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Public Law at the Cathedral: Enjoining the Government

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PUBLIC LAW AT THE CATHEDRAL: ENJOINING THE GOVERNMENT

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Conventional wisdom provides that injunctive relief in public law cases is generally unnecessary, because a declaratory judgment and the threat of damages are enough to induce the government to comply with a court's ruling (except, perhaps, in the institutional reform context). Consistent with this prevailing understanding, most scholars to apply Calabresi and Melamed's Cathedral *framework to public law have concluded that nearly all constitutional rights are protected by property rules, regardless of whether a rightholder actually is protected by an injunction, or instead merely has a substantial likelihood of obtaining one if she goes to court.*

This Article challenges this prevailing understanding, including past attempts to apply the Cathedral *framework to constitutional rights. It argues that a constitutional or statutory right receives the greatest available level of protection when it is secured by an injunction. A court's decision about whether to issue an injunction is likely to make the biggest difference in protecting a public law entitlement where: (i) high transaction costs otherwise may deter or prevent rightholders from enforcing their rights (such as where administrative exhaustion requirements exist or the threatened violation is "fast moving"); or (ii) the benefits of violating the right will accrue primarily to politically influential people or groups, while violations are inflicted primarily on members of unorganized or politically weak groups.*

Because of the importance of injunctions in public law cases, procedural, jurisdictional, and other related rules should be reformed to reduce the unique obstacles that hinder plaintiffs in such cases from

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obtaining injunctive relief, and make injunctions available on a wider, more consistent, and substantively defensible basis. Moreover, the Cathedral *framework should be modified as it applies to public law cases, to more accurately reflect the important distinction between actually being protected by an injunction ("complete property-rule" protection), and merely having a substantial likelihood of being able to obtain one ("potential property-rule" protection).*

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INTRODUCTION

Commentators and courts generally maintain that, when a litigant prevails in a public law case against a government agency or official, it does not especially matter whether the court issues an injunction to

accompany its judgment and opinion (except, perhaps, in the institutional or structural reform context).[1] The Supreme Court has held in public law cases that "there is little practical difference between injunctive and declaratory relief."[2] It has elaborated elsewhere that, when a plaintiff successfully challenges a legal provision, "a district court can generally protect . . . [the plaintiff's] interests . . . by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."[3]

For example, in *Roe v. Wade*—perhaps one of the most hotly contested Supreme Court decisions of all time[4]—the Court held, "[w]e find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional."[5] Many

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1 Lower courts have been more sympathetic to the need for injunctive relief in structural or institutional reform cases, in which an entity such as a prison, hospital, or school district is being operated in a pervasively unconstitutional manner. *See, e.g.*, Cobell v. Norton, 283 F. Supp. 2d 66, 139 (D.D.C. 2003). Courts generally are more willing to grant injunctions in such cases because they often impose prophylactic requirements or restrictions beyond those the accompanying opinion identifies as constitutionally or legally necessary, or require the defendants to perform certain specified acts from among a range of constitutionally and legally permissible alternatives. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982). Such broad relief can be necessary to remedy past constitutional or statutory violations; avoid difficulties that arise from applying subjective standards, by giving the defendant concrete steps to implement; make it easier for the court to monitor compliance; and address other problems that, while not independently illegal or unconstitutional, exacerbate the effects of the legal or constitutional violations. *See* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 663–64 (1978). Owen Fiss has been a staunch proponent of injunctive relief in structural reform cases. *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978). The Supreme Court has expressed concern over structural injunctive relief against government entities, however, and is highly receptive to modifying or vacating such orders. *See* Horne v. Flores, 557 U.S. 433, 448–50 (2009). This Article focuses primarily on non-institutional public law cases, but many of its insights apply to institutional cases as well.

2 California v. Grace Brethren Church, 457 U.S. 393, 408 (1982); *see also* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299 (1943). This principle is not limited to public law cases; the Court has held that the consequences of injunctive and declaratory relief are substantially equivalent in a variety of contexts. *See, e.g.*, Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 591 (1995); Kugler v. Helfant, 421 U.S. 117, 131 (1975); Samuels v. Mackell, 401 U.S. 66, 72 (1971).

3 Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); *cf.* Wooley v. Maynard, 430 U.S. 705, 712 (1977) (affirming grant of injunctive relief against police where "three successive prosecutions were undertaken against [the plaintiff] in the span of five weeks" for covering the state motto on his license plate).

4 *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48–49 (1996).

5 410 U.S. 113, 166 (1973); *see also* Republic Nat'l Bank v. United States, 506 U.S. 80, 97 (1992) (White, J., concurring) (explaining that declaratory relief is sufficient because government officials can be "expect[ed]" to "satisfy their obligations"); Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) ("[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, [a] declaratory judgment is the functional equivalent of an injunction.").

academics, including Douglas Laycock,[6] Peter Schuck,[7] Michael L. Wells, and Thomas A. Eaton,[8] likewise have minimized the importance of injunctive relief in public law cases.

This presumptive indifference to whether a court's judgment and opinion are accompanied by an injunction is built into the framework set forth by Judge Guido Calabresi and A. Douglas Melamed in their seminal Article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* (the *Cathedral* framework).[9] Under the *Cathedral* framework's conception of a "property rule," it does not matter whether an entitlement is actually protected by an injunction. Commentators applying the framework generally use the term "property rule" to refer to two different groups of people: those who actually are protected by an injunction against violations of a particular entitlement, and those who merely have a substantial likelihood of obtaining such an injunction if they go to court.[10] Most scholars who have applied the *Cathedral* framework to public law have therefore concluded that constitutional rights, except for those arising under the Takings Clause,[11] are per se protected by property rules, regardless of whether a rightholder actually is protected by an injunction.[12]

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6 DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 497 (2d ed. 1994) (arguing that injunctive relief is largely superfluous in protecting public law rights, because declaratory judgments are just "as effective").

7 PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 191 (1983) (arguing that "governmental liability for damages should enjoy remedial primacy," and courts should employ "[c]onditional declaratory relief" when such damages prove insufficient); *see also* Carlson v. Green, 446 U.S. 14, 21 (1980) (holding that the availability of compensatory damages from government officials "serves [a] deterrent purpose").

8 MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 185 (2002) (declaring that there is "little practical difference" between injunctions and declaratory judgments). The remainder of the book does not distinguish between these remedies. *Id.* at 186.

9 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For an explanation of the framework, especially as applied to public law cases, see *infra* Part II.

10 *See, e.g.*, Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 610 (2001) (declaring that an entitlement is protected by a property rule if the holder "can secure an injunction" against violations); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1723 (2004); *see also* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 716 (1996) (explaining the concept of property rules without mentioning injunctions).

11 U.S. CONST. amend. V; *see also* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1135 n.325 (2001) ("[J]ust-compensation rights are uniquely weak; they provide only liability-rule protection instead of the stronger property-rule protection provided by other constitutional rights.") (internal quotation marks omitted); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 884 (2011).

12 Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1695 (2007) ("In Calabresi and Melamed's terms, constitutional rights are protected by property rules . . . ."); Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2005 (2008) (discussing "property rules stemming from broad-based constitutional provisions"); Seamon, *supra* note 11, at 1135 n.325; Serkin, *supra* note 11, at 884; *see, e.g.*, John O. McGinnis, *The Once and Future Property-Based Vision of the First*

This Article rejects both the conventional view of injunctive relief in public law cases, as well as prevailing attempts to apply the *Cathedral* framework to them. It demonstrates that injunctions provide stronger protection for a person's constitutional or statutory rights than any other remedy currently available from federal courts.[13] Moreover, actually having the protection of an injunction should not be viewed as effectively equivalent to merely having a substantial likelihood of being able to obtain an injunction from court.

Normatively, this Article advocates that, at a minimum, plaintiffs should not be required to overcome additional burdens or obstacles—beyond those to which plaintiffs seeking injunctions typically are subject—to obtain injunctive relief in public law cases, whether on behalf of themselves or others similarly situated. Some courts, for example, simply decline to issue injunctions in public law cases.[14] Others greatly limit the scope of such relief by refusing to certify classes in public law cases under the judicially-created "necessity doctrine."[15] Because injunctions play such an important role in the enforcement of statutory and constitutional rights against government officials and entities, litigants seeking them should not be subject to these types of additional hurdles.

Moreover, procedural rules and doctrines should be reformed to eliminate contingent, random, or substantively unwarranted barriers to the award of injunctions in public law cases. For example, a district court may interpret a legal provision or adjudicate its validity in any of the following contexts:

- an individual's pre-enforcement suit, seeking injunctive relief solely for the plaintiff;
- a pre-enforcement class action suit, seeking relief for both the plaintiff and a class of similarly situated people; or

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Amendment, 63 U. CHI. L. REV. 49, 77 (1996) ("The First Amendment provides individuals with a property right against the government's interference with transmission of information: the government does not have a right to stop you from speaking even it pays you for your lost opportunity."); *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 115 & n.113 (1997); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1914 (2007) (arguing that constitutional rights "should generally be protected by more than mere 'liability rules'"); Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization*, 91 CORNELL L. REV. 411, 439 (2006) ("In the main, constitutional law strongly disfavors the forced sale of individual rights, preferring specific enforcement instead.").

13 For brevity, this Article uses the term "right" broadly, rather than in a precise or technical sense, as a shorthand way of referring to a person's interest in having public officials act in accordance with applicable legal restrictions. For example, this Article would contend that a person has the "right" to not be subject to legislation that exceeds Congress's Article I, § 8 powers, *see, e.g.*, United States v. Lopez, 514 U.S. 549 (1995), or a President who is less than thirty-five years old, *cf.* U.S. CONST. art. II, § 1, cl. 5.

14 *See, e.g.*, *supra* notes 2, 5.

15 *See infra* Part III.C.

- a criminal prosecution in which the defendant challenges the proper interpretation or validity of the underlying law or regulation.

In each of these cases, the court may issue an opinion interpreting, limiting, or invalidating the challenged legal provision on the same grounds, for the same reasons. The legal consequences of the court's ruling and the type of protection it creates for the right at issue will differ, however, based solely on the posture of the case. Procedural rules allow plaintiffs in the first two types of cases to seek injunctive relief, but not defendants in criminal prosecutions. Likewise, injunctive relief in the individual suit would run only to the individual plaintiff and not other, similarly situated people, while injunctive relief in the class action would extend to all members of the class. Injunctive relief should not hinge on such contingent aspects of cases.[16]

This Article concludes by presenting a stronger variation of its thesis, suggesting that a plaintiff who faces an impending constitutional violation should be presumptively entitled to an injunction, as well as the contempt remedies necessary to enforce it, and may be denied them only in rare cases. The government generally may deprive a person of her constitutional rights only to achieve a compelling interest that cannot be furthered through more narrowly tailored means.[17] And an injunction is the only legal mechanism through which a person may attempt to prevent a violation of those rights ex ante. Procedural rules or doctrines rooted primarily in judicial economy concerns should not prevent a person from obtaining an injunction to protect her constitutional rights when, as a matter of substantive law, the government may not violate those rights, even to further much more important goals.

Part I demonstrates that an injunction provides significantly more protection for a person's rights than either an entitlement to damages or merely having a substantial likelihood of being able to obtain injunctive relief (whether because of a declaratory judgment or a favorable judicial opinion). This Part further shows that, when a person's public law rights are not protected by an injunction, agencies sometimes nonacquiesce to judicial rulings with which they disagree and violate those rights, particularly when: (i) high transaction costs may deter rightholders from seeking judicial assistance (such as where administrative

16 Many procedural rules that restrict the availability of injunctions in public law cases apply equally to declaratory relief. Thus, even if one disagrees with this Article's descriptive premise about the importance of injunctions against governmental agencies and officials, it is still possible to agree with a modified version of the Article's prescriptive argument, that injunctions (and, by extension, declaratory judgments) should be made available in public law cases on a more consistent, uniform, and substantively defensible basis.

17 *E.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993).

exhaustion requirements exist or the threatened violation is "fast-moving"); or (ii) the benefits of violating the right will accrue primarily to a substantial number of politically active people and groups, while violations are inflicted primarily on members of unorganized or politically weak groups. This Part also responds to the claim that property-rule protection is unnecessary for many constitutional rights.

Building on this analysis, Part II challenges the traditional *Cathedral* conception of "property rule." At least as applied to public law cases, this concept should be disaggregated to distinguish between a "complete property rule," which applies if a person's entitlement is actually protected by an injunction, and a "potential property rule," which applies if a person instead has a substantial likelihood of obtaining an injunction from a court. This modification provides a useful vocabulary for discussing public law remedies, reflects the legal significance of a court's decision to issue an injunction (or its refusal or inability to do so), and allows the *Cathedral* framework to be applied more accurately to public law cases.

Part III recommends modifications to the procedural and related doctrines that restrict the availability of injunctive relief in public law cases based on contingent, random, or substantively indefensible considerations. It examines: (i) rules that prohibit litigants from bringing a claim or counterclaim for injunctive relief based on the posture of a case; (ii) limitations on the entities against whom injunctions may issue, stemming from sovereign immunity and Rule 65(d);[18] (iii) restrictions on class certification under Rule 23(b)(2) for plaintiffs seeking injunctive relief against governmental defendants;[19] and (iv) the non-merits factors governing injunctive relief, including the irreparable injury, inadequate remedy at law, balance-of-hardships, and public interest requirements.[20] A brief conclusion follows. Whereas Calabresi and Melamed illuminated the *Cathedral*'s common law nave, this Article attempts to cast a new light on its constitutional and statutory presbyter.

I. COMPARING REMEDIES IN PUBLIC LAW CASES

Despite conventional wisdom to the contrary, a court's decision about whether to issue an injunction in a public law case is significant; it substantially affects both the way in which the rights of the successful litigant (and others) are protected and the likelihood that the government will respect those rights.

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18 FED. R. CIV. P. 65(d).

19 FED. R. CIV. P. 23(b)(2).

20 eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

Most scholars and courts downplay the significance of injunctions in public law cases for three main reasons. First, many courts optimistically assume that government officials view adherence to judicial opinions as part of their duty.[21] Second, the threat of having to pay compensatory damages under § 1983[22] or *Bivens*[23]—as well as the possibility of punitive damages[24] or criminal prosecution[25] for civil rights violations—often are regarded as sufficient to deter government officials from violating public law rights recognized in judicial opinions or declaratory judgments.[26]

Third, a person facing an impending violation of a constitutional or statutory right recognized in an opinion or declaratory judgment likely can obtain emergency relief in time to prevent the threatened violation from occurring. That ability to obtain a temporary restraining order or preliminary injunction leads executive officials to refrain from attempting to violate the right in the first place. In other words, a substantial likelihood of being able to obtain an injunction is effectively equivalent to actually having one.[27]

This Part considers and responds to these arguments, demonstrating that a person's public-law rights are most firmly protected when the rightholder is covered by an injunction, compared to other remedies that federal courts offer. Section A lays the foundation for this discussion by contrasting the legal effects of judgments,

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21 *See, e.g.*, *supra* note 5 and accompanying text.

22 42 U.S.C. § 1983 (2012).

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

24 *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269–70 (1981).

25 *See* 18 U.S.C. § 242. A government official generally may not be prosecuted under § 242 unless the victim's constitutional right was "clearly established" at the time the official allegedly violated it; the tests for civil and criminal liability are largely equivalent. United States v. Lanier, 520 U.S. 259, 270–71 (1997).

26 *See, e.g.*, Memphis Cnty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."); Owen v. City of Independence, 445 U.S. 622, 651 (1980); SCHUCK, *supra* note 7, at 191. This rationale does not apply to district court opinions in circuits that ignore district court rulings, and consider only circuit court and Supreme Court opinions, in determining whether the law on an issue is "clearly established" for qualified immunity purposes. *See, e.g.*, Marsh v. Butler Cnty., 268 F.3d 1014, 1032–33, 1033 n.10 (11th Cir. 2001) (en banc); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("[D]istrict court decisions cannot *clearly* establish a constitutional right."); Richardson v. Selsky, 5 F.3d 616, 623 (2d Cir. 1993) (same). The Supreme Court has approved of this approach without resolving the inverse issue of whether a circuit may choose to allow district court rulings to clearly establish law and allow plaintiffs to overcome public officials' qualified immunity. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011).

27 *See, e.g.*, LAYCOCK, *supra* note 6, at 497; WELLS & EATON, *supra* note 8, at 185; *cf.* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 19 (noting that parties to a dispute "each predict what the court will do. If the predictions agree, they can settle at once. If the predictions do not agree, they still may settle if the value of the divergence is less than the cost both sides will incur in obtaining the court's answer...."); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (explaining how litigants negotiate and act based on the expected outcome of litigation).

injunctions, and written judicial opinions. The remaining Subsections proceed by induction, examining and rejecting each of the typical justifications for minimizing the significance of injunctive relief in public law cases. Building on the work of Daryl Levinson,[28] Section B shows that alternate forms of relief, such as compensatory and punitive damages, are insufficient to protect public law rights, because public officials are not deterred by the prospect of monetary damages in the same way as private actors. This discussion also responds to the position advanced by several scholars that certain constitutional rights should be protected exclusively through ex post awards of compensatory damages.

Section C examines the weaknesses of the "shadow of the law"-type argument that merely having a substantial likelihood of being able to obtain an injunction is effective interchangeable with actually having one.[29] Section D offers a qualitative empirical analysis of agency nonacquiescence in judicial rulings to demonstrate that, when a court does not issue an injunction in a public law case, public officials who disagree with the court's ruling cannot necessarily be expected to simply follow it.[30]

Thus, a court's decision to award an injunction in a public law case carries both legal and practical significance that most discussions of public law remedies overlook or minimize. An injunction is likely to make the biggest difference in cases where the government disagrees with the court's ruling and: (i) rightholders encounter substantial barriers to seeking injunctive relief, such as when they face time-consuming administrative exhaustion requirements or "fast-moving" violations of their entitlements; or (ii) the benefits of violating the right will accrue primarily to a substantial number of politically influential people or groups, while violations are inflicted primarily on members of unorganized or politically weak groups.

A. *Components of a Public Law Ruling*

When a court interprets a legal provision or holds it unconstitutional, the court's ruling may be comprised of up to three different components: the judgment[31] (as modified by any appellate mandate);[32] the accompanying injunction or order, if any; and the written opinion, if any. Each of these components has different legal

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28 Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

29 *See supra* note 27 and accompanying text.

30 *Cf.* Roe v. Wade, 410 U.S. 113, 166 (1973); Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008).

31 FED. R. CIV. P. 58.

32 FED. R. APP. P. 41.

effects and impacts executive officials in different ways. The consequences of a judicial ruling interpreting a legal provision or holding it unconstitutional, as well as the nature of the protection that a person's rights receive as a result of that ruling, depend on which of these components the court employs.

1. Judgment

A judgment is an independent, self-contained document through which a court terminates a case.[33] It identifies the prevailing parties and the relief each is awarded, but does not include the court's reasoning or intermediate holdings;[34] it is distinct from any findings of fact or written opinion the court might render.[35] In a suit for damages, the judgment may direct payment from certain litigants to others. When a party seeks injunctive relief, the judgment may contain, allude to, or reproduce the injunction. In a declaratory judgment action, the judgment may contain the requested declarations of law.[36]

A judgment, however, does not bind anyone other than the parties to the underlying case.[37] Moreover, although courts have the inherent authority to enforce their judgments,[38] neither judgments in general, nor declaratory judgments in particular, are enforceable through contempt.[39] If a government litigant acts contrary to a declaratory judgment, the rightholder may seek additional relief, including an injunction against future violations,[40] but that government litigant would not be subject to any immediate sanctions.

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33 FED. R. CIV. P. 58(a).

34 12 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 58.05[1], [4][a] (3d ed. 2013).

35 FED. R. CIV. P. 52(a)(1); *see also* R.R. Vill. Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987).

36 *See* 28 U.S.C. § 2201(A) (2012); *see also* FED. R. CIV. P. 57.

37 Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party . . . ."). A lawsuit also may bind certain third parties, such as the litigants' privies, under certain narrow circumstances. *See* Taylor v. Sturgell, 553 U.S. 880, 893–95 & 894 n.8 (2008).

38 *See* Peacock v. Thomas, 516 U.S. 349, 356 (1996); *see also* 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

39 "[A] declaratory judgment . . . is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." Steffel v. Thompson, 415 U.S. 452, 471 (1974) (quoting Perez v. Ledesma, 401 U.S. 82, 125–26 (1971) (Brennan, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *see, e.g.*, Armstrong v. Exec. Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

40 Powell v. McCormack, 395 U.S. 486, 499 (1969).

2. Injunction

An injunction is a court order that may direct government agencies or officials to act, or refrain from acting, in certain ways. Unlike a judgment, an injunction applies not only to the litigants in a case, but their officers and agents, as well as anyone else acting "in active concert or participation" with them.[41] It may impose restrictions or requirements that go beyond what the accompanying judgment or opinion identify as constitutionally or legally required, to "fit[] the remedy to the wrong or injury that has been established."[42]

An injunction is the only mechanism that gives a person the immediate ability to attempt to prevent violations of a constitutional or statutory right ex ante. A court may threaten or hold violators in civil contempt to attempt to prevent violations before they occur or end violations that otherwise would persist.[43] It may set the fine for civil contempt at whatever amount it deems necessary to coerce the defendant's compliance, even if it far exceeds the amount of damages the rightholder could obtain as compensation ex post.[44] In *Spallone v. United States*, for example, the Supreme Court refused to stay civil contempt fines of $1 million per day against a city whose council refused to follow the district court's order to pass an ordinance allowing the construction of public housing.[45]

If a defendant violates an injunction, the court may award compensatory damages ex post to the rightholder.[46] It also may hold violators in criminal contempt[47] and impose punitive fines or imprisonment.[48] The court even may appoint a prosecutor, who may be an attorney outside the government, if necessary, to pursue criminal contempt prosecutions of those who violate its orders.[49]

3. Written Opinion

Finally, when granting relief in statutory and constitutional cases, courts typically issue written opinions through which they justify the

41 FED. R. CIV. P. 65(d)(2)(B)-(C).

42 Salazar v. Buono, 559 U.S. 700, 718 (2010). *But see* Michael T. Morley, *Statutory Injunctions*, 2014 U. CHI. LEGAL F. (forthcoming) (arguing that, when a federal law provides for injunctive relief, courts should decline to impose prophylactic restrictions that bar conduct which the statute itself does not prohibit).

43 Int'l Union v. Bagwell, 512 U.S. 821, 827 (1994).

44 United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

45 Spallone v. United States, 487 U.S. 1251 (1988).

46 *United Mine Workers*, 330 U.S. at 304.

47 Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987).

48 *See Bagwell*, 512 U.S. at 828-29.

49 FED. R. CRIM. P. 42(a)(2).

exercise of their Article III power "to say what the law is."[50] A judicial opinion does not bind government defendants in the same manner, or through the same mechanisms, as judgments and injunctions.[51] An opinion from an appellate court primarily offers insight into how the same court will address related issues in the future due to stare decisis[52] or the prior panel rule,[53] and how lower courts will do so based on their obligation to follow higher courts' precedents as part of a hierarchical judicial system.[54] An appellate opinion also may "clearly establish" the law on an issue, allowing plaintiffs to overcome government officials' qualified immunity[55] and obtain ex post damages under § 1983[56] or *Bivens*.[57] In rare cases, the government may decide to criminally prosecute a public official who violates a constitutional right recognized by a judicial opinion.[58]

District court opinions, in contrast, have far less effect, even aside from their much more limited geographic reach. Most notably, they do

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50 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

51 Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

52 State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997).

53 Under this rule, which applies to federal circuit courts of appeal, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*." United States v. Mitchell, 500 F. App'x 802, 803 (11th Cir. 2012) (alteration in original) (quoting United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)) (internal quotation marks omitted).

54 *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."); *see also* U.S. CONST. art. III, § 1 (establishing "one supreme Court" and recognizing Congress's ability to create "inferior Courts").

55 Hope v. Pelzer, 536 U.S. 730, 739–40 (2002); Butz v. Economou, 438 U.S. 478, 500–01, 506–08 (1978).

56 42 U.S.C. § 1983 (2012).

57 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). A plaintiff may pursue compensatory damages against a municipality or county even if the law was not clearly established at the time of the alleged statutory or constitutional violation. Owen v. City of Independence, 445 U.S. 622, 651 (1980). Such local government units may be held liable, however, only under certain narrow circumstances that often are challenging to establish. Pembaur v. City of Cincinnati, 475 U.S. 469, 481–83 (1986); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

In contrast, a plaintiff generally may not seek damages for constitutional or statutory violations directly against the federal government, a state, or a federal or state agency. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 473 (1994) (refusing to recognize *Bivens* remedy against federal entities); Alabama v. Pugh, 438 U.S. 781, 781 (1978) (holding that sovereign immunity presumptively prevents private plaintiffs from suing states in federal court); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (holding that states are not "persons" subject to suit under § 1983). A plaintiff may sue the government or a state for damages only if, among other things, the government or state has waived its sovereign immunity against the type of claim the plaintiff wishes to pursue, *see, e.g.*, 28 U.S.C. § 2674 (waiving sovereign immunity against certain types of tort claims against the government), or Congress has abrogated States' sovereign immunity against that type of claim, *see, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456–57 (1976).

58 *See* 18 U.S.C. § 242.

not give rise to stare decisis:[59] "'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'"[60] Similarly, in many circuits, a district court opinion is insufficient to "clearly establish" the law on an issue and allow a plaintiff to overcome a government official's qualified immunity.[61]

Because government entities generally are not subject to offensive collateral estoppel,[62] opinions at any level below the Supreme Court do not preclude future litigation in other jurisdictions on the meaning of a constitutional or statutory provision. Also, judicial opinions are not directly enforceable through civil or criminal contempt. A person must obtain an injunction to attempt to prevent a government agency or official from acting inconsistently with an opinion.

B. *Alternative Remedies Are Insufficient*

Despite the fact that having an injunction changes the range of remedies that a rightholder may immediately invoke to attempt to prevent statutory and constitutional violations, courts and commentators typically downplay the significance of injunctive relief in public law cases for a variety of reasons. One such theory is that the prospect of damages against either governmental entities or individual government officials is sufficient to deter them from violating people's rights.[63]

Subsection 1 demonstrates that the prospect of liability for compensatory damages is insufficient to prevent government actors from violating statutory or constitutional rights ex ante. Subsection 2 shows that the additional threat of punitive damages or criminal prosecution for such violations offers limited protection, at best. Finally, Subsection 3 responds to the argument that, at least under certain circumstances, some constitutional rights should be protected exclusively by a liability rule, meaning that rightholders should not be permitted to seek injunctions to prevent or end violations of those rights.

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59 "[A] district court cannot be said to be bound by a decision of one of its brother or sister judges." Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., 240 F.3d 956, 965 (11th Cir. 2011).

60 Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE, *supra* note 34, § 134.02[1][d]).

61 *See supra* note 26.

62 United States v. Mendoza, 464 U.S. 154, 158 (1984).

63 *See supra* note 26 and accompanying text.

1. Compensatory Damages

The possibility of being held liable for compensatory damages ex post is generally unlikely to deter a government official or entity from violating constitutional or statutory rights, for several reasons. First, in many constitutional cases, particularly those that do not involve physical assaults or deprivations of personal property, the amount of damages that a plaintiff may recover is quite limited. "[D]amages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages . . . ."[64]

In *Carey v. Piphus*, for example, a school district had suspended a student without first giving him a chance to be heard.[65] The Supreme Court held that, although the school had violated the student's due process rights, he could not recover more than one dollar in nominal damages.[66] The Court explained that the student had not suffered any cognizable harm from the due process violation, since his suspension was substantively warranted and would have been imposed even had the school followed constitutionally adequate procedures.[67] Many types of constitutional violations likewise involve harm that is largely incommensurable, symbolic, or, at the very least, noneconomic. Thus, the threat of an ex post compensatory damages award—especially when reduced by the likelihood of a rightholder actually filing a lawsuit and litigating until a favorable outcome or settlement is reached—often is unlikely to be a substantial deterrent to many constitutional violations.

Second, as Professor Daryl Levinson convincingly demonstrates, government officials and agencies are not motivated by economic incentives in the same way as private actors.[68] Levinson explains that front-line government officials typically respond to their bureaucracies' incentive structures, including the standards for receiving positive evaluations, promotions, bonuses, and indemnification from damage awards. Policymakers, in turn, generally structure agencies' policies and incentive systems to ensure the satisfaction of a majority of the public (or the satisfaction of a sufficiently large coalition of interest groups), in order to receive continued political support.[69]

Levinson explains that, even if officials or municipalities are held liable for constitutional (or, by extension, statutory) violations, policymakers nevertheless may have an incentive to not only permit

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64 Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986).

65 Carey v. Piphus, 435 U.S. 247, 250 (1978).

66 *Id.* at 266–67.

67 *Id.*

68 *See* Levinson, *supra* note 28, at 416 ("[M]aking government pay money is not an especially promising approach to constitutional remedies . . . .").

69 *Id.* at 352–53.

such conduct, but structure agencies' internal incentive systems to encourage it:[70]

> So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.[71]

He offers the example of warrantless, suspicionless stop-and-frisks of young men loitering in high-crime areas: "Even if every victim" of such stop-and-frisks "were entitled to compensation, the majority of citizens would be happy to pay this price for the (by hypothesis) greater benefits of decreased crime."[72] Pamela Karlan[73] makes the same point, focusing on the chokeholds of criminal suspects challenged in *City of Los Angeles v. Lyons*.[74] Because the Supreme Court relegated potential chokehold victims to ex post suits for damages, "the city could go on choke holding individuals in violation of the Fourth Amendment as long as it was willing to pay damages at the back end—damages that were . . . unlikely to fully deter unconstitutional conduct, precisely because the city's policy was politically popular."[75] Thus, when a sufficiently large proportion of voters or coalition of interest groups believes that the benefits of violating a particular constitutional entitlement outweigh the monetary cost of compensating rightholders, the prospect of such compensation will not deter politicians from allowing or encouraging agencies to engage in such conduct.

Third, most of the time, government officials—particularly law enforcement officers, who are most susceptible to constitutional claims[76]—are indemnified against compensatory damage awards in constitutional and statutory cases arising from their work.[77] New York

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70 *Id.* at 352.

71 *Id.* at 370. Later in his Article, Levinson applies a similar analysis based on an interest group, rather than majoritarian, model. *Id.* at 378–79.

72 *Id.* at 368.

73 Karlan, *supra* note 12, at 1917.

74 461 U.S. 95 (1985).

75 Karlan, *supra* note 12, at 1917; *see also* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 782 (2004).

76 Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587–88 (2000); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2836–37 (1997).

77 Miller & Wright, *supra* note 75, at 781; Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1217 (2001).

City, for example, "regularly indemnifies police officers regardless of whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and regulations of the New York City Police Department...."[78] Pressure from public employee unions makes such policies difficult to change. This coverage necessarily dampens whatever deterrent effect the prospect of compensatory damage awards may have on government officials.

Similarly, many agencies are not required to pay large damage awards out of their own budgets; rather, such judgments typically are paid from the general fund of the municipality, state, or federal government.[79] This further reduces the deterrent effect of such awards on government agencies.

Fourth, damages are unlikely to be an effective deterrent where a constitutional or statutory right is recognized or established exclusively in district court opinions. Qualified immunity protects public employees and officials from being held personally liable for violating a plaintiff's constitutional or statutory rights unless, at the time of their actions, those rights were "clearly established."[80] Generally, for a right to be deemed clearly established, a court must have recognized or upheld the right under closely related factual circumstances.[81]

Many circuits do not allow district court rulings to be considered in determining whether a right was clearly established at the time of an official's challenged conduct.[82] Consequently, public officials in those jurisdictions typically may not be held liable for violating rights that are recognized only in district court opinions. And by declining to appeal adverse district court rulings, government litigants can prevent higher courts from ruling on an issue, thereby preventing the law from becoming clearly established for qualified immunity purposes.

Sovereign immunity prevents plaintiffs from circumventing qualified immunity by suing the federal government or a state directly[83] and, in any event, states are not subject to suit under § 1983.[84] Although plaintiffs may sue municipalities for public law violations without demonstrating that their rights were clearly established,[85] such suits are permissible only under certain narrow circumstances, may not be based

78 Emery & Maazel, *supra* note 76, at 587–88.

79 Miller & Wright, *supra* note 75, at 781. *See generally* 31 U.S.C. § 1304(a) (2012) (establishing federal judgment fund).

80 *See supra* note 55.

81 *See id.*

82 *See supra* note 26.

83 *See supra* note 57.

84 Will v. Mich. Dep't of State Police, 491 U.S. 58, 63–64 (1989).

85 Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980); *see also id.* at 650–51.

on respondeat superior liability, and are rarely successful.[86] For these reasons, it can be extremely difficult for a plaintiff to seek damages for violations of constitutional or statutory rights that are recognized or established only in district court opinions, and strategic government litigants can prevent higher courts from having the opportunity to affirm such rights.

Finally, damages are inherently an ex post remedy. A rightholder may use the threat of damages, of course, to attempt to deter a government actor from violating her rights. The right to obtain damages after a violation has occurred, however, does not give the rightholder a formal legal mechanism for preventing the violation from occurring in the first place. At most, damages are a second-best alternative to more direct forms of preventative relief.

Thus, compensatory damages are unlikely to prevent many types of constitutional and statutory violations, particularly when the violations are politically popular. They also will be an ineffective deterrent where violations do not result in tangible harm, violators are indemnified against paying damages, or the rights at issue are recognized only in district court opinions.[87]

2. Punitive Damages and Criminal Prosecutions

Punitive damages are potentially more effective than compensatory damages alone at deterring government actors from violating public law rights, because they increase the potential ex post consequences of such violations.[88] As a practical matter, however, they are unlikely to exert a substantial deterrent effect for many of the reasons discussed in the preceding subsection. Most basically, the Due Process Clause generally requires the size of a punitive damage award to be related to the amount of compensatory damages a plaintiff receives.[89] Although the Court has upheld larger punitive awards in cases where "a particularly egregious

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[86] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–95 (1978); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 463 (2002) ("[The] standards of municipal liability make it exceedingly difficult to prove that local governments are causally responsible, and thus directly liable, for wrongs committed by their officials."); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1462 (2009).

[87] *Cf.* Erin Ryan, *Federalism at the* Cathedral*: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 76 (2010) (arguing that liability rules do not provide sufficient protection for states' Tenth Amendment rights against federal commandeering of their personnel).

[88] *See* Smith v. Wade, 461 U.S. 30, 56 (1983) (affirming that punitive damages are available in § 1983 suits); Carlson v. Green, 446 U.S. 14, 22 (1980) (noting the availability of punitive damages against federal officials and employees in *Bivens* suits).

[89] BMW v. Gore, 517 U.S. 559, 582–83 (1996); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003).

act has resulted in only a small amount of economic damages,"[90] punitive damage awards in public law cases remain subject to strong constitutional constraints.

Moreover, even when punitive damages increase the amount government entities must pay (whether directly or indirectly, through indemnification) after violating a public law right, those entities still face the same underlying calculus described by Levinson and Karlan. Government officials have an incentive to violate a right when the perceived benefit to a sufficiently large plurality of politically active citizens or coalition of interest groups outweighs the expected amount of a damage award.[91]

Additionally, numerous jurisdictions indemnify government officials and employees against punitive damage awards.[92] Even when they are not indemnified as of right, municipal entities often voluntarily choose to indemnify employees against punitive damages[93] or engage in other machinations to assume the liability.[94]

Furthermore, the range of public law cases in which punitive damages are available is quite limited. As discussed earlier, a plaintiff may not obtain any relief, including punitive damages, against a public official for violating a right that is established or recognized only in district court opinions in circuits where such rulings cannot "clearly establish" the law on an issue.[95] A plaintiff able to overcome qualified immunity must further demonstrate that the defendant showed "reckless or callous disregard for the plaintiff's rights" or intentionally violated the law to qualify for punitive damages.[96] Even where a plaintiff satisfies these requirements, the jury has discretion over whether to award punitive damages; a plaintiff is not entitled to them.[97] And such

90 *Gore*, 517 U.S. at 582.

91 Karlan, *supra* note 12, at 1917; Levinson, *supra* note 28, at 352–53, 370, 388–89.

92 Schwartz, *supra* note 77, at 1219 & n.49; Tell, *supra* note 76, at 2836 & n.80.

93 James D. Cole, *Defense and Indemnification of Local Officials: Constitutional and Other Concerns*, 58 ALB. L. REV. 789, 807–08 (1995); Tell, *supra* note 76, at 2836 & n.81; *see, e.g.*, O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir. 1988). Martin Schwartz offers a variety of reasons why municipalities may choose to indemnify public officials against punitive damages. Schwartz, *supra* note 77, at 1221.

94 For example, state law prohibits municipalities in Illinois from indemnifying police officers for punitive damage awards. 745 ILL. COMP. STAT. 10/2-302 (2014). When a jury enters such an award against a Chicago police officer, however, the City of Chicago often will negotiate a post-verdict settlement under which it agrees to pay an undifferentiated sum to the plaintiff, sufficient to cover the amount of both compensatory and punitive damages the plaintiff was awarded, thereby "insulating errant officers from accountability." Mark Iris, *Illegal Searches in Chicago: The Outcomes of 42 U.S.C. § 1983 Litigation*, 32 ST. LOUIS U. PUB. L. REV. 123, 134 (2012).

95 *See supra* note 26.

96 Smith v. Wade, 461 U.S. 30, 51 (1983).

97 *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

damages may never be awarded in connection with a § 1983 claim against a county or municipal government.[98]

Finally, while punitive damages are a greater deterrent than compensatory damages alone, they remain an ex post remedy. The ability to seek punitive damages after a public law violation has occurred does not give a plaintiff a formal legal mechanism, beyond the mere threat of ex post litigation, for preventing the violation ex ante.

The possibility of criminal prosecution for violations of public law rights[99] generally is even more remote, and is a matter of prosecutorial discretion, outside the rightholder's control. Such prosecutions are relatively rare, particularly in the absence of serious physical violence or intentional racial discrimination.[100] Law enforcement agents may be reluctant to investigate or prosecute either members of their own agency or other government officials who violate the Constitution or statutes in the course of pursuing legitimate government goals. Because prosecutions for civil rights violations are possible only where the underlying right is "clearly established,"[101] rightholders also face some of the same obstacles that qualified immunity imposes in suits for damages. Thus, while criminal prosecution is a fallback remedy for especially egregious violations, it is unlikely to have a major deterrent effect in most cases.

3. Against Exclusive Constitutional Liability Rules

Some commentators—who may be called Constitutional Liability Rule Scholars—have argued that, at least under some circumstances, certain constitutional rights should be protected exclusively by liability rules.[102] Under this view, a court may not enjoin the government ex ante

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98 *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

99 18 U.S.C. §§ 241–242 (2012).

100 Frederick Schauer, *When and How (If At All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 787–88 (2010).

101 United States v. Lanier, 520 U.S. 259, 270–71 (1997).

102 Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 759, 765 (2004) (stating that constitutional entitlements should be protected by liability rules "where high transaction costs prevent efficient rights-transfers under a property rule"); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1138–39 (2005) (applying the author's earlier work to a broader range of rights); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1156–58 (1999) (identifying a range of factors that should determine whether constitutional rights are protected by liability or property rules); *see also* Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 1009 (1998) (arguing that, in "hard cases," courts should have discretion to "recognize a constitutional violation and yet, when the social costs of relief seem overwhelming, refuse to enjoin it"); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 27 (2008) (discussing the possibility of protecting some constitutional rights through liability rules);

from violating those rights; instead, it may only order ex post compensation for the rightholder.

The Constitutional Liability Rule Scholars contend that social welfare sometimes would be maximized by allowing the government to act in ways that violate constitutional rights. Currently, in such cases, the government often attempts to induce the rightholder to voluntarily waive her rights, either unilaterally or in exchange for some benefit (as with a plea bargain).[103] These authors argue that, when high transaction costs prevent the government from obtaining such waivers through voluntary negotiations, it should be permitted to simply violate the rights and compensate the rightholder(s) afterwards.[104] High transaction costs may exist where the government either needs a particular person to waive his right, effectively making him a monopolist, or instead requires waivers from numerous people to achieve its goal, thereby giving rise to holdout and adverse selection problems.[105] In effect, Constitutional Liability Rule Scholars advocate treating certain constitutional rights the way that the Takings Clause treats the right to property—as subject to "condemnation" by the government upon payment of just compensation, to promote efficiency.[106]

Eugene Kontorovich argues that allowing rights to be protected only by liability rules under certain circumstances also offers courts a

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Moin A. Yahya, *Deterring* Roper*'s Juveniles: Using a Law and Economics Approach to Show that the Logic of* Roper *Implies that Juveniles Require the Death Penalty More than Adults*, 111 PENN. ST. L. REV. 53, 96–97 (2006) (discussing the possibility of protecting juveniles' due process rights through liability rules); Kenneth Baker, Note, *Affirmative Action at the Cathedral: Applying Liability Rules to Benign Discrimination in Educational Admissions*, 9 GEO. J.L. & PUB. POL'Y 439, 446–47 (2011) (applying Kontorovich's theory to affirmative action programs and the Equal Protection Clause); *cf.* Ryan, *supra* note 87, at 11 (arguing that states' rights under the Constitution should be protected by property rules instead of inalienability rules, so that states can waive them).

More specifically, Kontorovich advocates that constitutional rights be protected by a "pliability rule," under which the entitlement is protected by a property rule under some circumstances, and by a liability rule the rest of the time. Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra*, at 760–61; Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra*, at 1140 (explaining how the Third Amendment establishes an express pliability rule); *see also* Baker, *supra*, at 445–47. *See generally* Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 5–7 (2002) (explaining the concept of "pliability rules").

103 Merrill, *supra* note 102, at 1158–59.

104 *Id.* at 1159–60; Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 759, 765; Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1153–54; *accord* Baker, *supra* note 102, at 447; *cf.* Bhagwat, *supra* note 102, at 962–63, 967 (arguing that courts should exercise their remedial discretion to decline to award injunctive relief in "hard" cases, in which the results are "not dictated, or even closely guided, by existing legal materials (including precedents) and/or interpretational theories").

105 Merrill, *supra* note 102, at 1159; Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1153–54.

106 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 779; *see also id.* at 759, 792; Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1189.

compromise alternative that, in practice, will lead them to recognize a greater range of constitutional rights.[107] He invokes Daryl Levinson's theory of remedial equilibration, which teaches that a "right may be shaped by the nature of the remedy that will follow if the right is violated."[108] Applying that theory, Kontorovich explains that allowing a court to protect certain constitutional rights through liability rules enables it to affirm a right's existence while avoiding the negative social consequences that would result from prohibiting the government from engaging in the challenged behavior.[109] Thus, offering courts greater flexibility with regard to constitutional remedies may make them more willing to recognize constitutional rights.[110] Thomas Merrill adds that imposing a compensation requirement ensures that the government will "condemn" a person's rights "only if the social benefits of extinguishing the right exceed the private value of the right" to the rightholder.[111]

Commentators have suggested a range of rights that they contend should be protected exclusively through liability rules, at least under certain circumstances. Most notably, Kontorovich advocates that the Fifth Amendment right to Due Process should be protected only by a liability rule when the government detains large groups of people based on their "ethnic or ideological characteristics" in the wake of a mass

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107 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 757, 760, 798.

108 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884 (1999).

109 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 757, 759, 761, 802, 805–06.

110 Kontorovich further contends that switching from a property-rule to a liability-rule regime would ensure that rightholders "enjoy some financial recovery" for violations of their rights. *Id.* at 760. As explained *infra* Part II, however, constitutional rights may enjoy both liability-rule and property-rule protection simultaneously. The need to compensate rightholders for violations should not prevent a court from attempting to prevent the government from violating their rights in the first instance.

111 Merrill, *supra* note 102, at 1201. This argument, of course, runs contrary to Daryl Levinson's theory that government actors neither internalize, nor are motivated by, financial costs in the same manner as private actors. *See* Levinson, *supra* note 28.

One interesting distinction between Merrill's and Kontorovich's approaches is that Merrill urges that liability rules be used only where there is an "objective basis for calculating ex post compensation." Merrill, *supra* note 102, at 1163. Unless juries can ascertain the damages that result from a rights violation with some decree of precision, he contends, "the magnitude of verdicts would vary tremendously" and compensatory damages "would operate more like an open-ended regime of punitive damages." *Id.* at 1165.

Kontorovich agrees that constitutional rights "do not lend themselves to objective measures of compensation," and believes that measurement difficulties are likely to cause courts and juries to systematically undervalue rights. Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 773. He does not believe that such difficulties counsel against the imposition of liability rules, however, because the value of constitutional rights "should be no harder or easier to quantify than such imponderables as emotional distress, which courts routinely monetize." *Id.* at 774. Kontorovich argues that courts could help offset valuation difficulties by compensating for the "intangible" aspects of constitutional violations. *Id.*; *cf.* Carey v. Piphus, 435 U.S. 247, 256–57 (1978).

attack.[112] He explains that courts historically have been unwilling to hold mass detentions by the executive unconstitutional[113] and have instead "denied the existence of the constitutional right or . . . avoided decision."[114] A liability rule, Kontorovich argues, would allow a court to hold such detentions and racial profiling unconstitutional, while allowing the government to continue performing them, by awarding the victims monetary compensation instead of an injunction.[115]

Merrill similarly argues that the First Amendment right of tobacco companies to advertise cigarettes should be protected only by a liability rule. He explains that the government should restrict cigarette advertising because, although it has some private value for cigarette companies by helping them generate additional profits,[116] it has little public value[117] and leads to substantial social costs by encouraging youth smoking.[118] Merrill contends that liability-rule protection is appropriate because restrictions on cigarette advertising would be ineffective unless they applied to all tobacco companies, leading to holdout problems in negotiating voluntary waivers under a property-rule regime.[119] Other authors have recommended protecting other rights exclusively through liability rules, including juveniles' due process rights[120] and the equal protection right against certain kinds of racial preferences.[121]

The Constitutional Liability Rule Scholars' approach to protecting constitutional rights is creative and intriguing, but ultimately flawed. Neither the text of the Constitution nor the intent of the Framers suggests that the government may violate the Constitution, so long as it compensates adversely affected individuals afterwards. The Constitutional Liability Rule Scholars' theory is based on questionable

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112 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 757; *see also id.* at 760, 790. According to Kontorovich, lack of time and information, holdout problems, and adverse selection prevent the government from asking members of an ethnic, religious, or ideological group that is purportedly associated with an attack to voluntarily waive their due process rights. *Id.* at 788–89.

113 *Id.* at 760, 781.

114 *Id.* at 760.

115 *Id.* at 760. Kontorovich's follow-up Article applies this theory to other constitutional contexts, as well. Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1143.

116 Merrill, *supra* note 102, at 1191–92.

117 *Id.* at 1182–84.

118 *Id.* at 1188–89, 1191.

119 *Id.* at 1200. He explains that, if even a single cigarette company runs advertisements that are attractive to youths, teenagers who decide to start smoking would flock to that brand, and other cigarette companies would implement comparable advertising to offset that advantage. *Id.*

120 Moin A. Yahya argues that states should be permitted to immediately impose "hard labor, caning, or some other harsh punishment" on juveniles suspected of serious crimes, so that "the message that youth violence will not be tolerated would be loud and clear." Yahya, *supra* note 102, at 96–97. Juveniles who are later acquitted would receive "compensation . . . for having been wrongly punished." *Id.*

121 Baker, *supra* note 102, at 440–41.

notions of "rights" and "incommensurability." Additionally, despite those theorists' insistence to the contrary, their approach can have profound implications for structural constitutional provisions, as well.

a. Constitutional Text

Most basically, the Constitution's text does not suggest that the government may violate people's rights, so long as it pays compensation. Rather, both the Article I Bill of Rights[122] as well as the first ten amendments are written in imperative or prohibitory terms: "Congress shall make no law respecting an establishment of religion";[123] "the right of the people to keep and bear Arms, shall not be infringed";[124] "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."[125] These clauses do not suggest that the Constitution empowers the government to engage in the prohibited acts, so long as it compensates the rightholder.

Kontorovich summarily dismisses this argument, cautioning that one should not read too much into the "tone" of the Constitution's rights-related clauses.[126] This argument is not based on the "tone" of these provisions, however, but rather their ordinary meaning; they expressly declare that the government lacks power to engage in certain acts.[127] This conclusion is only reinforced by the Takings Clause, which provides, "nor shall private property be taken for public use, without just compensation."[128] This clause expressly permits the government to take a person's property without her consent so long as it compensates her.[129] The *expressio unius* canon suggests that the absence of comparable language from other constitutional provisions means that they do not share this structure.[130]

Kontorovich draws the opposite conclusion from the Takings Clause. He reasons that, because it "is the only provision in the Constitution that explicitly prescribes a remedy of any kind for its

122 U.S. CONST. art. I, § 9.

123 *Id.* amend. I.

124 *Id.* amend. II.

125 *Id.* amend. IV.

126 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 814; *see also id.* at 778 (arguing that the framers "gave the legislature almost entirely unguided discretion to craft remedies for the rights set out in the Constitution"); Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1171 ("[I]t is far from clear that the use of 'shall' and 'shall not' is a textual prohibition on liability rules . . . .").

127 *See* U.S. CONST. amend. X ("[P]owers not delegated to the [federal government] . . . are reserved to the States . . . or to the people.").

128 *Id.* amend. V.

129 First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 314 (1987).

130 *Cf.* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

violation," most other constitutional provisions "leave[] remedies open to legislative experimentation."[131] He goes on to claim that any other application of *expressio unius* reasoning to the Takings Clause "would lead to the conclusion that the Constitution offers no remedy at all for violations of other rights."[132]

Kontorovich's argument seems to be based on mistaken notions of the precise right that the Takings Clause protects and what constitutes a "violation[]" of that provision.[133] The Takings Clause does not prohibit the government from taking private property and establish liability-rule protection for violations of that right, as Kontorovich appears to contend. Rather, as mentioned earlier, the Clause expressly authorizes the government to take private property so long as it pays just compensation.[134] In other words, when a compensated taking occurs, the clause has not been violated. The Supreme Court has explained that the Takings Clause

> does not prohibit the taking of private property, but instead places a condition on the exercise of that power.... [I]t is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.[135]

No other constitutional provision similarly permits the government to engage in an otherwise proscribed act so long as it pays the adversely affected rightholder afterwards.

Likewise, the Takings Clause's just compensation provision does not implicitly prohibit courts from awarding damages ex post for violations of other constitutional provisions.[136] Compensation is not a remedy for Takings Clause violations, but rather an element that prevents the government's seizure of a person's property from amounting to a constitutional violation in the first place.[137] Therefore, while the Takings Clause's just compensation language implicitly supports the ex ante award of injunctions to prevent violations of other constitutional provisions, it does not preclude the use of compensatory

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131 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 814–15.

132 *Id.* at 816.

133 *Id.*

134 E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in part and dissenting in part).

135 First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 314–15 (1987); *see also* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

136 *Cf.* Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 816.

137 *See supra* note 135 and accompanying text.

damages as an ex post remedy when the government violates such other provisions.[138]

b. Framers' Intent

This textual reading is buttressed by even a cursory examination of the Framers' intent in enacting the Bill of Rights. For example, when James Madison proposed the initial draft of the Bill of Rights to the House of Representatives, he declared: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[139] The amendments were intended as "one means to control the majority from those acts to which they might be otherwise inclined."[140]

Referring to judicial enforcement, he added:

> If [the amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[141]

The Preamble to the Bill of Rights codifies this understanding; it specifies that the Bill of Rights' "declaratory and restrictive clauses" are intended to "prevent misconstruction or abuse" of the government's powers.[142] As Frederick Schauer explains, the Constitution and Bill of Rights were enacted both to "keep[] bad people from doing bad things," as well as to "keep[] good people from doing good things, in the service of higher or longer-term goals."[143] They identify various areas of

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138 Kontorovich also relies on the Third Amendment to bolster his thesis that most constitutional rights are not protected by property rules. Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra note* 102, at 1164. The Third Amendment provides that, "[i]n peacetime, quartering of troops can only be done with 'the consent of the Owner.'" *Id.* (quoting U.S. CONST. amend. III). He contends that this provision's express reference to the landowner's consent implicitly creates a property rule "entitl[ing] [her] to equitable relief" against violations. *Id.* at 1164. Kontorovich concludes that the Constitution's "failure to stipulate consent as a necessary condition for transfers of other entitlements . . . suggests that the Constitution does not presume property rule protection" for other rights. *Id.* at 1170. This argument appears to be reading too much into the Third Amendment's selective use of the word "consent." A warrantless unreasonable search would violate the Fourth Amendment, for example, just as much as quartering troops in peacetime without a homeowner's consent would violate the Third Amendment. Injunctive relief should be equally available in both cases.

139 1 ANNALS OF CONG. 454 (1789) (statement of Rep. James Madison).

140 *Id.* at 455.

141 *Id.* at 457.

142 U.S. CONST. Bill of Rights pmbl., *available at* http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited June 21, 2014).

143 Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1896 (2013).

personal freedom that may not be balanced against other interests on an ad hoc basis to maximize social utility or promote other collective goals.[144] Nothing in the debates surrounding the Constitution or Bill of Rights suggests that the framers intended their provisions (other than the Takings Clause) to be conditional guarantees of financial compensation rather than prohibitions on certain types of government conduct.

c. Double-Counting the Public Interest

The Constitutional Liability Rule Scholars' theory also would lead courts to double-count the public interest when determining whether the government may perform certain acts. Supreme Court doctrine requires courts to take the public interest into account in various ways at the liability stage of many constitutional cases. For example, courts must weigh the public interest to determine the constitutionality of ballot access requirements,[145] restrictions on commercial speech,[146] and even many types of searches under the Fourth Amendment.[147] A court also considers the public interest to determine whether a person's constitutional rights are outweighed by compelling governmental interests that cannot be achieved through more narrowly tailored means.[148]

Once a court has determined that a constitutional violation has occurred, it should not be permitted to take the public interest into account yet again at the remedies stage to determine whether the plaintiff's entitlement should be protected only by a liability rule—meaning the government may engage in the otherwise prohibited conduct, so long as it compensates the plaintiff—or a property rule. Such repeated consideration of the public interest would tip the scales too heavily against enforcement of individual rights. Moreover, if public interest considerations are insufficiently weighty to prevent recognition

144 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 99-100 (1977); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-33 (1974) (characterizing rights as "side constraints" on government power); *cf.* Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting in part) ("[I]n a democracy like our own . . . the autonomy of each individual is accorded equal and incommensurate respect.").

145 *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh . . . 'the precise interests put forward by the State as justifications for the burden imposed by its rule[.]'" (quoting Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983))).

146 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.").

147 United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual."); *see also* Brown v. Texas, 443 U.S. 47, 50-51 (1979) (holding that courts must consider "the degree to which [a] seizure advances the public interest" in determining its reasonableness under the Fourth Amendment).

148 Washington v. Glucksberg, 521 U.S. 702, 719-21 (2000).

of a right at the liability stage, there seems to be no basis for allowing them to preclude enforcement of that right at the remedies stage.

d. Structural Implications

A final concern with the Constitutional Liability Rule Scholars' approach is that much of their reasoning seems to apply with equal force to many of the Constitution's structural provisions. For example, as discussed above, Kontorovich argues that, even though the Constitution's rights-related provisions are "phrased as absolute prohibitions on governmental conduct," the Constitution's text "leaves remedies [for violations] open to legislative experimentation."[149] Thus, he contends that constitutional rights should be enforced solely through liability rules when allowing the government to perform the otherwise proscribed acts would further important public interests and the transaction costs of negotiating voluntary waivers would be prohibitive.[150]

It appears, however, that this reasoning would equally allow the government to ignore structural constraints on its power in order to avoid transaction costs and promote the public interest, so long as it compensates states or individuals who are adversely affected by its actions. Congress would be able to commandeer state officials,[151] rather than relying on their voluntary participation in federal programs;[152] abrogate states' sovereign immunity through its Article I powers,[153] rather than persuading states to voluntarily waive their immunity;[154] and even coerce state legislatures into passing certain laws,[155] rather than attempting to induce them to do so through constitutionally permissible means of persuasion.[156] In each of these scenarios, the government could contend that "condemnation" of states' constitutional prerogatives (upon payment of appropriate compensation, of course) is necessary because holdout problems and

149 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 814.

150 *Id.*

151 *Cf.* Printz v. United States, 521 U.S. 898, 914 (1997); *see also* New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to . . . administer a federal regulatory program.").

152 *See Printz*, 521 U.S. at 923 n.12 (noting that "voluntary state participation" in the administration or enforcement of federal programs is permissible, because it "significantly reduces the ability of Congress to . . . reduc[e] the power of the Presidency").

153 *Cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65–66 (1996).

154 *See* Alden v. Maine, 527 U.S. 706, 737 (1999) ("[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit.").

155 *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

156 *See New York*, 505 U.S. at 188 ("[T]he Federal Government [may] . . . hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes."); *see, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

adverse selection would prevent the government from achieving its goals through voluntary negotiations with them.

To take an extreme example, one might even imagine Congress extending a sitting President's term for a few extra years (perhaps to preserve continuity during an ongoing war and avoid partisan campaigning against the Commander in Chief), upon payment of a small sum to each registered voter to compensate for the temporary loss of their 1/153,157,000 voice in selecting the President.[157] Once "pliability rules" are recognized as a valid means of enforcing constitutional provisions that do not expressly specify a means of enforcement, there does not appear to be a persuasive basis for applying them exclusively to the Constitution's rights-related provisions.

Kontorovich addresses this point briefly in a footnote. He declares that injunctive relief should be available to enforce the Constitution's separation-of-powers and federalism constraints because it is unclear "how money damages would remedy violations [of such constraints] . . . .or even to whom . . . damages would be paid."[158] Elsewhere in his discussion, however, Kontorovich downplays the "difficulty of objectively valuing" constitutional entitlements.[159] Despite the absence of tort-law analogues to separation-of-power and federalism violations to provide a baseline for calculating damages,[160] courts likely would be able to determine the tangible harm, if any, that they cause to states and individuals, and perhaps add a premium to compensate for the intangible aspects of the harm.[161]

The point, of course, is not that courts should establish liability-rule protections for structural constitutional provisions, but rather that the Constitutional Liability Rule Scholars' approach to constitutional remedies seems to apply to many such provisions, as well. This *reductio ad absurdum* argument undermines the validity of their proposed interpretation of the Constitution's rights-related provisions. Thus, for all of these reasons, constitutional rights—as well as the Constitution's structural provisions—should be enforceable ex ante through injunctions, rather than exclusively ex post through liability or "pliability" rules.

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157 *See Voting and Registration in the Election of November 2012: Table. 4a. Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2012*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html (last updated May 8, 2013).

158 Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 760 n.8.

159 *Id.* at 773.

160 *Cf. id.* at 760 n.8.

161 *Cf. id.* at 774. *But see* Carey v. Piphus, 435 U.S. 247, 266–67 (1978).

C. *The Right to Seek Injunctive Relief Is Insufficient*

The availability of ex post damages is not the only reason why scholars generally downplay the significance of injunctive relief in public law cases. Many commentators reason that government officials contemplating conduct that may violate a statutory or constitutional right do so in the shadow of the law, particularly judicial rulings concerning that right.[162] When a court rules for a plaintiff in a public law case without issuing an injunction, its judgment and written opinion recognizing a right typically are sufficient to enable rightholders within that jurisdiction to obtain injunctions to prevent violations of that right. Recognizing the likely outcome of such potential litigation, government actors within that jurisdiction will refrain from attempting to violate the right, as if the court had issued an injunction.

Such reasoning abstracts away from the actual functioning of the judicial system, particularly the transaction costs of obtaining injunctive relief. This Section challenges the widely accepted practice—built into Calabresi and Melamed's *Cathedral* framework[163]—of treating a declaratory judgment or written opinion recognizing a right as effectively equivalent to an actual injunction. It demonstrates that an injunction provides a significantly higher level of protection for public law rights than either of those alternatives.

First, injunctions allow rightholders to avoid administrative exhaustion requirements that otherwise might frustrate their ability to enforce rights recognized in judicial opinions. Many agencies that nonacquiesce to judicial rulings with which they disagree[164] require adversely affected people to exhaust internal appellate processes before challenging their actions in court.[165] These processes often involve multiple rounds of review and can take years. Especially during the Reagan Administration, the Social Security Administration (SSA) was particularly notorious for leveraging exhaustion requirements[166] to allow it to ignore circuit court rulings when dealing with residents of the very circuits that issued them.[167]

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162 *See supra* note 27 and accompanying text.

163 *See* Calabresi & Melamed, *supra* note 9.

164 *See infra* Part I.D.

165 *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1403–04 (1991); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815, 1818 (1989).

166 *See* Weinberger v. Salfi, 422 U.S. 749, 764–65 (1975).

167 *See* Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399, 401 (1989); Ann Ruben, Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOK. L. REV. 89, 114–15 (1986).

As the Ninth Circuit explained, when an agency with exhaustion requirements acts contrary to a purportedly binding judicial opinion that interprets or invalidates a statute or regulation:

> If . . . a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced [by the Ninth Circuit]. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting [agency decision] stand.[168]

In contrast, when a court issues an injunction to a plaintiff class[169] that requires an agency to interpret a statute or regulation in a particular manner, and the agency persists in applying its own contrary interpretation, adversely affected individuals may circumvent administrative exhaustion requirements and pursue immediate judicial relief through summary contempt proceedings. Historically, class actions for injunctive relief have been one of the most effective means of defeating persistent agency nonacquiescence.[170]

Second, a person protected by an injunction also is better able to deter "fast-moving" constitutional violations[171] in which the rightholder is unable to get to court to obtain emergency relief before the violation occurs. For example, if police confronted a passerby and demanded to search her, or sought to enter a home without a warrant, the rightholder would be unable to obtain an injunction in time to stop the violation, even if prior judicial opinions made it likely that the court would issue one.

A person protected by an injunction—whether she obtained it on her own or was covered as a member of a successful plaintiff class—would be able to threaten the officer with civil or criminal contempt. A person who is not protected by an injunction, in contrast, could only threaten to seek an injunction against future violations, which would not apply to the pending situation, and ex post damages, which often are ineffective in deterring constitutional violations.[172] Injunctions, therefore, provide more effective protection against fast-moving

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168 Lopez v. Heckler, 713 F.2d 1432, 1439–40 (9th Cir. 1983).

169 The court could choose to limit the class to residents of its judicial district or circuit. *See, e.g.*, Shvartsman v. Apfel, 138 F.3d 1196, 1201 (7th Cir. 1998); Tatum v. Mathews, 541 F.2d 161, 163 (6th Cir. 1976); *see also infra* Part III.C.

170 *See, e.g.*, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Hyatt v. Heckler, 757 F.2d 1455, 1460–62 (4th Cir. 1985), *vacated on other grounds sub nom.* Hyatt v. Bowen, 476 U.S. 1167 (1986); Lopez v. Heckler, 572 F. Supp. 26, 31–32 (C.D. Cal. 1983), *aff'd in part, rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded*, 469 U.S. 1082 (1984).

171 Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, *supra* note 102, at 1178–79.

172 *See supra* Part I.B.

statutory or constitutional violations than either a declaratory judgment or the mere right to seek injunctive relief.

Third, as a practical matter, an injunction is likely to have a much greater psychological impact on government officials than a judicial opinion in the *Federal Reporter*.[173] A court order prohibits specifically identified government officials or a particular agency from performing certain acts or applying a legal provision in certain ways. Government actors may find it much harder to ignore such an order than a comparable ruling contained in a judicial opinion.

Finally, government actors may have political incentives to continue engaging in constitutional or statutory violations until a court compels them to stop. As Levinson and Karlan explain, politically active voters and interest groups sometimes support policymakers' decisions to undermine or nonacquiesce to certain public law rights.[174] Public officials may find it politically valuable to be able to claim that they are being forced, against their will, to uphold or respect an unpopular public law right, and that they have exhausted all possible means of opposing its enforcement.[175] Thus, unless and until a litigant actually obtains an injunction carrying the possibility of civil or criminal contempt, ignoring courts' interpretations of the law may further an official's professional interests and ideological preferences.

D. *Agency Nonacquiescence in Judicial Opinions*

Practical experience buttresses the previous Sections' theoretical analysis. When courts do not issue injunctions in public law cases, government agencies sometimes nonacquiesce to rulings with which they disagree.[176] A nonacquiescing agency will implement the court's judgment for the plaintiff or claimant in the case the court decided, but refuses to apply the court's interpretation or opinion in other, future proceedings, instead applying its own, contrary interpretation of the legal provisions at issue.

An exhaustive, albeit dated, academic study of agency nonacquiescence concludes that is a "widespread practice in the American governmental system."[177] A survey prepared for the

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173 The impact might be comparable to that of a declaratory judgment, although an injunction typically is drafted in more imperative or prohibitory terms.

174 *See supra* notes 70–75 and accompanying text.

175 *Cf.* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 271 (1987) (discussing agency officials' incentives to enter into consent decrees).

176 *See infra* notes 179–86.

177 Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 537 (1986); *see also* William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 584–89 (1985) (describing the

Administrative Conference of the United States a few years later confirms that numerous agencies engage in the practice.[178] Among the federal agencies with official nonacquiescence policies are the National Labor Relations Board (NLRB),[179] Internal Revenue Service (IRS),[180] Social Security Administration (SSA),[181] Equal Employment Opportunity Commission (EEOC),[182] Federal Labor Relations Authority (FLRA), Federal Trade Commission (FTC), Merit Systems Protection

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intracircuit nonacquiescence practices of three agencies).

178 Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692–718 (1989).

179 D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007) ("The Board generally applies its 'nonacquiescence policy,' and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court." (citation omitted) (citing, inter alia, Arvin Indus., 285 N.L.R.B. 753, 757 (1987))); *see also* SF Mkts., LLC, 198 L.R.R.M. 1816, 2014 NLRB LEXIS 108, at *20 (Feb. 18, 2014) ("[T]he Board generally applies a 'nonacquiescence policy' to appellate court decisions that conflict with Board law, and instructs its administrative law judges to follow Board precedent, not court of appeals precedent." (citation omitted)). *See generally* Scott Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137 (1987).

180 For the IRS:

> Nonacquiescence signifies that, although no further review was sought, the Service does not agree with the holding of the court and generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a nonacquiescence indicates that the Service will not follow the holding on a nationwide basis. . . . [but] will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.

IRM 4.10.7.2.9.8.1(4)(C) (Jan. 1, 2006); *see, e.g.*, AOD 2013-12, 2013 AOD LEXIS 2 (Mar. 18, 2013) (nonacquiescing in *Zapara v. Comm'r*, 652 F.3d 1042 (9th Cir. 2011)); *accord Actions Relating to Decisions of the Tax Court*, 2008-9 I.R.B. 481, 481, 2008 IRB LEXIS 1575, at *2–3 (Mar. 3, 2008). In practice, however, it appears that the IRS is willing to engage in intracircuit nonacquiescence. *See, e.g.*, AOD 2011-44, 2011 AOD LEXIS 2, at *3–4 (Oct. 31, 2011) (nonacquiescing in *Keller v. Comm'r*, 556 F.3d 1056 (9th Cir. 2009), *"including [in] cases appealable to the Ninth Circuit"* (emphasis added)).

181 SSA policy provides:

> In the absence of an instruction to apply court of appeals holdings to the cases before them, SSA adjudicators are obliged to apply agency policy and agency interpretations of the law. In matters of law and policy, the Agency head has primacy. An [Administrative Law Judge (ALJ)] is bound to follow Agency policy even if, in the ALJ's opinion, the policy is contrary to law.

Memorandum from Office of the General Counsel, SSA, Legal Foundations of the Duty of Impartiality in the Hearing Process and Its Applicability to Administrative Law Judges 5–6 (Jan. 28, 1997) (internal quotation marks omitted) (quoted in Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 300 (2003)).

182 The EEOC's Administrative Law Judges' handbook provides, "When there is a conflict between the Commission's position and that of the Circuit Court in the jurisdiction where the Administrative Judge sits, an Administrative Judge must follow Commission policy, but may acknowledge that the Circuit Court has reached a different conclusion." EEOC, HANDBOOK FOR ADMINISTRATIVE LAW JUDGES, ch. 2, § III (2002); *see, e.g.*, Montemorra v. Snow, No. 01A41536, 2005 WL 1936122, at *3 n.4 (EEOC Aug. 2, 2005); *see also* Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 973–76 (2009).

Board (MSPB),[183] Securities and Exchange Commission (SEC),[184] and the Occupational Health and Safety Review Commission (OHSRC),[185] among others.[186] Many of these policies expressly authorize intracircuit nonacquiescence, permitting agency personnel to disregard a circuit court's opinions even in matters that arise within that circuit.[187] As noted earlier, injunctions have been the most effective method of defeating persistent agency nonacquiescence—at least where courts have been willing to issue them.[188]

Perhaps the most extreme examples of nonacquiescence arose from SSA during the Reagan Administration. In 1984, SSA denied 900,000 applications for disability benefits, often in direct violation of binding precedent due to SSA's nonacquiescence with the law of the circuit.[189] Claimants represented by counsel were better able to exhaust administrative remedies and press their claims in the courts, which would apply the legally correct—and much more favorable—

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183 Estreicher & Revesz, *supra* note 178, at 718; *see also id.* at 713–14.

184 *See, e.g.*, *In re* Carnation Co., Exchange Act Release No. 22,214 [1984–85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,801, 87,592, 87,596 n.8 (July 8, 1985) (expressing nonacquiescence in *Greenfield v. Heublein, Inc.*, 742 F.2d 751 (3d Cir. 1984)); *see also* Peter J. Rooney, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111 (1992) (discussing the difficulties of identifying and preventing informal nonacquiescence by the SEC).

185 *See, e.g.*, S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1278–79 (5th Cir. 1981) (noting that the OSHRC "decline[s] to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits").

186 *See, e.g.*, ITT World Commc'ns, Inc. v. FCC, 635 F.2d 32, 43 (2d Cir. 1980) (overturning the FCC's decision to apply reasoning contained in a dissenting opinion, with which the FCC agreed, rather than binding Second Circuit law).

187 Buzbee, *supra* note 177, at 583–84. Intercircuit nonacquiescence, in contrast, is the refusal to apply one circuit's ruling in other jurisdictions. Estreicher & Revesz, *supra* note 178, at 687. Most scholars believe that *intracircuit* nonacquiescence is unconstitutional, or otherwise should be prohibited in most or all circumstances, because it allows an agency to apply different law to a person or matter than a court of competent jurisdiction would apply. Coenen, *supra* note 165, at 1346, 1412; Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Schwartz, *supra* note 165, at 1904; *cf.* Buzbee, *supra* note 177, at 604–08 (arguing that intracircuit nonacquiescence should be permissible in certain narrow circumstances); Estreicher & Revesz, *supra* note 178, at 743 (arguing that intracircuit nonacquiescence "can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its position"). *But see* Maranville, *supra* note 177, at 537–38 (arguing that nonacquiescence has negative consequences, but does not violate constitutional or other doctrines).

Most scholars generally regard intercircuit nonacquiescence, in contrast, as permissible, because a circuit's precedents typically are not binding outside of its geographic jurisdiction, nonmutual collateral estoppel generally is unavailable against the government, and the Supreme Court has recognized the value of allowing government entities to re-litigate legal issues in multiple courts. Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 71–75 (2003); Estreicher & Revesz, *supra* note 178, at 735–41; *see also* United States v. Mendoza, 464 U.S. 154, 159–60 (1984).

188 *See supra* note 170 and accompanying text.

189 Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 996 (1987).

standards.[190] They "almost always" prevailed.[191] "Those disability claimants—about 650,000 in 1984 alone—who d[id] not appeal ha[d] their claims decided by the executive pursuant to far less favorable standards."[192]

Agencies may nonacquiesce expressly, by publishing prospectively applicable notices or acknowledging their nonacquiescence in written opinions from administrative adjudications,[193] or silently, by simply refusing to incorporate district or circuit court rulings into internal policies, procedures, and guidance documents for agency personnel.[194] Even police departments sometimes, in effect, nonacquiesce to judicial rulings by continuing to enforce laws—typically quality-of-life provisions—that have been held unconstitutional. For example, the Ithaca, New York, police department continued to enforce a state loitering law[195] two decades after the New York Court of Appeals struck it down.[196] Disturbingly, the Second Circuit concluded that an individual who was wrongly arrested under this invalid law could not even seek compensatory damages against the arresting officers.[197] Similarly, New York City police officers detained, arrested, or issued summonses to the same woman on over ten occasions for baring her breasts in public,[198] despite the fact that the state's highest court had ruled years earlier that such conduct was legal.[199]

Police may choose to arrest violators under unconstitutional laws, even though any prosecutions would be doomed to failure, because many arrests are made "to advance some other goal."[200] As criminal procedure scholar and former police officer Seth Stoughton notes, police may arrest a person without regard to the possible success of a criminal prosecution to punish him for being insufficiently respectful to the officer, end a potentially disruptive or uncomfortable situation, "facilitate the delivery of noncriminal social services" to the arrestee, or any number of other reasons.[201]

Thus, as an empirical matter, a court's failure to issue injunctive relief in public law cases facilitates agency nonacquiescence. Although

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190 *Id.*

191 *Id.*

192 *Id.* at 996–97.

193 Maranville, *supra* note 177, at 476–78.

194 *Id.* at 480–84.

195 N.Y. PENAL LAW § 240.35(3) (McKinney 2014).

196 Amore v. Novarro, 624 F.3d 522, 527 (2d Cir. 2010) (citing People v. Uplinger, 447 N.E.2d 62 (N.Y. 1983) (Mem.)).

197 *Id.* at 526.

198 J. David Goodman, *Topless Woman? Move On, Police Are Told*, N.Y. TIMES, May 16, 2013, at A21.

199 People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

200 Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 881 (2014).

201 *Id.* at 881–82; *see also* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437 (Frank J. Remington ed., 1965).

an injunction cannot guarantee that governmental actors will comply with a court's rulings, it provides greater protection for public law rights than a court opinion or declaratory judgment alone. An injunction reduces the transaction costs for rightholders to seek judicial enforcement of their rights, gives public officials additional "cover" for taking unpopular actions to uphold them, and exacerbates the potential consequences for government actors considering violating them. It is likely to have the greatest impact when government officials disagree with a court's ruling and (i) high transaction costs otherwise may deter rightholders from seeking judicial assistance in enforcing their rights (such as where administrative exhaustion requirements exist or the threatened violation is "fast-moving"); or (ii) the benefits of violating the right will accrue primarily to a substantial number of likely voters or a broad coalition of interest groups, while violations are inflicted primarily on members of unorganized or politically weak groups.

II. RENOVATING THE *CATHEDRAL* FOR PUBLIC LAW CASES

The *Cathedral* is one of the best-known and most enduring frameworks for examining the relationship between rights and remedies. It was developed in the private law context, however, and must be modified to be applied usefully to public law. Section A examines past attempts to apply the *Cathedral* framework to constitutional rights. Section B proposes an expansion of the framework that offers a more accurate and complete view of the various ways in which the law may protect public law rights, both statutory and constitutional.

The *Cathedral* framework uses the term "property rule" indiscriminately in connection with two different groups of people: those who hold an entitlement protected by an injunction, and those who merely have a substantial likelihood of being able to obtain injunctive relief against violations of that entitlement.[202] As the previous Part demonstrated, however, there are important legal and practical distinctions between these groups with regard to public law rights. As applied to such rights, the concept of "property rule" should be disaggregated to distinguish between a "complete property rule," which applies to an entitlement if the rightholder is protected by an injunction, and a "potential property rule," which applies to an entitlement if the rightholder does not have an injunction, but rather has a substantial likelihood of obtaining one from a court.

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202 *See supra* note 10 and accompanying text.

A. *Past Attempts to Apply the* Cathedral *Framework to Constitutional Rights*

Calabresi and Melamed explain that an entitlement may be protected by either a "liability rule" or a "property rule."[203] The type of rule that protects an entitlement determines both the ex ante circumstances under which that entitlement may be transferred, as well as the range of potential ex post consequences if it is violated.[204] A third party may violate an entitlement protected by a liability rule, without the entitlement holder's consent, so long as it pays the entitlement's fair market value (i.e., compensatory damages).[205] The entitlement holder may not prevent third parties from violating the entitlement, but rather may insist only on receiving an objectively determined amount of compensation.[206]

A property rule, in contrast, gives an entitlement holder the formal legal right to prevent third parties from violating his entitlement ex ante.[207] An entitlement protected by a property rule cannot be transferred to a third party without the entitlement holder's consent.[208] Thus, property rules generally are thought to confer more effective or complete protection for entitlements than liability rules.[209] As

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203 They explain that entitlements also may be protected by an "inalienability rule." Calabresi & Melamed, *supra* note 9, at 1093, 1111. An inalienability rule is similar to a property rule, except the entitlement holder is not permitted to transfer, sell, give away, or otherwise divest himself of the underlying entitlement. *Id.* at 1092. From the perspective of a potential violator, an inalienability rule and property rule are effectively equivalent, because each prohibits involuntary transfers of an entitlement.

204 This Article uses the term "violation" to refer broadly to the violation, transfer, seizure, or destruction of a legal entitlement.

205 Calabresi & Melamed, *supra* note 9, at 1092. When an entitlement is protected only by a liability rule, interesting conceptual questions arise as to whether a third party who violates that entitlement, but adequately compensates the holder, has violated the holder's rights. On one view, the right to damages under a liability rule is solely a remedy, arising only if the underlying entitlement is violated. Alternatively, the entitlement itself can be reconceptualized as the right to *either* have a third party perform or refrain from performing certain acts *or* be paid a certain amount of money. *See* Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996) (reframing a liability rule as an option that grants others the right to "take an entitlement nonconsensually and pay the entitlement owner some exercise price"). On this view, a third party may select either alternative without violating the entitlement holder's rights. *See, e.g.*, United States v. Blankenship, 382 F.3d 1110, 1133 (11th Cir. 2004) ("[A] contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose."). The *Cathedral* framework, with its careful distinction between entitlements and the rules protecting them, seems to presuppose the first view, but a complete analysis of the issue is left for future work.

206 Calabresi & Melamed, *supra* note 9, at 1092.

207 *Id.*

208 *Id.*

209 Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 709 (2005) ("[A] property rule, when available, provides the fullest measure of protection for owners' right to resist the government."); *see also* Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2153 n.10 (1997)

mentioned earlier, a "property rule" is conventionally said to protect an entitlement regardless of whether the entitlement holder is actually protected by an injunction, or instead simply has a substantial likelihood of obtaining one from a court.[210]

A person who violates an entitlement protected by a property rule generally faces ex post consequences beyond the mere payment of compensatory damages. Calabresi and Melamed call these additional consequences an "undefinable kicker," which "represents society's need to keep all property rules from being changed at will into liability rules."[211] Depending on the context, they may include civil or criminal contempt, punitive damages, double or treble damages, or potentially even imprisonment. The consequences for violations of property rules are supposedly "set at such a high level that they would in theory deter all takings of entitlements without the owner's consent."[212]

One of the *Cathedral*'s authors, A. Douglas Melamed, noted in a later work that the Article "address[es] issues of private law," and opined that "it is worth exploring the property rule/liability rule issue in the context of public law. The property rule/liability rule framework might be a useful metaphor with which to view larger issues about the role of government."[213] Several commentators have taken up Melamed's challenge to apply the *Cathedral* framework to the public law realm, employing comparable, though not identical, approaches.[214] The chart below synthesizes the conventional theories of how the *Cathedral* framework maps onto constitutional law:

(Because "judicial 'error' associated with assessing damages may be virtually inevitable, or simply not designed to provide full compensation, . . . it is possible to think of liability rules as less 'complete' remedies than property rules.").

210 *See supra* note 10 and accompanying text.

211 Calabresi & Melamed, *supra* note 9, at 1126.

212 Smith, *supra* note 10, at 1720; *see also* Ayres & Balkin, *supra* note 205, at 705 ("Property rules are liability rules with an exercise price so high that the option is almost never taken.").

213 A. Douglas Melamed, *Remarks: A Public Law Perspective*, 106 YALE L.J. 2209, 2209, 2213 (1997); *see also* Levmore, *supra* note 209, at 2151 (noting that the *Cathedral* framework does not "include remedies for . . . burdensome unconstitutional statutes"); *cf.* Calabresi & Melamed, *supra* note 9, at 1089 (explaining that the *Cathedral* framework is intended to unify the private law areas of property and torts).

214 *See* Baker, *supra* note 102, at 444–46; Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, *supra* note 102, at 762–65; Merrill, *supra* note 102, at 1151–53 (incorporating inalienability rules into the framework); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 66 (1986) (focusing on takings).

Table 1

		Type of Protection Entitlement Receives	
		Property Rule	*Liability Rule*
Entity to Which Entitlement Is Allocated	*Individual*	Rule 1 – A person may obtain an injunction to stop the government from violating his entitlement. *Example*: Most constitutional rights.	Rule 2 – The government may violate a person's entitlement if it pays compensation. *Example*: Real property subject to eminent domain under the Takings Clause.
	Government	Rule 3 – The government may prevent people from performing an act (or require them to do something), and impose penalties for noncompliance beyond compensatory damages. *Example*: Most exercises of government powers that do not violate constitutional restrictions.[215]	Rule 4 – The government may prevent people from performing an act (or require them to do something), but a person may act contrary to the government's decision by paying compensation. *Example*: None, as a constitutional matter. For statutory rights, any law that allows a person to purchase a permit to engage in otherwise unlawful conduct or requires violators to pay only compensation.[216]

Most scholars assume that nearly all rights conferred by the Bill of Rights (except for the Takings Clause) are protected by property rules, because a person may seek an injunction to prevent the government from violating them.[217] Rule 1 reflects this conventional view.

215 Although the government may restrict certain types of speech, the First Amendment's ban on prior restraints often precludes it from obtaining ex ante injunctions against prohibited speech. *See* Alexander v. United States, 509 U.S. 544, 553 (1993). Therefore, unlike most other governmental powers, its entitlement to restrict such speech may not be protected by a complete property rule.

216 From a purely economic perspective, buying a permit and paying damages or a civil fine are largely equivalent. Buying a permit (for example, paying an entry fee for a public park or obtaining a driver's license) legitimates a person's performance of certain acts, however, while paying an ex post fine of the same amount does not. *See generally* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1552 (1984).

217 *See supra* notes 11–12. Professor Ryan emphasizes that some constitutional provisions are instead protected by inalienability rules which offer the same protection as property rules, with the

B. *The Expanded* Cathedral *Framework*

The main problem with the *Cathedral* framework as typically applied to public law cases is that it uses the term "property rule" to refer to two different groups of people: those who already are protected by an injunction, and those who instead have a substantial likelihood of being able to obtain an injunction from a court.[218] This approach masks the true impact of procedural rules, jurisdictional restrictions, and ancillary doctrines on the legal effects of courts' public law rulings. The *Cathedral* framework should be expanded, at least in public law cases, to distinguish between "complete property rules," which apply to a person whose entitlement is protected by an injunction, and "potential property rules," which apply to a person who has a substantial likelihood of being able to obtain an injunction if she goes to court.[219] The chart below reflects this proposed expanded *Cathedral* framework for public law rights:

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added limitation that the entitlement holder may not transfer or waive them. Ryan, *supra* note 87, at 5.

218 *See supra* note 10 and accompanying text.

219 The model could further be clarified by adding a fourth rule category, for which there is no private-law analogue, to reflect the special type of protection that exclusionary rules provide for the Fourth Amendment right against unreasonable searches and seizures, Weeks v. United States, 232 U.S. 383, 398 (1914); the Fifth Amendment right against involuntary self-incrimination, Miranda v. Arizona, 384 U.S. 436, 478–79 (1966); and the Sixth Amendment right to counsel, Massiah v. United States, 377 U.S. 201, 205–06 (1964).

An exclusionary rule is not a property rule because it cannot be invoked ex ante to prevent a violation, and does not seek to punish government actors ex post. United States v. Leon, 468 U.S. 897, 916 (1984). Instead, exclusionary rules are best seen as "quasi-liability" rules that put a rightholder in nearly the same position in which he would have been if the unconstitutional search or interrogation had not occurred. Harrison v. United States, 392 U.S. 219, 224 n.10 (1968); *see also* Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2297–99 (1998). *See generally* William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 636 (1983) ("[T]he principal role of the exclusionary rule should be to restore victims of those unconstitutional searches and seizures that yield incriminating evidence to the position they were in before the illegality occurred."). Although the Supreme Court has vigorously opposed this characterization of the exclusionary rule, *see* United States v. Janis, 428 U.S. 433, 454 n.29 (1976), it appears descriptively accurate.

The exclusionary rule is not a full liability rule, however, because the Court has recognized numerous exceptions under which the government may use illegally seized evidence for various purposes. *See, e.g.*, United States v. Havens, 446 U.S. 620, 627 (1980) (holding that illegally seized evidence may be used for impeachment); United States v. Calandra, 414 U.S. 338, 354 (1974) (same for grand jury proceedings). Also, the government need not return contraband discovered pursuant to an unconstitutional search. *See, e.g.*, United States v. Van Cauwenberghe, 827 F.2d 424, 433 (9th Cir. 1987). The *Cathedral* framework could be further tweaked to reflect this unique constitutional remedy.

Table 2

	Potential Property Rule	**Complete Property Rule**	**Liability / Liability-Plus Rule**
Individual	The rightholder has a substantial likelihood of being able to obtain an injunction against violations of the entitlement. Constitutional rights: This rule protects most constitutional rights by default. Statutory rights: This rule protects a statutory right by default unless the statute provides only for damages.	The rightholder may seek civil and criminal contempt penalties against those who violate her entitlement. Constitutional and statutory rights: This rule applies when a person's entitlement is protected by an injunction.	The rightholder is entitled to compensatory damages (and possibly punitive damages) for violations of her entitlement. Constitutional rights: This rule applies by default against violations by counties and municipalities, but under narrow circumstances. It applies against government officials and employees only if an opinion or declaratory judgment from a court of the appropriate level "clearly establishes" the right. Statutory rights: This rule applies if a statute allows rightholders to seek damages.

Government	Federal law permits the government to seek an injunction against, or criminally prosecute, a person to prevent her from performing an act that the government has the constitutional power to prohibit.	The government has obtained an injunction or conviction against a person who was performing, or was going to perform, an act that the government has the constitutional power to prohibit.	The government exercises its constitutional power to restrict or prohibit an act, but permits people who pay a compensatory fee (or, perhaps, a civil penalty) to perform it.

Unlike the conventional *Cathedral* framework, this variation presents the different rules that may protect rights as partially cumulative, rather than as mutually exclusive alternatives. For example, a person's entitlement may be protected by both a complete property rule, because she has an injunction, and a liability rule, because the law is clearly established enough to allow her to seek damages. Likewise, a person's entitlements may be protected by different types of rules against different potential violators. If an injunction runs against only officials of a certain county, for example, then rightholders who fall within the injunction would enjoy complete property-rule protection against only those officials.

By default, a potential property rule protects most constitutional and statutory rights against violations by government officials of any level (except for rights under the Takings Clause or statutes that limit a rightholder only to damages). This means that the rightholder has a substantial likelihood of being able to obtain an injunction against impending or ongoing violations.[220]

Due to qualified immunity, a liability rule generally does not protect a constitutional right against violations by public officials and employees unless a judicial opinion "clearly establishes" it.[221] There are

220 If procedural or jurisdictional doctrines preclude a plaintiff from obtaining an injunction, *see infra* Part III, and the rightholder cannot seek damages, then the claimed right is not protected by any rule at all. *Compare* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that a constitutional right may exist, even if a person has no means of judicially enforcing it), *with* Levinson, *supra* note 108 (arguing that a claimed entitlement is not a right unless there is some means of enforcing it). Sovereign immunity generally prevents a rightholder from seeking any form of relief, including an injunction, directly against the federal government or the states themselves, as entities. *See* FDIC v. Meyer, 510 U.S. 471, 475 (1994); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989); Alabama v. Pugh, 438 U.S. 781, 781–82 (1978).

221 Hope v. Pelzer, 536 U.S. 730, 739 (2002); Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002).

very few circumstances in which the plain text of a constitutional provision or a general holding in a precedent is considered enough, on its own, to "clearly establish" the law.[222] When a right is clearly established, the rightholder may be deemed protected against public officials and employees by a "liability-plus rule" since, in addition to compensatory damages, she also may seek punitive damages against violators, and there is at least the theoretical possibility that the government would criminally prosecute them.[223]

A traditional liability rule protects constitutional rights against violations by municipalities and counties, regardless of whether the law is "clearly established," because qualified immunity does not apply to such entities.[224] Such local government units may be held liable only under certain narrow circumstances, however, because they are not subject to respondeat superior liability.[225] For statutory rights, whether they are protected by a liability rule or potential property rule (or both) depends on the remedies set forth in the statute itself.

When a district court adjudicates a constitutional or statutory issue and does not issue an injunction, people within the court's jurisdiction remain protected by a potential property rule. If, in contrast, the court issues an injunction, then those covered by it become protected by a complete property rule against the potential violators to whom the injunction applies, while others within the court's jurisdiction remain protected by a potential property rule.[226] If circuit precedent allows district court rulings to "clearly establish" the law on an issue, then the court's ruling grants everyone within its jurisdiction liability-rule protection (which, as discussed earlier, may be characterized instead as "liability-plus" rule protection) against violations by all public officials, as well.

The analysis is similar when a circuit court affirms the existence of a right. If the court directs or affirms the issuance of an injunction, then a complete property rule protects those covered by the injunction from the officials or entities to whom the injunction applies. Anyone not covered by the injunction remains protected by a potential property

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222 *See* United States v. Lanier, 520 U.S. 259, 269 (1997).

223 The possibility of seeking punitive damages does not, in itself, give rise to a property rule in this context because it is not a mechanism for attempting to prevent a violation from occurring ex ante. *But see* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 30 (1987) (associating punitive damages with property rules); *see also* David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1 (1990).

224 Owen v. City of Independence, 445 U.S. 622, 651 (1980).

225 Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). A liability rule, rather than a liability-plus rule, protects rightholders against municipal and county action, because punitive damages are not available against such entities under § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

226 Again, neither complete nor potential property-rule protection applies to rights under the Takings Clause or statutes that allow a rightholder to seek only compensatory damages.

rule. Everyone within the circuit court's jurisdiction also becomes protected by a liability rule (or liability-plus rule) against violations by public officials, since the circuit court's opinion clearly establishes the law and allows rightholders to obtain compensatory damages, and potentially even punitive damages.

This proposed modification of the *Cathedral* framework for public law entitlements, which distinguishes between complete and potential property rules, reflects the important differences between those who are protected by an injunction and those who merely have a substantial likelihood of obtaining one.

III. DETERMINING PROTECTIONS FOR PUBLIC LAW ENTITLEMENTS

Despite the importance of injunctive relief in public law cases, several judicially-created doctrines make it harder for plaintiffs to obtain injunctions in such suits than in other contexts. And a plaintiff's ability to obtain an injunction in a public law case often depends on contingent, random, or substantively unjustified factors relating to the lawsuit itself, rather than the substance of the underlying rights.

For decades since the *Cathedral*'s publication, scholars have argued that the type of protection an entitlement receives should be based on concerns such as economic efficiency, distributional equity, and justice.[227] They focus on substantive considerations, rather than procedural technicalities. This Part suggests a range of procedural reforms that would make injunctive relief—complete property-rule protection[228]—available for public law rights on a more uniform, consistent, substantively defensible basis.

A. *Posture of a Public Law Case*

The manner in which a litigant raises a public law issue plays a major role in determining the type of protection a court may afford her. In a pre-enforcement challenge[229] or other lawsuit directly challenging a government act or the proper interpretation or validity of a legal provision,[230] a person generally may seek an injunction.[231] Likewise, when a government entity sues a person civilly, he or she generally may file a counterclaim seeking injunctive relief based on such issues.[232]

227 *See, e.g.*, Calabresi & Melamed, *supra* note 9, at 1089, 1092.

228 *See supra* Part II.

229 *See, e.g.*, Brown v. Enter. Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011).

230 *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2816 (2011).

231 *See* FED. R. CIV. P. 65(a).

232 *See* FED. R. CIV. P. 13.

There is no mechanism for seeking an injunction, however, based on constitutional, interpretive, or other such issues raised in the context of a criminal case.[233] Similarly, if a court recognizes or applies a public law right in a lawsuit among private litigants, it may issue an injunction binding those parties, their privies, and their associates,[234] but such complete property-rule protection will not extend to conduct by anyone else, including any government entities that did not choose to intervene in the case.[235]

In each of these cases, the court may resolve the public law issue in the same manner, using the same reasoning. However, the court's ability to issue an injunction—that is, the availability of complete property-rule protection—turns on essentially contingent aspects of the case's procedural posture. The types of factors that scholars contend should be the basis for determining how an entitlement should be protected, such as economic efficiency, equity, or other justice-related concerns, are not considered.

Litigants wishing to raise public law issues in cases involving the government, including criminal prosecutions and challenges to agency action,[236] should be permitted to seek injunctive relief, through counterclaims if necessary, subject to standing limitations.[237] Similarly, when a litigant raises a public law issue in private litigation, the court should join the agency responsible for administering, interpreting, or enforcing the challenged legal provision as an additional party,[238] rather than simply requiring the litigant to notify the government or affected state.[239] These reforms would expand courts' ability to issue injunctions in appropriate public law cases regardless of their posture, allowing constitutional, statutory, and regulatory rights to more consistently receive complete property-rule protection.

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233 *See* FED. R. CRIM. P. 11–12.

234 *See* FED. R. CIV. P. 65(d)(2).

235 *Cf.* 28 U.S.C. § 2403(a) (2012) (allowing the government to intervene in any lawsuit in which the constitutionality of a federal law is questioned); FED. R. CIV. P. 5.1(a) (requiring parties challenging the constitutionality of a legal provision to notify the appropriate governmental entity).

236 *See, e.g.*, FED. R. APP. P. 15(a) (permitting petitions for review to be filed with federal circuit courts of appeals).

237 *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). A voluminous body of literature critiques standing restrictions. *See, e.g.*, Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 317 (1990); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 24 (1982); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 630–32, 642–43 (1983); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 19 (1978).

238 *Cf.* FED. R. CIV. P. 20(a)(2) (standards for permissive joinder in general).

239 *Cf. supra* note 235. In the absence of any such agency, the litigant should be required to join the U.S. Attorney General for federal statutes, the appropriate State Attorney General for state laws, or a county or municipality for local enactments.

B. *Defendants Subject to Injunctive Relief*

Procedural and jurisdictional rules also dictate the scope of injunctive relief that courts may award in public law cases. An injunction generally is enforceable only against the litigants to whom it is directed (as well as their officers, agents, and anyone acting in "active concert or participation" with them).[240] Rules limiting the government entities which may be named as defendants in public law cases therefore directly impact the extent of complete property-rule protection that courts may provide for successful litigants' rights.

Sovereign immunity bars a person from suing the government or a federal agency without its consent,[241] while the Eleventh Amendment prohibits a person from suing a state without either its consent[242] or congressional authorization under section 5 of the Fourteenth Amendment.[243] To circumvent these restrictions and seek an injunction against allegedly unconstitutional or otherwise invalid federal or state action, a person must sue the head of the agency involved in his official capacity under *Ex Parte Young*.[244] The injunction would apply not only to the agency head, but his agents and subordinates throughout the agency.[245]

Courts will not enforce an injunction, however, against government agencies or officials which are neither named in the injunction nor within the scope of Rule 65.[246] Thus, an injunction will not cover employees of other agencies who are working independently of the enjoined official;[247] a lawsuit against the Attorney General, for example, will not provide complete property-rule protection against agents of the Department of Homeland Security or law enforcement officials within the Treasury Department.

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240 FED. R. CIV. P. 65(d)(2).

241 FDIC v. Meyer, 510 U.S. 471, 475 (1994).

242 College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–76 (1999).

243 *Id.* at 637.

244 *Ex Parte* Young, 209 U.S. 123 (1908).

245 FED. R. CIV. P. 65(d)(2).

246 *See, e.g.*, Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 18 (1st Cir. 1991) (declining to enforce an injunction against the U.S. Department of Housing and Urban Development (HUD) because it "was only mentioned parenthetically in what appears as an explanation of the funding source that [a certain housing authority] would tap. More was needed as a prelude to saddling HUD with the pains and penalties of contempt"); Illinois v. U.S. Dep't of Health & Human Servs., 772 F.2d 329, 333 (7th Cir. 1985) (refusing to compel the U.S. Department of Health and Human Services (HHS) to reimburse the State of Illinois for therapeutic abortions under Medicaid, because an injunction that required the state to fund such abortions could not be "used affirmatively to compel post hoc a non-party to pay for the cost of its compliance"); *cf.* Spallone v. United States, 493 U.S. 265, 279–80 (1990) (reversing contempt finding against city council members for failure to comply with a consent decree that had been issued against only the city as an entity).

247 *See, e.g.*, Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70, 81 (D.D.C. 2003).

In contrast, sovereign immunity does not protect counties and municipalities from being sued directly as entities. By suing a county or municipality, a person may obtain complete property-rule protection against all of its agents and officials, regardless of the department or agency for which they work.[248] Thus, sovereign immunity restrictions determine whether a successful plaintiff may obtain relief against all officials and employees of a government entity, or only certain ones. Particularly since the interplay between sovereign immunity and *Ex Parte Young*'s exception for suits against public officials acting in their official capacities is generally considered a legal fiction,[249] the doctrinal contours of sovereign immunity should not be permitted to affect the extent to which a person can enforce her public law rights.

One reasonable solution, short of revisiting *Young*, would be to amend Rule 65 so that an injunction against a government official sued in her official capacity is treated as an injunction against the governmental entity (i.e., the state or federal government) for which she works, as well as its officials, agents, and employees.[250] This procedural fix would minimize the substantive impact of the *Young* fiction without unduly impairing legitimate governmental interests.

Such an amendment would not unfairly prejudice either the federal government or the states. All federal and state officials are agents of the governmental entity for which they work and ultimately accountable to the President or the state's governor. Moreover, federal or state officials sued in their official capacities generally are represented by their respective Attorney General's office, regardless of the department to which they belong. Effectively treating separate departments as independent juridical entities therefore is both unnecessary and inaccurate. An injunction against one agency head should be applicable to other agencies of the same level of government.

C. *Plaintiff Class Certification*

When a court issues an injunction in a public law case, the range of people who are protected by it—and, thus, receive complete property-rule protection for their entitlement—depends in part on whether the court certified the case as a class action. Most class action suits seeking

248 *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401 (1979).

249 *See, e.g.*, Karlan, *supra* note 12, at 1929; Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 127 (1996); *cf.* Kenneth Culp Davis, *Suing the Federal Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 436–37 (1962) (calling *Ex Parte Young* a "false pretense" that "hide[s] the truth").

250 It is debatable whether an injunction against an independent agency or its officials should extend to "conventional" executive departments and officials, and vice versa. These recommendations also might apply in a more limited fashion to state executive officials who are independently elected.

injunctive relief against governmental defendants are brought under Rule 23(b)(2), which applies when a defendant has "acted or refused to act on grounds that apply generally to the class."[251]

Many courts have crafted a common law "necessity doctrine," under which they refuse to certify Rule 23(b)(2) classes against government entities.[252] The necessity doctrine provides that class certification is inappropriate when "[n]o useful purpose would be served by permitting [the] case to proceed as a class action."[253] Applying this doctrine, courts often refuse to certify Rule 23(b)(2) classes in public law cases, on the grounds that government agencies can be expected to implement their rulings in good faith.[254] For the reasons discussed throughout this Article, such an assumption is unwarranted.[255]

Courts' liberal use of the necessity doctrine to defeat public law class actions is not required by Supreme Court precedent. In *Califano v. Yamasaki*, the Court affirmed the district court's decision to certify a national class to seek relief against the Secretary of Health, Education, and Welfare.[256] It rejected the Secretary's objection that certification would "foreclos[e] adjudication by a number of different courts and judges."[257]

While it is debatable whether classes in public law cases should be limited to residents of a particular district or circuit, or instead certified on a nationwide basis, courts should be willing to follow one of those routes when Rule 23's requirements are met.[258] The judge-made necessity doctrine unnecessarily limits the availability of complete property-rule protection for public law entitlements based on dubious assumptions.

D. *Non-Merits Requirements for Injunctive Relief*

When a plaintiff brings a successful public law claim, a court may decline to grant an injunction—i.e., refrain from granting complete

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251 FED. R. CIV. P. 23(b)(2).

252 *See generally* Daniel Tenny, Note, *There Is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1019 n.8 (2005) (collecting cases).

253 Ihrke v. N. States Power Co., 459 F.2d 566, 572 (8th Cir.), *vacating as moot* 409 U.S. 815 (1972).

254 *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344, 1357 (1st Cir. 1985).

255 *See supra* Part I.D.

256 442 U.S. 682, 702–03 (1979).

257 *Id.*

258 *See* Tenny, *supra* note 252, at 1032–33 (arguing that courts should certify Rule 23(b)(2) classes in public law cases to allow everyone affected by the government's allegedly improper conduct to be able to enforce the judgment).

property-rule protection—for a variety of "non-merits" reasons.[259] In *eBay, Inc. v. MercExchange, L.L.C.*, the Court reaffirmed that a litigant who has prevailed on the merits of her claim may not obtain a permanent injunction unless she also establishes that: she has "suffered an irreparable injury;" legal remedies, such as monetary damages, are inadequate; the balance of hardships between the plaintiff and defendant "warrant[s]" injunctive relief; and an injunction would not "disserve[]" the "public interest."[260]

This four-prong standard applies to all cases in which a party seeks an injunction, including statutory[261] and constitutional cases.[262] Indeed, in *Younger v. Harris*, the Supreme Court declared that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it."[263] Historically, some courts have effectively waived the first two requirements in constitutional cases, presuming that violations of constitutional rights inflict irreparable injury for which there is no adequate remedy at law.[264] Especially following *eBay* and *Winter v. National Resources Defense Council*[265] (which reaffirmed similar requirements for preliminary injunctions), however, many courts refuse to presume that those factors are automatically satisfied.[266] Indeed, courts have even denied injunctive relief in constitutional cases based on a plaintiff's failure to satisfy them.[267]

The non-merits requirements for obtaining injunctive relief are potentially formidable restrictions on a person's ability to obtain property-rule protection for statutorily or constitutionally protected

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259 *Cf.* Morley, *supra* note 42 (discussing non-merits requirements for injunctive relief under federal laws).

260 eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

261 Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 32 (2008) (holding that non-merits requirements for both preliminary and permanent injunctions apply in a case under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2012), against the Navy).

262 *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 930–32 (1975); *see also* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 215 n.52 (2012) (collecting cases).

263 401 U.S. 37, 54 (1971); *cf.* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

264 Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 759 n.66 (2012) (collecting cases).

265 555 U.S. at 22.

266 *See, e.g.*, Doe v. Reed, 586 F.3d 671, 681 n.14 (9th Cir. 2009) (criticizing district court for relying on presumption of irreparable injury in First Amendment case); *see also* Hohe v. Casey, 868 F.2d 69, 72–73 (3d Cir. 1989) ("[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury . . . . Rather the plaintiffs must show a chilling effect on free expression.") (internal quotation marks omitted); Pub. Serv. Co. v. Town of W. Newbury, 835 F.2d 380, 382 (1st Cir. 1987) ("The alleged denial of procedural due process, without more, does not automatically trigger . . . a finding [of irreparable harm].").

267 Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1286 (11th Cir. 1990); *see also* Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) ("[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.").

interests. *Winter*, for example, arose under the National Environmental Protection Act (NEPA),[268] which requires federal agencies to file an environmental impact statement (EIS) before performing a major action that will "significantly affect[] the quality of the human environment."[269] In 2007, the Navy planned to perform antisubmarine sonar training that it estimated would disrupt a few hundred whales each year, but did not prepare an EIS.[270] The district court issued, and the Ninth Circuit approved, a preliminary injunction against the Navy's drills until it filed an EIS.[271]

The Supreme Court overturned the preliminary injunction, holding that "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy."[272] The Court explained, "For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet."[273] The Court determined that "[t]he public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs."[274] It added: "[I]t would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction."[275] Thus, a plaintiff's ability to obtain an injunction can turn on the non-merits requirements for injunctive relief, even when her statutory or constitutional entitlements are being violated.

Many commentators have concluded that *eBay*'s non-merits requirements impose inappropriate obstacles for plaintiffs seeking to prevent constitutional violations ex ante.[276] Similarly, Professor Jared

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268 42 U.S.C. §§ 4321–4370h (2012).

269 42 U.S.C. § 4332(C).

270 *Winter*, 555 U.S. 7, 16 (2008).

271 *Id.* at 19.

272 *Id.* at 26.

273 *Id.*

274 *Id.*

275 *Id.* at 32.

276 A substantial amount of scholarship focuses specifically on the irreparable injury requirement. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.5, at 86–101 (2d ed. 1993); FISS, *supra* note 1, at 91–92; Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1406 (2002). Other pieces critique the balance-of-hardships and public interest prongs. *See, e.g.*, Ryan Griffin, Note, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values When Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839, 855 (2010). For an overview of the literature critiquing equitable balancing, see Morley, *supra* note 42.

One scholar defends the recent trend against presuming harm in constitutional cases, arguing:

> The Supreme Court has never suggested that courts should approach the question of injunctive relief differently in constitutional cases and has repeatedly emphasized the irreparable injury element in that context. . . . Courts should not presume damages for

Goldstein contends that applying the balance-of-interests factor in statutory cases is "an assertion of naked judicial authority to choose among competing federal policies."[277] It "simply instructs judges that they may issue an injunction if they think it will do more good than harm, but the instruction to do good rather than bad is no rule."[278] The balance of hardships test "thus empowers courts to pick the statutory interests they consider most important based on their own policy preferences."[279] A variation on this point applies in the constitutional context; the balance-of-hardships test requires courts to weigh incommensurable values, determining whether the adverse practical consequences of enforcing constitutional provisions justify permitting violations to continue.[280]

Most or all of the non-merits requirements for injunctive relief should be relaxed or abandoned, at least in constitutional cases. Once a plaintiff has proven a constitutional claim, the government should not be permitted to exceed its constitutional authority to avoid hardship or promote the public interest, or on the grounds that the plaintiff may seek monetary damages after the fact.[281] The main reason government actors are subject to constitutional restrictions is to remove certain issues from the normal realm of debate over the public interest.[282]

Moreover, as a matter of substantive law, the government generally may abridge a person's constitutional rights only for compelling reasons that cannot be furthered through more narrowly tailored means.[283] The non-merits requirements for injunctive relief, however, generally do not rise to this level. Therefore, absent extraordinary circumstances, a court should not be permitted to rely on them to deny injunctive relief and allow constitutional violations to proceed. A similar analysis applies to rights and restrictions set forth in federal statutes.[284]

> constitutional wrongs; why then should they presume irreparable harm? . . . The presumption obscures the perhaps discomforting reality that many constitutional infractions produce either no injury or one that damages can adequately redress.

DiSarro, *supra* note 264, at 745–46; *see also* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683 (2013) (arguing that courts should not give constitutional claims special treatment).

277 Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 517 (2010).

278 *Id.* at 523–24.

279 *Id.* at 524.

280 *See, e.g.*, Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634, 638 (4th Cir. 1999).

281 United States v. Comstock, 560 U.S. 126, 159 (2010) ("Congress has no power to act unless the Constitution authorizes it to do so.").

282 *See supra* Part I.B.3.

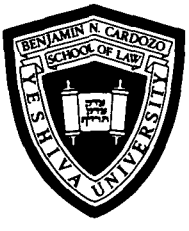
283 Reno v. Flores, 507 U.S. 292, 301–02 (1993).

284 For a discussion of how the non-merits requirements should be modified in statutory cases, see Morley, *supra* note 42.

CONCLUSION

Actually having an injunction provides a significantly higher level of protection for rightholders against illegal or unconstitutional conduct than merely having a substantial likelihood of being able to obtain an injunction or the right to seek ex post damages. Expanding the *Cathedral* framework to distinguish between "potential property rules" and "complete property rules" captures the importance of this distinction and enhances the framework's utility and accuracy as a model of public law remedies.

Because of the importance of injunctive relief in public law cases, courts should modify procedural, jurisdictional, and other ancillary rules to ensure that plaintiffs litigating against government agencies and officials are not at a special disadvantage in obtaining injunctions, and that such relief is available on a wider, more consistent, and substantively defensible basis. Such reforms will help limit the impact of a case's posture on the nature of the protection that a court provide for a litigant's rights, make litigants better able to deter public law violations, and reduce agency nonacquiescence to judicial rulings.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