EMORY | LAW

Emory Law Journal

Volume 71 | Issue 6

2022

Erroneous Injunctions

Michael T. Morley

ERRONEOUS INJUNCTIONS

Michael T. Morley[*]

ABSTRACT

When a federal court concludes that a statute or regulation is unconstitutional or otherwise invalid, it will often enter an injunction prohibiting the government from enforcing that measure against the plaintiff in that case. But a court will dissolve a preliminary injunction after trial when it concludes that the plaintiff is not entitled to relief on the merits. It may likewise vacate a permanent injunction when subsequent developments in precedent reveal that it misconstrued the relevant legal provisions. And any type of injunction may be overturned on appeal.

Once an erroneously issued injunction has been reversed, vacated, or dissolved, the government may enforce the challenged legal provision against the plaintiff if it violates that provision in the future. It is less clear, however, whether the government may similarly prosecute that plaintiff or impose other punitive measures against it for violating the challenged provision while the injunction was in effect. Despite the centrality of injunctive relief in constitutional litigation, the Supreme Court expressly left this issue unresolved in Edgar v. MITE Corp.*, with various opinions defending different sides of the issue. Recent scholarship has vigorously advocated such retroactive prosecutions. The Supreme Court has exacerbated the confusion by construing many of the most seemingly applicable defenses—due process "fair notice" restrictions, prohibitions against ex post facto laws, and the mistake of law defense—too narrowly to completely bar retroactive punitive enforcement of previously enjoined legal provisions.*

This Article offers a new approach. Drawing on traditional equitable practices, including the principles governing injunction bonds as well as

---

[*] Sheila M. McDevitt Professor of Law, Florida State University (FSU) College of Law. Special thanks to William Baude, Rick Hasen, F. Andrew Hessick, Douglas Laycock, Jake Linford, Thomas B. Metzloff, Jonathan Nash, Richard Re, Doug Rendleman, Caprice Roberts, and David A. Simon for their invaluable feedback on this article and discussions on this topic. I am also grateful for the valuable suggestions I received from the participants at the Emory University School of Law Colloquium Workshop, Federalist Society Junior Scholars' Colloquium, FSU College of Law faculty workshop, and George Washington University Law School Junior Scholars Workshop. Finally, I would like to thank Kat Klepfer of the FSU College of Law Research Center for her thorough and indefatigable support; my invaluable research assistants Anna Kegelmeyer and Peyton Smith for their help in exhaustively searching for sources; as well as Patrick M. Judd and the staff of the *Emory Law Journal* for their tremendous efforts in editing this Article.

criminal contempt proceedings under injunctions that have been overturned, this Article demonstrates that even injunctions that were issued erroneously and no longer remain in force can continue to affect litigants' rights. It further explains that federal courts have authority—as a component of both the Article III judicial power as well as their equitable powers—to prevent the federal government and states from taking punitive measures against people for actions performed under the protection of a federal injunction. This Article goes on to examine various ways in which courts may implement this restriction. Injunctions are critical tools for protecting constitutional rights. Courts may shield litigants from the possibility of civil penalties, statutory damages, and criminal prosecution for acts taken under injunctions that were issued erroneously.

TABLE OF CONTENTS

INTRODUCTION

When a court concludes that a law, regulation, executive order, or other legal provision is unconstitutional, it will decline to apply or enforce that provision in the case before it.[1] Courts generally treat unconstitutional legal provisions as void,[2] at least in most respects.[3] Additionally, in civil cases,[4] the court will often enter an injunction prohibiting the defendants—who are usually governmental officials or entities (though not always[5])—from enforcing that provision.[6]

But what happens if the court makes a mistake or later changes its mind? This can happen in a variety of ways. For example, an appellate court may

---

[1] *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (describing the power of judicial review as "the negative power to disregard an unconstitutional enactment").

[2] Norton v. Shelby County, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte* Siebold, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

[3] *See generally* OLIVER P. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935) (discussing various legal consequences of unconstitutional laws in certain contexts).

[4] "There is no mechanism for seeking an injunction, however, based on constitutional, interpretive, or other such issues raised in the context of a criminal case." Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2496 (2014).

[5] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, unconstitutional in litigation by private investors against a securities investment company); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion) (holding § 241(a) of the Bankruptcy Act of 1978, 28 U.S.C. § 1471, unconstitutional in bankruptcy litigation between an entity seeking reorganization and a private company that was allegedly liable to it for breach of contract and various torts); *see also* FED. R. CIV. P. 5.1(a) (requiring a litigant challenging the constitutionality of a federal or state law to serve notice on the U.S. Attorney General or state attorney general, respectively, if no agencies or officials of the appropriate government are parties to the suit).

[6] F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1066 (2021) ("An injunction is . . . a judicial order commanding a person to take, or refrain from taking, a particular action."). The U.S. Supreme Court has specified the requirements for preliminary injunctions, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008), and permanent injunctions, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). *See* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205–06 (2012) (arguing that *eBay*'s four-factor test does not accurately reflect traditional equitable principles, which rested instead on presumptions and safety valves).

In recent years, commentators have strenuously disagreed on the proper scope of relief in constitutional cases. Some have argued in favor of statewide, and even nationwide, defendant-oriented injunctions. *See, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018). Such orders completely prohibit a government defendant from enforcing the underlying legal provision against anyone, anywhere in the state or nation. *See* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunction in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 490 (2016). Others have raised a variety of objections to such orders, arguing that a court generally must instead issue plaintiff-oriented injunctions, tailored to protecting the rights of the plaintiff or plaintiffs before it. *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 9–10 (2019) [hereinafter Morley, *Disaggregating Nationwide Injunctions*]; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017).

overturn a preliminary injunction[7] in an interlocutory appeal[8] or a permanent injunction after final judgment.[9] A district court may decide to modify or revoke a preliminary injunction while a case remains pending[10] or dissolve it at the end of the case by declining to enter a permanent injunction.[11] And a court may even vacate a permanent injunction long after a case has concluded[12] when the constitutional or statutory provisions involved are reinterpreted in subsequent cases.[13] This Article will refer to all of these types of orders collectively as "erroneous injunctions."[14]

An injunction, judgment, or judicial opinion holding a legal provision unconstitutional neither nullifies that provision nor removes it from the law books. And once that judicial impediment is overturned, vacated, or otherwise dissolved, the government may resume enforcing the provision prospectively against future illegal conduct.[15] For example, in 1923, *Adkins v. Children's*

---

[7] *See, e.g.*, N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020); Courthouse News Serv. v. Brown, 908 F.3d 1063, 1075 (7th Cir. 2018). For brevity, this Article will use the term "preliminary injunction" to refer to both preliminary injunctions and temporary restraining orders, except where it is necessary to distinguish between them.

[8] *See* 28 U.S.C. § 1292(a)(1) (authorizing interlocutory appeals of district court orders "granting, continuing, modifying, refusing or dissolving injunctions").

[9] *See, e.g.*, Luft v. Evers, 963 F.3d 665, 679, 681 (7th Cir. 2020); Trustees of Ind. Univ. v. Curry, 918 F.3d 537, 544 (7th Cir. 2019); Ronnie Van Zant, Inc. v. Cleopatra Recs., Inc., 906 F.3d 253, 258–59 (2d Cir. 2018).

[10] *See, e.g.*, I.M. Wilson, Inc. v. Grichko, No. 18-5194, 2019 U.S. Dist. LEXIS 182350, at *13 (E.D. Pa. Oct. 18, 2019).

[11] *See, e.g.*, Garnett v. Zeilinger, 485 F. Supp. 3d 206, 232–33 (D.D.C. 2020).

[12] *See* FED. R. CIV. P. 60(b)(5) (authorizing district courts to grant relief from a final judgment when "applying it prospectively is no longer equitable").

[13] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237–40 (1997) (vacating a permanent injunction given the change in Establishment Clause caselaw); Assoc. Builders & Contractors v. Mich. Dep't of Lab. & Econ. Growth, 543 F.3d 275, 278–79 (6th Cir. 2008) (revisiting an injunction after a change in ERISA caselaw).

[14] Likewise, when this Article discusses injunctions being "reversed" or "overturned," it should be understood as including all of these forms of subsequent rejection by courts, except when context dictates otherwise.

[15] *See, e.g.*, Jawish v. Morlet, 86 A.2d 96, 97 (D.C. 1952) (holding that if a judicial ruling that rendered a law "inoperative or unenforceable" is reversed, then the "statute is valid from its first effective date"); Pierce v. Pierce, 46 Ind. 86, 95 (1874) ("[T]he cases having been overruled, the statutes must be regarded as having all the time been the law of the State."); Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645, 651 (1951); Note, *The Effect of Declaring a Statute Unconstitutional*, 29 COLUM. L. REV. 1140, 1146–47 (1929); *see also* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553–54 (1870) (holding that the Legal Tender Act of 1862, ch. 33, 12 Stat. 345, 352 (Feb. 25, 1862), was constitutional and enforceable, and reversing Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1868), which had held the law unconstitutional); William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1908–17 (1993) (collecting cases); *cf. In re* Rahrer, 140 U.S. 545, 564–65 (1891) (holding that, where a state enacts a law that may not validly be applied to interstate commerce without congressional consent and Congress subsequently passes a law authorizing such provisions, the state law may be applied to transactions that occurred in the interim between the enactment of the two measures).

Hospital held that Washington, D.C.'s minimum wage law was unconstitutional.[16] Over a decade later, the Court overruled *Adkins* in *West Coast Hotel Co. v. Parrish*, declaring that minimum wage laws are valid.[17] The U.S. Attorney General issued a legal opinion to President Roosevelt concluding that Washington D.C.'s minimum wage law was accordingly "valid from the date it became effective."[18] Relying on that opinion, the D.C. Court of Appeals ruled that the law was enforceable without any need for Congress to re-enact or otherwise resuscitate it.[19]

It is far less clear, however, whether a person is subject to liability, civil penalties, or even criminal prosecution for violating a legal provision while an injunction barred the government from enforcing it. At first blush, basic norms of fundamental fairness suggest that a person cannot be punished for actions taken under the protection of an injunction. The purpose of a pre-enforcement injunction, like a declaratory judgment, is to allow a litigant to safely navigate "between the Scylla of intentionally flouting state [or federal] law and the Charybdis of forgoing what he believes to be constitutionally protected activity."[20]

But reality may be more complicated. In general, "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law."[21] And in *Edgar v. MITE Corp.*, various Supreme Court Justices reached sharply different conclusions about whether a plaintiff who won a preliminary injunction against a state law, and then violated that law while the injunction was in effect, could be prosecuted for those actions if the injunction were later reversed on appeal.[22] The plurality acknowledged that this was a difficult question without resolving it.[23] And

---

[16] 261 U.S. 525, 562 (1923).

[17] 300 U.S. 379, 400 (1937).

[18] 39 Op. Att'y Gen. 22, 22–23 (1937); *see also* Treanor & Sperling, *supra* note 15, at 1913–14; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 64 n.93 (1993); Erica Frohman P lave, Note, *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*, 58 GEO. WASH. L. REV. 111, 120 (1989).

[19] *Jawish*, 86 A.2d at 97.

[20] Steffel v. Thompson, 415 U.S. 452, 462 (1974).

[21] Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 96 (1993).

[22] *Compare* 457 U.S. 624, 648–49 (1982) (Stevens, J., concurring in part and concurring in the judgment) ("Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution."), *with id.* at 656 (Marshall, J., dissenting) (concluding that a federal court has "the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect," even if the injunction is later overturned).

[23] *See id.* at 630 n.5 (plurality opinion) (holding that a nonfrivolous dispute existed over whether a litigant was subject to civil or criminal penalties under such circumstances); *see also id.* at 665 (Rehnquist, J., dissenting)

subsequent courts have grappled with the problem,[24] with several allowing defendants to be prosecuted for actions taken under the protection of injunctions that were later overturned.[25]

The academic literature on equity is likewise sharply divided. Professor Jonathan Mitchell's recent *Virginia Law Review* article, *The Writ-of-Erasure Fallacy*, contends that when a court reverses, vacates, or dissolves an injunction against a legal provision, "the executive [is] free to enforce the [provision] again—both against those who will violate it in the future and against those who have violated it in the past."[26] Professor Douglas Laycock also recognized this possibility while touching upon a few potential counterarguments and noting that the "issue remains unresolved."[27]

Professor Richard Fallon, in contrast, advocates a more selective approach, taking into account the type of remedy the government seeks to impose for acts taken while an erroneous injunction was in effect.[28] He contends that due process concerns about adequate notice prevent the government from retroactively prosecuting someone for violating a statute while its enforcement had been enjoined.[29] The government may, however, be able to impose civil penalties or similar sanctions for such conduct.[30] Other scholars have recognized the problem without reaching a solution.[31] Academic works on the revival of

(recognizing the "possibility" that the plaintiff might be subject to an enforcement action for violating an Illinois statute after obtaining a preliminary injunction against that law if the injunction were later overturned on appeal, but declining to resolve the issue).

[24] *See infra* notes 97–99 and accompanying text.

[25] *See infra* note 98 and accompanying text.

[26] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 987 (2018).

[27] Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 209 (1977) ("If the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation within the limitations period. . . . While the case for protecting litigants who relied in good faith on the interlocutory order of a federal court is strong, so is the argument that there is no federal power to enjoin enforcement of a constitutional state statute.").

[28] Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 619 (2007).

[29] *Id.*; *see also* Patrick T. Gillen, *Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?*, 8 DREXEL L. REV. 269, 315 (2016) (arguing that due process prevents the government from prosecuting a person for crimes they committed while under the protection of a preliminary injunction); *cf.* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 883 n.191 (1991).

[30] Fallon, *supra* note 28, at 619.

[31] *See, e.g.*, Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 FORDHAM URB. L.J. 657, 668–70 (2004) (concluding that Congress could enact a statute immunizing conduct performed in violation of an enjoined federal or state law but recognizing that it has failed to do so, and expressing uncertainty over whether the Due Process Clause bars such prosecutions (citing Jinks v. Richland County, 538 U.S. 456 (2003)); *cf.* Doug Rendleman, *Preserving the Nationwide*

previously invalidated statutory provisions[32] and the retroactive application of judicial reinterpretations of the law more generally[33] have likewise touched on this issue.

The abortion statute that Texas enacted in 2021, S.B.8, purports to impose substantial civil liability based on conduct performed pursuant to court rulings that are later overturned.[34] The statute creates a private right of action allowing any person to sue someone who either performs an abortion or aids and abets a pregnant woman in obtaining an abortion when a fetal heartbeat is detectable, in the absence of a medical emergency.[35] A successful plaintiff may recover

National Government Injunction to Stop Illegal Executive Branch Activity, 91 U. COLO. L. REV. 887, 919–21 (2020) (discussing the distinction between "erroneous" and "void" injunctions).

[32] *See, e.g.*, FIELD, *supra* note 3, at 181–87, 195–97 (collecting cases and recommending the enactment of statutes to protect people who act in reliance on judicial decisions); Treanor & Sperling, *supra* note 15, at 1906–08 (arguing that, when a court overturns a precedent under which laws had been held unconstitutional, those laws should not "be revived" if they "implicate[] individual liberty interests" in order to "force current legislative reconsideration" of the issue, particularly since the court's earlier ruling may have blunted efforts to repeal such measures); Mark C. Graham, Note, State v. Douglas*: Judicial "Revival" of an Unconstitutional Statute*, 34 LA. L. REV. 851, 855 (1974) (concluding that, if a court changes its interpretation of the Constitution or a statute after holding the statute unconstitutional, "then the statute can be enforced in the future without reenactment; it was not previously 'invalidated,' but simply not enforced because it was erroneously believed that the constitution prevented enforcement"); Crawford, *supra* note 15, at 648; Note, *The Effect of the Unconstitutionality of a Statute*, 37 GEO. L.J. 574, 591 (1949); *The Effect of Declaring a Statute Unconstitutional*, *supra* note 15, at 1146 ("There would appear to be no practical reason why the statute should not be applied after the reason for the prior refusal to apply it has been removed . . . .").

[33] Some commentators have argued that the Court is too willing to retroactively apply new judicial interpretations of legal provisions, especially in criminal cases. *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 492 (2001) (arguing that defendants should be able to assert a due process defense when their conduct was consistent with circuit-level precedent, rather than only Supreme Court precedent). Others have vigorously defended retroactively applying judicial changes in the law. *See* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 836–37 (2003) (arguing that judicial opinions should be fully retroactively applicable); Harold J. Krent, *Should* Bouie *Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 93–94 (1997) (arguing that "checks on retroactive lawmaking are not as critical" for courts since judges are less likely than legislatures to act vindictively toward criminals); *see also* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2145 (1996) [hereinafter Krent, *Puzzling Boundary*] (arguing there is a greater need for judicial protection against retroactive criminal laws than against civil statutes because the political process already provides substantial protection against the latter). Important work also exists on the converse issue of the extent to which rightsholders are entitled to remedies for violations of constitutional rights that the Supreme Court does not recognize until after those violations have occurred. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991).

These questions are a subset of broader issues concerning mens rea and mistake of law as defenses. *See* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 42, 78 (1997) ("Instead of treating the reliance defense solely as a matter of due process, courts should begin again to assess claims of reliance on official advice under common law principles of moral culpability."); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 43 (1939).

[34] *See* S. 8, 87th Legis. Assemb. (Tex. 2021) (codified at TEX. CODE § 171.201).

[35] *Id.* (codified at Tex. Code §§ 171.204(a), 171.205).

damages of at least $10,000 for each abortion performed in violation of the act.[36] The statute expressly provides that it is "not a defense" that a defendant "reli[ed] on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter."[37] This provision appears to allow a person to be held liable for violating S.B.8 for acts performed while enforcement of S.B.8 was enjoined, if that injunction is later reversed, vacated, or dissolved. This law presumes that retroactive application of essentially punitive remedies—here, a substantial statutory fine—for conduct taken under the protection of a since-vacated injunction is permissible.

This Article offers a new approach. It demonstrates that, under traditional equitable principles, erroneous injunctions that are no longer in effect can continue to influence litigants' rights. For example, when a plaintiff commits acts that amount to a tort or statutory violation while under an injunction's protection, and that order is later reversed, vacated, or dissolved, the aggrieved rightsholder (i.e., the previously enjoined defendant) may not pursue its otherwise available tort or statutory claims against the plaintiff. Rather, that rightsholder is relegated to an action on the injunction bond, if any, that the court ordered when entering the injunction.[38] In other words, even an erroneous injunction that is no longer in effect permanently limits the manner and extent to which a wrongfully enjoined party may retroactively enforce its rights against the plaintiff for the plaintiff's actions while the injunction was in force. The injunction's reversal does not restore the full range of legal rights that the wrongfully enjoined party would have possessed had the injunction never been issued.

Likewise, if an enjoined party willfully violates an injunction that is subsequently reversed or vacated, then the issuing court may hold that party in criminal contempt for those past actions, even though the underlying order is no longer in effect. Such retroactive enforcement of an invalid order is said to vindicate the authority of the issuing court and encourage litigants to seek judicial review of apparently invalid orders rather than unilaterally deciding for

---

[36] *Id.* (codified at Tex. Code § 171.208(b)(2)).

[37] *Id.* (codified at Tex. Code § 171.208(e)(3)).

[38] An injunction bond indemnifies the enjoined party "in damages if the injunction was 'wrongfully' sued out." Liner v. Jafco, Inc., 375 U.S. 301, 305 (1964). In many circuits, courts generally have discretion over the amount of the bond and whether to allow an erroneously enjoined defendant to recover on it. *See infra* notes 217–18, 231–33 and accompanying text.

themselves to violate them.[39] Thus, erroneous injunctions may continue to exert important legal effects even after their reversal.

Having laid that foundation, this Article goes on to show that the Article III judicial power[40] and federal courts' constitutional authority to grant equitable relief[41] allow federal courts to issue injunctions that definitively establish litigants' rights concerning acts taken while those orders are in effect, even though the injunctions are subject to appeal or the possibility of later being vacated or otherwise overturned. At most, a person should be required to pay compensatory damages or restitution for acts taken pursuant to an erroneous injunction that is later reversed. Remedies with a punitive element—including civil fines, civil penalties, substantial presumed statutory damages, punitive damages, licensure revocations, and criminal prosecutions—should be unavailable.

Although this authority arises from Article III and federal courts' equitable powers, this Article recommends two ways of facilitating its implementation. First, courts should expressly prohibit retroactive punitive proceedings for acts taken pursuant to subsequently overturned injunctions. During the early twentieth century, the U.S. Supreme Court occasionally issued injunctions that expressly specified that the government defendant was prohibited from *ever* pursuing an enforcement action against the plaintiff—including an enforcement action commenced after the injunction was reversed, vacated, or dissolved—for violating the enjoined legal provisions while the injunction remained in effect.[42] Second, rather than including such language in each injunction, Federal Rule of Civil Procedure 65(d)[43] could be amended to specify that injunctions enjoining enforcement of legal provisions shall presumptively be interpreted as implicitly containing such restrictions.

Part I of this Article begins by delving into the dispute among the Justices in *Edgar v. MITE Corp.*[44] over the extent of a person's civil and criminal liability for violating legal provisions that were enjoined under erroneous injunctions that are later reversed. This Part then turns to the argument, recently presented by Professor Jonathan Mitchell, that such an overturned injunction provides no protection against later prosecutions or other enforcement proceedings for

---

39 *See infra* note 263 and accompanying text.

40 *See* U.S. CONST. art. III, § 1.

41 *Id.* art. III, § 2, cl. 1.

42 *See infra* notes 361–71 and accompanying text.

43 FED. R. CIV. P. 65(d).

44 457 U.S. 624 (1982).

conduct performed while the order had been in effect.[45] This Part goes on to discuss how this "writ of erasure" argument would greatly undermine the utility of injunctions in public law cases. It concludes by examining why some of the most obvious potential defenses, such as due process and mistake of law theories, are too narrow to fully alleviate the problem.

Part II explains how the traditional equitable principles governing injunction bonds demonstrate that overturned injunctions can exert ongoing legal effects.[46] This Part shows that an erroneous injunction can continue to limit a wrongfully enjoined party's ability to seek complete relief even after that order is reversed, vacated, or otherwise dissolved. The government should not be able to claim greater authority to take retroactive punitive measures in public law cases.

Part III bolsters this analysis with another example of the continuing legal effects of overturned erroneous injunctions. It shows that if an enjoined party violates an injunction that is later deemed erroneous and reversed, then that wrongly enjoined party may nevertheless subsequently be held in criminal contempt. When considering the legality of the enjoined party's actions, the relevant law is typically based on the injunction *as it existed at the time of those actions*, regardless of whether the injunction is subsequently overturned. The same should be true in assessing the legality of the plaintiff's actions (i.e., the

---

[45] Mitchell, *supra* note 26, at 986–1003.

[46] A few pieces, mostly dated, have focused on injunction bonds. *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1414–17 (2015) (explaining the role of judicial discretion in imposing injunction bonds); Elizabeth Leight Quick, Note, *The Triggering of Liability on Injunction Bonds*, 52 N.C. L. REV. 1252, 1277 (1974) (providing a descriptive overview of injunction bonds and concluding that a defendant may recover on a bond for a preliminary injunction if the court declines to enter a permanent injunction); Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. REV. 1091, 1091 (1974) (suggesting comprehensive changes to the law governing injunction bonds); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 347–53 (1959) (discussing alternatives to recovery on injunction bonds and *Erie* issues concerning Rule 65(c)); *see also* Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 SEATTLE U. L. REV. 903, 905 (2009) (arguing that wrongfully enjoined defendants should be entitled to seek restitution as an alternative to suing on the bond).

Several pieces have argued that injunction bond requirements should be waived in public interest cases. *See* Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863, 1904 (1995) ("In noncommercial cases, such as those involving the vindication of constitutional rights or public benefits rights under a federal statute, waiver may be appropriate."); Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 835 (1986) (arguing that courts should be required to set bond in an amount "sufficient to compensate fully an injured defendant," except in cases "involving indigent or public interest plaintiffs"); Reina Calderon, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENV'T AFFS. L. REV. 125, 167 (1985) (arguing that bonds "can and should be waived by courts in the public interest litigation setting"); Alexander T. Henson & Kenneth F. Gray, *Injunction Bonding in Environmental Litigation*, 19 SANTA CLARA L. REV. 541, 552 (1979) ("[T]he bond requirement is unjustified as a tool of deterrence and presents a serious obstacle to environmental litigation.").

party that obtained the injunction). Thus, a key premise of the writ of erasure argument appears inconsistent with traditional equitable principles; even erroneous and subsequently overturned injunctions can continue to govern litigants' rights for the period those orders had been in effect.

Building on these insights, Part IV sets forth this Article's main normative contributions. It demonstrates that the Article III judicial power (for permanent injunctions) and the federal judiciary's equitable powers (for both preliminary and permanent injunctions) enable federal courts to bar a government defendant from using punitive measures to retroactively enforce a legal provision for acts performed while that provision had been enjoined, even after the injunction is overturned or otherwise dissolved. This Part then examines the various ways in which courts may implement this critical restriction. It suggests that courts should include express language to this effect in each order they issue. Alternatively, the Federal Rules Advisory Committee should recommend amendments to Federal Rule of Civil Procedure 65(d) to modify the default rules that govern the interpretation of injunctions. The final Part briefly concludes.

Injunctions play a critical role in the enforcement of both constitutional rights[47] and statutory constraints on the modern administrative state.[48] The Court should adopt a clear, consistent understanding of an injunction's effects when it proves to be erroneous.

I. ENFORCEMENT ACTIONS FOLLOWING ERRONEOUS INJUNCTIONS

Much of the uncertainty concerning the potential civil and criminal liability of people who commit otherwise illegal acts under the protection of erroneous injunctions that are later overturned stems from the opinions of various Supreme Court Justices in *Edgar v. MITE Corp.*[49] Building on this uncertainty, Professor

---

[47] *See* Bell v. Hood, 327 U.S. 678, 684 (1946) (holding that federal courts "issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do" (footnotes omitted)); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4 (1978); Morley, *supra* note 4, at 2457 ("[I]njunctions provide stronger protection for a person's constitutional or statutory rights than any other remedy currently available from federal courts."); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 416–17 (2000) (arguing that injunctions present "the best hope for preventing constitutional violations where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity").

[48] *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 153 (1967) (allowing a pre-enforcement suit for injunctive and declaratory relief against pharmaceutical labeling regulations to proceed because requiring the plaintiffs to "challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily"), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

[49] 457 U.S. 624.

Jonathan Mitchell articulated a new, parsimonious view of the federal judiciary's equity power in *The Writ of Erasure Fallacy*.[50] In his view, injunctions barring enforcement of federal or state legal provisions lack any permanent immunizing effect.[51] At most, such an order only delays prosecution or civil enforcement actions against a litigant who violates the enjoined legal provisions, until such time as the order is reversed.[52] Many of the most common objections to retroactive application of newly enacted laws or new judicial interpretations of legal provisions cannot completely overcome this "writ of erasure" analysis.

A. Edgar v. MITE Corp.

In *Edgar v. MITE Corp.*, the Court considered for the first time whether an entity that violated a state law while enforcement of that law was enjoined could be prosecuted once the injunction was lifted.[53] The Illinois Business Take-Over Act required all tender offers for shares of Illinois corporations to be filed with the Illinois Secretary of State twenty days before the offers were made to shareholders or publicized.[54] During that twenty-day waiting period, the Secretary could hold a hearing on the offer.[55] Even if the Secretary decided against holding such a hearing, either the target company's outside directors or a group of its Illinois shareholders could require the Secretary to do so.[56] Once a hearing was held, the Secretary could register the offer to allow it to proceed only if he determined that it disclosed all relevant information and the price was not "inequitable."[57] There was no deadline by which the Secretary had to make these determinations.[58]

The plaintiff, MITE Corp., was a Delaware corporation that made a tender offer for an Illinois corporation, Chicago Rivet & Machine Co.[59] MITE registered its tender offer with the U.S. Securities and Exchange Commission (SEC), as required by the federal Williams Act.[60] It did not comply with the Illinois law, however, which would have triggered the twenty-day waiting

---

50 *See* Mitchell, *supra* note 26.
51 *Id.* at 987.
52 *Id.* at 987–1000.
53 457 U.S. 624.
54 *Id.* at 626–27 (citing ILL. REV. STAT. ch. 121 1/2, ¶ 137.54.A (1979)).
55 *Id.* at 627.
56 *Id.*
57 *Id.* (quoting ILL. REV. STAT. ch. 121 1/2, ¶ 137.57.E).
58 *Id.* at 637.
59 *Id.* at 626.
60 *Id.* at 627 (citing 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f)).

period and given the Secretary an opportunity to reject the offer.[61] Rather, MITE sued in federal court, arguing that the Illinois law was preempted by the Williams Act and unconstitutional under the Commerce Clause.[62]

The district court entered "a preliminary injunction prohibiting the Secretary . . . from enforcing the Illinois [law] against MITE" in connection with its "tender offer for Chicago Rivet."[63] While the preliminary injunction was in effect, MITE published its tender offer in the *Wall Street Journal*.[64] A few days later, the court followed up with a permanent injunction, concluding that the Illinois law was both preempted and unconstitutional.[65] After the court entered final judgment, MITE and Chicago Rivet entered into an agreement that resulted in MITE withdrawing its tender offer.[66] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's ruling,[67] and the Secretary sought review in the U.S. Supreme Court.[68]

The Court began by considering whether the case was moot since MITE was no longer making a tender offer in violation of state law.[69] The Secretary had declared that if the district court's injunction were reversed, then he would pursue civil penalties and potentially even criminal prosecution against MITE for initiating its tender offer in violation of the Illinois law.[70] The Court acknowledged that a nonfrivolous dispute existed over whether "the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties."[71] It declined to address that question, however. Instead, the Court declared that if it reversed the injunction, then the question would be "decided when and if the Secretary of State initiates an action."[72] Thus, because MITE faced the possibility of civil and criminal liability under Illinois law for its past actions if the permanent injunction were overturned, the Secretary's appeal was not moot.[73] The Court went on to affirm the lower courts' rulings that the Illinois

---

61 *Id.* at 628.
62 *Id.*
63 *Id.* at 629.
64 *Id.*
65 *Id.*
66 *Id.* at 629–30.
67 MITE Corp. v. Dixon, 633 F.2d 486, 502–03 (7th Cir. 1980), *aff'd sub nom. Edgar*, 457 U.S. 624.
68 *Edgar*, 457 U.S. at 630.
69 *Id.*
70 *Id.* at 630 & n.5.
71 *Id.* at 630.
72 *Id.*
73 *Id.*

law was unconstitutional under the Dormant Commerce Clause.[74] A plurality also concluded that the Williams Act preempted the Illinois law.[75]

Justice Stevens's concurring opinion declared that, to determine whether the appeal was moot, the Court should have resolved whether the preliminary injunction in effect when MITE published its tender offer in the *Wall Street Journal* gave the company a complete defense to any enforcement actions, even if the Court determined the order was erroneous.[76] Stevens argued that the case remained a live, justiciable controversy because MITE would face civil and criminal liability if the Court concluded that the Illinois law was valid and should not have been enjoined.[77] He declared, "Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution."[78]

Justice Stevens added that federal courts lack the "power to grant such blanket dispensation from the requirements of valid legislative enactments."[79] The fact that plaintiffs must typically post bond as a condition of obtaining a preliminary injunction,[80] he argued, confirms that an injunction does not inherently immunize such plaintiffs from all legal liability if it is later overturned or vacated.[81] He further emphasized that litigants are aware that lower courts' injunctions—and even judgments—can be overturned on appeal.[82] Thus, when a litigant acts in reliance on an injunction, it does so subject to the possibility that the order may later be reversed, vacated, or otherwise dissolved.

Justice Marshall, joined by Justice Brennan, rejected this analysis. He dissented on the ground that the case had become moot.[83] No matter how the Court ruled, Marshall explained, MITE could not face enforcement proceedings.[84] If the Supreme Court affirmed the lower court's ruling, the permanent injunction against enforcement of the Illinois act would remain in effect.[85] But even if the Court concluded that the act was valid and reversed the lower court's judgment, MITE still could not be subject to enforcement

---

74 *Id.* at 645–46.
75 *Id.* at 639–40 (plurality opinion).
76 *Id.* at 647 (Stevens, J., concurring).
77 *Id.* at 648.
78 *Id.* at 648–49.
79 *Id.* at 649.
80 *See* FED. R. CIV. P. 65(c).
81 *Edgar*, 457 U.S. at 649 (Stevens, J., concurring).
82 *Id.* at 651.
83 *Id.* at 655 (Marshall, J., dissenting).
84 *Id.*
85 *Id.*

proceedings for its past actions.[86] The district court injunction in place at the time of MITE's aborted tender offer "barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred" while it was in effect.[87]

Justice Marshall declared that federal courts "have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect."[88] He explained that such protection is necessary to facilitate constitutional challenges to potentially unconstitutional state laws.[89] Marshall noted, "Parties seek to restrain the enforcement of a state statute, not just because they want short-term protection, but because they desire permanent immunity for actions they take in reliance on the injunction."[90] Plaintiffs would be far less likely to sue to attempt to enforce their constitutional rights "when they know that if they decide to act" pursuant to a preliminary or even permanent injunction, then "enforcement proceedings might be initiated at some later stage" should an appellate court overturn the order.[91] Consequently, "in the ordinary case, unless the order contains specific language to the contrary, it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period it was in effect."[92] Thus, Marshall concluded that a federal court has the power to completely immunize litigants' conduct, even if its constitutional interpretation is later overturned or otherwise winds up being erroneous. He urged that injunctions presumptively be read as exercising this power, even absent language expressly addressing the issue.

Justice Rehnquist's dissent also concluded that the case was moot and the permanent injunction should be vacated, but he declined to join Marshall's analysis.[93] He reasoned that MITE no longer had a live claim for an injunction since it no longer sought to engage in conduct that violated state law.[94] He

---

[86] *Id.* ("[E]ven if the Court had held that the Illinois Act is constitutional, and had lifted the permanent injunction that now restrains enforcement of the Act against MITE, there would be no basis for continued litigation.").

[87] *Id.* at 656.

[88] *Id.*

[89] *Id.* at 656 n.1.

[90] *Id.* at 658.

[91] *Id.*

[92] *Id.* at 657.

[93] *Id.* at 664, 667 (Rehnquist, J., dissenting).

[94] *Id.* at 665 ("[T]he facts that gave rise to *this controversy* over the constitutionality of Illinois' anti-takeover statutes no longer exist, and it is unlikely that they will be repeated in the future.").

declared that the "possibility" that the Secretary might pursue an enforcement action against MITE for its past conduct was "insufficient" to allow the Secretary's appeal to remain justiciable.[95] In the event the Secretary commenced an enforcement action, the court in that later case could consider whether the Illinois act was constitutional and, if so, whether the preliminary injunction previously in effect afforded MITE a defense.[96] Thus, Justice Rehnquist, like the majority, refused to resolve the issue of whether a vacated injunction could protect a plaintiff.

The morass of opinions in *MITE* has left both lower courts and commentators in disarray. Some courts, consistent with Justice Marshall's dissent, have declared that an injunction or declaratory judgment that is later set aside may serve as a valid defense for actions taken while it remained in effect.[97] Others, echoing Justice Stevens's concurrence, have concluded that erroneous injunctions provide no such protection.[98] And still others, like the majority in

---

[95] *Id.*

[96] *Id.* at 666 (stating the case was moot, despite the fact that "resolution of the merits of the instant case will resolve certain defenses that MITE could raise in an enforcement action were one to be brought by the Secretary").

[97] Clarke v. United States, 915 F.2d 699, 701–02 (D.C. Cir. 1990); United States v. Mancuso, 139 F.2d 90, 92 (3d Cir. 1943) ("If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties for that act or omission."); W. Watersheds Project v. U.S. Fish & Wildlife Serv., No. 4:10-CV-229, 2012 U.S. Dist. LEXIS 13771, at *46 (D. Idaho Feb. 2, 2012) ("[A] court order would be a complete defense to prosecution under the Act.").

[98] *See, e.g.*, Occidental Petro. Corp. v. Cities Serv. Co., No. 82-1286, 1982 U.S. Dist. LEXIS 16932, at *16–17 (W.D. Okla. Dec. 20, 1982) (holding that, where the district court had entered a preliminary injunction against a state law and the plaintiff made a tender offer without complying with that law, the plaintiff would face prosecution and civil liability unless the court entered a permanent injunction); Hamilton v. City of Birmingham, 189 So. 776, 779 (Ala. Ct. App. 1939) ("[O]nce the injunction was out of the way, prosecution could proceed—for acts done at *any time* within the life of the ordinance . . . ."); State v. Wadhams Oil Co., 134 N.W. 1121, 1123 (Wis. 1912) ("[T]he defendant was subject to the legislative act during the pendency of the preliminary restraining order, and during this time it acted at its peril in committing any act violating its provisions . . . ."); *see also* Willett Co. v. Carpentier, 123 N.E.2d 308, 311 (Ill. 1954) ("A party to a decree cannot acquire any rights thereunder while the same is subject to review which he can assert after the decree is reversed, since the effect of the reversal is to abrogate the decree and leave the cause as it stood prior to the entry of the decree." (quoting First Nat'l Bank of Jonesboro v. Road Dist. No. 8, 58 N.E.2d 884 (Ill. 1945))); *cf.* Christian Sci. Reading Room Jointly Maintained v. San Francisco, 807 F.2d 1466, 1469 (9th Cir. 1986) (Norris, J., dissenting from denial of reh'g en banc) (noting that the San Francisco airport could "be held in violation of the . . . establishment clause" in a future case, even if it follows binding circuit precedent, should the Supreme Court interpret the clause differently); Goshen Cnty. Coop. Beet Ass'n v. Pearson, 706 P.2d 1121, 1126 (Wyo. 1985) ("While the district court had authority to temporarily prohibit the Association from enforcing the marketing agreements, it had no authority to permanently immunize the growers against suits for actions taken in violation of valid contracts."); State v. Keller, 70 P. 1051, 1054 (Idaho 1902) (holding that, when a federal court enjoined enforcement of a state law and that injunction was subsequently voided for lack of jurisdiction, it could not preclude a defendant from being prosecuted for acts taken while the order remained in effect), *overruled on other grounds*, State v. Suriner, 294 P.3d 1093, 1100 (Idaho 2013).

MITE, have recognized the difficulty of the issue while leaving it unaddressed.[99] Rightsholders are left to question the extent to which preliminary and permanent injunctions can protect them from civil penalties or prosecution in the event that those orders are later reversed, vacated, or dissolved.

B. The Writ of Erasure Argument

Professor Jonathan Mitchell argues in a recent *Virginia Law Review* article that the government may prosecute people for actions taken under the protection of preliminary and permanent injunctions that are later set aside as erroneous.[100] He attacks what he calls the "writ-of-erasure fallacy," which he defines as "[t]he assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute."[101] Mitchell contends that this fallacy arises in part from the practice of colloquially claiming that federal courts "strike down" or "invalidate" statutes.[102] This terminology leads courts to erroneously treat their power of judicial review as analogous to a presidential veto or the authority to "void" federal laws that the Framers had considered vesting in a Council of Revision (which they ultimately opted against establishing).[103]

Mitchell explains that when a court concludes that a law is unconstitutional and enjoins its enforcement, executive officials are barred from enforcing that provision only while the injunction remains in effect.[104] If the injunction is dissolved, overturned, or vacated, then the parties are returned to the status quo ex ante. The underlying legal provision—which remained "on the books" the entire time—may be given full force and effect. The government may enforce that provision as if the injunction had never been issued.[105]

---

[99] *See, e.g.*, Farmers Union Cent. Exch., Inc. v. Thomas, 881 F.2d 757, 759–60 (9th Cir. 1989) ("[W]e leave to a future enforcement action, if any, the issue whether CENEX is insulated from civil and criminal liability because of its reliance on the district court judgment."); Ariz. Contractors Ass'n v. Napolitano, Nos. CV07-1355, CV07-1684, 2007 U.S. Dist. LEXIS 96194, at *16–17 (D. Ariz. Dec. 21, 2007) ("If the injunction were lifted, the county attorneys would not be barred from bringing future proceedings for violations that occurred during the term of the temporary injunction, and it is unsettled whether the interim injunction would be a defense to the later enforcement actions.").

[100] Mitchell, *supra* note 26, at 938.

[101] *Id.* at 937 (elaborating that the fallacy arises from a "fail[ure] to recognize that a statute continues to exist as law even after a court declares it unconstitutional or enjoins its enforcement").

[102] *Id.* at 935, 944.

[103] *Id.* at 954. The Framers also rejected efforts to give the judiciary a veto power over state laws. *Id.* at 959–60.

[104] *Id.* at 986–87.

[105] *See id.* at 940 (arguing that the government "can initiate enforcement proceedings against those who violated the statute while the erstwhile injunction was in effect"); *see also id.* at 942 ("Those who choose to violate a duly enacted statute in reliance on the judiciary's present-day constitutional beliefs expose themselves to statutory penalties if a future court decides to repudiate its predecessor's non-enforcement edict."); *id.* at 953

Mitchell adds that a court's constitutional rulings "will never foreclose a future court from reviving and enforcing the formerly disapproved statute," whether prospectively or retroactively.[106] Even a permanent injunction may be overturned on appeal or vacated based on subsequent Supreme Court rulings.[107] And an overturned, vacated, or dissolved injunction "does not prevent the enjoined officials from enforcing the law against those who violated it" while the order was in force.[108] Accordingly, people may not assume that they "are free to flout the law . . . without any fear of subsequent prosecution" simply because a court has enjoined enforcement.[109] Mitchell goes so far as to recommend ways for legislatures to facilitate the enforcement of previously enjoined laws, such as by tolling statutes of limitations while injunctions remain in effect, legislatively abolishing a potential mistake of law defense, and authorizing private enforcement and *qui tam* suits.[110]

Mitchell contends that the writ of erasure fallacy arises from a misunderstanding of the nature of judicial review. But, as Mitchell himself acknowledges, that understanding traces directly back to the constitutional convention itself.[111] Framers including George Mason,[112] James Madison,[113] and James Wilson[114] explained judicial review as the power to "declare an unconstitutional law void"[115] or "set aside" unconstitutional laws.[116] James Wilson opined that judges could "refus[e] to give them effect,"[117] while Luther

---

(reiterating that enjoined laws "remain available for the executive to enforce against present-day violators once the judiciary rescinds its non-enforcement policy"); *id.* at 987 ("If a court were to dissolve the injunction, the executive would be free to enforce the statute again—both against those who will violate it in the future and against those who have violated it in the past.").

106 *Id.* at 942.

107 *Id.* at 939 ("[T]here is always a possibility that a court's 'permanent' injunction will be vacated on appeal—and even if the injunction survives appellate review it is always possible that a future Supreme Court will change its interpretation of the Constitution and start enforcing statutes similar or identical to the one that was 'permanently' enjoined.").

108 *Id.* at 938.

109 *Id.*

110 *Id.* at 948–49.

111 *Id.* at 945.

112 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., 1911) [hereinafter 2 FARRAND'S RECORDS] (statement of Mason).

113 *Id.* at 93 (statement of Madison) ("A law violating a constitution established by the people themselves, would be considered by the Judges as null & void.").

114 *Id.* at 73 (statement of Wilson).

115 *Id.* at 78 (statement of Mason).

116 *Id.* at 27 (statement of Madison); *accord id.* at 28 (statement of Morris); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1911) [hereinafter 1 FARRAND'S RECORDS] (statement of Gerry).

117 2 FARRAND'S RECORDS, *supra* note 112, at 956 (statement of Wilson); *see also* 1 FARRAND'S RECORDS, *supra* note 116, at 97 (statement of Gerry) (stating courts had a "power of deciding on [the] Constitutionality"

Martin described judicial review as a "negative on the laws."[118] These thoughts were echoed in the ratification debates[119] and the *Federalist Papers*.[120] At least at first blush, it seems the Constitutional Convention actually provides some support for a "writ of erasure" understanding of judicial review. Nevertheless, such brief, general allusions to judicial review at the Convention do not definitively resolve this issue either way.

C. Problematic Potential Defenses

Perhaps the most obvious objection to subjecting people to civil or criminal liability based on actions they take under the protection of an injunction is that it unfairly penalizes their reliance on the law as it existed—or reasonably appeared to exist—at the time of their actions. But Supreme Court doctrine on that issue is surprisingly parsimonious. And it starts from a strong presumption that a court's new interpretations of a legal provision, as well as its recognition of other new principles of law, are to be applied retroactively.[121]

1. Due Process and Ex Post Facto Limitations

The Constitution limits the government's ability to take adverse action against a person based on conduct that was legal at the time it was performed. The extent of those constraints depends in large part on the nature of the sanctions the government seeks. The Constitution's Ex Post Facto Clauses[122] prevent the federal government and states from retroactively criminalizing, or increasing the penalties for, conduct after it has already occurred.[123]

The Ex Post Facto Clauses apply only to criminal laws, however.[124] Moreover, even within the context of criminal law, the clauses apply only to retroactively applicable new statutes. The clauses do not extend to judicial

---

of laws); *id.* at 109 (statement of King) (explaining that courts "will no doubt stop the operation of such as shall appear repugnant to the constitution").

[118] 2 FARRAND'S RECORDS, *supra* note 112, at 76 (statement of Martin).

[119] *See* Mitchell, *supra* note 26, at 961–62, 962 nn.114–16.

[120] THE FEDERALIST NO. 78 (Alexander Hamilton).

[121] *See* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) (holding that "controlling interpretation[s] of federal law . . . must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule"); James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991) (plurality opinion) (holding that "principles of equality and *stare decisis*" require "a rule of federal law" to be applied "retroactively").

[122] *See* U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

[123] Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169–70 (1925)); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.).

[124] *See* Seling v. Young, 531 U.S. 250, 262 (2001); *Calder*, 3 U.S. at 390.

rulings that retroactively change a legal provision's meaning or validity.[125] In the Supreme Court's view, when a court rejects its own previous interpretation of a legal provision, it is "not chang[ing] the law," but rather "explain[ing] what [the provision] had meant ever since [it] was enacted."[126] The Court's longstanding, unduly narrow approach to the Ex Post Facto Clauses renders them inapplicable to prosecutions for conduct taken under injunctions that are no longer in force.

The Due Process Clauses,[127] in contrast, have somewhat broader applicability. They require the government to provide "fair notice" of what conduct is prohibited.[128] Unlike the Ex Post Facto Clauses, those provisions prohibit "unforeseeable judicial enlargement of a criminal statute, applied retroactively."[129] Applying this principle, the Supreme Court has held that, where the Court itself unforeseeably expands the scope of a criminal statute by overturning one of its own precedents, a defendant who acted prior to that unexpected reinterpretation cannot be punished for violating the Court's newly articulated standards.[130]

Even this protection has been called largely illusory.[131] Due process restrictions apply only when a judicial reinterpretation is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."[132] Courts are generally reluctant, however, to find that a

---

[125] *See* Rogers v. Tennessee, 532 U.S. 451, 460 (2001) (refusing to "extend[] the strictures of the *Ex Post Facto* Clause to the context of common law judging" and emphasizing that "[t]he *Ex Post Facto* Clause, by its own terms, does not apply to courts").

[126] Bousley v. United States, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part).

[127] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[128] Rabe v. Washington, 405 U.S. 313, 316 (1972) (per curiam) (holding that a court may not convict a defendant for conduct that violated its newly adopted interpretation of a statute where the statute itself did not provide "fair notice" of "a vital element of the offense").

[129] Bouie v. City of Columbia, 378 U.S. 347, 353 (1964); *see also* United States v. Lanier, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (citations omitted)).

[130] *See, e.g.*, Marks v. United States, 430 U.S. 188, 196 (1977) (holding that "since the petitioners were indicted for conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved" violated the Court's previous, pre-*Miller* standard); James v. United States, 366 U.S. 213, 221–22 (1961) (plurality opinion) (overturning Comm'r of Internal Revenue v. Wilcox, 327 U.S. 404 (1946), but reversing the defendant's conviction because he should have been tried based on "the gloss" that *Wilcox* had placed upon the Internal Revenue Code).

[131] *Cf.* Morrison, *supra* note 33, at 521 (arguing that current Supreme Court doctrine "undermines the principles of fair warning").

[132] *Bouie*, 378 U.S. at 354 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)).

judicial rejection of binding precedent was unforeseeable.[133] Unduly preventing courts from retroactively applying new interpretations of law, the Court has held, would "place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system."[134] Moreover, the Due Process Clauses protect against unforeseeable judicial rejections only of earlier Supreme Court holdings, not lower courts' precedents.[135]

United States v. Rodgers is perhaps the clearest example of the Court allowing a defendant to be prosecuted following its rejection of what otherwise would have been a binding, dispositive precedent.[136] In 1967, in *Friedman v. United States*, the U.S. Court of Appeals for the Eighth Circuit interpreted the federal false statements statute, 18 U.S.C. § 1001,[137] as prohibiting a person from making false statements to a federal agency only if the statements concerned matters for which the agency had "the power to make final or binding determinations."[138] Years later, a defendant within the Eighth Circuit made false reports to the FBI and Secret Service.[139] Applying *Friedman*, the Eighth Circuit affirmed the district court's dismissal of the Section 1001 indictment.[140] It reasoned that Section 1001 was inapplicable since neither the FBI nor the Secret Service had authority to make a final determination about the defendant's allegations.[141]

The U.S. Supreme Court reversed, holding that the Eighth Circuit had construed Section 1001 too narrowly.[142] Rejecting *Friedman*, the Court held that Section 1001 applies to any false statements relating to "the official, authorized functions of an agency or department."[143] Since the FBI and Secret Service had the authority to investigate the defendant's allegations, his alleged statements violated Section 1001 and the prosecution could proceed.[144]

---

133 Morrison, *supra* note 33, at 479.

134 Rogers v. Tennessee, 532 U.S. 451, 461 (2001).

135 Morrison, *supra* note 33, at 483 ("[W]hile individuals may rely on Supreme Court constructions of criminal statutes, they may not rely on circuit court constructions.").

136 466 U.S. 475 (1984).

137 18 U.S.C. § 1001 (1964).

138 Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967).

139 United States v. Rodgers, 706 F.2d 854, 855 (8th Cir. 1983), *rev'd*, 466 U.S. 475 (1984).

140 *Id.*

141 *Id.* at 855–56.

142 *Rogers*, 466 U.S. at 479 ("[W]e do not think that [Section 1001] . . . admits of the constricted construction given it by the Court of Appeals.").

143 *Id.*

144 *Id.* at 481–82.

The Court expressly rejected the defendant's complaint about "retroactive application" of a new legal standard to his past conduct.[145] It was irrelevant that the defendant's statements did not violate Section 1001 as construed by binding Eighth Circuit precedent at the time he uttered them. The Court explained that any "reliance upon the earlier *Friedman* decision[] would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable."[146]

In other words, the Due Process Clause does not allow people to rely on all binding judicial interpretations of the law. Rather, they must assess the likelihood of such rulings being overturned. A defendant may be prosecuted for performing acts that binding precedent holds are not prohibited when it is foreseeable that the relevant cases may be overturned. Prudent defendants must acquaint themselves not only with the law of their respective jurisdictions, but also with the law of other circuits and states to attempt to gauge how reliable and robust their jurisdiction's precedents are. Thus, in *United States v. Qualls*, the Ninth Circuit sitting en banc concluded that the Due Process Clause did not prohibit it from retroactively applying a much broader interpretation of a criminal statute to a criminal defendant than binding circuit precedent provided at the time of his offense.[147] The court explained that "the circuits were split on the proper construction of the felon-in-possession statute when [the defendant] committed the acts for which he was indicted and convicted."[148]

The Due Process Clauses provide even less protection against retroactive application of civil penalties, civil fines, and other such enforcement mechanisms, like those authorized by S.B.8.[149] The Court subjects laws retroactively imposing new civil liability only to rational basis scrutiny.[150] This

---

145 *Id.* at 484.

146 *Id.*

147 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) (en banc); *see also* Metrish v. Lancaster, 569 U.S. 351, 366 (2013) (refusing to grant habeas relief where a state supreme court overturned lower courts' precedents that had placed the burden of proof for the defendant's mental state on the prosecution and applied that new rule retroactively to past conduct); United States v. Shabani, 513 U.S. 10, 15 (1994) (holding that the Ninth Circuit had erred by requiring proof of an overt act in furtherance of a drug conspiracy, even though binding circuit precedent at the time of the defendant's conduct had contained that requirement); United States v. Hansen, 9 F. App'x 955, 958 (10th Cir. 2001) (applying a change in circuit precedent concerning criminal sentencing retroactively because it was "plainly foreseeable").

148 *Qualls*, 172 F.3d at 1138–39 n.1.

149 *See* Krent, *Puzzling Boundary*, *supra* note 33, at 2149 ("[T]he Court has generally sustained any retroactive enactment in the economic sphere that is supported by a plausible public purpose.").

150 Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) (holding that Congress may satisfy the constitutional requirements for applying a civil law retroactively "simply by showing that the

permissive posture also extends to retroactively applicable clarifications of preexisting law. In *General Motors Corp. v Romein*, the Court upheld the constitutionality of a state law that retroactively overturned the state supreme court's interpretation of a previously enacted statute, exposing employers to tens of millions of dollars of additional liability under that earlier statute.[151] When applying this rational basis standard, the Court typically concludes that statutory changes may be applied retroactively because such broader application would further the legislature's underlying goals to a greater extent.[152]

Thus, perhaps somewhat surprisingly, the Due Process Clauses may provide only limited constitutional protection against enforcement proceedings for actions taken under the protection of an injunction that is later overturned. Any such protection would likely prevent only criminal prosecutions; it would be inapplicable to either purely civil proceedings or other types of enforcement proceedings with a punitive component. Even in the criminal context, such protection may not apply where other circuits or states had reached different conclusions or expressed uncertainty about the underlying constitutional issues. And under *Rodgers*'s reasoning, it may be deemed unreasonable for plaintiffs to rely on a trial court's order—especially a preliminary injunction, which is an interim remedy—unless it is affirmed on appeal, due to the possibility of subsequent reversal.[153] Due process protection would most likely apply primarily where jurisdictions were in accord on the Constitution's meaning—precisely the sort of situation where the injunction would be least likely to be reversed or vacated in the first place.

---

retroactive application of the legislation is itself justified by a rational legislative purpose"); *see* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

The Court somewhat mitigates this unfairness by applying a presumption against the retroactive application of statutes. Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."). It will not interpret a law as applicable to conduct that occurred before the law's enactment absent express language to that effect in the law itself. The Court stated, "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272–73.

[151] Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) ("The retroactive repayment provision of the [later] statute was a rational means of meeting [the state's] legitimate objective . . . .").

[152] *Id.* at 191–92; *Pension Benefit Guar. Corp.*, 467 U.S. at 730 ("[I]t was eminently rational for Congress to conclude that the purposes of the [Act] could be more fully effectuated if its withdrawal liability provisions were applied retroactively."); *Usery*, 428 U.S. at 18 ("[T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . .").

[153] *See supra* note 146 and accompanying text.

2. *Mistake of Law and Estoppel*

Another possibility is that an injunction that is later reversed may give rise to a mistake of law defense. In general, mistake of law is not a valid defense,[154] except where a statute contains a willfulness requirement or other mens rea element that requires the defendant to be aware that their conduct is illegal.[155] The Due Process Clause, however, bars the government from prosecuting a defendant "for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach."[156] Due process can effectively estop the government from prosecuting someone who was "affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation."[157]

But a mistake of law defense might not apply in the context of a preliminary injunction, where a court is simply predicting whether the challenged legal provision is likely to be held unconstitutional after full discovery and a trial.[158] Such a prediction is sufficient to bar the government from enforcing the challenged provision while the case is pending. It is less clear, however, that such a prediction could qualify as a sufficiently "authoritative" interpretation of the Constitution or other legal provision as to give rise to a mistake of law or estoppel defense.

It is likewise unclear whether a ruling by a lower court—particularly while it remains subject to appeal or an appeal is pending[159]—would be sufficiently definitive to give rise to a mistake of law defense.[160] In *Ostrosky v. Alaska*, for example, the defendant was convicted in Alaska state district court for violating Alaska law by fishing without a license, and the conviction was upheld by the state superior court.[161] He was subsequently convicted of violating the statute again, but this time the state superior court overturned his conviction on the grounds that the law violated the state constitution.[162] While the state's appeal of that ruling was pending before the Alaska Supreme Court, the defendant

---

154 Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

155 *Id.* at 201.

156 United States v. Laub, 385 U.S. 475, 487 (1967); Raley v. Ohio, 360 U.S. 423, 438 (1959).

157 United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674 (1973).

158 *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

159 *See* United States v. Foumai, 910 F.2d 617, 620 (9th Cir. 1990) ("No expectation of finality can attach during the period in which either party may appeal.").

160 *Cf.* State v. Guice, 621 A.2d 553, 557 n.13 (N.J. Super. Ct. Law Div. 1993) (collecting cases upholding mistake of law defenses based on overturned or erroneous judicial rulings).

161 913 F.2d 590, 592 (9th Cir. 1990).

162 *Id.*

violated the statute for a third time and was issued a citation.[163] The Alaska Supreme Court ultimately concluded that the law was valid, overturning the superior court's ruling in the second prosecution that it was unconstitutional.[164]

The defendant then challenged the validity of his third prosecution on the grounds that the State had cited him for fishing after the Alaska superior court had held the underlying statute unconstitutional in his earlier case, but before the Alaska Supreme Court reversed that ruling.[165] The trial judge in the third prosecution rejected that argument, holding that "the defense was unavailable to [the defendant] because he had assumed the risk that the Alaska Supreme Court would reverse."[166] The defendant was convicted, and the state courts affirmed his conviction, rejecting his mistake of law argument.[167]

A federal district court granted the defendant a writ of habeas corpus on due process grounds,[168] but the Ninth Circuit reversed it. The appellate court rejected the defendant's argument that he had "a right to rely as a matter of law on [the Alaska Superior Court] decision in his own case that a statute is unconstitutional even though the case [was] on appeal to [the Alaska Supreme Court]."[169] The Ninth Circuit held that the state was not required to cease enforcing state law just because an intermediate court had held it unconstitutional, even though that ruling had occurred in another case involving the same defendant.[170] Because the defendant knew that the Alaska Supreme Court could overturn the Superior Court's ruling, he did not have a due process right to either rely on that ruling or assert a mistake of law defense based on it.[171] The Ninth Circuit concluded that the defendant "had fair notice of the consequences of his action, and his prosecution was not fundamentally unfair."[172]

---

163 *Id.*

164 *Id.* (citing State v. Ostrosky, 667 P.2d 1184 (Alaska 1983)).

165 *Id.*

166 *Id.*

167 *Id.* at 593 (citing Ostrosky v. State, 725 P.2d 1087, 1090 (Alaska Ct. App. 1986)).

168 *Id.*

169 *Id.* at 594.

170 *Id.* at 596 ("Alaska has the authority to decide, without violating the due process clause, what effect an Alaska lower court decision that a state statute is unconstitutional will have on the statute's enforcement and what authority Alaska superior courts have to bind each other.").

171 *Id.* at 597.

172 *Id.* at 599. The Ninth Circuit had previously held to the contrary in an unrelated case. In *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987), the Ninth Circuit declared that a person "should be able to depend on" the "latest controlling court opinion declaring his activities constitutionally protected . . . until that opinion is reversed, or at least until the Supreme Court has granted certiorari." However, following the Supreme Court's ruling in *Rodgers*, *see supra* notes 145–46 and accompanying text, the Ninth Circuit sitting en banc reversed *Albertini* on the grounds that a defendant cannot rely on circuit precedent when a circuit split exists. United States v. Qualls, 172 F.3d 1136, 1138–39 n.1 (9th Cir. 1999) (en banc).

Furthermore, it is uncertain whether a defendant can assert a mistake of law or related due process defense based on a holding about a law's unconstitutionality.[173] Dean Amar explains, "Someone who acts believing that her behavior is not criminal under a given statute in the first place is arguably more innocent than someone who knowingly violates a statute because she feels it is unconstitutional."[174] Finally, if precedent made clear that the protection offered by injunctions were as tenuous as the Writ of Erasure theory concludes, a litigant who obtains an injunction would have the type of notice that would likely preclude them from raising a mistake of law or estoppel defense against a retroactive prosecution, should their order later be reversed. Thus, based on current precedent, if litigants are to be protected for actions taken pursuant to injunctions that are later eliminated, some other theory is likely necessary.[175]

II. ERRONEOUS INJUNCTIONS IN PRIVATE LITIGATION

When an appellate court reverses an injunction or a district court dissolves or rescinds it, the injunction—by definition—is no longer in force. Professor Mitchell's Writ of Erasure argument is premised on the notion that "[o]nce the preliminary order is gone, all the protections conferred by the order go with it."[176]

Yet even a revoked court order can continue to exert legal effect.[177] Before attempting to resolve the difficult questions that arise in constitutional and other public law cases, it is helpful to lay a foundation by assessing the ongoing legal consequences of revoked injunctions in private litigation. In a lawsuit between private litigants arising under the common law or a statutory cause of action, when a plaintiff takes action under an injunction that is later reversed, vacated, or dissolved, it is typically not liable to compensate the defendant to the same extent as if the order had never been entered. And the defendant may not pursue

---

[173] Mitchell, *supra* note 26, at 995 (noting the uncertainty over whether a defendant may assert a mistake of law defense when he knew "he was committing an 'offense' as defined in a statute, but believed the statute to be unconstitutional on account of a now-overruled judicial ruling"); Amar, *supra* note 31, at 672 ("If a statute gives fair warning that conduct is criminal, that may, in the Court's eyes, be enough to render such conduct prosecutable—even if the statute is enjoined for some time by lower courts.").

[174] Amar, *supra* note 31, at 671–72.

[175] A related issue is the extent to which a person who is not protected by an injunction should have a valid defense when acting pursuant to a binding precedent that is later overturned—the circumstances presented in *Rodgers*. The actor in such a situation would be relying on the stare decisis force of a precedent to which they were not a party. This broader question is beyond the scope of this Article.

[176] Mitchell, *supra* note 26, at 988 n.230.

[177] *Cf.* FIELD, *supra* note 3, at 4–8 (discussing some potential continuing effects of laws that have been held unconstitutional).

the same common law or statutory causes of action against the plaintiff for the plaintiff's actions while the injunction was in effect that would otherwise have been available.

Rather, in general, the only relief for a wrongfully enjoined defendant is an action to recover damages under the injunction bond, if any, that the court ordered at the time it issued the injunction[178] (and such bonds are not even available in connection with permanent injunctions[179]). There are two exceptions to this rule. First, many jurisdictions will allow a wrongfully enjoined defendant to bring an independent tort against the plaintiff for malicious prosecution if the plaintiff sought the preliminary injunction with legal malice and lacked probable cause.[180] Second, several jurisdictions allow a defendant to seek restitution of specific property that a plaintiff has taken or received from a defendant pursuant to an overturned court order.[181] In the broad run of cases, however, a defendant's recovery is limited to the amount of an injunction bond.

The equitable traditions that have evolved concerning injunction bonds offer two important insights to help guide analysis concerning erroneous injunctions in public law cases.[182] First, judges have broad discretion at many steps of the process that they may exercise in some cases to deprive a wrongfully enjoined defendant of any remedy. Second, the fact that a wrongfully enjoined defendant's remedy is generally limited to an action on the bond suggests that a reversed, vacated, or dissolved injunction can continue to have legal

---

178 W.R. Grace & Co. v. Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 770 n.14 (1983) ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."); *see also* Russell v. Farley, 105 U.S. 433, 437 (1881) ("Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation . . . .").

179 *See infra* note 186.

180 *Russell*, 105 U.S. at 438 (explaining that injunction bonds arose because the damage arising from wrongly issued preliminary injunctions was "*damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution"); 2 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 1593 (4th ed. 1905) ("The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie. . . . [B]ut there must be distinct allegations of malice or a want of probable cause.").

181 *See, e.g.*, Dass v. Tosco Corp., 280 F. App'x 571, 571 (9th Cir. 2008); *cf.* Grosskopf & Medina, *supra* note 46, at 908; Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1286 (2007) (arguing that, when considering whether to issue an injunction, a court should consider the likelihood of the plaintiff wrongfully obtaining "irreparable" benefits for which no practicable mechanism for disgorgement exists).

182 The rules governing injunction bonds apply equally to public law litigation, including constitutional challenges to legal provisions. Courts in such cases will generally either waive injunction bonds or set them at a nominal amount. *See* Rendleman, *supra* note 46, at 1414. One reason why injunction bonds are a poor fit for many constitutional cases is that the public interest, which many challenged legal provisions are enacted to promote, seldom is quantifiable and cannot readily be monetized. *Id.*

consequences and protect a plaintiff, at least to some extent, for actions taken while the injunction remained in effect.

A. Judicial Discretion and Injunction Bonds

Injunctions are equitable remedies.[183] Courts of equity have historically exercised broad discretion over both the breadth of their injunctions, as well as the terms on which they are awarded.[184] These courts came to require that plaintiffs post bonds as a condition for receiving preliminary injunctions,[185] but not permanent injunctions.[186] The bond was generally set in an amount sufficient to cover "all costs and damages that may accrue to [the defendant] in the event of the injunction being improperly issued."[187] If the court determined at the end of the case that the plaintiff was not entitled to injunctive relief, then it had discretion to allow the wrongly enjoined defendant to recover damages up to the amount of the injunction bond.[188] The defendant was limited to the amount of

---

[183] Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 n.1 (2002).

[184] *Russell*, 105 U.S. at 438 ("The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial."); *see also* Meyers v. Block, 120 U.S. 206, 214 (1887); HIGH, *supra* note 180, at 1603 (explaining that a court may "requir[e] or dispens[e] with a bond as the court in the exercise of a sound discretion may deem proper, and if a bond is required, prescrib[e] its condition and penalty").

[185] *Russell*, 105 U.S. at 441 (discussing "the power to require security or impose terms before granting an injunction"); WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 567 (Edgar Percy Hewitt et al. eds., 4th ed. 1903) ("When an interlocutory injunction or an *interim* restraining order is applied for, the Court will require the plaintiff, as a condition of its interference in his favour, to enter into an undertaking to abide by any order the Court may make as to damages."); HIGH, *supra* note 180, at 1574 ("The plaintiff in an injunction suit is usually required, as a condition precedent to obtaining an interlocutory injunction, to file a bond . . . .").

[186] *See* HIGH, *supra* note 180, at 1576 ("Nor is a bond necessary where an injunction is granted upon a final hearing."); *see also* KERR, *supra* note 185, at 591 (discussing "interlocutory injunction[s]" that have "been granted on the undertaking of the plaintiff as to damages"); *see, e.g.*, Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 516 (7th Cir. 2002) ("The purpose of an injunction bond is to compensate the defendant, in the event he prevails on the merits, for the harm that an injunction entered before the final decision caused him, and so it is required only for a temporary restraining order or a preliminary injunction, Fed. R. Civ. P. 65(c), not for a permanent injunction."); *cf.* St. Louis, I.M. & S. Ry. Co. v. McKnight, 244 U.S. 368, 373–74 (1917) (explaining that a defendant may recover on an injunction bond for damages suffered while an erroneous interlocutory injunction remained in effect, but not for damages incurred after issuance of a permanent injunction that is later reversed (citing Houghton v. Meyer, 208 U.S. 149, 160 (1908))); Novartis Pharms. Corp. v. Accord Healthcare Inc., No. 18-1043, 2020 U.S. Dist. LEXIS 235763, at *7 (D. Del. Dec. 15, 2020) (holding that an injunction bond entered in connection with a preliminary injunction must be dissolved despite the fact that the permanent injunction was being appealed because the defendant was not "entitled to a bond against the permanent injunction").

[187] HIGH, *supra* note 180, at 1574–75.

[188] *See Russell*, 105 U.S. at 444, 446 (noting the default rule that, in the absence of a statute, court rule, or contrary language in the bond, the court may order the plaintiffs to "pay such damages as the parties enjoined may sustain by reason of the injunction"); KERR, *supra* note 185, at 591 ("[T]he Court is not bound to grant an inquiry as to damages in every case in which the injunction is dissolved, or the action is dismissed at trial. The

the bond, however, even if its damages wound up being greater.[189] And if the trial court did not require a bond, then the defendant was barred from recovering any damages.[190]

Federal Rule of Civil Procedure 65(c) codifies these traditional equitable principles. It allows a court to issue a preliminary injunction or temporary restraining order "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined."[191] Rule 62(d) contains similar provisions concerning appeal bonds for staying preliminary or permanent injunctions pending appeal.[192] Such stays are functionally similar to injunctions in their own right.[193]

These rules raise three main interpretive issues concerning the scope of a court's discretion. First, courts have sharply disagreed over whether trial courts must impose bond requirements when granting preliminary injunctions. Second, jurisdictions have likewise differed on the extent of a court's discretion in setting the amount of a bond. Third, conflicting approaches exist about whether courts retain discretion over whether to allow a wrongfully enjoined party to recover damages under a bond.

1. Mandating a Bond

Rule 65(c)'s language appears to mandate that courts impose bond requirements when issuing preliminary injunctions. It provides, "The court may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security."[194] Rule 65(c)'s language can be traced back to the Clayton Act

---

Court has a discretion, and . . . must be satisfied that the injunction was improperly obtained and that under all the circumstances of the case damages ought to be given.").

189 HIGH, *supra* note 180, at 1582 ("But when an injunction is granted upon condition that a bond shall be filed in a given sum, which is done, and no further order is made as to the damages, defendants are limited in their recovery of damages to the amount of the penalty in the bond.").

190 *Id.* at 1607–08 ("[A]n independent suit for damages resulting from the granting of an injunction which is afterward dissolved can not be maintained where no bond was filed at the time the injunction was granted.").

191 FED. R. CIV. P. 65(c). The rule goes on to state that the United States, its officers, and federal agencies "are not required to give security." *Id.* States vary greatly in their bonding requirements. Some state rules make injunction bonds mandatory in some, most, or all cases, while others expressly vest discretion with the trial judge. Dobbs, *supra* note 46, at 1097–99.

192 FED. R. CIV. P. 62(d) ("While an appeal is pending from an interlocutory order or final judgment" granting, denying, or modifying an injunction, "the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.").

193 *See* Nken v. Holder, 556 U.S. 418, 428, 434 (2009).

194 FED. R. CIV. P. 65(c) (emphasis added).

of 1914, which mandated bonds for preliminary injunctions in labor disputes.[195] Circuits have split, however, on whether the bonding requirement is mandatory, adopting three distinct approaches.[196]

Some circuits have held that an injunction bond is always required as a condition precedent for a preliminary injunction.[197] Under this approach, "the absence of a bond precludes issuance of an injunction."[198] The Third Circuit has gone so far as to declare that "[t]he District Court must set a bond even where the parties have neglected to raise the issue."[199] Even concern that the bond requirement may "chill[]" litigants from enforcing their rights "cannot justify excusing [it]."[200]

Other jurisdictions have held that bonds are generally required, except under certain circumstances.[201] For example, a court may waive a bond requirement in cases brought in the "public interest," especially under a federal health or welfare statute.[202] Several scholars oppose bond requirements in public interest

---

[195] Clayton Act, ch. 323, § 18, 38 Stat. 730, 738 (1914) (current version at 15 U.S.C. § 26).

[196] Dobbs, *supra* note 46, at 1100–01.

[197] Md. Dep't of Hum. Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1483 (4th Cir. 1992) ("[T]he decision whether to require a bond is strictly circumscribed by the terms of Rule 65(c). . . . Failure to require a bond before granting preliminary injunctive relief is reversible error."); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 210 (3d Cir. 1990); Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1145 (3d Cir. 1977) ("[A] district court commits reversible error when it fails to require the posting of a security bond by the successful applicant for a preliminary injunction."). Under this categorical approach, a court need not require a bond if it makes a finding that the injunction will not cause compensable harm to the enjoined parties. *See* Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 426 (3d Cir. 2010) ("[A] district court lacks discretion under Rule 65(c) to waive a bond requirement except in the exceptionally narrow circumstance where the nature of the action necessarily precludes any monetary harm to the defendant . . . ."); *accord* Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 103 (3d Cir. 1988).

[198] Hope v. Warden York Cnty. Prison, 972 F.3d 310, 322 (3d Cir. 2020); Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 131 (5th Cir. 1990) (holding that a plaintiff "is not entitled to a preliminary injunction unless he posts security indemnifying [the defendant] against the financial losses it might suffer as a result of a wrongful injunction").

[199] Tilden Recreational Vehicles, Inc. v. Belair, 786 F. App'x 335, 343 (3d Cir. 2019).

[200] *Hoxworth*, 903 F.2d at 211.

[201] Justice Stevens's concurrence in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), appears to embrace this approach. He wrote, "*[G]enerally* the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." *Id.* at 649 (Stevens, J., concurring) (emphasis added).

[202] Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826 F.3d 1030, 1043 (8th Cir. 2016) ("[I]t was permissible for the district court to waive the bond requirement based on its evaluation of public interest in this specific case."); Pharm. Soc'y of N.Y., Inc. v. N.Y. State Dep't of Soc. Servs., 50 F.3d 1168, 1175 (2d Cir. 1995) (holding that, because the plaintiff had sued "to enforce 'public interests' rising out of a comprehensive health and welfare statute, . . . the district court's waiver of the bond requirement was proper"). Some commentators have encouraged this approach. *See, e.g.*, Morton, *supra* note 46, at 1904 ("In noncommercial cases, such as those involving the vindication of constitutional rights or public benefits rights under a federal statute, waiver may be appropriate.").

cases, particularly environmental cases, on the grounds that many plaintiff groups cannot afford them and already face substantial disincentives to pursuing meritless litigation.[203]

Still other circuits have concluded that, "[c]ontrary to the strong language of Rule 65(c)," a district court has complete discretion as to whether to require a bond.[204] These courts have generally reasoned that because district courts determine the bond amount, they may set the amount at zero, thus "dispens[ing] with the filing of a bond."[205] If the court chooses to forego a bond, however, it must be an affirmative decision rather than a failure to consider the issue.[206]

The First Circuit, applying the discretionary approach, has identified a range of factors for district courts to consider in deciding whether to impose an injunction bond.[207] "First, at least in noncommercial cases, the court" must weigh "the possible loss to the enjoined party" against "the hardship that a bond requirement would impose on the applicant."[208] The court does not weigh this factor heavily in commercial cases because commercial parties are presumed to be "capable of bearing most bond requirements."[209] Second, the court considers the bond requirement's impact on the plaintiff's ability to enforce its federal rights.[210] The court is less likely to require a bond "where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant."[211] This factor is less important "where both parties are

---

[203] *See* Calderon, *supra* note 46, at 165–66 (arguing that, due to the requirements for a preliminary injunction, "[d]efendants in public interest cases are thus well-screened from the issuance of an erroneous injunction, even without the 'screening' device provided by a bond"); Henson & Gray, *supra* note 46, at 551–52 (arguing injunction bonds are unnecessary to protect against baseless preliminary injunctions because attorneys have a duty not to file frivolous suits, public interest lawyers have "a detailed knowledge of complex areas of fact and law," the "enormous expense of time and money involved in litigation" deters frivolous filings, and many public interest groups require internal review of lawsuits before they are filed).

[204] *See* NACCO Materials Handling Grp. v. Toyota Material Handling USA, Inc., 246 F. App'x 929, 952–53 (6th Cir. 2007) ("[A] court has no mandatory duty to impose a bond as a condition for issuance of injunctive relief." (citing Roth v. Bank of Commonwealth, 583 F.2d 527, 538 (6th Cir. 1978))); Int'l Ass'n of Machinists & Aerospace Workers v. E. Airlines, Inc., 925 F.2d 6, 9 (1st Cir. 1991) ("[T]he provisions of Rule 65(c) are not mandatory and . . . a district court retains substantial discretion to dictate the terms of an injunction bond.").

[205] Clarkson Co. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976).

[206] *See Roth*, 583 F.2d at 539 (holding that the district judge erred by "fail[ing] to exercise the discretion required of him by Rule 65(c) by expressly considering the question of requiring a bond").

[207] Crowley v. Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984); *accord In re* Kingsley, 802 F.2d 571, 578 (1st Cir. 1986).

[208] *Crowley*, 679 F.2d at 1000.

[209] *Id.*

[210] *Id.* The court did not address how this consideration would apply in the context of a diversity suit involving state-law rights. *See id.*

[211] *Id.*

individuals or institutions."[212] Finally, while the strength of the plaintiff's case is typically not a consideration—since that has already been factored into the underlying decision to grant an injunction in the first place—a court seldom must require a bond "[i]n cases where the likelihood of success is extraordinarily high."[213] Thus, many jurisdictions accord district courts discretion, at least in some cases, over whether to require a bond at all.

2. Setting the Bond Amount

Circuits similarly vary as to the amount of the bond a court must require. Some jurisdictions, while alluding to a district court's discretion, require the bond to be set at an amount that will compensate the defendant for its anticipated losses as a result of the injunction.[214] When calculating the amount of a defendant's potential losses, the court must consider the defendant's ability to mitigate damages.[215] Under this approach, if a defendant is unable to show that the order is likely to cause substantial harm, then the bond may be set at a low amount.[216]

Other cases, in contrast, hold that the amount of the injunction bond is completely within a court's discretion.[217] Some circuits have ruled that a trial

---

[212] *Id.*

[213] *Id.* at 1000 n.25.

[214] *See* Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 n.3 (4th Cir. 1999) ("The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party . . . ."); Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 373 (8th Cir. 1991) (holding that an injunction bond must be "in an amount that fairly protects" the defendant "should it be ultimately found that the [defendant] has been wrongfully enjoined"); *see, e.g.*, Howmedica Osteonics v. Zimmer Inc., 461 F. App'x 192, 198 (3d Cir. 2012); Rathmann Grp. v. Tanenbaum, 889 F.2d 787, 789 (8th Cir. 1989) ("The $10,000 that [the plaintiff] posted pursuant to the [temporary restraining order] thus is inadequate to protect [the defendant] in the event that a trial on the merits results in a decision in his favor.").

[215] *See* Div. No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consol. Rail Corp., 844 F.2d 1218, 1229 (6th Cir. 1988) ("[T]he failure to consider mitigating the possibility of lost business before setting an extravagant injunction bond on that basis was an abuse of discretion.").

[216] *See, e.g.*, Candle Factory, Inc. v. Trade Assocs. Grp., 23 F. App'x 134, 138–40 (4th Cir. 2001) (setting a nominal bond because "any injury to [the defendant] from issuance of the Preliminary Injunction would be slight"). Under this approach, the amount can be zero if the enjoined party is not likely to suffer any compensable damages. *See* Doctor's Assocs. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996) (quoting Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961)); *Hoechst Diafoil*, 174 F.3d at 421–22 n.3.

[217] *See* Pashby v. Delia, 709 F.3d 307, 332 (4th Cir. 2013) ("[T]he district court retains the discretion to set the bond amount as it sees fit . . . ."); BellSouth Telecommc'ns, Inc. v. MCImetro Access Transmission Servs., LLC, 425 F.3d 964, 971 (11th Cir. 2005) (holding the same); Int'l Ass'n of Machinists & Aerospace Workers v. E. Airlines, Inc., 925 F.2d 6, 9 (1st Cir. 1991) (holding the same); Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 103 (3d Cir. 1988) ("[T]he amount of the bond is left to the discretion of the court . . . ."); Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F.2d 300, 303 (5th Cir. 1978) ("The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all."); Stockslager v. Carroll Elec. Coop., 528 F.2d 949, 951 (8th Cir. 1976) ("The amount of the bond rests within the

judge's discretion to set the bond "in such sum as the court deems proper" includes authority to set a minimal bond or to even set the amount at zero (thus essentially negating the bond requirement).[218] Courts are particularly likely to take advantage of this discretion in "public interest" cases.[219] When a bond is set at zero, a wrongfully enjoined party is generally unable to seek compensation if the injunction is reversed, vacated, or dissolved.[220]

A litigant may ask the trial court to increase or decrease the amount of the bond while the injunction remains in effect.[221] Any such changes must be purely prospective. When an injunction is reversed or vacated on appeal, the appellate court will generally decline to retroactively increase the bond amount, even if it was erroneously low and insufficient to compensate the enjoined party for the harm it suffered.[222] Such courts reason that part of the bond's purpose is to notify the plaintiff as to the maximum amount of its potential liability.[223] Retroactive adjustments to the bond amount would subject plaintiffs to unanticipatedly high liability.[224]

---

sound discretion of the trial court . . . .").

[218] *See, e.g.*, Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996) (quoting FED. R. CIV. P 65(c) and citing *Corrigan Dispatch*, 569 F.2d at 303); Md. Dep't of Hum. Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1483 (4th Cir. 1992); Cont'l Oil Co. v. Frontier Refin. Co., 338 F.2d 780, 782 (10th Cir. 1964).

[219] City of Atlanta v. Metro. Atlanta Rapid Transit Auth., 636 F.2d 1084, 1094 (5th Cir. 1981) (upholding the court's refusal to require an injunction bond where "plaintiffs were engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement").

[220] W.R. Grace & Co. v. Loc. Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 770 n.14 (1983) ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 804 (3d Cir. 1989) ("[A] defendant wrongfully enjoined has recourse only against the bond."); *In re* Ladner, 799 F.2d 1023, 1025–26 (5th Cir. 1986) (adopting the "no bond, no damages" rule).

[221] *See, e.g.*, Dass v. Tosco Corp., 136 F. App'x 21, 24 (9th Cir. 2005) (affirming the district court's decision to increase the amount of an injunction bond based on the district court's estimate of the defendant's "potential damages resulting from the injunction"); *cf.* Bebe Stores, Inc. v. May Dep't Stores Int'l, 313 F.3d 1056, 1058 (8th Cir. 2002) (remanding for the district court to consider whether to increase the injunction bond amount).

[222] Sprint Commc'ns Co. v. CAT Commc'ns, Int'l, Inc., 335 F.3d 235, 241 (3d Cir. 2003) ("A retroactive increase in the amount of an injunction bond on dissolution or reversal is generally improper."); *accord* Scanvec Amiable Ltd. v. Chang, 80 F. App'x 171, 175–76 (3d Cir. 2003); Clark v. K-Mart Corp., 979 F.2d 965, 969 (3d Cir. 1992) ("We likewise will not hold that a party who accepts the benefit of a preliminary injunction by posting a nominal bond implicitly *agrees* to post a larger bond if unsuccessful on appeal . . . .").

[223] Nokia Corp. v. Interdigital, Inc., 645 F.3d 553, 557 (2d Cir. 2011) (holding that "the bond provides the plaintiff with notice of the maximum extent of its potential liability" should the injunction prove to be erroneous); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 210 n.31 (3d Cir. 1990) ("Plaintiffs too derive some protection from the bond requirement, for defendants injured by wrongfully issued preliminary injunctions can recover only against the bond itself."); Continuum Co. v. Incepts, Inc., 873 F.2d 801, 803–04 (5th Cir. 1989) (noting that the amount of an injunction bond establishes the plaintiff's "reasonable expectations" about the extent of its potential liability).

[224] *See Sprint Commc'ns Co.*, 335 F.3d at 240–41 ("If a retroactive increase is permissible, the injunction bond is no longer cabined; the bond no longer fixes exposure nor caps liability. A retroactive increase subjects

For example, in *Sprint Communications Co. v. CAT Communications International, Inc.*, the district court awarded Sprint a preliminary injunction prohibiting the defendant's customers from using Sprint's long-distance telephone network.[225] It imposed an injunction bond of $250,000.[226] Almost two years later, the defendant moved to increase the amount of the bond and vacate the order.[227] The district court dissolved the injunction based on a revised view of Sprint's likelihood of success on the merits[228] and retroactively increased the bond to $4.95 million to fully compensate the defendant for the expenses it had incurred over the preceding two-year period to comply with the order.[229] The Third Circuit affirmed the injunction's dissolution but reversed the modification of the injunction bond on the grounds that such a "retroactive increase" would subject the plaintiff "to an unexpected and unanticipated liability."[230]

3. Recovering Under the Bond

Courts have also disagreed as to whether wrongly enjoined parties have the right to recover their damages up to the amount of the injunction bond, or the award of such relief is instead discretionary. Some courts have held that a victim of a wrongful injunction has the "*right* to pursue recovery on the security bond."[231] Others have held that wrongfully enjoined parties are entitled only "to a *presumption* in favor of recovery against the bond for provable damages."[232] Among the considerations that these latter courts have taken into account in calculating the amount of recovery are "the resources of the parties, the defendant's efforts or lack thereof to mitigate his damages, and the outcome of the underlying suit."[233]

---

the successful applicant to an unexpected and unanticipated liability.").

225 *Id.* at 238.

226 *Id.*

227 *Id.* at 239.

228 *Id.* at 242.

229 *Id.* at 239.

230 *Id.* at 241, 243.

231 Div. No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consol. Rail Corp., 844 F.2d 1218, 1225 (6th Cir. 1988) (emphasis added); Atomic Oil Co. of Okla. v. Bardahl Oil Co., 419 F.2d 1097, 1100 (10th Cir. 1969).

232 Nokia Corp. v. Interdigital, Inc., 645 F.3d 553, 557 (2d Cir. 2011) (emphasis added); *see also* Glob. NAPs Inc. v. Verizon New Eng., Inc., 489 F.3d 13, 23 (1st Cir. 2007) ("[A] district court must have a good reason to depart from the preference for recovery of security granted under Rule 65(c)."); Coyne-Delany Co. v. Cap. Dev. Bd. of Ill., 717 F.2d 385, 392 (7th Cir. 1983) (recognizing "the implicit presumption in Rule[] . . . 65(c) in favor of awarding" recovery under an injunction bond).

233 *Coyne-Delany Co.*, 717 F.2d at 392; *see also Nokia*, 645 F.3d at 559 ("Good reasons to deny recovery of all or a portion of the alleged damages would be that the damages sought were unreasonable in amount or that a party failed to mitigate them.").

In contrast, some other jurisdictions have granted district courts complete discretion "to weigh the equities of the particular case in awarding or denying damages resulting from a preliminary injunction wrongfully obtained."[234] As one such circuit noted, Rule 65(c) "does not contemplate that a defendant who is wrongfully enjoined will always be made whole by recovery of damages."[235] This approach is consistent with the Supreme Court's ruling in *Russell v. Farley*, which predated Rule 65(c) by over a half-century.[236]

B. Implications of Injunction Bonds

The longstanding equitable principles governing injunction bonds demonstrate that injunctions can continue to affect litigants' rights even after they have been reversed, vacated, or dissolved. When a court enters a preliminary injunction authorizing a plaintiff to take actions that would otherwise violate a defendant's common law or statutory rights, that defendant may not sue the plaintiff for those violations once the injunction is lifted. Rather, the defendant's sole remedy is generally limited to an action against the injunction bond itself.[237] And, as we have seen, many circuits allow courts to decline to impose injunction bonds,[238] set the bond amount at zero,[239] or even bar the defendant from recovering on a bond.[240] In such cases, not only are the defendant's statutory or common law remedies eliminated by the now-nonexistent preliminary injunction but the defendant is also left without an alternate means of seeking compensation for the admittedly wrongful harm it suffered.

The situation with permanent injunctions is even starker. The Federal Rules of Civil Procedure do not provide for injunction bonds in connection with permanent injunctions[241] and courts of equity have no tradition of imposing them.[242] When a permanent injunction is overturned on appeal or otherwise

---

234 Lasercomb Am., Inc. v. Holliday, No. 91-1675, 1992 U.S. App. LEXIS 9819, at *16–17 (4th Cir. May 6, 1992); Page Commc'ns Eng'rs, Inc. v. Froehlke, 475 F.2d 994, 997 (D.C. Cir. 1973) (holding that a court has "discretion to refuse to award damages [under an injunction bond], in the interest of equity and justice"); H & R Block, Inc. v. McCaslin, 541 F.2d 1098, 1099 (5th Cir. 1976).

235 *Page Commc'ns Eng'rs*, 475 F.2d at 997.

236 105 U.S. 433, 446 (1881) (holding that the district court "had power to decide" that, "under the circumstances of the case," no damages "ought to be recovered" under an injunction bond).

237 *See supra* notes 178–79, 188–90 and accompanying text.

238 *See supra* notes 204–06 and accompanying text.

239 *See supra* notes 218–20 and accompanying text.

240 *See supra* notes 234–36 and accompanying text.

241 *See* FED. R. CIV. P. 65(c).

242 *See supra* note 186 and accompanying text.

vacated,[243] the defendant's only remedy is a restitution claim for the return of any money or property it transferred to the plaintiff or the fair market value of goods or services it provided pursuant to the injunction.[244] The defendant may not recover any additional consequential, statutory, or other damages to which it would have been entitled had the plaintiff performed the same actions without the protection of an injunction.

Thus, in private litigation, the fact that a court reverses an injunction does not return the parties to the status quo ex ante. Although a revoked order cannot provide prospective protection for future conduct, it is not treated as void ab initio.[245] Even an erroneously issued injunction that is later revoked can limit the nature, scope, and amount of the plaintiff's potential liability to the defendant for its past actions while the injunction had been in effect.

III. CRIMINAL CONTEMPT OF ERRONEOUS INJUNCTIONS

The Court's jurisprudence regarding injunctions reveals another way in which reversed, vacated, or dissolved injunctions can continue to have legal effect: a previously enjoined party may be held in criminal contempt for past violations of them. "An enjoined party is required to obey an injunction issued by a federal court within its jurisdiction even if the injunction turns out on review to have been erroneous, and failure to obey such an injunction is punishable by contempt."[246] Under the collateral bar doctrine, a respondent charged with contempt generally may not challenge the injunction's validity as a defense, even if he claims the underlying statute that the injunction is enforcing is unconstitutional.[247] This rule arises from "a belief that in the fair administration

---

[243] *See* FED. R. CIV. P. 60(b).

[244] *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (Am. L. Inst. 2010) ("A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment."); *see, e.g.*, Broadcom Corp. v. Qualcomm, Inc., 585 F. Supp. 2d 1187, 1190 (C.D. Cal. 2008) ("The law of restitution also has broad application in cases where money is transferred pursuant to a court order that is subsequently reversed.").

[245] One might question whether the collateral consequences of an injunction that a court lacked jurisdiction to enter should be treated differently than those of an injunction that proved to be merely erroneous or an abuse of discretion on the merits. *See* Doug Rendleman, *More on Void Orders*, 7 GA. L. REV. 246, 246 (1973) (discussing "the distinction between void and erroneous orders"). This will seldom be an issue with regard to federal injunctions against allegedly invalid legal provisions. Federal district courts have general federal-question jurisdiction over litigation arising under the U.S. Constitution, Administrative Procedures Act, and other authorities for challenging the validity of legal provisions. *See* 28 U.S.C. § 1331 (2018).

[246] Firefighters Loc. Union No. 1784 v. Stotts, 467 U.S. 561, 600 n.5 (1984) (Blackmun, J., dissenting).

[247] Walker v. City of Birmingham, 388 U.S. 307, 314 (1967) (quoting Howat v. Kansas, 258 U.S. 181, 189–90 (1922)); *see also* W.R. Grace & Co. v. Loc. Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 769 (1983) ("Courts have sufficient contempt powers to protect their

of justice no man can be judge in his own case."[248] An enjoined party who believes an injunction is invalid generally must first seek relief from the courts, rather than unilaterally deciding to violate it.[249]

The collateral bar rule thus allows for enforcement of injunctions regardless of whether they are substantively invalid or even unconstitutional.[250] But the Court has gone even further. As a corollary to the collateral bar rule, the Court has held that a person may be held in criminal contempt for violating an injunction while it was in effect, even after that order is reversed or otherwise invalidated.[251] In *Donovan v. City of Dallas*, a group of Dallas residents lost a state-court class action case in which they had sought to prevent the city from issuing bonds to build an additional runway at Love Field airport.[252] Some of the residents who brought that case, along with others who had not been involved with it, filed a subsequent federal lawsuit seeking similar relief.[253] The Texas Supreme Court directed the Texas Court of Civil Appeals to issue an order prohibiting the residents from maintaining their federal case.[254] When the residents proceeded with their federal claims in violation of the order, the Texas Court of Civil Appeals held them in contempt.[255] It imposed a fine on each plaintiff and a twenty-day jail sentence on their attorney.[256]

The U.S. Supreme Court granted certiorari for both the Texas Supreme Court's order to enter the injunction, as well as the residents' ensuing contempt

---

injunctions, even if the injunctions are issued erroneously."); GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 386 (1980).

[248] *Walker*, 388 U.S. at 320.

[249] The Court has suggested that two exceptions may exist to the collateral bar doctrine. The doctrine might be inapplicable, first, to "transparently invalid" orders, *id.* at 315, or second, when the issuing court improperly delays adjudicating a challenge to the order, *id.* at 318. The Court invoked a variation of the latter exception in *Maness v. Meyers*, 419 U.S. 449, 470 (1975), in which it held that an attorney who advises a litigant to disobey a court's order to reveal information at trial on Fifth Amendment grounds may contest that order's validity in a later contempt proceeding. The Court explained that "[c]ompliance" with such an order "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily . . . totally repair[] the error." *Id.* at 460.

[250] *Walker*, 388 U.S. at 314 (holding that an injunction "must be obeyed . . . however erroneous the action of the court may be, even if the error be in the assumption of the validity of a . . . void law going to the merits of the case" (quoting *Howat*, 258 U.S. at 189–90)); *see also Maness*, 419 U.S. at 458 ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

[251] Donovan v. City of Dallas, 377 U.S. 408, 414 (1964) (remanding the case so the state court could decide whether to punish petitioners for contempt of an invalid injunction).

[252] *Id.* at 408–09.

[253] *Id.* at 409.

[254] *Id.* at 410.

[255] *Id.*

[256] *Id.*

convictions.[257] The Court held that the injunction was invalid because the state courts were "without power to enjoin these litigants from prosecuting their federal-court action."[258] It also vacated the residents' contempt convictions, explaining that it was uncertain "[w]hether the Texas court would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid."[259] Rather than entering final judgment on the grounds that the underlying injunction was invalid, however, the Court remanded the case back to Texas state court specifically to allow that court to decide whether the residents should be punished for violating the overturned order.[260]

Thus, even after declaring the injunction invalid,[261] the Court not only recognized but also affirmatively facilitated the possibility that the state court could hold the wrongfully enjoined parties in contempt for violating it. Lower courts have likewise recognized that "contempt of an order later held beyond the court's power to issue may nevertheless be punished."[262] Such "punishment is to vindicate the court's authority which has been equally flouted whether or not the command was right."[263]

Yet again, erroneous injunctions continue to exert legal consequences even after they have been reversed and are no longer in existence. The Court's corollary to the collateral bar rule treats an injunction as definitively establishing an enjoined party's rights and obligations for the period it remains in effect, regardless of whether the order turns out to be erroneous and is later reversed. An injunction should likewise dispositively establish the plaintiff's rights and obligations for that period, as well.

---

[257] *Id.* at 411.

[258] *Id.* at 411–12.

[259] *Id.* at 414.

[260] *Id.* ("[S]ince that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand.").

[261] *Id.* ("[P]etitioners have been punished for disobeying an invalid order.").

[262] Mann v. Calumet City, 588 F.3d 949, 954 (7th Cir. 2009); *see also* State *ex rel.* Mix v. Newland, 560 P.2d 255, 260–61 (Or. 1977) ("[T]he trial court may, in its discretion, impose some appropriate sanction on defendant for his contempt of its earlier injunction . . . , even though that order has subsequently been found to be invalid."); *see, e.g.*, Retired Chi. Police Ass'n v. City of Chicago, 76 F.3d 856, 870 (7th Cir. 1996) ("Our determination that the sanctions were invalid does not dictate the conclusion that Krislov should not have been held in contempt for the failure to pay those sanctions within the time ordered."); United States v. Dickinson, 465 F.2d 496, 514 (5th Cir. 1972) (remanding the case to the district court "for a determination of whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm"); Dunn v. United States, 388 F.2d 511, 512–13 (10th Cir. 1968) (applying *Donovan* under analogous circumstances).

[263] Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F.2d 727, 727 (2d Cir. 1936) (per curiam).

IV. PROTECTIVE EFFECTS OF ERRONEOUS INJUNCTIONS

If a court concludes that a legal provision is unconstitutional or otherwise invalid—either facially or as applied under certain circumstances—then it generally must ignore that provision in the course of adjudicating the case, refusing to afford it legal effect.[264] When the enforcement or threat of enforcement of such an invalid provision threatens to inflict irreparable harm on a litigant, the court may enjoin its enforcement.[265] In these cases, the court draws its authority from a higher source of law than the challenged provision itself.[266]

This reasoning is inapplicable, however, when an injunction enjoining a legal provision is reversed, vacated, or overturned. In such cases, the judiciary has ultimately concluded that a higher source of law does not actually prevent the government from enforcing the challenged provision. Some alternate source of authority is therefore necessary for a court to be able to displace a defendant's legal rights, such as by replacing a wrongfully enjoined party's common law or statutory causes of action against the plaintiff with a discretionary action on an injunction bond or restitution claim,[267] or allowing a wrongfully enjoined party to be prosecuted for criminal contempt for engaging in otherwise lawful conduct.[268] Such an alternate source of authority would likewise be necessary to empower a court to prevent a wrongfully enjoined governmental defendant (i.e., a federal or state agency or official) from prosecuting or seeking other punitive sanctions, such as statutory damages or civil penalties, against a plaintiff that violated a legal provision that had been subject to a since-vacated injunction. Earlier, we saw that the most seemingly applicable defenses—the Ex Post Facto Clauses, due process notice requirements, and mistake of law—may be insufficient to cover the broad run of such cases.[269] This Part suggests two alternate sources of authority: (1) the Article III judicial power for permanent injunctions, and (2) the federal equity power for both preliminary and permanent injunctions. After exploring these sources of constitutional authority, this Part goes on to explore the various ways in which courts may exercise them.

---

264 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

265 *See Ex parte* Young, 209 U.S. 123, 167 (1908).

266 A court may enjoin a federal statute on the grounds that it violates the U.S. Constitution. It may enjoin a federal regulation when the regulation violates either a federal statute's procedural or substantive requirements or the U.S. Constitution. *See* 5 U.S.C. § 706(2) (2018). And, subject to the restrictions on federal preemption doctrine, a state legal provision may be enjoined for violating either a federal regulation, federal statute, or the U.S. Constitution. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1479–80 (2018).

267 *See supra* Part II.

268 *See supra* Part III.

269 *See supra* Part I.C.

A. The Judicial Power

The Article III judicial power should be construed as empowering federal courts to ensure that their judgments dispositively adjudicate the rights and duties of litigants for the period in which such judgments remain in effect. Litigants generally should not be subject to proceedings with a punitive component for actions taken in reliance on judgments to which they are parties, specifically including permanent injunctions, even if those judgments are later reversed or vacated.

Article III vests "[t]he judicial Power of the United States" in the federal judiciary.[270] An essential element of the judicial power is the authority to issue final judgments adjudicating the rights of the litigants in a case.[271] Of course, such judgments may be stayed[272] or reversed on appeal.[273] But while a judgment remains in effect, its essential attribute is *dispositiveness*: litigants may prospectively rely on a judgment as a binding statement of their rights and duties.[274] Should the judgment be reversed, overturned, or vacated, it no longer continues to have any such prospective effect. But, unless the court lacked subject matter jurisdiction to issue the judgment,[275] it is not void ab initio.

---

[270] U.S. CONST. art. III, § 1, cl. 1.

[271] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) ("[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . . ."); *see also* William Baude, *The Judgment Power*, 96 GEO L.J. 1807, 1809 (2008) ("[T]he judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case."); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989–90) (defining the "judicial Power" as "one to render dispositive judgments").

[272] *See* FED. R. CIV. P. 62.

[273] Even an initially correct judgment may require reversal if the legislature changes the underlying substantive law while the appeal is pending. *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

[274] *See* Jennings v. Stephens, 574 U.S. 271, 272 (2015) (noting that courts "reduce their opinions and verdicts to judgments precisely to define the parties' rights and liabilities"); Kessler v. Eldred, 206 U.S. 285, 289 (1907) ("If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it."); City of Chanute v. Trader, 132 U.S. 210, 214 (1889) ("The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered."); *see also* Morley v. Lake Shore & M.S. Ry. Co., 146 U.S. 162, 175 (1892) ("The effect of a judgment is to fix the rights of the parties thereto by the solemn adjudication of a court having jurisdiction." (citation omitted)).

[275] *See* 2 RESTATEMENT (SECOND) OF JUDGMENTS § 11 (Am. L. Inst. 1980); *see, e.g.*, State v. Sams, 345 S.E.2d 179, 182 (N.C. 1986) ("An order is void *ab initio* only when it is issued by a court that does not have jurisdiction.").

These principles are clearest regarding declaratory judgments, which are often sought in conjunction with injunctions in public law challenges.[276] The Declaratory Judgment Act empowers a federal court to "declare the rights and other legal relations of any interested party seeking such declaration."[277] A declaratory judgment "declares conclusively and finally the rights of the parties in litigation[] over a contested issue"[278] and "constitut[es] *res judicata*."[279]

The "very purpose of the Declaratory Judgment Act [is] to ameliorate" the "dilemma" of having to choose between avoiding the risk of prosecution or other penalties for violating a seemingly invalid legal provision by refraining from exercising one's claimed rights, on the one hand, and exposing oneself to punitive consequences by exercising one's claimed rights in violation of that provision, on the other.[280] A declaratory judgment allows litigants to obtain binding judicial declarations of their rights in advance of committing potentially illegal acts[281]—to "remove[] all that peril."[282] As Representative Gilbert explained during debates over the statute's enactment, "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a

---

[276] *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1143 (2014) ("The declaratory judgment and the injunction are rough substitutes."); *see also* Steffel v. Thompson, 415 U.S. 452, 466 (1974) (discussing the close relationship between injunctions and declaratory judgments). *But see* Morley, *supra* note 4, at 2458–59 (identifying certain circumstances in which it is particularly important for people to have their rights protected by an injunction rather than a declaratory judgment).

[277] Pub. L. No. 73-343, 48 Stat. 955 (1934) (codified at 28 U.S.C. § 2201(a) (2018)).

[278] S. REP. NO. 73-1005, at 2 (1934); *see also* Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 47 (1934) ("[T]he declaratory judgment is a final judgment like any coercive judgment conclusively determining the rights of the parties . . . .").

[279] Borchard, *supra* note 278, at 47.

[280] Abbott Lab'ys v. Gardner, 387 U.S. 136, 152 (1967) (citing S. REP. NO. 73-1005, at 2–3, and Edwin Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 454 (1943)); *see also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 134 (2007) ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk . . . the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."); Bituminous Coal Operators' Ass'n v. Int'l Union, United Mine Workers of Am., 585 F.2d 586, 596 (3d Cir. 1978) ("[T]he declaratory remedy may be resorted to before there has been a change in the status quo which results in injury . . . ."); *Declaratory Judgments: Hearings on H.R. 5623 Before the Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. 16 (1928) [hereinafter *Senate Hearings*] (statement of Professor Borchard, noting the statement of Benjamin Cardozo, C.J., N.Y. Ct. App.) (explaining that the Declaratory Judgment Act could be used where people "would otherwise have acted at their peril").

[281] Steffel v. Thompson, 415 U.S. 452, 468 n.18 (1974) (urging that declaratory judgments "be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality" (quoting *Senate Hearings*, *supra* note 280, at 75–76 (statement of Rep. Edward E. Denison))); S. REP. NO. 73-1005, at 3 (explaining that a pre-enforcement declaratory judgment action allows a litigant to avoid "social and economic waste and destruction in order to obtain a determination of one's rights").

[282] *Senate Hearings*, *supra* note 280, at 35 (statement of E. R. Sutherland).

hole. Under the declaratory judgment law you turn on the light and then take the step."[283]

Absent a stay, a declaratory judgment is immediately effective upon issuance, regardless of whether appeals are pending.[284] A person may exercise their rights as set forth in the declaration, including taking actions for which they would otherwise face the risk of punitive enforcement measures.[285] If a person may be retroactively prosecuted or subject to other punitive measures for steps they took while a declaratory judgment was in effect, then the judgment would be unable to achieve its purpose of declaring a person's rights for that period. The district court's ruling would be akin to a mere advisory opinion, insufficient on its own to provide definitive guidance about the legality of a plaintiff's intended activities unless and until all appeals were exhausted. And even then, the judgment could be attacked under Rule 60(b) if subsequent developments in precedent demonstrated that the judgment's legal predicate was erroneous.[286]

This reasoning applies with equal force to permanent injunctions. A court's ability to exercise the judicial power would be crippled if the court could not allow litigants to rely upon a permanent injunction that has entered into force.[287] If the judgment or injunction turns out to be erroneous, then the consequence should *not* be that the plaintiff's conduct becomes retroactively illegal. Rather, at most, the plaintiff should be subject to potential liability for compensatory damages up to the amount of the injunction bond, if any, or restitution to prevent unjust enrichment.[288]

Of course, the Constitution does not mandate that a ruling from a single district judge must take immediate effect. Throughout much of the twentieth

---

283 69 CONG. REC. 2030 (1928) (statement of Rep. Ralph W.E. Gilbert).

284 *See* Coleman v. Tollefson, 575 U.S. 532, 539 (2015) ("Unless a court issues a stay, a trial court's judgment . . . normally takes effect despite a pending appeal. And a judgment's preclusive effect is generally immediate, notwithstanding any appeal." (citation omitted)); 16A CHARLES E. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE – JURISDICTION & RELATED MATTERS § 3954 (5th ed. 2021) ("The taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal."); *see, e.g.*, Florida v. U.S. Dep't of Health & Hum. Servs., 780 F. Supp. 2d 1307, 1316 (N.D. Fla. 2011) ("[T]o suggest that a declaratory judgment will only be effective and binding on the parties after the appeals process has fully run its course is manifestly incorrect and inconsistent with well established statutory and case law."); *cf.* Badger Cath., Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) ("[A] declaratory judgment is a real judgment, not just a bit of friendly advice . . . .").

285 *Cf. Florida*, 780 F. Supp. 2d at 1316–17 (stating that the U.S. Department of Health & Human Services could not implement the Affordable Care Act, including the individual mandate, while the district court's declaratory judgment holding it unconstitutional was in effect, but staying the declaratory judgment).

286 *See* FED. R. CIV. P. 60(b).

287 *See supra* notes 271, 274 and accompanying text.

288 *See supra* notes 178, 244 and accompanying text.

century, for example, Congress required most constitutional litigation to be heard by district court panels comprised of three judges.[289] One could conceive of a judicial structure in which district courts' injunctions or judgments were automatically stayed, and therefore did not take effect, unless and until approved by a court of appeals. Once an order or judgment does take effect, however, it should settle the legality of actions the plaintiff performs throughout the time it remains effective.

Likewise, Congress may prohibit federal courts from exercising jurisdiction over certain types of cases[290] or limit their jurisdiction to grant particular remedies such as declaratory judgments or injunctions.[291] But, again, once Congress grants federal courts jurisdiction to hear a case and grant certain forms of relief, such authority should be understood as including the power to protect a litigant who acts in accordance with the court's judgment from retroactive punishment. Indeed, an order that was insufficient to establish the legality of conduct that occurred while it remained in effect may lack the requisite dispositiveness and finality to qualify as a constitutionally valid exercise of the Article III judicial power. Rather than purporting to settle the litigants' rights, such an order would leave the ultimate legality of the plaintiff's conduct to be conclusively resolved, if at all, at some later time: on appeal, in a Rule 60(b)

---

[289] *See* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 701 (2020) ("Throughout much of the twentieth century, when a plaintiff asked a federal trial court to enjoin an allegedly unconstitutional federal or state law, the case was heard by a panel of three judges, rather than by a single judge." (footnote omitted)).

[290] Amar, *supra* note 31, at 670 (rejecting the notion that the federal judiciary has inherent authority to "facilitate access to the federal courts for federal claimants," due to the "commonly accepted wisdom that Congress need not vest federal courts with anything close to the full extent of what Article III allows"); *see* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. . . . No [court] can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all."); *see also* Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799) ("A Circuit Court, however, is of limited jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace.").

[291] Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (upholding Congress's authority to specify the conditions under which a federal court may exercise jurisdiction to grant certain remedies); *see, e.g.*, Tax Injunction Act, ch. 726, 50 Stat. 738 (1937) (codified at 28 U.S.C. § 1341 (2018)); Johnson Act, ch. 283, 48 Stat. 775 (1934) (codified at 28 U.S.C. § 1342 (2018)); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101–15 (2018)).

For a time, the Supreme Court had held that Article III did not permit federal courts to grant declaratory judgments. *See* Willing v. Chi. Auditorium Ass'n, 277 U.S. 274, 289 (1928) (holding that granting a declaratory judgment "is beyond the power conferred upon the federal judiciary"); Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 76 (1927) ("[T]he District Court, as a court of the United States established under Article III of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment."). *But see* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 244 (1937) (holding that the Article III judicial power extends to claims under the Declaratory Judgment Act).

collateral attack on the judgment, or with uncertainty lingering indefinitely. One need not go so far, however, to conclude that, at a minimum, the Article III judicial power presumptively allows federal courts to treat judgments that incorporate permanent injunctions as dispositively establishing litigants' rights and liabilities concerning actions taken while those judgments are—or were—in force.

Justice Stevens's concurrence in *Edgar v. MITE Corp.*[292] and Professor Mitchell's writ of erasure argument,[293] in contrast, would allow an injunction to determine a plaintiff's rights only so long as it remained in effect, leaving room for the retroactive imposition of punitive consequences. Such an approach would undermine the ability of federal courts to dispositively adjudicate litigants' rights. Mitchell acknowledges that, under the writ of erasure approach, "[j]udicial pronouncements of unconstitutionality" are inherently "temporary" because "they are *always* subject to reversal on appeal or repudiation by a future Supreme Court."[294] A court's decision to enjoin enforcement of a law on constitutional grounds is as transient, he argues, as a President's decision to refrain from enforcing a federal statute on constitutional grounds.[295] He elaborates, "[A]nyone who violates the statute during the injunction will run the risk that a future court might vacate the injunction and allow the government to pursue penalties against those who had previously violated the law."[296]

Mitchell offers the example of *Citizens United v. FEC*.[297] Under 52 U.S.C. § 30118, corporations cannot make expenditures for political communications to influence federal elections.[298] In *Citizens United*, the Supreme Court held that Section 30118 is facially unconstitutional because corporations have a fundamental First Amendment right to engage in pure political expression, even if it costs money.[299] Mitchell contends that politicians who oppose *Citizens United* may nevertheless "threaten to prosecute anyone who violates [Section] 30118 if a future Supreme Court removes the judicial obstacles to enforcement"

---

292 457 U.S. 624, 647 (1982) (Stevens, J., concurring).

293 Mitchell, *supra* note 26, at 941–42.

294 *Id*. at 941.

295 *Id.* at 941–42 ("[T]he court's instruction to the executive lasts only as long as the judiciary adheres to its belief that the statute violates the Constitution—just as a President's non-enforcement order lasts only as long as the President decides to keep that non-enforcement policy in effect.").

296 *Id.* at 988.

297 *Id.* at 990–92 (discussing Citizens United v. FEC, 558 U.S. 310 (2010)).

298 52 U.S.C. § 30118(a) (2018).

299 558 U.S. at 361, 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

within the statute of limitations period.[300] Even though individuals currently cannot be prosecuted for failure to comply with Section 30118, "the mere threat of future prosecution . . . may be enough to induce substantial if not total compliance with the statute during a period of judicial non-enforcement."[301]

He similarly points to *Shelby County v. Holder*, in which the Supreme Court effectively suspended the Voting Rights Act's preclearance requirements by invalidating the statutory formula for identifying covered jurisdictions subject to them.[302] Mitchell argues, "[C]overed jurisdictions should continue submitting their voting-related laws to the Department of Justice for preclearance—even after *Shelby County*—because the preclearance regime continues to exist as a statutory requirement and it could be enforced if the Supreme Court returns to Democratic control."[303]

These examples confirm the narrow view of judicial authority embodied in Justice Stevens's and Professor Mitchell's approach. If an injunction cannot definitively legitimate conduct while it remains in effect, then both private parties and government officials are forced into parallel legal worlds simultaneously: one based on the law as it currently exists based on the district court's order, and another based on an alternate possible set of standards that a court may retroactively apply at some point in the future should the injunction be overturned. Rightsholders will often be deterred from exercising what courts have declared to be their rights if they face the possibility of retroactive prosecution should the underlying order or judgment be overturned. The greater the controversy or legal uncertainty, the more a prudent or risk-averse person will follow restrictions that are not being enforced; submit filings to government offices that cannot be processed; attempt to follow procedures that are no longer being implemented; and otherwise take wasteful, defensive measures to hedge against the possibility that an appeal or subsequent change in precedent will not only modify the law going forward, but also create substantial new retroactive exposure. The regime embodied in these examples is not one in which a court's judgment—including that of the Supreme Court—dispositively adjudicates rights, resolves disputes, or provides meaningful guidance for the future. Such a torpid vision of the judicial power is not recognizable, desirable, or necessary.

---

300 Mitchell, *supra* note 26, at 992.

301 *Id.*

302 Shelby County v. Holder, 570 U.S. 529, 556–57 (2013).

303 Mitchell, *supra* note 26, at 950.

B. The Federal Equity Power

While the preceding section focused on the effects of permanent injunctions, the federal judiciary's constitutionally authorized equity powers[304] also allow federal courts to preclude the retroactive imposition of punitive measures for conduct taken pursuant to either preliminary or permanent injunctions. The core purpose of both types of orders is the prevention of irreparable injury to rightsholders.[305] The Supreme Court has frequently held that constitutional violations, particularly First Amendment violations, constitute per se irreparable injuries.[306] One reason such violations are considered irreparable is due to the obstacles aggrieved rightsholders face in seeking monetary compensation. For example, federal and state entities have sovereign immunity from damages claims for constitutional violations, particularly where such violations do not amount to torts that fall within the scope of statutory waivers.[307] And qualified immunity often precludes litigants from recovering against individual government officers.[308]

Even when immunity does not bar litigants from seeking compensatory damages, they will often not receive adequate compensation. It may be difficult to establish the amount of harm a rightsholder suffered, or the value of the underlying right may be largely nonpecuniary, greatly limiting the amount of damages that are potentially recoverable.[309] Moreover, to the extent constitutional restrictions are intended to prevent the government from infringing on certain entitlements, monetary damages are a substitutionary

---

304 *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under [federal law] . . . .").

305 *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008) (establishing irreparable injury as a requirement for preliminary injunctions); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (holding the same for permanent injunctions).

306 Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Ex parte* Young, 209 U.S. 123, 167 (1908) (holding that enforcement of unconstitutional laws "interfering with tangible property" would cause "great and irreparable injury of the complainants").

307 *See* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478 (1994) (holding that the Federal Tort Claims Act, 28 U.S.C. § 1346(b), does not waive the United States' sovereign immunity against damages claims for constitutional violations); Hopkins v. Clemson Agric. Coll. of S.C., 221 U.S. 636, 642 (1911) ("[E]very state has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever.").

308 *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 80 (1999) ("[Q]ualified immunity has proved to be a virtually insurmountable hurdle to *Bivens* actions.").

309 Carey v. Piphus, 435 U.S. 247, 266–67 (1978) (permitting plaintiffs who suffered constitutional violations but were unable to establish that those violations caused them "actual injury" to recover only nominal damages).

remedy of a categorically different nature that do not protect the particular entitlements at issue.[310]

The Court has also held that a person suffers irreparable harm when the threat of sanctions or other adverse consequences chills or deters them from exercising their constitutional rights.[311] *Ex Parte Young* authorized federal courts to award pre-enforcement injunctive relief against state laws that were likely unconstitutional specifically to prevent that chilling effect.[312] By lifting the threat of enforcement, an injunction alleviates irreparable injury to the putative rightsholder.[313]

For an injunction to serve this essential purpose of preventing irreparable injury, it is not enough to simply prevent the government from imposing punitive consequences against an actor while the order remains in effect. An actor who knows they can be prosecuted or otherwise subject to punitive sanctions if an injunction is overturned on appeal or dissolved is likely to be deterred from exercising their claimed rights.[314] Although the threat of immediate enforcement has been held at bay, the reasonable possibility of punishment has not been eliminated; prudent people will often continue to be chilled. A federal court's equitable authority allows it to do "complete rather than truncated justice."[315] To achieve its goal of preventing irreparable harm to a plaintiff's rights, a court must have authority to bar enforcement of a legal provision for actions the plaintiff performs while an injunction is in effect, even if that injunction is later reversed or vacated.[316]

---

310 Morley, *supra* note 4, at 2469.

311 *See* Allee v. Medrano, 416 U.S. 802, 814–15 (1974) (holding that the plaintiffs had shown irreparable injury because "[t]he workers, and their leaders and organizers were placed in fear of exercising their constitutionally protected rights of free expression, assembly, and association"); *see also* Dombrowski v. Pfister, 380 U.S. 479, 486, 489 (1965) (holding that the plaintiffs sufficiently alleged irreparable injury due to the "substantial loss or impairment of freedoms of expression" caused by the state's threats to prosecute them for engaging in civil rights advocacy).

312 209 U.S. 123, 155–56 (1908) (holding that state officers who threaten to enforce an unconstitutional law "may be enjoined by a Federal court of equity from such action"); *see also* Wadley S. Ry. Co. v. Georgia, 235 U.S. 651, 662–63 (1915) (explaining that a person should not be coerced to "yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if [the challenged provisions] should thereafter be declared to be valid").

313 *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (affirming a preliminary injunction that prohibited enforcement of a local ordinance against the plaintiffs on First Amendment grounds because, "unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm"); *see also* Laycock, *supra* note 27, at 204 ("The preliminary injunction is one of the classic remedies where temporary deprivations impose hardship.").

314 *See* Gillen, *supra* note 29, at 300.

315 Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

316 *See* Gillen, *supra* note 29, at 303–04.

This point should not be overstated, however. One commentator contends, for example, that "there is good reason to believe that the power of the federal courts to provide preliminary injunctive relief derives directly from Article III because it is essential for the federal judiciary to exercise the judicial power in a meaningful way."[317] As discussed earlier, however, it is unlikely that Congress must grant federal courts jurisdiction over all constitutional litigation in the first place.[318] Nor does the Constitution require Congress to grant federal courts jurisdiction to issue equitable remedies in all cases in which they may be helpful or appropriate.[319] Thus, it is unlikely that a court could assert inalienable Article III authority to enjoin enforcement of unconstitutional laws.[320] Rather, when Congress authorizes federal courts to exercise their broad equitable powers by awarding remedies such as injunctions, we should presume that the effect of such remedies is to fully achieve their traditional goal of preventing irreparable harm.[321]

We have already seen that a reversed, vacated, or dissolved injunction can prevent an erroneously enjoined defendant from suing for common law or statutory harms that the plaintiff caused while the injunction was in effect. Such a wrongfully enjoined party is instead relegated to seeking recovery against the injunction bond, if any, or restitution.[322] Likewise, when an enjoined party violates an injunction while it was in effect, the government may prosecute that party for criminal contempt, even if a court has since concluded that the injunction was erroneous and reversed, vacated, or dissolved it.[323] To fully protect against chilling the exercise of constitutional rights, courts should similarly recognize that reversed, vacated, and dissolved injunctions protect plaintiffs from being subject to enforcement proceedings with a punitive component for actions they took while the challenged legal provision was enjoined. Even after an order is no longer in force, a federal court's equitable power to prevent irreparable harm allows that order to continue exerting a residual effect concerning a plaintiff's past actions.

---

317 *Id.* at 310.

318 *See supra* notes 290–91.

319 *See supra* note 291 and accompanying text.

320 *See* Amar, *supra* note 31, at 670 (rejecting the notion that federal courts have inherent authority "to facilitate access . . . for federal claimants" due to "the commonly accepted wisdom that Congress need not vest federal courts with anything close to the full extent of what Article III allows").

321 Remedies for violations of the U.S. Constitution are a matter of constitutional common law. *See* Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 221 (2018). Courts are free to presumptively apply traditional equitable principles, but Congress has discretion to displace them, at least within broad limits. Fallon & Meltzer, *supra* note 33, at 1736.

322 *See supra* Part II.B.

323 *See supra* Part III.

C. Methods of Implementation

Having explained why injunctions may continue to protect plaintiffs from proceedings with a punitive component even after being reversed, vacated, or dissolved, this section turns to the logistical question of how courts may implement such protection. As discussed above, the Article III judicial power and federal courts' equitable authority are likely sufficient on their own to allow federal courts to prevent governmental defendants from pursuing retroactive enforcement actions for conduct that plaintiffs performed pursuant to erroneous, subsequently overturned injunctions. The better approach, however, would be for a court to expressly impose such restrictions in either the substantive injunctions it issues or accompanying collateral injunctions. Alternatively, the Federal Rules of Civil Procedure could be amended to clarify the continuing legal consequences of reversed injunctions.

1. Implied Injunctions

The Supreme Court has held that, under certain narrow circumstances, federal courts may hold a litigant in contempt for performing otherwise legal actions that frustrate the potential efficacy of future orders the court may enter.[324] In other words, a party may be held in contempt, even where the court has not yet issued any injunction, for undermining a potential future order that does not—and may never—exist. For example, in *Merrimack River Savings Bank v. Clay Center*, the plaintiff was a bank that had loaned money to a local power company; the loan was secured by the power company's poles and wires in a certain municipality.[325] The municipality ended the power company's franchise and threatened to remove its poles and wires.[326] The bank sued the municipality, claiming that the municipality lacked authority to terminate the power company's franchise.[327] The bank won a temporary injunction from the trial court "to prevent the destruction of the lines of poles and wires as threatened."[328] The bank then lost, both at the trial court and on direct appeal to the Supreme Court.[329]

Before the time for petitioning the Supreme Court for rehearing had elapsed, the municipality cut down and removed the power company's poles and wires.[330]

---

[324] Merrimack River Sav. Bank v. City of Clay Center, 219 U.S. 527, 536 (1911).
[325] *Id.* at 532.
[326] *Id.* at 532–33.
[327] *Id.*
[328] *Id.* at 533.
[329] *Id.*
[330] *Id.*

The bank filed a petition asking the Supreme Court to hold the municipality in contempt.[331] The municipality pointed out that the Court had not entered any injunctions or orders that it could be accused of violating.[332] The Court declined to decide whether the municipality had violated the trial court's temporary injunction.[333] It held instead that "*irrespective of any such injunction actually issued*[,] the willful removal beyond the reach of the court of the subject-matter of the litigation or its destruction pending an appeal . . . is, in and of itself, a contempt of the appellate jurisdiction of this court."[334] The Court went on to hold that the municipality had committed a "technical contempt" by destroying the poles and wires.[335] It concluded, however, that the municipality had acted in good faith and its contempt was inadvertent since it had not anticipated the possibility that the bank would petition for rehearing.[336] The Court therefore declined to impose contempt sanctions.[337]

The U.S. Court of Appeals for the Fourth Circuit went on to apply this approach in *Griffin v. County School Board*.[338] Several years after *Brown v. Board of Education* held racially segregated schools unconstitutional,[339] a federal district court entered an injunction prohibiting Prince Edward County, Virginia, from paying tuition grants to subsidize private schooling for white children until the county's public schools were desegregated and reopened.[340] In a later ruling, the district court ordered the county to appropriate the funds necessary to reopen the public schools on a desegregated basis.[341]

The plaintiffs had also asked the district court to continue prohibiting the county from funding tuition grants in upcoming academic years for the private education of white students.[342] They wanted the county to use those funds to supplement the public school's funding instead.[343] The district court denied

---

331 *Id.*

332 *Id.* at 534.

333 *Id.* at 535.

334 *Id.* at 535–36 (emphasis added).

335 *Id.* at 536.

336 *Id.* at 536–37.

337 *Id.*; *see also* Lamb v. Cramer, 285 U.S. 217, 219–20 (1932) (holding that, where the defendant in a land dispute transferred part of the property at issue to his attorney as payment for attorneys' fees, the attorney could be held in contempt, even though the court had not entered any orders restricting transfers of the land).

338 363 F.2d 206, 211 (4th Cir. 1966).

339 347 U.S. 483, 495 (1954).

340 *Griffin*, 363 F.2d at 208.

341 *Id.*

342 *Id.*

343 *Id.*

those aspects of the plaintiffs' request, and they appealed.[344] The Chief Judge of the U.S. Court of Appeals for the Fourth Circuit directed the court clerk to ask the county to stipulate that it would voluntarily refrain from issuing tuition grants while the appeal was pending, but the county refused.[345] In the meantime, the county rushed to process 1,217 grant applications and distributed about $180,000 within a day of the court's request.[346]

The plaintiffs moved to hold the county in contempt, even though it had not violated any court order and had expressly declined the court's request.[347] The Fourth Circuit held the members of the county board of supervisors in contempt.[348] It explained that, while the appeal was pending, the funds for tuition grants were "wholly subject to [the Fourth Circuit's] orders."[349] By making grants to white parents, the board had placed the funds "beyond its control as well as that of the court."[350] The board's actions, the court ruled, were "an arrogation of this court's responsibility" because their "aim was to thwart the impact of any adverse decree which might ultimately be forthcoming on the appeal."[351] Thus, the Fourth Circuit effectively held the board members in contempt for violating an injunction that the district court had refused to enter and that the appellate court had not entered.[352]

In *Merrimack* and *Griffin*, the courts claimed inherent authority, even in the absence of a written order, to punish contempts for acts that interfere with the property at issue in a case and reduce or eliminate the value of potential future orders that a court might later enter concerning that property. A court may likewise claim authority to prohibit prosecutions or other enforcement actions with a punitive component based on violations of a legal provision that occur while that provision is enjoined, even absent a written order to that effect. Such

---

344 *Id.*

345 *Id.*

346 *Id.* at 208, 210.

347 *Id.* at 208–09.

348 *Id.* at 212.

349 *Id.* at 210.

350 *Id.*

351 *Id.*

352 *See Federal Courts: Contempt: Payment of Tuition Grants by County Board of Supervisors to Parents of White Children Attending Segregated Private Schools While Question of Board's Power to Make Such Grants is Pending on Appeal Constitutes Civil Contempt of Appellate Court*, 52 VA. L. REV. 1556, 1569 (1966) ("It is difficult to imagine a course of conduct more contemptuous of or disrespectful toward . . . the judicial process and the entire federal system as well, than the feverish activity of the County Board of Supervisors of Prince Edward County between midnight and dawn of August 5, 1964."); *see also* Ronald K. Ingoe, *Civil Contempt in Federal Courts*, 24 WASH. & LEE L. REV. 119, 122–23, 125 (1967) (discussing circumstances in which courts may hold people in contempt despite the absence of an injunction).

retroactive prosecutions following an injunction's dissolution substantially reduce the overall value and practical effects of a court's injunctions in public law cases. The possibility of such prosecutions allows enjoined legal provisions to continue exerting a chilling effect, immune to judicial reduction, on plaintiffs' exercise of their claimed rights. Moreover, rightsholders may be deterred from attempting to seek judicial relief since, even if a court issues an injunction, the rightsholders would remain subject to prosecution if the order is reversed on appeal or otherwise dissolved. Thus, to preserve the efficacy of its orders, particularly in constitutional litigation, a court might assert inherent authority to bar the government from retroactively pursuing punitive enforcement measures against a temporarily successful plaintiff, even without an explicit order setting forth such permanent restrictions.

The "constitutional tolling" doctrine that some courts continue to apply is based on similar reasoning. This doctrine provides that plaintiffs "ought not to have to pay a statutory penalty for non-compliance with" a legal provision "during the time they were judicially testing [its] validity," even when a court has not enjoined the provision's enforcement.[353] This doctrine rests primarily on the Supreme Court's rulings in *Ex parte Young*[354] and *Wadley Southern Railway Co. v. Georgia*,[355] which held that the government could not rely on the threat of substantial fines to deter people from seeking judicial review of legal provisions. These cases recognize that rightsholders should not be pressured into following a legal provision they believe is unconstitutional simply because they do not want to run the risk of substantial penalties by violating it.[356] This

---

[353] United States v. Pac. Coast Eur. Conf., 451 F.2d 712, 717–18 (9th Cir. 1971); *see, e.g.*, Kloosterboer Int'l Forwarding LLC v. United States, No. 3:21-CV-198, 2021 U.S. Dist. LEXIS 195312, at *15 (D. Alaska Oct. 10, 2021) ("[T]he Court finds that constitutional tolling applies to preclude the imposition of additional penalties . . . until entry of final judgment by this Court."); United States v. Reserve Mining Co., 412 F. Supp. 705, 708 (D. Minn. 1976) ("Because [the defendant] mounted substantial, continuous legal challenges to [the legal provision it violated], the law does not authorize imposition of penalties . . . .").

[354] 209 U.S. 123, 146–48 (1908) ("[T]he provisions of the acts relating to the enforcement of the rates . . . by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.").

[355] 235 U.S. 651, 662 (1915) ("Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question.").

[356] *See, e.g.*, S.W. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490–91 (1915) (holding that, because "[t]here was no mode of judicially testing the . . . reasonableness [of the phone company's actions] in advance of acting," imposing "upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law"); Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340, 350 (1913) (holding that the plaintiff railroad could not be held liable for the substantial statutory fines that accrued while it was litigating its constitutional defense against private lawsuits brought to enforce a statutory rate schedule).

principle may be sufficiently broad to protect a rightsholder who actually obtains injunctive relief against a legal provision when that order is subsequently reversed.

On their own terms, however, these lines of precedent are open to the objection that they treat the absence of an injunction as equivalent to the issuance of one. Enforcing such "implied injunctions" also seems to undermine the efficacy of a court's declinations to grant injunctions. Moreover, this approach may generate unnecessary uncertainty about people's legal rights. Without a written order,[357] a litigant must speculate about what conduct, if any, is prohibited.

2. Collateral Injunctions

Rather than relying on implicit restrictions, a superior alternative would be for federal courts to issue collateral injunctions alongside their preliminary and permanent injunctions. A collateral injunction would bar the governmental defendant from ever prosecuting a plaintiff for actions taken pursuant to the accompanying substantive injunction. And it would remain in effect regardless of what happens to that other order. The Supreme Court itself applied this approach in a few cases from the early twentieth century.

For example, in *Oklahoma Operating Co. v. Love*, the plaintiff had unsuccessfully sought a preliminary injunction in federal district court to enjoin the Oklahoma Corporation Commission from enforcing against it price controls for laundry service.[358] Jurisdictional statutes at the time allowed the plaintiff to appeal that denial directly to the Supreme Court.[359] The plaintiff argued that the law was likely unconstitutional since it provided no opportunity for judicial review of the mandated rates until a regulated entity violated them.[360]

The Court agreed with the plaintiff's due process argument and issued a temporary restraining order enjoining the Commission from enforcing the challenged rates against the plaintiff for the duration of the litigation.[361] The Court explained that if the plaintiff proved that the rates were confiscatory, then

---

[357] *Cf.* FED. R. CIV. P. 65(d)(1)(B)–(C) (requiring that an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required"); *see also* Hessick & Morley, *supra* note 6, at 1070–71 (explaining the requirement for specificity in injunctions).

[358] 252 U.S. 331, 332–33 (1920).

[359] *See* Morley, *supra* note 289, at 714–15 (discussing direct appeals from federal district courts to the Supreme Court under the Evarts Act of 1891).

[360] *Love*, 252 U.S. at 333.

[361] *Id.* at 335, 337.

"a permanent injunction should issue to restrain their enforcement."[362] Conversely, even if the rates were constitutionally permissible, "a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued *pendente lite*," so long as "the plaintiff had reasonable ground to contest [the rates] as being confiscatory."[363] In other words, this order not only enjoined enforcement of the challenged law pending a final judgment on the merits, but also specified that the law could not be retroactively enforced against the plaintiff for acts it took while that injunction was in effect—even if the plaintiff ultimately lost on the merits of its challenge and the law was valid.

Similarly, in *Board of Trade of Chicago v. Clyne*, the plaintiffs were members of the Chicago Board of Trade who challenged the constitutionality of the federal Grain Futures Act.[364] The district court dismissed the plaintiffs' bill.[365] They took a direct appeal as of right to the Supreme Court.[366] With the Government's consent, the Court granted an injunction pending appeal against enforcement of the law.[367] The injunction mandated that "the status quo be preserved while th[e] cause [was] pending in th[e] Court and for twenty days thereafter."[368] To accomplish that goal, the order prohibited the U.S. Attorney for the Northern District of Illinois from "attempting to enforce the . . . 'Grain Futures Act' during the pendency of this cause in this court and for twenty days thereafter."[369] The order went further, however, stating the following:

> [The U.S. Attorney is prohibited] from at *any time* prosecuting criminally, or otherwise, under said act any member of the Board of Trade of the city of Chicago, or any customer of any such member, for, or by reason of, any violation by him or them of any provision of said act committed during the pendency of this cause in this court or twenty days thereafter.[370]

Thus, like a traditional preliminary injunction, the order prevented the Government, while the constitutional challenge remained pending, from prosecuting Chicago Board of Trade members and their customers for violating

---

362 *Id.* at 337–38.

363 *Id.* at 338.

364 260 U.S. 704, 704 (1922) (per curiam); *see also* Bd. of Trade of Chi. v. Olsen, 262 U.S. 1, 40 (1923) (affirming, in a later ruling, the district court's dismissal of the constitutional challenge to the Grain Futures Act).

365 *Olsen*, 262 U.S. at 3.

366 *Id.*

367 *Clyne*, 260 U.S. at 704.

368 *Id.*

369 *Id.*

370 *Id.* (emphasis added).

the Grain Futures Act. The order further barred the Government, however, from *ever* prosecuting them for actions they took in violation of the Act while the Court was adjudicating their appeal.[371] The Supreme Court ultimately rejected the plaintiffs' challenge, and there is no record of the Government subsequently prosecuting any board members or their customers for violating the act during the appeal.[372] Some lower courts have also periodically applied this approach, both in the early twentieth century[373] and in the modern era.[374]

As a matter of practice, courts should either include such language in their injunctions or issue collateral orders imposing such restrictions. Should an injunction that bars enforcement of a legal provision get reversed, vacated, or dissolved on the merits, such subsequent developments should not eliminate the plaintiff's supplemental protections, whether they appear in the same order or a collateral order. That is, ancillary provisions in a court order enjoining a government defendant from retroactively bringing enforcement actions for violations of an enjoined legal provision that occur while the injunction's main substantive restrictions are in effect should survive any later reversal of those substantive restrictions.

3. Interpreting Injunctions

Rather than leaving it to each court to include language in each injunction prohibiting retroactive prosecutions and other punitive measures, Federal Rule of Civil Procedure 65 may be amended to address the issue. Rule 65(d)(2)

---

371 *Id.* at 704–05.

372 *Olsen*, 262 U.S. at 43 (affirming the district court).

373 *See, e.g.*, Otoe Cnty. Nat'l Bank v. Delany, 88 F.2d 238, 243 (8th Cir. 1937) ("Even though the chief equitable relief sought be denied, the court has power to grant other relief of an equitable nature . . . , such as relief from penalties pendente lite, if there was reasonable ground for plaintiff originally seeking equitable relief . . . ."); Conn. Fire Ins. Co. v. McNeil, 35 F.2d 675, 676 (6th Cir. 1929) (holding the same); United Fuel Gas Co. v. R.R. Comm'n of Ky., 13 F.2d 510, 517 (E.D. Ky. 1925) (holding that, in a challenge to the constitutionality of maximum rates for natural gas, if the rates are "found to be not confiscatory, a permanent injunction should nevertheless issue to restrain the enforcement of penalties accrued pendente lite").

374 *See, e.g.*, ACLU v. Reno, No. 98-5591, 1998 U.S. Dist. LEXIS 18546, at *16–17 (E.D. Pa. Nov. 20, 1998) (entering temporary restraining order barring the government "from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time for any conduct that occurs while th[e] Order is in effect" (footnote omitted)), *preliminary injunction entered*, ACLU v. Reno, 31 F. Supp. 2d 473, 498–99 (E.D. Pa. 1999) (containing identical language barring prosecutions for conduct occurring while the order is in effect), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated sub nom.* Ashcroft v. ACLU, 535 U.S. 564 (2002); Int'l Paper Co. v. Town of Jay, 672 F. Supp. 29, 35 (D. Me. 1987) (entering preliminary injunction and discussing the plaintiff's right, "even for unsuccessful challenges, to have penalties enjoined *pendente lite* where plaintiffs had reasonable grounds to raise them"); *see also* Wagner Seed Co. v. Daggett, 800 F.2d 310, 315–16 (2d Cir. 1986) ("One way of ensuring that a plaintiff is not faced with such unconstitutional penalties is to require that no penalty be imposed where a challenge was brought in good faith.").

governs the "Contents and Scope of Every Injunction and Restraining Order."[375] The Federal Rules Advisory Committee could propose the following addition to it:

> (d)(3) *Applicability of Injunction*. Any order that affects, restricts, limits, prohibits, or otherwise enjoins enforcement of any legal provision—whether permanently or pending trial or appeal—shall be presumptively interpreted as permanently affecting, restricting, limiting, prohibiting, or otherwise enjoining enforcement of that legal provision for actions taken while the order remains or remained in effect, unless the order expressly specifies otherwise.
>
> Such implied restrictions shall presumptively remain in effect, notwithstanding the reversal, withdrawal, modification, overturning, vacation, or dissolution of such order, unless the court expressly specifies otherwise.

An amendment to Rule 65 would help avoid unnecessary disputes by expressly resolving the issue. Including this proviso in Rule 65 would also alleviate the need to complicate every court order by including such language. Additionally, this proposal would alleviate the possibility of problems arising when an attorney inevitably fails to request such language.

A potential drawback to this approach is that questions may arise as to whether this rule modifies substantive rights in violation of the Rules Enabling Act (REA).[376] The Court upholds rules as valid exercises of authority under the REA so long as they are "arguably procedural,"[377] which is a very low threshold to surmount.[378] The proposed Rule 65(d)(3) would merely provide a new rule for interpreting injunctions rather than affect substantive rights. It seems similar to existing Rule 65(d)(2), which provides another interpretive rule for injunctions.[379] That provision specifies that an injunction applies not only to litigants and their agents, but also to third-party non-litigants who receive notice of the order and are "in active concert" with an enjoined party.[380] Rather than creating new rights, the proposed Rule 65(d)(3) interpretive rule would

---

375 FED. R. CIV. P. 65(d)(2).

376 *See* 28 U.S.C. § 2072 (2018) (prohibiting federal procedural rules from enlarging, abridging, or modifying "any substantive right").

377 *See* Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring); *see also id.* at 472 (majority opinion) (holding that a rule is valid under the REA so long as it is "rationally capable of classification as either" procedural or substantive).

378 *See* Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2294 (1998) ("[T]he Court has never applied the REA to invalidate a Federal Rule.").

379 FED. R. CIV. P. 65(d)(2).

380 *Id.* 65(d)(2)(C); *see* Morley, *Disaggregating Nationwide Injunctions*, *supra* note 6, at 49–50 n.277.

expressly specify restrictions already authorized by the Article III judicial power and the federal judiciary's equity power.[381]

CONCLUSION

Injunctions have been a crucial tool in constitutional litigation for well over a century.[382] Yet the Supreme Court remains uncertain about whether erroneous injunctions that prohibit enforcement of challenged legal provisions but are later overturned or vacated can nevertheless protect plaintiffs from retroactive prosecution or other punitive enforcement proceedings for actions taken while those orders were in effect.[383] The Court's interpretations of many of the most seemingly relevant restrictions—due process notice requirements, protections against ex post facto laws, the mistake of law defense—may be too narrow to fully prevent such retroactive enforcement.[384]

Federal courts have authority, however, to prevent such retroactive enforcement. The Article III judicial power includes the power to dispositively adjudicate litigants' rights. When a court enters a permanent injunction as part of its final judgment that a legal provision is invalid, that exercise of the federal judicial power should be understood as conclusively establishing the litigants' rights, unless and until it is stayed or overturned. To have such a dispositive effect, that judgment must be able to protect the plaintiff from prosecution or other punitive consequences, even if the judgment is later overturned as erroneous. The plaintiff may be liable on an injunction bond to provide compensation to the wrongfully enjoined government defendant or in restitution to prevent unjust enrichment from an erroneous court ruling. However, such a plaintiff should not be subject to liability with a punitive aspect, including civil fines, presumed statutory damages, professional discipline, or prosecution.

Likewise, the primary function of both preliminary and permanent injunctions is to prevent irreparable injury.[385] The Court has recognized that the risk of prosecution or other remedies with a punitive component can chill the exercise of constitutional and other rights, thereby inflicting irreparable injury.

---

381 *See supra* Parts IV.A–B.

382 *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 155–56 (1908) ("[I]ndividuals who, as officers of the State, . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.").

383 *See supra* notes 22–23 (summarizing the various opinions in Edgar v. MITE Corp., 457 U.S. 624 (1982)).

384 *See supra* Part I.C.

385 *See supra* note 305 and accompanying text.

For a preliminary or permanent injunction to be capable of effectively alleviating that chill and preventing the ensuing harm, it must offer permanent protection against the risk of punitive consequences for violating the enjoined legal provisions. That protection must apply even if the injunction is overturned, vacated, or dissolved.

To the extent these restrictions arise from the Constitution, Congress is unable to directly abrogate them (short of restricting the jurisdiction of the federal courts[386]). Alternatively, the principles governing equitable relief in constitutional cases may be constitutional default rules,[387] which the Constitution establishes as a matter of constitutional common law[388] and are subject to congressional retrenchment.[389] Regardless, nothing in either the text or legislative histories of the federal laws upon which federal courts draw to adjudicate constitutional cases[390] suggests that Congress intended to limit the scope of this broad remedial authority.

Federal courts may implement this authority by expressly prohibiting the government from pursuing enforcement actions with a punitive aspect for violations of a legal provision that occur while that provision's enforcement is enjoined. Such language may be included in the same injunction that prohibits enforcement of the challenged provision or an accompanying supplemental order. Should a court later determine that the main injunction was erroneously issued, it should reverse or vacate only the portions of the order that enjoin prospective enforcement of the challenged statute or regulation, leaving

---

386 *See supra* notes 290–91 and accompanying text.

387 John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 827 (2006) (arguing that "judicial decisions frequently create default rather than mandatory rules, thereby providing opportunities for political actors to displace those rules"); *see* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, [but] [t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956))); *cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2095–96 (2002) (discussing "constitutional starting-point rules," which "the Court has no constitutional common lawmaking power to alter, but that may be altered by act of Congress").

388 Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 19 (1975) ("[A]cceptance of the Supreme Court's power to fashion constitutional common law . . . is the most satisfactory way to rationalize a large and steadily growing body of Court decisions.").

389 *See* Fallon & Meltzer, *supra* note 33, at 1736.

390 *See, e.g.*, 28 U.S.C. § 1331 (2018) (granting sweeping federal-question jurisdiction over cases arising in both law and equity); *id.* § 2201 (granting authority to award declaratory judgments); 42 U.S.C. § 1983 (2018) (creating a cause of action to provide equitable relief against people acting under color of state law for constitutional violations); *see also supra* notes 277–83 (discussing the legislative history of the Declaratory Judgment Act).

undisturbed the ancillary provisions barring retroactive enforcement. Alternatively, the Court could amend Federal Rule of Civil Procedure 65 to establish these principles as default rules for interpreting injunctions.

Professor Mitchell's "writ of erasure" argument, in contrast, would allow for retroactive prosecution once an injunction is reversed.[391] It is premised on the notion that an overturned court order no longer exists and, therefore, may no longer protect the plaintiff in any way.[392] This claim, however logical sounding, is inconsistent with the traditional equitable principles that govern injunctions. For example, a wrongfully enjoined defendant cannot pursue common law causes of action or statutory claims against a plaintiff for acts that the plaintiff took under the protection of an erroneous, subsequently overturned injunction. Rather, the defendant is relegated to either an action on the injunction bond or a restitution claim. Likewise, a wrongfully enjoined defendant who violates an injunction while it was in effect may be punished for criminal contempt, even after the injunction has been deemed erroneous and overturned. In short, even a subsequently reversed erroneous injunction continues to govern the litigants' rights for the period it remained in effect. This principle should equally protect a plaintiff who violates a legal provision that has been enjoined, even if that order is later reversed. While injunctions do not completely erase invalid statutes or regulations from the law books, such issuances may nevertheless permanently protect plaintiffs, even after being reversed, vacated, or dissolved.

391 *See* Mitchell, *supra* note 26, at 987.

392 *See id.* at 943 ("[A] future court will always hold the prerogative to repudiate the constitutional pronouncements of its predecessors and give retroactive effect to its new interpretation of the Constitution.").