Structural Reform Revisited

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In 1978, amid a flurry of enthusiasm for structural reform injunctions, Paul Mishkin sounded a cautionary note. In *Federal Courts as State Reformers*,[1] Mishkin surveyed the dangers and difficulties of what he called "institutional decrees."[2] These were injunctions issued by federal courts ordering comprehensive changes in state and local institutions, such as prisons, mental hospitals, and schools, and resulting in pervasive and ongoing judicial supervision. Prominent among the problems with such decrees were the tendency of institutional remedies to outrun the rights that gave them birth;[3] the issues of federalism inherent in the management of state and local institutions by the federal courts;[4] and the risks involved in bypassing majoritarian political processes, especially in large questions of resource allocation.[5] Mishkin ended with a call for restraint and a reminder that "the way to achieve desirable political goals—and the only way to do so lastingly—is through the democratic political processes which must remain the core of our polity."[6]

Mishkin's analysis was trenchant, and all the more so for being brief. Brevity no doubt accounted for his failure to say much about the relation of structural injunctions to alternative remedies. Mishkin did say that institutional decrees were justified when they were "unquestionably the only possible effective remedy" for "soundly established constitutional

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1. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 W. & L. L. REV. 949 (1978).
2. *Id.*
3. *Id.* at 955-958 ("Another key fact about institutional decrees is that the relief ordered often does much more than just prevent or undo constitutional violations.").
4. *Id.* at 967-71 (examining the factors and attitudes that "stimulate federal judges to act against state agencies and . . . provide far less inhibition against their doing so").
5. *Id.* at 958-59, 970-71 ("[I]nstitutional decrees . . . always involve allocation of some, and at times, large amounts of state resources . . . They then pose in crucial form the ultimate problem of legitimate power.").
6. *Id.* at 976.

rights."[7] This formulation wisely draws attention to the inadequacy of other remedies as the rationale for structural reform, but may well set the bar too high.

In this Article we return to the subject of structural reform nearly thirty years after Mishkin left it. Our first aim is to take account of the passage of time. In 1978 Mishkin wrote against an accelerating judicial enthusiasm for structural reform injunctions. Today both courts and Congress lean the other way. We think there is more to be said for structural reform than the current legal climate admits, and to that extent we hope to update Mishkin's views. Our second aim is to put questions of institutional decrees more squarely in the context of alternative remedies. Ultimately, nothing persuasive can be said about structural reform injunctions without explicit attention to the strengths and weaknesses of other means of enforcing constitutional rights. We hope to shift the consideration of these issues toward that frame of reference.

The Article begins with a survey of the standard remedies for constitutional violations, moving in a sequence roughly from less to more problematic: from defensive invocation of constitutional rights to prohibitory injunctions, damages, and exclusion of evidence. We offer this survey partly to place structural relief in the historical context of developing remedies. The courts in each era fashioned remedies thought necessary to redress constitutional violations recognized at the time. Constitutional remedies followed constitutional rights, confirming, if only in a loose and general way, that "where there is a right, there is a remedy."[8] A secondary purpose of this survey is to explain and qualify that maxim. Although it has never been—and probably could not be—true that every violation of a constitutional right has an effective remedy, most violations do have some remedy. When plaintiffs succeeded in establishing liability—by proving that they had been harmed by the defendants' violation of the Constitution—they were presumptively assured of some relief, even if it was not fully compensatory or ideally complete. The attempt to make good on this assurance motivated the search for new forms of relief when old forms proved inadequate. We think that this lesson

7. Mishkin, *supra* note 1, at 971 ("If we are dealing with soundly established constitutional rights for which court-ordered institutional relief is unquestionably the only possible effective remedy, then surely such judicial relief is in our system fully justified."). This seems perilously close to Justice Brennan's standard for prior restraints, which was of course designed completely to preclude them: "Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

8. The original Latin maxim is "Ubi jus, ibi remedium." BLACK'S LAW DICTIONARY 1690 (4th ed. 1968). For the classic American statement of the maxim, see *Marbury v. Madison*, 5 U.S. 127, 147 (1803): "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."

extends to structural reform injunctions: this form of relief should be presumptively available when it provides the only effective remedy for constitutional violations. In the last part of this Article, we examine the actual and perceived characteristics of structural reform injunctions and how the concerns about them might be alleviated. Recent developments reveal that such injunctions have gained greater support from the political branches of the federal government, and have interfered less with state and local government, than previously believed. They accordingly have become a less intrusive form of judicial regulation as they have been tailored to the cases in which they are most necessary. We begin with a few words on how we came to this topic and on our interest in structural reform injunctions as a natural outgrowth of the study of constitutional torts.

I
CONSTITUTIONAL REMEDIES

We come to this topic from constitutional torts.[9] For many years, the dominant theme in that literature has been hostility to limitations on the recovery of money damages for constitutional violations. Doctrinally, this hostility has had many targets. Scholars have criticized the Eleventh Amendment immunity of states,[10] the decisions limiting the direct liability of localities,[11] and the doctrine of qualified immunity, which protects officers (and indirectly governments) at all levels from damages liability

9. With Peter W. Low and Pamela S. Karlan, we co-author a civil rights casebook, the principal focus of which is damages actions under 42 U.S.C. § 1983 (2000). *See* JOHN C. JEFFRIES, JR., ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (2d ed. 2007).

10. For a very partial listing of prominent articles critical of the Eleventh Amendment, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 935 (2000); James D. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260 (1990); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign immunity*, 98 YALE L.J. 1 (1988); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. PA. L. REV. 515 (1978).

11. *See* note 84, *infra*, and accompanying text.

for borderline constitutional violations.[12] None of these arguments has been abandoned, but there seems to have been some moderation—or at any rate some recognition of complexity—in the push for money damages. The end state toward which most academic arguments led was a world of strict governmental liability in money damages for all violations of constitutional rights. To some, however, such a world has come to seem more problematic and less ideal than once was true.

Perhaps this shift—if indeed it really exists—reflects realpolitik. It has been a long time since the diversity interpretation of the Eleventh Amendment[13] or routine liability of local governments[14] seemed likely to succeed in the Supreme Court. The long reign of conservatives has made these goals seem—at least for now—beyond reach. A change in the direction of the Court would likely re-energize the academic supporters of strict governmental damages liability for constitutional violations. Meanwhile, the issue is quiescent.

It is possible, however, that academic rebuttal of the conventional wisdom is beginning to raise doubts. Criticism of what we have called the dominant theme of civil rights scholarship takes three main forms. First is the argument, long endorsed by the Supreme Court, that strict liability of government officers for unconstitutional acts would excessively inhibit legitimate conduct.[15] Second is the claim that making government pay for every wrong would increase the costs of constitutional innovation and inhibit the development of constitutional law.[16] Third is the argument, advanced by Daryl Levinson, that imposing damages liability on government would not necessarily affect the incidence of constitutional

12. *See* notes 74-88, *infra*, and accompanying text. The absolute immunity afforded those exercising legislative, judicial, and prosecutorial functions also has been criticized. *E.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU. L. REV. 53 (2005); Kevin R. Cole, Comment, *Civil Rights: A Call for Qualified Legislative Immunity for City Council Members Under 42 U.S.C. S 1983*, 66 WASH. L. REV. 169 (1991). *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 539-49 (1992) (arguing for priority of protecting individual rights over immunities, including absolute judicial immunity). Decisions creating exceptions to *Bivens* actions against federal officers on the same grounds have been criticized as well. *E.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 SO. CAL. L. REV. 289 (1995); Gene R. Nichol, Jr., Bivens, Chilicky, *and Constitutional Damage Claims*, 75 VA. L. REV. 1117 (1989); Joan Steinman, *Backing Off* Bivens *and the Ramification of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984).

13. *See, e.g.*, William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

14. *See* notes 77-80, *infra*, and accompanying text.

15. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); John C. Jeffries, Jr. *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998).

16. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

violations. If true, his argument would call any instrumental rationale for money damages into question.[17]

These arguments are recounted in more detail below. For present purposes, we merely note that our interest in structural reform injunctions follows naturally from our belief that strict damages liability for all constitutional violations would not be the panacea that some have assumed. More generally, we believe that any remedial scheme—including money damages and structural injunctions—has pluses and minuses and will work well in some contexts and not in others. It follows that the analysis of remedial options should be comparative, and that the discussion of any remedy in isolation will be incomplete. This Article does not undertake a sustained argument in favor of structural reform injunctions, but tries to locate that question in its proper framework of comparative evaluation. Put briefly, structural injunctions must be considered against the background of other constitutional remedies.

A. Defenses

As Henry Hart noted, the basic and essential remedy of constitutional rights is defensive assertion against government coercion.[18] In the paradigmatic case, an individual charged with a crime can assert a constitutional claim that would block his or her conviction. If the government detains an individual without filing charges—at least if the individual is a citizen and the detention is domestic—some court must be open to hear constitutional objections.[19] This principle also extends to civil enforcement proceedings. Some forum must be available for the individual to argue that he or she has suffered or will suffer an unconstitutional deprivation of liberty or property.[20] This forum need not be federal and

17. *See* Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

18. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) ("What you have to keep your eye on, when a plaintiff is attacking governmental action, is whether the action plays a part in establishing a duty which later may be judicially enforced against him.").

19. *Id.* at 1401 ("The state courts. In the scheme of the Constitution, they [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."). The traditional position on executive detention has been only partially confirmed by recent decisions. *See* Hamdi v. Rumsfeld, 542 US. 507, 533 (2004) (holding that U.S. citizens classified as enemy combatants could be lawfully detained, but were entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that foreign citizens held in Guantanamo are entitled by statute to habeas review, but not deciding whether they have a constitutional right to review of their detention); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2767 (2006) (holding that the Detainee Treatment Act did not deprive the Supreme Court of jurisdiction over appeals in habeas corpus cases pending when the act took effect).

20. Hart, *supra* note 18, at 1370-71 ("Consider, for example, the possibility that summary collection of taxes might be invalid if the Government did not waive its immunity to suit for refund."). For a more recent defense of this view, see Henry Paul Monaghan, Comment: *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 125-26 (1996).

need only prevent or nullify the unconstitutional action. It need not do more, but it cannot do less. The government must provide a judicial officer for evaluation of the individual's constitutional claim.[21] One way or another, persons who are targets of government coercion must be given an opportunity to defend by showing that this action is taken in violation of the Constitution.

Asserted as a minimal account of the enforceability of constitutional rights, this claim is not controversial. Difficulties are generally thought to arise over affirmative relief, such as injunctions or damages, to enforce constitutional rights. That said, it is surprising how few of the early constitutional decisions of the Supreme Court conform to the defensive paradigm of individual constitutional rights asserted to block government action. Few early decisions involved what we think of today as individual rights at all. More typically they involved claimed violations of some constraint on the structure of government. *Marbury v. Madison*[22] is a famous example. Marbury sought a judicial order directly from the Supreme Court compelling Madison to deliver his commission to serve as a judge in the District of Columbia. Of course, if the order had been issued, Madison would have been coerced, but not in an action brought by government. On the contrary, Madison *was* the government, as he was sued in his official capacity as Secretary of State. The constitutional defense recognized by the Supreme Court derived from a limitation on its own jurisdiction. Had an order for delivery of Marbury's commission issued from a proper court, it would have not have violated any of Madison's rights as a defendant. The only individual rights at stake were Marbury's as a plaintiff.

The obvious place to expect defensive assertion of constitutional rights is criminal prosecution, but federal litigation featuring such claims was not prominent before the Civil War. The staple of modern civil rights litigation—individual rights protected by the Fourteenth Amendment—did not yet exist. Rights against the states were confined to those in Article I, Section 10, and Article IV. Most litigation involving individual constitutional rights concerned the Contracts Clause, which was typically invoked by private plaintiffs who sought to enforce contracts that defendants claimed had been nullified by state statute.[23] Thus, *Ex Parte Burford*[24] stands out as a rare early decision vindicating the constitutional

21. Hart, *supra* note 18, at 1377 ("Shutting off the courts from questions of law determinative of enforceable duties was one of the things *Yakus* assumed that Congress could *not* do.").

22. 5 U.S. 137 (1803).

23. *E.g.*, Fletcher v. Peck, 10 U.S. 87 (1810) (litigation between rival private claimants to land). Nevertheless some cases under the Contracts Clause involved coercive actions by government, for instance, when a state promised tax concessions to a private individual or corporation, but then insisted on collecting the tax. *See* Ann Woolhandler, *The Common Law Origins of Compelled Constitutional Remedies*, 107 YALE L.J. 77, 89-92 (1997).

24. 7 U.S. 448 (1806).

rights of criminal defendants, but only in narrowly defined circumstances. The case arose when Burford was detained in the District of Columbia, apparently without a trial, probable cause, or even the opportunity to make bail, all assertedly in violation of his rights under the Fourth, Sixth, and Eighth Amendments. His objections on these grounds were, at the time, good only against the federal government, and could be asserted in the Supreme Court only because they went to the jurisdiction of the lower federal court.[25] It was these special features of the case that made a Supreme Court decision possible and that demonstrate how truly exceptional it was. A more notorious case is *Prigg v. Pennsylvania*,[26] in which the agent of a Maryland slave owner asserted a constitutional right under the Fugitive Slave Clause of Article IV. This right was raised as a defense to a Pennsylvania prosecution for removing a black woman from the state by force or violence in order to return her to slavery. The asserted constitutional right, since superseded by the Thirteenth Amendment, is a perverse inversion of modern civil rights law and reveals just how much the antebellum constitutional landscape differs from our own.[27]

Defensive assertion of constitutional rights became more common after the Civil War. Three concurrent developments accounted for this change. First, the expansion of federal rights against states in the Reconstruction Amendments dramatically increased the constitutional claims that could be asserted. Second, the growth of government regulation of commerce and the exercise of powers during wartime increased the range of government activities to be attacked. And third, the growth of the federal judicial system facilitated the assertion of rights, both in proceedings begun in federal court and in appeals from state decisions. As the number of rights and the scope of federal activity grew, the federal judicial system grew as well. This trend accelerated during the twentieth century with the continued growth of government regulation, the advent of the welfare state, and the increasing demands of national defense.

Yet even as constitutional rights flowered in the Warren Court, relatively few of the celebrated decisions involved purely defensive

25. The case was accordingly reviewable by petition for habeas corpus. Appeals from criminal convictions in federal cases were not widely allowed until 1889, and the writ of habeas corpus was not generally available to challenge state custody before 1867. Even then, habeas corpus allowed only challenges to "jurisdictional defects" in state or federal prosecutions, a term that was narrowly construed until the middle of the 20th century. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1425, 1430, 1539 (2d ed. 1973).

26. 41 U.S. 539 (1842).

27. A less notorious decision, *McCulloch v. Maryland*, 17 U.S. 316 (1819), also involved the assertion of a constitutional defense, in that case against enforcement of a state tax. McCulloch, an official of the Bank of the United States, raised the defense that the bank was constitutionally immune from state taxation as an instrumentality of the federal government. The principal constitutional claim in that case, however, was raised by Maryland, which attacked the constitutionality of the legislation establishing the bank, and with it, the basis for any claim of governmental immunity.

remedies.[28] The leading decisions on desegregation, reapportionment, civil rights, and to some extent even criminal procedure, involved remedies beyond simply resisting government coercion. More often, they sought injunctions or damages or the exclusion of evidence.[29] The last-named remedy illustrates just how fine the distinction can be between constitutional rights as defenses and as the basis for some other remedy. On the one hand, excluding illegally seized evidence allows a defense to a criminal prosecution in the sense that it impairs (often fatally) the prosecution's ability to prove its case. On the other hand, the Fourth Amendment exclusionary remedy does not follow directly from the violation of the right, as would be true, for example, for the Fifth Amendment.[30] The privilege against self-incrimination, if it means anything at all, precludes use of evidence coerced from the defendant in the prosecution's case in chief. The Fourth Amendment exclusionary rule—at least as interpreted by the Supreme Court—does not reflect the same direct connection between right and remedy, and its status as a constitutional requirement is correspondingly less secure.[31]

Forcing all constitutional remedies into the mold of defenses distorts the comparative advantages of each form of relief. We believe that the defensive assertion of constitutional rights is significant chiefly as a minimum. It is the remedy that cannot be taken away, even when all others have been suspended or revoked. It does not guarantee the best possible enforcement of a constitutional right, but only some defense against the worst abuses by government. Typically, constitutional rights are also enforceable by other remedies, whose efficacy depends as much on the rights protected as on the distinctive character of different remedies.[32] Some rights, such as the right to vote, are best protected by injunctions, which eliminate the need for a strictly defensive remedy. For others, exclusion of evidence is the most meaningful response, as it is for coerced confessions.

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28. For an example, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969). For a similar case decided by the Burger Court, see *New York Times v. United States*, 403 U.S. 713 (1971). The abortion cases, the most controversial of the Burger Court, might also be grouped with coercive actions, since the plaintiffs sought injunctions in anticipation of criminal prosecution. Roe v. Wade, 410 U.S. 113, 120 (1973); Doe v. Bolton, 410 U.S. 179, 184 (1973).

29. Brown v. Board of Education, 347 U.S. 483, 486-87 (1954); Baker v. Carr, 369 U.S. 186, 193-95, 196-98 (1962); Monroe v. Pape, 365 U.S. 167 (1961); id at 204 (Frankfurter, J., dissenting in part); Miranda v. Arizona, 384 U.S. 436, 444-45, 491-99 (1966); Mapp v. Ohio, 367 U.S. 643, 644-46 (1961).

30. A coerced confession, of course, is different from exclusion of evidence for failure to give *Miranda* warnings, which are prophylactic requirements extending well beyond actual coercion. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306-07 (1985). The exclusionary rule under *Miranda* is closer to the exclusionary rule under the Fourth Amendment than to the exclusion of evidence obtained directly in violation of the privilege against self-incrimination.

31. *See* Section I.D. *infra*.

32. *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000).

In short, the effectiveness of remedies is a comparative issue, dependent as much on the constitutional rights at stake as on the circumstances in which they are violated. The development of injunctions as remedies for constitutional violations confirms this lesson.

B. Injunctions

Injunctions are often the best remedy for constitutional violations. Damages and other forms of monetary relief may be precluded by the sovereign immunity of states and the qualified immunity of officers. If the wrong suffered is intangible, as is often true for constitutional violations, damages compensate imperfectly, requiring a degree of speculation resistant to proof and to consistency across judgments. Of course, wholly realized wrongs can be remedied only by damages, imperfect though they may be. Some risk of future violation is necessary for prospective relief. But where future violation is threatened, injunctions are often the only effective relief. Today, though not historically, injunctions stand on an equal footing with damages and must be evaluated in comparison with them.

The case that shunted aside the traditional presumption against equitable relief, *Ex parte Young*,[33] is better known for its holding that the Eleventh Amendment does not bar injunctive relief against state officers who act in violation of the Constitution. The case arose in a wave of late-nineteenth and early-twentieth-century litigation over state regulation of commerce. Shareholders in a railroad subject to allegedly confiscatory rates brought a federal derivative suit to enjoin the state attorney general from enforcing these rates under state law. The attorney general invoked Eleventh Amendment immunity and argued that the railroad had an adequate remedy at law by way of a defense to criminal prosecution. The Supreme Court rejected the first of these arguments on the ground that a state officer who acts unconstitutionally loses his or her authority under state law, leaving the officer outside the protection of the Eleventh Amendment and exposed to personal liability.[34] An injunction could therefore issue against the officer as an individual. Exactly how an officer sued in an individual capacity could be engaged in state action under the Fourteenth Amendment, and how an injunction against the officer as an individual could control official action, have remained doctrinally puzzling.

The solution to this puzzle lies in the Court's holding that the plaintiffs had no adequate remedy at law by way of a defense to criminal prosecution under the state ratemaking statute. The Court found this remedy to be inadequate because of the statute's severe and cumulative

33. 209 U.S. 123 (1908).
34. *Id.* at 159-60.

penalties, accruing with each ticket and freight contract sold in excess of the allowable rates.[35] In order to challenge the statute's validity, the railroad's employees would have had to risk imprisonment, and their liability would have increased with every repetition. To await criminal prosecution, said the Court, "would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid."[36] The Court therefore accepted the plaintiffs' contention that they were entitled to some alternative form of relief, invoking a principle of equity jurisprudence to override the state's constitutional immunity.

This odd consequence of the Court's seemingly narrow holding on the inadequacy of legal remedies was magnified by contemporaneous developments allowing federal courts to issue injunctions when state courts could not do so. State statutes precluding such power were held inapplicable in federal court.[37] And, in the era before *Erie*,[38] the federal courts were free to develop their own conceptions of equity jurisprudence independently of the state courts, even when federal jurisdiction was based solely on diversity.[39] In practice federal courts sometimes looked closely at the adequacy of legal remedies and sometimes did not.[40] Often they took a blunt-instrument approach to the need for equitable relief, summarily finding legal remedies inadequate with little or no discussion of the particular facts. *Smyth v. Ames*,[41] a case enjoining state railroad rates, is illustrative. On appeal from the entry of an injunction, the Supreme Court upheld federal equity jurisdiction despite a provision for review of the rate making proceedings in the state supreme court. The Court declared that "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought."[42] From all that appears, the state remedy was inadequate simply because it was provided by the state.

The Court's willingness to allow federal injunctions against state officials eventually prompted Congress to enact restrictive statutes, including the now-repealed requirement of a three-judge district court with direct appeal to the Supreme Court in any case seeking to enjoin

35. *Id.* at 144-45, 148, 165.

36. *Id.* at 163-64.

37. *Ex parte* Tyler, 149 U.S. 164, 188-90 (1893).

38. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

39. Woolhandler, *supra* note 23, at 105 ("The Judiciary Act of 1789 contemplated that federal equity courts might grant remedies in diversity cases even when no equitable remedies existed under state law.").

40. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1010-11 (2d ed. 1973).

41. 169 U.S. 466 (1898).

42. *Id.* at 516.

enforcement of a state statute.[43] Congress also adopted more lasting restrictions on the kinds of cases in which injunctions could issue. Specifically, Congress prohibited federal injunctions against ongoing proceedings in state court, against enforcement of utility rates, and against collection of state taxes.[44] These limitations and their exceptions have elaborate histories intertwining statutory requirements with equitable standards for relief. The Tax Injunction Act,[45] for instance, has an exception for cases in which the plaintiff has no "plain, speedy and efficient remedy" under state law, a provision that has sometimes been interpreted to mean the same thing as no adequate remedy at law.[46] And 28 U.S.C. section 2283 prohibits injunctions against state proceedings except when "expressly authorized by Congress." That exception has been read to encompass civil rights actions under 42 U.S.C. section 1983,[47] but it can be invoked only if there are no pending state proceedings that would furnish the plaintiff with an adequate remedy at law.[48]

Other restrictions on injunctive relief operate indirectly by limiting the plaintiff's ability to sue in the first place. The case or controversy requirement of Article III imposes significant limitations by way of standing, ripeness, and mootness. Thus, the greatest obstacle to enjoining police misconduct, *City of Los Angeles v. Lyons*,[49] does not purport to address remedial issues as such, but instead concerns standing to attack future conduct. The plaintiff, Lyons, had been subjected to a chokehold by the Los Angeles police, but the Court held that he lacked standing to enjoin this practice in the future because he could not prove that he would again resist arrest and be subject to this restraint.[50] This holding, like many decisions on "case or controversy,"[51] transforms a common law requirement into constitutional doctrine—in this case likely future injury as

43. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 965-79 (2d ed., 1973).

44. 28 U.S.C. §§ 1341, 1342, 2283 (2000). In a more recent example of the same phenomenon, Congress has restricted the issuance of federal injunctions in prison litigation. 18 U.S.C. § 802.

45. 28 U.S.C. § 1341 (2000).

46. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 976-79 (2d ed. 1973) ("[T]he three major Supreme Court opinions seem to use the terms interchangeably, and on occasion even to suggest that the act is merely declaratory of the prior equity standard.").

47. Mitchum v. Foster, 407 U.S. 225 (1972).

48. Younger v. Harris, 401 U.S 37 (1971). This restriction first applied only to criminal cases, but then was extended to "civil proceedings in which important state interests are involved." Moore v. Sims, 442 U.S. 415 (1979). Declaratory relief has been treated the same as injunctive relief for most purposes, since the binding effect of a declaratory judgment depends upon its enforceability through a subsequently issued injunction. Samuels v. Mackell, 401 U.S. 66 (1971). Nevertheless, the Supreme Court has allowed declaratory relief in a limited range of cases in which a criminal prosecution is only threatened, but not yet commenced. Steffel v. Thompson, 415 U.S. 452 (1974).

49. 461 U.S. 95 (1983).

50. *Id.* at 105.

51. *E.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Allen v. Wright, 468 U.S. 737 (1984).

a prerequisite for injunctive relief. A similar, albeit non-constitutional, limit on the plaintiff's ability to sue is the necessity of establishing a private right of action. This does not usually present a problem for suits brought under section 1983, as that statute creates its own cause of action. But it remains very much an issue for those who sue federal officers under *Bivens*[52] and—indirectly—for those who try to use section 1983 to enforce other federal statutes.[53]

Whether imposed by Congress or by the courts, these restrictions on injunctive relief broadly reflect common law conceptions about the role of equity. They depend on background principles about the scope and effectiveness of alternate remedies and about the kinds of cases that can properly be brought. As these traditional conceptions are neither rigid nor static, the federal courts have adapted them as necessary to vindicate federal rights and assure the supremacy of federal law. As noted earlier, the leading role of the federal courts became established in diversity cases, where federal courts proved willing to enjoin state officers based on concepts of general law interpreted independently of state restrictions on equity. One way of describing *Ex parte Young* is that it preserved this understanding of the amenability of state officers to federal injunctive relief against arguments based on the revival (if that is the right word) of the Eleventh Amendment.[54]

As noted, *Ex parte Young* rested on the premise that a state is sued only when it is named as the defendant or when an officer is sued in his or her official capacity.[55] The state is not sued when an officer is sued personally, including (importantly, if illogically) for constitutional violations requiring state action. From this formalism, it follows that the state itself is not liable for an officer's unconstitutional actions and

52. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (finding a cause of action for damages against federal officers for violation of the Constitution); Webster v. Doe, 486 U.S. 592 (1988) (requiring clear statement of congressional intent to bar such causes of action).

53. In these cases, the absence of a private right of action under the statute providing substantive rights is sometimes taken to limit—in a manner difficult to articulate—the availability of damages or injunctive relief under § 1983. *See, e.g.*, Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). Perhaps the best that can be said is that the Court looks to more recent statutes for an alternative enforcement scheme that suggests an implied repeal of private enforcement rights under § 1983. *E.g.*, Blessing v. Freestone, 520 U.S. 329, 346-48 (1997) (leaving open remedies under § 1983 for claims under Title IV-D of the Social Security Act where that act does not provide sufficiently comprehensive remedies); *See* Cass Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 421 (1982) (suggesting a test of "manifest inconsistency" between enforcement under the statutory scheme and under § 1983).

54. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 284 (1992) ("On the level of institutional assumptions, the Court accepted the idea that the principal role of the national courts was to protect federal constitutional rights against interference by the states and the further idea that the federal courts were properly the 'primary' protectors of those rights.")

55. *Ex parte* Young, 209 U.S. 123, 151 (1908).

therefore that any action against the officer is not barred by the Eleventh Amendment. This doctrine leaves the states free and clear of direct damages liability, although governments typically find compelling practical reasons to reimburse officers for adverse judgments. *Ex parte Young* simply extends this reasoning from damages actions to suits for injunctive relief, with the consequence that state officers can be enjoined in their personal capacities from fulfilling duties under state law.

At any rate, such was the Court's reasoning. In functional terms, which were appreciated even at the time,[56] a personal action against the state officer was necessary to provide some avenue of relief when the state itself was immune. Put simply, the Court allows the injunction against the state officer personally because no other remedy will regulate the conduct of the office. The same functional concerns explain how a state officer can be said to engage in state action while acting in his or her personal capacity. Saying that an officer acts "under color of" state law, even when the state law is disabled from authorizing the act in question, is necessary to give effect to the superior authority of the federal Constitution.[57] If the usually superior remedy of damages is precluded by the state's sovereign immunity and the state officer's personal immunity, the plaintiff can seek an injunction. To have held otherwise would have drastically limited the enforcement of federal rights.[58]

Of course, damages plus prohibitory injunctions do not begin to reach all cases. As explained below, damages are limited by a liability rule of negligence as to illegality, relieving a state officer of liability for any action reasonably believed to be lawful. No damages can be awarded for actions a state officer reasonably believes to be legal. Injunctions are limited by the requirement of future harm. Reasonable errors without prospect of future recurrence are not covered. As we shall argue, some of these unremedied violations can be addressed by structural reform injunctions, which seek to constrain conditions and practices productive of constitutional harm. These restructuring injunctions have problems of their own, but their availability is supported by the same general principles that underlie *Ex parte Young*. The core principle is necessity. Just as the inadequacy of legal remedies supports prohibitory injunctions, the inadequacy of ordinary injunctions

56. Woolhandler, *supra* note 23, at 123 ("Nevertheless, the Court appears to have treated trespass remedies against the wrongdoing governmental actor—with their deep roots in the common law—as existing independent of the will of the legislature.").

57. Hafer v. Melo, 502 U.S. 21 (1991).

58. It was for this reason, we believe, that Justice Kennedy's suggestion in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270-80 (1997) (opinion of Kennedy, J.) that *Ex parte Young* might be limited by a case-by-case consideration of state interests in immunity raised such alarm. To the extent that such case-by-case consideration did not merely duplicate the equitable restrictions on injunctive relief, it would have diminished the range of cases in which federal courts could order such relief. On this point, however, Justice Kennedy, spoke only for himself and Chief Justice Rehnquist.

supports structural reform. But before we get to that argument, more must be said about the limited availability of money damages.

C. Damages

Students find the availability of money damages for constitutional violations so right and natural that it is often hard for them to recognize—or accept—the limited role that damages actually play in enforcing constitutional rights. Before the revivification of section 1983 in *Monroe v. Pape*[59] and the creation of analogous actions against federal officers in *Bivens*,[60] damages for constitutional violations were embedded in state law. That, at least, is a post-*Erie*[61] way of describing a regime in which there was no distinctively federal cause of action to remedy constitutional violations. Actions against officers typically alleged a common law harm. The defendant would claim official authority. The question whether the officer's conduct violated the Constitution would come in by way of the plaintiff's reply to that defense.[62] Today, it seems natural to describe this regime as a state law cause of action and a state law defense of justification, which might be overridden by the superior authority of the federal Constitution.[63] In fact, pre-*Erie* judges and lawyers did not see state and federal law as so cleanly divided. Federal courts entertaining diversity-based actions against government officers acted with considerable independence, especially with regard to remedies.[64] The result, according to Ann Woolhandler, was the rise of suits against state officers in federal court that "more closely resembled modern implied constitutional rights of action and § 1983 cases than modern federal courts scholars have supposed."[65]

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59. 365 U.S. 167 (1961) (allowing claims under § 1983 despite the presence of remedies under state law).

60. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

61. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

62. Ann Woolhander, *Patterns of Official Immunity and Accountability,* 37 CASE W. RES. L. REV. 396, 399 (1987) ("The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass. The issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of defense and reply when the officer pleaded justification.").

63. *See, e.g.*, Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1129 (1969) ("[P]laintiffs would apparently be pressing a state-created claim, and relying upon a federally-created right solely to overcome a plea of justification.").

64. Woolhandler, *supra* note 23, at 77, 82 (concluding that "federal diversity courts did not closely imitate state courts in providing remedial rights in suits against state officials, either in actions at law or in suits in equity"). Even as late as 1969, a distinguished scholar published an important article addressing, among other questions, whether private damages actions against federal officers for violation of federal constitutional rights arose under federal or state law. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

65. Woolhandler, supra note 23, at 82.

Even so, the pre-*Erie* damages remedy for constitutional violations was hardly robust. As noted earlier, the range of official conduct that violated the federal Constitution was different from, and vastly smaller than, it is today. Before the incorporation of Bill of Rights guarantees against the states,[66] federal constitutional violations by state actors usually concerned the Contracts Clause.[67] Later the Fourteenth Amendment Due Process Clause became available for challenges to confiscatory taxation, unreasonable rates, and other forms of economic regulation.[68] In all these cases, litigation challenged official state policy. Almost completely missing were the complaints against the individual misdeeds of prison guards, police officers, school officials, and welfare administrators that make up the great bulk of today's constitutional tort litigation.[69] Moreover, potential plaintiffs often lacked practical incentives as well as doctrinal bases for their claims. Actions for damages against individual officers would have been inefficacious as a way of vindicating rights against continuing economic regulation.[70] Discrete small claims that conceivably could have been remedied through the award of damages would, in any event, have been economically unattractive absent an award of attorney's fees. For these and other reasons, money damages played a relatively small role in vindicating constitutional rights prior to *Monroe* and *Bivens*.

After those decisions the number of filings soared,[71] and damages achieved a new prominence as a potential remedy for constitutional violations. That prominence is reflected in law school curricula, which

66. The term comes from *Twining v. New Jersey*, 211 U.S. 78, 108 (1908) (evaluating whether there should be the "incorporation of the privilege" of protection from the "practice of compulsory self-incrimination" to state and local governments). While the Court rejected the "incorporation" of this particular privilege, it acknowledged that certain provisions in the Bill of Rights were within the scope of "due process of law," and thus could be applied to the state action through the 14th Amendment. *Id.* at 99.

67. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contract . . ."). *See generally*, Woolhandler, supra note 23, at 89-95

68. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.2 (2d ed. 1992) ("The idea of substantive due process became the most viable concept for the Court to adopt as a legal theory to protect industry from government regulation. By the turn of the century the Court had embraced the concept fully and was ready to use it as a rationale for striking legislation that attempted to restrain the freedom of businesses to contract.").

69. In 1961, fewer than 300 civil rights actions were brought in federal court. By 1971, that number had risen to 8,267, including 3,129 prisoner suits. In 1997, more than 43,000 civil rights actions were filed, most of them under § 1983. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-2A (2000); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 658 (1987). Thereafter, the number of civil rights actions in federal courts seemed to level off at about 40,000 a year. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 162 tbl. C-2A (2005).

70. *See* Woolhandler, *supra* note 62, at 451 ("The shallow pockets of suable officials gave little incentive to sue for damages in such cases; damages were in fact an inadequate remedy for violation of rights through continuing government regulation. An anticipatory equitable remedy was likely to be the most effective action to obviate the plaintiff's loss.").

71. *See* sources cited in note 69, *supra*.

today feature stand-alone courses on constitutional torts.[72] However, as anyone who has taught or taken such a course can readily attest, the award of money damages for constitutional violations is anything but routine. States themselves enjoy sovereign immunity.[73] Although the Eleventh Amendment and related doctrines that afford this protection have received enormous scholarly attention, they are probably not as important as the rules that restrict the end-run of direct governmental liability through officer suits.[74] Qualified immunity protects executive officers from damages liability whenever a reasonable officer could have believed his or her actions to be lawful.[75] The effect is to establish a liability rule of negligence with respect to illegality. As administered by the courts, qualified immunity shields a vast range of garden-variety unconstitutionality from vindication through money damages.[76] At one time, the Supreme Court flirted with strict governmental liability for

72. As mentioned, we co-author a casebook on civil rights. *See* note 9, *supra*. The predeeessor to that volume, PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES, was published in 1988 and provided materials for a stand-alone course focused on money damages and attorney's fees. Before that time, constitutional tort actions were most likely covered, if at all, as a footnote to a federal courts eourse. *See*, for example, the second edition of Hart & Wechsler, published in 1973, which featured a four-page note on § 1983 in a book of 1600 pages. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 947-51 (2d ed., 1973). By contrast, the current edition of that casebook, dedicates almost 70 pages to § 1983. RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1072-1141 (5th ed. 2003). Additionally, there were (and are) civil rights casebooks that provide an overvicw of civil rights statutes from both Reconstruction and the modern era. *See, e.g.*, THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS (2d ed. 1987).

73. Hans v. Louisiana, 134 U.S. 1 (1890), is the canonical cite, though *Edelman v. Jordan*, 415 U.S. 651 (1974), might be a better choice.

74. For discussion of the relationship of sovereign immunity and officer suits, see John C. Jeffrics, Jr., *In Praise of the Eleventh Amendment*, *supra* note 15, at 47-51 (concluding that the "rules that actually control state liability for constitutional violations are . . . not the ostensibly categorical prohibitions of the Eleventh Amendment but the more qualified doctrines of Section 1983").

75. *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) (stating that federal agents could not be held liable for an unconstitutional arrest "if a reasonable officer could have believed" there was probable cause); Anderson v. Creighton, 483 U.S. 635, 639 (1987) (An officer's qualified immunity is determined by "the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken," *quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818, 819 (1982).).

76. *See e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004)(per curiam) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."); Hanlon v. Berger, 526 U.S. 808, 810 (1999) (per curiam) (although plaintiff's Fourth Amendment rights were violated, police were entitled to qualified immunity because law was not clearly established at the time of the violation); Hunter v. Bryant, 502 U.S. 224, 228-229 (1991) (per curiam) (police officers were entitled to qualified immunity even though they erred in concluding probable cause because "their decision was reasonable, even if mistaken"); Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law").

constitutional violations by local officers,[77] despite the prospect of radical discordance between strict liability for cities and absolute immunity for states. In time, however, the Court so narrowed the threshold requirement of "official policy or custom"[78] that the door once thought open is now nearly closed. The Court also defeated the ingenious stratagem of depicting individual misconduct as evidence of a governmental policy of failure to train.[79] As a result, direct governmental liability is quite exceptional.[80] In the vast majority of cases, plaintiffs are relegated to suing officers, all of whom can claim at least a qualified immunity from liability for money damages.

For present purposes, perhaps that is all we need to say. Whatever might be imagined in some hypothetical world of strict governmental liability, money damages are currently not available for routine constitutional violations. Indeed, in some contexts, notably that of illegal searches, damages are almost irrelevant.[81] Given the robust interpretation currently accorded qualified immunity, the general inefficacy of money damages is a point with which few will disagree.[82] More controversial is the suggestion that money damages should *not* be routinely available for all constitutional violations—or more precisely that the costs of providing such compensation would be too high. This argument is too elaborate to recount fully, but it begins with the observation that the victims of constitutional violations are not intrinsically more deserving of wealth

77. *See* Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (overruling *Monroe*'s determination that local governments were not "persons" within the meaning of § 1983); Owen v. City of Independence, 445 U.S. 622 (1980) (ruling that when local governments can be sued under § 1983, they cannot claim qualified immunity).

78. *See, e.g.*, City of St. Louis v. Praprotnik, 485 U.S. 112, 124-27 (1988) (plurality opinion) (taking a narrow view of official policy or custom, a question that the plurality determined largely by reference to state law). In a remarkable and confusing recent opinion, the Court even suggested that the strict liability standard of *Owen v. City of Independence* somehow incorporated a requirement of "fault" or "culpability." Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 406 (1997). *Cf.* McMillian v. Monroe County, 520, 781 (1997) (finding that Alabama sheriffs were state, not county, officers, thus precluding governmental liability).

79. City of Canton v. Harris, 489 U.S. 378, 388-89 (1989) (requiring "deliberate indifference" as the standard of locality liability for failure to train, thus effectively precluding strict liability).

80. *See* Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 15 at 58-59 ("As constrained by these interpretations, the exception of municipal liability is exactly that—a narrow deviation from the generally applicable rule of liability based on fault.").

81. *See id.* at 282-83 and sources cited therein (concluding that there is "no context in which the defense [of qualified immunity] has greater consequence in precluding damages for constitutional violations").

82. Indeed, one critic of qualified immunity law accuses the Court of "unqualifying immunity" by refining the procedural structure for resolving these issues in ways that move current doctrine "toward something resembling absolute immunity." Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232-33 (2006) (asserting that "[T]he Court assigns decision-making power to judges because it is extremely uncomfortable with the idea that qualified immunity is just that—qualified. The Court's recent efforts to refine this proeedural structure reflect its wish to move qualified immunity toward something resembling absolute immunity.").

transfers than any other class of citizens who have suffered loss or harm.[83] Damages are generally thought justified not because victims are uniquely deserving but in order to deter future violations. But this rationale immediately raises difficult empirical questions about the unintended deterrence of legitimate government activity by the threat of damages for unconstitutional conduct. This risk of overdeterrence has preoccupied the Supreme Court,[84] but an additional and qualitatively different concern has surfaced in the academy. That is the risk that damages liability for all constitutional violations would inhibit the development of constitutional law.[85] Making money damages freely available for all violations of constitutional rights, including newly declared or clarified constitutional prohibitions, would make such innovations more costly. By holding down the costs of new rights, qualified immunity helps to facilitate constitutional change. It also redistributes societal resources from older generations, who would benefit from payment for past harms, to younger citizens, who will benefit more from future reforms.[86] These are large questions, and if they are not already difficult enough, they are complicated by recent skepticism about whether money damages actually influence official conduct.[87] To the extent that this skepticism is justified—that is, to the extent that damage

83. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 92 (1989) (concluding that "the mere fact that injury is caused by government unconstitutionality is not, in itself, a suitable test" for redistribution of wealth).

84. For academic attempts to improve on the Court's overdeterrence rationale, see generally PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (1983) (explaining why "street-level" government officials may be especially susceptible to inhibition by the threat of damages liability); Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 29-31 (1978) (noting an imbalance between the cause of action readily available to those injured by affirmative misconduct and the difficulties faeed by those who are injured by a failure to act); Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 15, 73-78 (arguing that the interaction of the skewed incentives of government officers and the persistent indeterminacy of the eonstitutional standards under which they work makes overdeterrence a serious risk).

For attacks on this line of reasoning, see, e.g., Harold S. Lewis, Jr. and Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 756 (1992) (arguing for a modified version of respondeat superior to govern local liability); Susannah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C L. REV. 517, 538 (1987); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1988-89).

85. *See* Jeffries, *The Right-Remedy Gap*, *supra* note 16. *See also* Jesse Choper & John C. Yoo, *Who's So Afraid of the Eleventh Amendment: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2005).

86. Jeffries, *The Right-Remedy Gap*, *supra* note 16, at 113 ("Qualified immunity disfavors the backward-looking remedy of cash payments to victims of past harms and, in so doing, opens the door to forward-looking remedies requiring investments in the future.").

87. Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.").

awards in fact do not affect government conduct—all instrumental rationales for money damages are out the window.[88]

The upshot of all this for present purposes is clear. Money damages are not—and perhaps should not be—a routine remedy for constitutional violations. Much depends on context, and attention to context is something that current doctrine seeks to suppress.[89] Careful analysis of the potential efficacy of money damages as a remedy for constitutional violations would proceed locally, not globally, and would take account of differences among rights and the institutional and political contexts in which they are enforced.[90]

That said, we would offer a few tentative generalizations. Money damages are most likely to prove effective against extreme or egregious constitutional violations and least likely to work well against borderline misconduct that might reasonably have been committed in good faith. That is certainly true under current doctrine, which adopts more or less exactly that rule. Perhaps it also should be true, even if current doctrine could be reformed. Additionally, one can say that money damages are more likely to prove effective when the harm to be compensated is injury of the sort that the particular constitutional guarantee was intended to prevent. That would be true, for example, in excessive force cases, where the physical consequences of excessive force are precisely what constitutional doctrine attempts to prevent.[91] Money damages are less likely to be effective where the plaintiff's injury is distinct from the harm that the Constitution sought to prevent. An example would be an ordinary case of illegal search that discovers incriminating evidence leading to trial, conviction, and punishment. In a but-for sense, all of these harms flow from the illegal search, yet few would contemplate reimbursing the victim for the consequences of his or her own criminality.[92] Thus, in some contexts and

88. Of course, one need not take Levinson's argument at full flood to recognize how it complicates and enriches traditional assumptions about the deterrent effect of awarding money damages.

89. Justice Scalia, for instance, has inveighed against the idea that there is one law of qualified immunity for police, another for school teachers, and another for every kind of state official. Richardson v. McKnight, 521 U.S. 399, 416 (1997) (Scalia, J., dissenting) (immunity is determined by function, not status).

90. *See generally*, Jeffries, *Disaggregating Constitutional Torts*, *supra* note 32, at 291 (exploring remedial differences among rights and concluding that "thinking of remedies in relation to specific rights would lead to better enforcement of the Constitution").

91. *See* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALBANY L. REV. 173, 173-77 (1987) (physical injury is a prerequisite to recovery under any of these amendments).

92. For elaboration of this argument, see John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1475 (1989) ("The concern of the fourth amendment is not to curtail criminal prosecution, but to avoid unfounded (and therefore abusive) invasions of privacy. Compensation for violations of the fourth amendment should redress the invasion of privacy, not the costs of criminal prosecution.").

for some purposes, money damages could be an effective means of vindicating constitutional rights; in others, money damages are—and likely will remain—out of reach.

D. Exclusion

Three decades ago, one of the hottest topics in American law was whether the exclusionary rule should be overturned. The issue sparked a huge debate, though one often noted as "more remarkable for its volume than for its cogency."[93] Today, that question seems to have moved to the backburner, robbed of its heat by compromises that greatly reduced the costs of exclusion, followed by a long period of judicial quiescence. Some version of an exclusionary rule is built into the Fifth Amendment's privilege against self-incrimination, but until *Miranda*,[94] reliance on that remedy seems not to have been a matter of particular concern. The opposite is true of the Fourth Amendment exclusionary rule, where the remedy has always been a flash-point of contention.

Fourth Amendment exclusion began with *Weeks v. United States*,[95] but the apparent rigor of that rule was relaxed by the availability of state prosecution based on evidence excluded from federal court. Only when *Mapp v. Ohio*[96] made illegally seized evidence unavailable in any criminal prosecution did the issue move front and center. An attack by Chief Justice Burger, dissenting in *Bivens*,[97] kept up the criticism of exclusion and sparked a debate about possible alternatives.[98] Shortly thereafter, the Supreme Court rejected the theory that exclusion was a "personal constitutional right of the party aggrieved" and explained it as a "judicially created" device that should be "restricted to those areas where its remedial objectives are thought most efficaciously served."[99] Relying on this reasoning, the Court has allowed use of illegally seized evidence in grand jury proceedings,[100] in impeaching exculpatory testimony by the accused,[101]

93. WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE 109 (4th ed. 2004).

94. Miranda v. Arizona, 384 U.S. 436 (1966).

95. 232 U.S. 383 (1914) (applying the exclusionary rule in federal proseeutions).

96. 367 U.S. 643 (1961).

97. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 412-22 (1971) (Burger, C.J., dissenting).

98. References to the academic commentary can be found in CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 45 n.2 (2d ed. 1986); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365 (1999) (describing most academics as "cling[ing] to the exclusionary remedy despite its costs"); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (4th ed. 2004).

99. United States v. Calandra, 414 U.S. 330, 348 (1974).

100. *Id.*

101. Walder v. United States, 347 U.S. 62, 65 (1954) (saying that the defendant "could not provide himself with a shield against contradiction of his own untruths"); United States v. Havens, 446 U.S. 620 (1980) (applying the same rule to testimony elicited on cross-examination). *Cf.* Harris v. New

in situations where the illegal search violated the rights of someone other than the accused,[102] and in cases of "reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[103] The Court stopped short of completely eviscerating the exclusionary rule by adopting a comprehensive "good faith" exception,[104] though just how far short is open to interpretation.

As important as the explicit recognition of exceptions to exclusion is its implicit dilution through curtailed opportunities for collateral review. At the time of *Mapp*, federal habeas courts reviewed Fourth Amendment claims de novo.[105] This regime gave defendants a backstop against a lack of exclusionary enthusiasm in the state courts. In *Stone v. Powell*, the Supreme Court curtailed collateral review of Fourth Amendment claims when state courts provided the opportunity for "full and fair" litigation.[106] Egregious rulings could still be second-guessed, but state-court reluctance to order suppression in borderline violations was shielded from collateral review.

The combined effect of exceptions to the rule and restrictions on collateral review has been to leave exclusion of illegally seized evidence primarily in the hands of state courts. There surely are differences among states in the administration of the Fourth Amendment, but those differences are unlikely to affect egregious cases. Few object to suppression of evidence for flagrant illegality.[107] Difficulties arise in borderline cases, where the mere fact that the constable blundered seems an inadequate reason to set the criminal free.[108] One suspects that many courts in many places strain to avoid that result. Yet it is precisely in the context of the borderline mistake, the everyday close call that should have been made differently, that alternative remedies are hardest to find. Money damages will not lie when a reasonable officer could have believed that the search

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York, 401 U.S. 222 (1971) (applying the same reasoning to allow use of statements taken without *Miranda* warnings to impeach a defendant's in-court testimony).

102. *See* Jones v. United States, 326 U.S. 257, 261 (1960) ("one must have been a victim of [the] search or seizure, one against whom the search was directed"); Rakas v. Illinois, 439 U.S. 128, 140 (1978) (limiting standing to the defendant's own reasonable expectation of privacy).

103. United States v. Leon, 468 U.S. 897, 918-25 (1984). For a sampling of articles discussion *Leon*, see LAFAVE, SEARCH AND SEIZURE, *supra* note 98, at § 1.3 n.5.

104. *See* Illinois v. Gates, 462 U.S. 213, 217 (1983) (refusing to consider the exclusion of evidence because the issue was not presented to the Illinois courts).

105. *Brown v. Allen*, 344 U.S. 443 (1953), allowed federal habeas re-adjudication of all federal constitutional claims heard and decided in state criminal prosecutions.

106. 428 U.S. 465, 490-95 (1976) (review of state decisions applying the exclusionary rule on federal habeas corpus has insufficient deterrent effect on police misconduct).

107. *See, e.g.*, Slobogin, *Exclusionary Rule*, *supra* note 98, at 366 (endorsing exclusion for flagrant misconduct while opposing it elsewhere).

108. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered.").

was legal.[109] And any attempt to extend damages liability to the case of borderline error runs headlong into the judicial rationale for qualified immunity. In no other context is the problem of overdeterrence—more precisely, the problem of unintended deterrence of legitimate acts—more keenly felt.

In most cases, therefore, the remedy is either suppression or nothing. The lack of an effective alternative remedy under current law makes attacks on the exclusionary rule harder to justify and requires that something be put in its place.[110] Otherwise, the limitation of one remedy may leave the right without remedy, which is—or should be—intolerable.

II
STRUCTURAL REFORM INJUNCTIONS

A. A Brief History

Structural reform injunctions, like much else in modern civil rights law, owe their birth to *Brown v. Board of Education*,[111] evolving from the command to desegregate "with all deliberate speed"[112] to eliminating segregation "root and branch."[113] Continued resistance to desegregation, first in the South and then elsewhere, led the federal courts to deploy ever-more-ambitious injunctions as narrower ones proved inadequate. Simply prohibiting de jure segregation did not result in desegregation. Even after violent resistance had subsided, only token desegregation was accomplished before passage of the Civil Rights Act of 1964.[114] Title IV of that statute authorized the Attorney General to bring desegregation actions, and Title VI authorized the cut-off of federal funds to noncomplying school districts.[115] This legislation made progress, but determined school districts still managed to minimize the command of *Brown*, principally by adopting policies favoring attendance at neighborhood schools, thereby

109. Anderson v. Creighton, 483 U.S. 635, 641 (1987) (stating that qualified immunity bars recovery for unconstitutional acts that "a reasonable officer could have believed . . . to be lawful").

110. For discussion of exclusion and money damages as substitutes, see Jeffries, *Disaggregating Constitutional Torts*, *supra* note 32, at 283 ("We could conceivably have both, but unless we are willing to sacrifice the Fourth Amendment completely, we could not have neither."). Too many critics of exclusion have little to say about alternative remedies. For examples of scholars who do not ignore that issue, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811-16 (1994) (endorsing strict liability in money damages); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969-80 (1983) (proposing a system of restitution in place of exclusion); Christopher Slobogin, *Exclusionary Rule*, *supra* note 98 (endorsing money damages).

111. 347 U.S. 483 (1954).

112. Brown v. Board of Education, 349 U.S. 294, 301 (1955).

113. Green v. County School Board, 391 U.S. 430, 437-38 (1968).

114. Codified as amended as 42 U.S.C. § 2000a et seq. (2000). For an account of the history of desegregation, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 320-42 (2004).

115. 42 U.S.C. § 2000d et seq. (2000).

allowing public schools to remain as segregated as the neighborhoods they served.

The federal courts met these challenges with progressively broader remedies, from court-ordered busing to presumptions that blurred the distinction between de facto and de jure segregation.[116] These expansionist tendencies came to a halt when the Supreme Court rejected interdistrict busing, which required the transfer of students between urban schools, which had been found guilty of de jure segregation, and suburban schools, which had not. In *Milliken v. Bradley*,[117] the Court reversed the previous tendency to expand both the remedy and the underlying constitutional violation, holding instead that the busing remedy could extend only to the single urban school district found guilty of de jure segregation. Busing was limited by the traditional equitable principle that "the scope of the remedy is determined by the nature and extent of the constitutional right."[118]

This decision signaled a curtailment of structural remedies in desegregation, but not before they had spread from public schools to other institutions. Prisons, mental hospitals, and housing authorities all came under attack for practices alleged, and often found, to be violative of the Constitution.[119] Litigation against these institutions had much in common with school desegregation cases. Plaintiffs usually alleged systematic violations, not isolated occurrences, and joined as defendants entire state institutions or the officials in charge of them. Broad claims of constitutional violations were accompanied by even broader requests for relief, seeking to reform the underlying institutional conditions that led to the constitutional violations in the first place. Typically, injunctive remedies became extremely elaborate and detailed. For instance, cases against state prisons regulated everything from the size and condition of prison cells, to the quality of the food, the available medical treatment, the procedures for disciplinary proceedings, and mistreatment by prison guards.[120] In a tendency noted by Mishkin,[121] these cases became the occasion for more general efforts at institutional reform, extending beyond unconstitutional conduct. Because many of the cases were resolved by consent decrees, the proceedings came to resemble a form of supervised political bargaining. The settlement negotiations so typical of structural

116. Swann v. Charlotte-Mecklenberg Bd. of Educ. 402 U.S. 1, 28-31 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189, 205-14 (1973).

117. 418 U.S. 717, 745-47 (1974) (injunction limited to a single urban school district).

118. *Id.* at 744 (finding this to be the "controlling principle consistently expounded in our holdings").

119. For a survey of such cases, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1029-52 (2004).

120. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 602-04 (2006).

121. Mishkin, *supra* note 1, at 956 ('[T]he relief ordered often does much more than just prevent or undo constitutional violations.").

reform litigation reallocated power to different parties in a radically altered political context. This transformation reached its zenith in requests by nominal defendants for judicial coercion of greater state funding for the institutions, such as prison, mental institutions, and schools, under their control.[122]

Meanwhile, the post-*Milliken* Supreme Court had become more skeptical about structural reform generally. Standing became a heightened barrier to obtaining injunctive relief. As noted earlier, *Lyons v. City of Los Angeles*[123] restricted injunctive remedies for police brutality by requiring the plaintiff to prove that he was likely to be subjected to the disputed practices in the future. Constitutional rights were also reduced, as in prison cases requiring proof of "deliberate indifference" towards constitutionally protected interests,[124] and the remedies available to enforce them were more narrowly construed.[125] Similar developments occurred in housing discrimination, where the Supreme Court insisted on limited forms of standing and proof of intentional discrimination, both of which were only partly mitigated by litigation under federal statutes. But once again, it was school desegregation that provided the emblematic case on structural relief. In *Jenkins v. Missouri*[126] the Supreme Court reversed an injunction requiring lavish provision for a "magnet school" designed to attract white suburban students to the inner city. The Court reasoned, as in *Milliken*, that the scope of the injunction should be confined to the scope of the violation and that the financial burdens imposed by the injunction were out of proportion to the constitutional compliance it achieved.[127] This decision ended any presumption in favor of structural relief, at least in the absence of a clear showing that lesser remedies were inadequate.

Just as the first restrictive decisions were handed down—and partly out of concern for their implications—articles appeared offering systematic scholarly analyses of structural reform litigation. In time, it became almost accepted wisdom in the academy that structural reform litigation was

122. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Schlanger, *supra* note 120, at 562-63 ("Prison and jail officials were frequently collaborators in the litigation.").

123. 461 U.S. 95 (1983). For other such cases, see Rizzo v. Goode, 423 U.S. 362, 371-73 (1976) (inadequate evidence that plaintiffs were likely to suffer from future police misconduct); Warth v. Seldin, 422 U.S. 490, 502-08 (1975) (insufficiently specific allegations that plaintiffs would be victims of housing discrimination).

124. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (deliberate indifference to serious medical needs); Wilson v. Seiter, 501 U.S. 294, 302-04 (1991) (deliberate indifference to conditions of confinement); Farmer v. Brennan, 5112 U.S. 825, 832-34 (1994) (deliberate indifference to violence from other prisoners).

125. Lewis v. Casey, 518 U.S. 343, 357-61 (1996) (overly broad injunction requiring access of prisoners to legal assistance and legal materials).

126. 515 U.S. 70 (1995).

127. *Id.* at 87-101.

"something over and done with,"[128] and that a hopeful period in institutional reform had been brought to an end by the growing conservatism of the federal bench.[129] The obituary, however, was premature. As scholars have persuasively documented, structural reform litigation continues. Charles F. Sabel and William H. Simon refer to the "protean persistence of public law litigation"[130] and say that the movement is "still-growing."[131] In the words of Margo Schlanger, "litigation practice has refused to conform to the account of decline."[132] Schlanger showed that even in the area of prison litigation, structural reform cases continue, albeit at a reduced rate, despite the restrictions of the Prison Litigation Reform Act.[133] In areas unburdened by legislative intervention, there is said to be "no indication of a reduction in the volume or importance" of such suits.[134]

There has been, however, a qualitative change in the nature of structural reform litigation, making it both less intrusive and more acceptable. Early cases saw broad claims leading to broad relief which tended to mature into specific regulation of everything in sight,[135] a style of relief that has aptly been termed "command-and-control."[136] More recent cases are likely to be narrower and more focused, to involve heavier investment in demonstrating causal links between challenged conditions and constitutional violations, and to result in decrees of a different character.[137] Newer decrees typically avoid the "kitchen sink" approach to institutional reform[138] in favor of orders that identify goals the defendants are expected to achieve and specify standards and procedures for measurement of performance.[139] Data collection, monitoring and reporting requirements, performance measures, and mechanisms for ongoing

128. ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 10 (2003) (characterizing conventional wisdom) *quoted* in Schlanger, *supra* note 120, at 553.

129. SANDLER & SCHOENBROD, *supra* note 128, at 10 (again describing conventional wisdom). *See* also Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 144 (2003) (describing judicial "anti-activism").

130. Sabel & Simon, *supra* note 119, at 1021.

131. *Id.* at 1018.

132. Schlanger, *supra* note 120, at 553 (recounting a conclusion reached in Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999)).

133. Schlanger, *supra* note 120, at 569-602 (providing detailed evidence of the continuation of court-ordered correctional reform after passage of the PLRA and analyzing the impact of the provisions of that statute).

134. Sabel & Simon, *supra* note 119, at 1018-1019.

135. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 41 (1998) (describing the "comprehensive code for prison management" promulgated by the federal courts).

136. Sabel & Simon, *supra* note 119, at 1019.

137. For detailed description and analysis of the evolution of decrees in correctional cases, see Schlanger, *supra* note 120, at 601-21.

138. *Id.* at 602-05.

139. Sabel & Simon, *supra* note 119, at 1019-20.

reevaluation and auditing are often prominently featured.[140] As a result, structural reform injunctions have been more fine-grained, more process-oriented, and in important ways less intrusive.[141]

Thanks to the remarkable efforts of dedicated scholars, more information is available than ever before about the incidence, targets, strategies, and successes of structural reform litigation.[142] This information is of course valuable to scholars but is primarily important to practitioners in the field. Consultation among the parties, which has always been necessary to resolving litigation on this scale, has led to the exchange of information and experience on which remedies actually work. Remedies effective in one case are copied in another.[143] As the scope and contentiousness of institutional reform litigation have diminished, so has the force of the objections that it usurps processes better left to state and local government. Where Congress has not acted to restrict injunctive relief, structural reform litigation has not markedly declined. Rather, it has stabilized as a form of litigation with a range of generally accepted remedies adopted in a few leading cases and imitated elsewhere.

B. Characteristics of Structural Remedies

The nature of structural remedies was first described in a seminal article by Abram Chayes.[144] For him, as for subsequent commentators, school desegregation cases were the paradigm. They proposed structural remedies to resolve systematic unconstitutionality in state institutions. Chayes contrasted this new form of litigation with the traditional "bipolar lawsuit" involving claims between two (or at least a few) parties, clearly aligned as plaintiffs or defendants, and seeking only to compensate for past harm. For Chayes, structural remedies had three defining features (among a longer list of features of public law litigation generally):

> [1] Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequence for many persons including absentees.

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140. *See generally id.* at 1021-52.

141. Schlanger, *supra* note 120, at 602.

142. *See* Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 U.M.K.C. L. REV. 153 (2006) (providing references to various on-line data bases of court records).

143. For an interesting discussion of the law in structural reform cases as spreading horizontally from trial court to trial court, building into a network of national standards for the administration of state and local institutions, see David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004).

144. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

> [2] The remedy is not imposed but negotiated.
> [3] The decree does not terminate judicial involvement in the affair: its administration requires continuing participation by the court.[145]

These features liberate the relief that can be ordered from the constraints of the traditional "bipolar lawsuit." Together with other features of public law litigation that Chayes described, these characteristics transform litigation into a kind of ad hoc administrative rulemaking,[146] with courts actively involved with a wide range of parties on all sides of a dispute, seeking to devise workable solutions to social problems only broadly identified by the applicable law.

There was much to be said for this vision of public law litigation at the time, and much more has been said since, both for and against it. Much of this debate reflects the unspoken assumptions that public law litigation was confined to a few narrowly defined subjects, with parties in a characteristic posture, and almost always in federal court. The usual subjects are school desegregation, prison and jail conditions, reform of mental hospitals and other custodial institutions, housing discrimination, and occasionally police brutality (at least before *Lyons* and *Rizzo* foreclosed most private actions on this ground).[147] This limited range of subjects has remained surprisingly constant, with recent articles discussing cases in the same areas that Chayes addressed three decades ago. None of them involves private institutions, with the limited exception of housing discrimination cases, which occasionally are brought against private developers along with public housing authorities.[148]

The party structure in public law litigation has exhibited a remarkable consistency in other respects as well. Most plaintiffs are private individuals, often supported by civil rights groups or public interest attorneys, and the defendants are almost always state or local institutions and officers. State officials play a limited role as plaintiffs, even if they might support the plaintiffs' position in the "multi-polar" party structure of public law litigation. As nominal defendants, they might take positions

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145. *Id.* at 1302. These were originally numbers 4, 5, and 6 on a longer list of features of public law litigation generally.

146. *See id.* at 1310-13 (comparing public law litigation to the administrative process and finding it superior).

147. Sabel & Simon, *supra* note 119, at 1021-52 (summarizing developments in public law litigation in these fields); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976).

148. Even in this area, the presence of private defendants is far more common in traditional "bipolar" housing discrimination lawsuits. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 549-62 (2001) (describing claims under the Fair Housing Act).

Where private institutions have been the target of institutional reform, litigation has long been accepted as the necessary means of adjusting the rights of interested parties, through proceedings in bankruptcy, receiverships, and class actions. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

anywhere along a spectrum from active opposition to tacit support of the plaintiffs' claims.[149] Nevertheless, it is the individual plaintiff, acting as a "private attorney general,"[150] who almost always take the leading role in initiating public law litigation.

Federal officials, by contrast, rarely appear as defendants, again with the exception of fair housing cases where they frequently support the plaintiffs.[151] Federal programs are rarely the target of public law litigation, perhaps because the states sponsor far more programs, with fewer resources but more operational responsibility. The federal government runs only a small percentage of the nation's schools, mental health facilities, prisons, and police departments, and they operate with greater financial support and without the wide variation in quality and standards found among the states. In all of these areas, federal officials are far more likely to appear as plaintiffs, under authority granted by Congress to bring public enforcement actions on most of the subjects commonly addressed in structural reform litigation.[152] Their budgets, of course, are limited, and there are often political constraints. For these and perhaps other reasons, federal authorities bring only a small fraction of the possible cases, and their claims have not been the focus of debate. When federal officials do engage in structural reform litigation, the remedies they seek are not thought to be as problematic as those sought by private plaintiffs.[153]

Another pervasive feature of public law litigation is the preeminence of constitutional claims. Plaintiffs typically bring suit under section 1983, alleging violations of constitutional rights and perhaps adding claims under other federal statutes. But these statutes, in cases usually identified as public law litigation, typically do not add much to the constitutional grounds for imposing liability or to the scope of available remedies. When a statute does provide for greater liability or additional remedies, such as the Voting Rights Act of 1965,[154] litigation under it gradually migrates out

149. Diver, *supra* note 122, at 562-63.

150. Newman v. Piggie Park Enterprises 390 U.S. 400, 402 (1968) (per curiam) (a plaintiff who obtains an injunction in a civil rights case, "does not do so for himself alone but also as a 'private attorney general'").

151. *See* Zaring, *supra* note 143, at 1047-57 (describing litigation by and against HUD); Sabel & Simon, *supra* note 119, at 1047-50 (describing remedies in public housing cases).

152. *See, e.g.*, Title VI of the Civil Rights Act of 1964, codified as amended as 42 U.S.C. § 2000d et seq. (2000) (authorizing the cut-off of federal funds to segregated school districts); the Civil Rights of Institutionalized Persons Act of 1980, codified as amended as 42 U.S.C. § 1997a et seq (2000) (authorizing the Attorney General to sue for constitutional violations in state-run prisons and jails and facilities for the mentally ill and the mentally retarded); the Fair Housing Act of 1968, codified as amended as 42 U.S.C. §§ 3601-19, 3631 (2000) (authorizing private and public actions for housing discrimination).

153. *See* Sabel & Simon, *supra* note 119, at 1091 & n. 218; Zaring, *supra* note 143, at 1068-70.

154. 42 U.S.C. § 1973 (2000) et seq. For example, § 5 of the Act, codified as amended in 42 U.S.C. § 1973c (2000), creates an expedited procedure for enjoining changes in election practices that have not been precleared in covered states.

of the general category of public law litigation and into some more specialized form with narrower and more tractable issues. In these areas, the federal statute is taken to have solved whatever remedial problems lie within its scope. So, for example, while Chayes considered voting rights cases successful examples of public law litigation,[155] today they are rarely thought of in that context at all.

We do not advance these presumed features of public law litigation as a fixed or complete description of the phenomenon. On the contrary, we think they are not. Nor do we contend that these features are present in every case regarded as public law litigation. The term is not subject to hard-and-fast definition. Nevertheless, we believe that these features have exerted a pervasive influence over how public law litigation has been defined, influencing the way its problems are perceived and how they might solved. As a consequence the analysis of structural remedies remains confined to a selection of remarkably difficult cases, in which a combination of resistance to reform and lack of political support makes the resulting remedial issues especially difficult.[156] In short, the debate about the general utility of structural reform litigation has been preoccupied by a narrow range of the hardest possible cases.

This debate has also taken a curiously truncated view of the history of constitutional remedies. Structural reform litigation has been judged to be either a good idea or a bad idea, with or without adequate precedents in common law and equity jurisprudence. In doing so, both its supporters and its critics have neglected the context in which constitutional remedies developed. Structural relief cannot be justified as a simple extension of the traditional power of courts of equity to order prohibitory injunctions, nor condemned as illegitimate because it imposes affirmative obligations on government officials. As we saw in Part I, the remedies historically available for government wrongdoing developed in an era in which the scale of government activity and the scope of constitutional rights were far more limited than they are today. Without government programs for public housing and without constitutional rights against discrimination, no problem of structural relief for housing discrimination could even arise. From this perspective, the development of structural remedies appears to be a natural consequence of the increasing scope and complexity of government and the corresponding growth of constitutional restraints on official action.

155. Chayes, *supra* note 144, at 1309 ("Legislative apportionment, although bitterly opposed as an arena of judicial intervention, seems to have worked out reasonably well."). Chayes initially offered a much longer list of instances of public law litigation. *Id.* at 1284 (adding employment discrimination, antitrust, securities fraud, bankruptcy, union governance, consumer fraud, environmental cases).

156. For an extended and, we think, exaggerated argument for this position, see GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

By the same token, courts have rarely been able to solve the problems identified by structural reform litigation without the assistance of the political branches of government. More commonly, such litigation has placed these problems on the agenda for political reform, by calling them to the attention of the other branches of government. While Congress might respond with restrictions on judicial remedies, as it has done with a variety of forms of injunctive relief it has also reached the opposite conclusion, as illustrated by the civil rights legislation of the 1960s. The next section of this Article takes up another example of such legislation, the Violent Crime and Law Enforcement Act of 1994,[157] which authorizes the Attorney General to sue to enjoin police misconduct. This act, like virtually all recent civil rights legislation, was preceded by private litigation that sought to achieve the same objectives. We return to the lessons from this pattern of litigation in the Conclusion.

C. Structural Reform of Law Enforcement.

Of all the areas in which structural reform is generally accounted a failure, by far the most important is law enforcement.[158] Here the increasing conservatism of the federal bench—the usual explanation for the supposed retrenchment in structural reform litigation—is reinforced by specific doctrinal obstacles. *Rizzo v. Goode*[159] was an early Supreme Court case involving an order requiring the Philadelphia police department to institute approved procedures for handling citizen complaints. The Supreme Court found the order an "unwarranted intrusion by the federal judiciary into the discretionary authority" of law enforcement, and reversed.[160] The Court's principal objection was that proof of nineteen specific incidents of misconduct did not establish a basis for systemic relief against the city. Basically, the Court saw the injunction as transmuting disputes involving individual officers into structural reform against the city as a whole without sufficient proof: "[T]here was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [city officials]—express or otherwise—showing their authorization or approval of such misconduct."[161] Although *Rizzo* might have been viewed as dependent on its facts, the decision was subsequently seen as a strong inhibition against inferring systemic practices from street-level behavior. A second doctrinal

157. Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 18, 20, 28, and 42 U.S.C.).

158. Even Sabel and Simon, who are generally committed to the idea that structural reform flourishes, admit that its acceptance in policing "has been slower than in the other areas." Sabel & Simon, *supra* note 119, at 1043.

159. 423 U.S. 362 (1976).

160. *Id.* at 366.

161. *Id.* at 371.

obstacle was created by *City of Los Angeles v. Lyons*,[162] which made standing for injunctive relief depend on a disciplined showing of the prospect of future harm. As a result, many prospective police abuse cases failed for lack of a case or controversy.[163] Together, *Rizzo* and *Lyons* sharply constrained the structural reform of law enforcement.

Viewed as questions of comparative remedies, *Rizzo* and *Lyons* might be seen as implicit endorsements of money damages. After all, the police abuses that occurred in those cases injured identified individuals in non-trivial ways (including Lyons himself, who had been hurt by the "chokehold" he sought to enjoin in the future). Those individuals could have brought damages actions which, if successful, would have redressed their individual harms *and* created a financial disincentive for continued abuse. Any shortfall in the economic attractiveness of such cases would presumably have been corrected by the prospect of attorney's fees. The cumulation of judgments awarding significant damages plausibly could have prompted systemic reform in the pluralistic, bottom-up way characteristic of the common law. It is worth asking, therefore, whether damages actions provided adequate systemic relief in the circumstances of *Rizzo* and *Lyons* or, put differently, whether the inhibition of injunctive relief accomplished in those cases was really all that important.

While the reasoning may be open to debate, the answer to these questions seem clear. Damages actions are notoriously unsuccessful in vindicating claim of police abuse. Except in a few high-profile cases, usually accompanied by videotapes or other incontrovertible evidence of misconduct,[164] those who seek damages for excessive force by law enforcement routinely fail.[165] No doubt many claims are unfounded. Others founder on qualified immunity, which plays a large role in immunizing official misconduct when constitutional standards are evaluative or unclear. The doctrinal question in excessive force cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[166] Far from being precise and rule-like, this standard for excessive force is inevitably judgmental and irreducibly vague. It follows that qualified immunity covers a correspondingly broad range of borderline misconduct. The more uncertainty in the constitutional standard, the more

162. 461 U.S. 95 (1983).

163. For insightful analysis of *Lyons*, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984).

164. *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004) (listing the Rodney King, Abner Louima, and Amadou Diallo cases, among others); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1282-90 (1999) (discussing abuses by the Chicago police department).

165. Armacost, *supra* note 164 at 467-72 (discussing the obstacles to successful actions for damages).

166. Graham v. Connor, 490 U.S. 386, 397 (1989) (citation omitted).

room exists for reasonable belief in the legality of one's acts and the larger the doctrinal shield against damages liability.[167] Perhaps even more important than the protective liability rule is the sympathy naturally elicited by conditions of emergency. Judges and juries do not like to imagine themselves in the potentially life-threatening situations faced by police officers. From all that appears, they bend over backwards to exonerate officers from liability for seriously flawed decisions, perhaps because of fear that they could not do better and still do their job. Finally, there is always the possibility, which looms large in the literature and perhaps on the street, of cover-up. To the extent that police follow a "code of silence" with respect to officer misconduct, those seeking to vindicate their rights in actions for damages face unusual evidentiary obstacles.[168]

Whatever the causes, it seems clear that damages actions are not a generally effective remedy against abusive and excessive use of force by law enforcement. The inhibitions imposed by *Rizzo* and *Lyons* are therefore highly consequential. They obscure the benefits of epidemiological assessments of police violence and preclude the use of systemic remedies for what are, at bottom, institutional and systemic problems. The potential benefits of such remedies are displayed in the handful of structural reform cases brought by the Department of Justice pursuant to the post-Rodney King enactment of federal statutory authority to proceed against deprivations of federal rights resulting from a "pattern or practice of conduct by law enforcement officers."[169] Using this authority the Department of Justice has brought several lawsuits against police departments and investigated a number of others. At least five cases have resulted in consent decrees requiring important structural reforms and investigations in other cases have resulted in more or less formal agreements to take similar steps.[170]

While the decrees vary in detail, common elements include requiring explicit policies on the use of force, mandating data collection about

167. *See generally*, Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 15, at 77.

168. For a detailed analysis of these obstacles to individualized, after-the-fact litigation of police in Armacost, *supra* note 164, at 464-72.

169. 42 U.S.C. § 14,141(b) (2000). For an account of the legislative history of this statute, see Armacost, *supra* note 164, at 526-31; Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816-17 (1999). For criticism of the scope and effectiveness of the statute, arguing for private enforcement, see Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1385, 1404-12 (2000).

170. For a list of the consent decrees, agreements, and letters of investigation, see the Department of Justice's website, at http://www.usdoj.gov/crt/split/findsettle.htm#Police%20Misconduct%20Settlements. For a summary and assessment of the main provisions of such decrees, see Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 29-51 (2003); SAMUEL L. WALKER, REPORT OF THE CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION: A 10-YEAR ASSESSMENT 2-4 (2005).

incidents of force and the reasons for them, prescribing training of officers on a variety of situations related to the use of force, requiring videotaping of certain kinds of encounters, and specifying data to be preserved in ways that allow correlation with other information on police officer performance.[171] Equally important is the emphasis on procedures designed to strengthen departmental awareness and control. Managers are required to track incident reports and to analyze that information with respect to individual officers, police commands or units, geographical areas, racial identity, etc. Figures that show concentration of incidences in the hands of a few officers, or a particular shift, or with respect to a particular group of citizens, are early warning signals that require managerial inquiry.[172] Both non-punitive and disciplinary sanctions are provided to elicit and/or compel appropriate behavior. Finally, the decrees typically require audits to determine whether the record-keeping and data-reporting obligations are discharged in good faith and generally to assess the integrity of the mandated procedures.

There is every reason to believe and little reason to doubt that these decrees have been effective in raising the professionalism of delinquent departments, improving managerial knowledge and oversight, and thereby reducing the incidence of constitutional violations.[173] The very low number of such actions brought by the Department of Justice might mean that there are very few law enforcement agencies in need of such intervention or, more plausibly, that the Department of Justice faces financial and political constraints on its effectiveness. In some cases, at least, privately initiated structural reform actions could fill the gap. Even though there are important differences in political context, the purely remedial issues are the same in publicly and privately initiated litigation. Remedies proven to be effective in one form of litigation are likely to be effective in the other. Remedies for police misconduct obtained by the Department of Justice should therefore be equally effective, and perhaps therefore equally available, in actions by private parties. The one can serve as a model for the other; the structural remedies obtained by the government can provide

171. Observers generally agree on these salient features of the consent decrees. *See* Armacost, *supra* note 164, at 529-30 & n. 483; Livingston, *supra* note 169, at 826-41; Sabel & Simon, *supra* note 119, at 1044.

172. *See* sources cited in note 171, *supra*.

173. The most thorough study of one of these consent decrees, involving the Pittsburgh police department, concluded that it "dramatically changed the culture of the Bureau of Police" and that "[o]fficers and supervisors are accountable for their interactions with the public in a way that is qualitatively different from the situation that existed prior to the decree." ROBERT C. DAVIS ET AL., FEDERAL INTERVENTION IN LOCAL POLICING: PITTSBURGH'S EXPERIENCE WITH A CONSENT DECREE 35 (2002). There was, however, no way to measure numerically the improvements made by the decree because record keeping was so poor before the it took effect. *Id.* at 38-39. The principal drawbacks of the consent decree appear to be the inevitable consequence of any system of centralized monitoring: complaints from rank-and-file officers of lower morale, increased record keeping, and decreased flexibility in responding to situations on the job. *See id.* at 37-38.

the template for remedies that might be made available, on proper showings, to private plaintiffs.[174] Thus, an effective remedy in one case could provide a baseline for assessing what would work elsewhere, even if variations must be acknowledged and accommodated from one situation to another.

But what about *Rizzo* and *Lyons*? To the extent those decisions reflect intransigent judicial hostility to structural reform in this area, the problem may persist. We think, however, that the specific doctrinal obstacles created by these decisions are insuperable only if assumed to be so. *Rizzo*, for example, concerned the difficulties of aggregating specific incidents of police misconduct into generally applicable policies or practices suitable for judicial supervision. What Margo Schlanger has called the "increasing rigor of injunctive practice"[175] may well help resolve this problem. What she said with respect to correctional litigation is likely true for structural reform generally:

> When [structural reform] litigation was in its infancy, causation seemed obvious, and belaboring the topic seemed correspondingly hypertechnical. But over time, it came instead to seem appropriate to require plaintiffs seeking court-enforced relief to make a fairly rigorous showing of the precise nature of their causal claims.[176]

We think it highly appropriate to require of plaintiffs a rigorous showing of their causal claims, and that the thorough, sophisticated, resource-intensive lawyering now available in injunctive class actions would be equal to the task.[177]

We also think that *Lyons* poses no insurmountable barrier. The lower courts have limited *Lyons* to cases in which the plaintiff's own misconduct led to the disputed police action.[178] It was, so to speak, "want of equity" on the plaintiff's own part that led the Supreme Court to deny him standing to obtain an injunction.[179] Where such misconduct is absent, the lower courts have upheld standing to seek injunctive relief. This line of cases demonstrates that *Lyons* does not categorically bar privately initiated structural reform suits against law enforcement; it also may be subject to progressively narrower interpretations, denying standing only to plaintiffs who provoke police misconduct.

Of course, actions brought by the Department under explicit statutory authority are in many ways the ideal solution. Although relatively few of

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174. Zaring, *supra* note 143, at 1072-77 (2004).

175. Schlanger, *supra* note 120, at 621.

176. *Id.* at 613.

177. For a wonderful account of the advent of big-time lawyers in correctional reform litigation, see *id.* at 617-21.

178. Brandon Garrett, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1822-26 (2000).

179. 461 U.S. at 108.

these cases are brought, their influence greatly exceeds their number.[180] An action brought by federal officials represents a political endorsement of the need for structural relief, usually to remedy pervasive constitutional violations. Furthermore, when the litigation is settled, it serves as an acceptable form of bargaining between governments, outside the ordinary political processes of revenue sharing and legislation but still under political control. The concern that state officials use the litigation as a back-door way of obtaining increased funding is correspondingly lessened. If the case is not settled and the court orders structural relief, the resulting interference with state and local government appears to be less problematic, and for much the same reasons. Unlike court orders obtained by private plaintiffs, those obtained by federal officials involve some degree of political accountability in the decision to sue and to seek structural relief. The democratic deficit is rapidly resolved when the real attorney general, not a private attorney general, decides to sue.

That said, it does not follow that the absence of litigation by the Department of Justice should preclude suits by private litigants. There are a variety of reasons, including limited resources and political sensitivities, that might cause the Department to stay its hand. When private plaintiffs, operating without the advantages of government support, can nevertheless prove a policy or pattern of unconstitutional conduct, they should be allowed to proceed. The fact that such actions would proceed in the path of publicly initiated structural reform litigation would go a long way toward clarifying the appropriate reach of judicial remedies. There is, of course, no reason to return to the old "kitchen sink" approach to structural reform,[181] but neither are there reasons to remain fixed in opposition to structural reform merely because of the excesses of its past. Modern structural reform cases, whether publicly or privately initiated, show a clear prospect of meaningful and effective enforcement of constitutional rights that otherwise will be often violated. As always, the governing principle is necessity.

CONCLUSION

Mishkin's caution against early enthusiasm for structural reform injunctions was the starting point for this Article and the point to which we now return. In its time and context, Mishkin's criticism was sound. Too often, structural decrees reflected an assumption of judicial omnicompetence. The rush to reform where reform was needed sometimes led courts to move too far, too fast, and too coercively. The denigration of political authority in decrees that sought to regulate every detail of

180. Zaring, *supra* note 143, at 1068-70; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2024 (1999).

181. *See* Schlanger, *supra* note 120, at 605.

institutional life may have been necessary, but was also a weakness. Mishkin was surely right in emphasizing the "democratic political processes which must remain the core of our polity."[182] It follows that structural reform litigation is most likely to succeed when it generates political support, either through legislation or executive action. When it is forthcoming, political support diminishes the objections to public law litigation as a derogation from the democratic process and increases the likelihood that institutional reform will succeed. There is, of course, no guarantee that such support will be forthcoming. As the Prison Litigation Reform Act demonstrates, the opposite reaction is also possible.

Three considerations lead us to believe that, except where precluded by legislation, structural reform injunctions still have a valuable role to play in enforcing constitutional rights. The first is the long history of judicial innovation and flexibility in devising appropriate remedies for constitutional violations. Radical assumptions of judicial incapacity are negated by that history. In our view, the crucial question is not judicial power but rather the conditions under which that power can be usefully and effectively exercised. Second, in that connection we are encouraged by the maturation of structural reform remedies in the years since Mishkin wrote. They have evolved from bare-knuckled "command and control" decrees to orders that emphasize data collection, measurement, process, and participation. If sensitively handled, such decrees can be "accountability reinforcing."[183] They enable courts to play a constructive role in identifying problems, proposing solutions, and eliciting the consent and acquiescence of the political branches. Finally, and most fundamentally, we think structural reform decrees are justified by the absence of effective alternatives. That ought to be a precondition for any form of structural relief. Once it is shown that, viewed systemically and pragmatically, institutional reform is *necessary* for the vindication of constitutional rights, courts should take the lead.

182. Mishkin, *supra* note 1, at 976.

183. Sabel & Simon, *supra* note 119, at 1090.