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Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements

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MICHAEL COENEN

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RIGHT-REMEDY EQUILIBRATION AND THE ASYMMETRIC ENTRENCHMENT OF LEGAL ENTITLEMENTS

MICHAEL COENEN*

Abstract: Public-law litigation often gives rise to a basic but important asymmetry: claimants wishing to obtain a particular form of redress for a particular legal wrong must satisfy all the relevant procedural, substantive, and remedial prerequisites to the issuance of judicial relief. In contrast, governments wishing to avoid the issuance of that remedy need only demonstrate that a single such requirement operates in their favor. This Article considers the extent to which this asymmetry influences the development of the law. Specifically, this Article hypothesizes that, where the remediation of a right depends on a claimant’s satisfaction of multiple, mutually necessary procedural, substantive, and remedial rules, it will often be easier for courts to achieve and maintain decisions that frustrate the vindication of that right (and thus move the law in an “entitlement-weakening” direction) than to achieve and maintain judicial decisions that promote the vindication of that right (and thus move the law in an “entitlement-strengthening” direction). “Entitlement-strengthening” initiatives, after all, can often be undone by a single, counteractive change to any one of the several rules on which a claimant’s vindication of the right depends. “Entitlement-weakening” initiatives, by contrast, will often be immune to such a simple counterattack. Consequently, an “asymmetric entrenchment of entitlements” is hardwired into the basic architecture of public-law doctrine, rendering “entitlement-strengthening” decisions consistently more vulnerable to down-the-road re-entrenchment than their “entitlement-weakening” counterparts.

INTRODUCTION

Success in public-law litigation requires much more than a showing that the government violated the law. Before a court can evaluate the legality of the

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government's conduct, it must first consider such matters as a party's standing to sue,¹ the ripeness of the controversy,² the political question doctrine,³ the existence of a cause of action,⁴ abstention rules,⁵ and other potential limits on the Court's power to resolve the case.⁶ In the event those prerequisites are met, a legal violation must then be identified. And even if a violation is identified, the court must consider its authority to issue the requested remedy. Immunity doctrines, for instance, might bar a plaintiff from recovering damages against a rights-infringing governmental official.⁷ "The balance of the equities" (or other limits on injunctive relief) might preclude a court from enjoining the operation of an unlawful administrative scheme.⁸ An exception to the exclusionary rule might require the admission of unlawfully acquired evidence.⁹ Non-retroactivity

¹ See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401–02 (2013) (holding that plaintiffs challenging Section 702 of the Foreign Intelligence Surveillance Act lacked Article III standing to bring their suit because, among other things, their "theory of future injury is too speculative" and they "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").

² See, e.g., *Poe v. Ullman*, 367 U.S. 497, 507 (1961) ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting.").

³ See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims present nonjusticiable political questions).

⁴ See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) ("[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.").

⁵ See, e.g., *Younger v. Harris*, 401 U.S. 37, 54 (1971) (limiting the federal courts' power to adjudicate federal-court suits seeking to disrupt ongoing criminal prosecutions in state court).

⁶ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009) (pleading standards); *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (third-party standing); *DeFunis v. Odegaard*, 416 U.S. 312, 315 (1974) (mootness).

⁷ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

⁸ See *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); see also *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (holding that lower courts should not have enjoined the enforcement of an earlier iteration of President Trump's travel ban "against foreign nationals abroad who have no connection to the United States at all" and noting that "[t]he equities relied on by the lower courts do not balance the same way in that context").

⁹ See, e.g., *Davis v. United States*, 564 U.S. 229, 244 (2011) ("[E]xclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. The remedy is subject to exceptions and applies only where its 'purpose is effectively advanced.'" (internal citation omitted) (quoting *Illinois v. Krull*, 480 U.S. 340, 347 (1987))).

principles might defeat the granting of habeas relief.¹⁰ And so forth.¹¹ To get the remedy it seeks, the claimant must navigate every obstacle standing between its initial demand for relief and a court's granting of that relief. Winning claimants must run the table, satisfying every mutually necessary condition for obtaining the remedy they seek. Losing claimants, by contrast, can falter at any point for any number of different reasons.

One implication of this arrangement has recently drawn the attention of public-law scholars. When a remedy's issuance depends on the joint satisfaction of multiple, formally separate doctrinal requirements, courts can adjust for unwanted developments within one area of doctrine by pursuing compensating reforms within another. This idea finds succinct expression in Professor Richard Fallon's "Equilibration Thesis," which posits that public-law rules governing justiciability, remedies, and substantive rights often interact with one another in this responsive and offsetting manner. As Professor Fallon puts it:

[C]ourts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies. When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the Court will adjust or manipulate the applicable law. According to the Equilibration Thesis, however, it will frequently be the case that no unbending principle of law or logic dictates the doctrinal category within which an adjustment will occur. In other words, when the Court dislikes an outcome or pattern of outcomes, it will often be equally possible for the Justices to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine.¹²

¹⁰ See, e.g., *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

¹¹ See, e.g., *Chapman v. California*, 386 U.S. 18, 22, 24 (1967) (holding that, absent the occurrence of structural error, appellate courts need not reverse convictions for constitutional error where the error was "harmless beyond a reasonable doubt").

¹² Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) [hereinafter Fallon, *The Linkage Between Justiciability and Remedies*]; see also RICHARD H. FALLON, JR., *THE NATURE OF CONSTITUTIONAL RIGHTS* 155–78 (2018) (developing and exploring different aspects and applications of the equilibration thesis); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011) [hereinafter Fallon, *Asking the Right Questions About Officer Immunity*] ("According to the Equilibration Thesis, substantive rights, causes of action to enforce rights, rules of pleading and proof, and immunity doctrines all are flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole."). In developing this idea, Fallon builds on a large body of existing scholarship highlighting functional interdependencies between rights-based and remedy-based law. See, e.g., John C. Jeffries,

To take a simple example, courts might respond to a perceived over-expansion of rights-based guarantees (say, a strengthening of Fourth Amendment privacy protections) by pursuing reform within the substantive law itself (such as, for instance, by overruling the prior decision that expanded the Fourth Amendment). But they also might pursue compensating adjustments within the law of remedies (such as by introducing a new exception to the exclusionary rule) or the law of justiciability (such as by ratcheting up standing requirements for plaintiffs seeking to assert the right in an offensive posture), while leaving the scope of the underlying “right” formally unchanged.¹³ Regardless of which path the court takes, a similar bottom-line result obtains: prior to the compensating adjustment, more plaintiffs would have had access to meaningful judicial redress against government searches and seizures. After the adjustment, fewer such plaintiffs will be able to obtain the redress they seek. And that remains the case regardless of whether the adjustment involves substantive law, remedial law, justiciability law, or some other related body of rules.

At first glance, this phenomenon would seem well suited to yield some measure of doctrinal stability across time. The equilibration process, that is, might sometimes function to moderate doctrinal excesses, operating as a negative feedback mechanism that prevents the law from veering too far in an overly or “underly” rights-protective fashion. If a modification to Article III standing doctrine generates an unwanted flood of claimants asserting a particular type of substantive claim, a subsequent tightening of rights-defining rules can help to stem the tide. If a modification to remedy-based doctrine renders governmental actors too unaccountable for constitutional wrongs, a subsequent expansion of rights-based protections can help to mitigate the prior decision’s unwanted effects. One adjustment to one component of a legal entitlement can

Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99 (1999) (suggesting that substantive rights would be severely diminished in the absence of remedial rules that help to limit the practical costs of recognizing new rights in new cases); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85, 889–99 (1999) (highlighting ways in which “the threat of undesirable remedial consequences [can] motivat[e] courts to construct the right in such a way as to avoid those consequences”); see also Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985) (noting that “the Court’s view of the claim on the merits . . . will likely affect the standing determination as long as judges with strong feelings about substantive claims decide jurisdictional issues”); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (“[Law students] can predict judicial decisions [related to standing] with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.”).

¹³ Or, conversely, as Fallon and others have suggested, a court might respond to concerns about the costs of the exclusionary rule by scaling back the scope of Fourth Amendment rights. See Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 646; see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 112 (2003).

easily be counteracted by another adjustment to another component. Outlier precedents thus become less “sticky” and their consequences less severe, as courts find ways to neutralize the effects of their prior decisions without directly overruling the decisions themselves.¹⁴

But equilibration does not necessarily beget this sort of equilibrium, or so this Article will contend. The central difficulty in thinking otherwise lies in the assumption that the effectiveness of an equilibrating adjustment does not in any way depend on the direction in which the adjustment proceeds. But this will not always be true. Instead, as I will suggest, the conjoined and compartmentalized structure of legal entitlements—that is, their division into discrete sets of mutually necessary procedural, substantive, and remedial component parts—often will render “entitlement-weakening” initiatives easier to achieve and maintain than countervailing initiatives in the “entitlement-strengthening” direction.¹⁵ When a court sets out to weaken (or eliminate) a public-law entitlement (i.e., to make it harder for claimants to obtain a particular remedy against a particular government actor for a particular legal wrong), the court need not often do much to achieve its desired change, and it subsequently can do a lot to fortify that change against countervailing efforts to equilibrate in the other direction.¹⁶ Where, by contrast, a court sets out to strengthen (or create) such an entitlement (i.e., to make it easier for claimants to obtain a particular remedy for a particular wrong) the court must often do a lot to achieve its desired change, and it can only do so much to ensure that the change persists through time. Present-day efforts to strengthen legal entitlements will find themselves more vulnerable to down-the-road retrenchment than will corresponding efforts to weaken those entitlements.

Why would this be so? The answer to this question stems from the simple observation with which this Article began: to prevail on a demand for relief, a claimant must satisfy all the procedural, substantive, and remedial requirements that apply to a case, whereas to defeat that demand for relief, the government need only win on one of those grounds. Thus, judicial efforts to promote legal entitlements will succeed only if all the relevant prerequisites are

¹⁴ See Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 645–46.

¹⁵ This is a possibility that I believe Professor Fallon alludes to in his article but does not explore in further detail. See *id.* at 692 (noting that “when the courts are unsympathetic to claims or rights, the sharp separation of justiciability, substantive, and remedial doctrines does not necessarily conduce to the aggressive judicial enforcement of legal norms at all, but instead makes it possible for judges to fight rear-guard actions against judicial enforcement (after they have lost on the merits) by raising objections based on justiciability and remedial doctrines”); see also *id.* at 687 (noting that “courts that want to expand substantive rights typically also will want to effect needed adjustments in remedial and justiciability doctrine to make those rights effective”). But I am not aware of any existing scholarship that attempts an in-depth examination of this idea.

¹⁶ See *id.* at 638.

made to operate in the claimant's favor. Judicial efforts in the other direction, by contrast, need only create and maintain a single, government-friendly limit somewhere along the line. Judges who wish to frustrate the vindication of a substantive right will thus enjoy a power that their "entitlement-strengthening" counterparts will not—namely, the power to achieve their entitlement-specific goals by manipulating any one of the relevant procedural, substantive, and/or remedial rules that the claimant must navigate. An "entitlement-weakening" judge need only target a single link in the chain, whereas the "entitlement-strengthening" judge must ensure that each and every link remains strong. The equilibration process will thus implicate what we might call the "asymmetric entrenchment of legal entitlements," or the "entrenchment asymmetry" for short.

Part I of this Article elaborates on this idea, but for now a more concrete example might help to illustrate the key point.¹⁷ Suppose that it is 1971, and you are a lower court judge unhappy about the Supreme Court's recent decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁸ Specifically, you are uncomfortable with the idea of allowing plaintiffs to collect damages against federal officials who have violated their Fourth Amendment rights, and you are eager to do what you can to minimize the number of cases that produce this result. You adhere to vertical stare decisis, so you do not plan to try anything as radical as ignoring binding precedent. But where the case law gives you wiggle room, you take advantage of it, looking to undermine the entitlement in any way you can. You might sometimes manage to dismiss such an action on political question grounds. You might at other times rule for the government by finding no Fourth Amendment violation. You might at still other times manage to award qualified immunity to the defendant, or you might seize on the limiting language within *Bivens* itself to deny recognition of the cause of action in distinguishable cases. Some of these levers will not work for you in some cases; and others will not work for you in other cases. But you need only find one lever per claim in order to sap the entitlement of its overall strength.

Now imagine by contrast that you are a lower court judge today who feels that the Supreme Court has made it too difficult for plaintiffs to collect damages against federal officials for violating their Fourth Amendment rights.¹⁹ Your concern is the opposite of that of the previously described judge: you think the entitlement first recognized in *Bivens* has become severely under-protective of the values it purports to serve. But to restore the entitlement's vitality, you

¹⁷ See discussion *infra* Section I.C.

¹⁸ 403 U.S. 388, 389 (1971).

¹⁹ See, e.g., *Ziglar*, 137 S. Ct. at 1843.

have a very tough row to hoe. You may be able to squeeze some cases into *Bivens*'s ever-narrowing domain,²⁰ but even in these cases you will have additional hurdles to clear. You may need to navigate, for instance, the political question doctrine, Article III standing issues, government-friendly limits on Fourth Amendment rights, the state secrets privilege, rules of qualified and/or absolute immunity, and so forth.²¹ That is not to say that some (or even many) of the issues presented by those bodies of law cannot ever break in your favor. But, in contrast to the anti-*Bivens* judge from fifty years ago, you need all the stars to align in order to get the result you want. There is no easy way to vindicate the entitlement in each case you decide, as you lack the wide-ranging menu of "entitlement-weakening" options that your counterpart was able to put to work.²²

This is just one example, to be sure, and it remains to be seen how generally the point applies. Indeed, as Part II of this Article shows, the entrenchment asymmetry does not always exist, and its presence and strength will vary according to context. Most evidently, the extent of the asymmetry will depend on the number of prerequisites to relief that a claimant must satisfy: the higher the number of potential "veto points" for an "entitlement-weakening" judge to seize upon, the greater the comparative advantage that the "entitlement-weakening" judge will enjoy.²³ In addition, the extent of the asymmetry will depend on the strength and scope of stare decisis norms: the "cheaper" it becomes for an equilibrating court to reverse or narrow prior precedents, the less relevant it becomes that "entitlement-strengthening" judges must more often

²⁰ See Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, 161 U. PA. L. REV. ONLINE 221, 221 (2013), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1108&context=penn_law_review_online [https://perma.cc/93ZZ-V4RX] ("Courts confronting *Bivens* claims . . . like to note that the remedy is hanging on for dear life.").

²¹ Cf. *Ziglar*, 137 S. Ct. at 1882–84 (Breyer, J., dissenting) (recognizing that "a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security").

²² At first glance, this might seem like an unfair example, because it depends on the fact that the modern-day Court has rendered so many different areas of procedural and remedial law so uniquely hostile to the assertion of *Bivens* claims. In other words, one might contend that the true difference between our hypothetical anti-*Bivens* judge of 1971 and our pro-*Bivens* judge of 2019 is that the earlier judge was operating in a doctrinal landscape that was far less resistant to that judge's *Bivens*-reducing ends. Be that as it may, however, the important point is that asymmetry holds *even on the assumption* that the anti-*Bivens* judge and the pro-*Bivens* judge face procedural, substantive, and remedial doctrines that are *equally adverse* to their respective agendas. And the reason for that, as we have seen, is that the anti-*Bivens* judge will succeed as long as the judge finds a way around any one of those adverse doctrines, whereas the pro-*Bivens* judge will succeed only if the judge finds a way around all of them.

²³ See discussion *infra* Section II.A.

grapple with on-point precedents that are adverse to their cause.²⁴ And finally, the asymmetry may depend on the extent to which procedural and remedial rules apply in a genuinely “trans-substantive” fashion: courts may be less inclined to equilibrate against the expansion of a particular right when their actions will reverberate across other substantive regimes, and the less often that such equilibrations occur, the less severe the asymmetry itself should become.²⁵ In sum, where component requirements are numerous, *stare decisis* norms strong, and the operative rules trans-substantive, “entitlement-weakening” changes to the law should prove substantially more resistant to counteractive equilibration than their “entitlement-strengthening” counterparts. Where component requirements are few, *stare decisis* norms weak, and the operative rules less generalized, the asymmetry should be correspondingly less stark.²⁶

Having identified the conditions on which the strength of the asymmetry depends, this Article next considers the means by which it might be overcome. Specifically, Part III highlights various strategies that “entitlement-strengthening” judges might employ in an effort to resist or work around the special headwinds they face. For example, “entitlement-strengthening” judges might attempt to increase the remedial “payoff” for claimants who manage to secure the entitlement in question: by “scaling remedies upwards,” “entitlement-strengthening” judges might sometimes manage to mitigate or neutralize the effects of earlier encroachments on the entitlement itself.²⁷ Another strategy might involve the development of and reliance on definitional interdependencies between an entitlement’s respective procedural, substantive, and remedial components. Where, for instance, the application of a remedial rule depends on the application of a substantive rule (consider, for instance, the rule that qualified immunity is unavailable where an officer violates “clearly established” law), targeted, “entitlement-strengthening” reforms to one area of doctrine (e.g., making the substantive law more clear) may yield automatic “entitlement-strengthening” consequences within other areas of doctrine as well (e.g., making qualified immunity defenses easier to defeat).²⁸ And yet another strategy might involve the creation and enforcement of multiple “substitute entitlements”—formally separate packages of rights and remedies that end up promoting overlapping (if not wholly duplicative) sets of legal interests and values; by propping up multiple, substitute entitlements in this way, the proponents of those interests and values can benefit from a counteractive asymmetry

²⁴ See discussion *infra* Section II.B.

²⁵ See discussion *infra* Section II.C.

²⁶ See discussion *infra* Section II.C.

²⁷ See discussion *infra* Section III.A.

²⁸ See discussion *infra* Section III.B.

that works to the benefit of the interests and values themselves.²⁹ All of these strategies, as we will see, carry some but ultimately limited promise, suggesting that the entrenchment asymmetry cannot always be easily overcome.

That sets the stage for a final question: to the extent that the entrenchment asymmetry is real, what practical implications follow from its existence? Part IV highlights and considers a few possibilities. First, from a descriptive perspective, I consider how full recognition of the asymmetry might inform both our understanding of past doctrinal developments and our predictions about future such developments as well.³⁰ Second, I consider from a strategic perspective the means by which courts and other legal actors might utilize the asymmetry to their own strategic advantage.³¹ And finally, from a normative perspective, I consider whether the asymmetry is a good, bad, or neutral phenomenon.³² Although the takeaways on each point are tentative, the discussion should, I hope, help to reveal that the entrenchment asymmetry is a phenomenon that judges, practitioners, and legal scholars all have reason to consider and care about.

Having said those things, I should hasten to add an important caveat. Nothing in the ensuing discussion is intended to suggest that the asymmetric entrenchment of legal entitlements operates as the only factor of relevance to those entitlements' overall robustness and durability. To the contrary, the doctrinal structures giving rise to the asymmetry will often find their influence overcome (if not overwhelmed) by other, more powerful forces that push in an "entitlement-strengthening" direction. Politics and judicial ideology, for instance, will always matter a great deal; coteries of judges (and especially justices) who are committed to the strengthening of a particular entitlement can and often do find ways to undo their predecessors' "entitlement-weakening" efforts, even where doing so requires independently costly changes to multiple areas of the law. Wealth, power, and influence among litigants matters as well. The enhanced entrenchment of "entitlement-weakening" rules may not pose much of an impediment to the expansion of entitlements that benefit interest groups with the resources, connections, and know-how to litigate on those entitlements' behalf. Nor of course should we forget about the actual content of the law: where strong "internal" arguments from text, history, structure, and precedent provide clear legal support for an "entitlement-strengthening" effort, those sources themselves may suffice to preserve and protect that effort against

²⁹ See discussion *infra* Section III.C.

³⁰ See discussion *infra* Section IV.A.

³¹ See discussion *infra* Section IV.B.

³² See discussion *infra* Section IV.C.

subsequent undoing.³³ In short, positing the existence of the entrenchment asymmetry is by no means equivalent to predicting that all legal entitlements are destined to perish in the long run. The asymmetry represents one among many different forces, factors, and phenomena that bring themselves to bear on the development of legal doctrine. The goal of this Article is therefore not to posit a myopic model of legal change; rather, it is to enrich our understanding of one small part of the complex process by which the law evolves through time.

I. THE BASIC IDEA

A. *Definitional Preliminaries*

Let us begin with the idea of a *legal entitlement*. For purposes of this Article, a “legal entitlement” is defined as a *particular type of remedy made available in response to a particular violation of a substantive right*.³⁴ The entitlement, in other words, consists of more than just a right or remedy in isolation; rather, the entitlement consists of a specific rights-based protection joined together with a specific remedial enforcement mechanism. Under this definition, for instance, it would be inaccurate to say that the “exclusion of evidence” or “the Fourth Amendment right against warrantless searches” qualifies

³³ As Michael Klarman has suggested, legal decision making can be thought of as involving two axes of influence. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004). First, there is a “*legal axis*, which consists of sources such as text, original understanding, and precedent” and which “exists along a continuum that ranges from determinacy to indeterminacy.” *Id.* (emphasis added). And second, there is a “*political axis*, which consists of factors such as the personal values of judges, the broader social and political context of the times, and external political pressure” and which “exists along a continuum that ranges from very strong preferences to relatively weak ones.” *Id.* (emphasis added). The claims of this Article are consistent with this model. Some cases will involve legal sources of sufficient determinacy to dictate doctrinal results that run counter to judges’ own personal preferences, and where this is so, both “entitlement-weakening” and “entitlement-strengthening” efforts will be equally constrained by whatever the law requires. Other cases will involve “political preferences” that are strong enough to overcome any and all legal barriers that might stand in their way; where that is so, both “entitlement-weakening” and “entitlement-strengthening” efforts will manage to blow through whatever legal barriers purport to foreclose the desired change. But there will be a further set of cases in which the legal barriers and external pressures are sufficiently comparable in force as to make the asymmetry matter. That is, the external pressures might suffice to overcome one set of legal barriers, posed by one particular component requirement, but not all of the legal barriers posed by all of the component requirements. Under those circumstances, an “entitlement-strengthening” change to the law will tend to require a stronger set of external forces than will an “entitlement-weakening” change to that law.

³⁴ In case it is not already clear, I am here and throughout this Article using the word “entitlement” as something of a term of art to capture a particular type of thing for which I can find no better descriptor. I do not mean to reference other concepts and phenomena that the term is sometimes used to describe. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (defining property rights for procedural due process purposes as interests for which circumstances create a “legitimate claim of entitlement” on the part of the rights-holder).

as a legal entitlement. But one could identify a legal entitlement in, say, a criminal defendant's "power to suppress evidence obtained in violation of the Fourth Amendment right against warrantless searches." Similarly, a legal entitlement would amount to more than just, say, "the right against cruel and unusual punishment" or the "awarding of monetary damages to the victims of past legal wrongs." Rather, the relevant entitlement would be something like: "a plaintiff's power to recover damages against a state official who subjects that person to cruel and unusual punishment." An entitlement, in short, arises from a distinctive combination of substantive and remedial rules.

Next, the "availability" of a given entitlement is defined as *the extent to which claimants are able to obtain it*. Unavailable entitlements might be things like post-conviction relief from a conviction based on evidence obtained in violation of the Fourth Amendment,³⁵ damages relief against the judge who imposed a gag order in violation of one's free speech rights,³⁶ or various other right-remedy combinations that existing doctrines purport to withhold. Low-availability entitlements might be things like: post-conviction relief for "ineffective assistance of counsel,"³⁷ the suppression of evidence obtained pursuant to the execution of an invalid warrant,³⁸ or various other right-remedy combinations that existing case law permits but makes quite difficult for claimants to secure. And higher-availability entitlements might be things like: a declaratory judgment that a prior restraint on speech violates the Free Speech Clause,³⁹ the reversal of a conviction obtained in violation of the *Batson v. Kentucky* rule,⁴⁰

³⁵ See *Stone v. Powell*, 428 U.S. 465, 494 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.").

³⁶ See *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (holding that judges are absolutely immune under Section 1983 from damages awards for unlawful conduct undertaken pursuant to their official judicial duties).

³⁷ Compare, e.g., *Massaro v. United States*, 538 U.S. 500, 504 (2003) (holding, with respect to trials in federal court, that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal"), with *Strickland v. Washington*, 466 U.S. 668 (1984) (creating a high bar to the vindication of an ineffective assistance claim on its merits).

³⁸ See, e.g., *Herring v. United States*, 555 U.S. 135, 147–48 (2009) (finding that "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system" for evidence to be suppressed and that "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way'" (quoting *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984))).

³⁹ See, e.g., *Robinson v. Hunt Cty.*, 921 F.3d 440, 450 (5th Cir. 2019) (holding that the district court erred in dismissing a request for declaratory relief against an allegedly unconstitutional prior restraint and noting that "a court may grant declaratory relief even though it chooses not to issue an injunction or mandamus" (quoting *Powell v. McCormack*, 395 U.S. 486, 499 (1969))).

⁴⁰ See *Batson v. Kentucky*, 476 U.S. 79, 88–89 (1986) (prohibiting the use of race-based peremptory challenges); see also Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96

or other right-remedy combinations less stringently reined in by existing doctrinal rules. We might even imagine expressing each entitlement's availability in terms of a numerical probability rate intended to capture the likelihood of a given claimant's obtaining it—e.g., with low-availability entitlements posting values closer to the 0% threshold and high-availability entitlements posting values substantially higher than that. Obviously, any effort to measure and quantify “availability rates” in this way would encounter a number of practical and conceptual difficulties. But even if objective measurement remains infeasible, one can still apply rough-cut, qualitative judgments about whether some entitlements are more or less available to the claimants who seek them, and one can still plausibly predict whether a given legal change is likely to increase or decrease an entitlement's availability.⁴¹

More specifically, an entitlement's availability depends on the doctrinal rules associated with its *component requirements*. By “component requirement” I mean a discretely identifiable legal standard that a claimant must satisfy in order to obtain the entitlement. If, say, the relevant entitlement is “a criminal defendant's power to suppress evidence obtained from an unreasonable search,” its component requirements would include: (a) Fourth Amendment standing requirements governing the defendant's power to challenge the search;⁴² (b) substantive Fourth Amendment requirements governing the validity of the search itself;⁴³ and (c) the remedial rules relevant to determining whether exclusion is a proper remedy for a demonstrably unlawful search.⁴⁴ Note in particular that component requirements, as we have defined them,

MICH. L. REV. 2001, 2018 (1998) (noting that federal courts have tended to treat *Batson* errors as “structural defects” warranting automatic reversal on appeal).

⁴¹ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

⁴² See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 129–30, 148 (1978) (noting that “petitioners lacked standing to object to the allegedly unlawful search and seizure” because “[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized”).

⁴³ If, for instance, the search involved a *Terry* stop, then the relevant “substantive” component of the entitlement would derive from the particular Fourth Amendment-based limits on government conduct developed in *Terry v. Ohio* and its successor cases. 392 U.S. 1, 8–9 (1968).

⁴⁴ See, e.g., *Leon*, 468 U.S. at 897 (“The question whether the exclusionary sanction is appropriately imposed in a particular case as a judicially created remedy to safeguard Fourth Amendment rights through its deterrent effect, must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence.”). There is admittedly some slipperiness in this definition. Reasonable minds might disagree as to whether, for instance, a collection of thematically related rules is better thought of as representing a single “component” requirement or a series of smaller-scale component requirements, just as they might disagree as to whether some other rule should qualify as a component of the entitlement in question or as something altogether distinct from the entitlement itself. But these sorts of semantic arguments will often not matter much, at least with respect to the fundamental point of establishing the existence of the asymmetric entrenchment of entitlements. The key point to recognize is simply that most, if not all, legal entitlements depend on the satisfaction of multiple component requirements—however those requirements might be defined.

must exist in a conjunctive relationship to one another. If a claimant needs to show both “A” and “B or C” in order to obtain an entitlement, then the entitlement’s two respective components would be the requirement to show A and the requirement to show “B or C”; we would not say that B and C each constitute separate, independent components of the entitlement in question.⁴⁵ Notice further that an entitlement’s overall availability will ultimately depend on the “pass rates” of its constituent components—specifically, if we could somehow quantify each component’s “pass rate,” and if we could further demonstrate that each component operated independently of the others,⁴⁶ then the entitlement’s overall availability rate would be equivalent to the product of its respective components’ pass rates.

Finally, “doctrinal equilibration” occurs when a court alters or adjusts the law associated with one of an entitlement’s component requirements so as to neutralize, compensate for, or offset the entitlement-altering effects of some earlier adjustment to another component requirement. Thus, if a prior change to a remedy-based rule renders a given entitlement less “available” for claimants to secure, a court might equilibrate against that change by rendering the substantive law associated with that entitlement more claimant-friendly—enough so, at least, to undo the “entitlement-weakening” effects of the earlier doctrinal adjustment. Similarly, if a prior change to justiciability-based law (e.g., Article III standing doctrine) renders a given entitlement easier for claimants to secure, a court might equilibrate against that change by ratcheting up the restrictions on its remedial component (e.g., equitable principles governing injunctive relief). Such equilibrating efforts, to be sure, will not fully restore the entitlement back to its original reform—its respective components will themselves remain altered from their earlier positions. But the equilibration process will at least have succeeded at restoring the overall “availability” of the entitlement back to its original level, bringing one component’s pass rate up as another component’s pass rate has gone down.⁴⁷

⁴⁵ Note also that, where procedural and substantive rules apply in a genuinely trans-substantive fashion, a given component requirement can belong to more than one legal entitlement. The rules of Article III standing, for instance, would function as a component requirement for the entitlement governing a plaintiff’s power to collect damages against a state official for a violation of the First Amendment, the entitlement governing a plaintiff’s power to secure an injunction against an ongoing violation of the Second Amendment, and so forth. And the same is true of substantive rights that apply without distinction against different procedural and remedial contexts. The entitlement governing a plaintiff’s power to secure injunctive relief against a feared Eighth Amendment violation may in that way depend on the same “substantive” component as the entitlement governing a plaintiff’s power to secure damages relief for a past Eighth Amendment violation. For further discussion of the relationship between the entrenchment asymmetry and general applicability, see *infra* Section I.D.

⁴⁶ Note that this assumption will not always be true. See discussion *infra* Section IV.B.

⁴⁷ See Levinson, *supra* note 12, at 858, 874.

Doctrinal equilibration is in this sense quite different from the outright reversal or overruling of an earlier, disfavored decision. A court does not “equilibrate” against a claimant-friendly adjustment to Article III standing doctrine by repudiating the prior decision that was responsible for the adjustment. Rather, doctrinal equilibration proceeds by means of a more circuitous course; indeed, the phenomenon owes its significance to the fact that, unlike the direct overruling of a prior precedent, an equilibration-based response to a prior decision is not formally subject to stare decisis-based constraints. Doctrinal equilibration, in other words, sometimes furnishes courts with a means of functionally undoing a prior, disfavored decision without formally purporting to overrule it. Rather than disavow its earlier expansion of a now-disfavored substantive right, the court can instead simply pull back on the remedy. Rather than disavow its earlier contraction of a now-favored remedy, the court can instead simply expand the scope of the right. Either way, equilibration enables the court to push back against the effects of a prior decision while leaving that decision itself formally intact.⁴⁸

B. Equilibration in Action—A Few Examples

All of this is rather abstract, so let us consider a few examples. The primary purpose of these examples is to help flesh out the concepts introduced in Section A of this Part. But the examples will also serve the secondary purpose of foreshadowing the thesis that this Article advances—namely, that the equilibration process is inherently better-suited to serve “entitlement-weakening” rather than “entitlement-strengthening” goals.⁴⁹

1. Brown v. Board of Education (Brown II)

A relatively straightforward example of equilibration in action involves the Court’s early decisions concerning school desegregation.⁵⁰ In *Brown I*, the Supreme Court declared that the Equal Protection Clause prohibited race-based

⁴⁸ See *id.* at 891–92. I should emphasize that, although equilibration might often occur as the result of a conscious judicial choice, it might also arise as the product of subconsciously driven motivated reasoning. Cf. Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27 (2011) (highlighting the possibility that judges might sometimes be “unwittingly impelled to form perceptions of fact, interpretations of doctrines, and evaluations of legal arguments congenial to their own worldviews”). It is, in my view, quite possible for a court to “equilibrate” against a disfavored change to the law even where the court’s own members honestly understand themselves to be applying the law in a neutral and impartial fashion.

⁴⁹ See discussion *infra* Part IV.

⁵⁰ See FALLON, *supra* note 12, at 156 (characterizing *Brown II* as “[t]he most famous, and probably most notorious, example” of the equilibration process).

segregation in public schools.⁵¹ One year later, the Court in *Brown II* confronted the remedial question of how lower courts should ensure compliance with *Brown I*.⁵² In doing so, the Court struck a decidedly less claimant-friendly tone. School districts in violation of *Brown I*'s substantive holding, the Court explained, were not obligated to bring themselves into compliance right away.⁵³ Instead, the Court held, "equitable principles" militated in favor of a remedial approach that required "practical flexibility" and a "facility for adjusting and reconciling public and private needs."⁵⁴ Thus, rather than insisting on immediate compliance with *Brown I* or offering specific and concrete deadlines for district courts to impose, the Court instructed its subordinates to "enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."⁵⁵

That remedial formulation, as many commentators have noted, significantly undercut the right that *Brown I* purported to guarantee.⁵⁶ Segregationists could and would seize on the decision's "loose phraseology" to delay, frustrate, and otherwise resist integration in the years following *Brown II*.⁵⁷ Even though *Brown I* continued to declare a robust and absolute prohibition on de jure segregation in public schools, the decision's constitutional proclamation would carry little practical significance across the countless school districts where, thanks to *Brown II*, desegregation efforts remained deliberately and indefinitely delayed. The right against segregated public schooling would thus end up

⁵¹ See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (extending *Brown I*'s holding to apply to federally operated public schools in the District of Columbia).

⁵² *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

⁵³ *Id.* at 300–01.

⁵⁴ *Id.* at 300; cf. also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 614 (2002) (noting that, during their deliberations over *Brown*, "the Justices . . . spoke of the possibility of public school closings and violence should they rule to outlaw segregation").

⁵⁵ *Brown II*, 349 U.S. at 301.

⁵⁶ See, e.g., CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION*, at xiii (2004) ("[T]he Court removed much of the force of its decision [in *Brown I*] by allowing proponents of segregation to end it not immediately but with 'all deliberate speed.'"); Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 LAW & INEQ. 1, 3 (2006) ("The infamous 'all deliberate speed' formula and the South's massive resistance to desegregation arguably dissipated much of *Brown I*'s promise.").

⁵⁷ KLARMAN, *supra* note 33, at 318 (noting that the decision "adopted loose phraseology that could neither constrain evasion nor bolster compliance," and characterizing the decision as a "solid victory for white southerners").

losing much of its vitality on account of the remedial rule that would come to operate alongside it.⁵⁸

Put in the parlance of this Article, the remedial holding of *Brown II* can be understood as equilibrating against the substantive holding of *Brown I*. *Brown I* had, on its face, appeared to create a robust legal entitlement that would ensure meaningful injunctive relief to children attending school within segregated systems. *Brown II*, however, significantly reduced the “availability” of that entitlement by rendering its “remedial” component—that is, the rules governing the issuance of injunctive relief—hostile to plaintiffs’ demand for quick and meaningful compliance under *Brown I*. Without overruling *Brown I* itself, the Court nonetheless managed to take much of the wind out of its sails; the “substantive component” of the *Brown* entitlement remained unaltered, but its remedial component—and thus the entitlement as a whole—ended up assuming a decidedly less claimant-friendly shape.⁵⁹

2. *Paul v. Davis*

A second example of equilibration in action involves the case law governing procedural due process rights for the victims of reputational harm. *Paul v. Davis* arose from a civil action brought by an individual (Davis) who alleged that the Louisville Police Department had incorrectly included his name and image on a publicly distributed list of “subjects known to be active” in “shoplifting activity.”⁶⁰ Davis alleged a violation of the Fourteenth Amendment’s Due Process Clause, claiming that the commissioner had unconstitutionally denied him notice and an opportunity to be heard prior to acting in a manner that damaged his reputation. Relying on the cause of action conferred by 42 U.S.C. § 1983,⁶¹ Davis sought to recover damages from the police commissioner for the harms he suffered on account of his conduct.⁶²

The Court rejected Davis’s claim, concluding that Davis lacked a “liberty interest” in his reputation, thus excluding his complaint from the Due Process

⁵⁸ The Court would eventually come to repudiate the “all deliberate speed” standard, thus alleviating some of the “entitlement-weakening” effects of its earlier decision in *Brown II*. See *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 234 (1964) (“The time for mere ‘deliberate speed’ speed has run out . . .”). But it would subsequently end up saddling *Brown I* with other remedial holdings that frustrated lower courts’ efforts to remediate school desegregation around the country. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (severely limiting lower courts’ power to fashion interdistrict remedies for violations of *Brown I*); see also Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1312 (2004) (characterizing *Milliken* as “the case that effectively repudiated *Brown*’s . . . mandate”).

⁵⁹ See Levinson, *supra* note 12, at 877.

⁶⁰ *Paul v. Davis*, 424 U.S. 693, 695–96 (1976).

⁶¹ *Id.* at 696–97.

⁶² Brief for Respondent at 20, *Paul*, 424 U.S. 693 (No. 74-891), 1975 WL 173823.

Clause's domain.⁶³ But the Court's decision, as many commentators have noted, seemed largely to be driven by concerns regarding the nature of the remedy sought.⁶⁴ Some fifteen years earlier, in *Monroe v. Pape*, the Court held that plaintiffs seeking damages under Section 1983 were not required to first seek state law remedies for their harm.⁶⁵ Thus, under *Monroe*, a plaintiff like Davis could seek constitutional damages relief in federal court as an alternative to the state law defamation action that pre-*Monroe* case law would have required as a precondition to the suit.⁶⁶ And in *Paul* that possibility ultimately proved too much for the Court to take. Specifically, the Court feared that vindicating Davis's due process claim would have the effect of converting the Fourteenth Amendment into a "font of tort law to be superimposed upon whatever systems may already be administered by the States."⁶⁷ Fear about the remedial implications of finding a constitutional violation thus motivated the Court to conclude that no such violation occurred; the Section 1983 "tail" was "wagging the constitutional dog."⁶⁸

What is most significant about *Paul* for our purposes is simply that, as in *Brown II*,⁶⁹ a single change to a single component requirement carried with it an immediate and dramatic effect on the overall availability of the entitlement that Davis had sought to obtain.⁷⁰ Davis wished to secure damages relief for an

⁶³ *Paul*, 424 U.S. at 712.

⁶⁴ See, e.g., Fallon, *Asking the Right Questions About Officer Immunity*, *supra* note 12, at 488; John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 277 (2000); Levinson, *supra* note 12, at 893.

⁶⁵ *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

⁶⁶ See *id.* ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."); see also Barbara E. Armacost, *Race and Reputation: The Real Legacy of Paul v. Davis*, 85 VA. L. REV. 569, 572 (1999) (noting that *Monroe* "essentially 'invented' the Section 1983 cause of action as we know it," by making clear that "Section 1983 provides a federal remedy in federal court regardless of whether the conduct at issue violated state as well as federal law").

⁶⁷ *Paul*, 424 U.S. at 701.

⁶⁸ Jeffries, *supra* note 64, at 277; see also Levinson, *supra* note 12, at 893 (citing *Paul* as an example of "remedial deterrence," with the Court acting out of fears of "the wholesale federalization of tort claims against state and local government officials and the corresponding prospect of massive damages liability").

⁶⁹ Indeed, *Paul* in this respect presents something of a mirror image of *Brown II*. Whereas *Brown II* involved a manipulation of remedial law that would largely offset the effects of a prior, rights-expanding substantive decision, *Paul* involved a manipulation of rights-based law that would largely offset the effects of a prior, remedy-expanding decision. Either way, however, both cases shared the important attribute of "shutting down" access to a previously available legal entitlement by targeting one and only one of its multiple component parts.

⁷⁰ Notably, *Paul* was not the only case the Supreme Court decided in which it "further narrowed the class of constitutional damages claims that may be brought under the Due Process Clause." See Armacost, *supra* note 66, at 570 (citing as additional examples *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Daniels v. Williams*, 474 U.S. 327 (1986), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981), among others). These cases, too, might

alleged violation of due process in connection with reputation-damaging governmental action. The remedial component of that entitlement—i.e., the rules governing the availability of a Section 1983 action for relief—remained formally unaltered by the Court’s decision in his case.⁷¹ Nevertheless, for Davis and future claimants like him, *Monroe*’s expansive reading of Section 1983 meant very little in light of the non-viability of the due process claim they would have liked to have asserted. That future victims of reputation-damaging governmental action would encounter reduced *remedial* barriers to seeking damages under Section 1983 was no longer of any significance because the Court’s substantive holding in *Paul* ensured that they would only infrequently prevail on the merits. The Court had thus managed to equilibrate against the “entitlement-strengthening” effects of *Monroe*’s expansive remedial decision by adopting an “entitlement-weakening” construction of the Due Process Clause itself.

3. *Los Angeles v. Lyons*

Doctrinal equilibration can also occur within justiciability doctrine. In *Los Angeles v. Lyons*, the plaintiff, Adolphus Lyons, sought an injunction against the use of chokeholds by the city’s police officers.⁷² The lower courts ruled in Lyons’s favor, finding that the Fourteenth Amendment’s guarantee of substantive due process likely prohibited an officer from administering chokeholds under circumstances not threatening death or serious bodily injury and thus preliminarily enjoining all city officials from administering such chokeholds going forward.⁷³ But the Supreme Court reversed, and it did so on the ground that Lyons lacked Article III standing to press for the injunctive relief he sought.⁷⁴

The ostensible reason for this conclusion had to do with the absence of any indication that Lyons himself was “likely to suffer future injury from the use of the chokeholds by police officers.”⁷⁵ This was so, the Court made clear, even though Lyons had indeed suffered such an injury in the past, as the past

be understood as efforts to “equilibrate against” the remedy-expanding implications of *Monroe* by rendering different types of due process claims more difficult for claimants to prevail on.

⁷¹ It is perhaps worth noting that the Court’s decision in *Paul v. Davis* largely preceded a subsequent line of cases that would bolster official immunity doctrines and thus also render the remedial component of the entitlement significantly more difficult for subsequent claimants to satisfy. *See, e.g., Harlow*, 457 U.S. at 817–18 (holding that “bare allegations of malice” cannot suffice to defeat an assertion of qualified immunity and that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

⁷² *Los Angeles v. Lyons*, 461 U.S. 95, 97 (1983).

⁷³ *See Lyons v. Los Angeles*, 656 F.2d 417, 418 (9th Cir. 1981).

⁷⁴ *See Lyons*, 461 U.S. at 103.

⁷⁵ *Id.* at 105.

injury “d[id] nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any . . . offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”⁷⁶ But, as Richard Fallon has suggested, the decision seemed to derive from more than abstract musings about Article III’s “case or controversy” requirement. Specifically, the Court was responding to what it perceived as troubling remedial consequences that would follow from allowing Lyons and other plaintiffs like him to obtain city-wide injunctions against unconstitutional forms of policing.⁷⁷ Unlike in *Brown I* and *Paul*, no single decision about injunctive relief was the source of the relevant concern. Rather, it was the Court’s general sense that equitable principles in their current form were leading lower courts to issue especially intrusive and costly “structural” injunctions against vital governmental operations.⁷⁸ And thus, by ratcheting up the Article III standards that any future applicant for a similar injunction would have to satisfy, the Court could correspondingly ratchet down the likelihood that any such injunction would subsequently issue.

Lyons is in one sense an odd case because the Court—having denied standing to Lyons—nevertheless went on to explain why “traditional equitable principles” would in any event have barred the district court from issuing the injunction.⁷⁹ That latter portion of the Court’s decision, as Justice Marshall’s dissenting opinion pointed out, was superfluous in light of the Court’s earlier denial of standing: even if equitable principles had favored the issuance of the injunction in *Lyons*, the plaintiff’s lack of standing to seek it would have prohibited the district court from issuing it.⁸⁰ Even so, *Lyons*’s decision on standing still served to undercut further the more claimant-friendly equitable principles on which the lower court opinion was based. By making it all but impossible for Lyons and subsequent plaintiffs to demonstrate Article III standing, the Court necessarily made it all but impossible for them to secure their desired forms of injunctive relief.⁸¹ Even where substantive and remedial principles might otherwise cut in favor of efforts to secure prospective vindication of

⁷⁶ *Id.*

⁷⁷ Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 650 (“It is hard not to believe that . . . concerns about the peculiar intrusiveness of injunctive remedies influenced the Court’s disparate rulings with respect to standing.”).

⁷⁸ *Cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976) (noting that “[o]ne of the most striking procedural developments of this century is the increasing importance of equitable relief” and that “surely, the old sense of equitable remedies as ‘extraordinary’ has faded”); see *Paul*, 424 U.S. at 693; *Brown I*, 387 U.S. at 483.

⁷⁹ *Lyons*, 461 U.S. at 111–13.

⁸⁰ *Id.* at 134–35 (Marshall, J., dissenting).

⁸¹ See Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 168 (2003) (noting that *Lyons* “has ensured that victims of police brutality will rarely, if ever, be allowed to enjoin injurious police practices”).

rights, the high hurdle of having to allege a non-speculative future injury was itself sufficient to close off access to the entitlement.

4. Equilibration Through Application (or Death by a Thousand Cuts)

The foregoing examples all involve express alterations to doctrinal rules—alterations that carried immediate, system-wide consequences for the entitlements to which they attached. In *Brown II*, the Court formulated a rule of remedial law that would frustrate claimants' ability to secure redress for the clearly unconstitutional conduct of maintaining segregated schooling.⁸² In *Paul*, the Court formulated a rule of substantive law that would frustrate certain claimants' ability to make the required showing of constitutional harm to obtain damages under Section 1983.⁸³ And in *Lyons*, the Court formulated a rule of justiciability law that would frustrate claimants' ability to invoke the "judicial power" of the federal courts for purposes of securing prospective relief against chokeholds and other forms of unconstitutional police behavior.⁸⁴ These cases—like many the Court decides—all resulted in discrete and identifiable changes to operative doctrinal rules.

But doctrinal equilibration need not always involve the express modification of legal rules; the process might also involve the results-oriented application of nominally unchanged rules in a manner that produces a consistent set of "entitlement-weakening" outcomes over time.⁸⁵ A court might, for instance, routinely deny Article III standing to applicants seeking prospective vindication of a recently expanded constitutional right; it might routinely rule for the government on the merits in cases involving a recently created judicial remedy; it might find a way to apply equitable principles (or some other set of remedial rules) so as to deny relief in cases involving a recently liberalized set of justiciability requirements; or it might seize upon a hodge-podge of such rulings to minimize the entitlement's issuance over time. Although any one such decision might not have much effect on the entitlement's overall availability, the consistent rendering of such decisions might, over time, begin to make a material difference. Equilibrating effects on legal doctrine, in other words, can emerge not just from a single, rule-altering decision that creates claimant-unfriendly law, but also from a pattern of rule-applying decisions that produce consistently claimant-unfriendly outcomes.

⁸² See discussion *supra* Section I.B.1.

⁸³ See discussion *supra* Section I.B.2.

⁸⁴ See discussion *supra* Section I.B.3.

⁸⁵ Cf. Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 655 (noting that "remedial concerns" can "influence determinations of justiciability" through "ad hoc manipulation").

This last point is important because it helps to show how lower courts might become consequential, if not always visible, players in the equilibration game. Lower court judges lack the power to change Supreme Court doctrine; they cannot simply substitute an alternative set of decision rules for those that the Court has instructed them to apply. But lower court judges might sometimes manage to exploit uncertainties and ambiguities within those decisions in order to generate patterns of outcomes that undermine the Court's efforts to shift an entitlement's availability.⁸⁶ No one such application will, on its own, suffice to transform the entitlement to which it attaches. But, if enough lower court judges apply the law in a consistently "entitlement-weakening" or "-strengthening" direction, then the entitlement may end up acquiring a real-world significance that differs from whatever the doctrine purports to provide. Emergent patterns of lower court application can thus become functionally identical to express alterations to the rules.

C. *The Entrenchment Asymmetry*

We are now in a position to consider the thesis of this Article: *doctrinal equilibration tends to operate more effectively when it proceeds in an "entitlement-weakening," rather than "entitlement-strengthening," direction.* Put differently, courts will be able to equilibrate more effectively against unwanted "entitlement-strengthening" developments within the law than against unwanted "entitlement-weakening" developments. And it therefore follows as a corollary that "entitlement-weakening" decisions are relatively easier for their proponents to fortify against counteractive change.

One way of seeing this point is to imagine "flipped" variations of the examples we have already considered. Suppose, counterfactually, that *Brown I* had gone the other way—i.e., that the Court had reaffirmed *Plessy v. Ferguson* and allowed the rule of "separate but equal" to remain in effect. And suppose further that the Court soon came to regret that decision and thus began looking for ways to equilibrate against it. Could the Court have pulled a "reverse *Brown II*," indirectly undoing the effects of its earlier decision by mandating immediate compliance with the non-expanded right? The answer, of course, is no. Expedited injunctive relief in school-desegregation cases would have re-

⁸⁶ See, e.g., Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 797 (2012) ("While lower courts do not have authority to ignore binding Supreme Court authority, lower courts can interpret cases in ways that are equivalent to overruling or use procedural devices, such as standing, to reach results in line with what the judges predict to be current Supreme Court majority preference."); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 927–36 (2016) (noting the various ways in which lower courts might act to "narrow" Supreme Court precedents without offending vertical stare decisis norms).

mained valueless as long as the Constitution continued to permit segregated schooling. The “entitlement-weakening” effects of the earlier, rights-denying decision could only be undone by means of a direct reversal of the counterfactual *Brown I*—i.e., the recognition of the right that the Court had previously denied.

Suppose, again counterfactually, that the Court had never decided *Monroe v. Pape* and that Section 1983 remained a largely useless vehicle for seeking damages against state officials for violations of federal rights.⁸⁷ And suppose that the Court had subsequently developed concerns that the victims of reputation-damaging government action lacked an effective means of seeking compensatory redress in federal court. Would a “reverse *Paul v. Davis*” have sufficed to address that concern?⁸⁸ Again, clearly no. Holding that reputation-damaging governmental action implicated “liberty” interests under the Due Process Clause would not have made it any easier for the victims of that action to recover damages under Section 1983. As long as the law of remedies created an obstacle to the vindication of that entitlement, the law of remedies itself required changing—the entitlement reducing effects of the remedial rule could not have been mitigated by a corresponding expansion of the underlying right.

Suppose similarly that the Court had, prior to *Los Angeles v. Lyons*, held that federal courts lacked the power to impose structural injunctions against police departments.⁸⁹ And suppose further that the Court had developed second thoughts about this decision and was interested in compensating for its remedy-denying effect. Would a “reverse *Lyons*” decision have succeeded at accomplishing this goal? Once again, not at all. Giving more plaintiffs Article III standing to request a prohibited form of injunctive relief would not have changed the overall availability of the injunctions being sought. Instead, any effort to restore access to the remedy would have had to go through the law of remedies itself.⁹⁰

Consider finally the point as it applies more generally to the application-focused equilibrating efforts that lower court judges might sometimes undertake. If the Supreme Court were to deny recognition of a favored constitutional right, lower courts would not enjoy much success in equilibrating against that decision by, say, finding new ways to confer Article III standing on claimants alleging a violation of that right. Having cleared an initial justiciability-based obstacle to the adjudication of their case, those claimants would still end up crashing into the next obstacle before them—namely, the substantive rule that makes it impossible to assert a meritorious claim. If the Supreme Court were to

⁸⁷ See *Pape*, 365 U.S. at 183.

⁸⁸ See *Paul*, 424 U.S. 693.

⁸⁹ See *Lyons*, 461 U.S. 95.

⁹⁰ See *id.* at 112–13.

preclude the issuance of a particular type of remedy in Eighth Amendment cases, expanding the scope of claimants' Eighth Amendment right would still leave them unable to secure the remedy being sought. In these and other circumstances, informal equilibrating work-arounds will not suffice to overcome the "entitlement-weakening" effects of the decisions they are intended to target. The only way for lower courts to restore the entitlement's availability is to push back directly against the "entitlement-weakening" decision itself.

By now, we should be able to see why the equilibration process tends to operate more effectively in an "entitlement-weakening" direction. An entitlement can issue only if every one of its component requirements is satisfied. A single, difficult-to-satisfy component requirement—whether situated within justiciability-based law, substantive law, the law of remedies, or even somewhere else—can on its own shut off access to the overarching entitlement. If a judge wishes to render a legal entitlement especially difficult for claimants to obtain, that judge can achieve that goal by rendering any one of its component requirements difficult for claimants to satisfy. But if a judge wishes to render a legal entitlement especially easy for claimants to obtain, that judge can achieve the goal only by ensuring that all of the component requirements remain sufficiently easy for the claimant to clear.⁹¹

Non-legal analogues to this idea are not hard to spot: a single obstruction on the roadway will result in a traffic jam, even if no other obstructions block traffic. A single blockage of a pipe will clog the drain, even where the rest of the pipe remains clear. And a single misaligned domino will prevent the last one from falling, even where all the others have been perfectly placed. But whatever the preferred metaphor, the central takeaway for our purposes boils down to the same essential claim. Where a judicial analysis must "flow" through several different gates along the way to the final issuance of the entitlement itself, the flow can be interrupted by the closing of a single gate, and that interruption cannot be undone by making some other gate easier to pass through.

⁹¹ One can hazard a more mathematically oriented representation of the same basic point. Suppose that we could quantify each entitlement's availability rate, E , as a probability value between 0 and 1. And suppose that we knew the overall pass rates of the entitlement's n components, $c_1, c_2, c_3, \dots, c_{n-1}, c_n$. Because all c_i are between 0 and 1, and because *all* c_i must be satisfied in order for the entitlement to issue, it will always be the case that $E \leq c_i$, for all i between 1 and n . (If all the c s are independent of one another, then $E = (c_1)(c_2)(c_3) \dots (c_{n-1})(c_n)$, which itself will always be less than or equal to each c_i ; in the event that the c s are partially dependent, the probability calculus will be considerably more complex, but it should still be the case that the probability of all the dependent events happening together will never exceed the probability of any one of those events happening on its own.) Thus, a judge wishing to ensure that E never exceeds some value m can achieve this goal by changing the law associated with any c_i so as to render that component's own pass rate $\leq m$ as well. By contrast, a judge wishing to ensure that E never falls below some value m must ensure that $(c_1)(c_2)(c_3) \dots (c_{n-1})(c_n) \geq m$, which will be true only if each $c_i \geq m$.

D. The Significance of the Asymmetry

The discussion has thus far revealed that courts wishing to deny access to a legal entitlement can achieve their goal by focusing on any one of the entitlement's component requirements, whereas courts wishing to expand access to a legal entitlement often cannot do the same. But does this fact itself matter? Nothing I have thus far said, after all, means that "entitlement-strengthening" initiatives are impossible for courts to achieve. Even where equilibrating maneuvers are unavailable, "entitlement-strengthening" courts still have at their disposal the option of directly altering or overruling the earlier, "entitlement-weakening" changes to which they might object. Given that fact, one might maintain that the entrenchment asymmetry—though formally present within the law—has limited real-world significance. If it is always possible for judges to do *something* to achieve their entitlement-related objectives, then why should we worry about whether the equilibration process itself better conduces to "entitlement-weakening" change?

Put another way, before we begin to examine the nature of the entrenchment asymmetry and the conditions under which it is most likely to arise, we should first ask whether, and in what respects, the asymmetry itself is likely to matter. How and to what extent does the asymmetry confer real-world advantages on judges' efforts to weaken the entitlements they disfavor and real-world disadvantages on judges' efforts to strengthen the entitlements they like? This Section highlights two respects in which that might be the case.⁹²

1. The Choice-of-Adjustment Advantage

Consider first the position of two judges wishing to alter the overall availability of some legal entitlement: one judge ("Stringent"), wishes to render the entitlement difficult for claimants to secure. Another judge ("Generous"), wishes to render the entitlement easier to secure. The discussion thus far suggests that Stringent can always achieve an "entitlement-weakening" outcome by making a single downward adjustment to any one of the entitlement's constituent components. Generous, by contrast, will often face a more constrained set of choices. If Generous confronts a legal entitlement whose overall difficulty derives largely from one, difficult-to-clear component requirement—e.g., a rule of Article III standing that makes it very difficult for the relevant claimants to demonstrate an "injury in fact"—then Generous has no choice but to focus on that particularly problematic component. Just as one cannot compensate for a weak link in the chain by making another link stronger, Generous cannot neutralize the effects of an especially stringent component requirement

⁹² See discussion *infra* Section I.D.

by making some other component requirement easier for claimants to satisfy. Generous, unlike Stringent, has no real choice as to *which* component requirement to target for reform. Rather, Generous must target the particular component requirement(s) most responsible for the entitlement's low-availability state.

Call this the *choice-of-adjustment advantage*: no matter the default arrangement of a legal entitlement and its constituent components, and no matter how claimant- or government-friendly those components' respective legal requirements might be, an "entitlement-weakening" judge can always substantially reduce an entitlement's availability by manipulating the law associated with any one of its constituent parts. An "entitlement-strengthening" judge, by contrast, will very often lack that freedom of choice.

Still, one might ask, why should that difference matter? Stringent and Generous can both ultimately get where they want to go; it is just that Generous must sometimes take a predetermined route to that destination and Stringent can always take any number of different routes. But that fact itself is significant because not all adjustments are equally easy for judges to achieve. Suppose, for instance, that the law associated with one component requirement derives from a Supreme Court decision that leaves no uncertainty as to its scope and substance. And suppose that the law associated with some other component requirement derives from a vague set of gestures and dicta that the Court has offered over a series of cases. All else equal, the unsettled law should be easier for judges to "adjust" than the settled law, and the choice-of-adjustment advantage means that judges like Stringent will have more freedom to target unsettled areas of the law.⁹³ Suppose, similarly, that the law associated with one component requirement takes the form of a bright-line rule whereas the law associated with another component requirement takes the form of an open-ended standard. All else equal, the open-ended standard will afford equilibrating judges more room within which to push the law in their preferred direction. And the choice-of-adjustment advantage means that judges like Stringent will more often be able to avail themselves of this opportunity.⁹⁴ In general, the freedom to choose which component requirement to target should carry along with it the freedom to target those requirements that will be easiest for

⁹³ See Re, *supra* note 86, at 938 (noting that there "should be more room for considering nonprecedential arguments about legal correctness as the lower court becomes more uncertain about the meaning of the most relevant Supreme Court precedent").

⁹⁴ See Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 684 (2014) ("A standard-like formulation of a Supreme Court holding will 'decide less' than a rule-like formulation, thereby providing lower courts with a greater degree of freedom to continue experimenting with the substance of the doctrine under review.").

the judge to adjust. And this is a freedom that the “entitlement-weakening” judge is more often more likely to enjoy.

2. The Fortification Advantage

The choice-of-adjustment advantage concerns offensive, attack-minded maneuvers by judges attempting to move the law in an “entitlement-strengthening” or “entitlement-weakening” direction. But the entrenchment asymmetry also affects these judges’ defensive ability to fortify their changes against subsequent forms of counteractive action. Specifically, having effectively shut down an entitlement with a single change to one of its component requirements, a judge can go on to hammer home the effects of that decision by rendering others of its component requirements equally difficult for claimants to clear. From the claimant’s perspective, these changes will not make much of a difference—if a justiciability-based hurdle already precludes judicial vindication of the claim, then it will not matter much whether that same claim could also have been rejected on other, non-justiciability-based grounds. But fortifying changes could still make a difference in terms of frustrating future judicial efforts to restore the entitlement’s availability back to its original level. The higher the number of component requirements that are simultaneously dragging down an entitlement’s overall availability rate, the higher the number of component requirements that must be altered or adjusted before access to the entitlement is restored. Thus, fortifying adjustments to the entitlement’s other components can increase the costs of “entitlement-strengthening” change.

Recall, for instance, the Court’s proclamation in *Lyons* that the requested form of injunctive relief should not have issued even in the event that Lyons had possessed standing to request it.⁹⁵ As far as the claimants own interests were concerned, this was something of a moot point: future claimants like Lyons were seldom going to satisfy the standing portion of the Court’s decision, so the applicable equitable principles were unlikely to have much of an effect on their ability to obtain the injunction itself.⁹⁶ Still, the remedial portion of the *Lyons* opinion did something meaningful. It further fortified the decision’s “entitlement-weakening” effects against subsequent judicial undoing. Any subsequent effort to push back against *Lyons* would have had to grapple with both its adverse holding about standing and its adverse holding about remedies. Lower courts seeking to “get around” *Lyons* would similarly have to find a way of manipulating two component requirements rather than one. Supplementing a claimant-unfriendly justiciability component with an equally claimant-unfriendly remedial component would not have done much to render the

⁹⁵ *Lyons*, 461 U.S. at 111–13.

⁹⁶ *Id.* at 134–35 (Marshall, J., dissenting).

already-weakened entitlement significantly more difficult for claimants to obtain. But it might still have carried the strategic advantage of making the entitlement-denying effects of the decision more difficult for courts to undo.

When it comes to “entitlement-strengthening” change, by contrast, the fortification options are more limited. Even if a court does everything to ensure that every single one of the entitlement’s component requirements operates in a claimant-friendly manner, the entitlement itself can still be materially weakened by a single counteractive adjustment to just one of its constituent components. To be sure, the court seeking to ensure access to the entitlement can strive to make all of its component requirements difficult for subsequent judges to manipulate or adjust. But that judge can do nothing to increase the number of component requirements that any “entitlement-weakening” effort would have to work through. The most claimant-friendly entitlement imaginable will always be just a single, component-specific adjustment away from availability-reducing change.

In other words, maximum fortification against “entitlement-strengthening” change will yield several, difficult-to-change component requirements, all of which must be “switched” before the entitlement once again becomes accessible to the claimants seeking to secure it. Maximum fortification against “entitlement-weakening” change will also yield several, difficult-to-change component requirements, only one of which must be “switched” before the entitlement once again becomes inaccessible to the claimants seeking to secure it. “Entitlement-weakening” judges can thus force their adversaries to work through a large number of different, government-friendly component requirements; “entitlement-strengthening” judges, by contrast, will always find their creations just a single, component-specific adjustment away from being taken away.⁹⁷

⁹⁷ Obviously, the fortification advantage matters only if we assume that it is costlier for judges to render multiple adjustments to multiple component requirements than it is for judges to render a single adjustment to a single component requirement. That relationship, to be sure, is not quite so straightforward, and one can certainly imagine circumstances in which the costs of making one adjustment exceed the costs of making multiple adjustments. Some doctrinal adjustments will be significantly easier than others to achieve, and several “easy” adjustments may well be collectively “cheaper” to pursue than a single “difficult” adjustment in the opposite direction. What is more, modifications to multiple doctrinal adjustments might sometimes yield diminishing marginal costs over time. Once a judge has rendered one change to one area of the law, additional changes to additional areas of the law may become relatively less expensive for the judge to pursue.

All of that said, it is not implausible to maintain that changes to multiple areas of law will often impose costs that are essentially “additive” in nature—costs, that is, for which it will be generally (though not always) true that the judge who needs to adjust or manipulate component requirements must expend a greater degree of judicial capital than the judge who needs to adjust or manipulate only one component requirement. For example, the judge who must make multiple changes might incur extra costs in terms of the added level of time and effort needed to devise and implement a plausible legal “workaround” to precedent that militates against a desired change (and, if necessary, to persuade

II. THE ASYMMETRY'S DEPENDENCIES

The previous Part provided some reason to think that efforts at doctrinal equilibration tend to work more effectively in an “entitlement-weakening” direction. “Entitlement-weakening” judges, unlike their “entitlement-strengthening” counterparts, can always affect the overall availability of an entitlement by altering whichever one of its component requirements is most amenable to manipulation, and those same judges can more effectively fortify their own adjustments to that entitlement against subsequent, countervailing change. The choice-of-adjustment advantage and the fortification advantage thus combine to produce a baseline scenario in which entitlements are more vulnerable to contraction rather than expansion.⁹⁸

This all remains a fairly bare-bones picture, and we have not yet considered some additional doctrinal variables that add further nuance. This Part thus turns to that task. Specifically, it highlights three important variables on which the magnitude of the entrenchment asymmetry will depend: (1) the number of component requirements that the entitlement comprises;⁹⁹ (2) the extent to which stare decisis norms constrain judges’ ability to alter and manipulate the

other colleagues to go along with the change). Cf. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 626 (2001) (“By relying on past decisions, judges can save significant time and effort. . . . Judges can turn to past analyses and avoid rethinking every aspect of a decision.”); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 639 (2003) (“Judges will often accept the current state, which is represented by precedent, because to do otherwise would require significant cognitive effort.”). Second, if the contemplated workaround is sufficiently tenuous as a matter of law, the judge risks incurring reputational costs among that judge’s peers. Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1777 (2013) (highlighting the possibility that “if judges too obviously implement their preferences, they will harm their reputations so greatly that the reputational costs to the judge will exceed the ideological benefits” and that, as a consequence, judges “will want to avoid implementing their preferences when doing so is too obvious, and in these cases decide in a neutral or nonideological fashion”). Furthermore, if the judge serves on a lower court, that judge might worry about the risk of facing reversal on appeal, a risk that increases alongside the number of contestable “manipulations” of the law that the lower court decides to make. See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1771 (2013) (“Reversals can impose real resource costs on trial judges in the form of new trials and motions on remand, and they can impose reputational costs as well.”). Some of these costs may matter more than others, and some of the costs may carry diminishing marginal effects as the cost-creating activities start to add up. But my intuition is that all of these costs are at least “additive” in a rough sense—thus supporting the idea that, in general, a judge will incur more costs when pursuing multiple changes to multiple component requirements than when pursuing a single change to a single such requirement.

⁹⁸ See discussion *supra* Section I.D.

⁹⁹ See discussion *infra* Section II.A.

law;¹⁰⁰ and (3) the extent to which an entitlement's procedural and remedial components apply uniformly across multiple, different substantive rights.¹⁰¹

A. Component Numerosity

Most fundamentally, the extent of the entrenchment asymmetry will depend on the degree of compartmentalization that exists within the entitlement itself. Call this the variable of "component numerosity." All else equal, an entitlement whose availability depends on the satisfaction of a small number of component requirements should be less sensitive to the bias than an entitlement whose availability depends on a large number of component requirements. The more that courts have divvied up the entitlement into separate and independent parts, the greater the equilibrating advantage that opponents of the entitlement will enjoy.

To see the point, imagine a legal entitlement consisting of one and only one component requirement. Rather than require the joint satisfaction of discretely "procedural," "substantive," and "remedial" parts, the law governing this entitlement's availability calls for the application of a single and holistic entitlement-specific test—one that blends together all the traditionally disaggregated concepts of procedural, substantive, and remedial law.¹⁰² Under this test, claimants might be able to overcome a relatively weak showing of injury by asserting an especially strong substantive claim, they might be able to overcome a dubious substantive claim with a compelling demonstration of irreparable harm, and they might otherwise manage to compensate for one set of deficiencies in their claim by emphasizing countervailing strengths somewhere else. The idea, in short, would be to replace an existing, regimented test that required plaintiffs to "check all the boxes" with a new sort of totality-of-the-circumstances test that simply awarded the requisite entitlement to only those individuals who, all things considered, merited judicial intervention on their behalf.

A truly de-compartmentalized doctrine of this sort would eliminate the possibility of doctrinal equilibration and thus, along with it, the asymmetric entrenchment of entitlements. If each entitlement's availability turned on the content of an all-things-considered test, then both proponents and opponents of the entitlement would have no choice but to pursue their desired adjustments within the confines of that test. And there is no immediate reason to suppose

¹⁰⁰ See discussion *infra* Section II.B.

¹⁰¹ See discussion *infra* Section II.C.

¹⁰² See Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1221 (2014) (imagining "hybridized rules of 'right-remedy' law, whose content depends on *both* the type of relief a litigant demands *and* the type of substantive claim she asserts").

that such a test in isolation would be inherently more amenable to “entitlement-weakening” or “entitlement-strengthening” change. That is not to say that a freewheeling and holistic test would be any less immune to results-oriented manipulation—indeed, all else equal, the test would likely be more manipulable than one that prescribes a compartmentalized inquiry. But—and this is the key point—the test itself would be equally manipulable in both directions.

Of course, the rules governing access to public-law entitlements do not typically assume such a simplified, holistic form. Instead, these rules emerge from the linking together of discretely defined procedural, substantive, and remedial “components,” all of which must individually be satisfied in order for the underlying entitlement to issue. Thus, for instance, securing a permanent injunction against an alleged substantive-due-process violation depends not on the satisfaction of a holistically defined “injunction-for-substantive-due-process-violation” test;¹⁰³ rather, it depends on the claimant’s satisfaction of threshold justiciability-related limits, merits-based rules defining the scope of the right itself, and remedy-based limits on the issuance of injunctive relief. And once the chain of component requirements becomes linked in this way, the possibility of equilibration (and the asymmetry hard wired into it) begins to emerge.

But the relationship between equilibration and compartmentalization does not end there. Equally important is the point that the extent of the asymmetry should increase alongside the overall number of component requirements that the claimant must clear.

Consider first the choice-of-adjustment advantage, which derives from the fact that the “entitlement-weakening” judge, but not the “entitlement-strengthening” judge, is free to target any component requirement as the driver of a desired equilibrating change. That advantage should grow more pronounced as the number of potential targets grows higher. The more component requirements there are for an “entitlement-weakening” judge to choose from, the easier it is for the judge to disrupt the entitlement’s regular issuance.¹⁰⁴

¹⁰³ In that sense, one might say that public-law doctrine has adopted a “modular” design. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1176 (2006) (“In general, modularity is a device to deal with complexity by decomposing a complex system into pieces (modules), in which communications (or other interdependencies) are intense within the module but sparse and standardized across modules.”); see also Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1701–02 (2012).

¹⁰⁴ Suppose, for instance, that a prior decision about mootness doctrine has greatly increased the availability of a particular legal entitlement. If that entitlement consists of only a few other component requirements—say, an Article III standing component, a single rule of substantive law, and a single remedial rule—then it is not especially unlikely that these other areas of doctrine will already be resistant to manipulation or adjustment, and the “entitlement-weakening” judge would thus be unable to

Contrastingly, the “entitlement-weakening” judge—who must always target those component requirements most responsible for the entitlement’s low-availability state—will not face any easier of a task when the number of component requirements is high.

Component numerosity should affect the fortification advantage as well. That advantage exists to the extent that an “entitlement-weakening” judge can increase an entitlement’s resistance to counteractive equilibration by redundantly rendering all (or at least many) of its component requirements difficult for claimants to clear. Obviously, as the number of component requirements goes up, so too should the extent of the fortification advantage. If an entitlement consists of only three component requirements, then there will not be many potential redundancies for the “entitlement-weakening” judge to exploit. If, by contrast, the entitlement consists of many more requirements, then the judge can make it much more resistant to counteractive, “entitlement-strengthening” change.

All of this helps to confirm what should intuitively be clear: as the number of an entitlement’s component requirements increases, so too does the workload of the judge who hopes to prevent the entitlement from becoming less available. An entitlement consisting of numerous component requirements is like an army stretched thin across expansive territory, easy to attack and hard to defend.

B. *Stare Decisis Norms*

The extent of the entrenchment asymmetry will also depend on the strength of *stare decisis* norms. That point follows naturally from the fact that *stare decisis* norms operate as a major determinant of any doctrinal adjustment’s cost. All else equal, a judge wishing to modify the law associated with a particular component requirement should have an easier time doing so when the judge can more easily evade, narrow, ignore, distinguish, or otherwise wriggle out of precedential dictates to the contrary.¹⁰⁵ Where courts can easily “get around” prior decisions dictating the stringency (or non-stringency) of a given component requirement, equilibrating adjustments should prove relative-

achieve the desired equilibrating change. But if the entitlement consists of many other component requirements—say, an Article III standing component, a “cause of action” component, an exhaustion component, an “abstention” component, several different “substantive” components, and several different remedial components—then the equilibrating effort should become easier for the judge to achieve.

¹⁰⁵ See F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 657 (2016) (noting that “courts face significant constraints in experimenting with doctrine because of the nature of precedent”); Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 531 (2008) (“*Stare decisis* raises the cost of judicial policymaking . . . by encouraging or requiring judges to follow precedents.”).

ly easy for those courts to achieve. Where the courts cannot so easily do so, such adjustments will require an increased (and eventually, prohibitively high) expenditure of judicial capital.

At first glance, the strength of stare decisis norms might seem irrelevant to the equilibration-related asymmetry that this Article has described. Stare decisis norms, after all, can operate to prevent both “entitlement-strengthening” and “entitlement-weakening” judges from changing the law to accord with their preferences, and it is not immediately clear why the variable would affect the two judges in materially different ways.¹⁰⁶ But when the possibility of equilibration enters the picture, stare decisis norms can yield different consequences for different types of change. Specifically, an especially lenient set of stare decisis norms should tend to “level the playing field” between “entitlement-weakening” and “entitlement-strengthening” judges, and an especially stringent set of stare decisis norms should tend to do the same. It is only where such norms fall between these extremes—imposing meaningful costs on legal change but not going so far as to prevent legal change altogether—that “entitlement-strengthening” judges should gain a material advantage over their “entitlement-weakening” counterparts.

To see that point, consider first the extreme scenario of a doctrinal regime that adheres to a sweeping and absolute rule of stare decisis, such that courts are categorically prohibited not just from overruling their own decisions (and, in the case of lower courts, disregarding higher-court decisions), but from doing anything that “changes” the application of the law away from a status quo baseline.¹⁰⁷ If the doctrine were truly frozen to this degree, then both “entitlement-weakening” and “entitlement-strengthening” judges would find it equally impossible to pursue the adjustments they desired. Indeed, the entire possibility of equilibration would vanish altogether, as equilibrating maneuvers in both directions would find themselves equally subject to the absolute-stare-decisis bar.

Now consider the opposite extreme: a scenario in which law is maximally fluid, such that changes to legal doctrine are effectively costless for judges to render. Here too, the entrenchment asymmetry would cease to exist. Yes, the “entitlement-weakening” judge would still enjoy a choice-of-adjustment advantage over the “entitlement-strengthening” judge. But if all changes are equally costless for judges to render, then the “entitlement-weakening” judge would not gain anything meaningful from the advantage. A similar point holds for the fortification advantage as well: “entitlement-weakening” judges might

¹⁰⁶ See Hessick, *supra* note 105, at 657.

¹⁰⁷ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 871 (2004).

more often manage to force their “entitlement-strengthening” counterparts to work through “multiple” component requirements on the way to restoring an altered entitlement back to a high-availability state. But if the cost of each adjustment is zero, then the aggregate cost of all those adjustments will be zero as well.¹⁰⁸ If judges have infinite power to ignore, disregard, and alter past precedents, then anything and everything should become equally up for grabs in each and every case.¹⁰⁹

But between those two extreme scenarios, the entrenchment asymmetry should become apparent. Both the choice-of-adjustment advantage and the fortification advantage, that is, assume greater importance under circumstances where the costs of legal change are significant enough to preclude some adjustments to the law but not others. Where this is so, an “entitlement-strengthening” judge will face greater difficulty in increasing an entitlement’s overall availability, because the “entitlement-strengthening” judge will more often have to reckon with particular component requirements that the operative stare decisis norms have rendered prohibitively costly to change. The “entitlement-weakening” judge, by contrast, will more often be able to find at least one component requirement that, under the operative stare decisis norms, is relatively amenable to manipulation.¹¹⁰ And, to the extent that the “entitlement-weakening” judge is further able to fortify a disfavored entitlement against “entitlement-strengthening” change, the fortifications should exert a meaningful, additive impact on that judge’s adversaries’ efforts to increase its availability in future cases.

The relationship between the entrenchment asymmetry and stare decisis norms might thus be roughly represented by a parabolic curve. As the overall rigidity of the law increases from a point of absolute manipulability, the extent of the asymmetry should increase along with it. But at some point, the asymmetry will “max out” and its magnitude should diminish as the law tends towards a point of rigidity. The asymmetry should thus be most pronounced somewhere between these two extremes.

C. *Trans-Substantivity*

We have thus far spoken as if the particular component requirements that combine to form legal entitlements reflect distinctive bodies of entitlement-

¹⁰⁸ Indeed, nothing would prevent the “entitlement-strengthening” judge from simply “liberating” the entitlement from various component requirements on which its issuance previously depended.

¹⁰⁹ Cf. Hessick, *supra* note 105, at 666 (“The ability of courts to choose among different redundant doctrine raises the possibility of cycling, which may lead to instability in the law or making it easier for judges to manipulate the outcome in cases.”).

¹¹⁰ See Re, *supra* note 86, at 932 (discussing the tool of narrowing to “construe precedential ambiguities in favor of [judges’] own first-principles view of the law”).

specific law. In reality, however, these bodies of law overlap and intersect with one another in complex and consequential ways. Specifically, many procedural and remedial rules enjoy a “trans-substantive” scope of operation, carrying a uniform set of definitions and doctrinal requirements across varying substantive domains.¹¹¹ Thus, for instance, the same three-part Article III standing test applies regardless of whether a plaintiff pursues a Fourth Amendment, Fifth Amendment, or statutory claim;¹¹² the same set of pleading requirements applies regardless of whether a plaintiff challenges a law on free speech grounds, equal protection grounds, or on some other theory of unconstitutionality;¹¹³ the same qualified immunity principles apply regardless of the nature of the government actor’s wrongdoing,¹¹⁴ and so forth.¹¹⁵ And that in turn means that changes to the content of procedural and remedial norms as they apply within one substantive context will carry with them immediate implications for other substantive rights as well, “spilling over,” as it were, into substantive domains far afield from the particular one that initially provoked the change.¹¹⁶

The trans-substantive nature of procedural and remedial rules may function as a natural, built-in check on judges’ willingness to manipulate judicial doctrine for entitlement-specific purposes. Restricting the availability of injunctive relief might initially appear to be a promising means of counteracting an earlier expansion of a disfavored legal entitlement that depends on prospective judicial enforcement. But if the rules governing injunctive relief are trans-substantive in scope, then that same restriction will have the automatic effect of weakening numerous other legal entitlements that also depend on prospective enforcement. This includes, most importantly, entitlements involving other substantive rights that an equilibrating judge would prefer to continue enforcing. Thus, if the trans-substantive implications of a doctrinal adjustment are significant and obvious enough, a judge initially inclined to equilibrate for the purposes of weakening a disfavored entitlement may ultimately choose not to act. The contemplated change, after all, would inflict collateral damage on oth-

¹¹¹ See Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 691–92 (2013).

¹¹² See Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 441 (2017) (“The Supreme Court has treated Article III standing as a trans-substantive requirement that must be met in every case.”).

¹¹³ See generally FED. R. CIV. P. 8. *But see, e.g., id.* R. 9(b) (imposing heightened pleading standards in cases involving “fraud or mistake”).

¹¹⁴ See Jeffries, *supra* note 64, at 262 (noting, with respect to 42 U.S.C. § 1983, that “[s]o far as appears, all remedies are available for all rights on the same terms,” while proceeding to criticize this trend).

¹¹⁵ See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 426 (2010) (noting that trans-substantivity “remains robust” as a guiding principle for the design of the federal rules).

¹¹⁶ See Coenen, *supra* note 102, at 1223–47.

er legal entitlements that the judge favors, and it would thus become, from that judge's perspective, a change not worth pursuing.¹¹⁷

If trans-substantivity operates to deter courts from equilibrating, then trans-substantivity might also operate to narrow the entrenchment asymmetry itself. The asymmetry exists because "entitlement-weakening" judges can easily undo or reverse prior, availability-increasing changes to an entitlement by targeting any one of its several component requirements for availability-reducing change. But if all of these component requirements derive from genuinely trans-substantive bodies of law, then concerns about spillover and collateral damage may often function to render this option infeasible. An "entitlement-weakening" judge, for instance, might initially consider adjusting qualified immunity doctrine to cut off access to a disfavored substantive right. But, if the adjustment would also jeopardize the after-the-fact enforcement of other, substantive rights that the same judge favors, then the judge will in fact have fewer equilibrating options available. And the fewer the equilibrating options the "entitlement-weakening" judge has available, the lesser the extent of that judge's equilibrating advantage.

Having said all of that, we should be careful not to overstate trans-substantivity's importance. Its effects are limited by an oft-present disconnect between rhetoric and reality: even where procedural and remedial rules purport to apply without differentiation across varying substantive domains, those same rules will remain subject to manipulations and adjustments that, as a real-world matter, do not extend beyond particular substantive domains.¹¹⁸ Judges might, for instance, be more likely to apply an especially restrictive version of Article III standing principles in national-security cases but not in election-law cases.¹¹⁹ They might be more inclined to find nonjusticiable political questions

¹¹⁷ See Marcus, *supra* note 115, at 379 ("Rules designed to apply equally across doctrinal categories require a level of abstraction that prevent[s] them from explicitly expressing or manifesting a judgment as to the value of one area or another of substantive law."). There is an analogy here, albeit somewhat rough, to Justice Jackson's defense of *generality* as a desideratum of substantive lawmaking. See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) (noting that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally" and that "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected").

¹¹⁸ And that is to say nothing of procedural and remedial rules that are, by their own terms, substance-specific in application. See Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 673–78, 688 (characterizing First Amendment overbreadth doctrine and taxpayer standing doctrine as reflecting explicitly substance-specific glosses on otherwise generally applicable rules).

¹¹⁹ See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1071 (2015) (noting that Article III standing doctrine, although "aspir[ing] to trans-substantivity," nonetheless "fractures along substantive lines in important, identifiable categories of cases"). Compare, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (no standing to challenge NSA surveillance pro-

in cases involving partisan gerrymandering than in cases involving race-based gerrymandering.¹²⁰ Courts and judges might more often find violations of clearly established law in cases involving free speech claims than in cases involving excessive force claims.¹²¹ And so forth.¹²² Simply put, some rules may turn out to be far more trans-substantive on the books than they are on the ground. And the less trans-substantive these rules turn out to be on the ground, the less often they will deter courts from pursuing the sorts of equilibrating adjustments that undergird the entrenchment asymmetry itself.

In addition, the trans-substantive scope of procedural and remedial rules might sometimes have the effect of incentivizing rather than deterring equilibrating adjustments. Sometimes, to be sure, the trans-substantive effects of a contemplated alteration to the law will suffice to dissuade judges from acting on an equilibration impulse: a judge otherwise inclined to shut down a disfavored legal entitlement may ultimately decide to stand pat for fear of undercutting other legal entitlements that the same judge supports. Under other circumstances, however, an adjustment's amplified effects will fail to deter, either because the equilibrating judge simply fails to anticipate the down-the-road effects of a one-off decision, or because the judge views those widespread effects as all the more reason to make the contemplated change. (If, say, a judge dislikes 80% of the entitlements that depend on a given remedial rule, then the judge may regard damage done to the favored 20% as a price well worth paying for the damage done to the disfavored 80%.) When a single adjustment to one entitlement generates significant spillover effects across others, the prospect of spillover may sometimes increase rather than reduce the attractiveness of the change to the judge who mulls it over.

gram), *with* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 161 (2014) (standing to challenge state prohibition on false statements during political campaigns).

¹²⁰ *Compare, e.g.,* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (holding partisan gerrymandering claims to present nonjusticiable political questions), *with id.* at 2488 (noting that “[r]acial discrimination in districting . . . raises constitutional issues that can be addressed by the federal courts”).

¹²¹ *Cf. Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (holding that factual specificity in defining the “clearly established law” is “especially important in the Fourth Amendment context, where the Court has recognized that ‘it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts’” (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001))).

¹²² *See, e.g.,* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 48 (2010) (“Many, if not most, of the Federal Rules [of Civil Procedure] are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges. To that extent, they are only superficially uniform and superficially transsubstantive.”).

III. OVERCOMING THE ASYMMETRY

The previous Part considered various ways in which basic features of public-law doctrine contribute to the asymmetric entrenchment of legal entitlements. That Part concluded that the extent of the asymmetry is likely to vary from context to context, affecting some legal entitlements more acutely than others. But even where the asymmetry exists in especially severe form, “entitlement-strengthening” judges might still find ways of fighting back against it.¹²³

This Part in particular considers three potential means by which judges might manage to pursue and protect claimant-friendly changes to their preferred entitlements, overcoming (or at least mitigating) the competitive advantage that their “entitlement-weakening” counterparts might otherwise enjoy. First, “entitlement-strengthening” judges might attempt to compensate for an entitlement’s low availability by scaling upward *the value* of its underlying remedy.¹²⁴ Second, judges might exploit “definitional linkages” that exist across an entitlement’s component requirements in an effort to undo the effects of an “entitlement-weakening” change.¹²⁵ And finally, such judges might respond to the weakening of one entitlement by developing and propping up other, “substitute” entitlements that help to promote values and objectives associated with the entitlement being undermined.¹²⁶

A. *Scaling Remedies Upward*

We have thus far described legal entitlements on the assumption that they govern access to remedies of a fixed and unchangeable value; we have assumed, in other words, that equilibrating judges can alter the availability of an entitlement’s underlying remedy, but not the overall value of the remedy itself. Under some circumstances, that assumption makes sense: it is difficult (though perhaps not impossible) to imagine reforms to the declaratory judgment remedy that might render it more or less desirable for claimants to secure,¹²⁷ just as it is difficult (though perhaps not impossible) to imagine reforms to the exclusionary rule that would render an act of evidentiary exclusion more or less valuable to the defendant in a criminal case. But other remedies do not so obviously operate in such a binary on/off fashion—they enjoy a sort of scalability

¹²³ See discussion *supra* Part II.

¹²⁴ See discussion *infra* Section III.A.

¹²⁵ See discussion *infra* Section III.B.

¹²⁶ See discussion *infra* Section III.C.

¹²⁷ Although, one possibility might involve the extent to which a declaratory judgment is given issue preclusive effect. See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1113–20 (2014) (discussing the possibility that declaratory judgments carry “less issue-preclusive effect” than injunctions, though noting that this position currently enjoys only “slender support”).

that courts might also try to manipulate on behalf of their entitlement-specific aims. Monetary relief can be made more or less valuable through alterations to, say, the rules governing permissible ratios for punitive damages,¹²⁸ the evidentiary prerequisites for presumed damages,¹²⁹ and the methods of quantifying compensatory harm.¹³⁰ Injunctions can be more or less valuable through rules governing the consequences of noncompliance,¹³¹ the specificity and duration of their dictates,¹³² and the scope of their applicability.¹³³ Where these and other remedies come into play,¹³⁴ courts can pursue doctrinal adjustments that affect not only the frequency with which a remedy issues, but also the costs to the government and benefits to the plaintiff that flow from the remedy's issuance.

The scalability of remedies might sometimes afford “entitlement-strengthening” judges a useful means of overcoming the entrenchment asymmetry. Consider again our two hypothetical judges: Generous, who favors a particular entitlement and wants to do everything possible to maximize its availability, and Stringent, who disfavors that entitlement and wants to do everything possible to minimize its availability. As we have already seen, Generous is less well-positioned than Stringent to manipulate the entitlement’s *availability* in the desired direction. But consider now the possibility that Generous and Stringent can also manipulate the *value* of the remedy at the end of the chain. That possibility gives Generous a new means of resisting Stringent’s efforts to make the entitlement go away. Even where the entitlement only rarely is awarded, Gen-

¹²⁸ See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996).

¹²⁹ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

¹³⁰ See, e.g., *Carey v. Phipus*, 435 U.S. 247, 264 (1978) (“[A]lthough mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”).

¹³¹ See, e.g., Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1438–40 (2015); see also *Spallone v. United States*, 493 U.S. 265, 276 (1990) (noting that a judge’s choice of sanction for contempt is limited to using “the least possible power adequate to the end proposed” (internal quotation omitted)).

¹³² See Rendleman, *supra* note 131, at 1437 (“Even after the judge decides to grant the plaintiff an injunction, the question of timing remains.”).

¹³³ See, e.g., John M. Golden, *Injunctions as More (or Less) Than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1401–02 (2012) (noting that “injunctions can take any of a number of different shapes having differing degrees of effectiveness” and that “[e]ven if there is no debate over the timing and duration of an injunction, there can be debate over an injunction’s scope—i.e., over the extent and nature of the matter and activities that an injunction forbids or requires”).

¹³⁴ To take another example, the rules regarding attorney’s fees might be similarly manipulated to incentivize (or not incentivize) the bringing of constitutional cases. See Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (“Attorney’s fees are the fuel that drives the private attorney general engine.”).

erous can at least strive to ensure that the awarding of the entitlement is a very big deal.

This matters in two respects. First, scaling the remedy upwards allows Generous to ensure that the entitlement continues to deter government action that would violate the operative substantive rule. Suppose, for instance, that Stringent manages to reduce one of an entitlement's components' pass rates from 50% down to 10%, thus effectuating a fivefold decrease to the entitlement's overall availability, and suppose further that Generous lacks any means of restoring the entitlement's *availability* rate back to its original level. If the underlying remedy is scalable, then Generous can still prevent Stringent's fivefold reduction in the entitlement's availability rate from translating into a fivefold reduction in the remedy's overall deterrent force. Specifically, if Generous can effectuate a fivefold increase to the costs that the remedy inflicts on government actors—such as by prescribing an especially capacious measure of compensatory harm or by making a structural injunction especially costly for the government to comply with—then Generous might still end up neutralizing the deterrent-based effects of Stringent's initial change. From the government's perspective, an entitlement that yields a large number of small remedial costs may deter just as effectively as does an entitlement that yields a small number of large remedial costs: under both scenarios, the entitlement's (negative) expected value should remain largely the same.

In addition, by scaling an entitlement's remedy upward, Generous might also manage to expand the pool of claimants who choose to press for the entitlement in court. The size of that pool will depend not just on the probability of the entitlement's issuance but also on the size of the payoff that a prevailing plaintiff receives. As the entitlement's positive expected value increases, so too should the number of claimants who view an attempt to secure it as worth their while to pursue. And an increase in attempts should yield a corresponding increase in successful attempts, which should in turn help to ensure that more of the entitlement's intended beneficiaries ultimately get their rights vindicated in court.

That said, the "remedy scaling" strategy can only offer so much to the "entitlement-strengthening" judge. For one thing, remedies can just as easily be scaled downward as upward, and there is no immediate reason to suppose that "entitlement-weakening" judges would not be able to employ the same remedy scaling strategy to their own advantage.¹³⁵ What is more, even where

¹³⁵ Indeed, one might well conceptualize the Court's "entitlement-weakening" decision in *Brown II* as proceeding along these lines. See *supra* Section I.B.1. The Court in *Brown II* did not so much restrict the plaintiffs' *ability to obtain* injunctions against segregated schooling as it diminished the potency of the injunctions themselves. *Brown II* thus equilibrated against *Brown I* by effectively scaling *downwards* the value of the remedy that claimants could seek and obtain.

an “entitlement-strengthening” judge succeeds at scaling a remedy upwards, the “entitlement-weakening” judge might still counteract that change by adjusting some other component’s pass rate (and thus the entitlement’s overall availability) all the way down to 0%. (Once an entitlement becomes wholly unavailable to claimants, its positive expected value to the claimant and negative expected value to the government will always be equal to \$0.00.) And finally, there may at some point emerge practical constraints on the extent of upward scaling. Civil fines and damage awards can only go up so far; beyond that, losing parties will not be able to pay them. Similarly, injunctive remedies can only be rendered so intrusive and wide-ranging; beyond that, the costs of enforcement will overwhelm the overseeing court. Some remedies may be scalable but few if any remedies are infinitely so. And once the remedy’s value reaches its practical upper bound, further compensating adjustments may become impossible for the “entitlement-strengthening” judge to pursue.

B. Exploiting Definitional Linkages

A second means of overcoming the asymmetry would involve the creation and manipulation of linkages and dependencies across an entitlement’s constituent components. We have thus far spoken as if doctrinal adjustments to one component will leave all other components of the entitlement unaffected: expanding the remedy attached to a right will not make it any easier for the claimant to demonstrate a violation of the right, lessening the standing requirements associated with a particular remedy will not make it easier for the claimant to show that the remedy ought to issue, expanding the substantive scope of a right will not make it easier for the claimant to allege an Article III injury-in-fact, and so forth. But this assumption may not always be true. The component requirements of a legal entitlement might sometimes interrelate in such a way that renders the claimant- or government-friendliness of one such requirement at least partially dependent on that of another. And where that is so, “entitlement-strengthening” judges should find themselves at somewhat less of a competitive disadvantage.

Imagine, for instance, a tug of war between “entitlement-weakening” and “entitlement-strengthening” judges concerning the availability of the damages remedy to victims of unconstitutional acts of police brutality.¹³⁶ Suppose that, in an effort to diminish plaintiffs’ ability to obtain this entitlement, the “entitlement-weakening” judge manages to adjust the qualified immunity standard in a government-friendly direction, adopting a significantly more restrictive definition of what it means for a rule to be “clearly established.” (Qualified

¹³⁶ See, e.g., *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

immunity doctrine, recall, permits monetary recovery against only those executive officials who violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹³⁷) And suppose further that the “entitlement-strengthening” judge, displeased with this adjustment to the entitlement’s remedial component, decides to equilibrate against it by rendering its substantive component (i.e., Fourth Amendment prohibitions on excessive force) more claimant-friendly than had previously been the case.

By now we know the drill: all else equal, the initial, government-friendly adjustment to qualified immunity doctrine will be difficult (if not impossible) to neutralize via a subsequent, claimant-friendly adjustment to excessive force doctrine. But let us now relax the assumption that the substantive and remedial components are doctrinally independent. Doing so makes sense here. After all, in changing the substantive standards governing what counts as excessive force, a court alters not just the likelihood with which a subsequent plaintiff can show that a use of force was unlawful, but also the likelihood with which that plaintiff can show that the unlawfulness was clear.¹³⁸ The clearly established law requirement, in other words, incorporates by reference the substantive standards of the excessive force rule; the more precise and exacting those standards become, the harder it is for a defendant to avoid liability for a demonstrably unlawful act. And that means that some claimant-friendly adjustments to the substantive law should automatically effectuate parallel, claimant-friendly adjustments to the remedial law as well.

In other words, the definitional linkages that exist across qualified immunity doctrine and Fourth Amendment excessive force doctrine enable the “entitlement-strengthening” judge to secure two doctrinal adjustments for the price of one.¹³⁹ In this context, altering the scope of the substantive law neces-

¹³⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹³⁸ Indeed, that seems doubly true in this particular context, given that both the substantive rule and the remedial rule turn on considerations of reasonableness. See John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 861 (2010) (“Given that the underlying right incorporates all these potentially exculpatory considerations, the role of qualified immunity in excessive force cases is not at all obvious.”). But see *Saucier v. Katz*, 533 U.S. 194, 204 (2001) (insisting that “[t]he inquiries for qualified immunity and excessive force remain distinct”).

¹³⁹ Constitutional tort litigation is by no means the only context in which definitional linkages of this sort might arise. For another example, consider the oft-cited relationship between the political question doctrine and judgments on the merits. In particular, the question of whether a constitutional challenge involves a “textually demonstrable commitment” of an issue to another branch of government will often necessarily implicate the question of whether that branch has in fact exceeded constitutional limits on its authority. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (“[A]nalysis of the ‘textual commitment’ under Art. I, § 5 . . . has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution. . . . Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.”).

sarily means altering the stringency of its accompanying remedial rules. The “entitlement-strengthening” judge does not need to make any formal changes to qualified immunity doctrine for it to operate as a less formidable barrier to relief. Because the applicability of the qualified immunity rule depends on the applicability of the excessive-force rule, a single, claimant-friendly adjustment to excessive-force doctrine should yield additionally claimant-friendly benefits within the remedial law as well.

To be sure, definitional linkages of this sort can be exploited in either direction. Just as our “entitlement-strengthening” judge might manage to expand both the right and remedy with a single, claimant-friendly change to substantive law, so too might an “entitlement-weakening” judge manage to secure simultaneous movements in the opposite direction. But even if definitional linkages are equally susceptible to “entitlement-weakening” and “entitlement-strengthening” change, “entitlement-strengthening” judges should tend to benefit more as the number of linked and interdependent component requirements increases.

That point should be apparent when one recalls that the magnitude of the entrenchment asymmetry depends on the total number of component requirements that determine the entitlement’s availability.¹⁴⁰ If an entitlement’s availability is dictated by only one component requirement—i.e., a “holistic” amalgam of procedural, substantive, and remedial rules—then the asymmetry will vanish altogether. If the entitlement consists of three components, then the asymmetry should start to emerge. And the gulf will widen still as the entitlement becomes more disaggregated and compartmentalized. Thus, all else equal, an “entitlement-weakening” judge would prefer for an entitlement’s availability to depend on as many component requirements as possible.

And when components become definitionally interdependent—when the applicability of one component requirement depends on both its “own” doctrinal rules and also the doctrinal rules of another component requirement—it becomes less plausible to characterize those components as genuinely separate and distinct from one another.¹⁴¹ Rather, two definitionally linked sets of doctrinal rules will start to behave as if they had fused to form a single component requirement governed by a unitary body of law. Thus, by creating and

¹⁴⁰ For further discussion of this point, see *supra* Section II.A.

¹⁴¹ A related example concerns the “irreparable harm” and “inadequate remedy at law” requirements of the four-factor test for permanent injunctions. See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Several commentators have noted that the two tests are so closely interrelated as to essentially operate as “one and the same” legal requirement. See, e.g., John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 639 (2016). And as courts “tend overwhelmingly to generate identical outcomes through their analysis of the separate prongs[.]” the *eBay* four-factor test can really be understood as involving three factors instead. *Id.*

strengthening definitional linkages between an entitlement's component requirements, courts can effectively reduce the number of component requirements on which an entitlement's availability depends. For instance, the "damages-for-excessive-force" entitlement can be described as including one substantive excessive force component and another remedial qualified immunity component. But if the two components consistently move together, it may be more accurate to characterize the entitlement as including a single, "excessive-force-qualified-immunity" component governed by a hybridized body of right-remedy law. The greater the number of interdependent components within an entitlement, the lesser the number of independent components. And the lesser the number of independent components, the lesser the extent of the "entitlement-weakening" judge's advantage.

C. Propping Up Substitute Entitlements

The entrenchment asymmetry applies to the availability of individual legal entitlements. But the world is populated by many such entitlements, and the asymmetry itself tells us nothing about how these entitlements might develop and behave as an overall, collective whole. There are lots of rights out there and lots of remedies with which to enforce them. Even if each individual entitlement is itself more vulnerable to contractionary rather than expansionary change, the sum total of such entitlements might continue to afford claimants a variety of different avenues of constitutional redress.

That observation points the way to another potential means by which claimant-friendly judges might sometimes manage to overcome the entrenchment asymmetry itself. Even where the asymmetry renders one particular entitlement especially susceptible to erosion, "entitlement-strengthening" judges might nonetheless manage to rely on other "substitute" entitlements as an alternative means of vindicating the vulnerable entitlement's underlying values and priorities. If multiple, nominally separate legal entitlements provide equally viable means of effectuating the same underlying interests, then proponents of those interests need only ensure that one of the substitutes remains available. In this way, substitute entitlements might enable "entitlement-strengthening" judges to flip the script on the entrenchment asymmetry, giving the proponents of an entitlement multiple alternative means of promoting a set of legal objectives, while imposing on the opponents of that entitlement the more daunting task of having to undermine every one of the substitutes.

1. Substitute Remedies

One immediately evident means of propping up substitute entitlements involves the use of multiple remedies as alternate means of enforcing the same underlying right. The entrenchment asymmetry will often render "entitlement-

strengthening” judges powerless to respond to an “entitlement-weakening” decision within the particular remedial context in which that decision arises. If an earlier decision makes it difficult for claimants to obtain damages against government officials who unlawfully search their homes, an “entitlement-strengthening” judge might be unable to equilibrate against that decision by, say, eliminating a procedural prerequisite to the bringing of such an action in the first place. But if other remedies furnish an equally viable means of vindicating the same right, an “entitlement-strengthening” judge might still be able to prop up a substitute entitlement instead. Restrictions on, say, “monetary relief for the victims of unlawful searches” could be met with a strengthening of the exclusionary rule for unlawful-search claims in criminal cases, just as restrictions on, say, post-conviction relief for claimants asserting ineffective assistance claims could be met with the recognition of a special cause of action for a damages remedy instead. Where doctrinally distinctive remedies offer at least roughly interchangeable avenues for enforcing the right in question, the proponent of the right need only ensure that one such remedy remains widely available to the right’s intended beneficiaries. Opponents of the right, by contrast, must close off all possible paths to relief.¹⁴²

But relying on substitute remedies in this way will not always yield a successful strategy for overcoming the asymmetric entrenchment of entitlements. For one thing, certain types of substantive claims tend to accompany specific types of remedial requests. Fourth Amendment-based excessive force claims, for instance, almost always accompany after-the-fact requests for monetary damages;¹⁴³ *Miranda* claims are almost always raised as a defense to a criminal prosecution;¹⁴⁴ Sixth Amendment-based ineffective assistance of counsel claims almost always accompany post-conviction habeas corpus petitions;¹⁴⁵

¹⁴² A good example might involve the “legal fiction” of *Ex parte Young*, 209 U.S. 123 (1908), which, by allowing suit against individual officers, created viable substitutes for various entitlements that previously depended on suits against the State (and that the Court had previously weakened with its decision in *Hans v. Louisiana*, 134 U.S. 1 (1890)). See Henry Paul Monaghan, Commentary, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 126–32 (1996) (discussing the continuing effects of the *Young* decision).

¹⁴³ Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 920 (2010) (“Fourth Amendment claims challenging police officers’ use of excessive force cannot be remedied by exclusion because such conduct is unlikely to yield evidence. Without § 1983 damages, there is no other vehicle for constitutional enforcement.”).

¹⁴⁴ See *Miranda v. Arizona*, 384 U.S. 436 (1966); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 471 (2012) (“[V]ery few claims of *Miranda* violations are in fact litigated in the context of money damages actions under § 1983 when compared with the scores of *Miranda* decisions raised in criminal proceedings.”).

¹⁴⁵ Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) (“Although defendants can theoretically raise ineffective assistance of trial counsel claims on direct appeal, the vast majority of jurisdictions do not allow defendants to open or supplement the trial court record to support these claims.”); see

and so forth.¹⁴⁶ For these “single-remedy” rights, propping up remedies that are infrequently (if ever) used to enforce the rights will do little to mitigate “entitlement-weakening” encroachments on the primary remedy itself.

In addition, even for genuinely “multiple-remedy” rights, the opening up of one remedial avenue in response to the closing of another may not always prove to offer a genuine substitute for the eliminated entitlement. Multiple, different remedies may all help to promote the interests associated with a particular substantive right, but each individual remedy does so in materially different ways. Suppose, for instance, that an initial decision reduces the extent to which claimants can secure compensation for past abridgements of their free-exercise rights. Expanding the availability of prospective relief for free-exercise violations might help to offset the effects of the earlier weakening of the damages remedy in free-exercise cases. But the substitute entitlement will not do anything to further the compensatory or restitutionary interests of claimants who, having already suffered an abridgement of their free-exercise rights, seek after-the-fact redress from the courts.¹⁴⁷ Suppose similarly that an equilibrating court makes monetary relief more widely available to victims of unlawful searches, so as to counteract the effects of an earlier contraction of the exclusionary rule. The compensating adjustment may help to restore the deterrent force of Fourth Amendment-based privacy protections, but it will not do anything to alleviate the injustice and unfairness felt by those who suffer convictions based on unlawfully acquired evidence. “Entitlement-strengthening” adjustments within other remedial contexts may help to offset the effects of a particular entitlement’s demise. But if each unique entitlement furthers its own unique set of interests, the offsetting effect will inevitably remain partial and incomplete.¹⁴⁸

also Polk Cty. v. Dodson, 454 U.S. 312, 320–22 (1981) (holding that a public defender does not act “under color of state law” for purposes of establishing civil liability under § 1983).

¹⁴⁶ See Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 308 (2015) (“[I]n constitutional litigation, the availability of multiple remedial avenues is the subject of resistance, not acceptance.”).

¹⁴⁷ See Chen, *supra* note 143, at 916 (“[W]hen the Court precludes or imposes burdens on § 1983 damages claims, it offers no meaningful federal alternative for relief.”).

¹⁴⁸ Professor Leah Litman has highlighted one respect in which the existence of multiple remedial avenues might end up undercutting, rather than promoting, the overall enforcement of a given constitutional right. Specifically, such an arrangement might give rise to “a kind of shell game, where the Court looks at each remedial context separately, and denies one remedy based in part on an unjustified presumption that another remedy will be available to vindicate the underlying right in a different context.” Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1528 (2018).

2. Substitute Rights

Rather than focus on remedies, a second version of the substitution strategy might look for substitutes within the substantive law itself. Specifically, where an initial decision weakens a legal entitlement by contracting the scope of its underlying substantive right, a supporter of that entitlement might respond to the decision by propping up some other legal right that safeguards the same underlying interests and values. If, for instance, an initial decision has the effect of weakening free-exercise protections for victims of religious discrimination, an “entitlement-strengthening” court might respond by bolstering equal-protection-based limits on similarly discriminatory acts.¹⁴⁹ Similarly, if an initial decision has the effect of weakening Fourth Amendment-based restrictions on police brutality, an “entitlement-strengthening” court might attempt to bolster substantive due process prohibitions on similar conduct instead.¹⁵⁰ And similar efforts might span the boundaries of constitutional and non-constitutional law: claimant-friendly judges might compensate for “entitlement-weakening” diminutions of the Confrontation Clause right by pursuing “entitlement-strengthening” expansions of evidentiary hearsay protections;¹⁵¹ they might compensate for “entitlement-weakening” diminutions of Fourth Amendment restrictions on electronic surveillance by pursuing “entitlement-strengthening” expansions of statutory prohibitions on wiretapping;¹⁵² they might compensate for “entitlement-weakening” diminutions of free-exercise rights by pursuing “entitlement-strengthening” expansions of the Religious Freedom Restoration Act;¹⁵³ and so forth.¹⁵⁴ In short, where doctrinal redundancies arise within the substantive law,¹⁵⁵ those redundancies might lay the groundwork for the development and deployment of substitute entitlements.¹⁵⁶

¹⁴⁹ See Hessick, *supra* note 105, at 648 (“The two clauses each prohibit government discrimination against individuals based on religion, and they each have their own doctrines to enforce that limitation.”).

¹⁵⁰ Cf. Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 565 (2008) (“Arrestees and pretrial detainees whose claims do not fall under the Fourth Amendment or the Eighth Amendment may pursue relief under substantive due process.”).

¹⁵¹ See, e.g., *California v. Green*, 399 U.S. 149, 155 (1970) (“[H]earsay rules and the Confrontation Clause are generally designed to protect similar values . . .”).

¹⁵² Kerr, *supra* note 107, at 850–51.

¹⁵³ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–32 (2014).

¹⁵⁴ See Coenen, *supra* note 111, at 724–25 (highlighting additional examples of nonconstitutional norms that help to further values and interests associated with constitutional provisions).

¹⁵⁵ See generally Hessick, *supra* note 105, at 648 (highlighting instances in which “two separate doctrines protect the same values”).

¹⁵⁶ See *id.* at 654 (“[R]edundancy increases protections across cases by reducing the consequences of an appellate decision that limits or abolishes a doctrine.”); cf. Golden, *supra* note 141, at 709 (noting that a redundant doctrine can sometimes operate as a “backstop or safety valve” for other rules).

This strategy too, however, may ultimately yield benefits that are more theoretical than real. To begin with, not all substantive rights exist alongside fully redundant counterparts: many such rights lack obvious substitutes, and even where such substitutes do arguably exist, the overlap is often partial and incomplete.¹⁵⁷ In addition, overlapping substantive rules will not afford much value to “entitlement-strengthening” judges when, as is often the case, they end up operating as linked and codependent requirements.¹⁵⁸ It may be true, for instance, that the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Religion Clauses create similar safeguards against religious discrimination, but courts often do not treat these clauses as independent and self-contained fonts of rights-based protection. Rather, courts simply effectuate and enforce a single doctrinal “rule” against religious discrimination that the relevant clauses are said to support.¹⁵⁹ It may also be true that Fourth and Eighth Amendment-based protections against physically abusive treatment of arrestees and/or incarcerated persons find a potential substitute in “substantive due process”-based protections of bodily autonomy. But that is not of much significance given courts’ frequent refusal to entertain substantive due process claims in cases otherwise covered by the more specific guarantees.¹⁶⁰ Where substitute rights are linked together in this way, they lose much of their utility as a means of counteracting “entitlement-weakening” change. Under these circumstances, propping up the substitute entitlement becomes functionally indistinguishable from propping up the original entitlement, a task fully subject to doctrinal equilibration and the asymmetry to which it gives rise.

¹⁵⁷ To take one simple example, the protections of the Free Exercise Clause apply against both the state and federal governments, whereas the Religious Freedom Restoration Act applies only against the federal government. See *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997).

¹⁵⁸ See Hessick, *supra* note 105, at 653 (noting that “there is always some risk that courts will treat redundant doctrines as codependent”). A related phenomenon involves the court deriving rules and decisions from “the joint decisional force of two or more constitutional provisions.” See Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016).

¹⁵⁹ See, e.g., *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257–58 (10th Cir. 2008) (noting that, although the claimant had raised “claims under three different constitutional clauses governing religious discrimination, all of them draw on . . . common principles,” and going on to analyze the claims under the same general test).

¹⁶⁰ See *Graham*, 490 U.S. at 395 (holding that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach”); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (noting that “*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process”); see also *Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (“[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” (internal citation omitted)).

3. Defensive Enforcement

A final substitution strategy might involve the enforcement of rights as shields rather than swords.¹⁶¹ Most of the entitlements we have thus far discussed involve the offensive invocation of rights in civil cases, with plaintiffs and petitioners pointing to a legal right as a reason why courts ought to do something (e.g., award damages, enjoin unlawful conduct, issue declaratory judgments, grant a habeas petition, etc.) on their behalf. But rights can also be invoked defensively in criminal cases and other government enforcement actions, with defendants pointing to a right as a reason why courts should not allow the government to go forward with an action that the government is trying to undertake.

Defensively enforceable legal entitlements—entitlements such as, say, the “power of a criminal defendant to avoid prosecution for criticizing the government”—may prove a useful means of resisting the entrenchment asymmetry because such entitlements do not often carry as many prerequisites to their enforcement. Criminal and civil defendants, for instance, need not do anything special in order to satisfy Article III standing requirements,¹⁶² they need not demonstrate an explicit or implicit cause of action that authorizes the assertion of their defense,¹⁶³ and they need not clear many (if any) remedial hurdles on the way to persuading courts to issue the “sanction of nullification.”¹⁶⁴ To be sure, some procedural and remedial prerequisites may still come into play. Rights-based defenses must be raised in accordance with the applicable rules of criminal or civil procedure;¹⁶⁵ third-party standing requirements may limit defendants’ ability to invoke the rights and interests of parties not before the courts;¹⁶⁶ evidentiary rules may limit discovery on factual questions necessary to prove an affirmative defense;¹⁶⁷ waiver and forfeiture rules will sometimes

¹⁶¹ See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532–33 (1972).

¹⁶² See, e.g., *Bond v. United States*, 564 U.S. 211, 217 (2011) (noting that, in criminal cases, a defendant’s “challenge to her conviction and sentence ‘satisfies the case-or-controversy requirement, [given that] the incarceration constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction’” (internal alterations omitted) (quoting *Spencer v. Kemna*, 523 U.S. 1 (1998))).

¹⁶³ See, e.g., FED. R. CRIM. P. 12(b)(1) (“A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.”).

¹⁶⁴ Dellinger, *supra* note 161, at 1532.

¹⁶⁵ See, e.g., FED. R. CRIM. P. 12.

¹⁶⁶ See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”).

¹⁶⁷ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 461–71 (1996) (limiting criminal defendants’ power to obtain discovery on selective prosecution claims).

prevent defendants from raising certain types of defenses;¹⁶⁸ and the harmless error rule will limit an appellate court's power to consider allegations of procedural error at a criminal trial.¹⁶⁹ Even so, the uniquely defensive posture of the claimant's position might sometimes tend to reduce the number of component requirements bound up in the relevant legal entitlement and thus, along with it, the entitlement's vulnerability to contractionary legal change.

Once again, however, there arises the question of how adequately a defensive version of an entitlement can operate as a substitute for its offensively enforceable counterpart. For one thing, many substantive rights may be practically impossible to assert in a defensive posture. The government can often violate legal rights without bringing a full-scale criminal prosecution—as might happen, for instance, when a speaker is yanked off the platform (but thereupon never arrested), when the unlawful search of a home yields no incriminating evidence, or when persons already incarcerated are subject to abusive treatment. These and other actions will create material legal harms separate and apart from any judicial proceeding that the right might be used to block, and they therefore will be largely immune to defensive remediation.¹⁷⁰ In addition, other such rights—though theoretically available as a shield against coercive governmental action—may prove elusive to enforcement and development given the would-be claimants' unwillingness to risk subjecting themselves to punishments and sanctions that would follow from a successful government enforcement action.¹⁷¹ In short, although “entitlement-strengthening” judges might sometimes be able to turn to shield-like legal entitlements to counteract “entitlement-weakening” changes to their sword-like counterparts, the shield-like substitute will not always succeed at vindicating the underlying interests in a manner that compensates for the original entitlement's demise.

IV. IMPLICATIONS

To recap briefly where we have been: Part I of this Article advanced the claim that the basic architecture of public-law doctrine often gives rise to an asymmetry between the proponents and opponents of legal entitlements, affording the latter a greater degree of power to equilibrate against unwanted

¹⁶⁸ See Coenen, *supra* note 111, at 703–07.

¹⁶⁹ *Chapman v. California*, 386 U.S. 18, 24 (1967).

¹⁷⁰ See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 326 (1988) (“[D]efensive remedies are inefficacious in dealing with practices that do not lead to criminal prosecutions.”).

¹⁷¹ *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2015) (“We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law” (internal quotation marks and alterations omitted)).

changes to the entitlement's overall availability.¹⁷² Parts II and III then expanded on (and to some extent qualified) this basic idea, with Part II highlighting additional doctrinal variables bearing on the overall magnitude of the entrenchment asymmetry,¹⁷³ and Part III identifying several ways in which "entitlement-strengthening" judges might attempt to overcome the asymmetry through indirect means.¹⁷⁴

The foregoing analysis suggests that the entrenchment asymmetry, though by no means an omnipresent feature of public-law doctrine and by no means the exclusive determinant of legal change over time, at least sometimes operates as a special impediment to the creation and preservation of robust legal entitlements. And that observation raises the final important question with which this Article engages: *why should we care?* The entrenchment asymmetry may well exist, and deducing its existence may involve some interesting theoretical imaginings, but if nothing of significance turns on its existence, it is hard to justify the effort.

As it turns out, I believe that thinking carefully about the entrenchment asymmetry can yield three different sorts of practically useful implications. First, at a descriptive level, recognizing the asymmetry may help to enrich our understanding of past doctrinal developments and to inform our predictions about future such developments.¹⁷⁵ Second, at a strategic level, recognizing the asymmetry might usefully inform decisions on the part of both judges and litigants about how best to allocate finite resources on behalf of their respective ideological goals.¹⁷⁶ And finally, at a normative level, recognizing the asymmetry might point the way to a more refined and nuanced assessment of the tradeoffs associated with the judicial project of articulating and enforcing public-law entitlements.¹⁷⁷

A. Descriptive Implications

At the most basic level, recognizing and understanding the entrenchment asymmetry might influence our perceptions of past doctrinal developments and our predictions about future ones. Consider the example of the Warren Court. Prior to the Warren Court's existence, as David Rudovsky has noted, the "[civil rights] landscape was quite barren."¹⁷⁸ There were "few of the landmark deci-

¹⁷² See discussion *supra* Part I.

¹⁷³ See discussion *supra* Part II.

¹⁷⁴ See discussion *supra* Part III.

¹⁷⁵ See discussion *infra* Section IV.A.

¹⁷⁶ See discussion *infra* Section IV.B.

¹⁷⁷ See discussion *infra* Section IV.C.

¹⁷⁸ David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1209.

sions establishing the constitutional rights that we today take for granted,” there was “no damages remedy for many constitutional violations,” and (not unrelatedly) there were “few advocacy or litigation-oriented organizations that promoted civil liberties or litigated these issues in the courts.”¹⁷⁹ Two decades later, that landscape looked radically different. Decisions like *Brown I*,¹⁸⁰ *Gideon v. Wainwright*,¹⁸¹ *Reynolds v. Sims*,¹⁸² *Brandenburg v. Ohio*,¹⁸³ and *Engel v. Vitale*¹⁸⁴ had produced an expanded array of constitutional rights for claimants to assert against government actors. Decisions such as *Monroe v. Pape*,¹⁸⁵ *Mapp v. Ohio*,¹⁸⁶ and *Brown v. Allen*¹⁸⁷ produced an expanded set of remedial tools with which these rights could be enforced.¹⁸⁸ And decisions such as *Baker v. Carr*¹⁸⁹ and *Flast v. Cohen*¹⁹⁰ helped to dismantle previously imposing justiciability-based barriers to the invocation of claimants’ rights in Article III courts. These and other reforms transformed the world of public-law litigation, rendering the federal judiciary a powerful defender of a number of newly recognized individual rights.

What new light, if any, does this Article shed on this familiar historical narrative? First, the entrenchment asymmetry’s existence helps to underscore the overall ambitiousness of the Warren Court’s agenda. That the Warren Court pursued so many different doctrinal innovations across so many different areas of the law is in and of itself a remarkable fact. But that fact is made all the more remarkable when one recognizes that the majority of those innovations proceeded against the grain of the asymmetry itself. What the Warren Court sought to accomplish was a large-scale, multi-front expansion of access to legal entitlements, and the bulk of its work thus involved the added levels of time, energy, and creativity that “entitlement-strengthening” efforts tend to require.

¹⁷⁹ *Id.* at 1208.

¹⁸⁰ 347 U.S. 483 (1954).

¹⁸¹ 372 U.S. 335 (1963).

¹⁸² 377 U.S. 533 (1964).

¹⁸³ 395 U.S. 444 (1969).

¹⁸⁴ 370 U.S. 421 (1962).

¹⁸⁵ 365 U.S. 167 (1961).

¹⁸⁶ 367 U.S. 643 (1961).

¹⁸⁷ 344 U.S. 443 (1953). *Brown v. Allen* predates Chief Justice Warren’s appointment to the Court by one year, but it would become “a critical tool in the Warren Court’s revolution in constitutional criminal procedure.” Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 563 (1992).

¹⁸⁸ The notable outlier here is *Brown II*—a remedial decision that served to undercut the efficacy of the right to which it attached. *See* 349 U.S. 294, 301 (1955). Another counterexample involves the Warren Court’s willingness to “den[y] retroactive application to a number of its boldest criminal procedure decisions.” Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 688.

¹⁸⁹ 369 U.S. 186 (1962).

¹⁹⁰ 392 U.S. 83 (1968).

More important, the asymmetry might also inform our understanding of what ended up happening next.¹⁹¹ Specifically, the asymmetry should render us not especially surprised by the successes that subsequent iterations of the Court realized in dismantling many of the Warren Court's "entitlement-strengthening" initiatives.¹⁹² Expansions of criminal procedure rights found themselves undercut by contractions of the exclusionary rule;¹⁹³ *Monroe v. Pape* found itself undercut by the development of absolute and qualified immunity doctrines;¹⁹⁴ *Brown v. Allen* found itself undercut by a host of newly recognized restrictions on post-conviction relief;¹⁹⁵ and so forth.¹⁹⁶ Having developed a host of new legal entitlements for claimants to pursue, the Warren Court simultaneously created numerous new places at which subsequent courts could and would manage to equilibrate back in the direction of "entitlement-weakening" change.¹⁹⁷ This was by no means a foreordained outcome, but the entrenchment asymmetry helped to stack the deck in its favor.

Turning our gaze to the future, we might also think about the entrenchment asymmetry when making predictions about the long-term successes and failures of the Court's now-solidly conservative majority. The constitutional agenda of this new majority is likely to include both "entitlement-weakening" and "entitlement-strengthening" objectives. Among the legal entitlements likely to be targeted for further weakening (and in some cases already substantially

¹⁹¹ None of which, to be sure, is to characterize the entrenchment asymmetry as the primary cause of these entitlements' eventual erosion. More than anything else, that development owes its existence to the changed composition of the federal judiciary in general and the Supreme Court in particular. Had judicial appointees of the late 20th and early 21st centuries remained steadfastly committed to the Warren Court's constitutional agenda, much more of that agenda would remain reflected in the law today; those appointees, however, were not so committed, and modern constitutional doctrine looks quite different as a result. But even granting the historically contingent nature of this development, we can still appreciate the extent to which the asymmetric entrenchment of entitlements helped to increase the odds of its outcome: the entrenchment asymmetry might not itself have ensured the demise of the Warren Court's legacy, but it certainly helped to render that legacy fragile from the start, and it helped to facilitate eventual attacks on that legacy by subsequent iterations of the Court.

¹⁹² Karlan, *supra* note 134, at 185–86 ("Remedial abridgment is a pervasive tool of the contemporary Supreme Court.")

¹⁹³ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) ("[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions.").

¹⁹⁴ See Chen, *supra* note 143, at 910.

¹⁹⁵ See Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 537–38 (1995).

¹⁹⁶ See Rudovsky, *supra* note 178, at 1200.

¹⁹⁷ See Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 688 ("Without overruling liberal decisions, a more conservative Court often attempted to reduce the social costs of the underlying rights . . . by introducing or stiffening justiciability or remedial doctrines that impede judicial enforcement.").

weakened) are those involving the right to an abortion, rights for LGBT individuals, and rights against partisan gerrymandering.¹⁹⁸ Among the entitlements likely to be targeted for further promotion are those involving rights against race-conscious admissions programs, the right to bear arms, and free speech-based rights against various forms of economic and commercial regulation.¹⁹⁹ Even if these changes are all readily realizable over the short term,²⁰⁰ the asymmetry gives us some reason to think that the “entitlement-weakening” planks of the new Court’s agenda are more likely to endure over the long haul. If and when the Court swings back in the other ideological direction, its new members should find themselves relatively well equipped to equilibrate against the new entitlements that their predecessors have created. But those same Justices may well encounter more difficulty when attempting to revive and revitalize the entitlements its predecessors had sapped of strength. Reestablishing, say, the right to an abortion in the wake of an overruled *Roe v. Wade* would require, at a minimum, the “un-overruling” of *Roe* itself.²⁰¹ Establishing a justiciable constitutional norm against partisan gerrymandering would require, at a minimum, an overruling of *Rucho v. Common Cause*, the articulation of a substantive standard to govern such claims, and the deployment of remedial mechanisms designed to help enforce it.²⁰² And all such efforts may well require even more than that, depending on how aggressively the Roberts Court manages to fortify its “entitlement-weakening” efforts against anticipated

¹⁹⁸ See Erwin Chemerinsky, *What’s at Stake if Kavanaugh Is on the Supreme Court*, ABA JOURNAL (Aug. 29, 2018), http://www.abajournal.com/news/article/chemerinsky_whats_at_stake_if_kavanaugh_is_on_the_supreme_court [<https://perma.cc/JGJ5-74MP>]; see also *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (erecting a categorical, justiciability-based barrier to the vindication of partisan gerrymandering claims).

¹⁹⁹ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 584–85 (2011) (Breyer, J., dissenting) (noting that because “ordinary regulatory programs can affect speech, particularly commercial speech[,] . . . to apply a ‘heightened’ First Amendment standard of review . . . would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives”). See generally Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (highlighting the Roberts Court’s increased willingness to use the First Amendment as a vehicle for vindicating challenges to economic regulation).

²⁰⁰ I am less sure as to whether, in the immediate term, the Roberts Court itself will find its own “entitlement-strengthening” initiatives more difficult to achieve than its “entitlement-weakening” initiatives. Generally speaking, this Article provides some basis for assuming that this would be the case, but the problem here is that so many of the present-day Court’s “entitlement-strengthening” initiatives will already receive the benefit of foundational work that prior decisions have already laid down. Justice Anthony Kennedy may have been a “moderating” influence on the Roberts Court with respect to certain issues, but he himself was on board with, and helped to lay the groundwork for, many of the “entitlement-strengthening” changes that the Court is likely to continue pursuing. See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

²⁰¹ 410 U.S. 113 (1973).

²⁰² 139 S. Ct. 2484.

countermeasures by future Justices. This is all just speculation, hazarded in the face of considerable uncertainty about what the future might hold. But if we are forced to render a prediction in the face of that uncertainty, the entrenchment asymmetry provides some reason to suspect that the Roberts Court's long-term legacy is more likely to be reflected in the old entitlements it manages to destroy rather than the new entitlements it manages to create.

B. Strategic Implications

The strategic implications follow directly from the predictive ones. If “entitlement-strengthening” changes are less likely than “entitlement-weakening” changes to persist through time, then that fact might usefully inform strategic decisions about the sorts of legal initiatives that litigants and lawyers should choose to prioritize over others. If, say, a public interest organization is equally worried about the potential dismantling of an entitlement it supports as it is about the potential bolstering of an entitlement it opposes, the entrenchment asymmetry might provide reason for that organization to dedicate more of its resources towards protecting the favored entitlement (and fewer of its resources towards quashing the disfavored entitlement). From the organization's perspective, the “entitlement-weakening” change poses a greater degree of long-term risk; that change, unlike its “entitlement-strengthening” counterpart, would prove more resistant to counteractive equilibration and would thus prove more likely to exert significant and unchanging influence over time.

A related point applies to the Supreme Court. The Court polices lower court adherence to its decisions and sometimes grants certiorari to correct erroneous or misguided lower court applications of established precedent.²⁰³ Paying heed to the entrenchment asymmetry, the Court might reasonably decide to monitor with special attention lower court applications of its “entitlement-strengthening” (as opposed to “entitlement-weakening”) precedents. The “entitlement-strengthening” precedents, after all, may not accomplish much if lower courts find ways to equilibrate around them, and the entrenchment asymmetry suggests that lower courts will often be able to do just that.

Again, I do not mean to oversimplify what are undoubtedly complex and multi-faceted decisions. One can certainly imagine scenarios in which the particularities of a certain “entitlement-strengthening” change—such as, for in-

²⁰³ See SUP. CT. R. 10 (noting that certiorari will be granted when, among other things, “a state court or a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court”); see also William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 26–27 (2015) (highlighting recent summary reversals by the Court that appear to have been motivated by a desire to correct lower court errors).

stance, its immediate, adverse effects on a vulnerable population—render it a far more serious threat to those who oppose it than any number of other “entitlement-weakening” changes that might be on the horizon. And it is equally possible to imagine other scenarios in which the particularities of a certain “entitlement-weakening” change—such as, for instance, the possibility that legislatures might act to counteract the change through the development of substitute, non-constitutional rights—render it a less serious threat than any number of “entitlement-strengthening” changes instead. The entrenchment asymmetry represents just one factor among many to consider when thinking about how best to allocate finite resources on behalf of or against the various constitutional initiatives working their way through the courts. But although the asymmetry itself will rarely demonstrate the obvious correctness of one decision over another, it might at least help to inform the overall strategic choice.

C. Normative Implications

Let us at long last consider an issue we have thus far avoided: is the entrenchment asymmetry a good or bad thing? The answer to this question depends largely on our attitudes towards judicial restraint.²⁰⁴ Specifically, proponents of judicial restraint—i.e., those who believe that courts should exercise special care before meddling in the affairs of governmental actors—may well regard the entrenchment asymmetry as a salutary check on unduly interventionist forms of judicial action.²⁰⁵ Robust public-law entitlements empower courts, at the behest of individual claimants, to prevent, curtail, punish, or otherwise act to constrain government actors’ efforts to achieve their own regulatory goals, and that is itself a power that courts could come to abuse. Thus, to the extent one harbors special worries about the over-enforcement of public-law entitlements—worries that courts will, if not properly restrained, arrogate to themselves an inappropriately active role in supervising legislatures, agencies, and other public officials—then one would have good reason to favor a

²⁰⁴ In one sense, of course, the answer to that question may also depend on our respective attitudes towards the particular entitlements that the asymmetry most acutely works to undermine. One might, for instance, characterize the asymmetry as a good thing as it facilitates the undoing of entitlements one disfavors while at the same time characterizing it as a bad thing as it facilitates the undoing of entitlements one likes. And because few of us embrace a “monolithic” preference for or against *all legal entitlements*, full stop, the asymmetry is unlikely to carry an obvious ideological valence in that particular sense. See Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 12, at 704 (“The need for particular remedies to vindicate particular rights needs to be judged on a right-by-right basis, often through a process of doctrinal equilibration.”).

²⁰⁵ See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA*, at xii (2005) (characterizing majoritarian judges as those who “want to reduce the role of the Supreme Court in American government by allowing the democratic process to work its will”).

doctrinal phenomenon that helps to undermine the enforcement of robust, court-empowering packages of remedies and rights.

That is the most straightforward normative case to be made on behalf of the entrenchment asymmetry. But there are at least two different ways of responding to it. The first is to contest the premise that judicial restraint is in fact such a uniformly good thing. One need not be a dyed-in-the-wool judicial activist to recognize that the value of judicial intervention depends a great deal on the circumstances in which it is demanded. And even if one generally favors judicial restraint as a worthy baseline posture for courts to assume, one might still recognize instances in which the risks of judicial passivity far outweigh the risks of judicial aggressiveness. And where that is so, the entrenchment asymmetry might impose undesirable costs on the sustained development and enforcement of normatively worthwhile restrictions on government action. That is not itself a refutation of the suggestion that the proponents of judicial restraint should tend to favor the asymmetric entrenchment of legal entitlements; but it at least helps to introduce some nuance into the overall normative equation.

The second and somewhat less obvious response to the restraint-based defense would attempt to flip the argument on its head. The restraint-based defense sees the value of judicial restraint as a reason to favor the asymmetric entrenchment of legal entitlements. But one might alternatively see the entrenchment asymmetry as a reason to attach less value to judicial restraint. If decisions that strengthen legal entitlements are more naturally prone to equilibration-based undoing, that fact might actually justify some amount of creativity and flexibility when it comes to establishing legal entitlements in the first place. The future possibility of equilibration, after all, somewhat lessens the practical stakes of recognizing a new legal entitlement; yes, the entitlement might veer too far in the activist direction, constraining useful forms of governmental conduct, running too far afoul of majoritarian preferences, and so forth. But if those consequences come about, then there will often remain additional means by which subsequent courts can rein in the entitlement's adverse effects. By contrast, a judicial decision not to vindicate public-law rights is less malleable going forward. If such a decision turns out to involve a problematic under-enforcement of valuable legal interests, future courts will be comparatively less able to mitigate those adverse effects. Again, that observation in and of itself hardly resolves the question of whether some court should or should not attempt to recognize a new legal entitlement in some future case. But it does at least highlight another dimension along which to evaluate the restraint-related tradeoffs that any such decision will pose.

CONCLUSION

Generally speaking, it is harder to build things up than to tear things down.²⁰⁶ Stadiums are harder to construct than to implode; origami is harder to fold than to shred; glass is harder to manufacture than to shatter; and gardens are harder to grow than to trample upon. My three-year-old daughter has no idea how to tie my shoes, but she can (and does) revel in untying them. My dog has no idea how to bake a cake, but he does know how to eat one. I could never program smartphones, but I am distressingly adroit at rendering them inoperable. Making useful things is a far more complicated task than rendering things useless, and we could identify countless other objects whose creation requires far more time, effort, and coordination than does their destruction.

In a way, that simple feature of everyday life captures the core intuition underlying the hypothesis I have here attempted to advance.²⁰⁷ Legal entitlements are human-made “things,” owing their existence to coordinated judicial efforts across multiple, different areas of the law. The recognition, enforcement, and vindication of these entitlements require sustained judicial intervention over time, whereas the non-recognition and/or non-vindication of these entitlements can be accomplished with less proactivity. Left to their own devices, previously recognized entitlements will start to wither on the vine; previously recognized “non-entitlements,” by contrast, will happily persist in their extant, non-functional forms. And as the design of these entitlements becomes more intricate and complex, with different aspects of their operation governed by specialized and compartmentalized bodies of procedural, substantive, and remedial law, this asymmetry should assume even starker relief. Legal entitlements are in this sense no different from the myriad other creations that humans bring into existence: cultivating them is hard; ruining them is easy.

To be sure, this Article’s thesis, like this basic life lesson, is subject to its own qualifications, limitations, and nuances. The entrenchment asymmetry may not always exist, its magnitude is context dependent, and it will often find itself overcome by other, more powerful forces that move in the “entitlement-strengthening” direction. But while we should resist the urge to oversimplify, we should also not lose the forest for the trees. In general, “entitlement-strengthening” initiatives will be more vulnerable to down-the-road resistance than will their “entitlement-weakening” counterparts, just as so many other products of human creation will be harder to create and maintain than they are

²⁰⁶ KACEY MUSGRAVES & TRENT DABBS, *Undermine*, on THE MUSIC OF NASHVILLE, SEASON 1, VOL. 1 (Big Machine Records 2012) (“[I]t’s a whole lot harder to shine than [to] undermine.”).

²⁰⁷ The point, I am afraid to say, applies to legal scholarship as well: law review articles are much harder to research and write than they are to poke holes in. What that means for the fate of this project I will leave for others to say.

to target and destroy. As the universe tends towards entropy,²⁰⁸ so too should the world of the law.

²⁰⁸ See HANS REICHENBACH, *THE DIRECTION OF TIME* 49–56 (1956).

