

THE CONSTITUTION IN TWO DIMENSIONS: A
TRANSACTION COST ANALYSIS OF CONSTITUTIONAL
REMEDIES

*Eugene Kontorovich**

INTRODUCTION.....	1136
I. TRANSACTION COSTS FOR CONSTITUTIONAL RIGHTS	1141
A. <i>Property and Liability Rules</i>	1142
B. <i>The Constitution in the Calabresi and Melamed</i> <i>Framework</i>	1144
1. <i>Transacting Constitutional Entitlements</i>	1144
2. <i>One Dimension?</i>	1145
C. <i>Valuation Difficulties</i>	1146
D. <i>Balancing Constitutional Transaction Costs</i>	1149
1. <i>The Matrix</i>	1149
2. <i>The Algebra</i>	1153
E. <i>Liberty Entitlements</i>	1155
1. <i>Bargaining Transaction Costs Usually Low</i>	1155
2. <i>Jury Service: An Example of High Bargaining</i> <i>Transaction Costs?</i>	1156
3. <i>Judicial Transaction Costs Always High</i>	1158
4. <i>The Limits of Liability Rules for Liberty</i> <i>Entitlements</i>	1158
II. THE THIRD AMENDMENT AND THE TAKINGS CLAUSE.....	1159
A. <i>Liability and Property Rules in the Takings Clause</i>	1161
1. <i>Forms of Protection</i>	1161
2. <i>Transaction Cost Justification</i>	1162
B. <i>Property and Liability Rules in the Third Amendment</i> ...	1164
1. <i>Forms of Protection</i>	1164

* Visiting Professor, University of Chicago Law School; Assistant Professor, George Mason University School of Law. Email: ekontoro@gmu.edu. The author thanks Abraham Bell, David Driesen, Richard Epstein, Shubha Ghosh, Daryl Levinson, David Lisitz, Nelson Lund, Giuseppe Dari-Mattiacci, Ariel Porat, and Maxwell Stearns for their thoughtful comments and criticisms, as well as participants in the University of Illinois College of Law Faculty Workshop, the Law and Economics Workshop at the Tel Aviv University Faculty of Law, and George Mason's Levy Workshop. The author also benefited from the financial support of George Mason's Law and Economics Center.

1136	<i>Virginia Law Review</i>	[Vol. 91:1135
	2. <i>Transaction Cost Justification</i>	1165
	C. <i>The Relationship Between the Third and Fifth Amendments</i>	1167
	D. <i>The Third Amendment and the Permissibility of Liability Rules</i>	1169
III.	STRUCTURAL LIABILITY RULES	1173
	A. <i>Procedural Due Process</i>	1174
	1. <i>The Sufficiency of Post-Deprivation Process</i>	1174
	2. <i>Transaction Cost Justification</i>	1176
	B. <i>Fourth Amendment Search and Seizure</i>	1177
	1. <i>A De Facto Liability Rule</i>	1177
	2. <i>Between the Third and Fifth Amendments: A Possible De Jure Liability Rule</i>	1179
	3. <i>Liberty Entitlements</i>	1181
IV.	LIABILITY RULES FOR GOVERNMENTAL ENTITLEMENTS	1181
	A. <i>The Constitution's "Rule Four"</i>	1183
	B. <i>Prior Restraint</i>	1184
	1. <i>The Doctrine</i>	1184
	2. <i>Transaction Cost Justification</i>	1185
	3. <i>Flipping the Entitlement</i>	1189
	C. <i>Bail</i>	1192
	1. <i>The Liability Rule</i>	1192
	2. <i>Transaction Cost Justification</i>	1193
	3. <i>Flipping the Entitlement</i>	1195
	CONCLUSION	1197

INTRODUCTION

CONSTITUTIONAL law exists in two distinct dimensions, only one of which is commonly recognized. The first dimension is that of substantive entitlements. The second is that of remedies—the manner in which entitlements are protected against forced transfers or destruction. A constitutional norm can only fully be understood when viewed simultaneously in both dimensions, where rights and remedies interact.

The creation of a substantive entitlement does not dictate how it should be protected, as Guido Calabresi and A. Douglas Melamed's article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* ("The Cathedral") famously showed

in the private law context.¹ Entitlements can be protected through property rules or liability rules.² Under a property rule, an entitlement can only be transferred with the owner's consent. The entitlement must be purchased in advance of a transfer; injunctions and punitive damages are available to prevent coercive takings. Liability rules, by contrast, permit nonconsensual takings of entitlements, but award the original owner compensatory money damages in a subsequent judicial proceeding. The choice between liability and property protection depends on whether transaction costs are high enough to hinder voluntary transfers of entitlements when such transfers would be socially efficient. Liability rules work best when transaction costs are relatively high.

Constitutional theory has almost entirely ignored this two-dimensional understanding of rights and their relation to remedies.³ Constitutional entitlements are commonly thought to require, by their very nature, nothing short of property rule protection.⁴ In

¹ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1089–93 (1972).

² Calabresi and Melamed also discuss inalienability rules, which bar the transfer of entitlements even with the consent of the owner. *Id.* This Article will leave inalienability rules to one side. The focus here is on the institutions under which constitutional entitlements are transferred; under inalienability rules, there can be no transfer. Moreover, few individual rights receive inalienability protection, the Thirteenth Amendment's ban on slavery being one of the few exceptions. Inalienability rules are more commonly attached to constitutional entitlements held by the government and are briefly discussed in that context. See *infra* note 120.

³ The notable exception is Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 Nw. U. L. Rev. 1143 (1999). Professor Merrill discusses, as a theoretical and normative matter, the advantages of creating a constitutional liability rule for certain types of commercial speech. *Id.* Along similar lines, an earlier article discussed the normative benefits of switching to a liability rule for liberty entitlements in certain types of national security emergencies. See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 Stan. L. Rev. 755 (2004). The present Article, by contrast, identifies *existing* constitutional liability rules.

⁴ See, e.g., Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 Yale L.J. 1335, 1339–40 (1986) (“If rights entail or secure liberties, . . . [t]he very idea of a ‘liability rule entitlement,’ that is of a right secured by a liability rule, is inconceivable.”); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1563 (1972) (arguing that liability protection “is inconsistent with a constitutional system”); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 93–94 (1988); David Luban, *The Warren Court and the Concept of a Right*, 34 Harv. C.R.-C.L. L. Rev. 7, 19–21 & n.36 (1999) (implying that the “only conceivable notion of constitutional rights” entails “prophylactic protection from potential infringements” and that

this view, the government can never lawfully take constitutional rights without the owner's consent. Someone facing a nonconsensual deprivation of rights is presumptively entitled to an injunction.⁵ Money damages for constitutional violations are resorted to as a second-best remedy when it is too late for an injunction. Limiting remedies to ex post money damages (thereby adopting a liability rule) is widely thought of as incompatible with constitutional values.

In a previous article, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*,⁶ I challenged this dominant view of constitutional law by showing that liability rules can be the best way to protect constitutional rights in the same circumstances that recommend liability rules in private law—when transaction costs are high enough to obstruct socially beneficial exchange. That article demonstrated the potential utility of liability rules by pointing to a situation—mass detentions in emergencies—where transaction costs can render property rules dysfunctional. The argument was primarily normative: it showed that a particular entitlement currently protected by property rules might in some situations be better suited to a liability rule.⁷

the Warren Court subscribed to such a property rule view of constitutional rights); James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 Mich. L. Rev. 1273, 1278 n.21 (1983) ("Damages [for unlawful searches and seizures] would be a kind of forced exchange, and however appropriate that may be in a commercial context where all things are in principle exchangeable, it would be incompatible with the idea of a right specifically against the government . . .").

⁵ See *United States v. Stanley*, 483 U.S. 669, 690 (1987) (Brennan, J., concurring in part, dissenting in part) ("[C]onstitutional violation[s] may be enjoined if and when discovered."); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in judgment) (noting the "presumed availability of federal equitable relief against threatened invasions of constitutional interests"); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . ."); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (same); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (same); see also Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 1008 (1998) ("In constitutional law . . . equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right.").

⁶ See Kontorovich, *supra* note 3.

⁷ Sovereign immunity can be a barrier to actions for money damages and thus to liability rules. Money damages are recoverable in suits against municipalities and their officials, in *Bivens* suits against federal officers, and where the sovereign has waived

This Article has a broader agenda. It will cast much of constitutional law in a new light by revealing how it *already* uses liability rules. Constitutional theory's insistence on property rule protection fails to describe how constitutional values are actually protected. The Article will locate liability rules in the First Amendment prior restraint doctrine, the Third Amendment, Fourth Amendment search and seizure rules, the Due Process Clauses, the Takings Clause of the Fifth Amendment, the Self-Incrimination Clause of the Fifth Amendment, and the Excessive Bail Clause of the Eighth Amendment. These doctrines and provisions take on new depth when one becomes aware of their liability rule component. The transaction cost perspective on constitutional law reveals previously unnoticed connections between doctrines and provides a new criterion for evaluating their strengths and weaknesses. An awareness of the transaction cost underpinnings of these doctrines should help courts to better administer them.⁸

In response to the widely held view that the Constitution itself mandates property rule protection for all entitlements, this Article will present new evidence that liability rules are entirely consistent with the Constitution. It will show that the oft-overlooked Third Amendment *explicitly* mandates property rule protection for the entitlement it defines, and that it is perhaps the only constitutional provision to do so. This is essential to understanding constitutional remedies, yet it has heretofore gone unnoticed. The Third Amendment's explicit property rule, read together with the Takings Clause's explicit liability rule, suggests that the Constitution does not *require* either type of protection for other entitlements. The one explicit property rule and the one explicit liability rule define the second dimension of constitutional law.

Part I will set up the theoretical foundations of the Article by explaining the concepts of liability and property rules, and their relations to transaction costs. It will also introduce judicial transaction costs. These are the costs attendant to judicial determination

its immunity—as the federal government has done for takings claims. The discussion in this Article will leave immunity issues to one side.

⁸To be sure, the choice between liability and property rules in constitutional law, as in private law, is not solely a function of transaction costs; it can also be a response to other types of concerns. But noting the difference in how entitlements are protected opens the door to understanding what, if anything, motivates the differential treatment.

of damages for rights violations, and they are generally higher for constitutional than for private law entitlements. Liability rules are appropriate when, roughly speaking, ordinary bargaining transaction costs are high but judicial transaction costs are relatively low. Judicial transaction costs are particularly high for liberty entitlements, which explains why liberty entitlements are almost never protected by liability rules. Part I will also address some objections to the applicability of the liability-property framework to constitutional entitlements.

Part II will discuss the constitutional entitlements that explicitly call for liability or property rule protection. This Part will explain how the Third Amendment explicitly announces a property rule for the entitlement it defines. Recognizing the Third Amendment as a property rule has several important implications for constitutional law. It shows—when considered alongside the well-known liability rule in the Takings Clause—that other constitutional entitlements can be protected by either property *or* liability rules, as the courts and Congress see fit. Part II will also show that while it sets a property rule baseline, the Third Amendment calls for liability rule protection in certain high transaction cost circumstances. Thus, the Constitution itself suggests that the decision about how an entitlement should be protected should turn at least in part on the transaction costs that would be involved in its transfer. Finally, this Part will explain that the Third Amendment's property rule has important implications for the much-debated question of regulatory takings: it suggests that compensation is required for partial takings of property.

Part III will show how several constitutional provisions and doctrines create liability rules for individual rights. These doctrines allow the government to provide a judicial hearing *after* it acts, thus creating de facto liability rules. This Part will focus on two examples: procedural due process and Fourth Amendment search and seizure rules. The Supreme Court has held that under certain circumstances, due process rights are not violated if the government provides remedies *after* taking the entitlement. These “adequate postdeprivation remedy” cases create liability rule protection for procedural due process rights. Similarly, under the Fourth Amendment, if the government were allowed to conduct unwarranted searches and seizures, a wrongful search, in practice, would

have to be remedied with money damages, characteristic of liability rules.

Part IV will explain how the government's entitlements are protected by liability rules in the free speech and bail contexts. The government can prohibit speech that falls outside the First Amendment's protection, such as obscenity: the government has a substantive anti-speech entitlement. Under the prior restraint doctrine, however, this entitlement cannot be protected through injunctions; it can only be protected with ex post remedies. Similarly, the government has the power to detain criminal defendants until trial. Yet the Bail Clause of the Eighth Amendment effectively allows defendants to "buy out" the pretrial detention entitlement. Part IV will also examine whether these liability rules are justified by transaction costs. It will conclude that the bail liability rule may be grounded in transaction costs, but the prior restraint liability rule is not.

I. TRANSACTION COSTS FOR CONSTITUTIONAL RIGHTS

This Part explains liability rules, property rules, and transaction costs—terms that are used throughout the rest of the Article. These concepts have been explored in a vast body of private law literature since the publication of *The Cathedral*,⁹ and therefore are only briefly sketched in Section I.A.¹⁰ Section I.A also explains what it means for a constitutional right to be transacted, an admittedly counterintuitive notion. Section I.B broadens and elaborates on the concept of transaction cost to make it more relevant to constitutional entitlements. Section I.C explains that liability rules require a judicial valuation of the entitlement. This is itself a form of transaction costs and should therefore be balanced against the

⁹ For some notable contributions in the law and economics literature, see Ian Ayres & Paul M. Goldbart, Correlated Values in the Theory of Property and Liability Rules, 32 J. Legal Stud. 121, 123 (2003); Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade, 104 Yale L.J. 1027 (1995); Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996); James E. Krier & Stewart J. Schwab, Property Rules and Liability Rules: The Cathedral in Another Light, 70 N.Y.U. L. Rev. 440, 442–43 (1995).

¹⁰ For concise descriptions of these concepts and reviews of the related literature, see Abraham Bell & Gideon Parchomovsky, Liability Rules, 101 Mich. L. Rev. 1, 11–25 (2002).

transaction costs characteristic of property rules. Section I.D presents a matrix showing when different configurations of transaction costs lead to liability rules for various constitutional entitlements. It also introduces formulae to determine when liability rule treatment is preferable. Finally, Section I.E pays special attention to liberty, which is one of the most difficult constitutional entitlements to monetize. As a result, liability rules will be more unwieldy for liberty than for other entitlements.

A. Property and Liability Rules

A property rule prevents entitlements from being transferred or destroyed without the consent of the owner. Because they only allow voluntary exchanges, transactions under property rules are presumptively efficient. Both parties gain from the transfer of rights (and society gains with them), or else they would not have bothered with the transaction. The price at which the entitlement is transferred incorporates any idiosyncratic elements of value (such as sentimental value).¹¹ In well-functioning markets, the property rule price is, by definition, the “true” value of the entitlement. Property rules ensure that entitlements wind up with their highest value user.

Yet the advantages of property rules are realized only when transaction costs are relatively low.¹² Transaction costs can arise in myriad forms, all involving departures from the ideal of perfectly competitive markets.¹³ Transaction costs are commonly understood as costs of buying and selling, such as learning about the quality of goods and their prices; reaching an agreement with a distant party or a party that drives a hard bargain (behaves strategically); writing

¹¹ See Calabresi & Melamed, *supra* note 1, at 1092.

¹² Surprisingly, law and economics scholars have yet to agree on a definition of transaction costs. For a description of these difficulties and a criticism of the reliance on transaction costs in Coasean law and economics, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S. Cal. L. Rev. 1661, 1674 (1989) (“When we turn to the theoretical definition of transaction costs . . . we encounter serious controversy among economists. Several economists have noted that the definition of transaction costs is elusive and contested.”). Measuring transaction costs is not easy either, at least for judges. See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 Case W. Res. L. Rev. 961, 968–69 (1996) (discussing “the inability to measure transaction costs”).

¹³ See Calabresi & Melamed, *supra* note 1, at 1109–10 & n.39.

and enforcing contracts; and the expected cost of nonperformance. Another important type of transaction cost arises from strategic behavior on the part of one of the parties, often made possible by market power.

In order to avoid circularity in the definition, one has to state in advance the circumstances that make transaction costs high or low. Transaction costs are lower in territorially concentrated markets, in markets with large numbers of buyers and sellers, and markets for homogenous commodities and standard goods. The costs increase if small numbers of buyers and sellers are involved or if goods are customized or unique. Holdout, a particular type of transaction cost often associated with liability rules, occurs in situations where a buyer must purchase multiple severally-held entitlements, and each entitlement is unique (that is, cannot be substituted with another entitlement). The uniqueness of the entitlements, combined with the buyer's need to secure all of them, allows sellers to behave strategically.¹⁴ High transaction costs will reduce the likelihood of consummating efficient transactions.¹⁵ Liability rules are a device for avoiding this problem.¹⁶

Liability rules allow a would-be buyer to bypass the original entitlement holder's consent and instead to take the entitlement through coercion. The taker must pay compensation in an amount established by a court in a subsequent action for damages by the original entitlement holder.¹⁷ In the subsequent judicial proceeding, the court attempts to award a sum that approximates the price that would have been paid under a property rule. The drawback of liability rules is that there is less confidence in the accuracy of a judicially determined price than in a privately determined one: approximating the market price is not always easy.¹⁸ If courts under-

¹⁴ Holdout is explained more extensively in the discussion of the Takings Clause, which is particularly concerned with avoiding this problem. See *infra* text accompanying notes 64–65.

¹⁵ See Lloyd Cohen, *Holdouts and Free Riders*, 20 *J. Legal Stud.* 351, 356 (1991) (describing how such behavior can scuttle efficient transactions).

¹⁶ See Calabresi & Melamed, *supra* note 1, at 1106–07.

¹⁷ See *id.* at 1107. The price of the entitlement can also be established by legislation, an administrative agency, or another third party. See Bell & Parchomovsky, *supra* note 10, at 3 & n.8.

¹⁸ This account leaves to one side any psychic differences between liability and property rules, such as the displeasure people may experience at having an entitle-

estimate the private value of entitlements when awarding damages, they would encourage too much taking; if damages were too high, takings would be over-deterred (assuming, of course, that the government is sensitive to changes in the cost of its activities). Erroneous damages would also distort the entitlement holder's incentives. In either case, entitlements would not wind up with their highest value user, so the outcome would not be efficient.

B. The Constitution in the Calabresi and Melamed Framework

The application of these private law concepts to constitutional law is novel, and may seem counterintuitive. This Section addresses some concerns about the suitability of the Calabresi and Melamed ("C&M") transaction cost framework to constitutional entitlements.

1. Transacting Constitutional Entitlements

Since an explicit market for constitutional entitlements does not exist, one does not usually think of them as being transacted.¹⁹ A constitutional transaction occurs under a property rule when the government obtains a voluntary waiver of rights from an individual. Such transactions can be consummated in exchange for some consideration from the government, as in the case of plea bargains, or gratis, as is usually the case in consensual searches. Constitutional transactions also occur when the government condemns an entitlement through the judicial process.²⁰ Similarly, in private law, forcible destruction of another's property is a "transaction" for which the taker may be liable in tort for conversion. A transaction occurs regardless of whether the entitlement is transferred voluntarily or forcibly.

The jury and judge are alternative sources of consent for the taking of constitutional entitlements. The "negotiation" with the jury is the process of proving the case beyond a reasonable doubt. The transaction costs of securing this consent include those of develop-

ment forcibly taken. This displeasure would ideally be compensable under a liability rule, though monetizing such displeasure is also quite difficult.

¹⁹ See Kontorovich, *supra* note 3, at 772 (explaining the concept of "constitutional transactions" in the criminal context).

²⁰ See Merrill, *supra* note 3, at 1143 (defining constitutional transactions as occurring when the government purchases, condemns, or "otherwise extinguish[es] constitutional rights").

ing evidence and conducting a trial. “Constitutional transactions” under a property rule require the government to obtain the consent *either* of the entitlement holder *or* of a court *in advance*. This is not so different from the situation with entitlements in private law. If *A* believes that *B*’s farm belongs to *A*, he can either negotiate with *B* out of court for a return of the land, or he can sue for possession. Because property rules apply to the possession of land, *A* cannot disseize *B* without a court order.

2. *One Dimension?*

The Calabresi and Melamed (“C&M”) framework depends on disaggregating rights from the remedies that protect them.²¹ Some might object that, while this may be appropriate in private law, it is not possible in constitutional law. If the government destroys constitutional entitlements, it would be acting unconstitutionally, regardless of whether it subsequently provides compensation. In this view, what this Article treats as liability rules are really just a limitation on the scope of the substantive entitlement. For example, the Takings Clause does not create a substantive entitlement to property that is protected with a liability rule when taken for public use. Rather, the substantive entitlement itself is only against uncompensated takings. A compensated taking would simply not violate substantive constitutional norms and thus should not be regarded as a liability rule. As a doctrinal matter this account has some merit, yet it obscures more than it reveals. Even though a compensated taking does not violate the Constitution, the structure of the anti-Takings entitlement is different in important ways from the structure of other entitlements.²²

²¹ See Calabresi & Melamed, *supra* note 1, at 1090.

²² Daryl Levinson has powerfully attacked this one-dimensional view of constitutional rights for placing too much emphasis on “pure constitutional values” and ignoring the complex interplay of those values with the remedial regimes that implement them. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 859–60 (1999) (“Private law models cannot, of course, be superimposed without modification onto constitutional law. We might think, for example, that the optimal level of some types of constitutional violations, as opposed to most contract breaches . . . is close to zero, and for that reason, that remedies in constitutional law should be regarded primarily as sanctions rather than prices. . . . But the basic private law insight that rights and remedies are integrally connected does translate to constitutional law . . .”).

Nonetheless, it matters little for the purposes of this Article whether what are described here as liability rules are “really” part of the right or whether they constitute a distinct remedial rule. The contribution of this Article is to show that certain constitutional entitlements—whether called rights or remedies—emphasize *ex ante* procedures for their transfer or destruction, while others emphasize *ex post* procedures. Rules of the former kind—whether one calls them broad substantive rights or substantive rights protected by the broad property rule remedy—tend to require upfront dealing with the entitlement holder and rely on private valuations of entitlements. Rules of the latter kind—whether described as narrow substantive entitlements or substantive entitlements protected by the more limited liability rule remedy—rely on judicial (that is, public) valuation. This understanding focuses attention squarely on the relative costs of each method and allows one to better evaluate constitutional rules from the standpoint of social efficiency. Even if one believes that what this Article calls “remedies” are actually integral parts of the associated rights, different rights involve different procedures for their transfer or destruction. The relative transaction costs of bargaining and adjudication provide an objective criterion for identifying the best procedure. Labels aside, examining these procedures in the property-liability framework reveals previously underappreciated heterogeneity in constitutional norms and provides a basis for economic insights into the causes and consequences of this heterogeneity.

C. Valuation Difficulties

Liability rules require courts to put a monetary value on the taken entitlement. Doing so entails costs, which are the price of consummating the transaction through public rather than private processes.²³ This Article calls these “judicial transaction costs” to distinguish them from the classic transaction costs involved in direct dealing between the entitlement holder and the entitlement seeker;²⁴ the latter type of transaction costs are called “bargaining

²³ See Kontorovich, *supra* note 3, at 766.

²⁴ Other scholars have also described the costs of using courts or other public institutions as a type of transaction cost. See David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 *Ariz. L. Rev.* 61, 84 & n.129 (2005) and sources cited therein.

transaction costs.” Judicial transaction costs are a sum of administrative costs (such as judicial salaries, legal fees, and discovery) and error costs. Error arises from the difficulty of judicially determining the value of entitlements and is measured by the difference between the judicial valuation of the entitlement and what the original entitlement holder would have sold it for. The social cost of error arises from the inefficient incentives created by erroneous damages, which over-deter takings if set too high and encourage too much taking if set too low.

When an entitlement is not traded in thick markets, or possesses elements of idiosyncratic value, it becomes more difficult to get an accurate judicial valuation. If the court errs in assessing damages, under- or overcompensation will result. Systematic error in either direction creates improper incentives; thus, the error costs of liability rules increase as the difficulty of setting damages increases. The administrative costs increase as well: A wider variety of evidence must be considered by the court when it deals with non-market entitlements rather than with entitlements that have a market determined “price tag,” such as a commodity.

These considerations apply to liability and property rules in general. Constitutional entitlements are, as a class, harder to value than private law entitlements. First, there is no explicit market for most constitutional rights and, thus, no obvious way to determine their values.²⁵ Since individuals’ constitutional rights are only good against the government, the market for such rights is monopsonistic. Plea bargaining creates a thick market for liberty rights under cloud of title (that is, liberty entitlements facing possible condemnation through trial); yet plea agreements would be poor measures of the monetary value of a defendant’s liberty, because the defendant does not simply trade between money and liberty. Rather, he trades his liberty against a potentially greater loss of liberty.²⁶ Some constitutional rights are particularly difficult to value accurately, not simply because there is no market in the narrow sense that the government is not purchasing them like it purchases widgets and tanks, but rather because no one purchases them at all.

²⁵ See Merrill, *supra* note 3, at 1165 (“There is no established market price or other financial benchmark for unreasonable government searches.”).

²⁶ Of course, the costs of going to trial (financial and otherwise) are part of the plea calculus for both the prosecutor and the defendant.

Second, constitutional entitlements are often inchoate. It is not always obvious what interests a particular entitlement protects and which interests are compromised by its taking. Finally, there may be a high degree of variance in people's subjective valuations of their constitutional entitlements, making it harder for courts to award truly compensatory damages for takings. Liberty interests pose perhaps the greatest problems in this regard; they are discussed separately in Section I.E.

The somewhat metaphysical term "incommensurability" is often used to describe the difficulty of attaching monetary values to inchoate and non-market entitlements.²⁷ Incommensurability is one of the main objections to considering the potential of liability rules in constitutional law. The argument begins, correctly, by observing that certain entitlements are much more difficult to value than others. From this, it concludes that any regime that depends on monetizing them is fundamentally flawed. The argument has several weaknesses. First, it treats a continuous variable—the magnitude of error in a damage award—as discontinuous. Furthermore, it does not consider this variable's relation to others, such as the size of bargaining transaction costs.

Liability rules for takings of real property are uncontroversial because such entitlements are generally not regarded as incommensurable. Still, even the market value of a house, which is the benchmark for just compensation, does not incorporate its sentimental worth to its present owners—an inchoate and unique value that is difficult to monetize. Indeed, "just compensation" for eminent domain, determined by market price, is usually less than the land was worth to its owners. Had the market price exceeded their private valuation, they would have already sold the property themselves.²⁸ This does not mean that real property is incommensurable.

²⁷ See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich. L. Rev. 779, 796 (1994) (defining incommensurability as "occur[ing] when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized" (emphasis omitted)).

²⁸ See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to *his* property but merely the value that the marginal owner attaches to his property. Many owners are 'intramarginal,' meaning that . . . they value their property at more than its market value (i.e., it is not 'for sale').").

2005] *Transaction Costs of Constitutional Remedies* 1149

Usually, only a small portion of the value of the entitlement to its owner will be idiosyncratic. The greater the proportion of private value to market value, the greater the problems of judicial valuation. Accordingly, incommensurability is not a quality peculiar to certain entitlements that should immunize them from standard transaction cost analysis.

D. Balancing Constitutional Transaction Costs

Both bargaining and judicial transaction costs are matters of degree. Thus, there will be situations where even high bargaining transaction costs do not warrant an adoption of liability rules because judicial transaction costs will be higher. This also suggests, perhaps counter-intuitively, that there may be cases with low bargaining transaction costs where liability rules would still perform at least as well as property rules because judicial transaction costs are even lower. This Section illustrates these points, first with a matrix contrasting situations involving combinations of high and low bargaining and judicial transaction costs, and then with algebraic examples.

1. The Matrix

The matrix below illustrates how four different combinations of judicial and bargaining transaction costs can lead to different types of protection for constitutional entitlements. The remainder of the Article explains in more detail why particular entitlements fall where they do in the matrix. A few comments are offered now so that the matrix can serve as a guide to the subsequent discussion. The costs of transferring entitlements through the judicial system, such as error costs arising from valuation difficulties, are represented horizontally. These are the costs associated with liability rules. The costs attendant to transferring an entitlement through voluntary bargaining, as required under a property rule, are represented vertically.

Table 1: The Matrix

BARGAINING TRANSACTION COSTS			
		High	Low
JUDICIAL TRANSACTION COSTS	High	Quarantines; Prior restraint (1)	<i>Default property rule: most of constitutional law</i> (2)
	Low	Eminent domain; Wartime quartering (3)	Use immunity for compelled testimony; <i>Default property rule: most of constitutional law</i> (4)

For purposes of illustration, the costs are divided simply into “high” and “low,” although in reality the costs on both sides are continuous variables.²⁹ Each cell contains constitutional entitle-

²⁹ The model assumes that the contemplated transaction would be efficient in a zero transaction cost world; that is, that there is a social surplus that can potentially be realized through the transaction. This is a simplifying assumption, because whether the transaction is efficient may itself be a function of the amount of transaction costs. Transaction costs, broadly defined, sometimes purchase real benefits. Some types of transaction costs—such as the costs of negotiating contracts, which involve obtaining information about the value of the thing being contracted for—allow prospective purchasers to evaluate whether the transaction should proceed. See Dreisen & Ghosh, *supra* note 24, at 64, 84–85 (arguing that some types of transaction costs pay for “corollary benefits,” so lowering transaction costs would not always promote efficient transactions). For example, if an individual is innocent of a crime and poses no threat to society, there is no social benefit to detaining him. Requiring a hearing before someone is deprived of liberty reduces the chance that the government would take such an action in situations where it would result in pure social loss. *Id.* at 90. Only certain types of transaction costs, however, produce “corollary benefits” by reducing the likelihood of “erroneous” transactions. When transaction costs stem from strategic behavior, such as holdout and free riding, there is only deadweight loss, and there is never any reason to use private bargaining that involves such costs when a cheaper judicial alternative is available. In such situations, corollary benefits are zero. For ease of exposition, this Article uses “high” and “low” transaction costs to mean high or low net of corollary benefits.

ments involving that particular rough combination of transaction costs. The italicized entitlements currently are protected by property rules, the others by liability rules.

Most constitutional entitlements fall within cell two. Here, there are few barriers to bargaining between the government and the entitlement holder, and the costs of judicial valuation are high because of the non-market nature of most constitutional entitlements. For example, the government faces relatively low bargaining transaction costs in negotiating plea agreements, while judicial valuation of the liberty entitlement would be unreliable; therefore, criminal defendants' liberty receives property rule protection.³⁰

Cell four shows that liability rules may be preferable even when bargaining transaction costs are not extraordinarily high if courts can easily and accurately value the entitlement. In these situations, the judicial process could be the most efficient mechanism for transferring entitlements, so allowing a forced taking may be efficient. For example, the Fifth Amendment's privilege against self-incrimination³¹ is protected by a liability rule with the grant of immunity, not money damages, as the fixed price for compelling grand jury testimony.³² Because use immunity gives full compensation, courts allow the compulsion of testimony.

³⁰ See *infra* Section I.E. The liberty entitlement does have an inalienability rule backdrop. A guilty plea must be accepted by the court; the consent of the defendant is not in itself sufficient to transfer the entitlement. A court must reject a plea if it lacks a "factual basis." See Fed. R. Crim. P. 11(b)(3). A court may also reject a plea agreement (a guilty plea made in exchange for explicit sentencing consideration) if it disapproves of the sentence negotiated by the prosecutor and defendant. Fed. R. Crim. P. 11(c)(3)–(5); see, e.g., *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977). Despite this inalienability "safety net," in practice, a property rule protects defendants' liberty entitlements.

³¹ U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

³² Indeed, the Supreme Court has come close to acknowledging explicitly that the Self-Incrimination Clause, despite its prohibitory language, merely defines an entitlement to be transferred under a liability rule. See *United States v. Balsys*, 524 U.S. 666, 692 (1998) ("[T]he choice of the word 'inviolability' [to describe the privilege] was just unfortunate; while testimonial integrity may not be inviolable, it is sufficiently served by requiring the Government to pay a price in the form of use (and derivative use) immunity before a refusal to testify will be overruled."); see also Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 875 n.64 (1995) ("[L]ike its Fifth Amendment companion, the Takings Clause—the Self-Incrimination Clause in some ways states a liability rule, not a property rule. Once we see this, we should see the

Even an exchange of immunity for testimony will not always be fully compensatory. In *United States v. Balsys*, for example, the Supreme Court held that testimony can be compelled even when there is real potential for its use against the defendant in a subsequent prosecution by a foreign government.³³ *Balsys*, in effect, holds that the Self-Incrimination liability rule need not be fully compensatory. The reason for the holding can be understood in terms of transaction costs. A liability rule for testimony makes sense because, in the vast majority of cases, the proper price—domestic immunity—is easy to determine and award. In the few cases where foreign governments come into the picture, securing full compensation would require bargaining or other interaction between the United States and other nations.³⁴ Even if a foreign nation promises not to use compelled testimony, the defendant cannot enforce this promise in domestic courts.³⁵ Full compensation cannot be guaranteed without the horizontal integration of nations—that is, a world government.³⁶ Thus, the marginal cost of guaranteeing foreign as well as domestic immunity far exceeds the marginal increment of compensation that would thereby be se-

centrality of the scope of immunity: it establishes the all-important fixed price at which the government may buy a person's testimony outside his own criminal case." (citation omitted).

³³ *Balsys*, 524 U.S. at 697–98. Despite the Fifth Amendment's "any case" language, the Court held that because the Constitution only limits the power of domestic governments, the entitlement only extends to the use of testimony in domestic prosecutions. *Id.* at 673–74. *Balsys* should not be read as a holding about the substantive scope of the entitlement against self-incrimination. Just as the Court was surely right that the Fifth Amendment does not apply to foreign courts, it clearly applies to the compulsion of testimony in a domestic proceeding, which is precisely where *Balsys*'s testimony was being compelled. Thus, his substantive entitlement was clearly taken, and the case makes little sense unless viewed as a case about remedies rather than rights.

³⁴ See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 *Harv. L. Rev.* 430, 483 n.166 (2000) (suggesting that the absence of reciprocal immunity agreements between nations indicates that such agreements would be inefficient).

³⁵ *Balsys*, 524 U.S. at 693 (observing that the court "could not enforce the immunity abroad").

³⁶ The *Balsys* Court noted that, to the extent criminal prosecution becomes "internationalized," the argument for requiring foreign immunity becomes stronger. In other words, as the marginal administrative transaction costs decline due to governmental integration, full compensation becomes more reasonable. *Id.* at 693–94, 698–700.

cured.³⁷ Because situations where a fully-compensatory liability rule can be administered at negligible cost will be quite rare, property rules occupy most of cell four.

Cell three describes situations where bargaining transaction costs are particularly high, yet judicial valuation will be quite reliable. Eminent domain is the classic example. The ingredients are holdout problems on the ex ante side and relatively easy ex post valuation because the real property has a market price.³⁸

Finally, cell one shows a difficult situation where both bargaining and judicial transaction costs are very high. Liability rules may still be useful in this situation provided that the judicial transaction costs (1) do not exceed the social benefit from the rights-taking and (2) are lower than the bargaining transaction costs. Because cell one contemplates a situation where judicial valuation of the entitlement is highly problematic (such as a taking of liberty through forcible detention), one would only expect liability rules to be used when the social consequences of forgoing the transaction are unusually severe.

2. *The Algebra*

An algebraic illustration can flesh out the points demonstrated with the matrix. Suppose T_1 represents what are commonly called transaction costs (what this Section has described with greater specificity as “bargaining transaction costs”). T_2 represents judicial transaction costs, or the cost of using the judicial system to administer the transfer of entitlements, including error and administrative costs. Finally, S represents the total surplus from the transaction; S will always be positive in this discussion because it is assumed that the proposed government action would be desirable in a zero transaction cost world. (If $S < 0$, the entitlement should be protected by an inalienability rule, which would prohibit the government both from purchasing and from taking the entitlement.)

The choice between liability and property rules can be described through the interaction of these three terms, T_1 , T_2 , and S . If the goal is maximizing social surplus, property rules should be used

³⁷ See *Balsys*, 524 U.S. at 696–97 (observing that the costs of extending the privilege to foreign prosecutions, even if possible, would still exceed the benefits).

³⁸ See *infra* Section II.A.2.

when the costs of privately transferring the entitlement are lower than the costs of a transfer mediated by the judicial system. Thus, when $S - T_1 > S - T_2$, property rules should be used, and when $S - T_2 > S - T_1$, liability rules should be used. When $T_1 > S$ and $T_2 > S$, the proper response is an inalienability rule that leaves the entitlement in its original position.

A wrinkle arises when $T_2 < T_1 \leq S$. Normally, the remedial rule chosen should maximize the net social benefit. With private entitlements, it is assumed that the parties will be able to make side payments when increasing the size of the surplus happens to reduce one party's share of it. Without such side payments, parties would not agree to many efficient transactions, such as efficient contractual breaches. In the $T_2 < T_1 \leq S$ situation, bargaining transaction costs would not block socially beneficial activities, but it would still be cheaper to transfer entitlements through the judicial process than through direct negotiation. The net benefit principle suggests that liability rules should be used in these cases. If judicial valuation is the most efficient method of transferring rights, however, it is not clear why an entitlement holder would ever resort to an injunction even if a property rule applied. The rational rights holder would not block the taking with an injunction, as he would understand that if the judicial system is cheaper, the savings could be spread between the parties through side payments.

When constitutional entitlements are involved, however, the government might be unable to make side payments that would allow the individuals to share in the surplus. This raises problems when the liability rule leaves the individual worse off (because it is undercompensatory), but is still less socially costly than a property rule. Choosing the liability rule in this case would not make *both* parties better off than a property rule, and would thus fail the Pareto efficiency criterion. When side payments cannot be made, there will be little use for liability rules that are less than fully compensatory if one thinks constitutional transactions must always satisfy the Pareto criterion, rather than simply maximize social surplus. The latter view may seem counterintuitive because constitutional entitlements are generally seen as individual rights. This suggests that only the individual's private benefit should be considered, not the net benefit. Yet constitutional law routinely delimits the substantive scope of individual rights by weighing their value to

the individual against the cost of their exercise to society. That is the essence of the ubiquitous “balancing” tests relied on by the Supreme Court. The formulae above merely suggest a similar inquiry for the selection of remedies.

E. Liberty Entitlements

Takings of material property typically require compensation to the original owner.³⁹ Liberty entitlements are regarded as more important or fundamental than property entitlements, yet in the few situations where takings of liberty are permitted, such as military conscription or jury service, compensation is not constitutionally required.⁴⁰ With liberty, the switch is drastic, from a robust property rule to no protection.⁴¹ To be sure, outside of the criminal context, bargaining transaction costs can prevent efficient outcomes under property rules for liberty entitlements. Indeed, when uncompensated takings of liberty are allowed, it is usually because bargaining transaction costs are high. The lack of liability rule protection in these situations can best be explained by the difficulty of valuing liberty.

1. Bargaining Transaction Costs Usually Low

Individuals’ liberty entitlements are generally protected by property rules because in most situations in which the government seeks to condemn liberty entitlements, transaction costs do not pose insurmountable problems. Consider, for example, criminal prosecutions. The government deals with large numbers of separate defendants and need not succeed in striking plea deals or securing convictions against all of them.⁴² This is because the individual entitlement holders are fungible. Unless the government has an

³⁹ Cf. Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1333 & n.1 (1991) (observing the existence of a “gray area [of cases] in which it is difficult to predict whether compensation will be constitutionally required”).

⁴⁰ See Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. Chi. L. Rev. 1081, 1097 (1999).

⁴¹ Jurors and military draftees customarily receive some nominal payment, but it is not even close to fully compensatory damages. See Kontorovich, *supra* note 3, at 824.

⁴² See Merrill, *supra* note 3, at 1158–59 (explaining that plea bargaining can be seen as “taking place in a relatively low transaction cost setting” because there are only two parties to the negotiation, and both parties have information through counsel and “a viable alternative” to making a deal).

unrealistic goal of a 100% conviction rate, it would do well enough by successfully negotiating the transfer of some of the individuals' entitlements. Assuming that the harm caused by those charged with a given crime is more or less the same across a large number of cases, it does not much matter with which defendants the government succeeds in making a deal. If one accused murderer does not enter a plea bargain, another one might. This undermines the ability of each party to extract surplus and prevents the holdout problems that can make property rules troublesome.⁴³ In other words, the entitlements are not held jointly. A refusal to deal by one entitlement holder cannot frustrate the entire scheme—unlike in many eminent domain situations. Moreover, imperfect information and a lack of time will not systematically prevent successful prosecution or plea bargaining, as extensions are routinely given under the Speedy Trial Act to allow the government to develop its case.⁴⁴

Yet in some situations involving liberty entitlements—such as quarantines and compulsory vaccination, military conscription, and mass detentions during national security emergencies—the bargaining transaction costs are high enough to make property rules dysfunctional. Moreover, in all of these situations, large social benefits would be foregone if bargaining were to fail. Constitutional law authorizes the abandonment of property rule protection in such situations. The next Section uses compulsory jury service to illustrate the potential existence of prohibitive transaction costs in a context where uncompensated forcible takings of liberty are permitted as a matter of course.

2. Jury Service: An Example of High Bargaining Transaction Costs?

Jury service is an almost entirely uncompensated taking of liberty. Why abandon property rule protection in this context? Certainly the government could get all the jurors it needs through conventional labor markets, as it does to fill other government jobs.⁴⁵

⁴³ See Kontorovich, *supra* note 3, at 787, 789.

⁴⁴ See J. Andrew Read, Comment, Open-Ended Continuances: An End Run Around the Speedy Trial Act, 5 *Geo. Mason L. Rev.* 733, 736–37 (1997).

⁴⁵ This is borne out by the experience of one of the few other democracies to rely heavily on civil juries. In ancient Athens, payment was provided for jury service, set at roughly the cost of a day's barley ration for an average family. As a result, no compul-

When it comes to jurors, however, adverse selection problems may lurk in conventional labor markets. A market system would produce juries composed largely of unskilled or low-skilled people—those who sell their time at the lowest prices. This might not result in the kind of jury society wants. Furthermore, one can imagine mitigating the problem by offering a schedule of wages: for example, \$12 per hour for high school graduates and \$30 per hour for college graduates. This would create a more mixed jury. Even with differential payment, however, voluntary jurors would be quite different from the rest of society in at least one potentially important way: they would particularly enjoy being jurors. Those who derive non-pecuniary utility from jury service would be more willing to accept jury service at a given price than those who do not. Society may be wary of people who like being jurors more than the average person does. If good jurors are those who, like Socrates' ideal city guardians, only exercise power if forced by law, then compulsory service is a necessary response to bargaining problems. Under a property rule, those who like being jurors would serve repeatedly.⁴⁶ Of course, it is far from obvious that the compulsory jury service principle is based on such concerns. For one, peremptory challenges allow lawyers to create juries that do not particularly reflect society. Moreover, those who suffer particular disutility from jury service are given numerous ways out.

The compulsory jury service example highlights an important point about transaction cost analysis of constitutional rules. Property rules work poorly when bargaining is costly *relative* to the benefits of reaching a deal. In non-market situations such as jury service, it is not obvious how to define the social benefit. Whether bargaining transaction costs would hobble the jury system depends

sion was required to fill several-hundred-member juries. See Josiah Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People* 142–43 (1989) (discussing the purchasing power of the three-obol wage for jury service).

⁴⁶ Such professionalization of the jury was a leading complaint against ancient Athens's voluntary jury system. Aristophanes' satire *The Wasps* portrays jurors as bitter old men who do nothing but serve on juries and derive particular pleasure from passing judgment on others. See Ober, *supra* note 45, at 142–44 (describing the social composition of typical Athenian juries and suggesting that Aristophanes somewhat overrepresented the predominance of the old). Cf. Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* 129–31 (2000) (describing the traditional view that *The Wasps* is a criticism of juries that serve for pay, and suggesting this was only incidental to Aristophanes' true concerns about the jury).

on the purpose of the jury system itself. If the benefit of using a jury arises from its diverse composition of amateurs, then compulsion may be necessary.

3. Judicial Transaction Costs Always High

Among constitutional entitlements, those involving liberty interests are exceptionally difficult for courts to value. Liability rules for such entitlements will be justified only in unusual circumstances. Individual liberty is not traded in markets; as a result, courts cannot look to market prices to establish damages. Likewise, legislated schedules of damages would fail to accurately compensate because the degree of the injury caused by a deprivation of liberty varies greatly from person to person, depending on their individual opportunity costs of time, subjective attitudes toward confinement, and the prison conditions.

To be sure, some components of the injury, such as lost wages, can be accurately valued. Similarly for unlawful seizure of property, some components can be accurately valued, such as the rental value. The key difference, however, is that with liberty interests, the portion of the injury susceptible to objective valuation is a relatively small proportion of the total loss. Constitutional law's reluctance to afford anything other than property rule protection to the liberty entitlement is not a consequence of liberty being more sacred or important than property.⁴⁷ Rather, it is a consequence of liberty being harder to value in judicial proceedings.

4. The Limits of Liability Rules for Liberty Entitlements

The great difficulty of valuing liberty suggests that a transaction cost approach to constitutional remedies should carefully distinguish liberty from other entitlements, particularly when a constitutional provision protects liberty alongside more readily monetizable interests (for example, the Fourth Amendment and the Due Process Clause). The same bargaining transaction costs that recommend liability rules for other entitlements might not do so for

⁴⁷ Cf. Robert Brauneis, Treanor's *Mahon*, 86 *Geo. L.J.* 907, 927 n.116 (1998) ("We do not usually think of liberty as a commodity subject to eminent domain.").

liberty.⁴⁸ The difficulty of judicial valuation, however, does not obviate the need to consider the magnitude of bargaining transaction costs, even when liberty entitlements are implicated. In some situations, such as quarantines, compulsory vaccinations, and national security detentions, the transaction cost rationale is quite robust,⁴⁹ and in some others, such as the wartime draft, it is plausible, but perhaps not compelling.⁵⁰ Still other situations, such as the peacetime draft, are in no way responses to bargaining problems, and thus appear suspect, at least on economic grounds.⁵¹ When analyzing takings of liberty for jury service, examination of bargaining transaction costs is useful because it focuses attention on the purposes of the jury system.

II. THE THIRD AMENDMENT AND THE TAKINGS CLAUSE

The Constitution says little about how the substantive entitlements it defines shall be protected. With a few exceptions, it does not clearly assign liability or property rule protection to individual entitlements. A well-known exception is the Just Compensation Clause,⁵² which mandates liability rule protection for the entitlement to not have one's property taken for public use.⁵³ Some schol-

⁴⁸ The distinction between liberty and other entitlements is illustrated throughout this Article. See, e.g., discussion *infra* in Sections III.B.3, IV.C.3.

⁴⁹ See Kontorovich, *supra* note 3, at 825–26.

⁵⁰ *Id.* at 827–30.

⁵¹ William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 *Harv. J.L. & Pub. Pol'y* 23, 28–49 (1996); Kontorovich, *supra* note 3, at 831.

⁵² U.S. Const. amend. V.

⁵³ Many scholars have observed that the Takings Clause involves a liability rule. See, e.g., Amar & Lettow, *supra* note 32, at 875 n.64; Ayres & Talley, *supra* note 9, at 1037; Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 *Int'l Rev. L. & Econ.* 125, 131 n.36 (1992) (“The crucial point about the [T]akings [C]lause is that it creates only a ‘liability’ rule . . . hence, the issue is whether the government must compensate, not whether it can act.”); Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 *Idaho L. Rev.* 11, 15 n.14 (2003) (observing that “the Takings Clause acts as a ‘liability rule,’ as opposed to a ‘property rule’”). One court has described the Takings Clause in liability rule terms:

There is a fundamental conceptual difference between a takings claim and a substantive due process claim. If the government pays just compensation, it may take property for public use under the Takings Clause. Due process protections, by contrast, define what the government may not require of a private party at all. It is the difference between a liability rule and a property rule.

Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658–59 (3d Cir. 1999).

ars argue that because this is the only constitutional provision that specifies a remedial rule, remedies for all other constitutional entitlements are left open to legislative and judicial determination.⁵⁴ Yet because the Just Compensation Clause is a liability rule, it also supports the opposite inference—that property rules are implicitly required for all individual entitlements, except when the Constitution expressly says otherwise.⁵⁵ However, commentators have failed to notice that another constitutional provision also explicitly chooses between liability and property rule protection for individual rights:⁵⁶ the Third Amendment’s ban on quartering troops in peacetime.⁵⁷ This provision mandates property rule protection.

Looking at the Third Amendment in two dimensions provides insights into several important constitutional questions. It reveals the close relationship between the Third Amendment and the Tak-

⁵⁴ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366–70 (1953); Kontorovich, *supra* note 3, at 815–17.

⁵⁵ Cf. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 76–77 (1996) (arguing, based on the lack of a just compensation provision in the First Amendment, that its “information property” entitlements are protected by property rules).

⁵⁶ See, e.g., Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *The Federal Courts and the Federal System* 796 (5th ed. 2003) (“The text refers explicitly to remedies in only two instances. First, the remedy of habeas corpus is safeguarded against ‘suspension’ by Congress. Second, the Just Compensation Clause . . . ‘dictates the remedy for interference with property rights amounting to a taking’—compensation for the impairment of value.” (citations omitted)). While the Constitution clearly requires compensation for takings, it is less obvious that it requires the availability of a habeas relief. Some jurists believe that the Suspension Clause means that if Congress *chooses* to create a habeas remedy, it cannot arbitrarily withdraw it.

Habeas cannot be characterized as either a liability rule or a true property rule. Because the writ is only available to those already in custody, 28 U.S.C. § 2255 (2000), it does not prophylactically prevent forcible takings of liberty, as an injunction would. Nor is habeas a liability rule, as a successful petition results only in release, not money damages.

⁵⁷ U.S. Const. amend. III. Very few cases raise Third Amendment claims, and academics have paid little attention to this “lost” amendment. See *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir. 2001) (“Judicial interpretation of the Third Amendment is nearly nonexistent.”); *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (holding that a Third Amendment claim by striking corrections officers whose government-owned housing units at the prison were occupied by National Guardsmen called in during the strike survives summary judgment, but noting “[t]he absence of any case law directly construing this provision”).

ings Clause. This provides a new approach to the debate over whether regulatory or partial takings are compensable.⁵⁸ In addition, when considered together, the Third Amendment and the Takings Clause support the view that other constitutional entitlements remain neutral as between liability and property rules; the comparison bolsters the view that there is no general presumption of property rule protection for constitutional entitlements.

A. Liability and Property Rules in the Takings Clause

1. Forms of Protection

The Takings Clause contains a liability rule, but it also has a property rule. The Just Compensation Clause provides a liability rule as the exclusive form of protection against takings of property for public use, such as eminent domain. If the government is otherwise acting within the bounds of its authority, it cannot be enjoined from seizing property under the clause, but it can be ordered to pay judicially determined “just compensation” after the fact. This is the only individual entitlement in the Constitution that cannot be protected with equitable remedies.⁵⁹ By negative implication, when a taking is not for a “public use,” the owner can enjoin it—he enjoys property rule protection.⁶⁰ Thus, the interpretation of “public use” determines how much of the Fifth Amendment entitlement falls under a liability rule and how much under a property

⁵⁸ Few scholars have noted the similarities between the Third Amendment and the Takings Clause. The only extended discussion can be found in Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 *Wm. & Mary Bill Rts. J.* 117, 146–47 (1993) (discussing wartime quartering as a type of taking for which “just compensation” would be required); see also *Johnson v. United States*, 208 F.R.D. 148, 151–52 (W.D. Tex. 2001) (describing the Third Amendment “as first cousin to the Fifth”).

⁵⁹ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.” (footnote omitted)).

⁶⁰ See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 *Yale L.J.* 2091, 2112–13 (1997) [hereinafter Epstein, *A Clear View*]; Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Prune Yard v. Robins*, 64 *U. Chi. L. Rev.* 21, 34 (1997). The Takings Clause toggles between being a property and liability rule, depending upon whether the use is public. The Takings Clause is a paradigmatic “pliability rule,” combining elements of both property and liability rule protection. See Bell & Parchomovsky, *supra* note 10, at 59–60; see also Kontorovich, *supra* note 3, at 768–70 (explaining “pliability rules”).

rule. The Supreme Court's recent decisions, such as *Kelo v. New London*, broadly define what constitutes a "public use,"⁶¹ thereby increasing the scope of the liability rule. Conversely, narrower definitions of "public use" would increase the scope of the property rule.⁶²

2. Transaction Cost Justification

The Just Compensation Clause's liability rule is a response to the high transaction costs associated with eminent domain, particularly the problem commonly known as holdout.⁶³ The nature of these costs has been exhaustively explored in previous scholarship and need only be sketched here.⁶⁴ Holdout arises when the government wishes to build a facility (such as an airport) that requires the purchase of numerous adjacent parcels of land. Each parcel might be owned by a different individual. Under a property rule, the gov-

⁶¹ See *Kelo v. New London*, 125 S. Ct. 2655, 2665–66 (2005) (holding that the use of the eminent domain power to transfer private land to a private developer as part of an economic development plan constitutes a "public use"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." (emphasis added)). In *Midkiff*, the Court unanimously upheld the use of the takings power to transfer land from one group of private landowners to another, with the asserted "public use" being the breakup of large, concentrated land holdings. *Id.* at 241–42; see also Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 161 (1985) [hereinafter Epstein, Takings] (observing that the Court has delivered a "mortal blow" to the public use limitation by making it broad enough "to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress").

⁶² See Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 *Tex. Rev. L. & Pol.* 49, 89 (1998) ("[S]trengthening the public use requirement works to move the Takings Clause toward the categorization of a property rule, prohibiting certain acquisitions of land without the consent of the owner regardless of whether compensation is paid."). In this vein, several state courts have recently interpreted the "public use" provisions of their state constitutions much more restrictively than the U.S. Supreme Court's reading of the federal Constitution. See, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004) (holding that turning land over to private developers does not constitute a public use).

⁶³ See Lloyd Cohen, *Holdouts and Free Riders*, 20 *J. Legal Stud.* 351, 354–56 (1991) (illustrating that what is commonly called "holdout" is actually a type of free riding, and differs from true holdout because, in addition to distributional consequences, there are efficiency issues as well).

⁶⁴ See, e.g., Robert D. Cooter, *The Strategic Constitution* 289–90 (2000); Calabresi & Melamed, *supra* note 1, at 1106–07.

ernment would need to strike a deal with every landowner. Under certain circumstances, if even one landowner refuses to sell, the entire project could be undone—one cannot have an airport runway with someone’s house in the middle of it. The problem becomes more acute if the project can only be built in a particular place due to natural geographic constraints (as with a dam) or due to previous development (as with road and airport expansions).⁶⁵ The lack of close substitutes for the desired property allows homeowners to engage in strategic behavior. Each individual landowner could potentially veto the entire project, although he only controls a small portion of the total area to be developed.

While the Takings Clause’s liability rule is an appropriate response to potentially severe holdout problems, it is also an overbroad response that exceeds its transaction cost rationale. The liability rule is limited only by the “public use” requirement. Not all takings for public use face holdout problems. If the state needs to buy one hundred office chairs, it can purchase them in a competitive market of chair manufacturers. The assets are not unique: chairs of different manufacturers are close substitutes for one another. Individual manufacturers do not possess veto power because one’s refusal to sell the hundredth chair would not reduce the government’s benefit from purchasing the first ninety-nine. If the government uses the Takings Clause to seize office chairs, it may well be for a public use, but not one for which a liability rule is appropriate.⁶⁶ Assuming that the government internalizes the cost of its actions, this may not be a serious problem. When markets function well, the government faces higher transaction costs in a reverse condemnation suit than in voluntary bargaining. So even if the Just Compensation Clause applies, if judicial transaction costs exceed bargaining transaction costs, the government may actually “pre-

⁶⁵ See Merrill, *supra* note 3, at 1159 (“[I]f the government’s needs are site-dependent . . . then it is likely that one or more landowners will hold out or bargain strategically.”).

⁶⁶ See Cooter, *supra* note 64, at 289 (“[T]he state should not *take* property with compensation *merely* to produce public goods. In most cases, the state should *buy* property to produce public goods.”); Merrill, *supra* note 3, at 1159 (“If the government can accomplish its objectives by dealing in a competitive market of rightsholders, then it is unlikely that transaction costs will stand in the way of exchange.”).

fer[] to negotiate a transfer of the asset under ordinary property rule protection.”⁶⁷

B. Property and Liability Rules in the Third Amendment

1. Forms of Protection

Like the Takings Clause, the Third Amendment contains both a liability rule and a property rule (and is thus also a “liability rule”⁶⁸). The Third Amendment’s Peacetime Quartering Clause states a property rule, while the Wartime Quartering Clause provides a liability rule. In peacetime, quartering of troops can only be done with “the *consent* of the Owner.”⁶⁹ The requirement that the original entitlement holder’s consent be secured *ex ante* is the defining characteristic of a property rule.⁷⁰ The price the owners demand for quartering troops, if they agree at all, will reflect the full cost of the imposition. If the government tries to quarter troops without the owner’s consent, the owner is entitled to equitable relief. Punitive and compensatory damages would be awarded when it is too late for an injunction.⁷¹

In wartime, however, the Third Amendment no longer requires the owner’s consent and thus abandons property rule protection. Instead of bargaining, the military can compel home owners to lodge troops, at least when authorized to do so by Congress. The Amendment does not explicitly address whether the property rule is replaced with a liability rule, which would mandate that owners receive compensation for wartime quartering. As a textual matter,

⁶⁷ Bell & Parchomovsky, *supra* note 10, at 63. Indeed, this is how the government usually behaves: It purchases office chairs, and even commercial real estate, rather than condemning them under the Takings Clause. See Cooter, *supra* note 64, at 289.

⁶⁸ See Bell & Parchomovsky, *supra* note 10, at 59–60.

⁶⁹ U.S. Const. amend. III (emphasis added).

⁷⁰ See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 19 n.36 (1988) (“‘Property protection’ means that control over the asset can only be lost by consent . . .”); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357, 380 n.91 (2001) (“[P]roperty rules’ . . . require the consent of the entitlement holder before the entitlement can be taken . . .”).

⁷¹ See Bell, *supra* note 58, at 146 & n.228 (“Unless [courts] levy punitive damages or other penalties against those responsible for this illegal and unconstitutional behavior, the Third Amendment’s consent requirement will offer no more protection from quartering than the Fifth Amendment’s takings clause.”).

it is not entirely clear whether the “law” authorizing quartering must satisfy the Just Compensation Clause, or whether the separate treatment of wartime quartering in the Third Amendment means it is a “special class of takings” not requiring compensation.⁷² Professor Tom Bell, apparently the only scholar to consider this question, reasonably concludes that the Takings Clause applies to wartime quartering, and so compensation is required.⁷³ In this view, the Wartime Quartering Clause, like the Just Compensation Clause, creates a liability rule.⁷⁴

2. *Transaction Cost Justification*

The divisions between the Fifth Amendment’s liability rule, the Third Amendment’s property rule, and the Third Amendment’s liability rule are consistent with, and perhaps motivated by, differences in the underlying transaction costs. The Takings Clause announces a liability rule because where the government seeks to take land for public use—such as to build a road, fort, or airfield—holdout problems could destroy the project if the entitlements were protected by property rules.

By contrast, the Peacetime Quartering Clause carves out a property rule exception to the broad liability rule in a discrete class of takings that do not face prohibitive transaction costs. In peacetime, the military can use the rental market to house soldiers or construct barracks for them; the rental and construction markets are competitive. Moreover, geographic considerations will not limit the government to a few specific sites for quartering troops, as they may for building roads and airports. Indeed, the Third Amendment contemplates the use of private homes, suggesting a situation in which troop dispersion is acceptable. Thus the military will not face the kind of holdout problems that plague exercises of eminent do-

⁷² Id. at 147–48.

⁷³ Id. at 148. (“Applying the Ninth Amendment and the Fifth Amendment to the case at hand leads quite directly to one conclusion: the Third Amendment’s enumeration of a constitutional right to legal constraints on wartime quartering shall not be taken to deny or disparage a homeowner’s right to receive just compensation for a public taking.”).

⁷⁴ Bell notes that the liability rule for wartime quartering would not be fully compensatory. Id. at 149 (“It . . . does not appear that the victims of quartering could recover for what may be their most grievous injuries: being forced onto the street, seeing strangers occupy and ransack their houses, and homesickness.”).

main. Assuming that the government internalizes costs, the Third Amendment ensures that troops will be housed in the most cost effective manner. Troops will not be quartered in the homes of those who would be greatly inconvenienced or intimidated, as such people would not give their consent or would charge more than others. In short, because transaction costs are low, the Third Amendment uses a property rule to prevent the government from bypassing well-functioning markets and to ensure that the government takes account of individuals' idiosyncratic valuations of property.

In wartime, transaction costs suddenly become much higher. The number of soldiers needing accommodation rapidly increases, and this change may be greater than the rental and construction markets could bear. Markets will not clear quickly enough because it takes time for new sellers to enter in response to heightened demand. Delay, particularly in wartime, can carry very high costs, including defeat.⁷⁵ Moreover, in wartime, it is more important for troops to be quartered together and in a few specified places, such as near staging grounds, ports, or places in need of defense. This gives monopoly power to the homeowners situated near those areas and resurrects the holdout problem that characterizes eminent domain. The remedial rule in this situation switches to liability—the same rule used for eminent domain.

Interestingly, one of the rare modern cases addressing Third Amendment claims shows sensitivity to the transaction cost justification of the peacetime property rule. The plaintiff landowners claimed that overflights of their land by the Air Force constituted a “quartering” that required their consent.⁷⁶ The court said that the argument “border[ed] on frivolous.”⁷⁷ If a property rule applied to overflights, each owner in the flight path would have to affirmatively consent to Air Force training patterns, and any individual's refusal to consent would necessitate rewriting the training exercise. Thus each owner could hold out for a share of the value of the

⁷⁵ Similarly, the need to quickly fill the army's ranks could justify a wartime draft, which allows the government to bypass labor markets. This assumes that conscripts' salaries would be at least approximately compensatory, which they have not historically been. See Kontorovich, *supra* note 3, at 827–28.

⁷⁶ *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir. 2001) (citing *Engblom v. Carey*, 677 F.2d 957, 961–62 (2d Cir. 1982)).

⁷⁷ *Id.*

flights—the classic case where property rules are dysfunctional.⁷⁸ The court’s emphasis on the property owners’ holdout power suggests that the Third Amendment’s property rule protection might be abandoned even in peacetime in situations where, as in wartime, transaction costs are so high as to block activities with net social benefits.⁷⁹

C. *The Relationship Between the Third and Fifth Amendments*

The Third Amendment and the Takings Clause are closely related provisions, and the former has much to say about the scope of the latter. While the Third Amendment is almost never mentioned in cases or scholarship, the Takings Clause is a subject of perpetual academic interest and litigation. A particularly contested question concerns regulatory or partial takings under the Fifth Amendment.⁸⁰ In brief, the regulatory takings question is whether government action that substantially reduces but does not eliminate the value or usability of property constitutes a compensable “taking.” Under the Supreme Court’s decisions, the only situations where compensation is definitely required are where regulations destroy the full value of ownership⁸¹ or involve a permanent physical invasion of property.⁸²

The voluminous literature on regulatory takings has not noticed that the Constitution itself explicitly addresses the question.⁸³ The

⁷⁸ *Id.* (“The property Petitioners seek to protect is the airspace above their land. Taken to its logical extreme, Petitioners would have the United States military *seek consent from every individual or entity* owning property over which military planes might fly We simply do not believe the Framers intended the Third Amendment to be used to *prevent* the military from regulated, lawful use of airspace above private property without the property owners’ consent.” (emphasis added)).

⁷⁹ Though *Garvey* rested its decision on the disastrous consequences of enforcing a property rule for overflights, a simple textual argument would have sufficed. Overflights appear more analogous to an army marching across peoples’ land, which is quite different from an army being quartered in their houses, and falls under the Takings Clause.

⁸⁰ The literature is too vast to even survey except to note the polar positions. Compare William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 783 (1995), with Epstein, *Takings*, *supra* note 61, at 57–58.

⁸¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1030 (1992).

⁸² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 441 (1982).

⁸³ Professor Matthew Harrington briefly referred to the Third Amendment in a recent discussion of regulatory takings. He argued that the Just Compensation Clause

Third Amendment protects against quartering troops, which is a specific type of partial taking. When troops are quartered in a private house, the owner's occupancy of the property is limited and its value reduced; yet the owner retains title, can derive some benefit from the property, and will presumably regain full possession after some time. In effect, the owner is forced to accommodate tenants at a rental rate he deems too low—zero dollars. The Supreme Court has described similar governmental action as a regulatory taking that does not require compensation.⁸⁴

That the Constitution explicitly provides protection against one particular form of regulatory taking, but not against the myriad other forms, could suggest through negative inference (the canon of statutory construction known as *expressio unius est exclusio alterius*) that there is no entitlement against other types of partial takings, even those involving physical invasion. Put differently, if the Fifth Amendment protects against regulatory takings, then the Third Amendment would appear to be unnecessary and redundant. A broad application of the negative inference would find that the Third Amendment entirely settles the regulatory takings dispute against compensation. A more modest reading would suggest that the Third Amendment provides a benchmark for regulatory takings: To be compensable, they must involve a much more severe deprivation than the quartering of troops. Even this interpretation of the Third Amendment would be useful to regulatory takings jurisprudence, as the quartering benchmark may be easier to apply than Justice Holmes's notoriously slippery standard since that standard merely posits that a regulation only becomes a taking when it goes "too far."⁸⁵

and the Third Amendment are related in a different way from that suggested here: Both were introduced into the Constitution as a means of safeguarding citizens against the impositions of a standing army. Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 *Wm. & Mary L. Rev.* 2053, 2073 (2004). This interpretation illustrates the dangers of viewing entitlements in one dimension. See *infra* text accompanying note 86.

⁸⁴ *Block v. Hirsh*, 256 U.S. 135, 156–57 (1921) (upholding the constitutionality of an ordinance prohibiting landlords from increasing the monthly rents of holdover tenants).

⁸⁵ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see also *Lucas*, 505 U.S. at 1015 (“[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too far’ for purposes of the Fifth Amendment.”).

On closer examination, though, the Third Amendment does not imply that other types of regulatory takings do not require constitutional scrutiny. To understand why, one must look at both the Takings Clause and the Peacetime Quartering Clause in two dimensions. Both deal with takings, the former with takings generally and the latter with a particular type; the difference between the two lies in the remedial dimension, not the substantive one. The Just Compensation Clause creates an entitlement against takings but protects it with a liability rule. By contrast, the Peacetime Quartering Clause mandates the more robust property rule protection. The purpose of the Third Amendment is to ensure *greater* protection for the anti-quartering entitlement than for other property rights. The provision of a higher degree of protection against what was regarded as a particularly odious type of regulatory taking does not suggest that there is no substantive entitlement against other types. Instead, the Third Amendment's remedial structure supports the view that there is an entitlement against regulatory takings in general, but it is protected by a liability rule. This analysis demonstrates the importance of viewing the Constitution in two dimensions. For if one ignored the property rule aspect of the Third Amendment, one would reach the opposite conclusion—that regulatory takings do not require compensation.⁸⁶

D. The Third Amendment and the Permissibility of Liability Rules

The Third Amendment's explicit consent requirement—the hallmark of a property rule—has great significance for the theory of constitutional remedies. It is the only explicit property rule in the Constitution. If, as is commonly assumed, all constitutional rights inherently carry property rule protection, there would be no need for the Third Amendment to specify a remedial rule. If constitutional rights presumptively cannot be taken without consent, the Third Amendment could have simply said “No Soldier shall, in

⁸⁶ For example, Professor Harrington's interpretation of the relation between the two provisions illustrates the dangers of looking at entitlements in only one dimension. See *supra* note 83. He ignores the fundamental difference between the two entitlements: The government *can* take property without consent if it subsequently pays for it, but it cannot forcibly “take” the occupancy of a person's house even if it provides compensation. The different remedial treatment of different types of takings suggests that, contrary to Harrington's view, a different set of concerns motivated the two constitutional provisions.

time of peace be quartered in any house.” The property rule would be implied from the mandatory “*shall*,” which is found in the definition of all of the Bill of Rights entitlements. There is a strong presumption against interpreting the Constitution in a way that would render some of its language nugatory.⁸⁷ The phrase “without the consent of the Owner” is pure surplusage if there is a background presumption of property rule protection. The failure to stipulate consent as a necessary condition for transfers of other entitlements, given the explicit provision of this requirement in the Third Amendment, suggests that the Constitution does not presume property rule protection.⁸⁸ This does not, however, mean that all other entitlements must be protected by liability rules. The Just Compensation Clause mandates a liability rule for the entitlement it protects. This too would be superfluous if liability was the default remedy for entitlements whose protective rules are not specified. The Third Amendment’s explicit property rule and the Just Compensation Clause’s explicit liability rule show that the Constitution’s creation of entitlements does not in itself determine the remedial rule governing their transfer. These two explicit remedial provisions delimit the spectrum of constitutional remedies. The Constitution only specifies the *substance* of other entitlements. Its silence about how they should be protected is just that: silence.

Some have inferred from the Takings Clause that remedies for other rights are left to legislative and judicial discretion.⁸⁹ The Third Amendment strengthens this case: two points define a line. Here, the line is the continuum of remedies ranging from injunctive relief to money damages, which can be compensatory in various degrees. Both polar options—liability and property rule protection—are available, as are various “*pliability rule*” mixtures of the two. While property rules will generally be the best mode of protection, this is only for functional reasons, and not because of a constitutional requirement.

⁸⁷ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

⁸⁸ The word “consent” appears in no other amendment, nor in Article I, Section 9, clauses 2–4, which also define individual liberties. The word relates to structural issues of federalism and separation of powers, such as the requirement of senatorial “Advice and Consent.” U.S. Const. art. II., § 2, cl. 2.

⁸⁹ See, e.g., Fallon & Meltzer, *supra* note 54, at 1779; Kontorovich, *supra* note 3, at 815–17.

One might object that while the Peacetime Quartering Clause is unique in its explicit conditioning of entitlement transfers on the owners' consent, other provisions of the Bill of Rights also require property rule protection because of their use of mandatory language. For example, the strict language of the First Amendment—"Congress shall make no law"—might be taken as an absolute constitutional bar against legislation that infringes on the relevant entitlements, and thus a requirement of property rule protection. Similarly, the Second Amendment declares that gun rights "shall not be infringed," arguably creating a property rule.

Two points should be made in this regard. First, the present discussion does not hinge on the Peacetime Quartering Clause being the only explicit property rule. As long as some entitlements do not require either property or liability protection, the existence of an explicit liability rule (the Takings Clause) and at least one explicit property rule (the Third Amendment) suggest that the other entitlements can be protected by liability or property rules.

Second, it is far from clear that the use of "shall" and "shall not" is a textual prohibition on liability rules rather than merely a definition of substantive entitlement. Such a reading of "shall" may put more meaning on the mandatory form of the word than it can bear.⁹⁰ Consider, hypothetically, what would happen if the mandatory language in these provisions were not used; how could entitlements be clearly defined at all? If the word "should" were used instead (that is, "Congress should make no law . . ."; "the right . . . should not be violated") it would not be clear that an entitlement were being created; it would merely be precatory advice for Congress. Even the Takings Clause, the one clear liability rule, first states that private property "shall" not be taken. The mandatory form is necessary to create the substantive entitlement, or the first dimension, regardless of the remedial rule that would protect it.

It is instructive to consider that the in a wide variety of situations and over a long period of time, courts have not treated the Bill of Rights' "shalls" as textual prohibitions on liability rules. Liability rules have historically been used to protect the Fourth Amendment's entitlement against unreasonable searches; more recently, the Sixth Amendment's Confrontation Clause entitlement and the

⁹⁰ See Kontorovich, *supra* note 3, at 814–15 (suggesting that some "laws are phrased as 'shall nots,' yet are enforced only through liability rules").

Fifth Amendment's Self-Incrimination Clause have been paired with liability rule protection. The Fifth Amendment specifies that individuals "shall" not be compelled to testify against themselves, yet it is uncontroversial that the Self-Incrimination entitlement can be taken, provided that compensation is paid in the form of immunity. Similarly, the Fourth Amendment says the "the right of the people to be secure" against unreasonable searches and seizures "shall not be violated," but this entitlement was traditionally protected by state law damage remedies in tort suits. The available remedies for such violations have expanded to include injunctions, but this has been largely a result of new *statutory* avenues of redress created after the Civil War. These statutes did not arise from a determination that tort remedies were constitutionally inadequate given the Fourth Amendment's "shall not" language; rather, they reflected legislative and judicial policy decisions that while liability rules were constitutionally adequate, they in practice tended to be insufficiently protective.

The Sixth Amendment provides that a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor."⁹¹ Yet this mandatory language does not dictate what happens if the government takes the entitlement without the holder's consent by not producing important witnesses or evidence in its possession on grounds of national security. To be sure, the property rule view of these entitlements normally holds, in that the accused can "enjoin" a prosecution that would destroy the confrontation or compulsory processes entitlement; in other words, the indictment would have to be dismissed.⁹²

The amenability of these same entitlements to liability rule protection is vividly demonstrated in the prosecution of alleged September 11 terrorist Zacarias Moussaoui. The defendant wished to call as witnesses al Qaeda terrorists in government custody and to examine classified depositions of those witnesses, a request the government vigorously opposed on national security grounds. The

⁹¹ U.S. Const. amend. VI.

⁹² See *Jencks v. United States*, 353 U.S. 657, 672 (1957) ("The burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets . . .").

Fourth Circuit held that the defendant's Sixth Amendment entitlements would be destroyed by the government if his request were denied.⁹³ Yet it refused to dismiss the indictment.⁹⁴ Instead, it held that if the government destroys the entitlement it must compensate the defendant by providing a "substitution" of substantially equivalent information that would not compromise national security. The government was allowed to condemn the entitlement but was required to give the rights holder material that would "place the defendant, as nearly as possible, in the position he would be in if the classified information (here, the depositions of the witnesses) were available to him."⁹⁵ Thus Sixth Amendment "substitutions" are functionally equivalent to compensatory damages awarded under a liability rule. This shows that despite the constitutional text's use of "shall" and "shall not," the question of what remedial rule a court must apply when the government violates a constitutional entitlement is distinct from the question of whether the entitlement has been violated, and that sometimes a court can award compensation for the taken entitlement instead of enjoining the taking.

For a variety of entitlements—such as the Self-Incrimination and Confrontation Clauses—case law establishes liability rules as adequate protection under certain circumstances. Despite the constitutional text's use of "shall" and "shall not," the question of what a court must do when the government violates a constitutional entitlement is distinct from whether the entitlement is violated. While the property rule reading of the Bill of Rights' mandatory phrases is plausible as a textual matter, it is not required by the text, and is inconsistent with a substantial body of judicial interpretation.

III. STRUCTURAL LIABILITY RULES

Perhaps the most widespread use of liability rules in constitutional law is also the most subtle. "Structural liability rules" do not explicitly call for liability protection, but create it in practice by making certain determinations about when the government, with-

⁹³ *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004), cert. denied, 125 S. Ct. 1670 (2005) ("The district court . . . has properly determined that they [enemy combatant witnesses] could offer material testimony on Moussaoui's behalf, but the Government has refused to produce the witnesses.").

⁹⁴ See *id.* at 476–77.

⁹⁵ *Id.* at 477.

out ex ante judicial process, can act in a way that might destroy individual entitlements. When constitutional law authorizes the government to act first and justify itself in a hearing afterwards, it in effect creates a liability rule because the initial action cannot be enjoined even if it intrudes on individual entitlements.

A. Procedural Due Process

1. The Sufficiency of Post-Deprivation Process

The rules governing when a hearing is required under the Due Process Clauses sometimes create liability rules. One obstacle to thinking about liability rules as an option for constitutional entitlements is that substantive entitlements are often conflated with the potential remedies that protect them. The Due Process Clause, however, deals with the *procedures* for condemning or transferring the *substantive* entitlements of the Fifth and Fourteenth Amendments (life, liberty, and property). Violations of procedural due process are distinct from the underlying violations of liberty or property interests.

Determining what “process” is “due” involves choosing between property rules and liability rules for the protection of the Fifth Amendment’s substantive rights. When, as is generally the case, the “process” must occur before the taking of the substantive entitlement, a property rule is created.⁹⁶ When the process can be had after the taking, the process in effect becomes an ex post remedy and a liability rule is created. The polar cases illustrate the point. At one end is the property rule, reflected in the default due process requirement that liberty and property cannot be taken without the government first condemning them in a trial or similar administrative proceeding.⁹⁷ The government must get ex ante permission—

⁹⁶ Professors Driesen and Ghosh recently analyzed the Court’s procedural due process jurisprudence from a transaction cost perspective, noting that the typical insistence on ex ante hearings raises transaction costs to reduce the likelihood of an erroneous rights deprivation, which would be a deadweight loss. See Driesen & Ghosh, *supra* note 24, at 89–91. In the typical procedural due process case, the Court insists on raising the costs of the transaction because they generate even greater social benefits.

⁹⁷ See *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); see also Richard H. Fallon, Jr., *Some Confusions About Due Process*,

either from the individual or a court—to take the entitlement. At the other pole—the liability rule—some substantive constitutional rights may be taken without any ex ante hearing whatsoever; the entitlement holder is confined to “postdeprivation” remedies.⁹⁸ These lower due process requirements create a liability rule since the entitlement can be coercively taken at a price established in an ex post judicial process.

Between these polar cases are the majority of modern “procedural due process” cases involving “administrative” or “public” rights. In these cases, a property or liberty interest created by the government cannot be taken without an ex ante hearing of some kind. The hearing, however, need not be a full blown judicial procedure. It can be a less formal administrative procedure, with resort to judicial process available only after the completion of the challenged action.⁹⁹ Simplified procedural requirements do not allow for naked takings of entitlements, but they presumably increase the chances of wrongful deprivation of individual rights. They leave the entitlement protected by something between a property and a liability rule.

The liability rule aspect of restricting entitlement holders to post-deprivation remedies becomes evident when one considers the classic cases *Parratt v. Taylor*¹⁰⁰ and *Hudson v. Palmer*.¹⁰¹ These cases involved, respectively, a negligent loss and intentional (but

Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 330 (1993) (“When some kinds of liberty and property interests are involved—the right to freedom from criminal incarceration, for example—the Due Process Clause requires a judicial hearing.”).

⁹⁸ See *Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (“In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. . . . *Parratt* and *Hudson* represent a special case . . . in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.”); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (“[W]e hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.”).

⁹⁹ See Fallon, *supra* note 97, at 330–31 (“[W]hen an adequate substantive justification exists, government officials may lawfully deprive people of liberty and property in public rights cases and possibly in other circumstances too without first invoking judicial processes.”).

¹⁰⁰ 451 U.S. 527, 543–44 (1981).

¹⁰¹ 468 U.S. 517 (1984).

not authorized) destruction of prisoners' property by prison officials. Since these takings of property were not for public use, they would typically be protected by a property rule: the destruction would require the ex ante consent of the prisoner or of a judicial officer. In these cases, however, the Court held that a prisoner's due process right is not violated if his property is accidentally or even intentionally destroyed by a prison official, provided that post-deprivation remedies are available.¹⁰² In other words, the government can take the entitlement first and pay later.

2. *Transaction Cost Justification*

High bargaining transaction costs provide the most obvious justification for these decisions and thus also suggest their natural limits. Just as allowing drivers to enjoin potentially negligent or even reckless motorists would paralyze the highway system, allowing prisoners to enjoin negligent prison officials whose actions might destroy their property would risk paralyzing the prison system.¹⁰³ Under certain assumptions about the difficulty of monitoring the unauthorized intentional acts of prison employees, the same is true of intentional destruction of property.¹⁰⁴ For procedural due process entitlements, ex ante procedures are not required when they would be extraordinarily burdensome in comparison to the costs of ex post process and the value of the interest at stake.¹⁰⁵ When ex ante processes are so costly that they would preclude activities with a net social benefit, the government can take first and pay money

¹⁰² *Hudson*, 468 U.S. at 536; *Parratt*, 451 U.S. at 543–44.

¹⁰³ See *Parratt*, 451 U.S. at 541, 543.

¹⁰⁴ The Supreme Court made these assumptions in *Hudson*, 468 U.S. at 531–32.

¹⁰⁵ See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (“We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in ‘extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (holding that purely “postdeprivation remedies might satisfy due process” when “a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake”). This formulation seems to ignore the social benefit of the government action. The *Mathews v. Eldridge* balancing test does take into account the social benefit from the taking of liberty, under the prong focused on “the government’s interest.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 348 (1976).

later.¹⁰⁶ Indeed, the factors specifically mentioned by the Court as militating for liability protection are transaction costs: the administrative expenses of allowing property rule protection and the need for quick action.¹⁰⁷ The latter is a motif that recurs frequently when constitutional rights receive less than property rule protection.¹⁰⁸

B. Fourth Amendment Search and Seizure

1. A De Facto Liability Rule

The Fourth Amendment creates a substantive individual entitlement “against unreasonable searches and seizures.”¹⁰⁹ There are two rival views about how this entitlement should be protected. One theory, focused on warrants, results in something close to property rule protection. The other, focused solely on the substantive reasonableness of the search, leans towards a liability rule. The liability rule approach seems to be more sensitive to the underlying transaction costs.

The Supreme Court has said that the Fourth Amendment requires warrants for all searches or seizures.¹¹⁰ Professor Amar has powerfully criticized this view, arguing that reasonableness is the sole criterion for permissible searches.¹¹¹ If the Fourth Amendment

¹⁰⁶ *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (“This Court has recognized, on many occasions, that where . . . it would be *impractical* to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.” (emphasis added)); *Parratt*, 451 U.S. at 539 (same).

¹⁰⁷ See *Gilbert*, 520 U.S. at 930 (noting that providing only post-deprivation process is appropriate “where a State must *act quickly*” (emphasis added)). Compare *James Daniel Good Real Prop.*, 510 U.S. at 56–57 (holding that ex parte civil forfeiture of one’s home violates the right to due process because as real property cannot abscond, the forfeiture was not “justified by a pressing need for prompt action”), with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974) (holding that “postponement of notice and hearing until after seizure did not deny due process” where “the property seized—as here, a yacht— . . . could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given”).

¹⁰⁸ See *supra* text accompanying note 75 (discussing the need for quick action as a transaction cost basis for a liability rule for wartime quartering under the Third Amendment).

¹⁰⁹ U.S. Const. amend. IV.

¹¹⁰ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *Johnson v. United States*, 333 U.S. 10, 14–15 (1948).

¹¹¹ Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 3–17, 31–35 (1997).

requires warrants, then it creates something close to property rule protection. A warrant protects the individual against searches unless he consents to them,¹¹² or the government extinguishes the entitlement by securing the approval of a judge before acting. Because warrant hearings are conducted *ex parte* and the government need not prove its case beyond a reasonable doubt, the Fourth Amendment property rule is less robust than the property protection for the liberty of criminal defendants.¹¹³ Nonetheless, the emphasis on *ex ante* approval, and the presumptive invalidity of a search that proceeds without such approval, makes the warrant requirement more a property rule than anything else. Furthermore, government officials are protected against subsequent tort suits when they act armed with a warrant.¹¹⁴ The warrant view of the Fourth Amendment emphasizes *ex ante* mechanisms for governing rights transactions instead of—not in addition to—*ex post* mechanisms.

The other view of the Fourth Amendment is that it does not require warrants—the government can search when doing so is reasonable. In this view, a warrant creates a strong presumption of reasonableness, but unwarranted searches can also be reasonable. With no warrant requirement, government officials can search first and pay later, if they violate individual entitlements.

If the Fourth Amendment only requires that the search be reasonable, an issue that will only be litigated after the search, then it creates something that works *in practice* like a liability rule. To be sure, Fourth Amendment rights are nominally protected by property rules, because injunctive relief is theoretically available against illegal searches.¹¹⁵ In practice, however, searches usually happen

¹¹² See *Schneekloth v. Bustamonte*, 412 U.S. 218, 242–43 (1973) (“While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person’s voluntarily allowing a search.”).

¹¹³ See *supra* Section I.D.1.

¹¹⁴ See Amar, *supra* note 111, at 20–21, 73.

¹¹⁵ The Fourth Amendment says the entitlement “shall not be violated,” which has led many commentators to conclude that it must be protected with a property rule. See Amar, *supra* note 111, at 43. This conflates the remedy with the right. The substantive entitlement is clear, but because the Amendment is silent on the question of remedies, it is less clear whether an unreasonable search followed by a payment of just compensation can be considered a “violation” rather than a compensable taking

quickly and unexpectedly, making anticipatory relief improbable. This is why the reasonableness-based Fourth Amendment is best understood as a structural liability rule. Due to the nature of police searches, any rule that does not require and institutionalize ex ante approval of searches effectively pushes the protection of the entitlement towards a liability rule. This liability rule is well justified by transaction costs. It would, for example, be prohibitively expensive for police to seek a warrant before making a search incident to arrest. The costs of delay alone in such situations would exceed the social gains from searching.¹¹⁶

2. Between the Third and Fifth Amendments: A Possible De Jure Liability Rule

This raises the question of whether it makes sense to have even nominal property rule protection of Fourth Amendment rights—that is, whether injunctions should be available in the rare cases where they can be obtained before the entitlement is taken.¹¹⁷ This generally will be in situations where a particular search policy or system is in place, rather than situations involving isolated or spontaneous searches. Looking at the polar cases—provisions that explicitly specify liability or property rule protection—might allow for inferences about the proper treatment of intermediate entitlements with unspecified remedies.

Recall that the Third Amendment protects the anti-quartering entitlement in peacetime with a property rule, while the Fifth Amendment protects the property entitlement with a liability rule.

of the entitlement. Because the right does not specify a mode for its protection, liability rule protection may not violate the right.

¹¹⁶To be sure, delay in this context and others may reduce erroneous searches, which are deadweight social losses. The Fourth Amendment structural liability rule appears to assume that such social losses (a sum of the cost of the search in terms of police resources and the violated privacy interests) are on average much lower than the social costs of delay (failing to obtain the law enforcement information that a search would produce), or that the police rarely wish to search in error, or both. See *supra* note 29.

¹¹⁷Even Amar, famous for his endorsement of the tort model for enforcing Fourth Amendment rights, believes in the necessity of injunctive relief when possible. He does argue that ex post civil damages, rather than the exclusionary rule, should be the remedy for illegal searches when it is too late for an injunction. Yet this is not about replacing the nominal property rule protection with a liability rule, but rather about the proper measure of ex post compensation when injunctions fail. See Amar, *supra* note 111, at 25–28, 41–43.

What is striking is that the substantive entitlements are very similar in kind: they both protect against invasions and uses of one's real property by the government. Both entitlements protect interests that are similar or identical to the "homes" and "effects" protected by the Fourth Amendment. Recall the two main variables in choosing between liability and property rules: bargaining transaction costs and judicial transaction costs (of which valuation difficulties can be a significant component).

Some of the interests protected by the Third Amendment, such as the sentimental value of living in one's home, are difficult to accurately monetize. This cannot explain why the Third Amendment protects them with a property rule because all of the same idiosyncratic valuations are implicated in eminent domain, where a liability rule is used. If it is hard to put a price on the inconvenience and sentimental loss from strangers in military helmets living in one's home, it is at least equally difficult to put a price on the inconvenience and sentimental loss from strangers in hard hats knocking down that home. The same valuation difficulty applies to the Fourth Amendment—to strangers in police caps rummaging around one's home. Thus, the judicial transaction costs do not appear that different from the Third to the Fourth to the Fifth Amendment. Accordingly, the provision of a liability rule in the Fifth Amendment context suggests that the Constitution does not treat such injuries as posing insurmountable valuation difficulties.

The Third Amendment's peacetime property rule is a function of very low bargaining transaction costs. Conversely, the Fifth Amendment's liability rule is a response to particularly high costs. In either case, it is not *ex post* valuation difficulties doing the work. Fourth Amendment anti-search rights, at least as applied to property, are similar in nature to those protected by the Third and Fifth Amendments and present similar valuation problems. The explicit remedial choices made by the Third and Fifth Amendments suggest liability rules for searches of real "houses" and "effects" would be proper when bargaining transaction costs are relatively high, particularly when this is due to potential holdout problems. The Third and Fifth Amendment also suggest that liability rules might be off limits when, as in the Peacetime Quartering Clause, bargaining transaction costs are *de minimis*.

3. Liberty Entitlements

The discussion thus far has been confined to searches of *things*, rather than searches or seizures of *people*. The latter involve liberty interests quite different from the property interests protected by the Third and Fifth Amendments. Courts face greater difficulties in accurately valuing liberty than property.¹¹⁸ It would take extraordinarily high bargaining transaction costs to justify a liability approach to liberty entitlements. To refer again to the Fifth Amendment, both liberty and property are protected against deprivation without due process, but the Takings Clause only mandates liability rules for property. This suggests that for remedial purposes, what will be true for searches of things under the Fourth Amendment will not necessarily be true for searches and seizures of persons. This distinction is made in Fourth Amendment cases, which sometimes require greater cause to justify a search or seizure of a person than of things.¹¹⁹ This difference in the scope of substantive anti-search entitlements may be a response to the greater difficulty involved in valuing liberty interests. It is an awkward response, however, because it attempts to deal with remedial difficulties by adjusting the scope of the substantive anti-search right. This is a result of the courts' ignoring the second dimension of constitutional entitlements. A system that reflects the same constitutional values but works in both dimensions would establish the same substantive standard of reasonableness regardless of the object of the seizure, but would protect persons with property rules and things with liability rules.

IV. LIABILITY RULES FOR GOVERNMENTAL ENTITLEMENTS

Thus far, this Article has dealt with liability rules for individual rights. Constitutional law, however, creates governmental "enti-

¹¹⁸ Section I.C, *supra*, discusses the particular valuation problems raised by liberty entitlements.

¹¹⁹ See *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 55 (2000) (Rehnquist, C.J., dissenting)) (recognizing a higher standard for searches and seizures of persons or homes than for searches of automobiles); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999) (holding that while a dog sniff of luggage is not a Fourth Amendment search, a dog sniff of a person is such a search because "the level of intrusiveness is greater").

tlements” as well.¹²⁰ These are the powers the government has to regulate individuals, either under the amorphous “police power” or pursuant to an explicit constitutional grant of authority, such as the taxing power. As with individual rights, the government’s entitlements are almost always protected by property rules: individuals cannot appropriate these powers from the government without its consent. Some other governmental powers are protected by inalienability rules: the government cannot transfer them.¹²¹ It is unconventional to think about governmental entitlements as being protected by liability rules:¹²² constitutional rights are usually thought of as rights *against* the government.¹²³ Yet in the First

¹²⁰ See Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 *Fordham L. Rev.* 289, 311–12 (1999) (“[C]riminal prohibitions, which are intended to protect the public as a whole, give rise to a societal right—the right to the non-breach thereof. . . . ‘[E]ntitlements’ here are not necessarily the rights of individuals, as is typically the case with constitutional rights; they frequently belong to the state or to society at large.” (footnote omitted)).

¹²¹ For example, the nondelegation doctrine can be understood as an inalienability rule for the federal government’s entitlements. On the other hand, the Supreme Court’s recent Spending Clause cases, which allow the federal government to purchase states’ Tenth and Eleventh Amendment entitlements, treat these entitlements as protected by a property rule. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 209–10 (1987). These cases, however, prohibit the “coercive” use of the spending power—when the federal government makes states an offer they cannot refuse, even if the states are paid fair compensation in such situations. *Id.* at 211. Thus, the Court insists on property rule protection of the states’ entitlements—they cannot be condemned. The refusal to countenance liability rules seems sound in that there are no obvious major bargaining barriers between the federal government and the states. So, in a context where national uniformity is important, and thus holdout by states is a serious threat, one could imagine the Court accepting even a coercive use of the spending power. Indeed, the government in *Dole* argued that absolute national uniformity of drinking ages was an important goal, and the Court’s acceptance of this argument may have been the real basis for its refusal to heed the claim of coercion. *Id.* at 208–09 (“[S]afe interstate travel . . . had been frustrated by varying drinking ages among the States.”).

¹²² For example, one of the only scholars to consider the possibilities of constitutional liability rules writes that “[a]lthough it may be possible to imagine” that “an individual can acquire a constitutional right against the government . . . by paying the government for the costs associated with its exercise,” he concludes that “such rules, if any actually exist . . . are rare.” Merrill, *supra* note 3, at 1153 (emphasis added).

¹²³ See Merrill, *supra* note 3, at 1152 (arguing that it “makes no sense in considering constitutional entitlements,” to suppose that judges can allocate entitlements either to individuals or to the government because “the authoritative constitutional text itself establishes the menu of entitlements and who gets them—generally private persons who are subject to government regulatory power”). It bears noting that one of the two liability rules discussed in this Part, the prior restraint doctrine, is not established by

Amendment doctrine of prior restraint and the setting of bail under the Eighth Amendment, the government's regulatory entitlements are protected by *liability* rather than property rules.

A. The Constitution's "Rule Four"

Liability rules for social entitlements correspond to Calabresi and Melamed's "Rule Four" entitlement-remedy combination. The best way to explain Rule Four is with Calabresi and Melamed's pollution example.¹²⁴ Under basic tort principles, which Calabresi and Melamed classify as "Rule One," the substantive entitlement related to pollution is assigned to those harmed by the pollution (the pollutees). This entitlement is protected by a property rule: the pollution can be enjoined as a nuisance. Calabresi and Melamed, however, suggest another possible arrangement that they call "Rule Four." The entitlement is originally assigned to the polluter, but only protected by a liability rule. The pollutees can "buy out" the polluter's right to continue his harmful activities, even without his consent, but only by paying him judicially determined compensation. Rule Four is therefore a private right of eminent domain over the polluting activities. It can be useful in the rare situations where there is uncertainty as to whether the social costs of pollution exceed the benefits of the pollution-causing activity and the pollutees may be best situated to reduce the costs.¹²⁵

Rule Four is almost never used in private law, and Calabresi and Melamed conceded that "it does not often lend itself to judicial imposition for a number of good legal process reasons."¹²⁶ In private law, Rule Four is difficult to administer because it requires apportioning the costs of taking the polluter's entitlement across many pollutees, each of whom may have been harmed to a different extent.¹²⁷ It is equally rare in constitutional law, which has led

"the authoritative constitutional text" but rather by judicial decision. It also happens to be the one constitutional liability rule discussed in this Article that does not appear to be justified by transaction costs. See *infra* text accompanying notes 129–150.

¹²⁴ See Calabresi & Melamed, *supra* note 1, at 1115–17; see also *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 707–08 (Ariz. 1972) (holding that a real estate developer was entitled to enjoin a nearby nuisance, but was also required to indemnify it for the cost of moving or shutting down).

¹²⁵ See Calabresi & Melamed, *supra* note 1, at 1120–21.

¹²⁶ *Id.* at 1116.

¹²⁷ See *id.* at 1116–17.

an observer to posit its irrelevance in this context.¹²⁸ In constitutional law, Rule Four is used when it is an *individual* who might take the *government's* substantive entitlement under a liability rule. The full cost of the entitlement is paid for by the individual—the speaker under the prior restraint doctrine, and the defendant under the Excessive Bail Clause—so there is no apportionment problem.

B. Prior Restraint

1. The Doctrine

The First Amendment prior restraint doctrine applies to *unprotected* speech—speech that people do not have a constitutional entitlement to make. The doctrine creates a liability rule by banning injunctions against potentially criminal or otherwise unprotected speech but allowing those injured by such speech to seek recompense in the courts after the fact.¹²⁹ Hence, the doctrine treats prospective restrictions on speech as presumptively invalid:¹³⁰ the government can only impose sanctions for unprotected speech after it has occurred.¹³¹ This liability rule protects society's and individuals' entitlements to be free of certain types of speech, or to put it differently, the government's right to regulate certain types of speech for the benefit of society.¹³²

¹²⁸ See Merrill, *supra* note 3, at 1153 (arguing that Rule Four is an “unnecessary appendage in the constitutional realm”).

¹²⁹ A few scholars have recognized this point. See Bendor, *supra* note 120, at 312–13 (“The constitutional bias against prior restraints results in the use of liability rules to protect civil law anti-speech entitlements. . . . [A] party interested in impairing an anti-speech entitlement has the power to do so, but in return he or she must pay the holder of the entitlement compensation at a rate determined by the state.”); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *Ind. L.J.* 47, 63–64 (1994).

¹³⁰ See *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))).

¹³¹ See *Near v. Minnesota*, 283 U.S. 697, 721 (1931); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Probs.* 648, 648 (1955) (“[R]estrictions which could be validly imposed when enforced by subsequent punishment are . . . forbidden if attempted by prior restraint.”).

¹³² See Bendor, *supra* note 120, at 312 (“[I]ndividuals, society, and the state have certain ‘anti-speech’ entitlements, or entitlements that require limitation of the speech rights of others . . .”).

The doctrine, like the Free Speech Clause itself, was originally intended to guard against newspaper licensing schemes and other methods of administrative censorship. The doctrine has since expanded, however, to preclude courts from *enjoining* potentially unprotected speech, even in private defamation suits.¹³³ Commentators have been critical of this expanded approach because judicially imposed prior restraints do not share many of the undesirable characteristics of newspaper licensing schemes.¹³⁴ Despite these and other objections, however, the Supreme Court has continued to adhere to the broad prior restraint doctrine.¹³⁵ Because it is hard to see any reason to be more solicitous of unprotected speech when it is embryonic than when it is fully hatched, the justification for the doctrine must lie primarily in its “chilling effect” on protected speech. Prior restraints may, for various reasons, cut too wide a swath, stifling protected speech along with unprotected speech.¹³⁶ Thus, prior restraint is like overbreadth and vagueness—it saves unprotected speech (at least temporarily) so that protected speech may go free. As Justice Frankfurter has pointed out, this justification for the prior restraint doctrine is only somewhat coherent: Any *ex post* criminal regulation of unprotected speech acts as a prior restraint by deterring lawful speakers who fear they may step over the line and face punishment.¹³⁷

2. *Transaction Cost Justification*

Under the prior restraint doctrine, the anti-speech entitlement cannot be protected through injunctions, even in advance of an imminent harm. Rather, the speaker can forcibly “take” the anti-

¹³³ See *Near*, 283 U.S. at 721–23.

¹³⁴ See, e.g., Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 90 (1984) (“In most instances, judicially issued prior restraints on expression are no more harmful to first amendment interests than are subsequent punishment systems and therefore do not deserve the traditional disdain imposed by the prior restraint doctrine.”).

¹³⁵ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (observing, anachronistically, that “court orders that actually forbid speech activities [] are classic examples of prior restraints”).

¹³⁶ See John Calvin Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 425, 428–29 (1983) (discussing the overbreadth and chilling effect rationales for prior restraint).

¹³⁷ See, e.g., *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441–43 (1957); see also Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 539–40 (1977).

speech entitlement and then compensate the injured individual or the public, either through civil damages or jail time.¹³⁸ It is not obvious whether the doctrine reflects the underlying transaction costs. Anti-speech entitlements can be put into one of two categories, each typified by a landmark prior restraint case: private, individual entitlements such as the right to be free from defamation (*Near v. Minnesota*¹³⁹), and collective ones such as the right to be free from speech that undermines national security (*New York Times v. United States*,¹⁴⁰ also known as *Pentagon Papers*). Liability rules become increasingly attractive as bargaining transaction costs increase, and as the difficulty of valuing the entitlement decreases. When the anti-speech entitlement is individual, there are relatively few barriers to efficient bargaining between a prospective taker of the entitlement (the libeler or slanderer) and the person whose reputation would be harmed. The entitlement holders are few, their identities known in advance, and they can be negotiated with directly. If the prospective speaker fails to secure the consent of the entitlement holder in advance, it implies that the latter places a higher value on the speech than does the former. A forcible transfer of the entitlement would be inefficient. Thus, in *Near*-type cases, transaction costs do not justify the ban on prior restraints.¹⁴¹

¹³⁸ See Bendor, *supra* note 120, at 313 (“Without the doctrine of prior restraint, the holder of the [anti-speech] entitlement could refuse to sell it or, at the very least, could hold out for the price that he or she deemed satisfactory. . . . Instead, the victim of libel is entitled to compensation from the person harming him or her at a rate that is determined by a court.”).

¹³⁹ 283 U.S. 697 (1931).

¹⁴⁰ 403 U.S. 713 (1971).

¹⁴¹ See Bendor, *supra* note 120, at 317. Indeed, in a recent high-profile case, a California court may have implicitly recognized that private and social anti-speech entitlements stand on a different transaction cost footing and thus might warrant differential application of the prior restraint rule. *Cochran v. Tory*, No. B159437, 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003), vacated and remanded by 125 S. Ct. 2108 (2005). The court imposed a permanent injunction against libelous statements made by the defendant against attorney Johnnie Cochran. It held that the presumptive unconstitutionality of prior restraints “has no application where, as here, an injunction against a private person operates ‘to redress alleged private wrongs.’” *Id.* at *2. The court also noted that public transaction costs were quite high due to the difficulty of valuing Cochran’s reputational entitlement. *Id.* The situation the court described—where bargaining costs (between identifiable private parties) are low and judicial transaction costs are high—is one where transaction cost analysis dictates the prior restraint liability rule should not apply.

The transaction cost calculation is different when collective or social entitlements are involved, as in *Pentagon Papers*.¹⁴² Too many people are harmed by obscene speech or impairing national security for the speaker to be able to identify them in advance, let alone negotiate with them for the taking of the entitlement. Furthermore, the members of the large and diffuse injured group will face severe coordination and holdout problems.¹⁴³ Under a property rule, these transaction costs would prohibit efficient ex ante deals; they would block speech from ever being made even when the speaker is willing to pay the full social cost. So at first glance, the prior restraint liability rule makes sense for speech that violates communally held anti-speech entitlements.¹⁴⁴

Yet this explanation does not suffice. While “society” is too diffuse to bargain with, it has appointed a unitary agent to enforce its anti-speech entitlements—the government. After all, the publisher of obscenity or national security-compromising materials ultimately pays sanctions to the government, not society. Government, as the holder of collective entitlements for bargaining purposes, is a classic solution to both holdout and free-rider problems. Governmental enforcement of collective anti-speech entitlements greatly reduces transaction costs, thereby eroding the justification for a liability rule in this setting.

The government, however, is merely an imperfect agent for society.¹⁴⁵ The government may not properly internalize costs when taking land under the eminent domain liability rule.¹⁴⁶ Similarly, it is not clear whether it has proper incentives to accept an efficient payment from a prospective speaker in exchange for giving up its

¹⁴² See *N.Y. Times v. United States*, 403 U.S. 713 (1971).

¹⁴³ Bendor, *supra* note 120, at 317. (“The cost of gathering the members of a large group is huge, and sometimes such an operation is logistically impossible. Moreover, the completion of the transaction is contingent upon the separate consent of each member of the group; each of them is therefore in a position to extort in a manner that will yield her profits at the expense of the other parties.”).

¹⁴⁴ *Id.*

¹⁴⁵ See David A. Strauss, *First Amendment Entitlements and Government Motives: A Reply to Professor Merrill*, 93 *Nw. U. L. Rev.* 1205, 1209 (1999).

¹⁴⁶ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 347–48 (2000) (arguing that the government does not fully internalize costs as private actors do, and thus requiring the government to pay compensation does not affect its conduct as much as it would a private actor).

anti-speech entitlement. Under a property rule the government might sometimes refuse reasonable compensation out of self-interested political motives: *Pentagon Papers* again comes to mind.¹⁴⁷ Still, it is far from clear that concern about agency problems should dictate the choice between liability and property rules in the free speech context when they do not in the takings context. The political process is the primary mechanism for policing against agency problems in government.¹⁴⁸

An evaluation of the prior restraint liability rule would be incomplete without consideration of administrative and error costs, as well as judicial valuation problems.¹⁴⁹ The social harm caused by disclosure of national secrets or obscenity are diffuse and inchoate, and therefore hard to measure. Because these entitlements are not traded in markets (and are not even analogous to common law torts), courts cannot use market prices to determine damages. As a result, judicial valuations of the entitlement will be highly error-prone. Additionally, the potential speaker may be judgment-proof, unable to pay the extensive compensatory damages for collective entitlements. For example, an inciter may not be able to afford the costs of a riot, all difficulties of valuation aside. National security prior restraint cases like *Pentagon Papers* and *United States v. Progressive*¹⁵⁰ are even clearer examples of cases where, if the threatened harm transpired, the speaker would not have the resources to pay for it. Criminal enforcement becomes an attractive substitute for liability rules in such situations, as *The Cathedral* pointed out.¹⁵¹

In sum, the prior restraint doctrine creates a liability rule, but it is not a response to heightened transaction costs. In the case of individual anti-speech entitlements, bargaining transaction costs are

¹⁴⁷ See *N.Y. Times*, 403 U.S. at 720, 723–24 (Douglas, J., concurring) (“The dominant purpose of the First Amendment was to prohibit . . . governmental suppression of embarrassing information. . . . The present cases will, I think, go down in history as the most dramatic illustration of that principle.”).

¹⁴⁸ See Kontorovich, *supra* note 3, at 777.

¹⁴⁹ One commentator maintains that these entitlements are “incommensurable” and thus inappropriate for liability rules. See Bendor, *supra* note 120, at 318–23. One need not adopt the metaphysical language of incommensurability to come to the same conclusion.

¹⁵⁰ 486 F. Supp. 5, 9 (W.D. Wis. 1979) (reaffirming an injunction against the publication of a magazine article explaining how to build a hydrogen bomb because it would “likely cause a direct, immediate and irreparable injury to this nation”).

¹⁵¹ Calabresi & Melamed, *supra* note 1, at 1125 n.69.

quite low, and the existence of government substantially reduces transaction costs for collective anti-speech entitlements. Moreover, transaction costs are difficult for courts to value, further weakening the case for liability rules. Valuation difficulties aside, the absolute size of the injury may be high enough that most potential speakers would be judgment-proof. The potential concern about using a property rule is that the government would, for self-interested political reasons, withhold consent to socially efficient takings of its anti-speech entitlement.

3. *Flipping the Entitlement*

While the prior restraint doctrine is not justified by the underlying transaction costs, *The Cathedral* suggests an alternative entitlement/protective rule structure that would allow the doctrine's substantive goals to be realized. The prior restraint doctrine prevents the government from enjoining publication, but allows it to impose fines afterwards. A more efficient way of preventing First Amendment "chilling effects" would be to flip the entitlement. The substantive right would be initially allocated to the speaker, who could make even non-protected speech. The government, however, could forcibly condemn this entitlement. In other words, the government *could* enjoin publication—"take" the entitlement—but would then have to pay judicially determined damages if a court subsequently found the speech to be constitutionally protected.¹⁵²

Pentagon Papers shows the utility of the flipped approach. The Court thought the only alternatives were to allow the prior restraint or to allow publication.¹⁵³ Given the national security stakes involved, this left several Justices visibly conflicted and resulted in a weak per curiam decision with nine separate opinions, none commanding five votes. If the entitlement were flipped, the Court could have sustained the prior restraint, while allowing the *New York Times* to subsequently sue for damages. In that suit, with the

¹⁵² Professor Merrill has suggested a similar approach in the specific context of tobacco advertising. Merrill, *supra* note 3, at 1199–1204 (suggesting that the government could "condemn the tobacco companies' right to advertise in return for the payment of just compensation").

¹⁵³ *N.Y. Times*, 403 U.S. at 730, 734–37 (White, J., concurring) (suggesting that, in most cases, the government's only constitutionally valid tool is post-publication prosecution).

urgency of the enjoin-or-allow decision having faded, the merits could be more carefully considered.

This would also have avoided a chilling effect on protected speech. Newspapers are commercial enterprises run for profit, often with publicly traded shares; they respond to financial incentives. The prospect of eventually receiving compensatory damages for an injunction against protected speech would ensure that newspapers would not be deterred from investigating and publishing such stories in the future. Newspapers would have full incentive to pursue stories that fall within the realm of protected speech because they would be compensated for their investment either directly, through publication, or indirectly, through damages. Thus the government's security interests would be vindicated without compromising First Amendment values.

Another advantage of this approach is that the newspapers' damages are easier to compute than the government's.¹⁵⁴ As has been discussed, it is difficult to accurately assign a dollar value to intangible interests such as national security secrecy and decent speech. It is much easier to determine a newspaper's loss from having a speech entitlement condemned. One might look at the projected increase in sales from running a scoop, how much additional advertising revenue it would generate, in addition to publicity value for the paper, as measured by past evidence from similarly sensational stories.

Furthermore, while anti-speech entitlements like national security secrecy and obscenity may be hard to value, the government will probably possess *better* information about the scope of the potential harm than the would-be speaker.¹⁵⁵ Under the prior restraint doctrine, imperfect information may make it hard for a speaker to know whether to publish or not because of uncertainty about the size of ex post sanctions. This uncertainty may itself chill speech. Yet if the government were the one taking a speech entitlement under a liability rule, it could use its superior (but often classified) knowledge about the size of the social injury. This would make it

¹⁵⁴ See generally Calabresi & Melamed, *supra* note 1, at 1120–21 (noting that whether the polluter or pollutee should be protected by a liability rule depends in part on whose entitlement is easier to value through the judicial process).

¹⁵⁵ See generally *id.* at 1118–20 (discussing the relevance of asymmetrical transaction costs to the allocation of entitlements and the choice of protective rules).

more likely that the entitlement would be transferred when, and only when, it is socially efficient.¹⁵⁶

A major drawback of the flipped entitlement approach would be the creation of moral hazard. If newspapers were entitled to payment for suppressed *unprotected* speech, they might devote more resources to digging up national security secrets and obscene matter. They could prepare an edition full of incitement to violence and have the government “buy it out.” This problem stems from the characteristic feature of the prior restraint doctrine—that it applies to unprotected speech. Flipping the entitlement simply relocates the perverse consequences. Under a flipped liability rule, the government should only have to pay for condemnation of *protected* speech; otherwise the moral hazard problems would be insurmountable. If the speech turns out to be unprotected, the government would be free to pursue civil and criminal sanctions against the speaker, thereby reducing moral hazard.

The moral hazard problem suggests that the flipped entitlement approach should not be used in all contexts. It could, however, be appropriate for borderline cases where it is difficult to determine, especially in the hurry of an equitable proceeding, whether particular speech enjoys First Amendment protection. For example, in *Pentagon Papers* several Justices admitted that the matter ripened too quickly for them to be able to get a good grip on the merits.¹⁵⁷ The justices were divided on whether the speech fell within the First Amendment’s substantive protection. When it is unclear whether an individual has a substantive speech entitlement (protected by a property rule) or the government has the corresponding anti-speech entitlement (protected by a liability rule), the best compromise may be to presume that the individual has the entitlement but to protect it only with a liability rule. By extension, the flipped entitlement approach could be useful for borderline *catego-*

¹⁵⁶ See Merrill, *supra* note 3, at 1201 (“If the courts are very uncertain about the correct analysis of external costs and benefits, a liability rule provides a mechanism for assuring that the correct conclusion has been drawn.”).

¹⁵⁷ *N.Y. Times*, 403 U.S. at 725 (Brennan, J., concurring) (noting “the necessary haste with which decisions were reached” and “the magnitude of the interests asserted”); *id.* at 748–49 (Burger, C.J., dissenting) (“These cases are not simple for another and more immediate reason. We do not know the facts of the cases. . . . It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases.”).

ries of speech, where the doctrine is in flux and the scope or existence of substantive protection is uncertain.¹⁵⁸

C. Bail

1. The Liability Rule

The Eighth Amendment provides that “Excessive bail shall not be required.”¹⁵⁹ This establishes a liability rule for the government’s entitlement to detain people between arrest and conviction. The government is allowed to hold defendants pending trial. The defendants, however, can buy out the government’s detention right without its consent. To see the liability rule clearly, imagine if the government’s entitlement were protected by a property rule. A defendant would have to negotiate directly with the U.S. Attorney for a “bail bargain,” much as they now negotiate for “plea bargains.”¹⁶⁰ The amount of bail would be determined, if at all, by agreement. The Eighth Amendment, however, generally allows suspects to bypass such negotiations, and to obtain their liberty pending trial by paying a judicially determined amount. Thus the prohibition on “excessive bail” is a counterpart to the Fifth Amendment’s requirement of “just compensation”: the judge ensures that the price of the entitlement is close to its “market” value.

Of course, the way bail is popularly conceptualized is that the government does not have a “right” to detain people pending trial because the Constitution gives people a “right” to bail. This is doctrinally incorrect; individuals can be denied bail.¹⁶¹ The misunder-

¹⁵⁸ See Merrill, *supra* note 3, at 1202 (“[L]iability rules [for speech entitlements] . . . may be particularly appropriate where there is a high level of uncertainty about whether a police power rule should apply [that is, whether the speech should be protected in the first place].”).

¹⁵⁹ U.S. Const. amend. VIII.

¹⁶⁰ The Supreme Court has left it unclear whether the Bail Clause applies to the states through the incorporation doctrine. See Nelson Lund, *The Past And Future of the Individual’s Right to Arms*, 31 *Ga. L. Rev.* 1, 49 n.112 (1996) (“Since the process of incorporation began, the Court has apparently not had an occasion to decide whether the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment or the Third Amendment should be applied against the states.”).

¹⁶¹ The Excessive Bail Clause only governs the amount of bail in those cases where bail is required, but does not require bail in all cases. See *United States v. Salerno*, 481 U.S. 739, 752 (1987) (“This Clause, of course, says nothing about whether bail shall be available at all.”); *United States v. Abrahams*, 575 F.2d 3, 5 (1st Cir. 1978)

standing stems largely from confusing rights with remedies. The government's pretrial detention right is not recognized as an entitlement precisely because the liability rule makes transfers relatively easy in most cases, and thus the entitlement rarely stays in its default position. In the unusual situation where bail is not available, as can happen for capital offenses, the government's entitlement is protected with a property rule. Notably, the government has an entitlement to detain under all circumstances, and considerations like risk of flight affect the price at which the individual can force a taking against the government. Consider the case of someone who poses no flight risk and thus has his bail set at one dollar. The suspect remains in jail unless he affirmatively chooses to post the bail.¹⁶² This demonstrates that the broad detention entitlement is initially assigned to the government.

2. *Transaction Cost Justification*

The Bail Clause's liability rule can be understood as a response to monopoly power on the government's side. While it is not clear that monopoly power would block socially efficient transactions (bail releases), it would affect how any surplus is distributed between the government and bailees.¹⁶³ Thus the purpose of the Eighth Amendment's bail provision could be merely distributional.

When an entitlement belongs to the government, as in the bail context, many individual defendants must deal with a single, unified entitlement holder. Yet, the presence of a monopolist on one side of the transaction does not mean that a socially efficient bargain cannot be reached. His monopoly power will simply lead him

("The [E]ighth [A]mendment proscribes excessive bail, but it does not mandate that a defendant be allowed bail in all cases.").

¹⁶² See, e.g., *Tatum v. Morton*, 386 F. Supp. 1308, 1310 (D.D.C. 1974) (noting that the arrestees were held in jail overnight when they refused to post a \$10 bond because they said they "could not participate in the bail system which discriminated against persons without sufficient money to 'buy' their release"). In *Tatum*, the Court ruled that the arrestee's refusal to post such a "trifling" bond represented a failure to mitigate damages arising from an unlawful detention, especially given that it would not have "compelled plaintiffs to compromise or sacrifice any rights." Thus, plaintiffs could not recover damages for prolongation of detention past the point at which they could have posted the bond. *Id.* at 1311–12.

¹⁶³ For a model of optimal bail illustrating the surplus created when bail is set at a level equating the marginal benefit of release with the marginal cost, see William M. Landes, *The Bail System: An Economic Approach*, 2 *J. Legal Stud.* 79, 83–88 (1973).

to charge a supercompetitive price and thus expropriate most of the social surplus. Typically a monopolist reduces output to increase prices, and in such cases monopoly has both distributional and efficiency effects because supply is suboptimally low. Such a strategy would not work for bail because each arrestee's bail is a unique good: denying one person bail would not affect the price of another person's bail. Accordingly, in the bail context, the government's monopoly pricing strategy would be to charge each defendant his reservation price (assuming it is above the cost of bail to the government).

The consequences would be purely distributional: a monopoly would not block socially beneficial bail transactions, but would allow the government to keep for itself all the benefits. The Bail Clause changes these distributional consequences and ensures that the bailee receives some portion of the surplus.¹⁶⁴ This is an understandable policy choice from the Framers' perspective. The government is created to make collective action possible; it should not seek to maximize its own utility at the expense of individuals. While bail can be set at a *socially* optimal level, it should not be set any higher.

There may be an even more vexing agency problem involved, one that could block socially efficient bail transactions and provide an alternate or additional transaction cost explanation for the Bail Clause. Society benefits both from convicting criminals and, all else being equal, from releasing them on bail. An optimal bail system would take into account both considerations. But society's agent on the federal level, the U.S. Attorney, has a utility function that diverges from his principal's. The prosecutor's goal is to win convictions. This purpose can best be served by keeping all defendants in jail until trial. The U.S. Attorney has no obvious incentive to reach a bail deal with any defendant. On the contrary, he has an incentive to demand unnecessarily and inefficiently high bail. Of course, the government must pay for the costs of incarceration, but it is not clear to what extent the U.S. Attorney (as opposed to the government more generally, or a separate department) internalizes these costs. Nor is it clear whether he internalizes any benefit from

¹⁶⁴ See generally Calabresi & Melamed, *supra* note 1, at 1099–1101 (discussing the relevance of distributional concerns to the establishment of entitlements). See also *supra* Section I.D.2.

the forfeiture of bail posted by defendants who fail to appear. (This would depend in part on whether forfeited bail went into the prosecutor's budget or into general court funds.)

This, again, is the government-as-imperfect-agent problem, discussed earlier in relation to prior restraint. In that context, this Article suggested that a liability rule is not obviously the best response to the problem. In the bail context, however, agency costs will regularly be much higher than in prior restraint cases because the problem arises more often. The agency problem in prior restraint—the reason the government might refuse to give up its anti-speech entitlement even when it would be socially beneficial to do so—would arise only when the potential speech is both arguably unprotected and embarrassing to government officials. Such cases are rare, and account for a small proportion of the situations where the prior restraint doctrine applies. A prosecutor, however, faces his agency problem in every single bailable case.

To conclude, the Eighth Amendment works to prevent prosecutors from using their monopoly power to appropriate all of the social benefits from the bail system. This function is purely distributional: it does not affect social efficiency. However, if there is a significant principal-agent problem with prosecutors such that they care about the social benefits of conviction and not the social benefits of bail, then the Bail Clause also works to ensure that these agency costs do not block socially beneficial transactions. In this case, it would have efficiency benefits as well as distributional consequences.

3. Flipping the Entitlement

Another way to examine the economic purpose of the Excessive Bail Clause is to consider why the Constitution's purposes could not have been served by the opposite liability rule. Under such a rule, defendants would be presumptively free until trial, but the government could "take" defendants' entitlement to pretrial liberty by forcibly detaining them and paying just compensation. The chief difference with this system would be in what courts are asked to monetize. Under the present bail system, courts attempt to set bail at a level equal to society's interest in the bailee's appearing at trial, and possibly its interest in him not committing crimes while released, while a reverse bail system would have to put a monetary

value on the cost of detention to the bailee. The amount paid would have to be less than under the present defendant-pays system; otherwise it would provide a windfall to dangerous people and flight risks, and create significant moral hazard.¹⁶⁵

Determining the amount to be paid to the defendant would be quite complicated. The magnitude of the valuation problem is a consequence of bail protecting several different interests, most of them inchoate. Accurate compensation would have to account for each of them. Bail is useful to the defendant because it allows him to be free. But the liberty interest is particularly difficult to value. The defendant's wage rate could, at best, be a poor approximation (not the least because most jobs involve non-pecuniary compensation, such as enjoyment, higher than that offered by jail time).¹⁶⁶ A less obvious function of bail is to allow the bailee an opportunity to assist in his own defense by freely meeting with counsel and by not having the pallor of the cell upon him when he comes before a jury. This interest is even harder to value because it is contingent—if the defendant is not given bail and subsequently convicted, it would be difficult for a court to determine whether his inability to assist in his defense was a central ingredient in his conviction, or whether he was just factually guilty.

It is not clear whether society's interest in bail is easier for a judge to monetize than the individual's interest. Yet it is not implausible that the individual's interest will be more difficult to value. The form of the current bail system—a liability rule for a detention entitlement originally assigned to the government—could be understood as a response to these asymmetric judicial transaction costs.

Finally, liability rules may be particularly appropriate because the bail system seeks to accommodate conflicting private and pub-

¹⁶⁵ See Landes, *supra* note 163, at 98 (noting that when “levels of pretrial payments [are] high relative to the eventual sentence,” it becomes increasingly likely that “a person may commit and confess to a crime, . . . for the sole purpose of collecting payment”).

¹⁶⁶ Landes notes that voluntary reverse bail would have the beneficial effect of giving authorities an incentive to improve prison conditions because that would lower the amount of compensation each defendant would have to be offered. See Landes, *supra* note 163, at 96–97.

lic interests within one rule.¹⁶⁷ Of course, attempts to reconcile conflicting legitimate interests are ubiquitous in the law. In bail, however, the effort is made to reconcile these interests within each individual case, not across a wide swath of cases. In such situations, where a balance must be struck within individual cases, liability rules have the advantage, as they are more flexible than property rules.¹⁶⁸ Injunctions are all-or-nothing, but money can be more or less, and is better suited to fine adjustments between competing interests.

CONCLUSION

Constitutional law has long been regarded as a field where only property rules can apply. Yet only two constitutional provisions choose between liability and property, with the Takings Clause adopting the former, and, as has been shown here, the Third Amendment adopting the latter. For other entitlements, the Constitution makes no explicit textual choice. This silence shows that for entitlements where remedial rules are not specified, both options are open, as well as creative mixtures of the two. Liability rules are, therefore, fully compatible with the Constitution.

The amenability of constitutional entitlements to liability protection is not merely a theoretical innovation. Rather, this Article has shown that liability rules are in fact found throughout constitutional law. This Article does not purport to be comprehensive: The liability rules identified here do not necessarily exhaust all those that can be found in constitutional doctrine. Indeed, there may be constitutional entitlements that currently receive property rule protection but that should, under the considerations described in this Article, receive liability protection instead. This Article's identification of existing liability rules can be a point of departure for investigations into the desirability of developing new ones.

¹⁶⁷ *Faheem-El v. Klinkar*, 841 F.2d 712, 719 & n.10 (7th Cir. 1988) (en banc) ("Bail, as frequently noted, involves a struggle to reconcile competing interests.") (citing Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right To Bail: Historical Perspectives*, 82 *Colum. L. Rev.* 328, 329-30 (1982) ("Bail acts as a reconciling mechanism to accommodate [sic] both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial.")).

¹⁶⁸ See generally Kontorovich, *supra* note 3, at 798-801 (discussing the use of liability rules to reconcile competing interests in a given case, with particular attention to liberty entitlements). See also Bell & Parchomovsky, *supra* note 10, at 67-68.

The awareness of the second dimension of constitutional law draws attention to the economic structure of constitutional remedies—to holdout problems, imperfect information, valuation difficulties, agency costs, and related considerations typically obscured and overlooked by purely substantive discussions of constitutional rights. Determinations about the breadth of constitutional rights are, in an important sense, political or philosophical questions. Economic tools help reveal the best methods to enforce already defined entitlements.