CONSTITUTIONAL PRIVATE LAW

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ABSTRACT

Constitutional private law is like ordinary private law. It imposes relational obligations on government officials, like duties to use only reasonable force against a person or not to fire an employee for discriminatory reasons, that are analogous to the rules of tort, property, or contract. Constitutional public law, by contrast, controls when and how governments validly change non-constitutional legal rules. When a government violates constitutional public law, as when Congress exceeds its Article I powers, the government fails to change non-constitutional legal rules but does not breach a relational duty to anyone. That difference should reframe both forms of constitutional law. It explains why constitutional remedies might either under- or over-protect the interests safeguarded by constitutional public law. And it shows that the best defense of constitutional private law draws on a vision of ordinary private law as a system for redressing wrongs, and that constitutional private law should be less concerned about constitutional theory and more concerned about articulating basic norms of interpersonal justice for those with official authority.

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INTRODUCTION

Constitutional law is supposed to be public law. It concerns the "powers and responsibilities of governments" and the "rights and duties of individuals in relation to governments."[1] But in fact much of constitutional

1. John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012); *see also, e.g.*, Thomas W. Merrill, *Private and Public Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575 (Andrew S. Gold et al. eds., 2020) (differentiating private and public law and exploring their relationship). For critics of the distinction, see, for example, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–52 (1982);

law is more like private law. For many claims under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[2] often called "constitutional torts," the constitutional claims are analogous in structure and content to private law. As to structure, these rules of constitutional law comprise relational obligations imposed on government officials, and the breach of such duties confers upon the plaintiff a legal power to seek (usually) damages. As to normative content, the reasons for imposing liability and the elements of such claims often resemble the reasons for and elements of private-law claims. The twist is that the duty breached is thought to be imposed by some provision in the Constitution precisely because the official acts on behalf of a government.[3] So a plaintiff might seek damages for a Fourth Amendment excessive-force claim rather than for battery, for a violation of the Takings Clause rather than for trespass, or for a discriminatory firing under the Equal Protection Clause rather than for breach of contract or employment discrimination.

Call this "constitutional private law," a term I use because of the analogy between these constitutional rules and ordinary private law.[4] It is a kind of private law because of its structure and content, but it differs because it involves obligations of government officials, imposed by virtue of their position as government officials, to conduct themselves in a particular manner. Constitutional private law is also a kind of constitutional law, but it is distinctive because it imposes relational obligations concerning how government officials conduct themselves with respect to private persons. And the conventional view is that those obligations are imposed on officials because of some textual provision of the Constitution. The breach of such an obligation presumptively requires a commensurate remedy to restore the normative equilibrium between the parties.

Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1326–29 (1982).

2. 403 U.S. 388 (1971).

3. *See* Lindke v. Freed, 601 U.S. 187, 194 (2024) ("[Section 1983] protects against acts attributable to a State, not those of a private person."); Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 808 (2019) (stating that the Court's "state-action doctrine distinguishes the government from individuals and private entities."); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985).

4. The term "constitutional private law" has sometimes been used in a different sense to refer to private law inflected by constitutional norms. For example, "constitutional human rights" might apply "in private law" either by creating "rules of relief which are outside the private law" or by "strengthened indirect application" of constitutional norms in private law. Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 260 (1996). By contrast, constitutional private law in the United States applies only to government officials, because the state-action doctrine precludes application of constitutional private law to nongovernmental actors; constitutional duties lack "horizontal effect." *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 411–12 (2003); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 80 (2003).

Constitutional private law includes claims for excessive force, false arrest, and malicious prosecution under the Fourth Amendment; claims for deliberate indifference to medical needs, poor conditions of confinement, and excessive force under the Eighth Amendment; claims under the Due Process Clause that some protected interest has been denied without sufficient procedural care; claims for selective prosecution, retaliatory arrest, or employment discrimination under the First Amendment and the Equal Protection Clause; and more. The duties pertain to relationships of trust or dependence between officials and non-officials, and sometimes to contractual relationships between government employers and employees, instead of relationships of formal equality between non-officials. Here, constitutional law looks quite a lot like ordinary private law, though the content of constitutional private law is modified to conform to the unique context of official authority. But the "constitutional" origins of these rules of law invite disputes about constitutional interpretation and constitutional theory, disputes which might distract from the development of ordinary private law in the context of official misconduct or even of a general common law for officers. The constitutional framing also privileges federal courts—rather than state courts or (federal and state) legislatures—as fora for articulating theories of interpersonal justice.

Constitutional private law differs from constitutional public law. The public variant channels and limits the legal powers of the government—usually through legislatures and courts—to alter or determine legal rights of persons subject to their jurisdiction. But constitutional public law does not impose correlative rights and duties like the private law framework. While constitutional *private* law remediates the wrongful *conduct* of officials, constitutional *public* law determines the validity (or not) of *alterations* to non-constitutional legal rules.[5] Those invalidity rules sometimes matter in adjudication, but they matter because adjudication about non-constitutional legal entitlements sometimes implicates a dispute about the validity of the alteration of such legal entitlements—as when a criminal prosecution brought under an unconstitutional statute aims to deprive a person of her pre-constitutional liberty interest, or when a civil action seeking money from a defendant invokes an unconstitutional state law.[6] Said too simply, constitutional private law is for police; constitutional public law is for legislatures and judges.

5. *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324–25 (2015) (holding that the Supremacy Clause is "not the 'source of any federal rights'" and "does not create a cause of action" but "instructs courts what to do when state and federal law clash" (citation omitted)).

6. *See* Bond v. United States, 564 U.S. 211, 215 (2011) (criminal prosecution under unconstitutional federal statute); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 565 (1996) (civil action implicating unconstitutional application of state law).

That difference between constitutional private and public law alters the structure of constitutional adjudication. Constitutional private law is adjudicated when a victim seeks redress from an official for breaching a duty—a duty thought to be imposed by the Constitution which correlates to a legal right held by the victim. The point of adjudication is to redress a *constitutional injury*. By contrast, constitutional public law becomes the subject of adjudication when a litigant challenges the alteration of some *non-constitutional legal rule* by invoking a constitutional rule that purportedly precludes that alteration. Indeed, even some § 1983 claims involve constitutional public law when the gravamen of the dispute is that the official defendant has altered (or threatened to alter) the plaintiff's legal entitlements by unconstitutional, and thus invalid, means.[7]

The result is that constitutional public-law litigation disjoins the reason for adjudication and the reason for the constitutional rule. Concrete examples illustrate the point. A plaintiff seeking damages for a warrantless arrest argues that she is the victim of the breach of a constitutional conduct rule that commands that the official cannot arrest her.[8] She invokes constitutional private law. But a defendant claiming that she cannot be convicted of a crime defined by a law that exceeds Congress's enumerated powers invokes a constitutional rule about the allocation of governmental authority, and she invokes that rule to prevent the government from depriving her of a pre-constitutional liberty interest. She invokes a rule of constitutional public law.

Disaggregating these two kinds of constitutional rules, and two corresponding modes of constitutional adjudication, should reframe both forms of constitutional law, revising their plausible justifications and the institutions to which those forms of constitutional law are committed.

For constitutional private law, the analogy to private law suggests that its dominant theoretical framework is incorrect. Discussions of § 1983 and *Bivens* sometimes frame damages claims as mechanisms to check and constrain, or to demand compensation from, an undifferentiated "government."[9] That perspective justifies damages suits against officials to the extent that damages might reduce the likely incidence of governmental misconduct. Or it justifies the suits because they offer compensation for

7. *See* McDonald v. City of Chicago, 561 U.S. 742, 752 (2010).

8. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389–90 (1971); Monroe v. Pape, 365 U.S. 167, 169 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

9. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS, at xv (1983) (discussing "the problem of governmental wrongdoing and its control"); *cf.* DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE 173–79 (2024) (arguing that the "common law model of liability and adjudication . . . loses its conceptual grip when transposed to the very different situation of the state's dealings with its citizens").

governmental wrongs. But on those perspectives, constitutional private law is either a substitute for any number of alternative mechanisms for controlling governmental misconduct—including bureaucracy, criminal law, ethics rules, elections, other non-damages judicial remedies, and so on—or just a second-best alternative to compensation by the government itself while sovereign immunity precludes direct governmental liability.[10] Those perspectives reduce damages remedies to one mechanism among many that, empirically, might or might not be effective, thus demanding an inquiry that judges might not be well-suited to undertake. And even when damages are said to be justified because they hold wrongdoers "individually accountable to those whom they have injured," the tendency is to sacrifice that aim as long as *other* non-damages constraints render the government generally within the bounds of law.[11] These arguments thus invite the dominant critiques of *Bivens*: that federal courts are poorly situated to weigh the pros and cons of a damages remedy and that there is nothing unique about damages among other alternative remedies.[12]

The vision of constitutional private law as continuous with private law—indeed, a particular form of private law associated with the family of non-instrumental theories like corrective justice and civil recourse[13]—avoids such objections. If constitutional private law concerns the obligations of specific officials to specific persons, then efforts to justify these doctrines as mechanisms to control "the government" by controlling its agents miss the point. So too with efforts to justify the doctrine as fulfilling obligations of "the government" to compensate some subset of persons. Instead, constitutional private law aims to correct wrongdoing by officials insofar as those officials have obligations to specific victims. Because the obligation is the official's, responsibility to correct the breach is the official's too. Of course, that theory of constitutional private law has its own challenges, including vexing questions about the reasons for and content of the obligations imposed on officials. But the private law justification may be the best that is available for this pocket of constitutional law.

The shift in emphasis to the private law aspect of constitutional private law has further implications for the development of doctrine and the

10. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 39 (1963) (suggesting that suits against officers and the government are substitutes).

11. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 970–972 (2019).

12. *See* Egbert v. Boule, 596 U.S. 482, 496 (2022) ("The *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action."); *id.* at 497–98 (deeming an administrative "grievance procedure" an adequate alternative remedy).

13. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020); ERNEST J. WEINRIB, CORRECTIVE JUSTICE (2012).

institutions responsible for that development. If what is normatively important about constitutional private law is not that the duties are imposed by the *Constitution* but that the form and content is analogous to private law, then constitutional private law should be less concerned with the problems of constitutional theory and more concerned about articulating the set of obligations properly imposed on government officials. The process of articulating wrongs might draw on creative reinterpretations of constitutional text and history, but the Constitution necessarily underdetermines the set of wrongs that should be recognized. If the Constitution underdetermines the set of obligations owed by officials, then courts might have good reason to draw on modified principles and doctrines of private law to fit the peculiarities of official authority—or even to develop a general common law of official obligation (grounded in concepts like abuse of authority). At the same time, if the constitutional aspect of the regime is not what makes it distinctive, then there is nothing necessary about using federal constitutional law and federal courts as the institutional mechanism for the advancement of the core aim: articulating basic norms of interpersonal justice for those with official authority.

Regarding constitutional public law, if constitutional rules determine the validity of alterations to pre-existing legal entitlements, then there is no necessary connection between the purpose of the constitutional rule and the purpose of the judicial proceeding in which the constitutional issue is adjudicated. Severing those two aims of adjudication—protecting the legal interest and implementing constitutional rules—shows why such adjudication might be either over- or under-protective of constitutional interests. Constitutional adjudication might be *over*-protective where the deprivation of a cognizable legal interest allows a court to adjudicate some important constitutional norm that could be better enforced (or unenforced) by leaving the issue to the political processes. For example, constitutional challenges to the structure of the Consumer Financial Protection Bureau have been adjudicated at the request of regulated parties (or Bureau officials removed from their posts).[14] On the other hand, constitutional adjudication might be *under*-protective if the absence of a person with a cognizable legal interest precludes a court from adjudicating a constitutional issue that should be finally settled.[15] Perhaps a rational system of constitutional adjudication should not preclude resolution of important constitutional

14. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 208, 210–213 (2020) (permitting regulated party to challenge removal provision); English v. Trump, 279 F. Supp. 3d 307, 311–312 (D.D.C. 2018) (precluding the Bureau's deputy director from challenging her removal).

15. *Cf.* LEVINSON, *supra* note 9, at 173 (arguing that "constitutional law and adjudication" go wrong by "focus[ing] on localized, self-contained transactional harms").

questions simply because there is no traditional private law dispute between the parties.[16]

The argument thus suggests that adjudication of constitutional public law rules must be defended as a mechanism *either* to protect non-constitutional interests for the party seeking adjudication *or* to preserve general benefits of good governance or other constitutional values. But the former aim is not about the constitutional rule, and the latter aim is not about the parties. Recognizing the disconnect between the alternative justifications for constitutional remedies suggests better ways to understand problems concerning the political-question doctrine, Article III standing for institutional harms, the appropriate scope of *Ex parte Young*, preclusion of constitutional claims, and universal vacatur for agency rules.[17]

This Article proceeds as follows. Part I defines constitutional private law. Section I.A shows that it has the structure of private law because it imposes relational duties the breach of which requires redress. Section I.B identifies the normative content of the available claims, which mirror the doctrines of tort, contract, and property. Section I.C offers possible justifications for the structure and content of constitutional private law. Part II contrasts constitutional public law. Sections II.A and II.B show how constitutional rules constrain legislation and adjudication by imposing a series of (in)validity rules on those governmental entities, rather than by imposing relational obligations that constrain the conduct of those officials. Section II.C identifies boundary cases, where the distinction between public and private breaks down because of the challenge of characterizing an official's activity as conduct or an effort to alter legal rules. The chief examples are municipalities, prosecutors, and administrative agencies. Part III discusses the implications for constitutional private and public law.

I. CONSTITUTIONAL PRIVATE LAW

"Constitutional private law" refers to relational obligations imposed on government officials in their official capacity that, if breached, require

16. *Compare, e.g.*, United States v. Windsor, 570 U.S. 744, 762 (2013) (resolving constitutionality of Defense of Marriage Act even though the executive branch declined to defend the law), *with id.* at 778–79 (Scalia, J., dissenting).

17. *See, e.g.*, Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2305, 2308–09 (2024); Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1033 (2023); David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 SUP. CT. REV. 81, 96; Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1333–37 (2023) [hereinafter Fallon, *Constitutional Remedies*]; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000) [hereinafter Fallon, *Facial Challenges*].

redress tailored to correct some normative disequilibrium between the parties. It is constitutional law because the Constitution is conventionally thought to be the source of that obligation, even though closer attention to the legal regime suggests that the constitutional aspect of the claims is not as distinctive as it first appears. I call it private law rather than tort law, because "tort" is somewhat inapt when the obligations operate within contractual relationships, concern the use of property, or involve positions of trust and dependence rather than relationships between strangers.[18] This Part offers a descriptive account of the structure and content of constitutional private law.

At the outset, constitutional private law differs from both (1) private law that is *not* constitutional law, even when imposed on governmental officials, and (2) constitutional law that is *public* law, even when brought within litigation that has the structure of a common-law claim.

First, private law in the United States commonly imposes obligations on both state and federal officers. State law permits plaintiffs to bring ordinary state tort law suits against officials in their personal capacities and against municipalities, though the availability of such relief is complicated because of state immunity rules and other efforts to tailor liability to circumstances of the government actors.[19] Similarly, the Federal Tort Claims Act (FTCA) makes the federal government liable for the torts of its employees if "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[20] The FTCA contains several exceptions to liability,[21] but it generally makes the federal government liable for the torts of its employees if those employees would

18. Two more points on terminology. First, the term "constitutional torts" seems a better fit for the category only if "tort" is defined broadly. The aim here is to reframe the set of claims from the central examples of constitutional torts—*e.g.*, personal injuries from police violence—to the broader set of interests protected by constitutional private law. Second, "private law" of course contains rules more analogous to what I call the rules of constitutional public law, because they permit the alteration of the legal rights of the parties and sometimes third parties, *see, e.g.*, *infra* note 219, but I do not pursue that analogy here.

19. *E.g.*, Nancy Leong, *Constitutional Accountability Through State Tort Law*, 2023 WIS. L. REV. 1707, 1712–20, 1727–34 (noting possibilities of "state tort law" claims against officials and municipalities); Cristina Carmody Tilley, *A New Private Law of Policing*, 89 BROOK. L. REV. 367, 369 (2024); Allan F. Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 43–48 (1949) (stating a general rule that municipalities are liable for "private, proprietary, corporate or ministerial functions" but not for "governmental functions," then criticizing the distinction and its application).

20. 28 U.S.C. § 1346(b)(1); *see also id.* § 2674. Practices vary at the state level, but many have analogues to the FTCA. *See* Delaram Takyar, *The Hidden Price of Government Immunity*, 16 U.C. IRVINE L. REV. (forthcoming 2026) (manuscript at 8–21), https://ssrn.com/abstract=5110024 [https://perma.cc/EHA6-SALH].

21. The most prominent is the discretionary-function exception, which has been interpreted broadly. 28 U.S.C. § 2680(a); James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000).

be liable under the state's private law.[22] State-law claims against the employees in their official capacity are conventionally thought to be preempted by the FTCA.[23] These sets of claims complement constitutional private law claims brought under § 1983 and under *Bivens*, but they differ because they do not impose obligations thought to be derived from the Constitution and because, in the case of the FTCA or state analogues, they impose a form of vicarious liability on the government.

Second, constitutional law ordinarily functions as *public* law rather than *private* law. The Constitution identifies who gets to serve in Congress, how to elect the President, and how that President may appoint executive officers and federal judges; it grants and defines the powers of those institutions; it imposes restraints on the exercise of their powers; and it imposes certain individual-rights restrictions on those powers, including restrictions on the States. Some of these limitations are enforced entirely, or almost always entirely, through political processes. For example, the Senate's decision to remove an impeached person from office is not justiciable,[24] and there is no "council of revision" to set aside facially unconstitutional congressional statutes.[25] Eventually these constitutional rules might matter in adjudication, but in those cases, the constitutional rule protects non-constitutional legal rights from certain alterations. I discuss these rules of constitutional public law and the implications for adjudication of these rules later.[26]

A. Structure

This Section shows that constitutional private law shares the structure of private law. A successful invocation of constitutional private law requires a plaintiff to identify (1) a relational duty that (2) the defendant-official(s) breached that (3) proximately caused (4) harm that generates plaintiff's claim to redress. The decision to separate these elements of a claim is necessarily artificial, because each component follows from the notion of

22. *See* United States v. Olson, 546 U.S. 43, 46–47 (2005); Indian Towing Co. v. United States, 350 U.S. 61, 63 (1955); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 22.2 (2d ed. 2016); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.5(c) (2d ed. 2023).

23. James E. Pfander & Rex N. Alley, *Federal Tort Liability after* Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. 985 (2025); E. Garrett West, *Torts Stories After* Bivens, 138 HARV. L. REV. F. 89, 90 (2025).

24. Nixon v. United States, 506 U.S. 224, 226 (1993).

25. *See* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 248–57 (1989).

26. *See infra* Part II & Section III.B.

relationality at work in constitutional private law.[27] What the structure also reveals is that this pocket of constitutional law is (largely) committed to a version of private law in which the aim is to recognize and correct discrete acts of wrongdoing by officials against non-officials—not necessarily exclusively to control their conduct as agents of the government. Whether that commitment is normatively appealing is another matter that I defer until later.[28]

1. Duty

Constitutional private law requires a claim that the official has a relational obligation to the plaintiff not to take (or to take) certain actions.[29] This Section makes that point with the Court's treatment of the problem analogous to that of "unforeseeable" victims, its refusal to impose vicarious liability, and its incorporation of a misfeasance/nonfeasance distinction. This Section assesses claims that *fail* because, in rejecting a claim for damages, the court identifies a necessary feature of a claim.

First, the nature of a specifically *relational* obligation is illustrated by a case in which defendants have some responsibility to protect a generic set of potential victims of harm, but a particular victim who is injured nevertheless cannot assert a claim because the official lacks a relational obligation to that victim.[30] In *Martinez v. California*, plaintiffs sued state officials for paroling a criminal who tortured and killed their 15-year-old daughter. A unanimous Supreme Court accepted that the state officials "knew or should have known that the release of [the prisoner] created a clear and present danger that such an incident would occur."[31] But the Court held that the defendants did not "deprive" the decedent "of life within the meaning of the Fourteenth Amendment" because "the parole board was not aware that appellants' decedent, *as distinguished from the public at large*, faced any special danger."[32] The Court also explained that the death was

27. Accordingly, some of the arguments about duty might seem to be about proximate cause, or the discussion of breach might seem to better describe problems about duty, but those kinds of disagreements occur in private law too.

28. *See infra* Sections I.C & III.A.

29. For discussions of the relational structure of legal entitlements, see GOLDBERG & ZIPURSKY, *supra* note 13, at 92–95 (defining relational rights and wrongs); WEINRIB, *supra* note 13, at 2–5, 15–21 (discussing the "relational structure" and "correlativity" of private law); and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

30. I use "responsibility" to indicate that officials might have a moral, political, or even legal obligation (say, a contractual agreement with the employer) to act to protect some set of persons within that official's care, though the responsibility would not be a relational legal obligation to the victim.

31. Martinez v. California, 444 U.S. 277, 280 (1980).

32. *Id.* at 285 (emphasis added).

"too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[33]

In so holding, the Court incorporated the distinction from tort law between foreseeable and unforeseeable victims. Indeed, the Court adverted to state tort law: the question of constitutional law was independent of whether "as a matter of state tort law" the defendants "could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death," citing *Palsgraf v. Long Island Railroad Co.*[34] The reference to *Palsgraf* indicates that the Court recognized the analogy between its holding and the general rules of foreseeability, even while rejecting state law's relevance to federal constitutional law. *Martinez* thus incorporates the notion that officials might have obligations to protect only specific classes of *foreseeable* or identifiable victims, even if in some general sense the official also has a responsibility to protect the public's welfare.[35] The Court recognized the analogy to state tort law while asserting the independence of constitutional law.

Second, the Court has rejected vicarious liability in constitutional private law, which reflects a strict adherence to the relational structure of duties along with a commitment to the background rule of sovereign immunity. To be specific, municipalities are not liable when their employees breach their constitutional duties.[36] Supervisors are not liable for the acts of their subordinates.[37] A state is not liable to pay damages under § 1983 even when a state official is responsible for the judgment, and the United States is not liable under *Bivens* even when a federal official is obligated to pay.[38] Indeed, one reason that constitutional private law claims evade sovereign immunity is that they seek damages from the officials in their personal capacities

33. *Id.*

34. *Id.* (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)); *see, e.g.*, *Palsgraf*, 162 N.E. at 100 (N.Y. 1928) ("The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."); Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1758 (2012) ("The central point of Chief Judge Cardozo's *Palsgraf* opinion is that a defendant's failure to use due care must have been a breach of the duty of due care owed to the plaintiff; the breach and duty elements of the negligence claim must fit together in the right way.").

35. Perhaps the closer analogy would be *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

36. *See* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 627 (1999).

37. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (denying respondeat superior liability).

38. The officer's entitlement to indemnification would be a matter of contract. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 579 (2020) (noting that Department of Justice attorneys in *Bivens* cases repeatedly state that "indemnification is far from certain"); City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 611 n.3 (2015) (a § 1983 claim "concerns the *liability of individual officers*," though governments might have "contractual obligations . . . to represent and indemnify the officers").

rather than from the state or federal government.[39] As noted in more detail below, the personal-capacity structure of the claim indicates that both the constitutional obligation and the liability for its breach attach to the official herself. Officers owe damages in their personal capacity for the breach of duties imposed on them.

The rejection of vicarious liability appears at first as a disanalogy to private law (or at least tort law), where the liability of the employer for the wrongs of the employee is pervasive.[40] But in fact the rejection of vicarious liability reveals the doctrine's commitment to a particular vision of private law. The "government" is not the wrongdoer; the official is. If the aim of constitutional private law is to restore or correct breaches of duties of officials, then a suit against the sovereign—however desirable as a mechanism to compensate victims or to deter the government—is not a substitute for a claim against the wrongdoing official herself. And because constitutional private law retains the principle of sovereign immunity while permitting a personal-capacity suit against the sovereign's agent, the implication is that the official is not liable as the government even if she has personal obligations consistent with (or perhaps derived from) her position of official responsibility.[41]

Third, consider the Court's cases concerning the lack of "affirmative duties" by government officials. The leading cases are *DeShaney v. Winnebago County Department of Social Services* and *Town of Castle Rock v. Gonzales*.[42] The cases usually stand for the Court's unwillingness to recognize "positive" rights, but here they show that constitutional private law requires a relational obligation.[43]

In *DeShaney,* a county's department of social services (and its employees) failed to protect a child from severe physical abuse by his father.

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39. *E.g.*, Hafer v. Melo, 502 U.S. 21, 30–31 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983.").

40. *See* Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093, 1125–31 (2020).

41. My argument does not necessarily preclude a theory of vicarious liability. It is possible to embrace my characterization of constitutional private law while also embracing vicarious governmental liability, perhaps on the theory that the governmental entity is responsible for the harms resulting from the activity of governing. My point, discussed in more detail below, is that constitutional private law does not depend on those arguments for vicarious governmental liability (and therefore can co-exist with sovereign immunity).

42. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

43. On the distinction between positive and negative rights, see, for example, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). The positive/negative distinction could apply to constitutional duties or to other kinds of constitutional rules. For example, regarding duties, a person has a (negative) duty to stay off her neighbor's property and a (positive) duty to pay her mortgage. Likewise, a person might have a (positive) right to a statutory scheme that includes certain common-law remedies but a (negative) right to a non-discriminatory statutory framework. The "right" in the latter sense does not correspond to a duty.

The Court announced a general rule that there was "no constitutional duty to protect [the child]."[44] But the Court distinguished situations in which the plaintiff was in *state custody* or *state-created danger*. If a state "takes a person into its custody and holds him there against his will," then it accepts a constitutional "duty to assume some responsibility for [the person's] safety and general well-being."[45] For example, the Court had previously held that a city had a "constitutional obligation" to obtain medical care for a person "injured while being apprehended by the police."[46] Similarly, the *DeShaney* Court suggested that the situation might have been different if the state had participated in the "creation" of the danger or "render[ed] him . . . more vulnerable to [the danger]."[47]

DeShaney mirrors the structure of nonfeasance rules in tort. Generally, private persons have no duty to rescue, and municipalities have no duty to protect persons from violence by third parties.[48] But like the state-created danger exception in *DeShaney*, a person who creates another's peril incurs a duty to rescue. Similarly, just as the government may have obligations to those in state custody, some "special relationships" impose a duty of care on a person in a position of authority or control.[49] The Court noted the possible parallel to private law, suggesting that the government may have "acquired a duty under state tort law to provide [plaintiff] with adequate protection" by "voluntarily undertaking to protect [plaintiff] against a danger it concededly played no part in creating."[50] The Court thus, as in *Martinez*, affirmed both the analogy to private law and the independence of constitutional rules.

The decision in *Castle Rock* is doctrinally but not conceptually different. The question was whether the plaintiff had a "property interest in police enforcement of [a] restraining order against her husband."[51] If so, she argued, the municipal defendant should have provided some process to

44. *DeShaney*, 489 U.S. at 202.

45. *Id.* at 199–200 (citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist.")); *see* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1 (2007).

46. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983).

47. 489 U.S. at 201. Many circuits have adopted some version of the duty to protect against state-created dangers. *See* SHELDON H. NAHMOD, MICHAEL L. WELLS & FRED O. SMITH JR., CONSTITUTIONAL TORTS 276 (5th ed. 2020).

48. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (AM. L. INST. 2012); RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965); Riss v. City of New York, 240 N.E.2d 860 (N.Y. 1968).

49. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 38–44 (AM. L. INST. 2012) (discussing affirmative duties based on, among other things, special relationships, voluntary undertakings, and conduct creating a risk of physical harm).

50. *DeShaney*, 489 U.S. at 201–02.

51. Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005).

protect that interest.[52] That claim was odd because the "property" interest purportedly entitled to procedural protection was itself a "procedural" protection—*i.e.*, "a set of rules to be followed by officers exercising the State's executive power."[53] The more natural argument for the plaintiff would have been that the municipality had a duty to protect her from a dangerous third party who was reasonably identifiable after she reasonably relied on the promise of enforcement in the restraining order, but *DeShaney* foreclosed that theory.

In fact, the *Castle Rock* majority dealt with the plaintiff's procedural due process theory like a *DeShaney* failure-to-protect claim. The Court first reasoned that, in light of "deep-rooted . . . law-enforcement discretion," the law did not make "enforcement of restraining orders *mandatory*."[54] It then concluded that even a mandatory-enforcement regime would "not necessarily mean that state law gave [*plaintiff*] an entitlement to *enforcement* of the mandate."[55] An enforcement regime might be mandatory even without "confer[ring] a benefit on a specific class of people," because sometimes the criminal law serves "public rather than private ends."[56] The Court thus justified a no-duty rule by distinguishing relational obligations from generalized responsibilities to protect the welfare of all.

The claims in *DeShaney* and *Castle Rock* failed because the Constitution, as interpreted in those opinions, generally does not impose duties to take affirmative acts to protect persons from third parties. Those holdings show another aspect of the relational structure of constitutional private law: that constitutional wrongs require that a reasonably foreseeable victim will be harmed by the affirmative acts of the official defendant. Because the government official is not (ordinarily) responsible for the actions of an intervening wrongdoer, an injury at the hands of a third party does not entail any constitutional wrongdoing by the government official. And because the official's duty is (ordinarily) to *refrain* from certain wrongful acts but not to *take* certain required acts, the failure to protect the third party does not entail constitutional wrongdoing. The decisions hem in the scope of constitutional private law claims by insisting on the official's relationship to the particular victim of wrongdoing.

52. *See also id.* at 792 (Stevens, J., dissenting) ("Because respondent had a property interest in the enforcement of the restraining order, state officials could not deprive her of that interest without observing fair procedures.").
53. *Id.* at 770 (Souter, J., concurring).
54. *Id.* at 760–61 (majority opinion).
55. *Id.* at 764–65.
56. *Id.* at 765.

2. Breach

Constitutional private law also entails that the official breached a particular constitutional duty. The nature of the duty breached both determines the elements necessary to prove a successful claim and defines the scope of relief.

By way of example, *County of Los Angeles v. Mendez* rejected the argument that officers might be liable for an unreasonable use of force if "they committed a separate Fourth Amendment violation that contributed to their need to use force."[57] The Ninth Circuit had innovated a "provocation rule," under which an officer that "recklessly or intentionally provoke[d] a violent response" might be liable for excessive force even if the use of force was "otherwise reasonable."[58] A unanimous Court concluded that the rule "conflates distinct Fourth Amendment claims," like "excessive force" and "unreasonable entry" claims.[59] Conflating the claims was error because establishing the breach of one Fourth Amendment duty does not necessarily establish the breach of a different Fourth Amendment duty, so the two claims must be "analyzed separately."[60] The Court remanded for the lower court to determine whether the actual violation proximately caused the damages to the officer.

The separate analysis of separate breaches structures the rest of the claims too. First, different Fourth Amendment claims might require the plaintiff to establish different elements even to show the entitlement to relief; in *Mendez* itself, the elements of an excessive-force claim differed from the elements of a claim for unlawful entry.[61] Elsewhere, the Court has explained that the "elements of, and rules associated with, an action seeking damages" depend on the "analogous" common-law claims and the "values and purposes of the constitutional right."[62] Second, the remedies for breaches of different constitutional duties differ too: a defendant is liable only for "damages that are proximately caused by" the Fourth Amendment claim asserted.[63] Damages might be recoverable under one theory of breach but not another. For example, a person killed by a police roadblock might recover if the plaintiff alleges that the roadblock was intentionally deployed

57. Cnty. of Los Angeles v. Mendez, 581 U.S. 420, 422–23 (2017).
58. *Id.* at 425–26; *see infra* Section I.B.1 (discussing excessive force).
59. *Mendez*, 581 U.S. at 428–29.
60. *Id.* at 429.
61. *Id.* at 428–29.
62. Manuel v. City of Joliet, 580 U.S. 357, 370 (2017); *see* Chiaverini v. City of Napoleon, 602 U.S. 556, 561 (2024); Siegert v. Gilley, 500 U.S. 226, 231 (1991) (discussing application of qualified immunity where "improper purpose is an essential element").
63. *Mendez*, 581 U.S. at 430–31.

to injure him and thus interfere with his interest in bodily safety, but not if the roadblock was deployed *safely* to conduct a search that invaded the plaintiff's private rights.[64] The Court has likewise explained, more generally, that the appropriate remedy for "deprivation of one constitutional right" is "not necessarily appropriate to compensate injuries caused by the deprivation of another."[65] The requirement to show a breach of the duty thus implements the underlying constitutional duty and defines the remedy for breach.

3. Causation

Constitutional private law also requires that the defendant's constitutional misconduct be an actual and proximate cause of the injury to the victim.[66]

First, the Court has refused to impose liability if the defendant-official's alleged constitutional violation is not the actual cause of the redressable harm.[67] In *Mount Healthy City School District Board of Education v. Doyle*, a school teacher claimed that a city board refused to rehire him in retaliation for his protected speech.[68] But the city offered other independently sufficient reasons that "he would not have been rehired in any event."[69] In other words, even though "retaliation might have been a substantial motive," there could be no constitutional wrong "unless the alleged constitutional violation was a but-for cause of the employment termination."[70]

Notably, because of the relational structure of constitutional wrongs, the precise causation requirement depends on the structure of the claim and the role of the official. In *Hartman v. Moore*, for example, the Court explained that the causal inquiry for "ordinary retaliation claims" differs from the "retaliatory-prosecution context."[71] In the former, because the "government

64. *See* Brower v. Cnty. of Inyo, 489 U.S. 593, 599 (1989); *cf.* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1766–74 (1985) (arguing that the "tortious aspect of the defendant's conduct"—that is, the breach of the underlying duty—must cause the harm).

65. Carey v. Piphus, 435 U.S. 247, 265 (1978).

66. *See* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982).

67. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

68. *Id.* at 281–84.

69. *Id.* at 286.

70. Lozman v. City of Riviera Beach, 585 U.S. 87, 96 (2018). The decision departs from the standard tort rule that each of multiple sufficient causes of the harm is deemed an actual cause of the harm. *See* Eaton, *supra* note 66, at 454–55. Applying that rule to the retaliation context, if lawful and unlawful motives were each a sufficient cause of the action, then the multiple-sufficient-cause rule would allow recovery. *Cf.* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1153 (2018) (discussing possible rule imposing liability if an unlawful motive was "sufficient to independently motivate action").

71. Hartman v. Moore, 547 U.S. 250, 259 (2006).

agent allegedly harboring the animus is also the individual allegedly taking the adverse action," the agent's motive is thought to be strong circumstantial evidence that retaliation was the but-for cause of the adverse action.[72] But in the latter, because the retaliatory criminal charge by an absolutely immune prosecutor constitutes the injury, the plaintiff must show that the "retaliatory animus of one person" caused the "prosecutor to bring charges that would not have been initiated without [the first person's] urging."[73] The particular relational duty allegedly breached thus informs the structure of the causal inquiry.[74]

Second, proximate-cause rules limit the persons to whom government officials owe duties and the scope of those duties. *California v. Martinez*, discussed above, invoked an analogy to state-law proximate-cause rules in asserting that members of a parole board determining whether to release a prisoner had no duty to particular persons.[75] Likewise, the Court has indicated that plaintiffs may recover only "damages that are proximately caused by" the precise constitutional injury.[76] A good example is *Brower v. County of Inyo*, where the Court in dicta indicated that "proximate causality" entailed that the nature of a Fourth Amendment seizure's "unreasonableness" limited the scope of liability.[77] There, police officers set up a roadblock "in such manner as to be likely to kill" a person.[78] The Court explained that, if the "unreasonableness" had been that there was "no probable cause for the stop," and the victim had "the opportunity to stop voluntarily at the roadblock," the officers could not be liable for the death from an accident. [79] On those facts, the stop without probable cause would not have proximately caused the accident and death (even if it would have proximately caused an illegal stop that "depriv[ed] [the victim] of his freedom of movement").[80] The Court's invocation of the proximate-cause requirement thus cabins the scope of the relational duties of officers.

4. Harm

A breach of the relational obligation that proximately harms a defendant requires redress from the wrongdoer. The rule that officials are on the hook

72. *Id.* at 259–60.
73. *Id.* at 262.
74. *See also* Nieves v. Bartlett, 587 U.S. 391, 403 (2019) (adopting a variation on the *Mt. Healthy* test for retaliatory-arrest claims).
75. *See supra* text accompanying notes 31–35.
76. Cnty. of Los Angeles v. Mendez, 581 U.S. 420, 431 (2017).
77. Brower v Cnty. of Inyo, 489 U.S. 593, 599 (1989).
78. *Id.* at 599.
79. *Id.*
80. *Id.*

for damages awards, the measure of compensation, and the rules governing the availability of punitive damages establish that point. The rules also confirm the regime's core commitment to a particular variant of private law designed to redress wrongs.

First, constitutional private law demands redress from the governmental officer herself. "Personal-capacity suits," the Court has explained, "seek to impose personal liability upon a government official for actions he takes under color of state law."[81] The judgment for damages must be "executed only against the official's personal assets."[82] By contrast, "an official-capacity suit is . . . to be treated as a suit against the entity."[83] A personal-capacity suit thus somewhat paradoxically imposes personal liability on an official for state action. The paradox dissolves, however, if the obligation of the official is personal to her not because she is the state but because she is a person with legal obligations who happens to be an agent of the state. Although functionally governments often pay damages judgments for their employees,[84] the judgment imposes formal responsibility for the wrong on the person who committed it. The formal incidence of responsibility on the official is essential to avoiding the bar of sovereign immunity.[85]

Second, the scope of the remedy confirms that redress functions to restore the normative equilibrium between victim and wrongdoer. Citing a series of private-law treatises, the Court has explained that the "cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty."[86] The Court found this "principle" applicable under § 1983.[87] Although the Court repeatedly refers to "deterrence" as a reason for damages under § 1983, it subordinates deterrence to compensation, noting that deterrence should (usually) not be "more formidable than that inherent in the award of compensatory damages."[88] A deterrence theory that demands damages if

81. Kentucky v. Graham, 473 U.S. 159, 165 (1985).

82. *Id.* at 166.

83. *Id.*

84. Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1557 (2020) (noting findings that "officers virtually never contribute to the satisfaction of settlements and judgments entered against them" but that "there is significant variation among cities' and counties' indemnification policies and practices"); Pfander et al., *supra* note 38, at 585–94.

85. *See* Tanzin v. Tanvir, 592 U.S. 43, 52 (2020).

86. Carey v. Piphus, 435 U.S. 247, 254–55 (1978) (quoting 2 FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1, at 1299 (1956)); *see also id.* at 255 n.7 (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1, at 135–38 (1973); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 1 (1935); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (4th ed. 1971)).

87. *Carey*, 435 U.S. at 255.

88. *Id.* at 256–57; *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("Deterrence is also an important purpose of this system, but it operates through the mechanism of

and only if compensation already commands them does not do any incremental work. Thus, although the Court offers competing justifications for damages, the rule itself is parsimoniously explained (and potentially better justified) by its corrective function.

The *amount* of the damages, however, reflects ambiguity about the nature of the wrongs of constitutional private law. The Court has sometimes suggested that damages should be limited to categories available under the common law, which implies that constitutional private law is equivalent to (or a substitute for) ordinary common-law claims against officials.[89] At other times, the Court suggests that damages must reflect the unique nature of the constitutional wrong, which implies that constitutional private law is committed to implementing constitutional values.[90] Recently, the Court's affirmation of the availability of nominal damages indicates that the wrong to be redressed is the breach of the *constitutional* duty rather than the pre-existing private-law norm. As the Court explained in *Uzuegbunam v. Preczewski*, "every violation [of a right] imports damage"[91]—even if the plaintiff cannot establish the categories of economic and non-economic losses that are compensable under the common law.[92] The implication is that the "violation of [someone's] constitutional rights" is sometimes sufficient to establish a breach of a duty that requires some kind of remediation by the defendant.[93]

Third, victims sometimes collect punitive damages from officials but not municipalities.[94] That difference further confirms the relational structure of constitutional private law.

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damages that are compensatory — damages grounded in determinations of plaintiffs' actual losses."). The "usually" qualification refers to the possibility of punitive damages. *See infra* text accompanying notes 94–106. For other statements that "deterrence" is a justification for damages, see Hudson v. Michigan, 547 U.S. 586, 598 (2006); City of Riverside v. Rivera, 477 U.S. 561, 575 (1986); and City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981).

89. *See* E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 909–11, 919–20 (2025).

90. *Id.* at 909–11.

91. Uzuegbunam v. Preczewski, 592 U.S. 279, 293 (2021).

92. *See Stachura*, 477 U.S. at 307 (listing compensable harms).

93. *Uzuegbunam*, 592 U.S. at 293. The statement in *Uzuegbunam* is somewhat imprecise, because the relevant "violation" of a "right[]" has to be the breach of a duty cognizable as constitutional private law (or at least the breach of a private law wrong). Imagine, for example, that a plaintiff subjected to an enforcement proceeding seeking civil fines before an Administrative Law Judge (ALJ) sued the ALJ on the theory that the proceeding violated the Seventh Amendment, *SEC v. Jarkesy*, 603 U.S. 109 (2024), and sought nominal damages. Because the ALJ would not have breached a relational duty owed to the plaintiff by adjudicating a dispute, she would not have committed any "wrong" that would justify even nominal damages.

94. *Compare* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that punitive damages are unavailable against municipalities under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)), *with* Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages are available

The Court's differential treatment of punitive damages against municipalities and against officials is instructive. In *City of Newport v. Fact Concerts*, the Court reasoned that punitive damages might "punish the tortfeasor whose wrongful action was intentional or malicious" or "deter him and others from similar extreme conduct."[95] The Court rejected the deterrence rationale,[96] but its rejection of the retributive purpose is more telling.[97] The "ordinary principles of retribution," Justice Blackmun explained, require that the "wrongdoer himself" must be the one to "suffer for his unlawful conduct," and a city "can have no malice independent of the malice of its officials."[98] The Court was actually making two points: that the punishment must be inflicted on the wrongdoer alone[99] and that the official's malice is not the municipality's.[100] Those two "ordinary principles of retribution" thus show that redress should be exacted from wrongdoers only and that government officials themselves, not governments, are the perpetrators of wrongdoing.

The Court instead permitted punitive damages against officials in their personal capacity. *Smith v. Wade* allowed such damages if the official misconduct was "motivated by evil motive or intent" or "involve[d] reckless or callous indifference to the federally protected rights of others."[101] To be sure, as with municipalities, the Court suggested that the remedy functions not just to "punish" for "outrageous conduct" but also to "deter [the defendant] and others like him."[102] Punishment nevertheless appears to have been the dominant justification. The Court stated, for example, that damages require the "discretionary moral judgment" that compensation will not suffice and recognized that punitive damages are "justified by the moral culpability of evil intent."[103] The dissenters also argued (without good answer) that the Court did not attempt to show that punitive damages will

against officials). For a critique of both, see Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841 (1996).

95. *Newport*, 453 U.S. at 266–67.

96. The Court first doubted that "large punitive awards" assessed against municipalities would alter the incentives of the tortfeasor, either because local law would not permit the municipality to seek "indemnification" from the employee or because the employee might be judgment proof. *Id.* at 268–69. Then it suggested that "compensatory damages" alone might suffice to deter, that punitive damages against the official would be a "more effective means of deterrence" overall, and that the "financial integrity" of cities counseled against liability. *Id.* at 269–70.

97. *Id.* at 268 ("Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.").

98. *Id.* at 267.

99. *But see* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003).

100. *But see* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 674 (7th Cir. 2003) (attributing the knowledge of a "management-level employee" to the "employer" in assessing "whether the employer should be liable for punitive damages").

101. Smith v. Wade, 461 U.S. 30, 56 (1983).

102. *Id.* at 54 (citing RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979)).

103. *Id.* at 43 n.10, 52.

"achieve that level of deterrence that is most worth the costs it imposes," "ignore[d] the potential costs" of punitive damages, and failed to consider whether "punitive damages *as well as* attorney's fees" create an "imbalance of inducements to litigate."[104] In short, the dissent persuasively faulted the majority for failing to consider the systemic consequences of a deterrence-based justification of punitive damages.[105] That critique suggests that the true basis for the damages was punishment or retribution. If the dominant justification is punishing a wrongdoer, then the all-things-considered deterrence analysis is irrelevant.[106] The Court's differential treatment of punitive damages for municipalities and for officials thus confirms the relational structure of constitutional private law.

B. Content

The content of constitutional private law includes obligations that mirror those protected by the private law, though the obligations have been modified to fit both the constitutional text and the context of wrongdoing by government officials in positions of authority. Constitutional claims are often sorted by constitutional provision, but here I group constitutional private law based on the interests protected by the claim: person, property, privacy, process, and reasons.

Several themes emerge. The textual constitutional arguments seem only superficially relevant to the development of constitutional private law. The Court stretches the language of some constitutional provisions, particularly the Fourth Amendment, to cover interests that could be protected under separate strands of ordinary private law.[107] Or the Court sometimes claims to derive constitutional private law rules from the constitutional provision, even though that provision is obviously under-determinate with respect to the precise elements of a given constitutional private law claim; for example, the Due Process Clause generates rules for excessive force for pre-trial detainees, and the word "punishment" in the Eighth Amendment

104. *Id.* at 89–90, 89 n.16 (Rehnquist, J., dissenting); *see also id.* at 89 n.16 ("I fear that the Court's decision poorly serves this goal, and that in the end, official conduct will be less useful to our citizens, not better.").

105. *Id.* at 89 n.16; *see also id.* at 94 (O'Connor, J., dissenting) (assessing the "incremental deterrent effect" of punitive damages given that "compensatory damages and attorney's fees already provide significant deterrence").

106. *See also* West, *supra* note 23, at 107 n.109 (arguing that deterrence-based justifications for damages awards must assess its incremental deterrent effect within the whole system of remedies).

107. *See* Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023) (using analogies to trespass, property law, and privacy torts to articulate different sets of Fourth Amendment doctrines).

generates a mental-state requirement for claims against prison officials.[108] The creative but selective deployment of open-ended constitutional texts to protect distinct interests suggests that the doctrine derives less from constitutional text and more from the underlying normative commitments characteristic of private law—and thus that constitutional private law depends more on its analogy to private law than its constitutional aspect. Similarly, as the discussions of the Takings Clause and due process show, a recurring source of confusion arises out of the difficulty of characterizing state action as *conduct* (susceptible to constitutional private law) or *alterations of legal status* (better governed by constitutional public law). The doctrinal challenges reinforce the need to understand the structure of a constitutional claim as private or public to rationally adjudicate such disputes.

1. Person

Much of constitutional private law protects a person's life, health, and liberty.[109] A core obligation of government officials that recurs throughout constitutional private law is to avoid excessive uses of force. The Fourth, Eighth, and Fourteenth Amendments provide substantive protections against the intentional use of excessive force for arrestees, pre-trial detainees, and prisoners. These claims implement different constitutional texts, and the Court claims to interpret the Constitution in elaborating them. But adjudicating each claim—no matter its textual hook—entails weighing the official's interest in implementing a governmental imperative against the victim's interest in avoiding the use of force.

Regarding Fourth Amendment excessive-force claims, the Court imposes an intent requirement akin to the intent requirement for battery or false imprisonment.[110] The Court has concluded that a Fourth Amendment "seizure" requires the "intentional acquisition of physical control."[111] So the "detention or taking itself must be willful," rather than "unknowing," "unintended," or "accidental."[112] As to what kind of contact suffices under the Fourth Amendment, an official does not need to *successfully* "secure

108. The underdeterminacy of constitutional rights is not a novel problem, *see* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921 (2025), but the problem is particularly acute for constitutional private law, which emerges late in the constitutional tradition, *see infra* Section I.C.

109. Similar underlying interests might be protected from deprivations without sufficient process or for impermissible reasons, but I treat those claims separately. *See infra* Sections 1.B.4–5.

110. *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965) (including an intent requirement for liability for battery); *id.* § 35 (same for false imprisonment).

111. Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989); Torres v. Madrid, 592 U.S. 306, 317 (2021) ("A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify.").

112. *Brower*, 489 U.S. at 596; *see also Torres*, 592 U.S. at 317.

control over the arrestee;" rather, "mere touch" may constitute a seizure.[113] Thus, an excessive-force claim's contact requirement mirrors the contact requirement for common-law battery.[114] Remarkably, the Fourth Amendment even incorporates a transferred-intent doctrine. Just as a plaintiff might have a claim for battery if the defendant intended to contact a third person but contacted the plaintiff instead,[115] a Fourth Amendment "seizure" occurs if an "unintended person or thing is the object" of a willful "detention or taking."[116]

Besides intent and contact requirements, an "excessiveness" element requires a kind of proportionality assessment, weighing the "nature and quality of the intrusion" against the "countervailing governmental interests at stake."[117] The strength of the "governmental interests" depends on, for example, the "severity of the crime" and the immediate risk "to the safety of the officers or others."[118] The officer's motivations, whether he harbors "evil intentions" or "good intentions," are irrelevant; the question is whether the officer behaved in a way that was objectively reasonable.[119] The excessiveness inquiry thus prohibits the officer from subordinating the interests of the victim to the interests of the political community. But the emphasis on the "governmental interests" as the standard for reasonable ends and means obscures that the law asks whether the *official* weighing those interests—not some abstract "government"—has behaved reasonably with respect to the victim.

Pre-trial detainees must litigate excessive-force claims under the Due Process Clause instead of the Fourth Amendment, but the textual differences between those provisions do not seem to matter.[120] Instead, the pre-trial context alters the meaning of "excessive" by redefining the governmental and private interests. An official may take action to detain the victim for trial using "devices that are calculated to effectuate [the] detention," but the victim may not be "punished prior to an adjudication of guilt."[121] In turn, "punishment" is defined with reference to whether the use

113. *Torres*, 592 U.S. at 313, 317.

114. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c, § 19 (AM. L. INST. 1965).

115. *Id.* § 20(2) ("If an act is done with the intention of affecting a third person . . . but causes an offensive bodily contact to another, the actor is subject to liability to such other as fully as though he intended so to affect him.").

116. *Brower*, 489 U.S. at 596.

117. Plumhoff v. Rickard, 572 U.S. 765, 774 (2014).

118. Graham v. Connor, 490 U.S. 386, 396 (1989).

119. *Id.* at 397.

120. For cases recognizing excessive-force claims by pre-trial detainees, see, for example, *Kingsley v. Hendrickson*, 576 U.S. 389, 391–92 (2015); and *Graham*, 490 U.S. at 395 n.10.

121. Bell v. Wolfish, 441 U.S. 520, 535, 537 (1979); *see also id.* at 580 (Stevens, J., dissenting) ("This right to be free of punishment is not expressly embodied in any provision in the Bill of Rights. Nor is the source of this right found in any statute.").

of force is reasonably related to detention. The use of force is punishment if it is "arbitrary or purposeless,"[122] but not if used to effectuate the detention while maintaining internal order, discipline, and officer and prisoner safety.[123] As with the Fourth Amendment excessive-force standard, the law requires an objective proportionality analysis; unlike the Fourth Amendment standard, the law asks whether the official reasonably weighed the interest in effectuating detention instead of in making an arrest. The text of the Constitution says nothing about the differences in the standards; the refined test is inferred from background assumptions about the task the official undertakes.

The Eighth Amendment does alter the structure of the inquiry for prisoners claiming excessive force. Punishment after conviction is permissible unless "cruel and unusual."[124] When prisoners claim that guards employ excessive force, the Court has invoked the language of "punishment" to replace an objective proportionality analysis with an inquiry into the prison official's mental state.[125] The use of objectively "excessive physical force" is not cruel and unusual punishment if the "force was applied in a *good-faith* effort to maintain or restore discipline;" the use of force is excessive only if applied "maliciously and sadistically to cause harm."[126] The textual hook for the transition to subjective excessiveness is the limitation that punishment must be "cruel and unusual punishment." But it is not obvious that the words "cruel" or "punishment"—and not the word "reasonable"—require any particular subjective mental state. In fact, the Eighth Amendment also forbids legislatures from enacting objectively disproportionate criminal penalties regardless of whether the legislature (assuming it has a mental state) acts "maliciously or sadistically."[127] Thus, the same language from the Cruel and Unusual Punishments Clause somehow imposes different requirements for challenges to official *conduct* (governed by constitutional private law) and official *rule alteration* (governed by constitutional public law).[128]

Altogether, the constitutional prohibitions on excessive force have analogues in the private law claims for battery or false imprisonment. Those torts prohibit the intentional application of force or detention of the victim,

122. *Id.* at 539.

123. *See Kingsley*, 576 U.S. at 397.

124. *See* U.S. CONST. amend. VIII; Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*,*"* 129 YALE L.J.F. 365, 397 (2020).

125. *See* Wilson v. Seiter, 501 U.S. 294, 299 (1991).

126. Hudson v. McMillian, 503 U.S. 1, 6–7 (1992) (emphasis added); *see also* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 308 (2022) (responding to Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021) (noting that the "'maliciously and sadistically' standard, moreover, is entirely subjective")).

127. *Cf.* Ewing v. California, 538 U.S. 11, 28 (2003) (applying proportionality test).

128. The point holds if the focus is the text of the Fourteenth Amendment.

but with privileges for defense of self and others and to effectuate arrests.[129] As in Fourth Amendment and due process doctrines, those privileges require objective inquiries; they are limited to the amount of force the defendant "reasonably believe[d]" to be necessary for self-defense or to effectuate an arrest.[130] The Eighth Amendment's subjective standard, by contrast, imitates intentional torts that require the defendant to act with the *purpose* to cause harm.[131]

2. Property

Constitutional private law also imposes obligations akin to some property torts through the Takings Clause and (again) the Fourth Amendment. This discussion develops two important lines of the argument. First, it distinguishes between constitutional obligations that constrain official conduct and constitutional rules that invalidate certain efforts to alter a person's pre-constitutional legal entitlements. The Court unconsciously shifts between conceptions of the Takings Clause and Fourth Amendment as constitutional private law and as constitutional public law, though the two theories have different implications for constitutional law. Second, the discussion shows the need for a theory of constitutional private law (not just constitutional torts) by identifying some parallels to property.

The Takings Clause states that "private property" shall not be "taken for public use, without just compensation."[132] That could produce two kinds of rules. First, the Takings Clause might disable governments from enacting any statute, regulation, ordinance, or other legal rule that alters a plaintiff's pre-existing property entitlements without also offering compensation.[133] On this view, the legislation or other legal rule that purports to alter property rules without compensation is "void" or a "nullity," leaving in place

129. *See* RESTATEMENT (SECOND) OF TORTS § 118 (AM. L. INST. 1965) ("The use of force against another for the purpose of effecting his arrest and the arrest thereby effected are privileged if all the conditions stated in §§ 119-132, in so far as they are applicable, exist."); *id.* § 132 ("The use of force against another for the purpose of effecting the arrest or recapture of the other, or of maintaining the actor's custody of him, is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary.").

130. *See id.* § 63 (permitting "reasonable force" in defense of self or others); *id.* § 132 (force limited to amount "actor *reasonably* believes to be necessary" to make the arrest (emphasis added)).

131. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 4 (AM. L. INST., Tentative Draft No. 4, 2019) (recognizing a claim if the defendant "purposely causes bodily harm" to the victim); *cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. L. INST. 2012) (intentional infliction of emotional distress for "intentionally or recklessly" causing "severe emotional harm").

132. U.S. CONST. amend. V.

133. Robert Brauneis calls this a "legislative competence" theory of the Takings Clause. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 62 (1999).

whatever non-constitutional legal remedies might be available to the party alleging a taking.[134] A prohibition on takings as a change to legal rules is a form of constitutional public law. Second, the Takings Clause might impose a duty on officials not to physically occupy property without paying.[135] In this category, the "taking" occurs when officials either interfere with the use and enjoyment of land or physically occupy that land. Examples of physical takings include building a highway median that floods a plaintiff's property,[136] flying planes in the airspace above a plaintiff's property,[137] building a dam that floods a plaintiff's property,[138] or building embankments on a road that prevent a plaintiff from using the shop or home along that road.[139] A prohibition on physical takings constitutes a form of constitutional private law. The Court has recognized that the Takings Clause creates both kinds of constitutional rules: the government takes when it "uses its power of eminent domain to formally condemn property" (*i.e.*, public law) or "physically takes possession of property without acquiring title to it" or "occupies property" (*i.e.*, private law).[140]

The constitutional private law theory of takings expands the scope of liability compared to a theory that limits takings to alterations of legal rules. Sometimes the availability of the private law theory of takings matters in determining whether the plaintiff has a claim in the first place. For example, plaintiffs have invoked the Takings Clause when police officers have damaged or destroyed property without any formal authorization.[141] Likewise, plaintiffs have alleged that the construction of a highway that physically floods their properties "took" the property, even without a formal alteration of the legal status of the property right.[142] And in the famous *United States v. Causby*, plaintiffs successfully argued that "[f]lights over

134. *See id.* at 60–61.

135. *See* John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 747–48 (2020) (distinguishing between "appropriations" that involve a "government order or other action that either explicitly or effectively divests an owner of her interest in property" and "occupations" that involve "physical invasions of private property (typically land) by government officials or private citizens acting with governmental authority"); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1837 & n.76 (2016) (similar).

136. *See* DeVillier v. Texas, 601 U.S. 285, 288–89 (2024).

137. *See* United States v. Causby, 328 U.S. 256, 264–65 (1946).

138. *See* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872).

139. *See* Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 354 (2018).

140. Cedar Point Nursery v. Hassid, 594 U.S. 139, 147–48 (2021); *see also* United States v. Lynah, 188 U.S. 445, 470 (1903) ("[W]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value . . . ."). Somewhat confusingly, the Court has referred to both categories as "physical takings." In *Cedar Point*, for example, it said that a "physical taking" might occur whether or not "the government action at issue comes garbed as a regulation." 594 U.S. at 149. At the same time, the Court distinguished between "trespass and takings." *Id.* at 159.

141. *E.g.*, Baker v. City of McKinney, 84 F.4th 378, 379 (5th Cir. 2023).

142. *See* DeVillier v. Texas, 601 U.S. 285, 288–89 (2024).

private land" are a taking if they constitute a "direct and immediate interference with the enjoyment and use of the land."[143] Plaintiffs plausibly bring these claims only because the Takings Clause imposes obligations on *conduct* even without a formal alteration of legal status.[144] Indeed, the dissent in *Causby* argued that no taking occurred because the interference with the use and enjoyment of land "constitute[d] at best an action in tort."[145] The Court has clarified that an "isolated physical invasion" is a trespass rather than a taking, but the difference between an "isolated" physical invasion and an invasion that "occupies" property is a matter of degree and not of kind.[146]

Sometimes the availability of the constitutional-private-law variant affects the elements of the claim or the scope of relief. For example, the measure of damages and the rules for obtaining injunctive relief might differ depending on which Takings Clause theory the plaintiff advances.[147] Likewise, the accrual of the cause of action might depend on whether the plaintiff alleges that the official herself violated a constitutional duty.[148]

A particularly expansive theory of the Takings Clause might combine the holding that the Clause applies to *personal* property with the theory that it operates through private law to constrain the *conduct* of government officials.[149] Those theories would together permit Takings Clause claims for all manner of official conduct that destroys, damages, or retains personal property. If the Takings Clause is to become an all-purpose hook for claims of trespass, nuisance, and trespass to chattels against officials, courts will be pressured to develop various defenses for official actions that interfere with such property interests without alterations of legal rules—*e.g.*, blanket exceptions that the Clause "does not apply when property is retained or

143. United States v. Causby, 328 U.S. 256, 266 (1946).

144. Brauneis, *supra* note 133, at 89 (noting that, before the emergence of the view that the Takings Clause imposed a "remedial duty," "courts generally agreed that if certain acts could not support a trespass action, uncompensated statutory authorization of those acts did not run afoul of the constitution").

145. *Causby*, 328 U.S. at 270 (Black, J., dissenting).

146. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 159–60 (2021).

147. Brauneis, *supra* note 133, at 132–35.

148. *See, e.g.*, United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 334 (1920) (stating that no taking occurred until an agent of the United States "authorized" or "approved" a taking of property, and an official's unauthorized acts were "tortious" but "created no liability on the part of the Government").

149. *See* Horne v. Dep't of Agric., 576 U.S. 351, 357–358 (2015) (holding that the Takings Clause protects personal property).

damaged" from the exercise of "the state's police power,"[150] or perhaps the same "public necessity" exception available under the private law.[151]

The Fourth Amendment, like the Takings Clause, also permits claims against officials for interfering with property interests. The Court has deployed the Fourth Amendment to protect the interest in "property as such."[152] In *Soldal v. Cook County*, deputy sheriffs who carried off the plaintiffs' mobile home without an eviction order had "seized" the plaintiffs' property.[153] The Court reasoned that a seizure is a "meaningful interference with an individual's possessory interests in . . . property."[154] The "domicile" was "literally carried away," the Court continued, which called for "the protection of the Fourth Amendment."[155] The Court thus recognized something like a Fourth Amendment theory of conversion or trespass to chattels.[156]

The Seventh Circuit opinion reversed in *Soldal* fretted about exactly that possibility. Judge Posner explained that the plaintiffs' theory would allow the Fourth Amendment to "regulate garden-variety commercial disputes."[157] It would make "every repossession and eviction" potentially cognizable under the Fourth Amendment, thus "trivializ[ing] the amendment and gratuitously shift[ing] a large body of routine commercial litigation from the state courts to the federal courts."[158] Indeed, the theory of *Soldal* could substantially increase the set of Fourth Amendment property torts. Courts have already addressed claims for damages because an officer shot the plaintiff's dog,[159] because the police by "show of authority" required the plaintiff to surrender firearms,[160] and because officers stole

150. *E.g.*, Johnson v. Manitowoc Cnty., 635 F.3d 331, 336 (7th Cir. 2011).

151. Baker v. City of McKinney, 145 S. Ct. 11, 12 (2024) (Sotomayor, J., concurring in the denial of certiorari) (citing Bowditch v. Boston, 101 U.S. 16 (1880)); *see* Derek T. Muller, Note, *"As Much upon Tradition as upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481 (2006).

152. Soldal v. Cook Cnty., 506 U.S. 56, 62 n.7, 66 (1992).

153. *Id.* at 58–60.

154. *Id.* at 61 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

155. *Id.*

156. *See* Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003); *see also* Baude & Stern, *supra* note 135, at 1884–85 (arguing that the "current doctrine [for] a seizure of things" applies the "positive law" of "conversion or trespass to chattels").

157. Soldal v. Cnty. of Cook, 942 F.2d 1073, 1076 (7th Cir. 1991) (en banc), *rev'd*, 506 U.S. 56 (1992).

158. *Id.* at 1077; *see also id.* at 1081 (Easterbrook, J., concurring) (noting that the Fourth Amendment theory was "lexically possible" but would make it "so universal that it occupies the field of governmental action").

159. *See* Viilo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008) (stating that every circuit has "held that the killing of a companion dog constitutes a 'seizure' within the meaning of the Fourth Amendment"); *see also* Siebert v. Severino, 256 F.3d 648, 655–56 (7th Cir. 2001) (finding a Fourth Amendment seizure when an official seized a horse).

160. *See* Juzumas v. Nassau Cnty., 33 F.4th 681, 692 (2d Cir. 2022).

cash and rare coins subject to a valid search warrant.[161] Moreover, the Fourth Amendment expressly extends to "effects," which could include personal property like "a tube of lipstick or a sweater."[162] If pressed, *Soldal* could displace common-law relational obligations that concern interference with property with a constitutional rule of reasonableness.

The Takings Clause and Fourth Amendment thus highlight one challenge of generating constitutional private law. Once constitutional text may be interpreted to authorize *either* invalidity rules *or* duty rules, the duty rules begin to encroach on the traditional realm of the private law. Trespasses by government officials become takings; trespass to chattels becomes a Fourth Amendment violation. If constitutional private law is not to displace the private law or expand well beyond it, courts must develop various limiting rules—principled or otherwise—to hem in that new constitutional law. In some cases, the limitations built back into the constitutional law mimic the constraints originally placed on private law.

3. Privacy

Constitutional private law also protects interests conventionally protected by rights of privacy. It should be unsurprising by now that the Fourth Amendment offers one of the more important, though not the exclusive, textual hooks. This Section also contrasts the "privacy" protected through constitutional private law with the "right to privacy" of constitutional public law. It also introduces a new procedural mechanism for constitutional private law: the trial remedy. I explain how the scope and justification of the trial remedy depend on whether the underlying constitutional rule is thought to be private or public law.

161. *See* Jessop v. City of Fresno, 936 F.3d 937, 941 (9th Cir. 2019) ("We have never addressed whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment."); *see also* Mom's, Inc. v. Willman, 109 F. App'x 629, 637 (4th Cir. 2004) ("Because theft by a police officer extends a seizure beyond its lawful duration, such theft violates the Fourth Amendment.").

162. Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 948–51 (2016). Of course, most seizures of personal property would not result in constitutional litigation because the damages for the destruction of such property would be small. *But see, e.g.*, Sara Ruberg, *California County to Pay $300,000 over Butchering of Girl's Goat*, N.Y. TIMES (Nov. 3, 2024), https://www.nytimes.com/2024/11/03/us/california-goat-butchered-settlement.html [https://perma.cc/BA64-Z4TD] (reporting on a constitutional claim for seizure of pet goat); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 n.5 (1982) (discussing the difficulty of "[a]pplying economic reasoning to things of high sentimental value").

The Court has invoked "privacy" in defining the scope of Fourth Amendment protections.[163] The interference with a person's interest in privacy is cognizable as constitutional private law, and indeed *Bivens* characterized the interests there as "rights of privacy."[164] The Court has extended the same theory of wrongdoing to hold that a "strip search" of a middle-school girl could be cognizable under § 1983 (unless barred by qualified immunity), noting the plaintiff's "subjective expectation of privacy" and "her account of [the search] as embarrassing, frightening, and humiliating."[165] The Fourth Amendment thus becomes not quite a general federal tort law, but certainly a source of inspiration for tort-like rules that could have been handled through ordinary private law. The invasions of privacy from warrantless arrests and strip searches might have been handled through privacy torts, or intentional infliction of emotional distress, if they were tailored to the unique context of official authority.[166]

The Court considered but rejected privacy theories that cannot be assimilated into the language of the Fourth Amendment. In *Paul v. Davis*, plaintiff alleged a deprivation of "liberty" under the Due Process Clause because defendants circulated an "Active Shoplifters" flyer that he claimed would "inhibit him from entering business establishments" and would "seriously impair his future employment opportunities."[167] The Court rejected his interpretation of the Due Process Clause, arguing that the Clause cannot extend a "right to be free of injury wherever the State may be characterized as the tortfeasor."[168] It also characterized the wrong as a "classical claim for defamation,"[169] though it might have either mentioned false light or acknowledged that the exposure of information by police poses different risks than defamation by private persons. Expressly noting that it

163. *See, e.g.*, Sophia Z. Lee, *The Reconciliation Roots of Fourth Amendment Privacy*, 91 U. CHI. L. REV. 2139, 2141–49 (2024); *see also id.* at 2223 (arguing that the conceptual emphasis on "privacy" is a post-Civil War innovation); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069 (2014) (discussing different understandings of "privacy" at work in Fourth Amendment doctrine).

164. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971); *see also id.* at 388 (noting that the officials conducted a warrantless search of Bivens's apartment, "searched the apartment from stem to stern," and conducted a "visual strip search"); *id.* at 408 (Harlan, J., concurring) ("The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of 'privacy.'").

165. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 374–75 (2009).

166. *See, e.g.*, D'Onfro & Epps, *supra* note 107, at 980–84 (discussing intrusion upon seclusion claims for searches of the home); Tilley, *supra* note 19, at 421–36; Spencer v. District of Columbia, 168 F. Supp. 3d 114, 122–24 (D.D.C. 2016) (finding that plaintiff's allegation that police forced her to remain exposed after being arrested at the scene of a fight stated a claim for intrusion upon seclusion); Jones v. District of Columbia, No. 16-cv-2405, 2019 WL 5690341, at *7 (D.D.C. June 13, 2019) (similar).

167. Paul v. Davis, 424 U.S. 693, 697 (1976).

168. *Id.* at 701.

169. *Id.* at 697.

would have to infer a constitutional wrong from the word "liberty" in the Clause, the Court warned against making the Clause a "font of tort law to be superimposed upon whatever systems may already be administered by the States" and against creating a "body of general federal tort law."[170] The irony is that the Court has developed a body of general federal tort law under the Fourth Amendment—just for the set of claims that happen to have a plausible hook in the text.

The Court also concluded that "'stigma' to one's reputation" is a cognizable constitutional harm only if the plaintiff has been deprived of "more tangible interests such as employment."[171] In past cases allowing constitutional claims to proceed, the defamatory acts by government officials *also* "proscri[bed]" the plaintiffs from "ever holding a government job;" altered the "legal status of an organization or a person, such as loss of tax exemption or loss of government employment;" or resulted in the loss of "teaching positions at a state university."[172] In other words, as the Court suggested in a footnote, the Due Process Clause comes into play only when officials take actions "which will affect *an individual's legal rights*."[173] In refusing to embrace a constitutionalized defamation suit in *Paul v. Davis*, then, the Court refused to recast prior cases (arguably) preventing certain alterations of legal rights as constitutional private law for officials.[174]

Unsurprisingly, then, other canonical privacy rights operate as constitutional public law. Specifically, constitutional rules invalidating criminal prohibitions on activity protected by constitutional rights do not impose relational obligations on government officials. Instead, the constitutional rules adjudicated in cases like *Roe v. Wade*, *Stanley v. Georgia*, or *Griswold v. Connecticut* operated within the framework of constitutional public law, meaning that the Constitution operated to

170. *Id.* at 701; *see also* Parratt v. Taylor, 451 U.S. 527, 531 (1981) (similar), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

171. *Paul*, 424 U.S. at 701.

172. *Id.* at 702–05 (first citing United States v. Lovett, 328 U.S. 303, 314 (1946); then citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring); and then citing Wieman v. Updegraff, 344 U.S. 183, 191 (1952)).

173. *Id.* at 706 n.4 (emphasis added) (quoting Hannah v. Larche, 363 U.S. 420, 441 (1960)); *see also id.* at 708–09 ("[I]t was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards."); *id.* at 710 ("[T]he defamation had to occur in the course of the termination of employment."); *id.* ("[T]he act of the school officials suspending the student there involved resulted in a denial or deprivation of that right.").

174. *Paul* thus limits the Due Process Clause (with respect to defamation-like injuries) to governmental alterations of legal rights. The alternative approaches would have either produced a generalized constitutional defamation rule or, perhaps, limited the Clause to particularly severe damage to a victim's reputational interests. Both approaches are available for other constitutional provisions. The Fourth Amendment produces generalized excessive-force duties. *See supra* Section I.B.1. The Takings Clause limits constitutional private law to permanent *occupations* of property, treating "isolated" invasions as trespasses. *See supra* Section I.B.2.

invalidate the alteration of legal rights effectuated by the purportedly unconstitutional law.[175] *Stanley* and *Griswold* determined the constitutional invalidity of the statute in criminal prosecutions *enforcing* the statutory regime. But sometimes plaintiffs seek the invalidation of the statutory regime in litigation that anticipates that threat of prosecution, sometimes invoking *Ex parte Young* and sometimes invoking § 1983.[176] Such claims challenging the invalidity of the underlying statute are better characterized as constitutional public law: the theory of harm is that there may be some future alteration of legal rights under an invalid statute.[177]

A boundary case is *Rochin v. California*,[178] where the classification of the remedy (and its rationale) as private or public is unclear. There, the Court concluded that officials who coercively pumped a person's stomach to get evidence against him violated his "privacy" interests.[179] The stomach pumping occurred after Rochin was arrested at home and transported to a hospital for the procedure.[180] In *Rochin* itself, the Court reversed the state court and vacated Rochin's conviction because of the violation of his right to privacy.[181] In vacating the conviction, the Court used a trial remedy to redress the officials' inappropriate investigative technique, which is just how the Fourth Amendment exclusionary rule operates.[182] But the investigative technique might have just as easily been subject to a claim for damages under § 1983, presumably under the theory that it was an unreasonable search or seizure. (Indeed, later decisions in the *Rochin* line have been interpretations of the Fourth Amendment.[183]) Thus, in cases like *Rochin* and those invoking the Fourth Amendment, the constitutional rule might be enforceable as traditional constitutional private law (*i.e.*, damages) or with a trial remedy.[184]

175. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164–65 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Stanley v. Georgia, 394 U.S. 557, 565 (1969); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); *see also infra* Part II (discussing the implementation of constitutional public law).

176. *See, e.g.*, Roe v. Wade, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970) (challenging the constitutionality of a Texas abortion statute under § 1983), *aff'd in relevant part*, 410 U.S. 113 (1973); *see infra* text accompanying notes 308–13 (discussing challenges to the constitutionality of a state statute that proceeded under an *Ex parte Young* theory).

177. *See, e.g.*, *Roe*, 410 U.S. at 166 (determining that Texas's abortion laws were unconstitutional and therefore affirming a declaratory judgment to that effect).

178. 342 U.S. 165 (1952).

179. *Id.* at 172.

180. *Id.* at 166.

181. *Id.* at 174.

182. Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1918–25 (2014) (drawing the analogy between *Rochin* and the exclusionary rule).

183. *See* Winston v. Lee, 470 U.S. 753, 755 (1985).

184. Both, neither, or just one may be available. For example, Fourth Amendment "violations" justify trial remedies (the exclusionary rule) and constitutional private law remedies (§ 1983 or *Bivens*). On the other hand, a violation of *Miranda* justifies a trial remedy but no damages remedy under § 1983. *See* Vega v. Tekoh, 597 U.S. 134, 138 (2022).

Isolating constitutional private law provides a better framework for understanding the possible rationales for trial remedies. If the constitutional rule imposes relational obligations, then the theory of redress must be that the trial remedy somehow corrects the wrong done. For example, the wrong might be understood as a variant of malicious prosecution, but where the victim has been wrongfully subjected to criminal process with improperly obtained evidence; on that view, the trial remedy becomes a kind of specific relief for the constitutional wrong. The specific-relief theory might explain, for example, the rule that a criminal defendant cannot invoke the Fourth Amendment exclusionary rule when he is not the victim of the illegal search.[185] On the other hand, if the constitutional rule is *not* a relational obligation imposed on the officer, then use of a constitutional rule to invalidate a judgment has to be justified on other functional grounds, like incentivizing officials to behave themselves or maintaining the integrity of the courts.[186] Those arguments, however, present the kind of all-things-considered practical arguments that characterize judgments about constitutional public law.

4. Process

Constitutional private law also imposes a limited set of *procedural* protections for interests protected by the Due Process Clause. This category of claims lacks immediate analogues in private law, though some of the limited rules operate like a negligence regime. Moreover, the Court's effort to articulate a constitutional private law of due process underscores the challenges in distinguishing constitutional rules that govern *conduct* from those that govern the *alteration of legal status*.

A conventional due-process issue is whether a state-sanctioned proceeding offers the necessary procedural protections before altering legal entitlements.[187] The critical questions in such a case are what kinds of legal entitlements count as "life, liberty, or property" and what process satisfies the Clause.[188] But the Court has limited when procedural due process might

185. Alderman v. United States, 394 U.S. 165, 174 (1969).

186. Elements of this reasoning are apparent in the Court's Fourth Amendment exclusionary-rule jurisprudence. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))); *see also id.* at 659 (reasoning based on "judicial integrity").

187. *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (assessing the constitutionality of "existing administrative procedures").

188. *See* Richard J. Pierce, Jr., Essay, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1974–85 (1996); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886 (2000).

operate as a conduct rule that imposes obligations on officers. In *Parratt v. Taylor*, the critical case, the Court held that the "tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee" would not violate due process if there were a sufficient postdeprivation remedy—*e.g.*, a state-law tort suit against the employee.[189] In *Hudson v. Palmer*, the Court extended that holding to deprivations from "unauthorized intentional" wrongdoing by state officials.[190] Together, *Parratt* and *Hudson* refused to impose obligations on officials to take care before interfering with property interests of a defendant. At the same time, the insistence on an adequate "postdeprivation remedy" would have allowed adjudication of the (in)validity of state laws that authorize the alteration of legal entitlements without sufficient process.[191]

The Court has nonetheless left at least two avenues for process-based constitutional private law: cases of delegated discretion and cases sounding in breach of contract. First, in *Zinermon v. Burch*, the Court reasoned that when statutes give "broad power and little guidance" to officials "in admitting mental patients," the Constitution imposes on those officials "the State's concomitant *duty* to see that no deprivation occurs without adequate procedural protections."[192] In those circumstances, the Court held, the plaintiff might "hold *state officials* accountable for *their* abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue."[193] The other category of procedural duties that apparently survives *Parratt* and *Hudson* are those regarding the suspension or termination of public employees.[194] These employers should (usually) have no authority to alter legal rights through legislation or adjudication, but they have contractual rights to terminate employees in some circumstances. The Court's requirement that such employers sometimes satisfy procedural requirements imposes a kind of mandatory term within the contractual relationship.[195]

The process cases thus reveal a challenge in determining the structure of constitutional rules. On one hand, most due process cases arise when

189. Parratt v. Taylor, 451 U.S. 527, 541 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

190. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

191. Later, *Daniels v. Williams* held that negligence by officials could not violate the Due Process Clause, which limits the potential of *Parratt* to require adequate postdeprivation remedies for claims of negligence against officials. Daniels v. Williams, 474 U.S. 327, 330–31 (1986).

192. Zinermon v. Burch, 494 U.S. 113, 135 (1990) (emphasis added).

193. *Id.* at 136 (emphasis added).

194. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 926–27 (1997); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 300–04 (1986).

195. On mandatory rules, see, for example, Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 302–10 (2020); Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. CHI. L. REV. 255, 256 (2019).

plaintiffs challenge the authority of officials to alter legal rights through formal actions of some kind of adjudicator. In these cases, the Constitution operates through public-law rules, constraining the procedural mechanisms by which States might alter legal rights, including not just deprivations of traditional property but also the deprivation of state-created benefits. On the other hand, the Due Process Clause sometimes imposes duties on officials not to interfere with the legal rights of other persons without taking adequate (procedural) care. In these cases, the obligation of procedural justice extends not just from the courtroom to the informal administrative adjudicator,[196] but even to informal official decision-making that would not generally be considered adjudication—specifically, the contractual relationships between private persons and officials and to the obligations of officials exercising discretionary power to affect the material interests of persons. The constitutional private law of due process operates as a kind of negligence regime, because the law enjoins the official to be careful with respect to the material interest of the victim. But the Court has refused to transform the Due Process Clause into a generalized relational obligation to take care before interfering with another person's interests.

The refusal to produce a general relational obligation of officials to take care against interfering with others' life, liberty, and property forces constitutional private law into other textual pigeonholes.[197] If official interference with interests protected by the traditional private law were protected by the open-ended language of the Due Process Clause, then that Clause could become a "general federal tort law,"[198] or more precisely a general federal tort law of officers. That vision for constitutional private law failed. Instead, constitutional private law must be developed through various textual hooks within the Constitution—often the Fourth Amendment, but also the First, Eighth, and Fourteenth Amendments. That text-specific development of constitutional private law seems like a reasonable approach if the claims are justified as a form of constitutional law. After all, if constitutional private law is constitutional law, then the claims should track the specific textual provisions that generate constitutional norms. But if the structure of this constitutional private law reflects the obligations of officials because of their positions of authority, then the development of this body of law through these textual provisions may exclude some interests that should be protected against official wrongdoing. And if the textual provisions are under-inclusive, then there might be pressure to stretch the textual provisions that *do* exist to include

196. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).
197. *Cf.* Ketan Ramakrishnan, *What Is a Tort?*, 139 HARV. L. REV. (forthcoming 2026).
198. Paul v. Davis, 424 U.S. 693, 701 (1976).

claims that might be better developed as general federal tort law—as when, for example, the Fourth Amendment authorizes "malicious prosecution" claims.[199] Whether the creative interpretation of textual hooks deforms or improves the system depends on whether an ideal regime would include just the discrete set of constitutional norms or also a broader set of norms about official wrongdoing.[200]

5. Reasons

A final category of constitutional private law comprises rules prohibiting government officials from taking lawful actions for impermissible reasons. As an initial matter, as with some process-based protections, these constitutional rules often constrain the government in its employment relationships and thus impose mandatory terms on contractual relationships between government officials and citizens.

More specifically, constitutional private law precludes the deprivation of interests based on distinctions forbidden by the First and Fourteenth Amendment. The Court has recognized claims for retaliatory arrest and prosecution; for speech-based retaliation for public employees; for adverse employment action for an employee's political affiliation; and for discrimination in employment on the basis of sex, race, or religion.[201] These claims might be generalized: they impose obligations not to take adverse actions against persons for a reason deemed constitutionally impermissible. Some of these claims differ from those claims conventionally classified as constitutional torts because they operate within an employment relationship in which the parties have bargained. Instead of imposing obligations on strangers, the rules against discrimination in employment impose mandatory terms on the parties' contractual agreement.

C. Justifications

The natural question that follows is *why* constitutional private law should have the structure and content of private law, and one possible justification is implicit in the structure of the regime. Constitutional private law imposes relational duties on officials. The duties command the official to respect the interests of certain persons foreseeably injured by the official. The sets of

199. *E.g.*, Chiaverini v. City of Napoleon, 602 U.S. 556 (2024); Albright v. Oliver, 510 U.S. 266 (1994).

200. *See infra* Section I.C.

201. *See, e.g.*, Nieves v. Bartlett, 587 U.S. 391, 402 (2019) (retaliatory arrest); Hartman v. Moore, 547 U.S. 250, 256 (2006) (retaliatory prosecution); Garcetti v. Ceballos, 547 U.S. 410 (2006) (retaliation against a public employee for speech); Davis v. Passman, 442 U.S. 228, 235 (1979) (discriminatory firing); Elrod v. Burns, 427 U.S. 347 (1976) (adverse action based on political affiliation).

persons to whom such duties run, and the kinds of conduct that count as wrongful, depend not just on the language of the Constitution but on the social context of the official's function. If such a duty is breached, the official must personally make good the wrong done by paying damages to the victim of the misconduct. Damages are designed to restore the victim's rightful position. The operation of constitutional private law thus suggests its plausible purpose: to correct wrongdoing by government officials.

The more challenging question is what counts as wrongdoing that requires correction. A first potential theory, and a tempting one, is that the Constitution of its own force supplies those duties.[202] The argument would be that the relevant provisions of the Constitution constrain every form of state action;[203] that one kind of state action is the conduct of executive officials acting within the scope of their authority or abusing their authority;[204] and that the Constitution therefore imposes duties on those officials.[205] The view that the Constitution imposes the obligations also coheres with the frequent assertions by the Court that a claim for damages under § 1983 is for a "constitutional violation."[206] And it perhaps seems natural to think that the form of legal rule through which the law constrains the conduct of police officers, prison guards, and other executive officials should be duty rules.

But the Constitution necessarily underdetermines the form of constitutional rules that apply to executive officials. The premise that the Constitution constrains all state actors, including executive officials, does not entail that it constrains those actors by imposing obligations on them. As explained above, the Constitution constrains the activities of legislation and adjudication without imposing relational duties analogous to those in private law. And it is obviously possible that the Constitution could have constrained executive officials without imposing relational obligations on

202. *E.g.*, Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 662 n.11 (1997) ("Proof of a violation of the Constitution ought to be both necessary and sufficient" to state a § 1983 claim.); Matteo Godi, *Section 1983: A Strict Liability Statutory Tort*, 113 CALIF. L. REV. (forthcoming 2025). Previously, I also suggested that constitutional torts should simply implement the Constitution. *See* West, *supra* note 89, at 912–20. But the suggestion was incomplete because the Constitution cannot fully determine the content of constitutional private law. Instead, because constitutional law is textually and historically under-determinate with respect to rules of constitutional private law, and because these claims require some reason to implement the constitutional rule as a form of private law, the claims necessarily draw on private law.

203. *See, e.g.*, Lindke v. Freed, 601 U.S. 187, 194 (2024); *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

204. Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

205. *See, e.g.*, *Lindke*, 601 U.S. at 195 ("easy to spot" state action by "police officers, public schools, or prison officials").

206. *See, e.g.*, Chiaverini v. City of Napoleon, 602 U.S. 556, 561 (2024); City of Canton v. Harris, 489 U.S. 378, 385 (1989); Baker v. McCollan, 443 U.S. 137, 140 (1979).

them.[207] Indeed, before the modern era, the Constitution constrained executive action without duty rules, and the argument that constitutional law should be so limited was a plausible one at least as late as the decision in *Monroe v. Pape*.[208] There is thus nothing conceptually, textually, or historically necessary about constitutional duties.

A second possibility, tempting for different reasons, would be to make constitutional private law dependent on ordinary private law. The ordinary private law that establishes that baseline might be *either* what is currently articulated *or* what existed when § 1983 was enacted, and might comprise either state law or some idealized (or general) version of the common law.[209] The idea would be that the Constitution itself does not impose duties on officials but operates exclusively through constitutional public law, including when constitutional public law operates to preclude certain defenses to private law claims against those officials. Accordingly, an official should be responsible in her personal capacity only if the official violated some norm established already under the private law—say, for trespass, battery, trespass to chattels, intrusion upon seclusion, breach of contract, intentional infliction of emotional distress, and so on. On this view, the claims available against officials should thus be limited to the sets of claims that would be available under the private law, with the caveat that certain defenses or certain changes to private law might contravene constitutional public law.[210]

But private law is not perfectly suited to the responsibilities of state actors. An official's responsibilities to act on behalf of the government reframes the relationship between the official and other persons. Accordingly, the application of private law to public officials has required various modifications. For example, during the nineteenth century, when officials could be sued under various common-law claims, the Supreme

207. *See, e.g.*, John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies,* 86 GEO. L.J. 2513, 2516–17 & n.13 (1998) (discussing a system of public law remedies that did not depend on constitutional conduct rules for government officials).

208. *See* West, *supra* note 89, at 885–88 (discussing Justice Frankfurter's theory of constitutional rights).

209. Section 1983 might require a plaintiff to have a cause of action under *current* state law, *see* Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 950 (2024), under the modern general private law, *see* West, *supra* note 89, at 925–26, or under the general common law as of 1871, *see id.* at 923–24. For a suggestion that institutional developments render a true modern "general law" inaccessible as a guide to constitutional meaning, see Joshua C. Macey, Ketan Ramakrishnan & Brian M. Richardson, *Against General Law Constitutionalism*, 93 U. CHI. L. REV. (forthcoming 2026) (manuscript at 60–65) (on file with author) (arguing that "the revival of general law would require a far more modest vision of federal judicial review and federal supremacy over constitutional questions"). As discussed in more detail below, a general law of official misconduct could emerge in the states, *see infra* Section III.B.3, but only if the states were to develop the law of official misconduct without reference to *federal* constitutional private law.

210. *E.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

Court developed immunity rules that accommodated common-law claims to the problem of official authority.[211] Today, the FTCA subjects federal officials to liability "in the same manner and to the same extent" as private persons, but then includes various exceptions to liability that likewise accommodate official responsibility.[212] Likewise, for property torts, the defense of private necessity differs from public necessity,[213] and the defenses to battery and false imprisonment for officials differ from those available to ordinary citizens.[214]

A final possibility is that the content of constitutional private law depends on a theory of official responsibility and an incomplete analogy to private law. The analogy works because private law articulates relational obligations to protect the interests of persons against certain kinds of interference with those interests; the analogy fails because an official's public responsibilities necessarily alter her obligations to other persons. Thus, the set of obligations that emerges includes a series of wrongs with rough analogues to private law, but modified to reflect the official's public responsibilities. If constitutional private law were invented from the ground up, the set of wrongs might generally include *unreasonable* execution of official responsibilities, *malicious* use of official authority, or the *discriminatory* distribution of benefits or burdens.[215] Those categories would target carelessness, malice, and partiality; those categories might easily capture unreasonable or malicious uses of force, substantial interference with the use and enjoyment of property, the failure to exercise discretion to reasonably protect another's material interest, or discriminatory uses of official authority.

But the system of constitutional private law cannot be invented from the ground up.[216] Constitutional private law sometimes invokes principles of

211. *See, e.g.*, Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 414–32 (1987) (discussing "legality" and "discretion" models of official immunity).

212. 28 U.S.C. § 2674; *see also id.* § 2680(a) (excluding liability for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid").

213. *Compare* Bowditch v. Boston, 101 U.S. 16 (1880), *with* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

214. *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 94 (2d ed. Supp. 2025).

215. *Cf.* John Murphy, *Misfeasance in a Public Office: A Tort Law Misfit*, 32 OXFORD J. LEGAL STUD. 51, 51 (2012) (stating that "[a]n action for misfeasance in a public office" is available where, among other things, (1) "a defendant, in bad faith, abuses his powers . . . as a public officer specifically intending to injure the claimant" or (2) "where the defendant, in bad faith, acts knowingly beyond his powers").

216. *See* Parratt v. Taylor, 451 U.S. 527, 531 (1981) ("In the best of all possible worlds, the . . . statement that respondent's loss should not go without redress would be an admirable provision to be contained in a code which governed the administration of justice in a civil-law jurisdiction. For better or

constitutional law that might be modified to define relational duties (*e.g.*, anti-discrimination principles from the First or Fourteenth Amendments) or sometimes draws on principles of private law that might be modified to articulate the responsibilities of government officials (*e.g.*, rules of negligence or of battery and self-defense). Either way, whether by creatively reinterpreting constitutional norms or repurposing private law rules, constitutional private law should be consistent with a theory about the duties that officials have to those subject to their authority.

II. CONSTITUTIONAL PUBLIC LAW

Constitutional public law is different. Legislation and judicial decision-making alter the rights and obligations of persons subject to the jurisdiction of those institutions. Constitutional rules for those official functions determine whether, how, and to what extent these changes are effective. Put another way, constitutional rules for legislatures and judges are rules about rules, or "power" rules, and "one cannot really violate rules about power."[217] Failing to effectuate a legal change might have consequences for whether other legally cognizable interests have been impaired. But constitutional public law, unlike the private variant, disjoins the interests protected by the constitutional rule from the interests protected by the legal entitlement that justifies adjudication. I begin with a discussion of constitutional law for legislatures and judges before turning to governmental institutions that cannot easily be classified.

A. Legislation

Legislation alters the rights, duties, powers, immunities, and other legal relations of persons subject to the law.[218] The Constitution specifies who may legislate, how a law is properly made, whether the law is within the scope of congressional power, and whether the legislation is contrary to individual rights. The form of constitutional law that applies to these questions is a rule that determines the (in)validity of the law. In this Section, I show how the point of legislation informs the constitutional rules that

for worse, however, our traditions arise from the common law of case-by-case reasoning and the establishment of precedent."), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

217. John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 340–41 (1998); Hohfeld, *supra* note 29, at 745–52 (discussing powers and liabilities); H.L.A. HART, THE CONCEPT OF LAW 79–99 (3d ed. 2012) (distinguishing primary and secondary rules). For another attempt to distinguish constitutional rules for different institutional actors, see Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

218. *E.g.*, Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) ("Legislation . . . changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.").

constrain it, and further how the structure of the constitutional rules informs adjudication about them.

Consider first how the constitutional rules that constrain Congress or state legislatures differ from constitutional private law. Legislators have some responsibility to enact wise laws, but the responsibility is not owed to any person in particular. Indeed, while the relational duties of private law preclude certain conduct in the world that interferes with legal entitlements, legislation operates on and alters such legal entitlements.[219] Constitutional rules governing legislation thus constrain the alteration of legal entitlements; they determine whether a purported exercise of lawmaking power is effective to change the law. Lawmaking might be ineffective because Congress has failed to satisfy one of the procedural restrictions on the exercise of its power, because it exceeds its authority to make substantive law, or because the statute is contrary to someone's constitutional rights. Congress has no authority, for example, to enact "legislation" without satisfying the requirements of bicameralism and presentment,[220] to enact a statute beyond one of its enumerated powers,[221] or to enact a statute retroactively increasing the penalties for a crime.[222] If Congress enacts purported "law" that fails one of those limitations, the "law" is void and cannot effectuate a change in legal status; unconstitutional legislation is ineffective, invalid, null, void.[223] The same is basically true for

219. Legislation is not the exclusive mechanism to alter legal relations. Courts and administrative agencies, among other institutions, alter legal relations as well. *See* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 63 (2014) (noting that injunctions "impos[e] new duties on the defendant" and damages awards "create[] a new obligation to pay"); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 477 (2002) (noting that agencies sometimes promulgate "legislative substantive rules" that "regulate primary behavior with the force of law"). Private persons also alter legal obligations by agreement, *e.g.*, RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981) (defining "contract" as a promise "for the breach of which the law gives a remedy," or the "performance of which the law in some way recognizes as a duty"), or by one party's unilateral course of conduct, *e.g.*, RESTATEMENT (FIRST) OF PROP. § 457 (AM. L. INST. 1944) (creation of prescriptive easements).

220. *E.g.*, INS v. Chadha, 462 U.S. 919, 959 (1983) (holding that legislative vetoes have no legal effect because they do not satisfy bicameralism and presentment).

221. *E.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995) (affirming vacatur of a criminal conviction under a statute deemed "*invalid* as beyond the power of Congress under the Commerce Clause" (emphasis added) (citation omitted)).

222. *E.g.*, Peugh v. United States, 569 U.S. 530, 533 (2013) (holding that a defendant's sentence cannot be enhanced under Sentencing Guidelines promulgated after he committed his criminal acts).

223. *E.g.*, Massachussetts v. Mellon, 262 U.S. 447, 488 (1923) (noting that a court may "disregard an unconstitutional enactment" if it would "stand in the way of the enforcement of a legal right"). I do not, for present purposes, need to distinguish between the view that the statute is "law" but invalid or in some sense not "law." *Compare* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 951 & n.72 (2018), *with* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1112–13, 1150–71 (2003).

the application of constitutional norms to state legislation, though the set of constitutional rules that applies is more limited.[224]

While courts sometimes adjudicate the invalidity of legislation, they do so only incidentally as they adjudicate non-constitutional rights.[225] The procedural circumstances in which these claims arise vary, but they include criminal prosecutions by state or federal officials,[226] civil enforcement proceedings by such officials,[227] civil lawsuits between private parties,[228] common-law claims against state or federal officials,[229] bankruptcy proceedings,[230] and challenges to administrative action or administrative enforcement proceedings.[231] That is true whether the constitutional issue concerns compliance with lawmaking processes, consistency with federal legislative power, or interference with rights.

A consequence of the structure of legislative constitutionalism is that adjudicating the (in)validity of the law disjoins the constitutional norm and the legally cognizable harm. Though a party's entitlement to contest the deprivation of a legal interest "without authority of a valid law" is generally accepted,[232] the threatened legal interest that justifies constitutional litigation is only incidentally related to the interest protected by the constitutional rule. To return to examples referenced above, the interest in avoiding an order of deportation is only incidentally related to the reasons for bicameralism and presentment; an interest in avoiding paying a civil penalty is distinct from the interest in having a jury determine whether the fine should be imposed; and the interest in avoiding a criminal sanction is distinct from the reasons that the Constitution limits Congress's authority to enact substantive criminal law beyond its enumerated powers.[233] Indeed, when the constitutional norm is part of the structural Constitution, the true

224. *E.g.*, Crutcher v. Kentucky, 141 U.S. 47, 48, 58, 61–62 (1891) (reversing a criminal conviction because legislation contrary to congressional regulation of interstate commerce was "unconstitutional," "void," and a "nullity").

225. *See* Harrison, *supra* note 219, at 81–86 (arguing that invalidation is not a "remedy"). *But see* Amitpal C. Singh, *Declarations of Invalidity and the Metaphysics of Judicial Review*, 58 U.B.C. L. REV. 207 (2025) (discussing remedy of "declaration of invalidity" in Canadian jurisprudence).

226. *Lopez*, 514 U.S. at 552; United States v. Stevens, 559 U.S. 460, 467 (2010); Griswold v. Connecticut, 381 U.S. 479, 480 (1965); *Crutcher*, 141 U.S. at 48, 58, 61–62.

227. Tull v. United States, 481 U.S. 412, 414 (1987); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 300, 311 (1852).

228. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1, 186 (1824).

229. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 847–48 (1824); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 216 (1821).

230. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63 (1982).

231. SEC v. Jarkesy, 603 U.S. 109, 115 (2024); Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 462 (2001); *cf.* Skinner v. Ry. Lab. Execs.' Ass'n., 489 U.S. 602, 606 (1989) (constitutional challenge to administrative rules).

232. Fallon, *Facial Challenges*, *supra* note 17, at 1232–33.

233. *See* INS v. Chadha, 462 U.S. 919, 936 (1983); Tull v. United States, 481 U.S. 412, 414 (1987); United States v. Lopez, 514 U.S. 549, 552 (1995).

"injury" might be to the "institutional prerogatives" of some institution,[234] but the constitutional norm is adjudicated in the course of determining whether a private person has been deprived of some other legal entitlement not conferred by the Constitution.[235]

By contrast, constitutional private law unites the constitutional norm and the legally cognizable harm. For example, whenever a person has been unreasonably searched or seized, the Fourth Amendment norm against unreasonable searches or seizures justifies a suit for redress of the unconstitutional acts along with any harms that flow directly from them. Likewise, the constitutional norm prohibiting discrimination because of sex, race, or religion might justify a suit for redress simply because a person has been treated differently. The showing of *harm* or of *damages* may depend on non-constitutional interests (*e.g.*, physical damage to the body or property in the Fourth Amendment example, or loss of employment in the Fourteenth Amendment example). But the reason for recognizing those losses as cognizable injuries is because they flow from the constitutional wrong.[236] That is why nominal damages would be available, and Article III standing's injury-in-fact prong would be satisfied, even without showing some other compensable harm to person or property.[237]

The doctrine of absolute legislative immunity confirms the unique structure of legislative constitutionalism. Legislators have "absolute immunity" from suits under § 1983 for acts taken "in the sphere of legitimate legislative activity."[238] A claim against a legislature or its

234. Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 127 (2014) (discussing NLRB v. Noel Canning, 573 U.S. 513 (2014)); *see also* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013).

235. To be sure, there is often some articulable nexus between the interests protected by the constitutional provision and the interests protected by the pre-constitutional legal rule that might be altered by unconstitutional legislation. So a criminal prosecution for conduct thought to be protected by a constitutional provision threatens the defendant with legal sanction to preclude the exercise of the right at issue. Or the Court has said that a criminal prosecution under an unconstitutional statute threatened "individual liberty secured by federalism [that] is not simply derivative of the rights of the States." Bond v. United States, 564 U.S. 211, 222 (2011).

236. *See supra* text accompanying notes 89–93 (discussing *Uzuegbunam*).

237. Uzuegbunam v. Preczewski, 592 U.S. 279, 293 (2021) ("[I]t is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because 'every violation of a right imports damage,' nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms." (alterations and citation omitted)).

238. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998). For analyses of legislative immunity, see Woolhandler, *supra* note 211, at 401–05. That holding applies to state legislators, regional legislators, local legislators, and even to judges "acting in their legislative capacity." Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 731–34 (1980) (judges performing legislative functions); *see also Bogan*, 523 U.S. at 55 (local legislators); Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 406 (1979) (regional legislators); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (state legislators).

legislators for enacting unconstitutional legislation cannot succeed, because the legislators (or the legislature as an entity) breach no duties to those subject to the law, even if the law is bad or unconstitutional. Thus, immunity rules bar a lawsuit seeking injunctive relief on a claim that a "legislature" or its "members" committed some wrong by "refusing to amend" legislation—even legislation that the court has deemed "invalid."[239] The constitutionality of legislation must be adjudicated, if at all, by assessing the (in)validity of the law in the course of adjudicating some other pre-existing and non-constitutional legal interest.

B. Adjudication

Constitutional law for courts likewise differs from constitutional private law. The function of a court, like a legislature, is to alter or determine legal rights, but for the parties only.[240] It should thus be unsurprising that the series of constitutional rules that apply to adjudication concern the (in)validity of deprivations of legal interests by the correct judicial processes and correct application of substantive law.

Consider again how adjudicative constitutional rules differ from constitutional private law. The Constitution makes the state judges "bound" by federal law, "notwithstanding" contrary rules in the states, and both federal and state judges must take an oath to the Constitution.[241] Judges also have an obligation to the parties to render impartial justice, as the oath of office for federal judges suggests.[242] But as with legislators, that responsibility is not relational like the obligations of private law. If it were, then an erroneous judicial determination would be subject to a collateral lawsuit, which in turn would be subject to another collateral lawsuit, which in turn would be subject to another collateral lawsuit, and so on.[243] Instead, the obligation is one of impartiality to the parties in the adjudication of legal

239. *Consumers Union*, 446 U.S. at 733–34; *cf.* New Orleans Water Works Co. v. New Orleans, 164 U.S. 471, 481 (1896) ("[A] court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.").

240. *See* Harrison, *supra* note 219, at 82–83. This is, of course, an oversimplification of the functions of courts. For an extended historical discussion of the diverse forms of judicial power, see JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021).

241. U.S. CONST. art. VI, cls. 2, 3.

242. *E.g.*, Judiciary Act of 1789, 28 U.S.C. § 453 ("I . . . swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . .").

243. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348–49 (1872).

claims, and it is "enforceable" by means of the appellate process and political, professional, moral, or psychological constraints.[244]

Constitutional rules governing adjudication thus determine whether the exercise of adjudicative power suffices to alter the legal rights of the parties. The Constitution is thought to preclude a court from entering (or to require an appellate court to vacate) judgments imposing substantively impermissible sentences,[245] those obtained without sufficient evidence (excluding impermissibly admitted evidence),[246] those entered by a biased adjudicator,[247] those entered without jurisdiction,[248] and so on. The basic structure of constitutional rules for adjudication applies to both federal and state courts, though the content of the constitutional rules may differ.

Here again, because it involves a judicial determination that some other non-constitutional legal entitlement has been (in)validly altered, constitutional public law for adjudication disjoins the constitutional norm and the legally cognizable harm. Adjudication ensures the lawfulness of deprivations of pre-existing entitlements to life, liberty, property, and other legal entitlements that are largely creatures of state law.[249] The constitutional rules sometimes ensure that those underlying legal entitlements are accurately or fairly altered, but they sometimes enforce other societal or personal interests outside the scope of the adjudication.[250] For example, the suppression of evidence obtained by stomach pumping or

244. A major difference between the function of legislative and adjudicative constitutional rules concerns finality. A judgment is (ordinarily) final and conclusive even if erroneous, as long as it was issued with jurisdiction. *E.g.*, William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1826–31 (2008) (discussing the rule at the Founding). Finality thus precludes the invocation of constitutional rules that constrain courts outside of the initial adjudication or the appellate process, with some exceptions (*e.g.*, habeas or mandamus). By contrast, the invocation of constitutional rules that constrain legislation usually are not subject to such a "finality" rule. There are, of course, situations in which the legislature's determination is "final," *see* Field v. Clark, 143 U.S. 649, 680 (1892) (enrolled bill doctrine), or when a "final" adjudication is subjected to collateral attack for constitutional invalidity, *see* Brown v. Allen, 344 U.S. 443, 485–87 (1953) (post-conviction habeas corpus). One way of understanding this paper's recommendation regarding *over*-enforcement of constitutional rules, *see infra* Section III.B, is as an argument to increase the set of circumstances in which the legislature's determinations are final.

245. *See* Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L.J. 281, 302–03 (2022).

246. *E.g.*, *In re* Winship, 397 U.S. 358, 364 (1970).

247. *E.g.*, Williams v. Pennsylvania, 579 U.S. 1, 4 (2016).

248. *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998).

249. On the question whether legal interests protected by constitutional rules might *not* be state law, see Merrill, *supra* note 188, at 942–54.

250. *See, e.g.*, Weaver v. Massachusetts, 582 U.S. 286, 295 (2017) (noting that some criminal procedure rights are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest").

obtained by an illegal search protects the defendant's interests in bodily integrity or privacy—not his interest in staying out of jail.[251]

Immunity doctrines again clarify the logic of adjudicative constitutionalism. Judges are absolutely immune from suits for damages under § 1983.[252] At one point, the Supreme Court called this doctrine "as old as the law."[253] The judge's "duty," the Court has reasoned, is "to decide all cases within his jurisdiction that are brought before him."[254] That duty involves any number of subsidiary rules requiring impartial and (presumably) competent decision-making, but a duty to serve as a neutral arbiter between the parties is not compatible with competing relational obligations to non-parties or with peculiar obligations to one party or the other.[255] If the judge fails to follow her duty to the parties, the "errors may be corrected on appeal."[256] The constitutional rules of adjudication are thus enforced *within* the judicial system, without the use of damages, injunctions, or other remedies tailored to redress relational wrongs.[257]

C. Boundary Cases

Constitutional private and public law operate to constrain different kinds of governmental functions. The former constrains official conduct while the latter constrains legislation and adjudication. But some institutions can be

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251. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961); Rochin v. California, 342 U.S. 165, 174 (1952); *see also supra* notes 178–86 and accompanying text (discussing whether suppression is better understood as private or public).

252. Stump v. Sparkman, 435 U.S. 349, 351, 364 (1978); Butz v. Economou, 438 U.S. 478, 509 (1978); Pierson v. Ray, 386 U.S. 547, 553–54 (1967). *But see* Forrester v. White, 484 U.S. 219, 220–21 (1988) (denying absolute immunity to judge's decision to "dismiss a subordinate court employee").

253. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869); *see also* MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA § 28, at 125 (Chicago, Callaghan & Co. 1892) (calling the principle that judges "shall not be criminally accused or made liable to an action for what they do as judges" to be "a very ancient law"). *But see infra* note 257.

254. *Pierson*, 386 U.S. at 554.

255. *Cf. id.* at 564 n.4 (Douglas, J., dissenting) (noting the argument that "the judge's duty is to the public and not to the individual").

256. *Id.* at 554 (majority opinion).

257. For a provocative contrary argument that some judges should be sued for damages, see Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 556 (2012). Perhaps the idea is not so fanciful. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 10 (2008) (noting that some medieval Islamic jurists "held that judges who falsely convicted an accused person should suffer exactly the same punishment they had inflicted" and that, in medieval Italy, "judges were subject to civil and criminal liability for incorrect judgments"); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 663–65 (Cambridge, Mass., Harv. Univ. Press 1895) ("The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed."); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 16 (1996) (noting one case of "quasi-delictual liability" in Justinian's *Institutes* "referred to the judge who, through breach of his official duties, caused damage to another person").

challenging to classify because the conceptual difference between conduct that alters legal rules and conduct that interferes with a legal interest sometimes blurs. Consider the dual maxims of judicial immunity: judges are not liable for "what they do as judges," but "[w]here there is no jurisdiction at all there is no judge."[258] How do you tell? There are easy cases. A federal judge with an indisputable commission issuing orders in a case docketed and litigated in the usual fashion obviously acts to alter legal rules. If a man were to don a robe and "convict" and jail his neighbor for letting his dog out at 5:00 a.m., he would have no plausible authority to alter his neighbor's legal status and would commit false imprisonment.

But what about the parking judge who shackles a coffee vendor or a judge hearing a custody dispute that jails the non-party children?[259] What about municipal governments, which enact binding laws but also may be just one neighbor donning robes and fining the other? Or prosecutors, who are officers of the court but generally do not have the authority to alter the legal status of a defendant without a court order? Or administrative agencies, which both enforce the laws and promulgate rules or ordinances that (sometimes) alter the legal rights of the parties? The boundaries are especially blurry in the states, where the Constitution leaves substantial discretion to constitute the governmental structures.[260]

This Section shows the conceptual slippage between governments functioning as rule-changers and governments with agents acting in the world. It also shows that the failure to distinguish between the nature of governmental power—and thus to determine whether to apply the model of constitutional private or public law—explains much of the confusion in these boundary cases. I address the applicability of constitutional rules to municipalities, prosecutors, and agencies.

First, municipalities sometimes enact rules and ordinances, or adjudicate disputes, that purport to alter the legal rights of those subject to their jurisdiction.[261] But they sometimes act as the employers of government

258. NEWELL, *supra* note 253, § 28, at 125.

259. Rockett *ex rel.* K.R. v. Eighmy, 71 F.4th 665, 668 (8th Cir. 2023); Zarcone v. Perry, 572 F.2d 52, 53 (2d Cir. 1978).

260. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding that the Guarantee Clause does not place justiciable limits on how states structure their governments).

261. *See* Knick v. Township of Scott, 588 U.S. 180, 186–87 (2019) (land use); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 370 (1974) (taxation). By "municipalities" I mean to refer generally to local governments, including special-purpose entities, townships, and other variations. The precise term should not matter much here because, from a federal constitutional perspective, "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

officials who are constrained by (depending on the state) ordinary private law and constitutional private law.[262]

The puzzle about characterizing the municipality emerges in municipal liability cases under § 1983. The Court has held that a municipality may be liable if it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," including a "custom" that has "not received formal approval through the body's official decision-making channels."[263] But that category of actions—often lumped together as a "policy or custom"—includes both actions that alter legal rights and actions that eventually result in conduct by the municipality's officials or employees.[264]

That distinction corresponds to the application of constitutional private and public law. If the nature of the plaintiff's objection is that the official policy will result (or has resulted) in conduct by officials that would otherwise interfere with an interest protected by constitutional private law, then the structure of the claim is a request to enjoin or pay damages for the harm; the municipality would be liable for the constitutional wrong of its employee.[265] On the other hand, if plaintiff objects to the alteration of legal rules effected by the relevant determination, then the structure of the claim is a request to set aside the municipality's effort to alter legal rights (or a request for an anticipatory ruling on the lawfulness of the expected alteration).[266] Perhaps the best example of the distinction beginning to blur is liability for "practices so persistent and widespread as to practically have the force of law."[267] We would not usually think that "practices" change the law of a government constituted with a legislature, yet there is no obvious conceptual reason to conclude that a government could not change its formal legal rules through habitual practices.[268] The same ambiguity about characterizing governmental actions as either conduct or as the alteration of legal rules might be at work in the takings jurisprudence, where the Court treats a permanent occupation as a kind of prescriptive easement that alters legal rights and thus effects a taking.[269]

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262. *See, e.g.*, LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 793–817 (6th ed. 2022) (discussing various approaches to municipal liability under state law); *see supra* text accompanying notes 94–106.

263. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

264. For an effort to characterize the different theories of local liability, see Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1195–98, 1195 n.66 (2023).

265. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 388–89 (1989).

266. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 752 (2010).

267. Connick v. Thompson, 563 U.S. 51, 61 (2011).

268. *E.g.*, Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1068 & n.93 (1990) (quoting Justinian's *Digest* for the proposition that "statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all," but noting that the United States has "rejected" the doctrine).

269. *See supra* text accompanying notes 141–51.

A second category of boundary cases involves judicial officers like prosecutors. Those officials are, in one sense, part of the judicial system.[270] In that respect, the constitutional rules that constrain the prosecution ensure the fairness and integrity of the *adjudication* of the legal rights of criminal defendants, and constitutional remedies for prosecutorial misconduct would resemble constitutional public law for adjudication. On the other hand, prosecutors engage in conduct that interferes with concrete interests of defendants, and those interests might warrant the protection of constitutional private law. In other words, a deep question for constitutional law for prosecutors is whether to treat them like judges and juries or like police officers—whether to subject them to constitutional public or private law.

Prosecutorial immunity reflects that problem. Prosecutors have absolute immunity from civil suits for damages under § 1983 when "initiating a prosecution and in presenting the state's case," which the Court characterized as "intimately associated with the judicial phase of the criminal process."[271] Remedies for prosecutorial misconduct "associated with the judicial phase" must be "professional discipline" and review of the judicial judgment—whether post-trial, appellate, or collateral review.[272] *Brady v. Maryland* is an example.[273] At the same time, a prosecutor is entitled to only qualified immunity if she "functions as an administrator rather than as an officer of the court."[274] Thus, a prosecutor does not have absolute immunity for "offering legal advice to police about an unarrested suspect," for her "investigative" acts before a prosecution was initiated, or for comments on the prosecution to the media.[275] In those categories, the prosecutors might commit wrongdoing *not* associated with adjudication. A "constitutional wrong against innocent citizens" occurring outside the scope

270. *E.g.*, *In re* Griffiths, 413 U.S. 717, 728–29 (1973) ("It has been stated many times that lawyers are 'officers of the court.'" (quoting Cammer v. United States, 350 U.S. 399, 405 (1956))).

271. Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976); *see also* Burns v. Reed, 500 U.S. 478, 492 (1991) (quoting "intimately associated with the judicial phase of the criminal process" from *Imbler*).

272. *Imbler*, 424 U.S. at 427–30 (discussing the "fairness" of the "remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies," and noting that each would assess whether there was "a fair trial under law"); *id.* at 425 (referring to judicial determinations of whether "prosecutorial misconduct so infected a trial as to deny due process" as an issue for "post-trial relief").

273. Brady v. Maryland, 373 U.S. 83, 86–87 (1963); *see also, e.g.*, Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (conviction secured with evidence known to be perjured).

274. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (quoting *Imbler*, 424 U.S. at 431 n.33).

275. *Id.* at 275–79.

of the adjudicative process may require remediation under § 1983.[276] Several of the Court's cases draw this distinction.[277]

Finally, administrative agencies present the last category in which the boundary between conduct rules and power rules complicates the distinction between constitutional private and public law. Agencies sometimes enter orders or promulgate rules that alter legal rights, and sometimes their officials take actions in the world that enforce such orders or the underlying statutes.[278] Agencies with law enforcement capacity particularly have such dual capacities;[279] other agencies may almost exclusively enter orders altering legal rights.[280] Those agencies sometimes issue documents or might have likely consequences for the conduct of the officials implementing the guidance. The former would be better constrained by invalidity rules (or, if the agency failed to alter legal rights, perhaps with mandamus to require such an order), while the latter might be better constrained with constitutional duties enforced through injunctions.[281] Agencies thus perform some functions better constrained by public law and some better constrained by private law.[282]

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276. *Buckley*, 509 U.S. at 276. For an effort to explain why malicious prosecution is a "private wrong," an argument which could suggest that absolute prosecutorial immunity should be narrowed to allow analogous malicious-prosecution constitutional torts, see generally Michael Law-Smith, *The Tort of Malicious Prosecution: A Principled Account*, 69 MCGILL L.J. 141 (2024).

277. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 342 (2009) ("[A]bsolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." (quoting *Imbler*, 424 U.S. at 431 n.33)). The Court invoked a similar distinction in holding that an attorney appointed for a criminal trial was not "entitled to absolute immunity in a state malpractice suit." Ferri v. Ackerman, 444 U.S. 193, 194 (1979). A "prosecutor and a judge" are "public servants" who "represent the interest of society as a whole," and their official duties "affect a wide variety of different individuals." *Id.* at 202–03. A private attorney does not have that same undifferentiated duty: "Although . . . appointed counsel serves . . . in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client." *Id.* at 204.

278. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1059–61 (2011) (noting that administrative agencies have different "functions," like enforcement, adjudication, and rulemaking, and that these actions are often taken by different individuals within the agency).

279. *See* Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. 1941 (2024) (identifying law enforcement officers within the administrative state).

280. *But see, e.g.*, Celestine v. United States, 841 F.2d 851, 853 (8th Cir. 1988) (claim for false imprisonment under the Federal Tort Claims Act against law enforcement officers from Veterans Affairs).

281. Money damages are not available under the Administrative Procedure Act, *see* Bowen v. Massachusetts, 487 U.S. 879, 892 (1988), but may be available under *Bivens* or the FTCA, 28 U.S.C. § 1346.

282. Sometimes that distinction will track the different functions of different components of the agency. For example, an agency might contain ALJs that perform adjudicative functions as well as officials that execute warrants.

III. IMPLICATIONS

Demarcating constitutional private and public law has a series of doctrinal and theoretical implications for both bodies of law. First, the analogy between constitutional private law and ordinary private law offers a better theoretical framework for constitutional private law. The analogy also suggests new avenues to develop the ordinary private law as it applies to government officials. Second, the disanalogy between constitutional private and public law shows why constitutional remedies for private and public law require different justifications. The private-law model does not fit the structure of constitutional public law rules, and remedies for constitutional public law should be tailored to fit the underlying aims of those constitutional rules.

A. Private Law

1. Justifications

The analogy to the structure of ordinary private law reorients the basic normative justification for constitutional private law. A dominant theory of suits for damages against government officials treats the suits as mechanisms to constrain or seek compensation from "the government"—and thus applies to the official only incidentally. From the deterrence perspective, damages should "keep the government and its officials generally within the bounds of law."[283] From the compensatory perspective, constitutional law is "conceptualized as discrete transactions in which government inflicts harm on some individual by making her worse off relative to some baseline position,"[284] and damages aim to restore the individual to the baseline prior to the harm.

Justifying damages claims based on the victim's relationship to the *government* presents serious challenges. First, if deterrence is the aim, the argument for damages has both conceptual and empirical problems. That damages should keep governments "generally" within the bounds of law assumes some amount of optimal or permitted constitutional harms—an uncomfortable concession for constitutional law, even if an inevitable one. The empirical challenge is that, if deterrence is the aim, it is hard to know whether and how damages work. The efficacy of the damages remedy would depend on how officials respond to the incentive of damages awards;

283. Fallon, *Constitutional Remedies*, *supra* note 17, at 1323.

284. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002).

how likely damages are to be imposed and the expected cost of other payments (like attorney's fees and punitive damages); and how damages awards interact with officials' other incentives—like the threat of injunctive or declaratory relief, bureaucratic controls, state and federal criminal penalties, and electoral constraints. Calibrating damages to obtain optimal deterrence is a particular challenge for courts. Judges must articulate constitutional private law case-by-case, have limited information about the systemic incentives facing officials, and have little control over the other incentives that might structure official decision-making.

Second, if compensation for the victims of governmental misconduct is the aim, then damages for constitutional violations also might be difficult to justify. The victims of constitutional harms are not necessarily "especially deserving beneficiaries of redistribution of wealth."[285] Victims of constitutional harms might still be better off than many others—including others who have suffered losses from non-constitutional governmental harms, or from harms inflicted by non-governmental human agents, or from accidents of birth or chance.[286] It is not obvious why a system of governmental compensation would privilege compensation for constitutional harms over other kinds of setbacks that, as a class or in particular cases, might be more severe.

A theory that treats these suits against officials as a form of constitutional private law sidesteps these objections. Because the aim of compensation is not just redistribution but instead an effort to correct the wrong by the official herself, constitutional private law has good reason to treat the status quo before the official's breach as the baseline situation that must be restored.[287] And because constitutional private law imposes damages not as a mechanism to ensure a generally law-abiding government but to correct the wrong done by the official, the conceptual and empirical complexities of the deterrence-based justifications drop away. A system of constitutional private law has good reason to exist, at least on this theory, regardless of whether the imposition of money damages deters future misconduct to a desirable level. Likewise, a set of mechanisms that produces a government that "generally" follows the law is not a substitute for a set of rules that correct wrongdoing when officials breach their obligations.

That conception of constitutional private law is of course subject to other objections. First, the theories of private law on which it depends are

285. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 90 (1989).

286. Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 406–07 (2000).

287. *See* Jeffries, *supra* note 285, at 95.

controversial even as theories of private law.[288] If there is no reason to think that private law is aimed at a distinctive form of justice that rectifies certain kinds of wrongdoing by private persons, then there is no reason to think that *constitutional* law performs that function for wrongs committed by public persons against private ones. Second, even if those theories work for private law, the justifications may not carry over to constitutional or public law.[289] The government's agents might not be wrongdoers if they are carrying out instructions or responding to incentives,[290] or the fact that governments generally indemnify officials might render corrective justice irrelevant[291]—just as some think the availability of insurance undermines the justifications of corrective justice in private law.[292]

But unless corrective justice is never plausible as an aim of private law, these objections all seem to prove too much. It is hard to see why the government's agents, unlike the agents of corporations, should have *no* obligations to persons injured by conduct undertaken in the course of their official duties. And it is hard to see why indemnification of officials, unlike insurance for tortfeasors, would render corrective justice completely irrelevant. The objections to a corrective function of constitutional private law, then, mostly depend on the wholesale rejection of corrective justice in private as well as public law. Otherwise, the problem is simply one of modifying the content of constitutional private law to fit its underlying justification as a law of wrongs.

2. Content

Reframing constitutional private law as a private law of wrongs for official misconduct, however, calls into question the *constitutional* aspect of constitutional private law. If constitutional private law is not about the

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288. *Compare* WEINRIB, *supra* note 13, *and* GOLDBERG & ZIPURSKY, *supra* note 13, *with* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) (reviewing GOLDBERG & ZIPURSKY, *supra* note 13).

289. *Cf.* Paul B. Miller & Jeffrey A. Pojanowski, *Torts Against the State*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 323, 324 (Paul B. Miller & John Oberdiek eds., 2020) ("Accommodating torts against personified entities like the state will require tort theorists to significantly amend the interpersonal accountability model.").

290. *See, e.g.*, Levinson, *supra* note 286, at 408; Wilson v. Seiter, 501 U.S. 294, 311 (1991) (White, J., concurring in the judgment) (noting that some "inhumane prison conditions" challenged under the Eighth Amendment are "caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials").

291. *See* LEVINSON, *supra* note 9, at 207 (because "constitutional liability imposed upon an individual police officer amounts to the same thing as liability imposed upon the police department or the city," personal liability "end[s] up imposing costs on some morally arbitrary subset of ordinary citizens"); *see also* Pfander et al., *supra* note 38 (showing widespread indemnification in *Bivens* actions).

292. *See* Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2228–33 (2024).

government generally, but instead about an official's wrongdoing, then the reasons to correct those constitutional wrongs should be analogous to the reasons that the private law requires correction. And if the content of constitutional private law sometimes reflects modifications of the kinds of rules that govern private law, then variants of the private law's conceptions of interpersonal morality might likewise ground constitutional private law. On these assumptions, courts should focus less on the *constitutional* aspect of constitutional private law, because the invocation of the Constitution brings with it theoretical baggage that distracts from the problem of developing the law of official misconduct.

Downplaying the constitutional aspect of constitutional private law suggests both different substantive doctrines and different institutions for its implementation. On substance, if constitutional private law is better justified as a law of official misconduct, then it need not be tailored to the precise language of constitutional provisions.[293] In other words, perhaps courts should feel *less* constrained by constitutional text and *more* willing to develop a system of general federal law for official misconduct—one that develops rules against excessive force, inattention to serious medical needs, discrimination because of irrelevant considerations, or retaliatory uses of an official position without legitimate justification. On that view, any insistence that constitutional private law must flow from constitutional text—to be grounded in a "specific constitutional right allegedly infringed"[294]—shoehorns the general federal law of officers into constitutional provisions that fail to exhaust the ideal set of relevant claims.

Moreover, if the constitutional aspect of constitutional private law is inessential, and if a federal common law of official misconduct is off-limits, then the better home for some of these claims might be the private law of the states. As discussed above, ordinary tort law has long applied to state and local government officials, though state-by-state variation and immunities necessarily affect the scope of liability.[295] These state-law claims (or their historical general-law analogues) operated to constrain state and local officials long before constitutional torts emerged as the dominant mechanisms for official accountability.[296] Today, these ordinary tort-law rules even apply to federal officials through the Federal Tort Claims Act, which allows victims to sue the United States for the state-law torts of its employees.[297] Thus, much of the private law that applies to private persons

293. *See supra* Section I.B.
294. Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion).
295. *See supra* text accompanying notes 19–23.
296. *See* West, *supra* note 89, at 869–73.
297. On preemption of claims against federal officials, see Pfander & Alley, *supra* note 23; and West, *supra* note 23.

generally applies to governmental officials. But immunities and limitations modify those rules so that they better fit the problems of official authority.

In other words, ordinary tort law and constitutional private law approach, from two directions, the same solution to the problem of official accountability. Constitutional private law begins with the Constitution and derives rules of private law tailored to official misconduct, drawing express or implicit inspiration from private law; ordinary tort law begins with private law, modifying rules of law designed for private persons to fit the problems of official misconduct.[298] The implication is that doctrines developed originally as private law might inform the set of obligations that should constrain government officials, and doctrines developed originally as constitutional private law might offer inspiration to courts (or legislators) crafting the rules of private law that also constrain government officials.

3. Institutions

The analogy from private law to constitutional law and back again also suggests that state law offers a forum for experimentation about the law of officers beyond the federal courts.[299] Constitutional private law is not just the set of doctrines that exists today; it contains theories of wrongdoing that have been repudiated, never found a foothold, or never been attempted.[300] For example, state courts could adopt the positions of the dissenting opinions in *DeShaney v. Winnebago* or *Paul v. Davis* as rules of *ordinary private law*; nothing about the proposed theories of wrongdoing in either decision turned on the precise language of the Constitution, and each could be incorporated into state law. The analogy to constitutional private law thus

298. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS ch. 5 (AM. L. INST. 1965) (articulating rules for arrests and prevention of crime, including rules for "peace officers").

299. State courts may (and sometimes must) adjudicate § 1983 claims too. *See* Haywood v. Drown, 556 U.S. 729 (2009); Martinez v. California, 444 U.S. 277, 278 (1980). But federal constitutional law applied in the state courts is supposed to follow, and is subject to review by, the Supreme Court.

300. Without offering any sort of comprehensive collection of such claims, consider *Chiaverini v. City of Napoleon*, 602 U.S. 556, 571 (2024) (Gorsuch, J., dissenting), which suggests the possibility of a malicious-prosecution claim under the Due Process Clause; *Vega* v. *Tekoh*, 597 U.S. 134, 155 (2022) (Kagan, J., dissenting), which claims that *Miranda* gives a "correlative right" under § 1983 "to be tried without the prosecutor using his un-*Mirandized* statement"; *Thompson v. Clark*, 596 U.S. 36, 59–60 (2022) (Alito, J., dissenting), which suggests that the majority's Fourth Amendment malicious-prosecution claim might authorize a lawsuit for *any* detention without probable cause; *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989), which rejects a duty to protect; *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984), which rejects any Fourth Amendment right to privacy in prison cells; *Paul v. Davis*, 424 U.S. 693, 713–14 (1976), which rejects a claim based on disclosure of arrest on a shoplifting charge; and *Daniels v. Williams*, 474 U.S. 327, 335–36 (1986), which rejects negligence claims against officials. For some possible further extensions, see, for example, *supra* text accompanying notes 141–51, discussing the Takings Clause; and 152–62, discussing the Fourth Amendment.

offers the possibility that state law might articulate repudiated or novel theories of constitutional private law as *state* constitutional law or even state *private* law. If realized, that possibility could relocate the generation of norms constraining public officials away from federal courts and the Constitution to state courts, state legislators, and ordinary state non-constitutional law.[301] And if constitutional private law is, as suggested above, an imperfect substitute for a general federal law of officers, then maybe nothing would be lost by supplementing (or replacing) constitutional private law with ordinary private law.

That suggestion that state ordinary private law might be a *better* vehicle for the interests currently protected through constitutional private law might seem counterintuitive, but the fact that constitutional private law is the dominant model of official accountability is deeply contingent. A conventional story is that *Monroe v. Pape* led to an explosion of § 1983 claims in the second half of the 20th century.[302] A theme in *Monroe*—made more explicit in *Bivens*—was that constitutional wrongs are *different* from private law wrongs remedied by state law and necessary for that reason.[303] But the regime of constitutional private law that ultimately developed has turned out to mirror the structure and content of private law. If these constitutional rules are analogues of ordinary private law, and if the system of constitutional private law functions as an imperfect imitation of a general federal law of officers, then *Monroe*'s assumption about the special nature of constitutional duties seems dubious.

Perhaps, then, a system of private law applied to government officials might have developed in just about the same way had it been allowed to

301. Related proposals to de-emphasize federal constitutional law urge the enactment of state analogues to § 1983 or reliance on state constitutional law. *E.g.*, Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021). The comparative advantage of developing ordinary state private law is that it limits reliance on not just federal institutions and federal law, but also on state constitutional law (which may be more difficult to alter). *But see* Leong, *supra* note 19 (discussing ordinary private law claims against officials); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 566 (2013) (discussing the possibility of common-law claims against federal officials).

302. *E.g.*, Anne E. Ralph, *Qualified Immunity, Legal Narrative, and the Denial of Knowledge*, 65 B.C. L. REV. 1317, 1326 (2024) ("Following *Monroe*, Section 1983 litigation increased significantly." (citations omitted)).

303. *See* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) (noting that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right"); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.").

develop without the procedural avenue of § 1983.[304] If so, the function of § 1983 and its "supplementary" federal remedy did not so much generate a new form of redress, but instead substituted a constitutionalized version of ordinary private law. The constitutionalized private law shifted authority from state legislators and state courts to federal courts, and it shifted the development of that law from the processes of common-law adjudication to the processes of constitutional interpretation.[305] One consequence of that shift to constitutional private law was that it drew disputes about redress for official misconduct into proxy wars about constitutional theory and interpretive methods—*e.g.*, fights about the legitimacy of substantive due process or the role of judges in the federal system.[306] A private law of official accountability could avoid those disputes. And if constitutional private law is functionally something like a general law of official misconduct, then perhaps not much is lost by ceding the constitutional idiom.

B. Public Law

Distinguishing constitutional private and public law also highlights an odd feature of adjudication for constitutional public law: the "private rights model"[307] seems either to under- or over-enforce the underlying constitutional norm. That issue does not arise for constitutional private law, because the reason for adjudication is the vindication of the relational obligation by providing redress for its breach. With constitutional public law, by contrast, the reason for adjudication might *either* be the litigant's interest in the underlying legal entitlement *or* the general constitutional

304. For some of the articles before *Monroe* that attempt to expand the applicability of private law to state and local officials and governments, see, for example, Edgar Fuller & A. James Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Edwin M. Borchard, *Government Liability in Tort* (pts. 1 & 2), 34 YALE L.J. 1, 129 (1924–1925).

305. For discussion of the differences between these habits of thought, see ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 13 (Amy Gutmann ed., 1997) (contrasting the "*attitude* of the common-law judge" with the proper judicial attitude for "interpretation of . . . a regulation, or of a statute, or of the Constitution").

306. *See, e.g.*, Cnty. of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (adjudicating constitutional private law as an application of substantive due process and discussing the test applied in *Rochin v. California*, 342 U.S. 165, 172–73 (1952)); Egbert v. Boule, 596 U.S. 482, 491 (2022) ("[W]e have come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" (quoting Hernandez v. Mesa, 589 U.S. 93, 100 (2020)); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 349 n.226 (1993) (suggesting cases where the "desire to avoid substantive due process adjudication" might have influenced the Court's decision-making).

307. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–68 (1973) (describing the "private rights model" of judicial competence).

values that the rule of constitutional public law protects. And when those two reasons for adjudication come apart, the private rights model might under- or over-enforce the underlying constitutional value that adjudication is supposed to protect.

1. Under-enforcement?

The competing opinions in *Whole Woman's Health v. Jackson*, concerning Texas's infamous S.B. 8, highlight how *limiting* adjudication of invalidity rules sometimes seems to under-protect constitutional norms.[308] S.B. 8 prohibited abortions in clear contravention of then-prevailing Supreme Court precedent, but stated that the prohibition would be enforced exclusively through "private civil actions."[309] The structure was designed to preclude pre-enforcement review of a state statute under *Ex parte Young* by eliminating any state executive official's enforcement role.[310] Plaintiffs seeking pre-enforcement review of the statute instead sought to sue state judges and state-court clerks.[311]

Doctrinally, the opinions clash over sovereign immunity, but the deeper disagreement concerns the nature and structure of constitutional adjudication. The majority characterized the problem as one of finding a proper defendant who might be enjoined: "[petitioners] intend to seek an order enjoining all state-court clerks from docketing S.B. 8 cases and all state-court judges from hearing them."[312] The majority concluded that the state judge and state-court clerk could not be sued, however, because they did "not enforce state laws as executive officials might" but "work[ed] to resolve disputes between the parties."[313]

The dissenting opinions, instead of focusing on *who* could be sued and *how* they could be enjoined, emphasized that S.B. 8 was an

308. For commentary on the opinion, see, for example, Strauss, *supra* note 17; Fallon, *Constitutional Remedies*, *supra* note 17; and John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469 (2021).

309. Whole Woman's Health v. Jackson, 595 U.S. 30, 36 (2021).

310. The Court concluded that some "licensing officials" potentially had enforcement authority and thus could be sued under *Ex parte Young*, but to simplify I ignore that holding because the dissenting Justices thought it insufficient relief. *Id.* at 51.

311. *Id.* at 36. I omit one other defendant: a private person who could potentially file a civil action under S.B. 8. The Court held that plaintiffs lacked standing to sue that person because he did not intend to file a lawsuit, and neither plaintiffs nor the dissenting Justices disputed that point. Had the threat of a lawsuit been imminent, the question would have been whether the private person was a "state actor" who could be enjoined under an *Ex parte Young* theory. For an argument that answering this question would have required the Court to distinguish between private and public law, see Goldberg & Zipursky, *supra* note 308, at 489–91.

312. *Whole Woman's Health*, 595 U.S. at 39.

313. The Court added that the judicial officers were not "adverse" to the persons subject to S.B. 8 simply because they "resolve controversies about a law's meaning." *Id.* at 39–40.

"unconstitutional *law*."[314] Both emphasize the "chilling effect" of S.B.8 on the exercise of constitutionally protected activity.[315] Both emphasize that S.B. 8 was designed to "evade" or "block" pre-enforcement review.[316] One dissent even construed the remedial request as a request to "enjoin the *law*" (rather than enjoin *officials*).[317] For the dissents, the problem of fitting the adjudication into some bilateral framework was an afterthought; the true problem was the evasive and unconstitutional legislation itself.

Distinguishing constitutional private and public law reveals the core of that doctrinal dispute. The majority insists that the plaintiffs' claim does not fit the structure of constitutional private law. State judges and clerks do not breach a constitutional duty by adjudicating unconstitutional statutes.[318] The "chilling effect" produced by the statute might undermine some constitutional interest, but the *legislation* is responsible for it. Because invalidity must be adjudicated only when assessing a non-constitutional legal entitlement, plaintiffs have no claim because the legislation itself does not (yet) threaten the deprivation of any such interest. The dissents contend, in contrast, that the harm is the *legislation*. If the constitutional rule is protecting abortion access, then the "chilling effect" from the legislation is the problem. And the point of the injunction against the state officials is to prevent the law from chilling protected conduct—not to stop those officials from doing something wrongful. Thus, injunctive relief here would have been an alternative to a general finding that the statute was unconstitutional—a kind of "set aside" remedy or a declaration that the statute is illegal *in toto*. Indeed, in a telling moment, one dissent says that the "question of remedy" is "simple": because "S.B. 8 is unconstitutional," the Supremacy Clause means that the "contrary state rules . . . must give

314. *Id.* at 59 (Roberts, C.J., concurring in the judgment in part and dissenting in part) *(*emphasis added*)*; *see also id.* at 58–59 ("Texas has passed a law banning abortions after roughly six weeks of pregnancy. That law is contrary to this Court's decisions . . . ." (citation omitted)); *id.* at 60 ("S.B. 8 chills constitutionally protected conduct"); *id.* (noting that court clerks "are unavoidably enlisted in the scheme to enforce S.B. 8's unconstitutional provisions"); *id.* at 62 (Sotomayor, J., concurring in the judgment in part and dissenting in part) ("[T]he *Texas Legislature* has substantially suspended a constitutional guarantee . . . ." (emphasis added)); *id.* at 63–65 (describing "S.B. 8's unconstitutional scheme"); *id.* at 66 (describing a "facially unconstitutional law").

315. *Id.* at 60 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 62, 65, 67–68 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

316. *Id.* at 59 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 65 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

317. *Id.* at 72 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (emphasis added).

318. *Id.* at 40–41 (majority opinion).

way."[319] The implicit claim is that an invalidity determination pursuant to the Supremacy Clause is a remedy.[320]

The same debate has emerged about universal remedies under the Administrative Procedure Act (APA). The question is whether the APA authorizes courts to "vacate" agency action generally or whether they are limited to disregarding ("set[ing] aside") the unlawful rule in the course of entering some otherwise-available remedy, like a tailored injunction.[321] Because the objection is the invalidity of an administrative rule, the claim is analogous to the invocation of constitutional public law. Here, too, if courts make invalidity determinations only as an incident to the adjudication of other legal entitlements, they may under-enforce the administrative law norms that justify judicial review of agency action. From one perspective, universal vacatur solves that under-enforcement problem.[322] From another, universal vacatur departs from the strict requirements of the case-and-controversy requirement, which allows for the adjudication of administrative invalidity rules (like constitutional invalidity rules) only in the course of adjudicating other legal entitlements. The debate about APA remedies thus reflects the same underlying debate at issue in *Whole Woman's Health*.

2. Over-enforcement?

Taking an opposing tack, constitutional adjudication might *over*-enforce the underlying constitutional norms. In *Raines v. Byrd* and *Clinton v. City of New York*,[323] the Court was twice asked to address the constitutionality of the Line Item Veto Act, which allowed the President to "cancel" certain spending.[324] In *Raines*, the Court refused to adjudicate the constitutionality of the statute because, even though the statute allowed a "Member of Congress" to seek expedited review, the legislators who challenged the statute did not have a "sufficiently concrete injury" for purposes of Article

319. *Id.* at 69 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

320. *Cf.* Sohoni, *supra* note 17, at 2305 (arguing that "vacatur, the judicial power to void a regulation, is a remedy rooted in the foundations of modern administrative law").

321. *Compare* United States v. Texas, 599 U.S. 670, 686 (2023) (Gorsuch, J., concurring in the judgment) (arguing against vacatur), *with* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring) (arguing in favor of vacatur). *See generally* Sohoni, *supra* note 17 (arguing in favor of vacatur); Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037 (2023) (arguing against universal vacatur); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37 (2020) (similar).

322. *See Corner Post*, 603 U.S. at 833–37 (Kavanaugh, J., concurring) (cataloging challenges to administrative rules that could not be litigated without vacatur).

323. Raines v. Byrd, 521 U.S. 811 (1997); Clinton v. City of New York, 524 U.S. 417 (1998).

324. *Clinton*, 524 U.S. at 421, 436.

III.[325] Meanwhile, in *Clinton*, the Court found that entities that would not receive a grant or tax benefits after the President issued a line-item veto did have standing.[326]

The contrast between *Clinton* and *Raines* suggests that adjudication of pre-existing legal entitlements only accidentally implicates the interests protected by constitutional public law. The *Raines* plaintiffs—Members of Congress—claimed an interest in the litigation because the Line Item Veto Act would affect the legal consequences of each congressional enactment, shifting power from Congress to the President. The *Clinton* plaintiffs claimed an entitlement to grant money and tax benefits that were threatened by a particular veto. But the Court adjudicated the constitutional question in *Clinton* rather than *Raines* because certain pre-existing legal entitlements happened to be altered by an exercise of power contrary to the rule of constitutional public law. [327] The point generalizes: a congressman is entitled to challenge his exclusion from the House because he happens to be owed a salary for the job;[328] the lawfulness of a recess appointment is adjudicated because, after hundreds of years of practice without adjudication, an agency would lack a quorum without the recess-appointed officers;[329] Congress's Commerce Clause power is adjudicated because one party claims a state-law entitlement to navigate;[330] the President's recognition power is adjudicated when someone requests a passport;[331] and the lawfulness of a statute like S.B. 8 is adjudicated only if someone threatens penalties under the statute—even if the point of the constitutional provision is to protect certain conduct that the legislation itself "chills." But there is no guarantee that adjudication if and only if a legal entitlement is threatened offers the appropriate amount of federal judicial intervention.

325. *Raines*, 521 U.S. at 830.

326. *Clinton*, 524 U.S. at 434. On the merits, the Court held that the Act violated the Bicameralism and Presentment Clause because it allowed the President effectively to "amend[]" spending statutes. *Id.* at 438.

327. *See, e.g.*, Huq, *supra* note 234, at 1514–15 (suggesting that individual litigants should lack standing to sue if the structural constitutional principle could be vindicated by the institution it benefits); U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020) (finding that the House of Representatives suing on its own had standing to challenge allegedly unconstitutional appropriations by the executive branch, because "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys."); Va. House of Delegates v. Bethune-Hill, 587 U.S. 658, 662 (2019) (concluding that one house of a state legislature could not sue to enforce the interest of the legislature as a whole, but without concluding that legislatures *never* have standing). For a theory of "relative standing" that addresses the problem of congressional standing, see Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1234–35 (2014).

328. Powell v. McCormack, 395 U.S. 486, 495–500 (1969).

329. NLRB v. Noel Canning, 573 U.S. 513, 520 (2014).

330. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1–2 (1824).

331. Zivotofsky v. Kerry, 576 U.S. 1, 8–9 (2015).

3. Recalibrating adjudication?

If constitutional public law disjoins the purpose of adjudication and the reason(s) for the constitutional rule advanced in the adjudication, then there is no obvious reason to think that it would further both aims to adjudicate constitutional issues if and only if a relevant legal entitlement is threatened. Instead, the potential justifications for constitutional public law adjudication would depend either on the litigant's interest in the underlying entitlement or on the general benefits of good governance or other constitutional values. On this view, adjudication of constitutional public law should be tailored to the circumstances in which the adjudication of constitutional public law better advances the constitutional interest protected by the rule of public law—at least within the limits of due process. Adjudication might, again on this view, be permitted in more or fewer situations than the current model admits.[332]

Correcting for the risk of *over*-enforcement of constitutional norms, courts might limit determinations that a statute or judgment is constitutionally invalid to circumstances in which adjudication would compellingly serve the interest protected by the constitutional provision. The doctrinal form of those limitations might vary, but they might involve more aggressive implementation of the political-question doctrine,[333] judicially adopted abstention or preclusion doctrines,[334] stricter standing doctrines for constitutional claims,[335] and greater deference to congressional statutes precluding judicial review.[336] The most radical version of the

332. Here I take no position on whether it would be better to limit or expand adjudication of constitutional public law. I leave it to the reader to assess whether the system would be better with more or fewer constitutional interventions by the federal courts. For a discussion of the connection between constitutional interventions by the federal courts and the Supreme Court's emergency docket, see E. Garrett West, *Taming the Shadow Docket*, 112 VA. L. REV. (forthcoming 2026), https://ssrn.com/abstract=5329091 [https://perma.cc/8EY2-NMW5].

333. *See, e.g.*, John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 459 (2017) (defending a version of the political question doctrine that assigns "a non-judicial actor the final authority to apply legal rules to particular facts"); Zivotofsky v. Clinton, 566 U.S. 189, 212–13 (2012) (Breyer, J., dissenting) (defending a broader political-question doctrine in which "prudential considerations" should lead the Court to refuse to adjudicate a claim).

334. *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (announcing "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary" (citations omitted)).

335. *See, e.g.*, Huq, *supra* note 234, at 1514–23 (defending a stricter theory of standing for structural constitutional claims); United States v. Sineneng-Smith, 590 U.S. 371, 386–88 (2020) (Thomas, J., concurring) (critiquing facial challenges).

336. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 611–15 (1988) (Scalia, J., dissenting) (arguing that the supposed constitutional problem with statutory preclusion of judicial review is illusory); Laura E. Dolbow, *Barring Judicial Review*, 77 VAND. L. REV. 307 (2024) (considering alternative oversight mechanisms when judicial review of agency action is precluded).

argument would move adjudication as much as possible out of the federal courts.[337]

Correcting for the risk of *under*-enforcement instead, courts could adjudicate constitutional claims, even without an alteration to pre-existing legal rights, if adjudication would better enforce the interests protected by the relevant constitutional provision or the constitutional system generally. Thus, courts may be inclined to allow more aggressive use of universal vacatur for agency rules with constitutional defects; to more freely permit pre-enforcement review of congressional or state statutes; or to permit more frequent and more aggressive criminal-procedure remedies, even when the remedy might be considered a "windfall" for the defendant (as with the exclusionary rule). To take some examples, courts might relax the restrictions on proper parties under *Ex parte Young* along the lines suggested by the dissenters in *Whole Woman's Health*, weaken the showing of harm needed to bring a pre-enforcement challenge to enforcement of a statute, or perhaps even allow lawsuits for declaratory relief to be brought directly against legislatures for enacting unconstitutional statutes. That last adjustment would replicate APA-style universal vacatur for constitutional challenges to legislatures. These suggestions would use judicial power as an occasion to articulate and enforce constitutional norms rather than an opportunity to vindicate pre-existing legal entitlements.

Of course, there are potential constitutional objections to this tailoring. Regarding due process, if courts more freely articulated rules preventing litigants in private adjudication from asserting the invalidity of a given statute or judicial decision, they may violate the Due Process Clause.[338] But various doctrines prevent a person from asserting that a legislative enactment or judicial order is unconstitutional and thus invalid. For

337. Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. 867 (2025). The argument has at least one important conceptual limit. Under any theory, a court must at least "identify the law" to be applied, which means that they must adjudicate any constitutional "existence conditions" for a purported legal rule. *See* Adler & Dorf, *supra* note 223, at 1108–09. For example, even if there were no *Marbury*-style power of judicial review of the validity of congressional statutes, a court would be forced to determine whether a purported congressional statute "satisf[ies] the criteria for lawmaking set forth in Section 7 of Article I." *Id.* at 1108; *cf.* Stephen E. Sachs, *The Twelfth Amendment and the ERA*, 93 U. CHI. L. REV. (forthcoming 2026) (offering a recent example of a dispute about whether a constitutional amendment is, in fact, part of the Constitution). But many constitutional rules are not "existence conditions," many existence conditions are not subject to reasonable debate, and courts may defer to other entities regarding certain existence conditions. Adler & Dorf, *supra* note 223, at 1173–74 (discussing the "enrolled bill doctrine").

338. *See, e.g.*, Bond v. United States, 564 U.S. 211, 226 (2011) (Ginsburg, J., concurring) ("Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law."); Fallon, *Facial Challenges*, *supra* note 17, at 1332–33 (suggesting that the Due Process Clause requires that "a defendant cannot be sanctioned without the authority of a valid law"). *But see* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 42–49 (2021) (critiquing the valid-rule requirement).

judgments, the limits on collateral attacks show that a constitutionally defective *judgment* might be preclusive of subsequent challenges. Likewise, legislative alterations of legal rights might preclude constitutional challenges to the validity of the rule.[339] If there is no necessary connection between the invalidity rules of constitutional public law and the adjudicative structure that permits their invocation, appeals to constitutional public law do not necessarily prove that an invalidity determination is required. Instead, the question should be whether the pre-constitutional legal entitlement that the invalidity rule might protect has constitutional significance. The due process objection thus focuses on the importance of the entitlement that the litigant claims is impaired by an invalid rule—not the importance of the constitutional rule.

Regarding Article III, if courts were to adjudicate constitutional public law concerning the validity of (usually) legislation, then the constitutional objection would be that Article III precludes adjudication outside the pure private law model.[340] But the Court has already put pressure on that private law model. The dissenters in S.B. 8 sought (more or less) a declaration of the law's invalidity, not a judicial order stopping any particular person's enforcement of the claim.[341] The Court may well conclude that universal relief is permissible for challenges to agency rules—despite the obvious conflict with a certain version of Article III.[342] Prophylactic rules are said to be "ubiquitous" within constitutional law.[343] And because the Court also conceives of itself not as the final arbiter of disputes between the parties but as the authoritative interpreter of the Constitution, it constantly alters the structure of adjudication to ensure that the issues it resolves, even if technically cases and controversies, are selected and resolved not with an eye to resolving the dispute but with an eye to offering authoritative *interpretations* of constitutional rules.[344] Of course, Article III might still remain a doctrinal mechanism to tailor adjudication to ensure that it protects the underlying constitutional interests, but it need not hew closely but incompletely to the private rights model.[345] If adjudicating constitutional public law would be contrary to good governance, that argument could still be made in functional terms.

339. *See* Harrison, *supra* note 333, at 468–76.

340. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 819–20 (1997).

341. *See supra* text accompanying notes 314–20.

342. *See* Sohoni, *supra* note 17; Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 827 (2024) (Kavanaugh, J., concurring) ("The APA authorizes vacatur of agency rules.").

343. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

344. Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. (forthcoming 2025); Monaghan, *supra* note 307, at 1368–71; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

345. Monaghan, *supra* note 307, at 1371–75.

CONCLUSION

Constitutional private law is constitutional law because it binds government officials rather than private persons. But it is private law because it imposes relational obligations on those government officials who share the structure and content of private law. Constitutional private law requires courts to identify a relational obligation imposed by the Constitution, articulate elements necessary to show a breach, and impose liability on the official who committed the breach. These claims protect interests in bodily integrity, property, privacy, fair process, and freedom from discrimination. Many of those protections mirror the set of rules articulated by ordinary private law, including rules from tort, contract, and property. But constitutional private law imposes these rules in modified form. The modifications tailor ordinary private law either to the unique problem of official misuse of authority or, to some extent, the language of the Constitution.

Constitutional public law, by contrast, comprises the legal rules that determine the (in)validity of alterations to non-constitutional legal rules. These rules prescribe who enacts legislation, how to legislate, what laws may be enacted, and how adjudicators alter legal entitlements. Sometimes these constitutional rules become the focus of adjudication, but the reason for adjudication is that some pre-constitutional legal entitlement has been altered contrary to some constitutional limitation. Unlike constitutional private law, which unites the constitutional wrong and the legally cognizable harm, constitutional public law disjoins the constitutional norm from the underlying legal interest that justifies the invocation of the constitutional rule. The legal interest put at issue during litigation is distinct from the interest protected by the constitutional rule invoked.

The distinctions between constitutional private and public law suggest new possibilities for both of those regimes. First, the disjunction between constitutional public law and the legal entitlements protected by adjudication underscores that adjudication of those rules seems haphazardly designed. Constitutional adjudication might be too permissive or too constrained—too permissive when the reason a plaintiff has a stake in adjudication has nothing to do with rational constitutional governance, and too constrained when adjudication of the constitutional norm would be socially beneficial, but no litigant has a cognizable legal entitlement. The assumption that constitutional adjudication should happen if and only if there is a dispute about an underlying legal interest wrongly assumes that protecting a party's legal entitlement and vindicating constitutional values always coalesce.

Second, if constitutional private law operates much like ordinary private law, the dominant framework for this doctrinal regime is wrong or incomplete. It is better grounded as a regime to correct wrongdoing by officials than as a regime that deters, or compensates losses caused by, the government. At the same time, this corrective vision of constitutional private law downplays its *constitutional* aspect. On this view, courts should think less about the classic problems of constitutional law, like the counter-majoritarian difficulty and disputes about different interpretive methods, because disputes about the obligations that govern officials become proxy wars about constitutional theory. Instead, the constitutional private law that constrains line-level government officials today is not that different from the ordinary private law that applied to officials long before constitutional private law emerged and that still applies to officials today. The claims are called violations of the Fourth Amendment rather than "batteries" or "privacy torts," of the Due Process Clause rather than "breaches of contract," and of the Takings Clause rather than "trespasses," but the claims confront the same problem: what do people in positions of authority owe to the rest of us?