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Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?

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Table of Contents

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This will continue a several-sided discussion that began about a quarter century ago with Owen Fiss's monumental THE CIVIL RIGHTS INJUNCTION (1978). Moreover this particular Article's genesis was an amicus brief filed by Professor Douglas Laycock, another major contributor to the discussion. My title is a play on both the Establishment of Religion substantive topic and Laycock's obituary notice in DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991). That my views lack congruence with Laycock's will be manifest to a careful reader. However, even though our approaches may diverge, the discrepancy is but a nuance as compared to our joint disagreement with Judge Tjoflat. Think of two thermometers in a Midwestern winter. One says - 18°, the other - 20°. Although they disagree on detail, they concur that it is cold enough to freeze the ears off a brass monkey.

Prologue: The AMI Problem

After a federal judge holds that an Acropolis Military Institute (AMI) official mess-hall grace violates the Establishment Clause and grants an injunction forbidding it, AMI's Commander orders an official parade-ground prayer and posting of the Ten Commandments on the mess-hall door. Fatima El-Erian, a Muslim AMI cadet, tells her French professor how deeply offensive these practices are. "Why don't you talk to a lawyer about getting an injunction?" her professor says.

I. Introduction

After its experiment in constitutional government through courts, the Warren Court left a legacy of reform principles for lower courts to implement with injunctions. In desegregation litigation, *Brown v. Board of Education*[1] "gave the injunction a special prominence."[2] Injunctions also play indispensable roles in preventing malapportioned legislative districts[3] and in the subject of this Article, preventing improper establishments of religion.[4] Today, frontal assault and indirect incursion endanger many of the Warren Court's principles.

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1. 349 U.S. 294 (1955).

2. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4 (1978).

3. *See* Reynolds v. Sims, 377 U.S. 533, 586-87 (1964) (stating that district court acted properly in malapportioned district case when it ordered provisional reapportionment plan into effect and deferred hearing on permanent injunction until provisionally reapportioned legislature had opportunity to cure defects).

4. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 206, 226 (1963) (affirming issuance of injunctive relief against conducting readings and recitation of Lord's Prayer in public schools).

For opponents of the Warren Court's reforms, "the injunction has . . . become a very special target of attack."[5]

This Article examines what some readers may think of as a frontal assault and others may consider an indirect incursion: Judge Gerald B. Tjoflat's suggested alteration of the irreparable injury rule threshold for an injunction, which he proposed in a concurring opinion in an Establishment Clause appeal.[6] In a nutshell, Judge Tjoflat insisted that a judge should approve a plaintiff's assertion of irreparable injury only when that judge can enforce the plaintiff's proposed injunction with coercive contempt.[7] If the judge's only responses to a defendant's violation would be compensatory contempt and criminal contempt, the judge should conclude that the plaintiff has an adequate non-injunctive remedy and refuse to grant the injunction.[8]

This Article contends that Judge Tjoflat's proposal is a procedural and remedial threat to the Warren Court's Establishment Clause legacy. Judge Tjoflat's redefined irreparable injury rule would, in effect, erode a trial court's ability to grant a winning plaintiff an effective remedy and confound its ability to implement basic constitutional, statutory, and common law values.

The injunction is a substantively neutral remedy available to a court with equity jurisdiction to protect not only a plaintiff's constitutional rights and liberties, but also her rights under statutes and the common law of contract, tort, and property. This Article examines lower courts' remedial implementation of the Warren Court's Establishment Clause decisions and the probable effect of Judge Tjoflat's proposed alteration. The rule proposed for an establishment-of-religion injunction would, if adopted, affect all plaintiffs' requests for injunctions in the federal courts. This Article concludes that the proposal is impropitious and would affect other constitutional, statutory, and common law substantive areas.

The rule of law generally requires a government to have stable rules and predictable protection for citizens' interests.[9] The rule of law includes enforcement mechanisms, courts, procedures, and remedies to which people may resort when necessary to vindicate their interests against official breaches, to

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5. FISS, *supra* note 2, at 5.

6. *See* Chandler v. James, 180 F.3d 1254, 1266-77 (11th Cir. 1999) (Tjoflat, J., concurring) (arguing that courts should not enter injunctions that cannot be enforced through coercive contempt sanctions).

7. *Id.* at 1266 (Tjoflat, J., concurring).

8. *Id.* at 1269-70 (Tjoflat, J., concurring).

9. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 10-15 (2001) (arguing that authoritative settlements to prevent instability and disagreement over rules serve interests of society); RONALD CASS, THE RULE OF LAW IN AMERICA 7, 11-12 (2001) (exploring "principled predictability" as second element of conception of rule of law advanced by David Hume and John Adams).

compensate them for past injuries, and to discourage or deter future injuries. This Article focuses on the role of courts in developing stable substantive rules and remedies to protect citizens' civil liberties. It addresses the federal courts' institutional role in administering the Establishment Clause with injunctions and examines the part played by an equitable doctrine commonly called the irreparable injury rule, but also known as the inadequate remedy at law prerequisite. To focus on the injunction, I have based this Article on Dean John Jeffries's and Professor James Ryan's prediction that the substantive doctrines in the observances branch of the Establishment Clause will be stable and quiescent.[10]

Courts often articulate shared values, but sometimes their role is more mundane – to tell an actual or potential wrongdoer what to do or what not to do and to provide an effective enforcement mechanism. "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest . . . . It is an important function of the legal system to induce compliance with rules that a minority firmly believes are misguided. Legal penalties change the balance of self-interest . . . ."[11]

A plaintiff's successful Establishment Clause claim, leading to the remedies this Article examines, requires the court to favor an individual plaintiff's constitutional claim over a statute or executive decision and to impose a remedy on a government official. Judicial review, at the behest of an individual plaintiff, of a statute or an executive decision that represents majority will or sentiment is an integral part of government under a written constitution.[12] Nevertheless, protecting an individual who subscribes to a minority view strains judicial decisionmaking.

This subject requires some background. A critique of Judge Tjoflat's suggested remeasurement of the irreparable injury rule begins with a series of

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10. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 283-84 (2001) (predicting continuance of prohibition against religious exercises in public schools). The authors predicted correctly, as it turned out, that the Court would change the doctrine in the "funding" branch of the Establishment Clause. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, ___, 122 S. Ct. 2460, 2473 (2002) (holding that Ohio pilot program that provided tuition for students to attend public or private school of their choice did not violate Establishment Clause because program permitted individuals to exercise genuine choice among public, private, secular, and religious options).

11. *See* Coleman v. Commissioner, 791 F.2d 68, 69 (7th Cir. 1986) (enforcing tax code against citizens advancing frivolous arguments to justify non-payment of taxes).

12. *See* DANIEL FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS, 140-68 (2002) (rejecting arguments that judicial review comes at expense of majoritarian will and individual rights); Hon. Frank M. Johnson, *John A. Sibley Lecture: The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 463-67 (1977) (discussing importance of independent judiciary and judicial review to constitutional form of government).

inquiries into remedy in Part IV, the plaintiff's alternative damages remedy in Part V, the injunction and its kindred in Part VI, "play in the joints" and the tailoring principle in Part VII, equitable discretion in Part VIII, constitutional discretion in Part IX, and the irreparable injury rule as a prerequisite for injunctions in Part X and its critics in Part XI. This Article's itinerary reaches the recalibrated irreparable injury rule after discussing the irreparable injury rule in constitutional, Part XII, and Establishment Clause, Part XIII, litigation. How does Judge Tjoflat propose to change the irreparable injury rule? Part XIV answers this question. The answer, however, includes a necessary detour into contempt. How would Judge Tjoflat's proposal affect a court's ability to protect a citizen's constitutional right to be free from improper officially-sponsored religious activity, and would it affect the institutional role of federal trial courts? This Article considers these issues in Part XIV. What are the arguments against adopting the changed irreparable injury rule? Part XV addresses this question.

Why, a constitutional scholar might ask, sully this Symposium, devoted as it is to the pure and refined study of constitutional rights, with the humble subject of remedy? Joseph Moskovitz observed before the Warren epoch that often, "a deaf ear is turned to any discussion of the dry and technical subject of judicial remedies. The problem of remedies, nevertheless, is the crucial one, inasmuch as our procedural law is far less adequate than existing substantive law."[13]

This Article also illuminates a larger point: A citizen's constitutional liberties and the rule of law are hollow without a court and a procedural process to vindicate them and effective remedies to implement them.[14]

II. The Acropolis Military Institute Problem

More detail about Fatima El-Erian's proposed constitutional litigation will be helpful to the reader before this Article delves more deeply into its subject. Acropolis Military Institute (AMI) is an Acropolis state college that follows a military-type educational regimen and styles its graduates "soldier-citizens." AMI's unwritten litigation policy is never surrender; fight every battle to the last legal trench.

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13. Joseph Moskovitz, Comment, *Civil Liberties and Injunctive Protection*, 39 ILL. L. REV. 144, 144 (1945).

14. *See generally* Daryl J. Levinson, *Rights, Essentialism, and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that plaintiff's constitutional right is both interdependent and intertwined with her remedy).

A plaintiff cannot formally initiate a federal constitutional lawsuit against AMI, a state institution.[15] Instead, the plaintiff must sue an individual decision maker, usually AMI's Commander, who is the equivalent of a president at other colleges, as the named defendant.[16] Although a federal court's injunction will lead AMI itself to begrudging compliance, qualified immunity will insulate the named defendant himself from paying damages.[17] The Acropolis state government defends AMI's lawsuits, so AMI finances its resistance, in effect, by playing with Monopoly money. The free part of AMI's game ends, however, with a plaintiff's judgment, for then AMI's obligation to pay the fees the plaintiff's attorney accrues.[18]

Although federal courts had forbidden officially-sanctioned prayers at the federal service academies, AMI's Commander Busby established an official mess hall grace in 1996. After a federal judge found that AMI's official grace was inconsistent with the Establishment Clause and enjoined him from continuing it, Commander Busby commented on the decision and initiated the two new policies with which this Article deals:

> The Supreme Court pushed women in through AMI's Stone Gate and then it drove God out. I am going to let God back in. If AMI's cadets cannot say grace in the mess hall, I shall order them to say a prayer on the parade ground before they march to the mess hall for supper. I shall also order the dean to post the Ten Commandments prominently on the mess-hall door.[19]

AMI actively recruits cadets from South Asia and the Middle East, many of whom are not Protestants or even Christians. Our Problem's plaintiff, Fatima El-Erian, is an American citizen and devout Muslim.

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15. *See* U.S. CONST. amend. XI (providing states sovereign immunity).

16. *See Ex Parte* Young, 209 U.S. 123, 149-61 (1908) (finding that law permits enjoining state official from taking unconstitutional action and that such injunction does not violate Eleventh Amendment).

17. *See* Mellen v. Bunting, 181 F. Supp. 2d 619, 637 (W.D. Va. 2002) (immunizing official from monetary damages when official violated constitutional right that was not "clearly established"), *order amended by* Mellen v. Bunting, 202 F. Supp. 2d 511, 511-12 (W.D. Va. 2002).

18. *See* 42 U.S.C. § 1988(b) (1994 & Supp. V 1999) (allowing courts to use discretion and grant attorney's fees to prevailing parties in certain civil rights claims); *Mellen*, 202 F. Supp. 2d at 511-12 (allowing request for attorney's fees from defendant entitled to qualified good-faith immunity defense).

19. I made this up. I disclaim responsibility for any resemblance an imaginative reader incorrectly perceives between this fictional place and any actual academy or institute anywhere. This is because citizens in a democracy ought to expect from military leaders a sense of who makes binding rules and what they are, as well as a sense that the military is subordinate to civilian rules. Brazen defiance of superior authority is a shoddy and unbecoming model for citizen-soldiers in training.

The Commander's new policies are improper under the observances branch of the Supreme Court's Establishment Clause decisions that this Article will review presently.[20] That this doctrine is difficult to implement with effective remedies will also become clear below.

III. The Warren Court Establishment Clause Legacy

The Establishment Clause official-observances decisions were archetype Warren Court innovations. The Vinson Court had applied the Establishment Clause to the states in the 1940s in *Everson*[21] and *McCollum*.[22] In the early 1960s, the Warren Court decided its controversial "separationist" decisions disapproving official religious observances, school prayer,[23] and Bible-reading.[24]

The policy justifications for the Warren Court's observances decisions suffice to persuade someone sympathetic with secular government and the separation of church and state. Carrying forward the Framers' desire to protect liberty of conscience,[25] the official separation of religion from government fostered by the decisions serves crucial purposes. Separation militates against the sometimes lethal combination of religion and nationalism. In a world of conformity and inflated government power, separation safeguards religious nonconformity as an alternative to monolithic government institutions. Finally, separation insulates both government and religious institutions from each other's failures and lapses. Just as religious institutions were not directly involved in then-President Clinton's disgraceful peccadillo, the government is not directly involved as the Catholic Church reels under self-inflicted blows from child-molesting priests and higher officials' cover-ups.

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20. *See infra* Part XIII.

21. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8, 18 (1947) (deciding that New Jersey program to reimburse parents for transportation costs of sending children to parochial schools did not violate Establishment Clause of First Amendment as applied to states through Fourteenth Amendment).

22. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211-12 (1948) (using First and Fourteenth Amendments to invalidate practice of allowing religious representatives to teach religious doctrine in public schools). *See generally* Jeffries & Ryan, *supra* note 10, at 281 (stating that modern Establishment Clause dates from mid-twentieth century jurisprudence).

23. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (striking down public school district's policy of requiring reading of verses from Bible and recitation of Lord's Prayer by students as violation of Establishment Clause).

24. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (stating that using public school system to encourage recitation of prayer is wholly inconsistent with Establishment Clause).

25. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398-405 (2002) (describing connection between Establishment Clause and liberty of conscience). *See generally* James Q. Wilson, *The Reform Islam Needs*, CITY JOURNAL, Autumn 2002, at 26 (examining origins of freedom of conscience in western civilization).

Despite the justifications, the Warren Court's Establishment Clause decisions are unpopular. The Establishment Clause, as defined by the Supreme Court and administered by lower courts, is an "elitist," or minority, doctrine. The religion clauses, like other guarantees in the Bill of Rights, require a court to protect an individual's civil liberties against a government policy, the product of a political majority. Opinion-poll majorities uniformly favor the religious observances the Court forbids.[26] Religion disputes are emotional enough to polarize public opinion and rally chanting demonstrators to the Supreme Court's front steps.[27]

A constitutional right regulates relations between people; it is not an abstraction suspended in the air. Courts respond when a political majority uses an official observance to support the majority's religion. Constitutional government requires people to be able to understand others' outlooks. The Establishment Clause provides a court with a legal rule that enables it to prevent the majority from imposing its perspective on the minority; this is a negative way to instruct the majority to try to understand the minority's viewpoint. Judicial review is one technique for constitutional government to use to overcome the tendency toward conformity. The court may prevent a majority from imposing a coerced outward show of conformity. This will encourage pluralism and diversity by allowing a, perhaps forced, space for nonconformity. In the short run, a judge's injunction ordering an official defendant to cease an improper observance, ceremony, or display may not actually persuade the majority of anything; indeed it may embitter some of the majority and attract zealots. In addition to the injunction's attempt to command and control, however, the judicial process, including the decision and the injunction, has an educational effect over the long run.

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26. *See* Jeffries & Ryan, *supra* note 10, at 324 (stating polls show most citizens disagreed with Supreme Court decisions disallowing school prayer and Bible reading). After Alabama Chief Justice Roy Moore set up a Ten Commandments monument in the Alabama Judicial Building, 77% of the Alabamians polled approved it. Manuel Roig-Frazia, *On Trial in Alabama, Two Icons*, WASH. POST, Oct. 24, 2002, at A18. *Newsweek* took an opinion poll shortly after the court of appeals decision finding the phrase "under God" in the pledge of allegiance to be an establishment of religion; a huge majority (87% to 9%) disagreed with plaintiff Newdow's and the court's position on the pledge. Howard Fineman, *One Nation Under . . . Who?*, NEWSWEEK, July 8, 2002, at 23, 24. Senators lined up in the Capitol hoping to be on television reciting the full pledge and execrating the judges. *See id.* at 23 (describing scene at Capitol building as senators prepared to say pledge).

27. *See* Charles Lane & Michael A. Fletcher, *High Court Takes Up Two Big Issues: School Vouchers and Death Penalty Spark Lively Debate*, WASH. POST, Feb. 21, 2002, at A6 (describing scene at Supreme Court as "[h]undreds of chanting demonstrators patrolled the court's front steps" to voice their opinions during the *Zelman v. Simmons-Harris* oral arguments).

In their 2001 careful cultural-political-legal analysis of Establishment Clause litigation, Dean Jeffries and Professor Ryan predicted stability and quiescence in the religious observances decisions, the disputes this Article addresses.[28] Even if the Supreme Court's Establishment Clause doctrine is stable, this Article is based on the author's prediction that it will remain unpopular and that Establishment Clause disputes will persist. People who disagree with the Court's separationist decisions will assure that the Court's decisions will remain controversial, triggering anger and resistance, as well as provoking the contemporary equivalent of "Impeach Earl Warren" billboards and bellicose Fourth of July speeches by ambitious politicians.[29] Courts, usually beginning with federal trial judges, will implement Establishment Clause plaintiffs' "separationist" position on religious observances – "public schools should not be religious,"[30] and public education "should not play favorites."[31]

The observances branch of the Establishment Clause is particularly difficult for courts to implement with a meaningful remedy. The Establishment Clause sets up rules and distinctions that are impossible for citizen-litigants, executive and legislative officials, and courts to leave alone. Many people who have integrated religion into their daily lives do not draw fine distinctions between private and official conduct. This researcher, examining religious observances decisions for this Article, discerned an official presumptuousness in the technique and manner the majority sometimes employs to impose its particular creed on the minority.[32] Federal judges, insulated from majority retaliation by life tenure and salary protection, should advance

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28. Jeffries & Ryan, *supra* note 10, at 283-84 ("[T]he constitutional prohibition on religious exercises in the public schools will remain intact."). The authors divide the Establishment Clause into funding cases and observances cases and predict change in the funding cases, which is prescient and vindicated by the Court's later decision in the voucher case, *Zelman v. Simmons-Harris*. *See* Zelman v. Simmons-Harris, 536 U.S. 639, ___, 122 S. Ct. 2460, 2473 (2002) (holding that voucher portion of Ohio Pilot Scholarship Program does not violate Establishment Clause).

29. A highlight of my family's visit to a La Crescenta, California 2002 Fourth of July community picnic and fireworks display was a "patriotic" speech attacking the court that had "outlawed the pledge of allegiance." The speaker advocated an amendment to the United States Constitution to "save" the pledge.

30. Jeffries & Ryan, *supra* note 10, at 281.

31. *Id.* at 290.

32. *See, e.g.*, Adland v. Russ, 307 F.3d 471, 483-84 (6th Cir. 2002) (finding Kentucky state government, having "actually litigated" an almost identical prior case, was before court as recidivist); Glassroth v. Moore, 229 F. Supp. 2d 1290, 1293-94 (M.D. Ala. 2002) (noting factual predicate to order: Chief Justice of Alabama Supreme Court erected "Ten Commandments" monument in state judicial building without notice to other justices and after having been sued for similar practices as lower court judge).

constitutional government by protecting minority rights; the court may find that a statute, enacted by Congress or a state legislature, or an executive policy is repugnant to the United States Constitution even when the statute reflects the views of a political majority.

Lawyers and trial judges have a daunting job in making sense of the Supreme Court's substantive Establishment Clause tests. Even a lawyer's substantive no-brainer is difficult because many people, including Supreme Court justices, reject the earlier decisions' basic principles. One example is Chief Justice Rehnquist's principal opinion in 2002 in *Zelman v. Simmons-Harris*,[33] which declined to strike down Ohio school vouchers, but did not cite the prevailing *Lemon v. Kurtzman*[34] test.[35] Accordingly, the Warren Court's Establishment Clause observances rulings have been followed, sometimes begrudgingly; buttressed, sometimes inadvertently; and eroded, sometimes seriously, by Burger Court and Rehnquist Court decisions.[36] The substantive observances "rules" the Warren, Burger, and Rehnquist Courts have developed under the Establishment Clause have several unfortunate features: unstable conservative and moderate coalitions forming and dividing into shifting majority, plurality, concurring, and dissenting opinions; constant judicial posturing and skirmishing on the fringes and even at the center; language that creates false hopes and uncertainty, which, in turn, breeds more litigation; dissembling factual affidavits and testimony in the lawsuits themselves; spurious, specious, and implausible legal arguments; imprecise subjective tests; mind-reading and crystal-ball gazing; erroneous lower court decisions; metaphors and bad analogies combined with dogmatic assertions of revealed truth; and finally, turgid and verbose written opinions with narrow, unsustainable distinctions.

The disputed and partially-compromised observances decisions in the Warren Court Establishment Clause legacy still require judicial remedies. In our Problem, Fatima's lawyer concludes that the parade ground grace and the posted Ten Commandments do not violate the narrowly-drawn earlier injunction prohibiting grace in the mess hall. She writes Commander Busby outlining the Establishment Clause defects in the new observances and requesting that they cease. AMI's terse reply declines the invitation. Fatima's lawyer expects to keep the implied promise to sue. Because Fatima's substantive rights are clear, we can turn to her potential remedy.

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33. 536 U.S. 639, 122 S. Ct. 2460 (2002).

34. 403 U.S. 602 (1971).

35. Zelman v. Simmon-Harris, 536 U.S. 639, ___, 122 S. Ct. 2460, 2473 (2002) (holding Ohio voucher program does not violate Establishment Clause, without citing *Lemon*).

36. FARBER & SHERRY, *supra* note 12, at 113.

IV. Remedy

A "remedy," as I use the term in this Article, is what a civil court can do on behalf of a claimant who has prevailed on the substantive legal issues.[37] A remedy differs from the procedural path that a plaintiff's lawsuit takes through the system and the substantive rules the court applies. This Article takes a fluid, contextual view of a court's characterizations as remedy, procedure, and substance; it assumes the characterization will often depend on the court's purpose and may vary from decision to decision. There is nothing to be gained from characterization in the abstract as remedy, procedure, or substance. Moreover, it will often be a mistake for a court to use a characterization for one purpose in an unrelated context.[38]

For the most part, this Article examines the federal district courts, but sometimes it will also consider state courts of general jurisdiction. The substantive law is the United States Constitution's First Amendment Establishment Clause: "Congress shall make no law respecting an establishment of religion,"[39] and under that clause, the Supreme Court's decisions in observance, as opposed to funding, disputes.

A plaintiff's two basic remedies when a defendant violates her constitutional rights are money damages to compensate her loss and an injunction.[40] The extensive scholarly literature about constitutional remedies concentrates on two subjects: structural or institutional-reform injunctions and official

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37. This definition of "remedy" is narrower than many found in discussions of constitutional and public law remedies. The definition in the text is almost parallel to Regius Professor of Civil Law Peter Birks's fourth definition, "'Remedy' as a right born of the order or judgment of a court." Peter Birks, *Rights, Wrongs, and Remedies*, 20 OX. J. LEGAL STUD. 1, 15-16 (2000). In his 1999 Blackstone Lecture, Professor Birks attributes this definition to Blackstone. Nevertheless he advocates the extirpation of the word "remedy" from the legal, analytical vocabulary. *Id.* at 3.

38. Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1667 (1992).

39. U.S. CONST. amend. I.

40. The other basic category of remedy, restitution, hardly figures into constitutional remedies at all. A successful Establishment Clause plaintiff usually will have sued the defendant under 42 U.S.C. § 1983 and be qualified to recover her attorney fees under 42 U.S.C. § 1988. Professor Mike Wells maintains that a plaintiff's recovery of attorney fees deters, but inadequately. Mike Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 220 (1998). Under limited circumstances, moreover, a constitutional plaintiff may recover punitive damages. Smith v. Wade, 461 U.S. 30, 56 (1983). But with an exception noted below, Establishment Clause defendants' misconduct has not been sufficiently aggravated to warrant punitive damages. *See infra* notes 51-55 and accompanying text (discussing *Williams v. Brimeyer*, which allowed punitive damages to plaintiff denied incoming religious mail while in prison).

immunity from damages.[41] Judges grant structural injunctions for school desegregation, electoral reform, and, more recently, prison conditions remedies. Usually these tasks are bigger jobs than the courts typically ask of Establishment Clause injunctions against religious observances.

An important thing to note in a discussion of constitutional remedy is what professors call "the loose connection between public law right and public law remedy."[42] However, both Professor Daryl Levinson and Professor Tracy Thomas are correct to conclude their respective careful discussions of right-remedy in constitutional law by rejecting any approach that treats the plaintiff's remedy as subordinate; both assimilate the plaintiff's constitutional remedy to her substantive constitutional right.[43] Similarly, Dean Jeffries's perceptive article on constitutional torts suggests that "the liability rule for money damages should vary with the constitutional violation at hand."[44]

Aside from declining to subordinate remedy to right, this Article will not dwell on the elusive and slippery distinction between right and remedy. Clearly a plaintiff's right precedes her remedy. A court must find that the plaintiff has or had a substantive right that the defendant violated before moving to remedy. A plaintiff's remedy is a distinct category of her substantive interest; the remedy the court grants her should advance – certainly it ought not undermine – her substantive right. Constitutional remedies, as defined in this Article, present somewhat different analytical issues than constitutional rights; that a plaintiff's remedy is not congruent with her substantive right is one reason for a separate science of remedies. Instead of

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41. *See* Myriam Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854-58, 875-79 (2001) (considering remedial role of qualified immunity and structural reform injunctions in addressing constitutional tort violations); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 263 (2000) (arguing law of qualified immunity should be refined and rethought); Wells, *supra* note 40, at 191-92 (stating that remedies for constitutional violations may require injunctions and that damages may be indispensable, especially when harm occurred in past). In addition, the articles cited, either by conscious choice or informally, concentrate their discussions of damages on police officer defendants.

42. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 517 (1999).

43. *See* Levinson, *supra* note 14, at 913-14 (stating that under theory of remedial deterrence, "concerns about remedies routinely infiltrate rights, . . . remedies control the value of constitutional rights[, and] . . . rights and remedies operate as parts of a single package"); Tracy Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 681-95, 747 (2001) ("[T]he remedy for constitutional rights is in fact substantive."); *see also* Birks, *supra* note 37, at 3 (arguing categories of right and remedy overlap and that right should prevail in terminology). Precisely to combat expansive discretion, Professor Birks has argued that what this Article calls remedies are really rights. *Id.* at 15.

44. Jeffries, *supra* note 41, at 280.

skirmishing on the abstract line between right and remedy, scholars could help courts develop more precise damages measurement and injunction doctrines for plaintiffs who prove constitutional violations.[45] In aid of that goal, this Article turns next to constitutional remedies, beginning with damages.

V. Damages

A court will mete out damages to compensate a plaintiff for her loss due to the defendant's violation of the substantive law. In other words, the court seeks to put the plaintiff, so far as money can, where she would have been had the defendant not violated her rights. A court enters a damages judgment after the plaintiff's injury, sometimes long after, and thus substitutes the defendant's money for the interest the defendant impaired. In addition, the experience of paying damages in fact, and the possible risk of paying them in the future, will structure potential future defendants' incentives to avoid violating potential plaintiffs' substantive interests.

One of this Article's themes is that when a defendant violates a plaintiff's rights protected by the Establishment Clause, damages are both difficult for the plaintiff to attain and ill-suited to fix her problem. Establishment Clause litigation presents three damages issues wherein countervailing policies erode the policies of compensating plaintiffs and deterring potential defendants: official immunity, the nature of the plaintiff's injury, and the jury process.

In constitutional damages litigation, when an official defendant has invaded a plaintiff's constitutional right, the plaintiff often cannot recover damages because the official enjoys immunity. Protection of legitimate, but in retrospect erroneous, official decisions is the justification for official immunity. As a prerequisite to returning a damages verdict, the factfinder will ask whether the defendant violated the plaintiff's "clearly established statutory or constitutional rights of which a reasonable person would have known."[46] Did the defendant have "fair warning" that the contested practice was unconstitutional? The defendant's very action need not have been held unconstitutional, but its unconstitutionality must have been apparent under pre-existing law.[47] If the court sustains the immunity, the consequence is that the plain-

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45. *See id.* (suggesting that courts should use qualified immunity to distinguish damages from other remedies and to differentiate damages among rights).

46. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

47. *See* Hope v. Pelzer, 536 U.S. 730, ___, 122 S. Ct. 2508, 2515 (2002) (stating that unlawfulness of officials' action must be apparent in light of pre-existing law, but very act in question need not have been specifically held unlawful for official action to be unprotected by immunity).

tiff's substantive claim prevails, but because the court cloaks the defendant in immunity from damages, the plaintiff recovers nothing.[48]

Immunity is a defendant's affirmative defense that advances the substantive purpose of not constraining an official's discretion. Some readers might think immunity is not precisely a remedies concept, as this Article defines that concept. A defendant's immunity is not a defense to his liability under substantive law; nor will an immune defendant avoid the plaintiff's other remedies, particularly an injunction. A defendant's successful claim of immunity is closely related to the plaintiff's damages remedy, however, because it cuts off a plaintiff's ability to recover her proved damages for the defendant's proved violation. Because the defendant's successful claim of immunity eliminates the plaintiff's damages, it is remedial in the sense that it circumscribes the remedies a court can employ on behalf of the plaintiff who has prevailed under substantive law. As a practical matter, the defendant's potential or actual immunity figures heavily into the plaintiff's damages and other remedial calculations.

Researchers will not find much Establishment Clause damages litigation because of defendants' immunity and for other reasons that this Article discusses below. Very little scholarly literature addresses such damages litigation. The Establishment Clause defendants this Article discusses, including our hypothetical Commander Busby, have a qualified immunity. The Commander's immunity standard is whether a reasonable person would have known that his contested practices, saying parade-ground grace and posting the Ten Commandments, violated the Constitution.[49] The immunity standard was clear to the judge who decided one of the lawsuits on which the AMI Problem was based; he granted partial summary judgment exonerating the defendant who had violated the Establishment Clause from paying plaintiffs' damages.[50]

A Religion Clause decision in which the plaintiff did recover damages is *Williams v. Brimeyer*.[51] A free exercise of religion violation occurred when a

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48. *See, e.g.*, Mellen v. Bunting, 181 F. Supp. 2d 619, 637 (W.D. Va. 2002) (finding defendant's conduct violated Establishment Clause, but dismissing plaintiffs' claims for damages because of qualified, good faith immunity), *order amended by* Mellen v. Bunting, 202 F. Supp. 2d 511, 511-12 (W.D. Va. 2002).

49. *See Harlow*, 457 U.S. at 818 (holding that government officials are immune from liability when their conduct does not violate constitutional rights of which reasonable person would have known); *see also Hope*, 536 U.S. at ___, 122 S. Ct. at 2515 (finding prison guards entitled to immunity unless their actions violate constitutional rights that reasonable person would recognize).

50. *See Mellen*, 181 F. Supp. 2d at 637 (finding that applicable Supreme Court decisions sufficiently unclear that reasonable official would not find clear constitutional violation from daily supper prayers).

51. 116 F.3d 351 (8th Cir. 1997).

prison mail room staff member denied delivery of incoming religious mail to an inmate.[52] The Court of Appeals for the Eighth Circuit affirmed the inmate's recovery of $500 in punitive damages against each of the two defendants.[53] Dealing with the aggravated misconduct prerequisite for punitive damages, the court said that defendants' knowing "indifference to legally binding precedent" qualifies them for punitive damages under the "callous indifference" test.[54] The same level of misconduct would overcome the defendant's qualified immunity for compensatory damages.[55]

At least one Establishment Clause plaintiff recovered compensatory damages. In *Abramson v. Anderson*,[56] a high school principal authorized prayers in assemblies and Abramson, a teacher, sued.[57] The authorities admitted that the ceremonies were improper, an admission that may have been fatal to any claim of immunity.[58] The trial judge awarded Abramson $300 for his short period of shock, upset, embarrassment, and humiliation.[59] However, the judge cited a precedent that seemed to award presumed damages for mental distress.[60] He may have been applying a damages measurement standard the Supreme Court repudiated a few years later.[61]

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52. *See* Williams v. Brimeyer, 116 F.3d 351, 353 (8th Cir. 1997) (finding blanket ban on materials from Church of Jesus Christ unconstitutional).

53. *See id.* at 355 (finding no clear error in trial judge's damage assessment).

54. *Id.*; *see* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 7.4(3), at 344 (Practitioner Treatise Series, 2d ed. 1993) (stating that prisoner cases always have low damages).

55. *See* Smith v. Wade, 461 U.S. 30, 51 (1983) (finding no substantial difference between standards for compensatory and punitive damages). Coordination of a civil rights defendant's misconduct threshold for punitive damages with his qualified immunity is subtle. In *Smith*, the Court reasoned as follows: The punitive damages threshold is defendant's reckless disregard. *See id.* at 52 (requiring that jury find defendant's conduct was reckless before awarding punitive damages). The defendant's qualified immunity then required more than negligence, something like recklessness. If the misconduct thresholds for punitive damages and compensatory damages are identical, have punitive damages lost their punishment feature? No, a plaintiff who qualifies for compensatory damages by surmounting the defendant's qualified immunity has not automatically qualified herself for punitive damages, because punitive damages are discretionary, "never awarded as of right, no matter how egregious the defendant's [mis]conduct." *Id.*

56. 50 General Law U.S.L.W. 2462 (S.D. Iowa Jan. 20, 1982).

57. *See* Abramson v. Anderson, 50 General Law U.S.L.W. 2462, 2462 (S.D. Iowa Jan. 20, 1982) (describing teacher's lawsuit).

58. *See id.* (noting that principal acknowledged that prayers violated Constitution).

59. *Id.*

60. *See id.* (citing Williams v. Trans World Airlines, 660 F.2d 1267 (8th Cir. 1981)).

61. *See infra* notes 71-74 and accompanying text (noting Court's rejection of "presumed general damages" in *Carey v. Piphus*, 435 U.S. 247, 263 (1978) and *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986)).

Williams v. Brimeyer and *Abramson v. Anderson* are exceptions; most Establishment Clause plaintiffs' damages demands will founder at the immunity stage.

Once a plaintiff gets past the immunity hurdle, her second difficulty in recovering damages for a defendant's Establishment Clause violation is to define the plaintiff's impaired interests that the damages will compensate. Fatima will have problems defining her damages and explaining exactly how she suffered harm.

Although Professor Feldman does not analyze a religious observances plaintiff's injury for recovery of damages as such, he discusses the "harm" someone suffers when, contrary to the Establishment Clause, the government endorses religion or one particular religion.[62] The majority "sends a message" to both the majority and the nonconformist outsider: You are favored as a first-class citizen, but you are singled out as a second-class citizen. This distinction, he maintains, reduces "political equality."[63]

Returning to AMI, in Feldman's analysis the Commander's prayer tells Fatima El-Erian that she cannot be a respectable member of the AMI polity and thus creates or contributes to "background conditions that impede Muslims' equal capacity to realize political lives as Muslims" and AMI cadets.[64] The disfavored person's psychological harm actually reduces her political equality; "the experience of political exclusion on the basis of one's religious identity constitutes a real harm because it has practical consequences for democratic participation."[65] "[I]t might be said [that a person's] political exclusion on the basis of [her] religious identity is the worst sort of exclusion, comparable to race and, perhaps, sexual identity but to little else."[66]

Similarly, an Establishment Clause plaintiff must possess "standing" to sue. A plaintiff's standing requires an "injury," not analyzed for recovery of damages as such, but as a prerequisite for injunctive redress. A plaintiff's injury for standing purposes may emerge from self-exclusion. When an improper establishment of religion occurs, someone who is offended may shun

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62. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 704 (2002) (introducing argument that harm following Establishment Clause violation is "an actual reduction in political equality").

63. *See id.* at 708-09 (stating Establishment Clause prevents states from impeding political equality of religious minorities); *see also* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1297-98 (M.D. Ala. 2002) (considering plaintiffs' claim that Ten Commandments display in state building injured them in sense that they feel like "outsiders").

64. Feldman *supra* note 62, at 708; *see also* Jabr v. Rapides Parish Sch. Bd. *ex rel.* Metoyer, 171 F. Supp. 2d 653, 664 (W.D. La. 2001) (finding distribution of New Testament to Muslim students violates Establishment Clause).

65. Feldman, *supra* note 62, at 709 & n.181.

66. *Id.* at 716.

public places. Thus, an improper establishment of religion may lead a member of a religious minority to become an outcast.[67]

Plaintiff Michael Newdow described his eight-year-old daughter's risk of "emotional injury" from being forced to recite the pledge of allegiance with the inclusion of the words "under God."[68] But he, not the child, was the named plaintiff, and he sought no damages, only a declaratory judgment and an injunction.[69]

Translating these nebulous, imprecise, and impalpable notions into money damages is a formidable task. Establishment Clause violations share the characteristics of many constitutional torts: the victim has no physical injury, no medical expense, and no lost income. Pain and suffering premised on physical injury or proved "trauma" do not exist. An Establishment Clause plaintiff may recover for her emotional distress by testifying about the distress she suffered, and her doctor or counselor may support her testimony.[70] Although the plaintiff did not encounter any actual loss in money, the court must convert her testimony into money. The initial decision maker will have a large area of discretion in granting and measuring damages.

Should a plaintiff who sues to vindicate significant public rights under the nation's foundational document be able to recover damages measured by an augmented compensation or a corrective justice theory? The Supreme Court's apparently negative answer came in *Carey v. Piphus*[71] and *Memphis Community School District v. Stachura*.[72] The Court rejected "presumed general damages," a plaintiff's right to recover damages for the intrinsic or abstract dignitary injury to public values when a defendant violates a plaintiff's due process[73] and free speech[74] rights. The *Stachura* Court rejected

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67. *See generally* Adland v. Russ, 307 F.3d 471 (6th Cir. 2002); *see also Glassroth*, 229 F. Supp. 2d at 1297-98 (considering plaintiffs' claim that Ten Commandments display in state building injured them in sense that they feel like "outsiders").

68. Howard Fineman, *War At Home: One Nation, the Courts, and the Polls*, NEWSWEEK, July 8, 2002, at 20, 23 (explaining plaintiff's intention of protecting his eight year-old daughter from emotional harm of being atheist outcast in room full of God-fearing children).

69. Newdow v. U.S. Congress, 292 F.3d 597, 601 (9th Cir. 2002), *reh'g en banc denied*, Newdow v. U.S. Congress, No. 00-16423, 2003 WL 554742 (9th Cir. Feb. 28, 2003).

70. *See* DOBBS, *supra* note 54, § 7.4(3), at 346 (stating that courts may award damages based solely on plaintiff's testimony, but testimony of accredited observers such as doctors and priests is beneficial).

71. 435 U.S. 247 (1978).

72. 477 U.S. 299 (1986).

73. *See* Carey v. Piphus, 435 U.S. 247, 263 (1978) (finding that it is not reasonable to assume every departure of procedural due process causes distress); Katzenberg v. Regents, 58 P.3d 339, 344 (Cal. 2002) (rejecting proposition that "money damages are *presumptively* available unless Congress prohibits that remedy").

74. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (finding that

noncompensatory damages based on the jury's "subjective perception of the importance of [plaintiff's] constitutional [free speech] rights as an abstract matter."[75]

The Court based its reasoning on policy considerations. Responding to the point that recovery of "presumed" general damages would deter future constitutional violations, the majority maintained that compensatory damages deter enough.[76] Moreover, because deterrence-based measures beyond compensation are undefined, they introduce caprice into the factfinder's calculations and may lead to large, arbitrary verdicts.[77]

The Court qualified its rejection of presumed general damages in light of the inherent value of free speech. First, a plaintiff may recover presumed damages when her injury is "likely to have occurred but difficult to establish."[78] Pecuniary loss seems not to be a prerequisite; the plaintiff's emotional distress counts as an injury, but the plaintiff must present evidence of emotional distress or pain and suffering.[79] The Court's example is the second qualification: a defendant's injury to a plaintiff's voting rights, the franchise. When a defendant thwarts a plaintiff's right to vote, she may recover presumed general damages for the loss of the franchise measured by "the particular losses that the plaintiff suffered," which is "nonmonetary harm likely to have occurred, but difficult to establish, that cannot easily be quantified" which "may roughly approximate the harm that the plaintiff has suffered."[80] Professor Jean Love has written that the frustrated voter recovers presumed general damages for intangible injuries, not for abstract deprivations, which she maintained was consistent with corrective justice.[81]

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courts should not award damages without proof of actual injury).

75. *Id.*

76. *See id.* at 310 ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.").

77. *See id.* (finding that presumed damages would permit juries to make arbitrary awards unrelated to actual compensation).

78. *Id.* at 311.

79. *See* DOBBS, *supra* note 54, § 7.4(2), at 338 (noting that proof of actual injury from a rights violation "requires something personal to the plaintiff, such as pecuniary loss, pain or emotional distress"); Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1259 (1979) (noting that the *Carey* Court "restricted the range of compensable 'injuries' to pecuniary losses, such as the loss of education or employment opportunities, and nonpecuniary losses of a personal nature, such as emotional distress").

80. *Stachura*, 477 U.S. at 310-11. *But see* Santana v. Registrars of Voters, 502 N.E.2d 132, 136 (Mass. 1986) ("Nominal damages are appropriate where the defendants were merely ignorant or mistaken." (citing Lincoln v. Hapgood, 11 Mass. 350 (1814)).

81. *See* Jean Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 80 (1992) (recognizing that general damages may be recoverable for intangible injuries (citing Ernest J. Weinrib,

Let's return to Fatima El-Erian's hypothetical claim. A constitutional plaintiff under the analysis above can recover "presumed general damages" for injury to her franchise but not for deprivation of her due process or free speech rights. May Fatima recover "presumed general damages" for the defendants' breach of her right to be free of an establishment of religion? Professor Love's sedulous analysis of the franchise versus free speech and due process nevertheless leaves the reader somewhat confused about its application to the Establishment Clause. When someone is denied the vote, she is virtually certain to experience an intangible harm, but a due process-denial victim may not even be aware of the wrong. Denial of a citizen's right to vote thwarts her political activity, but due process denials affect a plaintiff's procedural rights. Both victims are unable to exercise a right: to vote and to participate in a hearing.

The basis of a plaintiff's constitutional right in a franchise case is usually the Fourteenth Amendment's guarantee of equal protection, but sometimes the Fifteenth Amendment. Although the substantive base may be difficult to discern in decisions, due process is equal protection's twin in the Fourteenth Amendment. For voting rights violations, damages are usually the plaintiff's sole remedy because an injunction will not be feasible after the election.[82] On the other hand, if a court finds a defective procedure to have been ineffective in the absence of proper due process, the court's declaration or injunction will avoid the defective process's effect on the plaintiff without massive logistic difficulties and public disruption.

Fatima may argue for presumed general damages for nonpecuniary injury to her right to be free of an official establishment of religion because injury is "likely to have occurred but difficult to establish" and quantify.[83] Only with presumed general damages will compensatory damages suffice to correct the injustice of the defendant's denial of the plaintiff's rights. Her injury is not pecuniary, but likely; however, her lawyer will find it is difficult to prove and whether a court would accept her argument is impossible to predict.[84] Damages, if recovered, will be her primary remedy for past deprivations, although an injunction will be her primary prospective remedy.

Understanding Tort Law, 23 VAL. U. L. REV. 485 (1989))).

82. *See id.* at 89 (citing Justice Powell's belief that damages are only appropriate remedy). *But see* Williams v. Salerno, 792 F.2d 323, 330 (2d Cir. 1986) (affirming district court's use of injunction to forbid unconstitutional interference with students' rights to register to vote in college town); Bell v. Southwell, 376 F.2d 659, 665 (5th Cir. 1967) (ordering election results set aside and calling for special election).

83. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 209, 311 (1986).

84. *See* Love, *supra* note 81, at 91 (noting that "the harm caused by a deprivation of the right to vote satisfies Justice Powell's three criteria for an award of presumed damages").

Professor Dobbs, who thinks courts should encourage citizens' exercise of their constitutional rights, finds courts' denial of presumed damages "troubling."[85] The reasons are easy to discern. Damages for a defendant's Establishment Clause violation are "more often an aspiration rather than a policy," and substituting a more generous recovery for the present parsimonious damages measure would emphasize deterrence of constitutional violations.[86] Rejecting the idea that compensatory damages measured to compensate ought to deter all the misconduct that needs deterring, Professor Wells favors "extra-compensatory" damages – non-punitive damages when the factfinder decides deterrence requires more than compensation.[87]

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85. DOBBS, *supra* note 54, § 7.4(3), at 340.

86. Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L. J. 531, 665, 668 (1975).

87. Mike Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 222 (1998). Professor Wells says he thinks plaintiff should recover only for proved harm, but at other times he sounds like he favors presumed general damages like the Court rejected in *Carey* and *Strachura*. *See also* Levinson, *supra* note 14, at 934 n.327 (noting that *Carey v. Piphus*'s damages measurement ruling leads to both undercompensation and underdeterrence).

Two other possible forms of damages recoveries exist, a statutory damages schedule and retaliation damages. First, a few years ago, the present author suggested that Congress enact a statute creating a schedule of minimum deterrence-based damages as a remedy for constitutional violations. Rendleman, *supra* note 86, at 668-69 (1975). Congress has not yet taken his advice, wise as it was.

Second is recovery for retaliation, which has virtues and problems. The school district later discharged compensatory-damages plaintiff Abramson. *See supra* notes 56-61 and accompanying text (detailing *Abramson* decision). Abramson sued a second time alleging, among other things, that he was discharged in retaliation for his earlier prayer lawsuit; his later lawsuit is reported on a narrow issue several years later, with a narrow victory for Abramson and an inconclusive remand for further proceedings. Abramson v. Council Bluffs Cmty. Sch. Dist., 808 F.2d 1307, 1309 (8th Cir. 1987). It nevertheless raises the question of whether a court ought to award a successful Establishment Clause plaintiff damages for retaliation. A public employer may not fire a public employee to retaliate for his criticism of governmental policy, in other words for being a "whistleblower." Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968). How should a court respond if a public employer discharges a public employee for critical speech in the form of "blowing the whistle" on his employer's Establishment Clause violation? If a plaintiff's constitutionally protected activity caused adverse employment action in retaliation, his possible remedies include reinstatement, back pay, special damages, emotional distress, and attorney fees. Problems accompany the benefits of "whistleblower" remedies. Most Establishment Clause plaintiffs are private citizens, not government employees. Further, a public-entity defendant may lack the ability to prevent private citizens from harassing an Establishment Clause whistleblower with abusive phone calls, e-mail, and worse. A comparable issue for plaintiff Fatima would arise if, after she filed her lawsuit, her fellow AMI cadets retaliated, abused her physically or verbally, or shunned her. Should AMI be responsible for other cadets' retaliation?

As Joseph Moskovitz maintained in 1945, arguing for injunctive protection for constitutional rights,

> Committed, as we are, to the *effective* protection of civil liberties, we must label insufficient the action for damages. If the damages are to be compensatory, we are defeated before we start, due to the impossibility of computing in terms of money the loss occasioned by a violation of such rights as the right to worship, or to speak freely.[88]

Moreover, if Fatima El-Erian seeks to recover damages, she will encounter the defendant's constitutional right to a jury. Suppose she sues AMI's Commander Busby in federal court and seeks a judgment for money damages from Commander Busby for the improper parade ground prayer and posted Ten Commandments. A plaintiff's recovery of compensatory damages is a legal remedy, leading to a jury trial.[89] At a trial, the Commander would have a right to a jury to try the liability and damages issues under the Seventh Amendment.[90] The jurors will be drawn from the locality and represent the community sentiment which led to and supported the contested provision in the first place.[91] Moskovitz added to the civil liberties plaintiff's difficulties "the varying political and social convictions of the respective juries" and the "sharply divergent reactions to the issues raised by civil liberties cases."[92]

Awarding a plaintiff damages for her past injury is consistent with granting her an injunction to forestall future damages by forbidding the defendant's misconduct in the future. Suppose Fatima seeks to recover both damages and an injunction. "[W]here equitable [the injunction] and legal [the damages] claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed by either trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between

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88. Moskovitz, *supra* note 13, at 144.

89. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law.'" (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974))); DOBBS, *supra* note 54, § 2.6(3), at 156, 165.

90. U.S. CONST. amend. VII.

91. In *Not So Far Out After All*, Professor Erwin Chemerinsky discusses the negative public and editorial reaction to the Ninth Circuit's *Newdow* decision finding "under God" in the pledge of allegiance to violate the Religion Clause. *See* Erwin Chemerinsky, *Not So Far Out After All*, NATIONAL LAW JOURNAL, Oct. 7, 2002, at A12 (disapproving of verbal attacks on Ninth Circuit's ruling in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), by talk show host Bill O'Reilly and journalist Adam Liptak in a front page *New York Times* story (citing Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, N.Y. TIMES, Jun. 30, 2002, at A1)).

92. Moskovitz, *supra* note 13, at 144.

the claims."[93] The jury will decide the liability issues and the issues leading to damages before the judge determines whether to grant a final injunction.[94]

Again, a plaintiff suing a defendant for an Establishment Clause violation encounters three serious barriers to recovering any damages: the defendant's immunity, her impalpable and difficult-to-define injury, and potential hostility in the jury process. Thus, these barriers discourage some Establishment Clause plaintiffs from seeking damages at all. Michael Newdow, the plaintiff-parent who contested the phrase "under God" in the school pledge of allegiance, asked for an injunction but sought no damages.[95] The wiser tactic, then, may be for the plaintiff to eschew damages and seek an injunction only. If Fatima sues for an injunction only, then Commander Busby has no right to a jury trial.[96]

The defendant's violation of the plaintiff's constitutional rights leads to a damages muddle. The plaintiff's best remedial tactic may be to seek to reduce her period of possible damages – to sue right away, moving for a prompt interlocutory injunction, a temporary restraining order, or a preliminary injunction, either forbidding a future violation or ordering the defendant to stop an ongoing violation. For example, two students suspended from school following a procedure that did not comport with due process sued the authorities promptly and moved for injunctions; the judge granted the students interlocutory injunctions readmitting them after eight and seventeen days respectively.[97] A similar approach may either prevent AMI's Establishment Clause violation or shorten its duration.

VI. Injunction

The remedy a federal judge grants to implement a plaintiff's Establishment Clause right will usually be an injunction, an equitable court order that directs the defendant to perform or not to perform a defined activity. The judge may tailor an injunction to the defendant and the dispute. The injunction's preventive feature contrasts to damages which substitute money for the plaintiff's impairment after it has happened. If the defendant obeys it, an

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93. Ross v. Bernhard, 396 U.S. 531, 537-38 (1970).

94. *See* Dairy Queen v. Wood, 369 U.S. 469, 479 (1962) (holding that "the legal claims involved in the action must be determined prior to any final court determination of the respondents' equitable claims").

95. *Newdow*, 292 F.3d at 601.

96. DOBBS, *supra* note 54, § 2.6(3), at 156-57; FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 8.7, at 511 (5th ed. 2001).

97. Carey v. Piphus, 435 U.S. 247, 250-51 (1978).

injunction averts a plaintiff's future injury. If the defendant violates an injunction or refuses to obey it, the judge may employ contempt to enforce it.

An Establishment Clause plaintiff has two alternative remedies instead of an injunction: a writ of mandamus in a state court or a declaratory judgment in either federal or state court. Although some state-court Establishment Clause plaintiffs have sought injunctions,[98] other state-court Establishment Clause plaintiffs have sued for mandamus.[99] Generally, a court grants a plaintiff mandamus to order "a public officer to carry out a ministerial duty about which the [officer] had no discretion."[100] Mandamus is the equivalent of an injunction[101] without, however, an irreparable injury rule.[102]

A state court's writ of mandamus has both an injunction's compulsory feature for the defendant and its preventive quality for the plaintiff. A writ of mandamus differs somewhat from an injunction. A mandamus is coercive relief at "common law," an extraordinary or prerogative writ issued by a court of law, not a court of chancery or equity.[103] A writ of mandamus is limited to guiding a public official's specific ministerial functions that the court can supervise easily. In short, the court cannot use mandamus to correct all the misconduct the court can enjoin.

Although mandamus fits many Establishment Clause disputes, in our Problem, Fatima and her lawyers decide to forego the risks of litigating the

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98. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42-43 (1981) (holding that Kentucky statute requiring posting of copy of Ten Commandments violates Establishment Clause); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (deciding public school teacher's action for declaratory and injunctive relief).

99. *See, e.g.*, Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 226-27 (1963) (deciding Maryland mandamus proceeding to compel school board to rescind rule providing for opening exercises in public schools embracing reading of Bible or recitation of Lord's Prayer); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (deciding action for mandamus to require Board of Education to adopt and enforce rules and regulations prohibiting religious education in all public schools in district).

100. DOBBS, *supra* note 54, § 2.9(1), at 165.

101. *See Schempp*, 374 U.S. at 226-27 (using legal remedy of mandamus to compel school board to act; a court sitting in equity could have achieved same result with injunction); Engel v. Vitale, 370 U.S. 421, 436 (1962) (same); *McCollum*, 333 U.S. at 212 (same).

102. *See infra* note 103 and accompanying text (noting that mandamus is a legal, as opposed to equitable, remedy). Turning the coin over, a plaintiff who sues for an injunction may encounter a judge who thinks that mandamus is an adequate remedy at law, thus barring the issuance of an injunction. *See* Moskovitz, *supra* note 13, at 151 n.47 (providing examples of cases in which mandamus is sufficient remedy).

103. Additional citations showing that mandamus is a legal remedy include: DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 13 (1991); Douglas Laycock, *The Triumph of Equity*, 56 LAW AND CONTEMP. PROBS. 53, 81 (Summer 1993).

Establishment Clause before an elected state-court judge[104] and, instead, sue in federal court.[105]

The federal government and most states have declaratory judgment statutes that, in a ripe controversy, allow a plaintiff to ask a judge to declare a statute or practice contrary to the Establishment Clause.[106] A court's declaration that a statute violates the Establishment Clause differs in a crucial way from a court's injunction forbidding a defendant from conducting an official ceremony in violation of the Establishment Clause: a defendant who thwarts

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104. A state court has concurrent jurisdiction over Establishment Clause and other constitutional litigation. JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.8 (3d ed. 1999); ALLAN IDES & CHRISTOPHER MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 515-18 (2003); JAMES ET AL., *supra* note 96, § 2.36. After competition of state adjudication and entry of a final state judgment, the United States Supreme Court may review the state courts' resolution of any federal question by certiorari. CHARLES WRIGHT, THE LAW OF FEDERAL COURTS § 107 (5th ed. 1994).

105. FRIEDENTHAL ET AL., *supra* note 104, § 2.3, at 14; GENE SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 24 (2d ed. 1994).

Beyond the basic treatises, the classic citation for the point that a federal court is almost always more receptive to a constitutional plaintiff than a state court is Bert Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Professor Neuborne published his article, however, on the eve of a dozen years of conservative appointments to the federal bench. These appointments were only moderately ameliorated during the following eight years. After the 2002 election, the nation seemed to be poised for more conservative federal court appointments. Neil Lewis, *Democrats Plan to Allow Confirmation of Two Judges*, N.Y. TIMES, Nov. 13, 2002, at A20 (stating that after 2002 election, observers expect Republican majority in Senate to confirm more conservative federal judges, including conservative religion clause scholar Professor Michael McConnell).

Writing a quarter-century after Professor Neuborne, Professor Rubenstein, focusing on gays' and lesbians' civil rights litigation, nevertheless makes several cogent points about state judges' receptivity to civil rights claims, generally centering on the state judges' community ties and broader dockets. William Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (2000).

Constitutional litigation is not a monolith. On balance, I conclude that an Establishment Clause plaintiff continues to be better off in federal court, most of the time. Unlike Mr. Rubenstein's clients, Establishment Clause plaintiffs are not seekers of "equality" and "fairness," but are usually iconoclasts, often literally. Moreover, Establishment Clause litigation lacks the family-law component Professor Rubenstein stresses in gay-lesbian litigation. Finally, a court seldom requires a lay jury to decide an Establishment Clause dispute.

A thoughtful account of the "parity" debate, which emphasizes the litigants' partisan substantive interests, is Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

106. *See* 28 U.S.C. §§ 2201-02 (2000) (permitting declaratory judgment actions); VA. CODE ANN. § 8.01-184 (Michie 2000) (same); *see also* DOBBS, *supra* note 54, § 2.1(2), at 61 (discussing use of declaratory judgment proceedings to declare statutes unconstitutional).

an injunction, but not a declaratory judgment, qualifies for the contempt sanction.[107]

A constitutional plaintiff like Fatima El-Erian might consider a declaratory judgment for two reasons: a state or local government official may obey a declaration without needing the threat of a sanction, and even if an official defendant does violate an injunction, it is unlikely that the federal judge will impose draconian contempt sanctions.[108] Accordingly, an Establishment Clause plaintiff who believes a declaratory judgment is the less intrusive, more "civilized" remedy might eschew an injunction.[109] Furthermore, once a judge enters a declaratory judgment, an official defendant "knows" the law; the defendant's next violation will not be insulated from compensatory damages by a qualified immunity, and it may even qualify the defendant for punitive damages.[110] In some disputes, moreover, a plaintiff will prefer a declaration to an injunction because she may not need to surmount the inadequacy prerequisite.[111] In other types of disputes, if the plaintiff predicts that a declaratory judgment will not suffice, she may use the declaration as the foundation for an injunction with its immediate threat of sanction.[112]

In our Problem, after discussing AMI's heel-dragging tradition and Commander Busby 's recent defiant remarks, Fatima El-Erian's lawyers plan to seek a declaratory judgment in addition to an injunction.

VII. Play in the Remedial Joints

Ubi jus, ubi remedium. Where the law gives someone a right, does it also give her a remedy?

A plaintiff who has a valid claim under substantive law has suffered injury in the past and is suffering current harm, or will suffer imminent future harm. A court awards damages to compensate past and unpreventable future harm. The court's goal with an injunction is to stop the defendant's present harm to the plaintiff and to protect her from future harm. The judge personal-

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107. *See* Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 163 (1976) (noting that violation of declaratory judgment is not punishable by contempt).

108. *Id.* at 168-69.

109. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 692 (1994) (issuing declaratory judgment in Establishment Clause dispute).

110. *See supra* notes 53-55 and accompanying text (discussing standard for award of punitive damages to constitutional plaintiffs and articulating *Smith v. Wade*, 461 U.S. 30, 51 (1983)).

111. *See* FED. R. CIV. P. 57.

112. Rendleman, *supra* note 107, at 155, 167-68.

izes the plaintiff's substantive right and tailors the injunction to protect or implement the plaintiff's substantive entitlement. If the defendant obeys the injunction, it allows the plaintiff to enjoy the rights as she would have absent the defendant's breach or threat to breach.

Chief Justice Marshall articulated the idea that a plaintiff's remedy ought to be congruent with his substantive right. In *Marbury v. Madison*,[113] Marshall posed the rhetorical question: "If [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?"[114] "The very essence of civil liberty," he answered himself,

> certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[115]

The Court's quotation from *Blackstone* is both shorter and clearer: "[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[116]

Examining how Chief Justice Marshall's idealistic statement played out in Marbury's actual dispute also reveals the world of real litigation with its second-best remedies or non-solutions. Marbury's writ was mandamus, a practical injunction equivalent. After saying that Marbury had a "right" to the commission he sought, the Court went on to hold, however, that he had sued the defendant, Madison, in the wrong court under an unconstitutional statute.[117] According to the Court's opinion, to convert his substantive right to his commission to a practical remedy, Marbury had to sue Madison in a court with original jurisdiction, which he had not done.[118] Professor Van Alstyne observed that the five-year term Marbury had a right to serve expired, and "reportedly" he "never received his commission."[119] Marbury's fate

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113. 5 U.S. (1 Cranch) 137 (1803).

114. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

115. *Id.* at 163.

116. *Id.*

117. *Id.* at 175.

118. *Id.* How did Chief Justice Marshall, who was presiding over a court lacking jurisdiction to decide Marbury's lawsuit, nevertheless manage to pass on the merits of the dispute he lacked power to adjudicate? *See generally* Michael Kent Curtis, *History Teaching Values, Reviewing William Nelson,* Marbury v. Madison: *The Origins and Legacy of Judicial Review*, 5 GREEN BAG 2D 329, 336 (2002). First, he had not been on the job long. Second, some observers have suggested that politics may have been involved.

119. William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L. J.

illustrates the point made above: a citizen's claim to a substantive right is empty without a court and a procedural process to vindicate it and an effective remedy to implement it.

VIII. Equitable Discretion

An idealist may insist that a judge's duty is to assure that a plaintiff's injunction is congruent with her right under substantive law. The judge, as a successor of a chancellor in equity, however, may grant sometimes more, and sometimes less, of an injunction than the substantive law provides.[120] This phenomena is called "equitable" discretion.

Later courts have often quoted Justice Douglas's statement in *Hecht Co. v. Bowles*:[121]

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[122]

Still later courts have repeated the debate between adherents of equitable discretion and adherents of positive law.[123] The question of when a plaintiff who successfully asserts a substantive right may not receive any remedy continues to the present day.

"Very pretty," an astute reader might say, "but, you said above that law consists of stable rules and courts to translate them into predictable results, so what exactly is the law?" John Seldon's remark about equity in the middle of the seventeenth century articulates the reader's fear that equitable discretion might create the opportunity for a chancellor to be too subjective and lead him to arbitrary decisions:

> Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is Equity. Tis all one as if they should make the Standard for the measure we call a foot to be the Chancellor's foot; What

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1, 13 n.24.

120. *See generally* DOBBS, *supra* note 54, § 2.4(6), at 81-4 (examining need to vary breadth of equitable relief); David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988) (considering discretion in providing equitable relief).

121. 321 U.S. 321 (1944).

122. Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944).

123. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 329 (1982) (advocating judicial discretion in majority opinion and statutory schemes for declaratory relief in dissent).

> an uncertain measure would this be; One Chancellor has a long foot, another a short foot, a third an indifferent foot.[124]

Having introduced the idealism of remedies congruent with rights and the reality of equitable discretion, this Article turns to constitutional discretion.

IX. Constitutional Discretion

The Rhode Island Supreme Court's idealistic statement in a voting rights decision is an appropriate way to begin discussing constitutional remedies. The court said that "the mere existence of a law, or a Constitution, without provisions to enforce that law makes it essentially meaningless."[125] Despite this compelling idea that a court's constitutional remedy for a defendant's constitutional violation ought to implement the plaintiff's rights, a plaintiff's actual remedy for a defendant's constitutional violation often falls short of the plaintiff's substantive right.

The equitable discretion to grant or withhold an injunction for a proved violation, that this Article discussed above, has a constitutional counterpart. One prominent environmental scholar insisted that a judge has more discretion to shape a plaintiff's remedy for a defendant's constitutional violation than he has for a statutory violation: if the defendant breached a statute, he maintained, the judge should not refuse to grant an injunction; but if the defendant violated the Constitution, the judge has discretion to withhold an injunction.[126]

The *Brown* Court assumed that the plaintiffs were entitled to injunctions or equivalent orders admitting them to desegregated schools; the problem was not whether but when. In *Brown II*, the school desegregation remedies decision, the Court commended "all deliberate speed" to the trial courts.[127] The Court's reapportionment decision in *Reynolds v. Sims*[128] contains a comparable statement.[129] In his piece *Remedies and Resistance*, Professor Paul Gewirtz maintained that courts may use gradual and partial injunctions as remedies for a defendant's violations of a plaintiff's constitutional rights.[130]

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124. THE TABLE-TALK OF JOHN SELDEN 43 (Pollock ed. 1927); *see* Birks, *supra* note 37, at 22-24 (calling discretionary remedies "a nightmare trying to be a noble dream").

125. O'Connors v. Helfgott, 481 A.2d 388, 394 (R.I. 1984).

126. Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 531 (1982).

127. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

128. 377 U.S. 533 (1964).

129. *See* Reynolds v. Sims, 377 U.S. 533, 585 (1964) (stating that "equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid").

130. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 598-606 (1983)

Several reasons support piecemeal implementation of constitutional rights. The first is logistical: school and election systems are large and complex bureaucracies with lots of inertia, unable quickly to reverse course, stop, or turn square corners.[131] Second, belonging to the executive branch of government, the official defendants are not accustomed to orders from the judicial branch, which, for its part, is not accustomed to running schools and elections.[132] Third, state and local governments are under state sovereignty, where federal courts are obliged to tread gently.[133]

Professor Farber wrote that courts' gradual-partial approach to constitutional remedies is, however, based on an unspoken premise: the Constitution does not create legal duties that officials must perform voluntarily. An official's constitutional duties only begin when a court grants an injunction ordering the official to respect the plaintiff's constitutional right.[134] The reality is, in Professor Fiss's words, that "the meaning of a [constitutional] value derives from its practical realization [in an injunction] as well as its intellectual articulation."[135]

When an Establishment Clause plaintiff like our Problem plaintiff Fatima succeeds, what equitable discretion will she encounter? An important decision about a federal judge's equitable discretion in Establishment Clause injunction litigation came in a second manifestation of *Lemon v. Kurtzman*. Since the plaintiffs in *Lemon* had not been aggressive in seeking interlocutory injunctive relief, the Supreme Court's definitive decision preventing government payments to church-related schools occurred after the schools had received some payments.[136] The delay led to a second Supreme Court decision on whether the first decision required the school authorities to refund money they had re-

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(noting how immediate and complete injunctions may not provide best solution under interest balancing approach).

131. *See id.* at 611 (recognizing necessity of changing all parts of school system to accommodate injunctions and that such change takes time).

132. *See id.* at 618-19 (rejecting proposition that stern orders from courts would coax school officials into immediate compliance).

133. *See id.* at 647-48 (noting that rights-maximizing courts sacrifice remedial effectiveness for local autonomy).

134. *See* Daniel Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 403-11 (arguing that judicial remedies, including injunctions, can be quite powerful for constitutional violations).

135. Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 761 (1982).

136. *See* Lemon v. Kurtzman, 411 U.S. 192, 197 (1973) (indicating schools had already entered into contracts prior to first decision).

ceived.[137] The Court did not compel the school authorities to refund payments.[138]

Chief Justice Burger's principal opinion held that the Chancellor's discretion and the flexibility of equitable remedies included denying retroactive application to the original *Lemon* decision.[139] The Chief Justice's opinion, which warrants extensive quotation below, garnered but a plurality of four in a Court of eight; one Justice concurred in the result; three Justices dissented.[140]

The Chief Justice stated:

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[141]

"In equity, as nowhere else," the plurality opinion continued, "courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots."[142] Moreover, "it is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy."[143]

The plurality opinion invoked the countervailing considerations that militate against federal structural injunctions. "Federalism suggests that federal court intervention in state judicial processes be appropriately confined . . . . Likewise, federalism requires that federal injunctions unrelated to state courts be shaped with concern and care for the responsibilities of the executive and legislative branches of state governments."[144]

An observer having read this far may conclude that Fatima, a substantive Establishment Clause winner, might nevertheless be turned out of court a

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137. *See id.* (examining whether courts should apply holding of *Lemon I* retroactively to payments made prior to decision).

138. *See id.* at 208-09 (finding that equity judge in lower court used practical remedies to determine case).

139. *Id.*

140. *Id.* at 193.

141. *Id.* at 200 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (citation omitted)).

142. *Id.* at 201.

143. *Id.* at 203.

144. *Id.* at 208.

remedial loser. The Chief Justice's plurality opinion dropped a footnote, however, that added, "This is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers to proceed with their business regardless of serious constitutional questions concerning state legislation."[145] Protecting the integrity of the plaintiff's Establishment Clause interest, as expressed in the footnote, appears to have set the course for federal judges' Establishment Clause injunctive decisions. In other words, courts that have devised plaintiffs' remedies for officials' Establishment Clause infringements have not adduced logistical difficulties, separation of powers, and federalism to justify delayed and partial relief. If lower courts had taken the Chief Justice's implicit cue and followed a gradual-piecemeal approach, their ability to secure minority plaintiffs' Establishment Clause rights would have been dramatically circumscribed. No matter how appealing the reader finds the gradual-piecemeal approach to structural injunctions for desegregation and reapportionment, it is misplaced in an Establishment Clause dispute like the AMI Problem.

X. The Irreparable Injury Rule

In our AMI Problem, Fatima El-Erian objects to AMI's parade-ground grace and the posted Ten Commandments on the ground that AMI begins each meal by violating her rights under the Establishment Clause. Her lawyer begins to draft a complaint and a motion for a preliminary injunction. The irreparable injury rule or inadequacy prerequisite is a crucial part of interlocutory and permanent injunctive litigation.

The two forms of interlocutory injunction are a temporary restraining order and a preliminary injunction. Both require the plaintiff to show irreparable injury. The plaintiff's moving papers for a temporary restraining order must show "immediate and irreparable injury loss or damage."[146] The standards for a preliminary injunction all require the plaintiff to demonstrate irreparable injury.[147]

A plaintiff must show that her remedy at law is inadequate – that absent an injunction she will endure irreparable injury. A plaintiff's complaint, after alleging her substantive claim, ends with "a demand for judgment for the

145. *Id.* at 208 n.8.

146. FED. R. CIV. P. 65(b).

147. *See* Morton Denlow, *Preliminary Injunctions: Look Before You Leap*, 28 LITIG. 8, 9-10 (2002) (describing tests for granting preliminary injunction requiring plaintiffs to show either probability or certainty of irreparable injury).

relief the pleader seeks."[148] As a plaintiff, if Fatima El-Erian is seeking an injunction, her "prayer for relief" will request the court to "permanently enjoin the defendant." In addition, as the law now stands, the plaintiff will have the burden of alleging in her complaint and convincing the judge that her remedy at law is inadequate; that, without an injunction, she will suffer irreparable injury from the defendant's violation of her rights.[149] If the plaintiff's legal remedy is adequate, her substantive claim "succeeds," but the judge will decline to grant her an injunction.

The present author has written that the judge will grant the plaintiff an injunction when her remedy at law, damages, is inadequate.[150] But what does "inadequate" mean? An injunction is superior to damages when: a) the plaintiff's substantive right is too important to allow the defendant to violate it and pay damages;[151] b) the subject matter of the dispute may be unique;[152] or c) the plaintiff's injury may be difficult or impossible to monetize.[153]

XI. The Irreparable Injury Rule's Critics

The irreparable injury rule has been controversial.[154] Critics have said that a plaintiff whose substantive right, including a constitutional right, is endangered deserves a potent preventive remedy, namely, an injunction.[155] The inadequacy prerequisite, however, sets up a remedial hierarchy that subordinates an injunction to damages, which, in turn, frustrates a judge's

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148. FED. R. CIV. P. 8(a)(3).

149. *See* JAMES ET AL., *supra* note 96, § 3.22, at 230 (noting complaint requires allegations that monetary damages are inadequate).

150. *See generally* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 346 (1981).

151. *See id.* at 349-50 (finding that injunctions are appropriate when money damages will not stop defendant's actions).

152. *See id.* at 352 (stating that certain "substantive interests are so basic that courts think people deserve to enjoy them in fact").

153. *See id.* at 349 (discussing difficulty of assigning dollar figure to damages). *See generally* DOBBS, *supra* note 54, § 2.5(1)-(2) (discussing means by which plaintiffs may assert irreparable harm or inadequate legal remedy and requirements for adequacy test); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 21 (1999) (discussing requirement that plaintiff must still prove irreparable harm or inadequate legal remedy and policies behind requirement); *Developments in the Law-Injunctions*, 78 HARV. L. REV. 994, 996 (1965) (examining types of injunctions and limits to injunctive application).

154. For balanced summaries of the debate see generally DOBBS, *supra* note 54, § 2.5(3); FISCHER, *supra* note 153, § 21; Pat Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 ORE. L. REV. 839 (1989).

155. *See* DOBBS, *supra* note 54, § 2.5(3), at 93 (arguing for injunctions because task of court is to effect social change, not economic efficiency).

ability to let a plaintiff enjoy her constitutional right in fact instead of a money substitute.[156] Courts ought to scuttle this practice of subordination.[157]

Two powerful critics of the irreparable injury rule are Professor Owen Fiss and Professor Douglas Laycock. Professor Fiss argued in 1978 that courts should dispense with the inadequacy prerequisite that disfavors the injunction. The judge should substitute a "context-specific evaluation of the advantages and disadvantages of each form of relief" and analyze an injunction's "technical advantages and the system of power allocation that it implies."[158] The judge should consider the quality and source of the plaintiff's substantive interest; a plaintiff's extraordinary substantive claim, for example a constitutional claim, requires an extraordinary remedy.[159]

Professor Fiss rejected the assertion that people may do whatever they want "provided they are made to pay the full costs of their action" as inconsistent with liability rules.[160] He maintained that courts cannot reduce rights "to a series of propositions assuring the payment of money to the victims."[161] "[C]ash payments [are] peculiarly inadequate" for a defendant's violation of a plaintiff's constitutional rights because the inadequacy of damages stems not merely from the difficulty of measuring the plaintiff's loss but also from the injunction's effect, changing the defendant's behavior and the status of both parties.[162] Fiss's stated purpose was to end the remedial hierarchy that subordinates injunctions to other remedies, in other words to extirpate the irreparable injury rule.[163] His conclusion asked courts to employ structural injunctions to protect particularly vulnerable citizens' constitutional rights. The end of the hierarchy of remedies should, he maintained, be generalized across the substantive spectrum to the non-constitutional claims of other plaintiffs.[164]

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156. *See id.* (arguing that court should determine remedy on basis of advantages and disadvantages in each case, not hierarchy of remedies).

157. *See* Moskovitz, *supra* note 13, at 152-59 (attacking stricture on equity that is closely related to irreparable injury rule: the maxim that "equity protects only rights of property"). The maxim limited injunctions to protecting plaintiffs' "property" rights and prevented courts from granting injunctions to protect plaintiffs' "personal" rights, which included almost all civil liberties.

158. FISS, *supra* note 2, at 6, 91.

159. *See id.* at 86, 94 (arguing for supremacy of injunctions to cure civil rights defects).

160. *See id.* at 75 (rejecting view of welfare economist who suggested that "a restraint on liberty greater than that entailed in threatening to internalize the costs of an individual's action is 'excessive'").

161. *Id.*

162. *Id.* at 87.

163. *See id.* at 6 (arguing that injunctions should not be disfavored remedy).

164. *See id.* at 91 (arguing that injunctions should not simply be placed higher on remedial

Professor Douglas Laycock conducted a lengthy study that included an exhaustive review of courts' decisions.[165] In his scholarship published in the *Harvard Law Review*[166] and later revised and issued as a book,[167] Laycock concluded that although courts continue to write decisions in the language of inadequacy and irreparability, in fact the irreparable injury rule is history. The words irreparable and inadequacy have ceased to describe the way courts decide disputes about injunctions.[168]

Laycock formulated the approach that he maintained reflected modern litigation reality: The judge will grant the winning plaintiff a final injunction to protect her interest if the plaintiff wants an injunction and demonstrates a credible need for one; the judge may reject the plaintiff's request for an injunction only if the plaintiff can take the defendant's damages money and buy the equivalent of the interest. In other words, damages are an adequate remedy only if the plaintiff can spend the money damages to buy the interest or its equivalent.[169]

Professor Fiss and Professor Laycock tell the courts to abandon the irreparable injury rule and, when a defendant contests a plaintiff's choice of an injunction, to compare the costs and benefits of damages and an injunction. The present author, although less hostile to the inadequacy prerequisite than either Fiss or Laycock, has maintained that courts no longer take the irreparable injury rule seriously in constitutional and civil rights litigation.[170] Nevertheless, the judge's choice between damages and an injunction is more complicated than previously indicated.

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hierarchy, but that hierarchy should be eliminated).

165. *See* LAYCOCK, *supra* note 103, at vii (comparing 1400 cases).

166. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990). Professor Laycock had first written about this issue more than a decade earlier in his review of Professor Fiss's THE CIVIL RIGHTS INJUNCTION. Douglas Laycock, Book Review, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065 (1979).

167. LAYCOCK, *supra* note 103. For this author's review, see Rendleman, *supra* note 38. For Professor Laycock's Cliff Notes summary see Laycock, *supra* note 103, at 53, which also updates his earlier work and responds extensively to points made by reviewers.

168. *See* LAYCOCK, *supra* note 103, at 5 (compiling case law and finding that "[t]he meaning of 'irreparable' and 'adequate' are constantly manipulated to achieve sensible results").

169. *See id.* at 266 (stating "general rule that '[A] plaintiff who has prevailed on the merits is presumptively entitled to choose either a substitutionary or specific remedy. A court should refuse plaintiff's choice of remedy only when countervailing interests outweigh plaintiff's interest in the remedy he prefers.'"). Countervailing interests include injunctions creating burdens on nonparties or prior restraints on speech. *Id.*

170. *See* OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS 78-79 (1984) (suggesting that preference for injunctions reverses "traditional hierarchy" in some circumstances); Rendleman, *supra* note 150, at 353 (positing that public policy can attenuate "inadequacy prerequisite").

If AMI's parade-ground grace and posted Ten Commandments are religious observances that violate the Establishment Clause, then every day is a new violation of Fatima's right to be free of an establishment of religion. AMI's violation may have a psychological effect that will persist into the future. Damages will not be an adequate response.

A judge's decision to grant an injunction to protect interests the plaintiff ought to be able to enjoy has five consequences: preventive relief, interlocutory relief, juryless procedure, the collateral bar rule, and coercive contempt. The judge ought to decide in favor of an injunction with these consequences in mind:

1) Preventive relief. The judge is protecting the plaintiff's perishable rights. To safeguard those rights, the judge grants preventive relief. An injunction, even one to refrain, circumscribes the defendant's range of possible activity. The limits may affect the defendant's actual conduct and have a constraining effect on the defendant.

2) Interlocutory relief. To secure interlocutory preventive relief, the plaintiff claims an imminent or ongoing injury to an interest that she maintains she has a right to enjoy in fact, thus she cannot be compensated with money. Because damages are inadequate, the judge takes procedural shortcuts to protect the plaintiff's interest quickly before a full hearing. The judge suspends the usual rules of civil procedure, pleading and discovery, because of alacrity to protect the plaintiff from interlocutory irreparable injury. Although the irreparability-inadequacy tests for interlocutory and final injunctive relief use the same words, the inadequacy prerequisite that the courts actually administer for interlocutory relief is more demanding. A court may cite lack of irreparable injury to reject an interlocutory injunction that it would be quite likely to grant after plenary trial.[171]

3) Absence of a jury. If the plaintiff's case for an injunction proceeds through pleading and discovery to plenary trial, the judge will dispense with the civil jury and find the facts himself. One purpose of the irreparable injury rule-inadequacy prerequisite for an injunction is to safeguard the litigant's right to a jury trial.[172] The decision between damages and an injunction is a decision between a jury and a judge factfinder. Absence of a jury to adjudicate an injunction is a historical accident with modern consequences. Judges, often life-tenured federal judges, enjoin to protect minority rights and liberties.

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171. *See* Merril Lynch v. Bennert, 980 F. Supp. 73, 75 (D. Me. 1997) (finding plaintiff failed to demonstrate that defendant's alleged solicitation of plaintiff's clients constituted irreparable injury).

172. *See* Ross v. Bernhard, 396 U.S. 531, 539 (1970) (finding that, historically, adequacy requirement preserved Seventh Amendment right to jury).

4) Collateral Bar Rule. If the defendant violates the injunction and the court charges him with criminal contempt, he cannot argue to defeat the charge that the injunction is substantively erroneous, even that it is unconstitutional.[173]

5) Coercive contempt. The inadequacy of retroactive damages relief for the plaintiff justifies difficult administration including coercive contempt to enforce an injunction. Because the court has expressed the plaintiff's right to enjoy the interest in fact, not a money substitute, the court will fine or confine the defendant to coerce him to honor the plaintiff's rights. The court will suspend the usual ban on imprisoning a defendant without criminal procedural protection, and will confine the defendant to secure the plaintiff's substantive right in fact.[174]

Coercive contempt is the chancellor's unique method of enforcing an injunction: if the defendant disobeys or refuses to obey an injunction, then the judge will order the recusant defendant to go to jail or to pay a daily fine until he complies. The judge imposing coercive contempt pressures the defendant to allow the plaintiff to enjoy her substantive right and keeps the implied promise he made when he decided to grant the injunction rather than order damages. Since part of the judge's decision on whether to enjoin was to prevent the defendant from violating the plaintiff's substantive right and paying damages, the judge will coerce the defendant to allow the plaintiff to enjoy her rights in fact. The judge should inquire whether the plaintiff's substantive rights are favored enough that he is willing to jail the defendant to coerce him to allow the plaintiff to enjoy her right in fact.

As the present author observed in an earlier article:

> Coercive confinement has an awesome potential for abuse. Power to imprison is concentrated in a single trial judge. The usual checks against abuse that precede criminal imprisonment, including a grand jury indictment, prosecutorial discretion, a jury trial for a sentence of greater than six months, the presumption of innocence, proof beyond a reasonable doubt, and the opportunity for an executive pardon, are absent before coercive confinement begins. Contemnor is entitled to a civil form of notice and hearing only. In contrast to criminal procedure, the judge may close the coercive contempt hearing and seal the record. Criminal sentences are for

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173. *See* Walker v. City of Birmingham, 388 U.S. 307, 317 (1967) (holding that the way to challenge the constitutionality of injunction is by seeking to have it modified or dissolved, not by disobeying it).

174. FISS & RENDLEMAN, *supra* note 170, at 1004 (arguing that contempt is necessary to make injunctions work). *But see* Laycock, *supra* note 103, at 79-80 (arguing that legislatures or courts could develop additional safeguards or limits on contempt power to curb its abuse).

> definite periods. But, in theory, if the coerced individual does not cooperate, coercive confinement may never end.
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> . . . .
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> . . . Our system usually checks state power to deprive a citizen of liberty by filtering it through several official bodies: a legislature passes a criminal statute that defines punishable misconduct and sets a maximum period of confinement, a prosecuting attorney decides to move forward, a jury concludes unanimously that the authorities proved the misconduct beyond a reasonable doubt. Coercive confinement concentrates that state power in one judge who finds the facts and formulates predictions based on clear and convincing evidence. As each day of coercive confinement ends, the contemnor's day was identical to her fellow inmate's who has been convicted of a crime.[175]

The other two forms of contempt are substitutes, confessions of failure. Under compensatory contempt, if the defendant violated the injunction and caused loss, the judge will order the defendant to pay what the plaintiff lost. Since compensatory contempt is clearly a second-best solution because the judge gives the plaintiff the damages he earlier found to be inadequate, the judge should use compensatory contempt only when it is too late to coerce the defendant. Like compensatory contempt, the judge will use criminal contempt after the defendant violates the injunction. If it is too late to coerce the defendant to obey, the judge who cannot unring the bell will use criminal contempt, not to benefit the plaintiff, but to punish the defendant's disrespect, to set an example, and to deter future violations.[176]

Judges have process reasons to ration injunctions. Committing to an injunction binds the court to preventive relief with its effect on the defendant's conduct, to consideration of interlocutory preventive relief with its procedural shortcuts if the plaintiff moves for it, to factual decisions without a jury, and, finally, to administration of an order against a recalcitrant litigant, including possible punishment for criminal contempt for breach of an incorrect injunction and coercive contempt, to secure plaintiff's right. To what extent, if any, should courts ration injunctions? Suppose the defendant's official observance is violating or is about to violate the plaintiff's right to be free of an establishment of religion. Should the judge enjoin to prevent the

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175. Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190, 208 (1991); *see also* Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 505 (1989) (recognizing serious constitutional concerns with power to impose lengthy confinement with lack of procedural safeguards); David J. Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, 4 BYU J. PUB. L. 239, 256 (1990) (same).

176. *See generally* Doug Rendleman, *How to Enforce an Injunction*, 10 LITIG. No. 2, at 23 (1983).

defendant's breach or let the defendant breach and then attempt to compensate the plaintiff after the injury has occurred?[177] If inadequacy or irreparability mean anything, they mean that a wrongdoer's injury to a plaintiff's constitutional right or liberty is too serious an impairment of a crucial interest for a court to countenance. Moreover, the plaintiff may not be able to recover damages at all, and even if damages are possible, they will be difficult to calculate. I find it difficult to think of an example when a judge should decline to enjoin a defendant to protect a plaintiff's Establishment Clause right or liberty.[178] A compromise that invokes equitable discretion, pragmatism, federalism, or separation of powers will erode, if not undermine, the court's role of protecting individual constitutional rights against violation by state, local, or federal executive or legislative decisionmakers.

XII. The Irreparable Injury Rule in Constitutional Litigation

If the argument for delayed or diluted injunctive protection of a plaintiff's constitutional right is, as I have argued above, a rickety one, then what role, if any, has the irreparable injury rule played in sorting constitutional plaintiffs' remedies into damages and injunctive tracks?

The pre-New Deal Supreme Court may have already said that a plaintiff who is threatened with or enduring a defendant's violation of his constitutional rights lacks an adequate remedy at law. "It is also plain that there was no adequate remedy at law for the redress of the injury, and, as the evidence showed that the Governor's orders were an invasion under color of law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction."[179] If so, no one paid much attention, then or later.[180]

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177. Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 223 (Minn. Ct. App. 2002) (finding that prevention of injury is better course when damages will be uncertain or difficult to determine).

178. I will leave interests other than constitutional rights and liberties for later. In my review of Professor Laycock's book, LAYCOCK, *supra* note 103, I suggested amendments to the rules of procedure abolishing the irreparable injury rule-inadequacy prerequisite as an element of the claimant's claim for relief and making them an affirmative defense that would allow the defending party to "object to personal relief on any ground that makes it less appropriate than another remedy." Rendleman, *supra* note 38, at 1666. Professor Laycock commented on a draft of this Article that a violation of the Establishment Clause does not present a meaningful test of our differences, if any, "because the [plaintiff's] need for injunctive relief is so obvious and great." E-mail from Douglas Laycock, Alice McKean Young Regents Chair in Law and Associate Dean for Research, University of Texas School of Law, to Doug Rendleman (Oct. 21, 2002) (on file with the Washington and Lee Law Review).

179. Sterling v. Constantin, 287 U.S. 378, 404 (1932).

180. The sentence quoted in text at footnote 179 is the last one in the Court's decision. I ran a Keycite on this decision, and among the 319 citations, I examined the sources cited to

The inadequacy prerequisite issue did not figure into the Warren Court's constitutional decisions on injunctions to desegregate education and reapportion legislative bodies.[181] A court of appeals decision in the wake of *Brown* lends support to the idea that the prerequisite played no role in constitutional litigation. The lower court had declined to implement the plaintiffs' right to a desegregated school. The court, said the court of appeals, will grant an injunction

> to protect and preserve basic civil rights such as these [to a desegregated school] for which the plaintiff seeks protection. While the granting of the injunction is within the judicial discretion of the District Judge, extensive research has revealed no case in which it declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights.[182]

The trial judge's decision not to enjoin was, the court held, an abuse of discretion.[183]

The Rhode Island court thought the constitutional inadequacy issue was straightforward. Damages are an inadequate remedy for defendants' malapportioned districts that diluted the plaintiffs' votes: "No amount of monetary damages can rectify this vote dilution, and without some type of injunctive relief the harm will continue."[184]

The inadequacy issue in constitutional litigation came up to the Supreme Court in 1976 in an appeal from a preliminary injunction.[185] As discussed above, the standard a court will apply before granting a plaintiff a temporary restraining order or preliminary injunction includes whether irreparable injury is in the offing.[186] The federal courts have, as Professor John Leubsdorf put it, a "dizzying diversity of formulations"[187] for preliminary injunction standards, but all are variations on the following four factors: a) the plaintiff's likelihood of success on the merits; b) the plaintiff's irreparable injury without

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West Headnote [17]. I found nothing on the inadequacy prerequisite.

181. *See* Reynolds v. Sims, 377 U.S. 533, 585-87 (1964) (declining to consider inadequacy prerequisite); Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (enjoining racial discrimination in public education without considering inadequacy prerequisite).

182. Clemons v. Bd. of Educ., 228 F.2d 853, 857 (6th Cir. 1956).

183. *Id.*

184. O'Connors v. Helfgott, 481 A.2d 388, 394 (R.I. 1984).

185. *See* Elrod v. Burns, 427 U.S. 347, 373 (Black, J.) (noting that loss of First Amendment freedoms, for even minimal amounts of time, constitutes irreparable injury).

186. Denlow, *supra* note 147, at 8-10. As discussed above, the courts' interlocutory injunction tests are more demanding because of the procedural shortcuts.

187. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978).

a preliminary injunction; c) a comparison of the plaintiff's injury with an estimate of the defendant's cost or hardship from a preliminary injunction; d) the public interest.[188] A federal judge considering an Establishment Clause plaintiff's motion for a preliminary injunction will apply a standard that differs in the way that the factors are phrased and combined.[189] Local variations are insignificant because the judge's important inquiry in an Establishment Clause lawsuit is the first one.

In short, if an Establishment Clause plaintiff is likely to succeed on the merits, most courts think that answers the other three inquiries. Turning first to the last two, the defendant suffers no harm by ceasing to impair the plaintiff's Establishment Clause rights, and the public interest is congruent with ending the defendant's unconstitutional conduct. A plaintiff's irreparable injury follows a finding that she is likely to prevail on the merits for the precedent and policy reasons we examine next.

In 1976 in *Elrod v. Burns*,[190] the Court decided that a public official's patronage dismissal of a public employee violated that employee's First Amendment rights to political association and belief.[191] Justice Brennan's opinion also stated one of the clearest rules of irreparable injury-inadequacy. The lawsuit reached the Supreme Court through the defendants' appeal from a preliminary injunction based on a lower court finding of irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time," Justice Brennan wrote, "unquestionably constitutes irreparable injury."[192] When a defendant's activity threatens or impairs a plaintiff's First Amendment right, the judge will grant the plaintiff an injunction to protect that right because that plaintiff's injury is irreparable; damages are not an adequate remedy.[193]

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188. *See* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111-13 nn.5 & 7 (2001) (listing federal circuits' individual and varying tests governing issuance of preliminary injunctions).

189. *See* Am. Civil Liberties Union of Tenn. v. Rutherford County, 209 F. Supp. 2d 799, 801 (M.D. Tenn. 2002) (using four factors to determine whether to grant or deny preliminary injunction). The third factor the judge considered was "whether granting the injunction will cause substantial harm to others." *Id.* A more precise formulation would use the third factor to focus on the defendant's cost or harm and consider non-party interests under the public interest.

190. 427 U.S. 347 (1976).

191. *See* Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that "practice of patronage dismissals is unconstitutional under First and Fourteenth Amendments"); *see also* Jeffries & Ryan, *supra* note 10, at 283-84 (discussing impact of *Elrod* on political patronage in civil service).

192. *Elrod*, 427 U.S. at 373.

193. Justice Brennan's inadequacy point was a sideshow in the *Elrod* decision. The show

The time was ripe. Justice Brennan's sentence has been a popular citation.[194] Indeed, Justice Brennan's point is so obvious that some courts make it without citing anything.[195]

Why is a First Amendment plaintiff's irreparable injury obvious? Unlike a worker's compensation schedule of injuries, the Bill of Rights is not a schedule of interests that, if violated, trigger compensation. The Bill of Rights is a charter of individual freedoms; it defines liberties people ought to be able to enjoy in fact. If the defendant has yet to impair the plaintiff's constitutional right, the judge should grant the plaintiff an injunction as a preventive remedy to order the defendant to honor the plaintiff's right to enjoy her constitutional right in fact. A person's constitutional right is socially too precious to value in money. Moreover, loss of a constitutional right is not an injury a person encounters in money terms; it is cumbersome for a judge or a jury to convert a plaintiff's constitutional loss into money. Finally, once a court begins to set the amount, a person's constitutional rights are difficult to "monetize."[196] In other words, a defendant's impairment of a plaintiff's constitutional right qualifies for an injunction for all the major reasons any substantive right may qualify.[197] Justice Brennan's was an idea whose time had come.

The Court grounded *Elrod* on the First Amendment freedom of association. Courts have generalized the *Elrod* Court's irreparable injury point to speech in general.[198] Other courts have cited *Elrod* for defendants' violations of plaintiffs' rights under this Article's topic, the Religion Clauses of the First Amendment.[199]

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in the main tent was the Court's decision against patronage discharges. Justice Brennan's broadly stated principal opinion garnered only two other votes (Justices White and Marshall). *Id.* at 353-73. Justices Stewart and Blackmun formed the majority by concurring more narrowly in Justice Brennan's patronage decision without, however, mentioning irreparable injury. *Id.* at 374-75 (Stewart, J., concurring). Three justices dissented on the patronage issue, also without mentioning irreparable injury. *Id.* at 375-89 (Burger, C.J. dissenting). Justice Stevens did not participate in the decision. *Id.* at 374.

194. When I looked at *Elrod*'s Westlaw Keycite in March 2002, over 2500 other sources had cited it, including several screens of cites to Headnote [25], the irreparable injury rule headnote; a Westlaw ALLFEDS search revealed that federal courts had quoted Justice Brennan's sentence from the prior paragraph 298 times.

195. *See* Williams v. Salerno, 792 F.2d 323, 326 (2d Cir. 1986) (noting without citation to *Elrod* that unconstitutional denial of right to vote qualifies as irreparable injury).

196. Bell v. City of Milwaukee, 746 F.2d 1205, 1266 (7th Cir. 1984).

197. *See supra* notes 150-53 and accompanying text (detailing general circumstances under which money damages are inadequate remedies).

198. *See* Olmeda v. Schneider, 889 F. Supp. 228, 231 (D.V.I. 1995) (noting that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

199. *See* Beerheide v. Zavaras, 997 F. Supp. 1405, 1411 (D. Colo. 1998) (granting

XIII. The Irreparable Injury Rule in Establishment Clause Litigation

In our Problem, Fatima El-Erian's complaint alleges that the AMI Commander's prayer and posting policies violate her rights under the Establishment Clause. To support her motion for injunctive relief and to develop affidavits and other evidence for the hearing on her motion for a preliminary injunction, her lawyer still needs to learn what role the irreparable injury rule has played in Establishment Clause decisions.

Courts have often granted injunctions or similar relief to Establishment Clause plaintiffs without considering the inadequacy prerequisite; the Supreme Court and lower courts have often moved directly from deciding or declaring that the defendant's activity breached the Establishment Clause to granting an injunction.[200] The trial judges in the two 2002 observances decisions I used to develop the AMI Problem, granted injunctions without citing the irreparable injury rule.[201] Several of the United States Supreme Court's Establishment Clause decisions involve its review of state mandamus proceedings, an injunction-equivalent without the irreparable injury rule.[202]

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preliminary injunction after finding that non-kosher food served in prison violates Free Exercise Clause).

200. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992) (affirming the decision of trial judge who moved directly from Establishment Clause to permanent injunction, without considering irreparable injury rule), *aff'g* Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990); Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (affirming after trial court had moved directly from Establishment Clause to injunction without considering irreparable injury rule); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (affirming court of appeals' instructions to trial judge to "issue and enforce an injunction"), *aff'g* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983); Stone v. Graham, 449 U.S. 39, 60 (1980) (reversing Kentucky state court's approval of posting Ten Commandments in public schools). The final reported Kentucky decision remanded to the trial judge for a "new judgment," apparently an injunction. Stone v. Graham, 612 S.W.2d 133, 133 (Ky. 1981). *See also* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 227 (1963) (affirming injunction issued by trial court preventing Bible reading in public schools), *aff'g* Schempp v. Sch. Dist. of Abington Township, 201 F. Supp. 815 (E.D. Pa. 1962).

201. *See generally* Freethought Soc'y v. Chester County, 191 F. Supp. 2d 589 (E.D. Pa. 2002) (granting permanent injunction to prevent display of Ten Commandments on county courthouse); Mellen v. Bunting, 181 F. Supp. 2d 619 (W.D. Va. 2002) (granting permanent injunction requiring Virginia Military Institute to cease daily supper prayers), *order amended by* Mellen v. Bunting, 202 F. Supp. 2d 511, 511-12 (W.D. Va. 2002).

202. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 227 (1963) (ruling that recitation of passages from Bible or Lord's Prayer in public schools violates First Amendment), *rev'g* Murray v. Curlett, 179 A. 2d 698 (Md. 1962); Engel v. Vitale, 370 U.S. 421, 436 (1962) (determining that use of public school system to encourage recitation of prayer was inconsistent with Establishment Clause); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (reversing Illinois Supreme Court's denial of writ of mandamus requiring board of education to terminate religious instruction by private teachers in public schools).

To decide injunction lawsuits without the irreparable injury rule also treats the two remedies the same.

When federal courts have discussed the inadequacy prerequisite for Establishment Clause relief, they have often cited the *Elrod* rule to decide quickly in favor of an injunction. The courts that have written Establishment Clause decisions granting or denying plaintiffs' motions for preliminary injunctions have usually mentioned the irreparable injury rule, for it is one of the inquiries involved in granting a preliminary injunction.[203] Two lower courts applied the irreparable injury test to the Establishment Clause and dutifully checked the irreparable injury box.[204] One judge unwisely cobbled the preliminary injunction standard into a permanent injunction test.[205]

The irreparable injury rule, which persisted in non-constitutional litigation, was barely discernable in the observances branch of the Establishment Clause, as well as in other constitutional litigation. There are several reasons.

Irreparable injury seemed inevitable for an Establishment Clause plaintiff – should the judge even ask a plaintiff opposing a school prayer to explain why money damages would not put her where an observance-free school would have? The plaintiff's "inadequate" non-injunction remedy would be compensatory damages. The legal culture has not supported constitutional plaintiffs who sue for money damages. First Amendment Establishment Clause rights were relatively new, the Court having applied the Religion Clauses to the states only in 1948 in *Everson*.[206] Plaintiffs and the federal

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203. I discovered a few irreparable-injury-rule Establishment-Clause decisions with combined headnote Westlaw searches. Using Westlaw headnote searches to find decisions dealing with both establishment of religion and irreparable injury, I searched both 92k84.5 and 92k84.1, each with 212k14, 212k15, and 212k16, for a total of six. Because of the doctrinal subtlety and vocabulary surplus in both remedies and constitutional law, precision sometimes eludes headnote writers. Accordingly, I then Keycited decisions on point to learn of subsequent and related decisions. Since the federal circuits' tests for a preliminary injunction include irreparable injury, Denlow, *supra* note 147, at 8, 9-10, a federal district judge granting or denying a plaintiff's motion for a preliminary injunction usually makes a finding on the irreparable injury rule, if only to check the box on the list of factors; that decision is appealable, so the court of appeals usually also discusses the irreparable injury rule.

204. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996) (finding substantial threat of irreparable injury because of threat to Ingebretsen's First Amendment rights); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 (5th Cir. 1993) (determining that irreparable injury is demonstrated if Establishment Clause rights have been violated).

205. *See* Jabr v. Rapides Parish Sch. Bd. *ex rel.* Metoyer, 171 F. Supp. 2d 653, 666 (W.D. La. 2001) (deciding that standard for determining "whether a permanent versus a preliminary injunction issue is primarily the same").

206. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (holding that state law allowing reimbursement for bus fares to parochial schools does not violate First Amendment made applicable to states by Fourteenth Amendment).

courts did not confirm and fashion the § 1983 constitutional tort to recover damages until *Monroe v. Pape* in 1961.[207] In *Brown*, the plaintiffs sued for injunctions, not money damages.[208] Such lack of materialism continues today; the plaintiff who challenged the phrase "under God" in the pledge of allegiance did not seek damages.[209]

As discussed above, a plaintiff's damages for a constitutional tort are circumscribed. In a plaintiff's constitutional tort action for damages, an official defendant may interpose a federal immunity from damages as an affirmative defense.[210] Once past immunity, the plaintiff will encounter the difficulty of identifying her loss and measuring it.[211] The Court has rejected the alternative of "presumed damages" for violations of a plaintiff's due process rights.[212] The defendant will be entitled to a jury trial.[213]

A constitutional plaintiff's injunctive remedy is less circumscribed than her damages claim. An official defendant is not immune from an injunction.[214] Since the defendant's immunities militate against an Establishment Clause plaintiff's recovery of damages, the argument that the plaintiff's legal

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207. *See* Monroe v. Pape, 365 U.S. 167, 192 (1961) (stating that plaintiffs may bring cause of action against police officers for deprivation of constitutional rights), *partially overruled by* Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

208. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 100-01 n.53 (1999) (stating that "there is no direct evidence of what no one considered"). Under the immunities law of today and with the damages class action, the *Brown* defendants would be mulcted for heavy damages. *Id.* at 101.

209. *See* Newdow v. U.S. Congress, 292 F.3d 597, 612 (9th Cir. 2002) (holding that schools' use of words "under God" in pledge of allegiance and teacher-led recitations thereof violate Establishment Clause), *reh'g en banc denied*, Newdow v. U.S. Congress, No. 00-16423, 2003 WL 554742 (9th Cir. Feb. 28, 2003).

210. *See supra* notes 46-61 and accompanying text (explaining that official defendants are often immune from money damages).

211. *See supra* notes 62-70 and accompanying text (explaining that plaintiff may have difficulty identifying loss caused by constitutional violation).

212. *See supra* notes 71-82 and accompanying text (stating that Supreme Court rejected presumed damages for constitutional violation).

213. *See supra* notes 95-96 and accompanying text (stating that defendants seeking damages in constitutional violation cases have right to jury trial).

214. *See* Welker v. Cicerone, 174 F. Supp. 2d 1055, 1062 (C.D. Cal. 2001) ("The Eleventh Amendment provides no shield for state officials . . . when plaintiffs request prospective injunction relief."); FISS, *supra* note 2, at 90 (discussing how lack of state immunity from injunctions led to primacy of injunctions in civil rights cases); Jeffries, *supra* note 208, at 110 (explaining that qualified immunity does not exist for defendants facing injunctions because there is no danger that injunctions will deter legitimate business of government and injunctions do not hinder evolution of law).

or damages remedy is inadequate is strengthened.[215] The constitutional plaintiff seeking an injunction must adduce only enough "injury" to possess "standing."[216] When the plaintiff seeks only an injunction, the defendant cannot demand a jury.[217]

Procedural factors that do not preclude damages outright nevertheless militate against a plaintiff seeking damages in constitutional litigation. During much of the period we are examining, a plaintiff who sued in federal court to enjoin the defendant from executing an arguably unconstitutional state statute would have filed her lawsuit in a three-judge district court.[218] Constitutional plaintiffs brought class actions asking for injunctions, not for damages.[219] The class action was then, compared to now, under-developed. Major amendments to class action rules in 1966 and more than three decades of expansion in the law of complex litigation have created a damages class action that an earlier lawyer would not even recognize.

Finally, many plaintiffs' lawyers in civil rights and civil liberties litigation have been cause oriented, as distinguished from recovery oriented. Professor Laycock summarized an ACLU litigator's grounds for preferring an injunction and subordinating damages:

> [C]ausation and quantification of damages are burdensome to litigate[,] . . . there is little prospect of substantial recovery[,] . . . including a damage claim profoundly irritates the judge, and . . . [the lawyer] could accomplish all his social policy goals by injunction. Consequently, [such a lawyer] always tried to talk his clients out of asking for damages, and he thought this was a widespread practice among civil liberties litigators.[220]

Up to this point, our AMI Problem's Fatima El-Erian's real-life researcher could declare the irreparable injury rule lifeless in religious observances litigation, leaving neither mourners nor legacies. If the Establishment

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215. *See* Leubsdorf, *supra* note 187, at 542 (explaining that defendant's sovereign immunity means plaintiff's potential loss is irreparable).

216. Adland v. Russ, 307 F.3d 471, 478 (6th Cir. 2002) ("[W]e conclude that the plaintiffs satisfy the injury-in-fact requirement. We also find that this injury is plainly caused by one defendant's statutory directive to erect the Ten Commandments and that an injunction can redress plaintiff's injury. Thus, we are satisfied that the individual plaintiffs had standing to pursue this action in the district court.").

217. *See supra* notes 95-96 and accompanying text (stating that defendants in constitutional violation cases have right to jury trial when plaintiff demands money damages).

218. *See* 28 U.S.C. § 2281 (1976) (repealed 1994) (requiring that three-judge district court hear all actions for permanent injunctions restraining enforcement of unconstitutional statute).

219. *See* FISS, *supra* note 2, at 15 (discussing emergence of Rule 23(b)(2) class actions for injunctions instead of Rule 23 (b)(3) damages actions).

220. Laycock, *supra* note 103, at 63-64.

Clause has been bereft of irreparable injury rule interest, is the irreparable injury rule truly dead? Or was it merely dormant?

XIV. Judge Tjoflat Resurrects the Irreparable Injury Rule

In 1999, concurring in *Chandler v. James*,[221] Judge Tjoflat asserted that courts should redefine the irreparable injury rule to ration injunctions even more than they do.[222] *Chandler* was one of the high school religious observances cases before *Santa Fe Independent School District v. Doe*.[223] While no court has adopted Judge Tjoflat's restatement, no court seems to have repudiated it.

Judge Tjoflat suggests an altered metric for the irreparable injury rule. Before granting the plaintiff an injunction, the judge should anticipate whether the injunction the plaintiff proposes will have, if the defendant violates it, a potential for coercive contempt enforcement.[224] If the plaintiff's proposed injunction lacks coercive-contempt potential, the judge should deny it. "[A] court should not enter an injunction that cannot be enforced through coercive contempt sanctions."[225]

Two overarching policies support Judge Tjoflat's proposal: "[E]quity will not intervene where there is an adequate remedy at law," is the first.[226] The inadequacy prerequisite protects the defendant's procedural rights. Second is "the constitutional principle of separation of powers."[227]

Judge Tjoflat has a substantive agenda – courts have "abused" the "important" injunctive remedy, a practice that the altered irreparable injury rule will curb.[228] This Article deals with the irreparable injury rule and coercive contempt, two procedure-remedies subjects with which many constitutional specialists may be less than completely familiar. The irreparable injury rule has been treated above. For an understanding of Judge Tjoflat's altered

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221. 180 F.3d 1254 (11th Cir. 1999).

222. *See* Chandler v. James, 180 F.3d 1254, 1266-77 (11th Cir. 1999) (Tjoflat, J., concurring) (arguing that courts should issue injunctions only if they can be enforced through coercive contempt sanctions).

223. 530 U.S. 290 (2000). Whether a successful Establishment Clause plaintiff has an adequate remedy at law was briefed for the en banc Court of Appeals for the Eleventh Circuit in *Adler v. Duvall County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1065 (2001). The en banc court decided for defendants, and so it did not reach the adequacy-inadequacy issue. *Id.* at 1343.

224. *Chandler*, 180 F.3d at 1266 (Tjoflat, J., concurring).

225. *Id.* (Tjoflat, J., concurring).

226. *Id.* (Tjoflat, J., concurring).

227. *Id.* (Tjoflat, J., concurring).

228. *Id.* at 1277 (Tjoflat, J., concurring).

irreparable injury rule, the following explanation of the basic distinctions in contempt seems necessary.[229]

Suppose that Polin and Danials dispute who owns an 1803 edition of Tucker's *Blackstone*, which is rare enough for a judge to consider "unique."[230] Polin, who has it, sues Danials, asking the court for a declaratory judgment of ownership and an injunction forbidding Danials from interfering with his possession. The judge declares that Polin owns the work and, finding damages inadequate, enjoins Danials not to disrupt Polin's quiet possession. Danials, in defiance, spirits the books away.

The legal system has three types of consequences for Danials's misconduct: a) the criminal law, larceny; b) the tort law, conversion; and c) the contempt power, for disobeying a court order. The law further divides contempt, in its turn, into three categories: a) criminal contempt, b) compensatory contempt, and c) coercive contempt. The three contempt remedies against Danials roughly parallel the legal system's consequences in the first sentence.

First, the judge may find Danials in criminal contempt and fine her $5000. The judge's criminal contempt sanction is determinate and irrevocable; its twofold purpose is to deter Danials and others from thwarting court orders and to punish her for disrespect of the court order. Criminal contempt resembles a criminal law sanction for larceny.

Compensatory contempt is Polin's second contempt remedy.[231] It resembles a property owner's damages action for conversion. The judge may enter a compensatory contempt judgment against Danials ordering her to pay Polin for the harm she caused him by disobeying the injunction. The judge may measure plaintiff Polin's compensatory contempt recovery by the value of the books on the date of the wrong and add the plaintiff's cost of enforcing the injunction including attorney's fees and costs.

The judge's intent with a compensatory contempt award is to restore the plaintiff's loss, so much as money can, and to make a plaintiff's enforcement costless. However, a minority of states, led by California, reject compensatory

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229. I have updated and rewritten the following paragraphs from Rendleman, *supra* note 176, at 24-25. Judge Tjoflat discusses the chancellor's contempt sanctions. Chandler v. James, 180 F.3d 1254, 1266-68 (11th Cir. 1999) (Tjoflat, J., concurring).

230. *See generally* Davison Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 204 (2001) (giving brief history of creation and publication of Tucker's Blackstone). Washington and Lee's set of Tucker's *Blackstone* is under lock and key in the library's rare book room. I did not discover a set of Tucker's 1803 *Blackstone* for sale with an internet rare-law-book search in late 2001 and early 2002.

231. *See generally* Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction*, 1980 U. ILL. L. REV. 971 (articulating doctrines, issues, and stages of compensatory contempt proceedings).

contempt; those states remit an injunction plaintiff to a second action for damages against the injunction breacher.[232]

The plaintiff's third contempt remedy is coercive contempt.[233] If Danials refuses to return the books or to disclose its location to the judge, the judge might say, "I fine you $100 per day until you return the Tucker's *Blackstone* or tell where it is." Criminal contempt and compensatory contempt are analogous, respectively, to the criminal law and the conversion tort for money; coercive contempt is distinctive to injunctions and personal orders.

Coercive contempt's parallel is to the original injunction, which the judge had granted because plaintiff Polin's damages remedy was inadequate. Polin's injunction protects his right to enjoy his substantive right in fact. If Danials violates the injunction, the judge will wield coercive contempt because a monetary recovery for Polin continues to be inadequate. The judge's goal with coercive contempt is to secure the conduct from Danials to which Polin is entitled. A coercive contempt order is a revocable, indeterminate threat. If Danials complies, the judge's coercive threat never starts or, having started, ends. Thus, when the judge announces his measures, coercive contempt resembles a second injunction with the penalty for breach specified.

Turning again to the distinction between civil contempt and criminal contempt, compensatory contempt and coercive contempt comprise civil contempt; criminal contempt is, obviously, criminal. The consequences of the civil contempt-criminal contempt characterization, although mostly procedural, are critically important. Coercive contempt and compensatory contempt follow civil procedure, with two refinements: There will be no jury, and the proponent's burden of proof is usually clear and convincing evidence.[234] On the other hand, criminal contempt requires criminal procedure; except for an indictment, a criminal contemnor may claim a full panoply of criminal procedural protections, including a jury for a "serious" criminal sentence.[235]

Another way to classify contempt is retrospective-prospective.[236] Criminal contempt and compensatory contempt are the two forms of retrospective,

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232. *See* Safer v. Super. Ct., 540 P.2d 14, 17 (Cal. 1975) (declaring that California has no provisions allowing for compensatory contempt).

233. *See generally* FISS & RENDLEMAN, *supra* note 170 (giving broad overview of policies behind coercive contempt and methods of enforcement).

234. *See, e.g.*, Vt. Women's Health Ctr. v. Operation Rescue, 617 A.2d 411, 414 (Vt. 1992) ("We first set out the standards for review of contempt orders. It is plaintiffs' burden to prove the elements of civil contempt by clear and convincing evidence.").

235. *See* Bloom v. Illinois, 391 U.S. 194, 201-02 (1968) (holding that jury trial provisions of Constitution apply to criminal contempt cases).

236. *See, e.g.*, Latrobe Steel Co. v. United Steelworkers of Am., 545 F.2d 1336, 1344 (3d Cir. 1976) (distinguishing between compensatory contempt and coercive contempt on ground that compensatory contempt is "backward-looking" while coercive looks "to the future").

or backward-looking, contempt. Retrospective criminal and compensatory contempt confesses failure. Because damages do not adequately protect Polin's right to the *Blackstone*, the judge enjoined Danials to assure Polin's enjoyment of the rights in fact. But Danials breached the injunction; the judge can no longer secure from Danials the conduct to which Polin is entitled. The judge substitutes money recovery, compensatory contempt, or punishes Danials, criminal contempt.

Compensatory contempt includes an additional irony because it is too late to achieve Danials's obedience that Polin rightfully expected: the judge must employ the backward-looking money recovery to advance, or at least not retard, the initial decision that money would be an inadequate remedy to protect Polin's interest.

Coercive contempt is the prospective, future-oriented contempt the judge uses to achieve the defendant's obedience; it is inextricably related to the prerequisite for an injunction that money is an inadequate solution to secure the plaintiff's substantive interest. When the judge grants the injunction Polin requested, the judge and the legal system commit to securing Polin's substantive right through Danials's obedience. After Danials breaches the injunction, the judge fashions a forward-looking coercive contempt plan to enforce the inadequacy prerequisite. A judge will use coercive contempt to structure the defendant's incentives and to modify the defendant's behavior to allow the plaintiff to enjoy her rights in fact, rather than a money substitute.[237]

Injunctions and coercive contempt are command and control devices. The judge's coercive contempt tools are blunt threats to fine or to imprison the defendant. Coercive contempt measures vary from gentle to severe. The judge may threaten to fine Danials $100 per day and the threat may work – Danials may turn over Tucker's *Blackstone* right away and the threatened fine will never start. An observer may find it difficult to distinguish a coercive contempt threat from an injunction because, when the judge announces it, coercive contempt resembles a second injunction with the penalty for breach specified.

On the other hand, there may be no upper limit except the judge's credibility to constrain coercive contempt. To achieve Danials's compliance, the judge may make threats he would hesitate to carry out. Suppose the judge tells Danials to cool her heels in the county jail until she tells the court where to find the *Blackstone*. A judge's coercive threat should exceed a projected potential compensatory award because the judge intends the threat to obviate the defendant's breach leading to compensatory contempt. Similarly, a

237. *See* FISS & RENDLEMAN, *supra* note 170, at 1004-06 (describing coercive contempt and distinguishing coercive contempt from criminal and compensatory contempt).

judge's coercive threat may exceed a projected potential criminal contempt sanction because if the coercive threat works, the court will not deploy the criminal sanction.[238]

A judge who tells Danials, "You have the jail keys in your pocket," means that Danials's coercive confinement in jail is incremental; Danials controls whether confinement will ever start and, if it starts, how long it will last. If the $100 daily fine fails to produce the *Blackstone* in a fortnight, the judge may also order imprisonment of Danials to quicken her conscience and to jar her memory. If she is obdurate, she may find herself still under confinement two years later. Coercive contempt inherently harbors the potential to overreach. A single trial judge, who issued the injunction in the first place, and who may be caught up emotionally in the defendant's dance of defiance, exercises the power to imprison the defendant (perhaps indefinitely) with neither a jury nor any of the checks that usually precede imprisonment.[239]

The following summarizes Judge Tjoflat's position. After explaining the three forms of contempt sanction, he brings together the type of injunction, the nature of the defendant's violation, and the type of contempt sanction.[240] He classifies two types of injunctions, "an injunction that commands the performance of a specific act" and one "that forbids the performance of a specific act."[241] This is the familiar distinction between a mandatory and a prohibitory injunction.[242]

If, despite an injunction that commands the defendant to "shut down the mill," it "continues to operate" the plant, then the judge may impose all three forms of contempt, to compensate the plaintiff for injury during the violation, to punish the defendant for flouting the order, and to coerce the defendant to obey in the future by imposing confinement or a daily fine.[243]

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238. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 35 (2d ed. 1980) (noting threats are "designed to impress on the other the automatic consequences of his act").

239. *See* Margaret Meriwether Corday, *Contempt Sanctions and the Excess Fines Clause*, 76 N.C. L. REV. 407, 414 (1998) (stating that "the potential for abuse [inherent to coercive contempt] stems from the fact that, in this one area, legislative, executive, and judicial powers are joined"); *supra* note 175 and accompanying text (noting coercive confinement's "awesome potential for abuse"); *see also* Chadwick v. Janecka, 302 F.3d 107, 117 (3d Cir. 2002) (holding that state court's denial of habeas corpus petition to contemnor confined indefinitely for period then totaling, so far, seven years was not unreasonable application of federal law).

240. *See* Chandler v. James, 180 F.3d 1254, 1268-75 (11th Cir. 1999) (Tjoflat, J., concurring) (formulating irreparable injury rule).

241. *Id.* at 1268 (Tjoflat, J., concurring).

242. *See Developments in the Law-Injunctions*, *supra* note 153, at 1061-63 (discussing the mandatory-prohibitory distinction).

243. *Chandler*, 180 F.3d at 1269-70 (Tjoflat, J., concurring) (outlining available sanctions for prohibitory and mandatory injunctions).

Judge Tjoflat contrasts the sanctions available for violation of a prohibitory injunction. "[W]hen an injunction forbids the performance of an act, coercive sanctions are not available to enforce the injunction."[244] For Judge Tjoflat, that is the problem with the present approach to the irreparable injury rule and contempt. Compensatory contempt duplicates the plaintiff's action "at common law" for compensatory money damages, and criminal contempt duplicates the government's criminal prosecution under the usual criminal statutes.[245] For Judge Tjoflat, the plaintiff's damages action and the government's garden-variety criminal prosecution are adequate remedies at law. Thus, if at the time the plaintiff requests an injunction, the judge anticipates that the only sanction for a future violation might be compensatory contempt and criminal contempt, the judge should decline to enjoin. "Only injunctions enforceable through coercive sanctions provide a form of relief that is unique to equity. They are therefore," Judge Tjoflat concludes, "the only type of injunctions that courts should enter, on the basis of the rule that injunctions should not be granted where the plaintiff has an adequate remedy at law."[246]

In short, under Judge Tjoflat's restated test, a court should not use the prohibitory or "don't" injunction because the judge could not enforce it with coercive contempt. A judge may only enter an injunction that commands affirmative conduct, conduct that the court can coerce the defendant into performing.

Furthermore, an injunction the violation of which the judge can only sanction through compensatory contempt and criminal contempt "has the potential to run afoul of the constitutional doctrine of separation of powers."[247] If the anticipated injunction is a legal duty established in a statute, "the legislature is likely also to have created rules regarding the means by which the law should be enforced and the appropriate sanction for a violation of the law."[248] If an injunction forbids the defendant from doing something that would be a tort absent the injunction, the defendant would be entitled to a civil jury in the civil tort action for damages, but in most states not in compensatory contempt.[249] If the judge pursues criminal contempt, that solution

244. *Id.* at 1269 (Tjoflat, J., concurring).

245. *See id.* at 1270 (Tjoflat, J., concurring) (noting deterrent is equally available to plaintiff through action for damages).

246. *Id.* (Tjoflat, J., concurring).

247. *Id.* at 1271 (Tjoflat, J., concurring).

248. *Id.* (Tjoflat, J., concurring).

249. *See* Rendleman, *supra* note 231, at 982-85 (noting majority of states maintain compensatory contempt without jury because judge's enjoining power stems from equity).

erodes the executive's prerogative to enforce the criminal law and converts activity Congress has not made criminal into a crime.[250]

When a plaintiff requests an injunction, the judge "should consider how the requested injunction is to be enforced. If the injunction cannot be enforced using coercive sanctions, then it should not be entered."[251] There are refinements, but the foregoing is the gist of Judge Tjoflat's argument.

Judge Tjoflat adduced reasons for his restated irreparable injury rule. Criminal contempt for violation of an injunction duplicates a criminal prosecution under the usual criminal statutes.[252] The legislature defines crimes.[253] A criminal defendant has the right to a jury.[254] Compensatory contempt duplicates a civil damages action and the legislature establishes criteria for civil recovery.[255] The judge's reasons can be put under the heads of separation of powers and due process.

The plaintiff, under Judge Tjoflat's analysis, has an adequate remedy at law: if official observances violate her Establishment Clause rights, the plaintiff can sue AMI's Commander for damages under familiar constitutional tort principles.[256] The federal government may prosecute criminally.[257] The sequence – injunction, violation, criminal contempt and compensatory contempt – would subordinate the Commander's procedural right to a civil jury and interfere with the prerogatives of both Congress and the federal prosecuting authorities.[258]

Judge Tjoflat had two important insights. First the injunction-contempt process concentrates significant power in the trial judge. Second, coercive contempt is related to the irreparable injury rule: the judge coerces the

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250. *See* Chandler v. James, 180 F.3d 1254, 1272 (11th Cir. 1999) (Tjoflat, J., concurring) (stating that use of criminal contempt "creates an opportunity to use different procedures and to impose different sanctions from those contemplated by the legislature under the circumstances").

251. *Id.* at 1273 (Tjoflat, J., concurring).

252. *See id.* at 1271-72 (Tjoflat, J., concurring) (noting legislature determines criminal conduct and punishment).

253. *See id.* at 1272 (Tjoflat, J., concurring) (reinforcing legislature's prerogative).

254. *See id.* at 1276 (Tjoflat, J., concurring) (describing defendant's procedural protections).

255. *See id.* at 1270 (Tjoflat, J., concurring) (noting legislature determines civil remedies).

256. *See* 42 U.S.C. § 1983 (Supp. V 1994) (providing civil action for constitutional tort).

257. *See* 18 U.S.C. § 242 (2000) (imposing fine, imprisonment, or both for deprivation of federal rights under color of law).

258. *See* Chandler v. James, 180 F.3d 1254, 1275 (11th Cir. 1999) (Tjoflat, J., concurring) (discussing due process and separation of powers problems with employing criminal and compensatory contempt).

defendant to secure those rights of the plaintiff that otherwise are subject to irreparable injury. The judge coerces the defendant to assure that the plaintiff can enjoy those rights in fact. Coercive contempt is the form of contempt unique to equity and related to the irreparable injury rule.

How would Judge Tjoflat's restated irreparable injury rule work in practice? Let's return to Fatima El-Erian and AMI. AMI's Commander approves posting the Ten Commandments and student-led parade-ground grace. Fatima El-Erian's complaint and motion alleges, "Plaintiff's rights under the Establishment Clause having been impaired and damages being an inadequate remedy, she will suffer irreparable injury without an injunction."

Because plaintiff Fatima El-Erian seeks an injunction to protect her Establishment Clause rights, the trial judge should look ahead to the injunction, to the defendant's breach, and to enforcement. If punishment for the defendant's violation will be compensatory contempt or criminal contempt, the judge should not grant the plaintiff an injunction. Instead the judge should tell the plaintiff that if an Establishment Clause violation occurred, the plaintiff could sue the defendant under § 1983 seeking damages for a constitutional tort.[259] The Establishment Clause victim might also ask the United States Attorney to prosecute the officials responsible for the observances as a constitutional crime.[260]

The judge would deal with AMI's particular violations as follows. For the Ten Commandments on AMI's mess hall door, the court's injunction might say "Remove it." The judge reasons thus: "Suppose I grant an injunction ordering the Commander to 'remove' the Ten Commandments in three days. If the Commander and other officials do not obey, I may use coercive contempt, fines, or confinement until they do. So I can grant the plaintiff's injunction."

What about AMI's parade-ground grace? Fatima El-Erian asks that the court enjoin the Commander "from approving, ordering, or condoning student-led prayers, grace, devotional messages, invocations, or benedictions at or before meals or college-sponsored assemblies or events or over the public-address system anywhere on AMI property."

An injunction might say "stop it" or "no more official parade ground grace or prayer," and the judge might reason as follows:

> Suppose I grant the injunction the plaintiff requests and the Commander, by an official memo, approves and implements a program for a mandatory mealtime pep rally on the parade ground before a lacrosse game that

259. 42 U.S.C. § 1983 (Supp. V 1994).

260. 18 U.S.C. §§ 241-42 (2000).

> includes a prayer for an AMI victory over Washington and Lee. The ceremony will violate the plaintiff's Establishment Clause right to be free of official religious observances and the injunction. But since the harm will have been done when the lacrosse captain's victory prayer ends, I cannot coerce the defendant, only punish him or compensate the plaintiff.

Can the judge develop an intelligent coercive program in the event the defendant violates that injunction? A wrongheaded approach would be to coerce the recusant defendant to apologize or to promise to obey the injunction.[261] The judge's responses to the defendant's violation would be limited to compensatory contempt and criminal contempt. Therefore, the judge should tell Fatima El-Erian, "I cannot grant you an injunction forbidding an official AMI prayer on the parade ground."[262]

XV. Criticism of Judge Tjoflat's Irreparable Injury Rule

Adoption of Judge Tjoflat's restated inadequacy prerequisite would be a mistake. Several reasons follow.

First a recap: Judge Tjoflat evaluates whether damages are an adequate remedy for the plaintiff by granting a hypothetical injunction and assuming hypothetically that the defendant will violate the injunction. Then he evaluates the hypothetical judge's contempt alternatives. Under Judge Tjoflat's analysis, in deciding whether to enjoin, the judge should ask how to respond if the court granted the plaintiff's injunction and if the defendant violated it. When the judge, before enjoining, finds that if the defendant violates the order, the judge can coerce him to obey it, then the judge may grant the injunction. The judge should not grant an injunction that forbids the defendant's conduct that, if violated by the defendant, leads to only compensation or punishment. Judge Tjoflat says to use other government responses to forbid the defendant's misconduct – damages actions and criminal prosecutions.

Judge Tjoflat compares damages to contempt sanctions. He then bases adequacy-inadequacy on a distinction between an injunction that commands

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261. FISS & RENDLEMAN, *supra* note 170, at 1026-28 (discussing examples of judicially mandated apologies and noting inherent impracticability).

262. *See* Chandler v. James, 180 F.3d 1254, 1274-75 (11th Cir. 1999) (Tjoflat, J., concurring) (stating that courts should not enforce prohibitory injunctions by compensatory or punitive contempt sanctions). The present author changed Judge Tjoflat's graduation-prayer example here because that may not be a substantive Establishment Clause violation at a college or university. *See* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) (finding university's practice of holding invocation and benediction at commencement permissible under Establishment Clause).

conduct and one that forbids it, limiting the judge's ability to enjoin to an injunction that commands conduct and that the court can enforce through coercive contempt. Since federal courts now grant injunctions that they can enforce only by compensatory contempt and criminal contempt, the major effect of Judge Tjoflat's revised irreparable injury rule would be fewer injunctions.[263] Restating the irreparable injury rule as a no-prohibitory-injunctions rule would prevent judges from granting injunctions in numerous Establishment Clause lawsuits and leave many constitutional and other plaintiffs without an effective remedy.[264]

Suppose, for example, that Commander Busby institutes a prayer led by the instructor at the end of every class session. A senior cadet-plaintiff seeks to enjoin the Establishment Clause violation on the day the Commander's instructions call for it to begin, April 25, 2003, which is also her last day of class before graduation. If the court granted this injunction and the Commander breached it, the breach is once and for all, and the only forms of contempt available would be compensatory contempt and criminal contempt, for nothing exists to coerce. A plaintiff's constitutional rights are too precious to let the violation occur. The judge should not decline to grant the plaintiff an injunction, stand idly aside, watch the defendant invade the plaintiff's Establishment Clause right, and expect that a jury will enter a damages judgment.[265] The Bill of Rights is not a list of occasions that trigger the payment of money to victims.[266]

An Establishment Clause plaintiff will usually be thwarted in her attempt to recover tort damages for an official religious observance. This Article discusses three things above that undermine a plaintiff's opportunity to recover damages as an adequate remedy for an Establishment Clause violation: a) a constitutional defendant's qualified immunity; b) the difficulty of calculating damages for an Establishment Clause violation; and c) the possibility of jury hostility to a plaintiff's Establishment Clause theory leading to low or no damages.[267]

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263. *See* En Banc Brief of Amicus Curiae Douglas Laycock at 26-27, Adler v. Duvall County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1065 (2001) [hereinafter Amicus Brief] (providing numerous examples of injunctions that would not be granted).

264. *See id.* at 5 (recognizing "that violation of constitutional rights causes irreparable injury").

265. *See id.* at 17 (quoting Declaration of Independence).

266. *See* FISS, *supra* note 2, at 75 (recognizing that civil rights deny "their reducibility to a series of propositions assuring the payment of money to the victims").

267. *See supra* notes 46-70 and 88-97 and accompanying text (detailing how these difficulties make money damages an inadequate remedy).

An Establishment Clause plaintiff's criminal remedy is even more remote from fruition. Will the federal prosecutor institute charges against AMI's Commander for ordering a prayer on the parade ground? United States Attorneys have more important business than criminal prosecutions of state and local government officials for Establishment Clause violations. Moreover, the general constitutional criminal statutes, 18 U.S.C. §§ 241 and 242,[268] do not give any kind of meaningful warning to an official. In unclear and developing areas of the law like the Establishment Clause, the defendants could usually avoid conviction under the criminal statutes because the law under the religion clauses is almost never specified in a way that provides a potential criminal defendant with "fair warning." For a criminal conviction under the statutes, pre-existing law must establish that the defendant's conduct is unlawful.[269] A specific injunction would clarify the applicable substantive law, identify the defendant, and spell out what conduct the defendant must perform or avoid. This individualizes the law and warns the defendant enough that, if he breaches, the judge should be able to employ compensatory contempt or criminal contempt.[270]

Assume for now a jury verdict granting compensatory damages to an Establishment Clause plaintiff. Under the inadequacy test Professor Laycock proposed, the court should ask whether the plaintiff could use the money from this damages judgment to replace the specific interest encroached by the defendant.[271] If so, and only if so, damages are an adequate remedy for the plaintiff. If not, the plaintiff is entitled to an injunction. An Establishment Clause plaintiff cannot use money to replace her lost constitutional right. Professor Laycock's brief cited the Declaration of Independence as a precursor of both the Constitution and the Bill of Rights to strengthen his argument that constitutional rights are both "unalienable" and "inalienable."[272] In more

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268. 18 U.S.C. §§ 241-42 (2000).

269. *See* United States v. Lanier, 520 U.S. 259, 266-67 (1997) (describing "manifestations of fair warning requirement").

270. Amicus Brief, *supra* note 263, at 24.

271. *See id.* at 3 (noting that "[t]he question is whether damages are adequate as compared to an injunction that successfully preserves the plaintiff's rights").

272. *Id.* at 17. Laycock is using the Declaration of Independence's language and the citation to invoke the ideological foundation for the Constitution and Bill of Rights. Even though in 1776 the authors of the Declaration could not have predicted the Constitution and its Bill of Rights that followed more than a decade later, his overarching argument is that the court should not allow the defendant to wield the inadequacy prerequisite in a way that forces the plaintiff to surrender her constitutional right in exchange for money because those rights are priceless or too precious to transfer. The Declaration draft's "*in*-alienable" became "*un*-alienable," my *emphasis*, in the final draft. Professor Pauline Maier says twice that the substitu-

literal terms, if the plaintiff seeks an injunction, the court should forbid the defendant from violating the plaintiff's constitutional rights and converting the plaintiff's right into a right to sue for damages. The judge should grant an injunction as a preventive remedy.

Moreover, under the inadequacy doctrine, if the plaintiff's damages will be difficult to calculate accurately, the court should view a preventive injunction favorably. This doctrine explains injunctions to forbid defendants' misconduct that would lead to lost profits.[273] When the plaintiff claims an Establishment Clause violation, determining what interests to compensate and how to measure the loss have been baffling problems.[274]

Judge Tjoflat's irreparable injury rule test, which views inadequacy from the perspective of the defendant's breach, creates arbitrary distinctions between enjoining and not enjoining. To enjoin AMI defendants to remove the posted Ten Commandments, but to refuse to enjoin the parade-ground Establishment Clause violation,[275] is a dysfunctional distinction without any basis in the reality of the violations. Instead of positing an injunction-breach hypothetical, the judge should analyze the plaintiff's request for an injunction from the plaintiff's perspective. The better approach is to assume that the defendant will obey an injunction and to compare that state of affairs, the defendant's obedience, with damages, that is, with allowing the defendant to violate the plaintiff's rights and awarding damages.[276]

Courts have both normative and practical reasons to assume a defendant's obedience when examining inadequacy. Our system of government through courts is based on the normative premise that defendants usually respect courts and court orders. If the judge enjoins, that is a personalized official statement that most people will obey. More down to earth, a defendant's lawyer should advise him to obey, or at least warn him not to disobey, an injunction.[277]

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tion of the prefix "un-" for the (today) more idiomatic "in-" happened during printing. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 144, 236 n.1 (Vintage ed. 1998).

273. LAYCOCK, *supra* note 103, at 44-47 (noting that injunctions are "routine remedy" for various "kinds of unfair competition").

274. *See supra* notes 22-31 and accompanying text (discussing Warren Court's Establishment Clause legacy).

275. *See supra* notes 83-84 and accompanying text (discussing difficulty of ascertaining nature of remedy for Establishment Clause violation).

276. *See* Amicus Brief, *supra* note 263, at 18-19 (noting that comparing remedy with sanctions for disobeying injunction has "no basis in the history of Anglo-American law").

277. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94(2) (2000) (providing, *inter alia*, that "a lawyer may not counsel or assist a client in conduct that the lawyer knows to

If the foregoing policies are insufficient to induce a defendant to obey an injunction, the threat of sanctions ought to play some role in structuring his incentives. An injunction "freezes the defendant's conduct" more than a possible action for damages.[278] "When an injunction issues, the possible severity of the penalty for disobedience renders the defendant's freedom of choice virtually nonexistent."[279] The world is too complex and future events are too unpredictable for the judge, when asked to grant an injunction, to be able to predict the injunction, the defendant's violation, and the available solutions.

A judge who seeks to protect a plaintiff's Establishment Clause rights should assume that compensatory damages and criminal penalties are unrealistic alternatives and concentrate on a plaintiff's rights, threatened as they are alleged to be with irreparable injury. A judge should assume that the defendant will obey an injunction; and the judge should ignore Judge Tjoflat's advice to analyze a proposed injunction as if the defendant will violate it.

But can the defendant in fact violate the injunction and the plaintiff's rights with it? "The injunction is not a set of handcuffs. In itself it cannot prevent the defendant from doing the criminal act."[280] To change the analogy, "[a]n injunction stops conduct only as well as a stop sign halts a car; the defendant must apply the brakes and obey."[281] Just because a judge cannot enjoin to prevent every violation does not mean that he should not enjoin to prevent most violations. Headstrong, stubborn, and desperate people will inevitably violate injunctions and create the need for contempt sanctions.

Judge Tjoflat's proposed irreparable injury rule maintains that the judge should grant the plaintiff an injunction only if the judge can use coercive contempt to enforce it.[282] He sets up the command-forbid distinction and argues that the judge cannot use coercive contempt to enforce a "forbid" injunction.[283] A broader understanding of the ways a judge can phrase injunc-

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be . . . in violation of a court order").

278. *Developments in the Law-Injunctions*, *supra* note 153, at 1005.

279. *Id.*; *see also* Amicus Brief, *supra* note 263, at 18 (noting universal assumption "that injunctions will generally be obeyed").

280. Charles Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L. J. 376, 391 n.65 (1955).

281. Rendleman, *supra* note 150, at 357.

282. *See* Chandler v. James, 180 F.3d 1254, 1266 (11th Cir. 1999) (Tjoflat, J., concurring) (concluding that "a court should not enter an injunction that cannot be enforced through coercive contempt sanctions").

283. *See id.* at 1268-69 (Tjoflat, J., concurring) (posing hypothetical and noting after party violates injunction "[c]oercive sanctions . . . are not available because the act to be prevented by the injunction has already occurred").

tions and use coercive contempt leads to different conclusions about the relationship between injunctions and coercive contempt. Courts can phrase some injunctions more broadly. For example, the court could rephrase an injunction forbidding improper religious observances after an April 25 class to prevent violations after all future classes. If the defendant's breach may recur or continue, the judge has at least five coercive options.[284] These include exhortations to obey, second injunctions called contempt to cease continuing violations, coerced promises to obey, deadlines for obedience, and orders to correct the breach.[285] The judge may displace the defendant as a decision maker by appointing a receiver or monitor.[286] Since the judge has already found money damages to be inadequate, his goal is to "coerce" and thereby assure that the plaintiff enjoys the right in fact, instead of a money substitute.

There are at least three refinements to the foregoing options. First, coercing a defendant to promise to obey often does not work well; a long-term example of the futility of this technique involves Randall Terry of Operation Rescue.[287] Second, when a court specifies or announces future sanctions, uniform or escalating, it imposes a form of coercive contempt because the defendant must comply to avoid the sanction. However, when the judge imposes those previously announced sanctions after the defendant's breach, that fixed sanction for past misconduct requires criminal procedure.[288] Because the court may avoid the possible problems relating to the transmogrification from coercive contempt to criminal contempt by paying careful attention to procedure, this distinction is unrelated to the command-forbid distinction.

Third, some injunctions and some breaches are once-for-all. Examples include: "do not pray at the 2002 graduation;"[289] "do not parade on Good Friday;"[290] and "do not cut the red maple tree on your property line." After the defendant violates a once-for-all injunction, the metaphorical bell has rung.

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284. *See* FISS & RENDLEMAN, *supra* note 170, at 1007 (listing options and providing examples); *see also* Amicus Brief, *supra* note 263, at 19-20 (recognizing five options).

285. *See* Amicus Brief, *supra* note 263, at 19-20 (recognizing five options).

286. *See id.* at 20 (noting this is option "if defiance is persistent").

287. *See* N.Y. State N.O.W. v. Terry, 159 F.3d 86, 89 (2d Cir. 1998) (noting original action for injunctive relief filed ten years earlier).

288. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-39 (1994) (concluding that when contempt sanction is punitive, rather than remedial, it acts as criminal punishment and cannot be imposed without constitutional protections that accompany criminal proceedings); *see also* Amicus Brief, *supra* note 263, at 21-22 (discussing requirement of criminal procedure when penalties shift from coercive to criminal contempt).

289. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992) (affirming court of appeals' injunction against prayer at graduation as violation of Establishment Clause).

290. *See* Walker v. City of Birmingham, 388 U.S. 307, 309 (1967) (considering injunction prohibiting street parades or processions).

The judge cannot wield coercive contempt to "unring" it. The judge has no tools left but compensatory contempt and criminal contempt.

The judge should grant the plaintiff an injunction even when the defendant's violation may be "once-for-all," and he may not be able to use coercive contempt to enforce it. If the court declines to grant a "forbid" injunction, it undermines the idea that the plaintiff's damages remedy is inadequate because it lets the defendant convert the plaintiff's right to the defendant's conduct into a right to recover money. As outlined above, most defendants obey injunctions. The first thing for the judge to consider, however, is whether the court can draft an injunction more appropriately to preserve the option to coerce. If any coercive contempt occurs, the judge should consider using coercive techniques to protect the plaintiff's actual substantive right. For these techniques to work, the court must impose coercive sanctions that are more onerous to the defendant than future compensatory contempt or criminal contempt would be.[291]

Finally, the present author argued a few years ago that, if compensatory contempt is necessary, the judge should measure it to advance the idea that money is an inadequate remedy.[292] Before enjoining, the judge found that money was inadequate. The defendant can violate an injunction and convert the plaintiff's irreparable right into a cause of action for compensatory contempt. By breaching, the defendant has remitted the plaintiff to that inadequate remedy because it is too late for the plaintiff to enjoy the substantive right. In measuring compensatory contempt, the judge should vindicate the substantive standard underlying the injunction by using that standard's damages measurement formula. In addition, the judge should vindicate the irreparable injury rule by awarding the plaintiff her cost to enforce the injunction which includes her attorney's fees.[293] The judge should make compensatory contempt as costless to the plaintiff as possible by adding attorney's fees to the plaintiff's recovery from the defendant's violation; the purpose of the attorney's fee recovery is to facilitate the plaintiff's enforcement and to vindicate as nearly as possible the plaintiff's right to avoid irreparable injury.[294] The judge should also be able to use criminal contempt for breaches

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291. *See* FISS & RENDLEMAN, *supra* note 170, at 1006 (noting that coercive contempt should make it more economical for contemnor to comply than to continue with contempt).

292. Rendleman, *supra* note 231, at 972-74 (1980).

293. *See id.* at 998-1002 (explaining that cost of enforcing injunction with contempt order is recognized exception to usual rule that courts will not allow prevailing litigants to recover attorney's fees).

294. *See id.* at 985-86, 997-1003 (explaining that allowing successful plaintiff to recover enforcement costs advances policies underlying decision to enjoin).

of non-coercible injunctions to punish the recusant defendant and to deter other similar breaches.[295]

Judge Tjoflat seeks perfection: to limit injunctions to those orders that let the judge use coercive contempt to secure the plaintiff's rights in fact. The position taken here accepts a certain amount of imperfection. The plaintiff's damages remedy is inadequate even if the judge cannot use coercive contempt; compensatory contempt simply converts the plaintiff's right to the defendant's conduct back into a right to money.

Judge Tjoflat is idealistic about judicial power. He seeks to ration judicial power – to limit the judge's injunction power to instances with a high probability of success and to decline to enjoin when the defendant may be able to thwart the judge. His technique is to enjoin only when, after the defendant's violation, the judge may still coerce the defendant to respect the plaintiff's rights and to shunt many disappointed plaintiffs to the usual civil and criminal courts. This proposed solution, however, leads to two kinds of problems. First, Judge Tjoflat endorses a troublesome form of injunction. Second, the judge cannot always coerce the defendant to obey.

Judge Tjoflat's restated irreparable injury rule requires judges to grant a "do it" injunction and to decline to grant a "don't do it" injunction. Although he phrases it differently, Judge Tjoflat is invoking the distinction discussed in decisions and the literature between "do it" "mandatory" and "don't do it" "prohibitory" injunctions. Another way to state the distinction is that the injunctions Judge Tjoflat prefers will alter the status quo, while the ones he disapproves will preserve it.[296]

Legal scholarship and court opinions usually raise the mandatory-prohibitory injunction distinction while pointing to the drawbacks of mandatory injunctions. Courts have held that a plaintiff must demonstrate a stronger need before a court will enter mandatory interlocutory relief, an injunction that changes the status quo and requires affirmative conduct.[297] Courts have historically favored "don't" or prohibitory injunctions and disfavored "do" or mandatory injunctions because prohibitory injunctions are "easier [for a

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295. *Cf.* Amicus Brief, *supra* note 263, at 23 (concluding that despite need for criminal procedure, court still has power to issue and enforce injunctions).

296. Judge Tjoflat reduces the distinction somewhat by proposing that the judge may, for example, desegregate the school by ordering the authorities to formulate a plan for a unitary school and then to implement the plan. Chandler v. James, 180 F.3d 1254, 1273 (11th Cir. 1999) (Tjoflat, J., concurring).

297. *See Developments in the Law-Injunctions*, *supra* note 153, at 1061 (reviewing courts' historical reluctance to issue mandatory affirmative injunctions). *See generally* Lee, *supra* note 188 (disagreeing with any trend to raise preliminary injunction standard for mandatory orders).

defendant] to obey and easier [for a judge] to enforce."[298] A court with a sense of alacrity to implement a plaintiff's right under substantive law will employ either a mandatory or a negative order. Judge Tjoflat's approval of only the hardest kind of order, a coercible or mandatory injunction, reverses the courts' usual inclination for forbidding rather than ordering conduct and creates difficulty for trial judges charged with securing obedience to law.[299]

Judge Tjoflat's idea that a judge should grant an injunction only when he can employ coercive contempt encounters the reality that coercive contempt does not always succeed. With coercive contempt the judge keeps the promise he made when he found damages were inadequate. He maintains that the plaintiff's substantive interest is important enough to protect in fact. But coercive contempt may be ineffective and may not suffice to keep the promise. The judge cannot successfully coerce a terminally stubborn defendant. Even though the judge may coerce by confining the contemnor, a recalcitrant contemnor may refuse to obey long enough to defeat coercive contempt, and will thwart the plaintiff's rights. When the judge realizes further confinement cannot coerce the contemnor, the judge should order his release.[300] Judge Tjoflat's reliance on coercive contempt fails to contend with a terminally stubborn defendant.

Remedies is a pragmatic science. The court usually starts with a plaintiff in an imperfect world, one marred by the defendant's violation. Often within the world of the second-best, the judge needs as many options as possible – positive and negative injunctions. Because injunctions will not always secure the plaintiff's rights, the judge also needs compensatory contempt, coercive contempt, and criminal contempt. "It is best," Professor Richard Epstein

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298. People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 533-34 (7th Cir. 1997) (Posner, J.).

299. *See* Amicus Brief, *supra* note 263, at 27 (discussing historical presumption in favor of prohibiting injunctions); *see also Developments in the Law-Injunctions*, *supra* note 153, at 1061-63 (discussing reluctance of courts to impose mandatory injunctions in all but the strongest cases). Positive statements of negative orders create problems of their own. To begin with, the band may tune up but never start to play. What does the judge say about the defendant's fifth unsatisfactory plan? Should the judge say, "Go to jail until you have a satisfactory plan"? A wise judge will avoid making a martyr out of the a defendant, particularly a federal judge dealing with a state or local government official. If Judge Tjoflat's restated irreparable injury test does not thwart federal injunctions completely, administering it will be cumbersome and confusing.

300. Rendleman, *supra* note 175, at 190-200 (explaining that once coercive confinement loses its power to coerce, the courts must release the uncoercable person to prevent the transformation of confinement into criminal punishment). *But see* Chadwick v. Janecka, 302 F.3d 107, 117 (3d Cir. 2002) (declining to release contemnor even though seven years of confinement had not coerced).

observed, "to avoid the mistake of thinking that nothing can be solved unless everything is solved."[301]

Finally, a recalibrated irreparable injury rule would impair the federal court's institutional role of protecting federal constitutional and other federally protected rights.[302] Judge Tjoflat's redefined irreparable injury rule would structure a constitutional plaintiff's incentives to sue in state courts, often with elected judges. The state court must hear a plaintiff's federal constitutional theory.[303] However, an elected or unsympathetic state judge could impose delay or error cost on an Establishment Clause plaintiff, who would then have to wend her way through the state system and secure plenary review from the United States Supreme Court.[304]

A plaintiff litigating to protect a substantive right under exclusive federal jurisdiction, copyright for example, would lack the constitutional plaintiff's option of suing in state court.[305] Copyright litigation would continue in federal courts under the regimen of a revised irreparable injury rule, where the reduced role of injunctions would undermine copyright owners' rights. Many compensatory contempt decisions involve copyright and patent proprietors' intellectual property rights which are under exclusive federal jurisdiction; forbidding federal judges from granting them injunctions would effectively remit them to second federal damages actions which would reduce the value of their property interests by making it always cumbersome and sometimes impossible for them to sue infringers to enforce their rights meaningfully.[306]

XVI. Conclusion

Fatima El-Erian's possible remedies for AMI's officially imposed religion are compensatory damages and an injunction. Large damages seem out of her reach. Fatima should be entitled to an injunction to protect her from an improper establishment of religion.

The irreparable injury rule has not been an impediment or a menace to plaintiffs in constitutional litigation. However, the irreparable injury rule

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301. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 331 (1995).

302. *See supra* note 105 (discussing increased receptiveness to constitutional claims at federal level).

303. *See* Hathorn v. Lovorn, 457 U.S. 255, 269-70 (1982) (concluding that when party to state proceeding claims that contemplated relief is unenforceable, state court must examine claim and refrain from ordering relief that violates federal law), *reh'g denied*, 458 U.S. 1131 (1982).

304. *Supra* note 104.

305. 28 U.S.C. § 1338(a) (1970).

306. *See* Rendleman, *supra* note 231, at 972 n.5, 1001 (discussing compensatory contempt cases that have grown out of injunctions to protect copyright and patent interests).

restated by Judge Tjoflat would mean no injunction or only a partial injunction for Fatima and any other plaintiff seeking to protect a right to be free from an establishment of religion. Thus, other courts should eschew Judge Tjoflat's suggested alteration of the irreparable injury rule.

The Problem judge's proper analysis under the present irreparable injury rule is straightforward. Has the AMI Commander violated, or is he about to violate, plaintiff Fatima El-Erian's constitutional liberty to be free of an improper establishment of religion? Has the plaintiff sought an injunction? The judge ought to overlook the irreparable injury rule-inadequacy prerequisite except, perhaps, to "check the box" before granting her an interlocutory injunction. The judge ought not allow a defendant to thwart the plaintiff's Establishment Clause rights and pay her money damages, if indeed money damages are possible or feasible. This is because money damages would transmogrify the plaintiff's constitutional right to be free of officially sanctioned religious observances in fact into a right the defendant can invade and convert into an inferior and often illusory right to money. The judge in the Problem should grant the plaintiff El-Erian an injunction forbidding the defendants from officially sanctioned religious activity that violates her Establishment Clause rights.

After rebutting Judge Tjoflat's proposal to reconstruct the inadequacy prerequisite and then using the unreconstructed irreparable injury rule to resolve the AMI Problem, I will close this Article with two loftier conclusions. First, any modification in the inadequacy prerequisite-irreparable injury rule should be in the opposite direction than the one suggested by Judge Tjoflat. I commend to the courts, Congress, and the Civil Rules Advisory Committee, to consider ways to reduce or eliminate the remedial hierarchy that may subordinate an injunction to other remedies.[307]

Second, the preservation of minority rights under law is the Warren Court's broadest and most enduring legacy. Alone among the civil remedies, an injunction will shield a citizen's rights and liberties in fact. An injunction concentrates judicial power and endows a court with the unique ability to articulate constitutional values even as it protects minority rights. May my modest effort remind the profession that the injunction is indispensable to government under the Constitution.

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307. *See* FISS, *supra* note 2, at 86-95 (explaining that courts should move to non-hierarchical conception of remedies and choose appropriate remedies based on their technical advantages rather than on generalized propositions about which remedies are favored); LAYCOCK, *supra* note 103, at 276-78 (proposing statute to abolish irreparable injury rule); Rendleman, *supra* note 38, at 1665-67 (proposing reform of irreparable injury rule through amendment of procedural rules).

Reform of Criminal Procedure in the States