in designing plaintiffs' wish-list relief. The Court commented that the lower court's injunction had been described as the "most ambitious and expensive remedial program in the history of school desegregation."[228] It found that the excessive relief awarded—such as a

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negotiations break down, the large company proceeds to use the new technology without a license, and the small inventor is left with no intellectual property and the high-cost of patent litigation. *Id.*

[222] *eBay*, 126 S.Ct. at 1842.

[223] 544 U.S. 197 (2005).

[224] *See* County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 231(1985).

[225] The availability of an alternative remedy in a federal process for placing Indian land in federal trust mitigated the Court's seemingly harsh decision. *See Sherrill*, 544 U.S. at 20-21. The Oneida did not pursue this option, but nevertheless found relief in subsequent proceedings when on remand, the tribe won tax immunity under New York state law that precluded taxation of tribal property owners. *See* Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2005).

[226] *Sherrill*, 544 U.S. at 227 n.6 (Stevens, J., dissenting).

[227] Stevens found the Court's legalistic distinction based on law and equity to be unpersuasive. *Id.* at 225-26.

[228] *Jenkins*, 515 U.S. at 78.

planetarium and a United Nations room—to encourage public school attractiveness and counteract white flight was judicial policymaking rather than proper remedial decisionmaking.[229] As Justice O'Connor articulated in her concurrence, "[t]he necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills. . . . It is best to leave social problems like education and segregation to the legislative branches."[230]

Justice Thomas, in his concurring opinion, was more direct in his attack on the lower court.[231] He urged the adoption of a proportionality rule to restrain such unacceptable use of judicial authority.

> It is perhaps not surprising that broad equitable powers have crept into our jurisprudence for they vest judges with the discretion to escape the constraints and dictates of the law and legal rules. But I believe that we must impose more precise standards and guidelines on the federal equitable power . . . to restore predictability to the law and reduce judicial discretion.[232]

Justice Thomas situated the factual debate in the larger critique of lower court activism, arguing that courts had more generally veered from the narrow course of remedying wrongs.[233] Challenging all structural and public law relief as improper, this larger criticism reprimands courts for assuming the role of legislatures by essentially enacting policy through the award of broad injunctive relief extending beyond the contours of the case.[234] The theory exemplified by Thomas' dissent is a federalist critique asserting that courts usurp legislative authority by making policy through the use of remedial authority. It takes on legal theorists like Professors Fiss and Chayes, who in the 1970s argued that the courts should disconnect right from remedy in order to implement moral justice through remedial power and structural injunctions.[235] Fiss and Chayes argued for remedies that were broader than the legal right in order to elaborate and instill new legal norms of social justice. The federalist critique attacks the ability of

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[229] *Id.* at 83 (quoting the dissenting appellate judge's conclusion that the case "involves an exercise in pedagogical sociology, not constitutional adjudication.").
[230] *Id.* at 112-13.
[231] *Id.* at 125 (Thomas, J., concurring). Thomas stated: "The judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary measures in the past. . . . Judges have directed or managed the reconstruction of entire institutions and bureaucracies with little regard for the inherent limitations on their authority." *Id.* at 125-56.
[232] *Id.* at 135.
[233] *Id.* at 131-33 (Thomas, J., concurring) (citing Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) and Paul Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978)).
[234] *See, e.g.*, John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996) ("[T]he essential flaw of judicial management is that the Constitution does not permit the federal courts to exercise their remedial powers to engage in the structural reform of local institutions and local government.").
[235] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *supra* note 177, at 1.

lower courts to award any type of structural relief beyond correcting the specific past harm.[236] Proportionality thus has become a doctrinal rule to discredit public law injunctions and implement a policy against alleged judicial activism.

This same attack on overzealous courts has appeared as a motivating factor guiding proportionality analysis in recent cases in the Supreme Court. For example, in *eBay*, the Court chastised the Federal Circuit for altering the centuries-old doctrinal rule of balancing the interests to determine injunctive relief.[237] The Federal Circuit asserted its authority to prioritize patent rights above other legal rights by adopting a categorical rule of always granting injunctive relief to patent holders. Such zeal was quickly curtailed by a unanimous Court, which focused on the appellate court's inappropriate assertion of power and authority.[238]

The critique of a lower court also dominates the Court's decision in the infamous case of *Bush v. Gore*.[239] In *Bush*, the Court struck down the Florida Supreme Court's remedy for the undercounting of votes in a presidential election where the Florida court ordered the manual recount of votes in designated counties.[240] The Court found the injunctive remedy to be both arbitrary and disproportional.[241] It also reacted to the Florida Supreme Court's zealous assertion of remedial power. As Professor Andrew Siegel surmises, the Justices in the majority "took note of the fact that in addition to simply taking jurisdiction over this crucial national issue, the Florida Supreme Court had also cheerfully taken up the role of equitable umpire, vesting itself with the power to craft ad hoc remedial solutions to a problem the legislature had not fully contemplated."[242] In a vigorous dissent, Justice Stevens, joined by Justices

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[236] See *Jenkins*, 515 U.S. at 133 (Thomas, J., concurring); Lewis v. Casey, 518 U.S. 343, 357 (1996) (Scalia, J.) (asserting that the actual injury requirement of standing generally limits injunctions to the injury in fact).

[237] 126 S. Ct. 1837, 1839 (2005).

[238] *Id.; see id.* at 1841-42 (Roberts, C.J. concurring) (agreeing with the rejection of an automatic grant of injunction, but arguing that plaintiff patent holders were historically granted such requests for injunctive relief).

[239] 531 U.S. 98 (2000). *See* Siegel, *supra* note 98, at 1181-82. Professor Siegel argues that while *Bush v. Gore* might be explained by some of the Justices' initial animosity to the political result of the Florida Court's decision, there was also "something deeper and more visceral at work." *Id.* at 1181. The Court displayed, "a fundamental hostility toward the role of the Florida Supreme Court took upon itself. . . . [T]he majority Justices likely saw a lower court advocating the primacy of a litigation solution to a contentious public debate." *Id.*

[240] *Bush*, 531 U.S. at 111.

[241] The Court found the recount remedy to be arbitrary because it failed to adopt uniform standards for designating a valid legal vote. *Id.* at 106. It found the remedy to be disproportional because it ordered recounts for overvotes (those ballots for which two votes were made) when the established legal violation addressed undervotes (those votes placed that were not tabulated by the machines). *Id.* at 107-09. *But see* Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 388-98 (2002) (arguing that the Supreme Court's suggested remedy of requiring detailed safeguards for the recount and changes in the voting laws was disproportional).

[242] Siegel, *supra* note 98, at 1182. "For many—perhaps most – Justices throughout our history, the role assumed by the Florida justices might not have seemed extraordinary. But for the five Justices who drove the tempo and timbre of the Rehnquist Court agenda, the Florida Supreme Court's embrace of such a role was a provocative act, one guaranteed to raise their hackles." *Id.*

Ginsburg and Breyer, argued that the majority's distrust of the remedial power of lower courts threatened the rule of law:

> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. . . . The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. . . . Although we may never know with complete certainty the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[243]

Bush v. Gore is thus another example where the remedial balance of proportionality was skewed by the perception of the implementing court as not deserving of credit for effectuating justice. The Florida court was undeserving of deference because of its attempt to control a national election beyond the contours of its state power.

The most recent U.S. Supreme Court cases on injunctive relief thus reveal prevalent judicial concerns for defendants and the potential consequences of disproportionate awards of injunctive relief. Seeking a balance between the plaintiff's deficiency and the potential excess, the Court has tilted the balance in favor of respecting defendants' interests in the computation of judicial redress. Factoring in a distrust for overzealous courts, the Supreme Court has been vigilant in strictly scrutinizing the injunctive relief developed by these courts, rather than according them traditional deference under a weak proportionality standard. This same use of strict remedial proportionality appears in the Court's cases addressing legislative remedies enacted under Section 5 of the Fourteenth Amendment.

C. Congruent and Proportional Legislative Remedies Under Section 5

Statutory remedies enacted by Congress under Section 5 of the Fourteenth Amendment offer another example of the Court's move towards remedial proportionality. Section 5 provides that Congress may "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment and the Court has defined this to be only a limited "remedial," rather than general substantive power.[244] The scope of these legislative remedies has been determined by the Court to parallel that of judicial remedies, and thus these Section 5 remedies add to the remedial story told by the cases on punitive damages and injunctions previously discussed.[245] Searching for the

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[243] *Bush*, 531U.S. at 128-29.
[244] U.S. CONST. amend. XIV, § 5.
[245] City of Boerne v. Flores, 521 U.S. 507, 520 (1997); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 336 (2004); Zoller, *supra* note 3, at 578-89; Thomas, *Remedial Rights*, *supra* note 11, at 706-07 (2001);

measure of appropriate relief under Section 5, the Court has adopted a principle of proportionality to gauge the proper scope of remedial legislation, requiring that the legislation exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[246] A "congruent and proportional" legislative remedy is one that demonstrates congruence between the means used and the ends to be achieved, and is not "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[247] Using this balancing framework, the Court reviews Section 5 legislation to make sure it is appropriately tailored and not excessive. As discussed below, the proportionality review is built upon a distrust of Congress and the perceived threat to the Court's ultimate power to define the constitutional law.

1. A Series of Disproportionate Events

In six cases over five years, the Supreme Court uniformly struck down Section 5 legislation in every case it reviewed, consistently finding that the congressional actions at issue were disproportionate to the targeted harm.[248] Congress' failure to target its prophylactic legislation at an identified constitutional right proved to be the downfall of the legislation in most of these cases.[249] Congress seemed to be resisting the remedial

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Hamilton & Schoenbrod, *supra* note 9, at 469. Many legal scholars have criticized the Court's adoption of a remedial standard for Section 5, arguing for a broader legislative power. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 148 (2002) (arguing that Section 5 should not be equated with judicial power since the Fourteenth Amendment assigns no enforcement role to the Court); Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783 (2000) (claiming that the Supreme Court made significant historical errors in interpreting Section 5 as a remedial rather than interpretive authority); James W. Fox, Jr., *Re-readings and Misreadings: Slaugher-House, Privileges or Immunities, and Section Five Enforcement Power*, 91 KY. L.J. 67 (2002) (tracing the history of Section 5 to suggest a source of broad interpretive power); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001) (arguing that Section 5 should be interpreted according to tests for general Article I power).

[246] *City of Boerne*, 521 U.S. at 520.

[247] *Id*. at 532.

[248] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank., 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act).

[249] For example, in *City of Boerne*, the Religious Freedom Restoration Act was invalidated because it targeted the non-constitutional harms of zoning, land-use, and fair housing laws. 521 U.S. at 521. In *Morrison*, Congress misdirected its legislative aim when it sought to remedy the common-law assault claims of domestic violence lacking constitutional protection. 529 U.S. at 625-26. And in both *Garrett* and *Kimel*, Congress targeted employment practices not prohibited by the federal Constitution. 531 U.S. at 366-72; Kimel, 528 U.S. at 91; *see College Savings*, 527 U.S. at 674 (invalidating Trademark Remedy Clarification Act because Congress attempted to remedy the non-constitutional, common torts of unfair

contours of its designated power by attempting to redefine substantive constitutional rights.

The development of a proportionality principle in the Section 5 context was thus guided by a distrust of Congress and structural concerns regarding interaction among Congress, the Court, and the states.[250] In one respect, the Court has suspected that disproportionate, excessive remedies create a windfall to Congress in allowing it to enact legislation beyond its enumerated power.[251] Section 5, the Court has held, does not authorize substantive legislation regarding legal rights, but only remedial legislation responding to existing or threatened violations of constitutional rights.[252] Excessive remedies under Section 5 threaten to exceed the authorized scope of legislative power: "If Congress were permitted to enact rules that it calls 'prophylactic' without any proportionality review, it could increase its power under Section 5 geometrically."[253] Proportionality review thus helps to maintain the proper separation of powers at the federal level.[254]

> The relation between proportionality and separation of powers should be underscored. It is fundamental to theories of limited government that government bodies cannot be trusted to impose and observe limitations on their own powers. Accordingly, limitations on power must come from outside the body that exercises power—from the people and from other government institutions. So proportionality as a limit on (for example) legislative power cannot be left to legislative determination.[255]

Secondly, the Court expressed a structural concern with Congress usurping the Court's power to interpret the Constitution. "[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees. The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[256] Commentators have thus concluded that the "Court now views Section 5 power as a potential threat to the Court's role as the ultimate

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competition and false advertising); *Florida Prepaid*, 527 U.S. at 643 (1999) (invalidating Patent Remedy Clarification Act which provides remedies for negligent patent infringement, whereas constitutional Due Process is implicated only by intentional patent infringement that is not adequately redressed by the state); *see also* Thomas, *Prophylactic Remedy*, *supra* note 247, at 338 & 338 n.160 (discussing cases).

[250] *See City of Boerne*, 521 U.S. at 523-23; William D. Araiza, *The Section 5 Power After* Tennessee v. Lane, 32 PEPP. L. REV. 39, 40 (2004).

[251] *See City of Boerne*, 521 U.S. at 529 (finding the Religious Freedom Restoration Act of 1993 to be "so out of proportion" to the objective under the Free Exercise Clause that it could be understood only as an attempt to work a "substantive change in constitutional protections.").

[252] *Id.* at 519, 521.

[253] Hamilton & Schoenbrod, *supra* note 9, at 487.

[254] Ristroph, *supra* note 47, at 287.

[255] *Id.*

[256] *Hibbs*, 538 U.S. at 728; *see also Lane*, 541 U.S. at 539 (Rehnquist, J., dissenting) (stating that proportionality test of Section 5 is to ensure that Congress does not usurp Court's responsibility to define the meaning of the Fourteenth Amendment).

expositor of the constitutional text."[257] The Court's proportionality approach reflects its insistence on primacy in defining constitutional rights, and its unwillingness to defer to Congress' own decisions as to how to wield its remedial power.[258]

The Court has also articulated a third structural concern of vertical federalism and Congress' potential encroachment upon states' rights.[259] In the Section 5 context, the Court has endorsed state sovereignty as important to the proportionality calculus. Thus, the Court struck down legislation as disproportionate because it lacked a causal nexus to the identified constitutional harm, and thus intruded into the governance prerogatives of the states.[260] This states' rights agenda dominated much of the Rehnquist Court's jurisprudence, both within and outside of the remedial cases. Indeed, the dominant narrative of commentators on the Rehnquist Court tells "the story of a Court obsessed with issues of federalism and, more specifically, dedicated to recalibrating the balance between federal and state powers so as limit federal authority and empower the states."[261]

Given the overriding structural concerns guiding the Court's Section 5 jurisprudence, proportionality was conceptualized as a rule of federalism, renewing the historical primacy of states' rights. Commentators attacked the proportionality standard as a mere pretext for judicial activism and a mechanism to implement the views of the conservative Justices on the Court.[262] Then, surprisingly, in 2003, the Court upheld legislation under Section 5 for the first time in nearly forty years.

2. Double Take: Upholding Proportional Legislation

The Court changed course in *Nevada v. Hibbs*, when it upheld legislation under Section 5 for the first time in recent history.[263] In *Hibbs*, the Court upheld the Family Medical Leave Act's private damages provision for employees denied the opportunity to take leave from work to care for a family member. Just one year later, the Court again upheld legislation under Section 5, affirming Title II of the Americans with Disabilities Act in *Tennessee v. Lane*. Commentators once again cried foul, this time intimating that nothing but the personal proclivities of the Justices explained the

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[257] Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943, 1945 (2003).
[258] Araiza, *supra* note 247, at 40.
[259] *Id.* at 40 (stating that the post-*Boerne* cases reflected the Court's "continuing suspicion of congressional power and, conversely, its solicitude for state sovereignty."); Thomas W. Beimers, *Searching for the Structural Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 29 HASTINGS CON. L.Q. 789, 828 (1999) (discussing the federalist concerns driving the Section 5 cases).
[260] Board of Trus. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-72 (2001) (invalidating the Americans with Disabilities Act because the evidence of private employment discrimination failed to show any connection to *state* employers); *Morrison*, 529 U.S. at 625-26 (striking down the Violence Against Women Act, in part, because of the lack of evidence showing the states' involvement in private domestic violence).
[261] Siegel, *supra* note 98, at 1100.
[262] K.G. Jan Pillai, *Incongruent Proportionality*, 29 HASTINGS CONST. L.Q. 645, 647 (2002).
[263] The last time the Court upheld Section 5 legislation was in 1966 in *Katzenbach v. Morgan* when it upheld legislation prohibiting literacy tests for voting. 384 U.S. 641.

differences in outcomes.[264] The Court, however, claimed that it had finally come across legislation that was appropriately proportionate to the identified harm.

The two cases shared one attribute that seemed to distinguish them from the prior Section 5 cases. In *Hibbs* and *Lane*, the legislation implicated the operation of a strong, fundamental right that had previously been identified and enforced by the Court.[265] The Court defined the scope of the "harm" more broadly in these cases than in prior cases by identifying legal rights that were at the top of the judicial hierarchy of protection – gender equality (*Hibbs*) and access to the courts (*Lane*).[266] Under a proportionality balance, a strong, broadly defined right supports the imposition of strong, broadly defined remedies.

Hibbs was a relatively easy application of the Section 5 proportionality rule.[267] In a 6-3 decision authored by Chief Justice Rehnquist, the Court upheld the Family Medical Leave Act and its authorization of private damages against state employers.[268] The FMLA targeted unconstitutional gender discrimination in the workplace and enacted prophylactic measures specifying twelve-week unpaid family leave for both sexes to address adverse employment action taken against women.[269] The Court found the FMLA to be proportionate to the harm because its broad scope of including men and mandating specific times addressed widespread gender discrimination and the potential reactions from recalcitrant employers to comply with family leave protections for women.[270]

Chief Justice Rehnquist, however, changed his vote in *Lane*, returning to his former distrust of congressional legislation.[271] The Chief Justice dissented in the 5-4 decision on grounds that the proportionality standard had been grossly misapplied.[272] Justice Stevens, writing for the majority, held that the public accommodation provisions of the Americans with Disabilities Act were a valid exercise of Section 5 power.[273] The majority identified the operative constitutional right as the fundamental right of access to the courts, rather than lower-level equal protection right against disability discrimination.[274] The plaintiffs in the case, a disabled criminal defendant and a court reporter, were wheelchair bound paraplegics who had been denied access to a public

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[264] *Editorial*, ST LOUIS POST DISPATCH, June 1, 2003, at B2 ("Chief Justice Rehnquist, rumored to be considering retirement, may have had his eye on his place in history and softening the edges of his regressive legacy.")

[265] *See* Araiza, *supra* note 247, at 40-42.

[266] *Hibbs*, 538 U.S. at 728, 735; *see* Araiza, *supra* note 247, at 41.

[267] Araiza, *supra* note 247, at 41-42; *see also* Thomas, *Remedial Rights*, *supra* note 11, at 730-33 (predicting that FMLA would be sustained under proportionality test of Section 5).

[268] 538 U.S. 721, 725 (2003).

[269] 29 U.S.C. § 2612(a)(1)(C).

[270] 538 U.S. at 735-77.

[271] 541 U.S. 509, 538 (2004).

[272] *Id.* at 539.

[273] Title II of the ADA prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs or activities. 42 U.S.C. §§ 12131-12165.

[274] *Lane*, 541 U.S. at 523. Unquestionably, this cautious choice of the operative right was done to retain the vote of Justice O'Connor, who invalidated the legislation in *Garrett, Florida Prepaid, Morrison*, and *Kimel*. *See* Araiza, *supra* note 247, at 47.

courthouse.[275] The majority placed these specific constitutional violations into context by setting them "against a backdrop of pervasive unequal treatment" in the administration of public services and programs including marriage, voting, and juror service.[276] This expansive scope of harm against the disabled, according to the majority, balanced the broad scope of the remedy enacted by Congress prohibiting the exclusion or denial of benefits to a disabled person in the provision of any public services and programs.[277] Moreover, the majority emphasized the particularly tailored and limited scope of the ADA remedial legislation.[278] Congress required only that "reasonable accommodations" be made for the disabled, and did not require a public entity to do everything possible.[279] The narrow scope of the enacted remedy coupled with the broad scope of the identified harm established the proportional balance needed to uphold the legislation.

Chief Justice Rehnquist was incensed by the inartful application of the proportionality standard.[280] "While the Court today pays lipservice to the 'congruence and proportionality' test, it applies it in a manner inconsistent with our recent precedent."[281] He faulted the majority for attempting to "rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."[282] He criticized the majority for selecting the fundamental right of access to the courts as the operative right, but relying upon evidence of widespread discrimination against the disabled in non-court settings like marriage, voting, and public education to justify the law.[283] Rehnquist found "nothing in the legislative record or statutory findings to indicate that disabled persons were systematically denied" the right of access to the courts.[284] Given the "near-total lack of actual constitutional violations in the congressional record," the dissenters would have invalidated the remedial legislation as in *Garrett*.[285] Rehnquist also criticized Congress for the "massive overbreadth" of the remedial legislation that covered a panoply of rights, including access to amusement parks and hockey games, extending far beyond the scope of the plaintiffs' rights to court.[286]

Commentators have generally attacked the Court's application of proportionality in the Section 5 cases as nothing more than conservative politics.[287] It is true that three

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[275] *Lane*, 541 U.S. at 513.
[276] *Id.* at 524.
[277] *Id.* at 531.
[278] *Id.* at 532.
[279] *Id.*
[280] *Id.* at 538 (Rehnquist, J., dissenting, joined by Kennedy, J., and Thomas, J.).
[281] *Id.* at 539 (Rehnquist, J., dissenting).
[282] *Id.* at 551(Rehnquist, J., dissenting).
[283] *Id.* at 541 (Rehnquist J., dissenting).
[284] *Id.* at 543.
[285] *Id.* at 547.
[286] *Id.* at 550-51.
[287] *See* Rosalie Berger Levinson, *Will the New Federalism be the Legacy of the Rehnquist Court*?, 40 VAL. U. L. REV. 589, 595 (2006) ("The Court's reliance on federalism thus appears suspect. Rather than being liberty enhancing, the decisions appear to simply promote a conservative agenda. . . ."); K.G. Jan Pillai, *supra* note 259, at 645; Post & Siegel, *supra* note 259, at 1949 (suggesting that "the decisions of the Rehnquist Court have been driven by implicit policy preferences.").

Justices (Kennedy, Scalia, and Thomas) have consistently voted to invalidate legislation. And two others (Justices Souter and Breyer) have consistently voted to affirm legislation. However, four Justices (Stevens, Rehnquist, O'Connor, and Ginsburg) have switched sides during these cases. Professor William Arazia explained the difference in the recent cases as of one of "mood," finding that "while *Lane*'s actual review of the evidence is not marked by any self-conscious alteration of pre-existing law, that review surely reveals a more lenient mood than does the analogous review in *Garrett* and previous cases. . . ."[288] The Court, however, has explained the variation as nothing more than the proper operation of the proportionality rule, which serves to ferret out inappropriate remedies while upholding those which are properly tailored.

D. The Exception to the Rule: Justice Scalia Rejects Proportionality

Justice Scalia stands as the one Justice who expressly rejects remedial proportionality. In all civil remedial contexts (save injunctions), Scalia has refused to apply the proportionality standard. Citing the inherent subjectivity of proportionality, he has disavowed it as "insusceptible of principled application."[289]

In the punitive damages cases, Justice Scalia, joined by Justice Thomas, criticized the use of remedial proportionality, arguing that it is "constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."[290] Elaborating on the subjectivity, Scalia attacked the Court's use of proportionality analysis, claiming it reflected "a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination."[291]

> In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. . . . One expects the Court to conclude: "To thine own self be true." These crisscrossing platitudes yield no real answers in no real cases. . . . The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."[292]

The claims against proportionality for punitive damages proffered by Scalia and Thomas are bound up in their position that the Constitution does not protect against excessive amounts of awards.[293] Rather than federal review of state awards, the

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[288] Arazia, *supra* note 252.
[289] *See Campbell*, 538 U.S. at 429; Gore, 517 U.S. 559, 599 (Scalia, J., dissenting).
[290] *Gore*, 517 U.S. at 599.
[291] *Id.* at 600.
[292] *Gore*, 517 U.S. at 605-06.
[293] *Id.* ("The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)"); *id.* at 598 ("Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.").

dissenting Justices would defer to the jury as to the proper measure of relief, subject to weak judicial review by state courts for reasonableness.[294]

Similarly, in *Hibbs* and *Lane* Justice Scalia rejected the remedial proportionality standard, despite his acknowledged adherence to the rule in the previous litany of Section 5 cases.[295] Scalia thus found himself dissenting from the Court's decision upholding legislative remedial programs. This result is ironic given Scalia's jurisprudential belief in deference to the legislative branches, and in Congress as the most democratic of the three governmental branches.[296] In *Lane*, Scalia reasserted those deferential proclivities on a larger scale, rejecting the proportionality review altogether in the Section 5 context.[297]

> I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government.[298]

Such engagement with Congress was exacerbated, Scalia said, by the use of a test that "cannot be shown to have been met or failed."[299] Thus, his rejection of proportionality was driven in part by its inherent subjectivity. As Scalia explained, "I have generally rejected tests based on such malleable standards as 'proportionality,' because they have a way of turning into vehicles for the implementation of individual judges' policy preferences."[300]

This disavowal parallels Justice Scalia's rejection of proportionality in the criminal context. He has rejected proportionality review of criminal sentences altogether, finding the oversight of criminal punishments to be inherently subjective and incapable of intelligent application.[301] While Scalia is thus consistent in his rejection of proportionality, the Court is not. Many commentators have addressed the inconsistencies between the Court's escalation of proportionality review for civil

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[294] *Id.* at 598-99.
[295] *Lane*, 541 U.S. at 556.
[296] *See generally* RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE (2006).
[297] Scalia indicated he would refuse to apply the proportionality test in any Section 5 case, except for those based on race discrimination, which he distinguished based on the history and principal purpose of the Fourteenth Amendment. *Id.* at 561-62 (Scalia, J., dissenting).
[298] 541 U.S. at 557-58 (Scalia, J., dissenting).
[299] *Id.* at 558 (Scalia, J., dissenting).
[300] *Id.* at 556 (Scalia, J., dissenting).
[301] *Ewing*, 538 U.S. at 31 (Scalia, J., dissenting); *Harmelin*, 501 U.S. at 986 (Scalia, J.) (arguing that Eighth Amendment strict proportionality review is "an invitation to the imposition of subjective values.");

remedies and its rejection of the strict standard for criminal sanctions.[302] The Court's experience with the strict proportionality standard over several decades in the criminal context led it to conclude that such a standard was too malleable to provide sufficient meaning and guidance.[303] Instead, the majority of the Court adopted a weak proportionality standard for reviewing punishments in non-capital cases.[304] This weak standard of "gross disproportionality" examines sentences only to see if they are extreme, rather than carefully calibrated, and reversal is reserved for the rare case.[305] Justice Kennedy, in his concurring opinion in *Harmelin v. Michigan*, explained, "The Eighth Amendment does not require strict proportionality between the crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime."[306] Applying the gross disproportionality standard, the Court has upheld sentences of 25 years to life for recidivists stealing three golf clubs[307] or $150 in videos.[308]

Similarly, in the excessive fines case of *United States v. Bajakajian*, Justice Thomas explained that the principle of proportionality in criminal law requires that "the amount of forfeiture bear some relationship to the gravity of the offense that it is designed to punish."[309] He acknowledged that "just how proportional to a criminal offense a fine must be will be inherently imprecise."[310] This imprecision, he explained, justified the adoption of a gross disproportionality standard, rather than a strict standard mandating precise proportionality of a sentence.[311] Under this standard, the defendant's fine of $357,144, the full amount of the cash he failed to declare when leaving the country, was held to be grossly disproportionate to the statutory fine of $5,000.[312] Thus, Justice Thomas seems to accept some level of proportionality review for criminal sanctions despite his rejection of such a rule for punitive damages.

Despite its experience with the difficulties of proportionality analysis in the criminal context, the Court continues to embrace proportionality review of civil

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[302] Ristroph, *supra* note 47, at 267; Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Karlan, *supra* note 110, at 880; Frase, *supra* note 42; Rachel A. Van Cleave, *Death is Different, is Money? Criminal v. Punitives and Proportionality*, 12 S. CAL. INTERDISC. L.J. 217 (2003); Adam Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages*, 86 VA. L. REV. 1249 (2000).

[303] Lockyer v. Andrade, 538 U.S. 63 (2003).

[304] *Id.* at 72; *Ewing*, 538 U.S. at 20 (O'Connor, J., plurality).

[305] *Lockyer*, 538 U.S. at 73.

[306] 501 U.S. 957, 1001 (1991) (upholding in a 5-4 decision a first-time offender's sentence of life in prison for possession of 672 grams of cocaine).

[307] *Ewing*, 538 at 25-28.

[308] *Lockyer*, 538 U.S. at 64. In fact, in only one modern case has the Court struck down a prison sentence as disproportionate. *See* Solem v. Helms, 463 U.S. 277 (1983) (Powell, J.) (striking down sentence of life in prison for petty criminal with six prior minor felonies for writing bad check for $100); *see also* Weems v. United States, 217 U.S. 349 (1910) (invalidating Philippine penalty in part for its disproportionality).

[309] 524 U.S. 321, 334 (1998). While Justice Thomas endorsed the proportionality standard for excessive fines in *Bajakajian*, he rejected all proportionality review for criminal sentences in joining Justice Scalia's dissent in *Ewing*. 538 U.S. at 32.

[310] *Id.* at 335-36.

[311] *Id.* at 336-37.

[312] *Id.* at 339.

remedies. Indeed, the Court, other than Justice Scalia and perhaps Justice Thomas, appears willing to rely increasingly on proportionality in the context of remedies. Exploring the Court's motivations for the proportionality principle in remedies, it appears that the Court is determined to continue on its current course.

III. JUSTIFYING PROPORTIONAL REMEDIES

The Supreme Court has not expressly articulated the reasons why it has embraced proportionality as the judicial standard for assessing whether relief is appropriate. Yet woven through its decisions are clues as to the motivations guiding the Justices in their near-universal adoption of proportionality for remedies. Implicit in the decisions are concerns about structural and legal integrity that seem to be motivating the Court. Three justifications emerge from reading between the lines of these cases: the need for objectivity in decisionmaking; the belief in judicial restraint and minimalism; and the curtailment of excessive litigation and remedies. All three of these justifications lead to limiting the exercise of the remedial power, whether that relief stems from the lower courts, juries, or Congress.

These three implicit justifications for the proportionality rule mirror the core concerns embodied in the international norm of proportionality: rationality, restraint, and reciprocity.[313] These "three Rs" define the core of proportionality analysis and provide guidance in evaluating governmental action.[314] When considering the rationality of a governmental action, international courts first evaluate whether the action is appropriate, arbitrary, unfair, or based on irrational considerations.[315] International courts then ask whether the governmental response is restrained, taking into account the availability of less restrictive alternatives.[316] Finally, international courts look for reciprocity, or proper fit between the harm and the judicial measure.[317] Together, these three Rs create a rule of minimal governmental action.

These same three global principles are reflected in the U.S. Supreme Court's own homegrown version of remedial proportionality. The three Rs provide an organizational framework for understanding the Court's justifications for remedial proportionality. The principle of rationality is embodied in the Court's emphasis on an objective, logical standard to constrain biased decisionmaking. The principle of restraint is seen in the Court's embrace of judicial minimalism and preference for the least-restrictive remedy. And the principle of reciprocity is evident in the Court's concerns with defendants being asked to respond to a wrong with a remedy in excess of the amount of harm caused.

There is, however, one crucial distinction between the international norm of proportionality and the U.S. Supreme Court's remedial proportionality rule. While the rest of the world uses proportionality to protect plaintiffs, the Supreme Court uses proportionality to insulate defendants. On the international level, the norm of

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[313] Jackson, *supra* note 3, at 805-06; Zoller, *supra* note 3, at 582.
[314] Zoller, *supra* note 3, at 582 n.83.
[315] Jackson, *supra* note 3, at 805-06; Zoller, *supra* note 3, at 582.
[316] Jackson, *supra* note 3, at 805-06; Zoller, *supra* note 3, at 582; Gunn, *supra* note 3, at 467.
[317] Jackson, *supra* note 3, at 805-06; Zoller, *supra* note 3, at 582; Gunn, *supra* note 3, at 467.

proportionality is generally used to protect plaintiffs against governmental intrusion.[318] Proportionality is used as a mechanism of judicial review to prevent exercises of excessive legislative and executive power that infringe on individual rights.[319] Conversely, the remedial proportionality principle of the Supreme Court is used to curtail excessive judicial intrusions into the interests of government and corporate defendants.[320] Both approaches share a theory of limited government, but the American approach applies this theory to benefit only defendants. It encourages, rather than prevents, the trumping of governmental interests to outweigh individual rights, thus turning the principle of individual freedom on its head.

This section seeks to flesh out the reasons why an Americanized remedial proportionality principle has emerged. Viewing the cases from the Court's perspective, this section lays out the justifications given by the Court for its adoption of a rule of proportional relief.

A. Rationality: The Pursuit of Objectivity

The Court believes that the proportionality standard in remedies provides an objective judicial measurement that ensures the rationality of judicial decisions. Rationality seeks a logical basis for legal reasoning that is not based on arbitrary, unfair, or biased grounds. In the punitive damages cases, for example, the Court has been concerned with punitives based on jury bias rather than "objective" measures.[321] The proportionality standard injects an objective standard into the judicial decisionmaking process providing a logical basis for remedial decisions. The Court, perhaps like many lay people, assumes that judicial discretion is potentially unbounded. As the old legal maxim states, "equity is as long as a chancellor's foot," meaning that what is "fair" varies randomly from judge to judge.[322]

This search for objectivity was the crux of the judicial debate in *TXO*, in which the Court first began to consider a proportionality standard for punitive damages.[323] The perceived need for an objective standard to avoid caprice and bias in decisionmaking was the guiding principle that steered the Court towards the eventual adoption of remedial proportionality rule. The Justices and the parties recognized the importance of an objective standard; they simply disagreed as whether the standard was

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[318] Zoller, *supra* note 3, at 568-69; Jackson, *supra* note 3, at 804-05. *See generally*, THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed. 1999); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW (1996); Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle*, 5 EUR. HUM. RTS. L. REV. 504 (2001).

[319] Ristroph, *supra* note 47, at 267-69; Jackson, *supra* note 3, at 804-05.

[320] Zoller, *supra* note 3, at 585.

[321] *TXO*, 509 U.S. at 467 (Kennedy, J., concurring) (expressing concern with a punitive damages award that "reflects bias, passion, or prejudice on the part of the jury, rather than rational concerns for deterrence and retribution."); Bankers Life & Cas. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring) ("Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount.").

[322] Yoo, *supra* note 231, at 1122.

[323] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

quantitative, qualitative, or both.[324] Justice O'Connor explained the need for objective rules of decision to avoid "arbitrariness, caprice, passion, bias, and even malice [that] can replace reasoned judgment and law as the basis for jury decisionmaking."[325] She then pushed the Court to develop specific objective factors to further refine that decisionmaking:

> As an initial matter, constitutional judgments should not be, or appear to be, merely the subjective views of individual Justices. Without objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference. One judge's excess very well may be another's moderation. To avoid that element of subjectivity, our judgments should be informed by objective factors to the maximum possible extent.[326]

The Court thus developed objective factors to further direct the exercise of proportionality review. The Court enunciated several three-part tests to approach the proportionality decision in a logical fashion. For injunctions, the proportionality review must measure the scope of the harm, match the scope of relief, and account for the interests of state defendants.[327] For punitive damages, the Court must evaluate the "three guideposts" of the reprehensibility of the conduct, the amount of compensatory damages, and the availability of other sanctions.[328] And for Section 5 remedies, the Court must identify the contours of the constitutional right at issue, identify the evidence in support of a history of demonstrated harms, and evaluate the proper scope of a congruent and proportional remedy.[329] In each case, the Court is simply elaborating on the basic balancing concept of matching the scope of the remedy to the scope of the harm. The establishment of additional objective factors aims to define the proportionality standard and standardize the judicial decisionmaking.

Proportionality thus purports to provide the transparency of reason to counter the notions of subjective remedial discretion.[330] As Justice Roberts expressed in his concurrence in *eBay*, "discretion is not whim. It is based on legal principles that are needed to establish consistency across the cases."[331] The legal principle of

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[324] Petitioners argued for a qualitative, comparative test to other punitive awards, 509 U.S. at 455, Kennedy concurred in favor of an individual qualitative assessment, *id.* at 467-68, the plurality adopted a quantitative comparison of punitives to potential harm, *id.* at 460, and O'Connor included both mathematical and qualitative factors in her standard. *Id.* at 480-82. This debate over a qualitative or quantitative proportionality standard for punitive damages is at issue again in the case of *Phillip Morris v. Williams* pending in the U.S. Supreme Court. *See discussion infra.*

[325] *Id.* at 474-75 (quoting W. OLSON, THE LITIGATION EXPLOSION 175 (1991)).

[326] *Id.* at 480-81 (O'Connor, J., dissenting).

[327] Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).

[328] *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

[329] *Lane*, 541 U.S. at 538-54 (Rehnquist, C.J. dissenting) (clearly laying out the three-part inquiry developed in prior cases); *Garrett*, 531 U.S. at 366-67.

[330] Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality,' Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 617 (1999).

[331] eBay Inc. v. MercExchange LLC, 126 S. Ct. 1837, 1841 (2005) (Roberts, C.J., concurring).

proportionality provides transparency by calling for rational explanations to appear in judicial decisions, thus providing added legitimacy to the rule of law. Application of the standard and its attendant factors allows us to view the operation of justice as a mechanical operation, and thus counters the criticism of judicial discretion as personal whim. It is the rule's transparency that helps to maintain the credibility of the rule of law by militating against claims of bias.

Finally, the assumed objectivity of the proportionality standard is designed to provide consistency across the judicial system. This perceived consistency provides the model of a level playfield in the law. For example, proportionality provides a consistent standard in punitive damages that the Court says provides adequate notice to defendants of potential penalties.[332] The use of formulas, ratios, and three-factored tests provides the appearance of objectivity necessary to avoid the caprice of the decisionmaker. Thus, the proportionality rule emerged in part as an antidote to biased decisionmaking. Its principle of balanced justice satisfied the demand for rationality in judicial decisionmaking to preserve the rule of law.

B. Restraint: A Rule of Judicial Minimalism

The Court has also justified its remedial proportionality test in the injunctions context as a rule of judicial restraint. The Court has articulated rules requiring the least restrictive remedy motivated by proper deference to the legislative and executive branches. This results in an overarching preference for modest, narrowly tailored remedies that provide relief to plaintiff at the least cost or burden to the defendant.[333]

An example of the Court's motivation of remedial judicial restraint can be seen in *Ayotte*, where the Court refused to uphold a broad injunction striking down a New Hampshire abortion law for minors that impermissibly failed to include an exception for the preservation of the minor's health.[334] The Court criticized the courts below for choosing the "most blunt remedy" rather than more narrowly tailored relief.[335] In vacating the overbroad remedy, the Court announced a general preference for the least restrictive remedy, mindful of its own limited institutional competence.[336] The Court noted concerns with crafting more comprehensive remedies because such "line-drawing is inherently complex" and risks "serious invasion of the legislative domain."[337] The *Ayotte* Court thus embraced the remedial rule of proportionality and the preference for

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[332] *Gore*, 517 U.S. at 587 (Breyer, J., concurring).
[333] *Madsen*, 512 U.S. at 765; *see also* Thomas, *Prophylactic Remedy*, *supra* note, at 353-61 (discussing prophylactic injunctions as remedies of last resort following the Court's rule of least restrictive remedy).
[334] 126 S. Ct. 961 (2006).
[335] *Id.* at 969.
[336] *Id.* at 968.
[337] *Id.* However, the Court disregarded this command of judicial restraint in its opinion in *Bush v. Gore*. 531 U.S. 98 (2000). There, instead of modestly striking down the unconstitutional recount provisions, as Justices Souter and Breyer advocated, the Court bluntly struck down the entire judicial remedy and drafted its own, broad substitution remedy. *Id.* at 110 (detailing specific steps and safeguards the Florida Court should have ordered); *see* Thomas, *Understanding Prophylactic Remedies*, *supra* note 243, at 387-98 (arguing that the Court's suggested remedy was overbroad and unjustified).

"modest" remedies based on deference to the legislature and notions of judicial incompetence.[338]

The Court's reasoning evidences a theory of judicial passivity or minimalism.[339] Justice O'Connor, the author of the unanimous *Ayotte* opinion, was the leading minimalist on the Supreme Court.[340] The minimalist approach seeks to "reduce the role of judicial lawmaking" and advance the theme that the Court's power and that of the federal courts is sharply limited.[341] Under this guise, courts are incompetent to craft remedies for ordinary litigants and must act cautiously, mindful of this disability.[342] The proportionality principle's rule of remedial restraint advances this theory of limited judicial competence. Whether the cases are rationalized by federalist notions of respect for the states or deference to the legislature,[343] the result is that the courts are encouraged to be more restrained in remedying violations of the law.

The irony is that this belief in the Court's limited competence and deferential treatment of the legislature does not emerge as a rationale for the use of remedial proportionality in the cases of punitive damages or Section 5 remedies. In contrast, the Court in these contexts distrusts the legislature, whether Congressional enactments of new protections or the state legislatures' failure to enact tort reform.[344]

The reconciling factor is a broader belief in remedial minimalism and a hostility to litigation as means of providing social justice. [345] As Professor Siegel has suggested, the Court appears hostile to litigation and its remedial rewards as the way of resolving social issues, and thus the Rehnquist Court's cases have "directly and consistently moved to limit both access to and the remedial power of the federal courts."[346] For example, in *Campbell,* the Court noted that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."[347] Thus, as Siegel concludes, the "contentious struggles over remedial issues that litter the Rehnquist Court's case reports are not battles over whether the Court should cut back on judicial discretion, equitable remedies, or litigation-positive interpretive strategies but instead disputes over how far

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[338] *Ayotte*, 126 S. Ct. at 969.

[339] Judicial minimalists favor rulings that are narrow and shallow that "produce outcomes and rationales on which diverse people can agree, not withstanding their disagreements on fundamental issues." Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

[340] *Id.*

[341] Meltzer, *supra* note 76, at 343 (arguing that judicial passivity represents "a dramatic departure from an important tradition in the Anglo-American legal system, one in which courts have a distinctive responsibility for promoting legal coherence.").

[342] Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223, 223-23 (2003).

[343] All of these theories have been used to explain the jurisprudence of the modern Supreme Court. *See* Siegel, *supra* note 98, at 1103-14.

[344] *See supra* Chemerinsky, *supra* note, at 1062-63 (noting inconsistencies in Court's deference to legislature in criminal sentencing and punitive damages cases); *see supra* discussion pp. 33-35 (discussing Court's distrust of Congress in Section 5 cases).

[345] Siegel, *supra* note 98, at 1097; Resnik, *supra* note 320, at 223-34.

[346] Siegel, *supra* note 98, at 1113.

[347] *Campbell*, 538 U.S. at 419-20.

such a trend should go."[348] Remedial minimalism explains the Court's preference for modest judicial relief.

C. Reciprocity: Curbing Remedial Excess

The third motivation for proportionality found in the remedies cases is the need for reciprocity between remedy and harm in order to curb remedial excess. The Court perceives remedial excess in injunctions that micromanage public institutions, punitives that bankrupt companies, and windfall recoveries that make attorneys millionaires. Public schools are ordered to build planetariums, and wealthy doctors win millions when their Beemers are repainted.[349] The overreaching in many cases has triggered a rebound effect in which the Court has reacted by crafting a rule of proportionality to block the excess. Such excess cannot be seen as reciprocal or corresponding to the proven harm when it fails to match the scope or gravity of the violation. Reciprocity in which the remedy provides an equivalent counterpart to the harm restores a sense of balance to the judicial arena at a time when excess appears to run rampant.

The first premise behind the reciprocity rationale is the Court's strong antipathy toward remedial windfalls. The punitive damages cases are replete with exclamations denouncing the outrageous rise of the remedy. Punitives are "skyrocketing," awards are "monstrous," and the system has "run wild."[350] The Court is reacting to a perceived problem of remedial excess, despite recent scholarship denying the problem.[351] As Professor Siegel aptly described, the Court believes that "the American system of compensation for private injuries is desperately out of control, producing untold riches for plaintiffs' lawyers and mammoth rewards for a handful of lucky litigants, warping the incentive structures for businesses and professionals, and causing a concomitant loss of efficiency and societal wealth."[352]

Underlying the reciprocity rationale is a distrust of society's factfinders. The Court distrusts the juries, judges, and legislatures, believing that left to their own druthers, these decisionmakers will overreach to the extent possible. This distrust is evident in the punitive damages context, where some Justices have expressed fears that uninformed juries biased against big business will engage in random social

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[348] Siegel, *supra* note 98, at 1128.
[349] *Jenkins*, 515 U.S. at 78; *Gore*, 517 U.S. at 567
[350] *Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor J., dissenting) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000… Since then, awards more than 30 times as high have been sustained on appeal."); *see supra* nns. 117-19 and accompanying text.
[351] *See* Theodore Eisenberg, et al., *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards, available at* http://ssrn.com (finding in empirical study no increase in punitive awards over time); Benjamin Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (stating that empirical studies have traced the "problem" of punitive damages to a handful of cases of unusually high awards, coming out of an isolated geographic portion of the country); Anthony Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. ___ (2007) (summarizing studies that show claims of punitive damages as "out of control" are groundless).
[352] Siegel, *supra* note 98, at 1147-48.

redistribution.[353] In public law injunction cases, the distrust is directed against activist judges who allegedly act to advance their own liberal theories of social justice.[354] And in the Section 5 context, the Court suspects that the legislature will take every opportunity to exceed the boundaries of Section 5 and legislate broadly for the general welfare, contrary to judicial interpretations of the Constitution.[355]

Armed with this distrust, the reciprocal commands of proportionality impose limits to restore the balance of justice. Proportionality works as a limitation on the remedy, requiring an equivalent societal response to wrong. This reciprocity, like the Moseaic "an eye for an eye, tooth for a tooth," demands parallel response and nothing more.[356] The command of an eye for an eye was originally instituted as a limitation to restrain people from over-punishing wrongs.[357] The people's inclination in Biblical times, perhaps as now, was to respond to wrongdoing with retribution and vengeance.[358] The Old Testament command was meant to restrict this impulse by instilling remedial power solely in magistrates, and requiring them to craft proportional responses.[359]

The use of a proportionality standard to restrict the inappropriate excess of response to wrongdoing thus explains the Supreme Court's motivation in its modern remedial proportionality cases. It views the world as one in which remedies have crossed over to vengeance due to the overreaching of judges into policymaking and remedial excess. Defendants receive vengeance, rather than appropriate sanctions, by a system run amuck with overly harsh remedies. The doctrinal rule of proportionality is meant to restrict this retributive judicial policymaking and misuse of discretion, limiting judicial remedies to more appropriate, "civilized" responses.

IV. THE MYTH OF PROPORTIONALITY AND ITS ATTENDANT DANGERS

The application of the proportionality principle, however belies the myth of neutrality. Indeed, any utilization of the principle beyond the theoretical necessarily implicates the very use of judicial discretion and subjectivity the rule seeks to avoid. Beyond the misconception of proportionality as an inherently evenhanded standard lies the risk of danger from buying in too strongly to this

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[353] *TXO*, 509 U.S. at 491 (O'Connor, J., dissenting).
[354] Yoo, *supra* note 231, at 1123.
[355] *See discussion supra* pp. 33-35; Zoller, *supra* note 3, at 579 (noting that "the congruence and proportionality test operates on a premise of distrust of Congress" and is "directed at calling Congress to order."
[356] *See* Exodus 21:23-25 (King James); Leviticus 24:18-20; Deuteronomy 19:21.
[357] Ristroph, *supra* note 47, at 280 (stating that an eye for an eye or "lex talionis" is a limiting principle on punishment); *see* Steven Eisenstat, *Revenge, Justice & Law: Recognizing Victims Desire for Vengeance as Justification*, 50 WAYNE L. REV. 1115, 1132 (2005) (indicating that numerous scholars have noted that the passage "an eye for an eye" imposed a proportionality requirement in order to limit the harshness of punishment).
[358] *See* Eisenstat, *supra* note 330, at 1132; Code of Hammurabi, Laws 196-97, 199 (L. W. King., trans.).
[359] The New Testament command of justice raises the bar and directs that the injured person turn the other cheek. In the Sermon on the Mount, Jesus thus raises the bar even further in demanding forgiveness rather than proportionate response. Matthew 5:38-39. *See* Mary Szto, *Lawyers as Hired Doves: Lessons from the Sermon on the Mount*, 31 CUM. L. REV. 27, 40 (2001).

rule. Proportionality as currently applied by the Supreme Court in its strict remedial form risks the adoption of a rule of Supreme Court judicial supremacy that elevates the preferences of defendant wrongdoers above justice to plaintiffs. This perversion of the remedial process into protection for the wrongdoer is a threat to the rule of law that must be addressed.

A. The Mask of Objectivity

The lure of objective remedial proportionality is a mirage. The establishment of a doctrinal rule and the identification of component objective factors does not save the standard from subjectivity. Rather, as some Justices and commentators have noted, proportionality remains an inherently subjective standard.[360] Professor Karlan put it succinctly: "proportionality is both an inherently alluring and an inevitably unsatisfactory measure of constitutionality . . . . The problem lies in translating the principle into a standard for judicial oversight. For all the Court's invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective."[361] This inherent subjectivity is compounded when its transparency is shrouded by a rule that seems to require precise, objective measurement.

Subjectivity is inherent in the proportionality analysis, from the initial framing of the question to the selection and evaluation of qualitative factors. Justice Kennedy made this point in arguing against the adoption of a proportionality standard for punitive damages in *TXO* (though he later signed on to the proportionality standard in *BMW* and *State Farm*):

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists . . . .[362]

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[360] *See, e.g.*, *See Gore*, 517 U.S. at 599 (Scalia, J., dissenting) ("[T]he application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."); *Lane*, at 556 (Scalia, J., dissenting); *TXO*, 509 U.S. at 466-70 (Kennedy, J. concurring); Karlan, *supra* note 101, at 882.

[361] *See* Karlan, *supra* note 101, at 882-83.

[362] *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring). Despite these strong reservations, Kennedy eventually signed on to the objective proportionality standard in *Gore*, 517 U.S. at 559, and wrote the majority opinion endorsing proportionality in *Campbell*. 538 U.S. at 408.

The objectivity of the proportionality principle is skewed from the start by the way in which the Court frames the question. The Court must ask whether the remedy is proportional, but proportional to what? The ability to alter the comparison point demonstrates the manipulability of the proportionality rule. It is this manipulability in the framing of the proportionality question that renders the standard subjective. For example, in the punitive damages context, the Court can frame the proportionality comparison as punitives compared to compensatories,[363] to actual harm,[364] to potential harm,[365] or to reprehensibility of the conduct.[366] As Justice Ginsburg noted, the result as to the validity of punitive measures varies depending on the reframing of the question: "By switching the focus from the ratio of punitive to compensatory damages to the potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1" rather than the 526 to 1 achieved by comparing punitives to actual harm.[367]

The framing problem was at the heart of the debate over a punitive damages award in the recently decided *Philip Morris v. Williams*.[368] The Oregon Supreme Court awarded punitive damages of $79.5 million against Philip Morris, an amount 97 times greater than the compensatory damages awarded, because of the company's extreme reprehensibility in defrauding consumers as to the dangers of tobacco smoking.[369] Philip Morris argued in its briefs to the Supreme Court that damages should be measured solely by the mathematical ratio of punitive to compensatory damages, as highlighted in *Campbell*.[370] Mrs. Williams, the widow of a man who died of lung cancer caused by smoking, framed the proportionality issue differently; she argued that the proportionality of the punitive award must be balanced against both the quantitative ratio between punitive and compensatory damages *and* the qualitative factor of the tobacco company's reprehensibility.[371] Thus, the proper amount of punitive damages could have turned simply on how the proportionality question was framed, dictating the components compared and the qualitative or quantitative nature of the inquiry. The framing of the question alone would have dictated the result—a straightforward

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[363] *See Campbell*, 538 U.S. at 408.
[364] *Id.*; *Gore*, 517 U.S. 559; *TX0*, 509 U.S. 443 (O'Connor, J., dissenting).
[365] *See TXO*, 509 U.S. 443; *see also Campbell*, 538 U.S. 408.
[366] *See* Brief for Respondent at 6-9, *Phillip Morris v. Williams*, No. 05-1256 (Sept. 15, 2006); see discussion infra pp. 47-48.
[367] *Campbell*, 538 U.S. at 429-39 (Ginsburg, J., dissenting). *See also* St. Louis I.M. & S. Ry. v. Williams, 251 U.S. 63, 66 (1919) (upholding civil penalty of $75 for loss from railroad overcharge to two students of 66 cents). In *St. Louis*, the Court identified the framing issue:

> When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id. at 67.
[368] 549 U.S.___, 127 S.Ct. 1057 (2007).
[369] Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006).
[370] *See* Brief for Petitioner at 25-32, *Philip Morris v. Williams*, No. 05-1256 (July 28, 2006).
[371] *See* Brief for Respondent at 6-9, *Philip Morris v. Williams*, No. 05-1256 (Sept. 15, 2006).

quantitative computation would have easily concluded that the $79.5 million award was excessive. The Supreme Court, however, avoided the proportionality question altogether, remanding the case on an alternative ground due to the jury's improper consideration of the defendant's conduct towards third parties in the punitive damages calculus.[372]

The framing problem is apparent in other instances of remedial proportionality. In the context of attorney fees, fees can be balanced against the amount of damages, the total relief, or the "public benefit" obtained. This was the issue in *City of Riverside v. Rivera,* where the defendants argued for a strict proportionality of the fees awarded ($300,000) to damages obtained ($32,000) to invalidate the award.[373] The Court entertained a comparison of fees to total relief granted ($32,000 and no injunction), but ultimately upheld the award by framing the question as fees compared to the "public benefit" obtained in the exposure of discriminatory police misconduct.[374]

In the desegregation cases, the validity of the school decrees varies by the framing of the initial question of proportionality. At times, the desegregation cases have allowed remedies to address *de facto* segregation, while at other times it has not. When the question has been framed to include economic and housing segregation as part of the "harm" through a series of causal links and presumptions, the remedy for *de facto* segregation as been upheld.[375] When the "harm" is isolated to include only the school's affirmative acts of segregation, then the approved remedy has been narrowed.[376] In *Jenkins,* the lower court tried to frame the scope of the harm to include white flight, arguing it was causally linked to the segregation because when segregation was prohibited, white residents fled to the suburbs.[377] Accordingly, a valid remedy could address that consequence by creating high quality magnet schools to attract students back from suburbs. A five-Justice majority of the Court rejected this depiction, and reframed the question to circumscribe the relevant harm to include only the initial segregation of school assignments.[378]

Subjectivity thus drives the framing question as the courts decide what will be placed upon the scale to balance against the remedy. Because proportionality is an ends-means test, "how broadly or how narrowly the Court conceptualizes the proper unit of analysis will matter in every" case.[379] The subjective manipulation inherent in the definition of the problem explains the widely disparate results in *Lane* and *Garrett* as to the constitutionality of legislative remedies under separate titles of the Americans with Disabilities Act. In *Lane,* the plaintiffs' specific right at issue – that of access to the courts – was placed within the broader context of disability discrimination in society

[372] Williams, 127 S.Ct. at 1062.
[373] 477 U.S. 561, 579 (1986)
[374] Id..
[375] Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*); Keyes v. School Dist., 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
[376] Missouri v. Jenkins, 515 U.S. 70 (1995); Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*).
[377] 515 U.S. at 91-92
[378] *Id.* at 92, 87-98, 100
[379] Araiza, *supra* note 247 (analyzing Section 5 remedial cases).

to conceptualize a broad problem justifying broad legislative remedies.[380] *Garrett* in contrast, evaluated only the particular violation suffered by the plaintiff, employment discrimination by the state, and expressly excluded from consideration the generalized context of disability discrimination.[381] Both *Lane* and *Garrett* were 5-4 decisions, but with the switch of Justice O'Connor, the remedial disability legislation was upheld when conceptualizing the problem as one of broad, societal harm.

In this way, the framing question undermines the alleged neutrality of the remedial proportionality standard by significantly altering the question that must be answered. Once the question is framed, the remedial question of matching proportionality is relatively easy to answer. The answer to the proportionality analysis simply depends upon the question asked, and that question varies depending upon the eye of the beholder. Therefore, the proportionality standard masks underlying judicial subjectivity by feigning objectivity and neutrality. It subverts the normative questions by making remedial decisions seem mechanical, objective, and straightforward when they are not.

Add to this framing discretion a secondary level of subjectivity which enters judicial decisions by the selection of the analytical inputs for the proportionality calculus. Subjectivity enters into the decisionmaking as the judges select the appropriate inputs for consideration – for example evaluating the magnitude of the harm or the reprehensibility of the conduct. In the punitive damages context, what is "reprehensible"? [382] The seriousness of a harm is not a universal, timeless fact, but rather turns upon the views of the individual judges.[383] Though "dressed up as a legal opinion, it is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the . . . jury."[384] As Justice Scalia argued in *BMW*, judicial review "reflects not merely a judgment about a matter of degree, but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination. . . . There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter."[385] Thus, as Professor Spencer put it, the "objective" guideposts of proportionality are just as subjective as the "Takes-the-Judicial-Breath-Away-and-Raises-the-Judicial-Eyebrows Test: all involve the Supreme Court in making its own determinations on behalf of an entire nation."[386]

B. Dangerous Deference to the Defendants

[380] Tennessee v. Lane, 541 U.S. 509, 523-28 (2004).
[381] Board of Trus. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-72 (2001).
[382] *See* Spencer, *supra* note 158, at 1096 ("What is "reprehensible"? Why is it that physical harm is always worse than economic harm? Isn't it worse to defraud the securities of an entire corporation and retirement like Enron than a punch in the face?").
[383] Karlan, *supra* note 101, at 888.
[384] BMW v. Gore, 517 U.S. at 559, 600 (Scalia, J., dissenting).
[385] *Id.* .
[386] Spencer, supra note 158, at 1096-97.

Remedial proportionality as currently utilized by the Supreme Court is a defendant-friendly concept. The Court has co-opted the international norm of proportionality as protection for victims and used it as a sword to cut down plaintiffs' rights. It has perverted the international norm by fashioning a rule of protection of "fundamental rights" for corporate defendants, institutional actors, and states.[387]

This pro-defendant bias has been well-documented in a series of articles by Professor Wendy Parker examining injunctive relief in discrimination cases.[388] In tracing the Court's desegregation cases and the resulting doctrinal rules of injunctive proportionality, Parker has seen a shocking rule of deference to defendants at the plaintiffs' expense.[389] She concludes: "The Supreme Court's approach to school desegregation in particular and public law remedies in general has prevented lower court judges from undertaking principled, well-grounded remedial processes and has ceded too much remedial power to the defendants, the alleged or adjudicated wrongdoer."[390] Similarly, the cases on punitive damages demonstrate a primary concern with the welfare of the defendant.[391] And even the Section 5 cases align with the defendant states over the individual victims or the people's protectors in Congress.[392]

The Supreme Court's pro-defendant remedial bias is dangerous in two respects. First, it fails to create the incentives necessary to alter illegal behavior. If defendants control the remedies, and courts must abide by the defendants' interests in crafting remedies, then there is less incentive to change illegal behavior. Justice O'Connor recognized this pitfall in *Ayotte* where she acknowledged the potential invitation to state legislatures to carelessly legislate and leave it to the courts to sort out. Similarly, in the punitive damages context, the remedial proportionality rule encourages careless behavior by potential wrongdoers.[393] A proportionality rule in which defendants receive relatively insubstantial penalties is "simply [] a tolerable cost of a certain course of action, provided the ultimate benefits to be gained outweigh that cost."[394] Thus, it will likely "influence the tortfeasor's rational-cost minimizing choice with respect to the utilization of reasonable and/or reprehensible input activities. If the price of

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[387] Zoller, *supra* note 3, at 569, 585 (noting that the Court most often has used the proportionality principle in the Section 5 cases to protect the rights of states, rather than for the benefit of individuals).
[388] Parker, *Public Law Remedies*, *supra* note 179, at 479; Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 W&M L. REV. 1691, 1694-95 (2004); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment Judicial Decisionmaking*, 81 NOTRE DAME L. REV. 889, 893 (2006) ("Courts are doing more than deferring to defendants; they are actually agreeing with the defendants.").
[389] Parker, *Public Law Remedies*, *supra* note 179, at 479; Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1657 (2003).
[390] Parker, *Public Law Remedies*, *supra* note 179, at 479.
[391] *See supra* discussion pp. 22-23.
[392] Zoller, *supra* note 3, at 569 ("Against the [international norm of proportionality], it looks, indeed as if the Court discovered that states too had rights just like individuals, that they could be abused just like the latter, and that their 'fundamental rights' ought to be guaranteed by the same principle of congruence and proportionality that protects human rights.").
[393] Marshall & Fitzgerald, *supra* note 124, at 257.
[394] *See* Spencer, *supra* note 158, at 1101.

reprehensible input activities decreases relative to the price of reasonable input activities, then one can anticipate an increase in such reprehensible activities."[395]

Second, the pro-defendant remedial bias skews the supposed balance of rights inherent in proportionality by prioritizing defendants' rights at the expense of plaintiffs.[396] Missing from these cases is any concern for when plaintiffs are accorded too little relief.[397] The Supreme Court does not strictly review motions for additur of punitive damages or enhance punitive damage awards to address the fact that a pay-your-own attorney fee system leaves the injured plaintiff less than fully compensated. In other words, proportionality is not a two-way street. The Court appears unconcerned with disproportionality that harms plaintiffs.

There is therefore a significant cost associated with this pro-defendant rule: the very real risk of under-enforcement of the law.[398] The result may have some appeal to Justices who believe that the legal system has run amok and that certain remedies, like structural injunctions and punitive damages, should not in fact be enforced. But the real cost is to plaintiffs and to the legal system. Plaintiffs have the burden of initiating lawsuits, and incentives to do so have been lessened. As between the two parties in the lawsuit, where remedial measures are at issue, the plaintiff is the one who has suffered harm, and the defendant the wrongdoer. Tipping the balance in favor of the defendant signals that plaintiffs, and the laws that protect them, are not important.

C. Unveiling Proportionality as Judicial Activism

By now it should be apparent that the remedial proportionality principle is not a rule of minimalism, but rather a rule of judicial activism. The Supreme Court is not taking the path of least resistance in these cases, but instead is actively engaged in policymaking to displace the traditional remedial process. The evidence speaks for itself. The quest for a rule of objectivity has in fact widened the doors for subjectivity. Claims of minimalism and modesty have produced activism. And the cry for restraint has resulted in the active overturning of carefully crafted remedies.

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[395] Marshall & Fitzgerald, *supra* note 124, at 257.

[396] See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101-02 (John Ladd trans. 1965) ("What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other."); ARISTOTLE, *supra* note 53, at Book V., Ch. 5, 1132b113-15 (stating that each side had what is justly theirs "whenever neither more nor less results").

[397] I have argued elsewhere that due process requires a minimum amount of adequate relief to injured plaintiffs. *See* Thomas, *Tort Remedies*, *supra* note 159; Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to an Adequate Remedy*, 41SAN DIEGO L. REV. 1633 (2003).

[398]Parker, *Judicial Decisionmaking*, *supra* note 386, at 1657. Professor Parker notes:

> They are willing to let the parties, particularly the defendants, control the process and outcome of these lawsuits. While this posture may allay some of the criticisms of the power of judges in school desegregation, the judges' deference to defendants has come at the cost of plaintiffs' right to desegregation to the extent practicable and, at times, at the cost of less than full compliance with Supreme Court precedent.

Id.

This article's revelation of the operation of remedial proportionality in the Supreme Court cases supports the conclusion of others that this is one of the most activist Courts in history.[399] Remedial proportionality establishes a rule of judicial supremacy in which the Court strikes down remedies with which it disagrees and enacts remedial reform that could not pass the legislative branches.[400] Proportionality becomes the doctrinal mechanism by which the Supreme Court activates its judicial supremacy. Ironically, while proportionality was intended as a rule to curb the alleged judicial activism of the lower court exercising broad remedial power and issuing broad rulings, proportionality has now transferred that activist potential to the highest court in the land. [401]

At some level, the term "judicial activism" is merely an epithet that can be hurled at any court decision with which the accuser disagrees.[402] Justice Ginsburg stated during her confirmation hearings that judicial activism is "a label too often pressed into service by critics of court results rather than the legitimacy of court decisions."[403] Conservatives have used the term to attack public law injunctions in schools and prisons, while liberals have used the epithet to attack judicial invalidations of social legislation.[404] However, the judicial activism of proportionality analysis is more than a simple disagreement over the content of the result.[405] The activism results from the displacement of the usual, centuries-old process of remedial judicial

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[399] *See generally* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); HERMAN SCHWARTZ, INTRODUCTION TO THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (HERMAN SCHWARTZ ED. 2002); *see also* Cass R. Sunstein, *Op-Ed, Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (stating that "[w]e are now in the midst of a remarkable period of right-wing judicial activism" on the Rehnquist Court); Larry D. Kramer, *Op-Ed, No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (contending that "conservative judicial activism is the order of the day").

[400] *See* Spencer, *supra* note 158, at 1090 (arguing that many would call proportionality in punitives "judicial activism" except that those who usually assail claims of activism politically agree with the result of punitives in the name of tort reform); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (describing the "crystal ball" of Section 5 proportionality that supports the Court's judicial activism of striking down acts of Congress).

[401] *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1154-56 (2002) (describing "remedial activism" of both the lower courts issuing broad, invasive remedies and the Supreme Court in striking down structural injunctions and crafting its own broad remedy in *Bush v. Gore*).

[402] Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, ___ MINN. L. REV. ___ *1-6 (forthcoming) (describing how the term "judicial activism" is often a rhetorical tool or "ideological harangue" used by both liberals and conservations to attack decisions with which they politically disagree); *accord* Young *supra* note 379, at 1141.

[403] *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 169-71 (1993).

[404] *See* Cross & Lindquist, *supra* note 400, at 4-5; *see, e.g.*, *Jenkins*, 515 U.S. at 131-35 (Thomas, J., concurring); Colker & Brudney, *supra* note 398, at 83.

[405] Donald H. Zeigler, *The New Activist Court*, 45 AMER. U. L. REV. 1367, 1367-68 (1996) ("When most people use the phrase, however, they are referring to how a court decides cases. They are talking about process more than result.").

decisionmaking by a new higher Court supremacy. Such displacement of long-accepted judicial process of crafting remedies is the essence of judicial activism.[406]

As demonstrated, proportionality analysis does not produce a rational, restrained rule of judicial remedies. Instead, it replaces the normal remedial functioning of the judicial process with a subjective rule of Supreme Court supremacy that gives the Court the singular power to determine remedies.

V. CONCLUSION: RESTORING DEFERENTIAL REVIEW OF REMEDIES

The open question is whether this trend toward heightened scrutiny of remedial decisions through the use of a proportionality standard will continue. Virtually every member of the Court has advanced the cause of proportionality in one context or another. The acceptance of the proportionality standard seems to cut across jurisprudential lines and political sides, making it likely that such a standard will survive in the near future.[407] Yet, Justice O'Connor was a driving force in many of the key remedial cases of the modern Court, and her absence may portend a change in the remedial winds. It may also be that Justice Scalia's rejection of proportionality in both the civil and criminal contexts will garner additional support from the newest members of the Court.

Armed with a more transparent understanding of remedial proportionality and its false promises, legal scholars and jurists can begin to shake the belief in proportionality as an absolute measure of objectivity. The focus of this article has been to debunk the assumed validity of proportionality by deconstructing the rule and its strict application by the Court. It does not conclude, however, without offering a recommendation for the future. For as Elisabeth Zoller argues, the proportionality test "is a legal tool that is neutral in itself. . . . it can be good or evil, depending on the use that is made of it. . . . The problem is to learn how to use it."[408]

The courts need to retain the ability to check for excessive remedies through the process of deferential judicial review. Justice Scalia's rejection of all remedial oversight risks would prevent the Court from being able to capture remedial outliers that deserve the Court's disfavor, such as public school planetariums or $175 million awards for emotional distress unaccompanied by personal injury. If reviewing courts stop asking what remedy is "just right," and instead look only for remedies that are "grossly excessive," the range of consensus is likely to increase as to what is in fact too extreme. While the range of appropriate relief on the remedial spectrum is vast, the spectrum's extremes are more clear. Judgments about the relative excessiveness of remedies are far more consistent than determinations of the absolute measure of precise

[406] *See* Cross & Lindquist, *supra* note 400, at 12; Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1473 (2004).
[407] Siegel, *supra* note 98, at 1126 ("[I]t is increasingly clear that the operative principle behind the Court's remedial hostility is not bluntly or categorically political. . . . ").
[408] Zoller, *supra* note 3, at 570-71.

remedial response.[409] The relative consensus dilutes the impact of the inherent subjectivity of the standard by addressing the extremes upon which most reasonable people can agree, rather than turning on the personal views of a few individual judges.

Rejecting strict proportionality in favor of deferential judicial review is the doctrinal path taken by the Supreme Court in the criminal proportionality cases. After several decades of experience with a strict proportionality standard in the criminal sentencing context, a majority of the Court has rejected it as unworkable and amenable to judicial subjectivity.[410] Instead, the Court has adopted a relatively deferential principle of "narrow" proportionality under the Eighth Amendment.[411] This weak standard of "gross disproportionality" examines sentences only to see if they are extreme, rather than carefully calibrated, and is reserved for the rare case.[412] Under this standard, the Court has upheld most of the sentences it has reviewed.[413] The Court's experience with proportionality weighs in favor of such weak-form review under which the gross disproportionality standard captures extreme cases.

Restoring the traditional standard of deference to remedial arbiters neutralizes the increasing activism of the Court. Deferential review would mean the end of de novo appellate review of remedies and the return to a respect of judges and juries crafting remedies. There is a sound basis for a rule of deference in determining the proper measure of relief because the factfinder is closer to the observed "truth" and facts. Judicial policymaking is minimized by tying the decision more closely to the facts or circumstances narrowly presented by each the case.

Thus, this article ultimately suggests restoring remedial proportionality analysis to its traditional place as a tool of judicial review that is used sparingly to guide remedial decisions. Returning to a moderate use of proportionality – call it narrow, or weak, or reasonable – employs proportionality only as an outer check upon potentially aberrant awards that go beyond the pale. The deference solution, in other words, is an argument in favor of the way we were.

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[409] *Cf.* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006) (citing empirical studies in the criminal sentencing context that "have found a substantial degree of consensus about the *relative* severity of different offenses, even in the face of disagreement over 'the absolute level of punishment' (the precise sentence that should be imposed for a given offense)).

[410] Lockyer v. Andrade, 538 U.S. 63 (2003); Pillai, *supra* note 259, at 316. The Court has retained strict proportionality review for death penalty cases.

[411] *Lockyer*, 538 U.S. at 72; *Ewing*, 538 U.S. at 20 (O'Connor, J., plurality); United States v. Bajakajian, 524 U.S. 321, 336-37 (1998).

[412] *Lockyer*, 538 U.S. at 73; *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991).

[413] *See Ewing*, 538 at 25-28 (upholding sentence of 25 years to life for three-time recidivist stealing three gold clubs); *Lockyer*, 538 U.S. at 64 (upholding sentence of 25 years to life for three-time recidivist stealing $150 worth of videos); *but see* United States v. Bajakajian, 524 U.S. 321, 334 (1998) (striking down fine of $357,144, the full amount of case defendant failed to declare when leaving the country as grossly disproportionate in light of statutory fine of $5000); Solem v. Helms, 463 U.S. 277 (1983) (Powell, J.) (striking down sentence of life in prison for petty criminal with six prior minor felonies for writing bad check for $100).