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Cover Page Footnote

Carter Professor, University of Georgia School of Law. The author benefited from comments on a draft by participants in the 2021 U. Ga.-Emory summer workshop and the joint Remedies-Federal Courts session at the 2022 AALS annual meeting. He especially thanks Dan Coenen and Fred Smith for their help.

UZUEGBUNAM V. PRECZEWSKI, NOMINAL DAMAGES, AND THE ROBERTS STRATAGEM

Michael L. Wells[*]

In Uzuegbunam v. Preczewski *the Supreme Court held for the first time that federal-court jurisdiction exists over a § 1983 case that presents only a claim for nominal damages. As a result, such claims remain subject to adjudication even when the plaintiff's request for prospective relief, targeting an allegedly unlawful practice, has been mooted by the government's discontinuance of the thus-challenged behavior. In dissent, Chief Justice Roberts maintained that the majority's ruling clashed with Article III's "personal stake" requirement and also unwisely permitted plaintiffs to sidestep controlling jurisdictional rules by adding a meaningless claim for nominal damages to a complaint centered on securing prospective injunctive relief. He also asserted that defendants in the future could dodge the Court's ruling by simply depositing one dollar into a bank account in the plaintiff's name, thus negating the existence of a continuing case or controversy by fully satisfying the plaintiff's only remaining request for relief. The Court in* Uzuegbunam *did not address this question. Justice Kavanaugh and the Solicitor General, however, have agreed that defendants can rid themselves of § 1983 nominal-damages suits by putting this tactic—which I call the "Roberts Stratagem"—to use.*

In this Article, I argue they are wrong. The linchpin of my argument is that the benefits of § 1983 nominal-damages litigation are substantial. More specifically, I contend that those benefits so greatly outweigh any countervailing costs that plaintiffs, as a rule, should be able to press forward with claims for nominal damages even in the face of a defendant's attempted use of the Roberts Stratagem. At bottom, the Chief Justice underestimates the importance both to victims of

[*] Carter Professor, University of Georgia School of Law. The author benefited from comments on a draft by participants in the 2021 U. Ga.-Emory summer workshop and the joint Remedies-Federal Courts session at the 2022 AALS annual meeting. He especially thanks Dan Coenen and Fred Smith for their help.

government wrongdoing and to society as a whole of the federal courts' vindication of fundamental constitutional rights. He also fails to appreciate that other means exist for curbing any threat to Article III values posed by the majority's validation of nominal-damages suits. In the end, the Chief Justice rightly emphasizes the importance of those values. But he also seeks, in this context, to safeguard them in far too crude of a way.

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I. INTRODUCTION

In *Uzuegbunam v. Preczewski*, the Supreme Court held that a prayer for nominal damages satisfies Article III's requirement that the requested relief "redresses" the plaintiff's injury.[1] The Court "look[ed] to the forms of relief awarded at common law,"[2] found that "nominal damages were available at common law in analogous circumstances,"[3] and "conclude[d] that a request for nominal damages satisfies the redressability element of standing when a plaintiff's claim is based on a completed violation of a legal right."[4] It made no difference that a change in government policy had mooted the plaintiff's request for injunctive relief, precisely because nominal damages remained available.[5]

Uzuegbunam was the Court's first ruling on the role of nominal damages in § 1983 litigation in more than four decades.[6] In its 1978 decision in *Carey v. Piphus*, the Court adopted the common law "compensation principle" for litigation under 42 U.S.C. § 1983 for procedural due process violations by officials, local governments, and others acting "under color of" state law.[7] Under the

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[1] *See* 141 S. Ct. 792, 801–02 (2021) ("[F]or the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right."); *see, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (providing that federal courts require a plaintiff to show that he is likely to be "redressed" by a favorable judicial decision as part of a three-part test for Article III standing); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) ("[T]o satisfy Article III's standing requirements, a plaintiff must show . . . it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."). *See generally Leading Cases: Constitutional Law: Article III—Standing—Nominal Damages—Uzuegbunam v. Preczewski*, 135 HARV. L. REV. 323 (2021) [hereinafter *Leading Cases*].

[2] *Uzuegbunam*, 141 S. Ct. at 795, 797–98.

[3] *Id.* at 804.

[4] *Id.* at 802.

[5] *See Leading Cases*, *supra* note 1, at 323 ("[T]he Court ruled that a plaintiff's constitutional challenge is not mooted by the termination of an unconstitutional policy where the plaintiff retains standing for nominal damages.").

[6] *See Carey v. Piphus,* 435 U.S. 247, 254 (1978) (serving as the last prior ruling on the role of nominal damages in a Section 1983 litigation and introducing the compensation principle); *see also* Farrar v. Hobby, 506 U.S. 103, 112–13 (1992) (addressing the intersection between nominal damages and attorney's fees). In *Farrar*, the Court held that a plaintiff who receives nominal damages is a "prevailing party" for purposes of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988(b), but also held that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all." *Id.* at 112, 115.

[7] *See* 435 U.S. 247, 254–56 (1978) ("The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section

compensation principle, recovery requires proof of lost income, medical expenses, emotional distress, or other harm.[8] *Carey* addressed only procedural due process.[9] Eight years after *Carey*, in *Memphis Community School District v. Stachura*, the Court rejected any sharp distinction between procedural and substantive constitutional rights.[10] Stachura had won a substantial jury verdict for a violation of his First Amendment rights, but the Supreme Court reversed because of jury instructions that allowed recovery for the "abstract value of a constitutional right," measured by such factors as a particular right's "importance . . . in our system of government."[11] These instructions were faulty because they "focus[ed], not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter."[12] Rigid application of the "compensation principle" would seem to preclude any award of nominal damages.

At the end of the *Carey* opinion, however, the Court acknowledged a role for nominal damages in constitutional tort law in order to "vindicate[] . . . rights that are not shown to have caused actual injury."[13] In the decades since *Carey* and *Stachura*, nominal

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for actions 'found . . . to have been violative of . . . constitutional rights *and to have caused compensable injury* . . . .'" (quoting Wood v. Strickland, 420 U.S. 308, 319 (1975))); *see also* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1247–58 (1979) (providing an overview of *Carey* and of constitutional tort actions generally); *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 967 (1980) (arguing that *Carey*'s reliance on the "background of tort liability" in construing constitutional torts is an inappropriate conception of damages).

[8] *See Carey*, 435 U.S. at 257–58 (stating that common law tort principles "provide the appropriate starting point for the [damages] inquiry under § 1983 as well").

[9] *See generally id.*

[10] *See* 477 U.S. 299, 309 (1986) ("Th[e *Carey*] case does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere' procedural safeguards.").

[11] *Id.* at 308.

[12] *Id.*

[13] 435 U.S. at 266. *Stachura* reiterated this point. *See* 477 U.S. at 308 n.11 ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury . . . ." (quoting *Carey*, 435 U.S. at 266)). For the common law background of these principles, see F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–81 (2008). *See also* 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.3(2), at 294–96 (2d ed. 1993) (defining nominal damages and noting that a court may award nominal damages when a plaintiff seeks "vindication of a right which is not economic in character and for which no substantial non-pecuniary award is available"). The practice continues. *See, e.g.*, Yukos Capital S.A.R.L. v. Feldman, 977 F.3d 216, 245 (2d Cir. 2020) (affirming district court's award of nominal damages in a fraud case); King v. Brock,

damages have grown in importance in § 1983 litigation in the lower federal courts. *Uzuegbunam* is an important case because the realities of constitutional tort litigation disfavor substantial economic recoveries for most plaintiffs. Unless the case arises in a business context,[14] or involves outrageous and well-publicized facts,[15] plaintiffs who win on the substantive merits often have difficulty proving compensatory damages under the *Carey*/*Stachura* rules. Many juries award only nominal damages.[16] Nominal

646 S.E.2d 206, 206 (Ga. 2007) (finding nominal damages are "sufficient to confer 'prevailing party' status" in a case for breach of contract). Nominal damages are also available for violations of some federal statutes. *See, e.g.,* Bayer v. Nieman Marcus Grp., Inc., 861 F.3d 853, 874 (9th Cir. 2017) (finding that the Americans with Disabilities Act authorizes courts to award nominal damages); Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1227–28 (10th Cir. 2001) (finding that nominal damages are appropriate under Title VII); Alexander v. Riga, 208 F.3d 419, 428–29 (3d Cir. 2000) (recognizing that nominal damages are available under the Fair Housing Act).

[14] *See, e.g.*, Int'l Ground Transp. v. Mayor of Ocean City, 475 F.3d 214, 221–22 (4th Cir. 2007) (finding substantial evidence supporting a jury award of $250,000 in compensatory damages); Tri Cnty. Indus., Inc. v. District of Columbia, 200 F.3d 836, 841–42 (D.C. Cir. 2000) (finding that a jury's award of $5 million in compensatory damages was reasonable); Blanche Rd. Corp. v. Bensalem Twp., 57 F.3d 253, 265 (3d Cir. 1995) (concluding that "the district court erred in precluding plaintiffs from pursuing their claim for recovery of compensatory damages"), *abrogated by* United Artists Theatre Cir., Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003).

[15] *See, e.g.*, Neil Vigdor & Azi Paybarah, *County Reaches $10 Million Settlement in Jailed Black Man's Death*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/us/jamal-sutherland-south-carolina-settlement.html ("In a unanimous vote, the Charleston County Council approved the [$10 million] settlement in the death of Jamal Sutherland . . . ."); Nicholas Bogel-Burroughs & John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for $27 Million*, N.Y. Times (Mar. 30, 2021), https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html ("The City of Minneapolis agreed on Friday to pay $27 million to the family of George Floyd, the Black man whose death set off months of protests after a video showed a white police officer kneeling on his neck."); Rukmini Callimachi, *Breonna Taylor's Family to Receive $12 Million Settlement from City of Louisville*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html ("After months of protests that turned Breonna Taylor's name into a national slogan against police violence, city officials agreed to pay her family $12 million and institute changes aimed at preventing future deaths by officers."); David W. Chen & Al Baker, *New York to Pay $7 Million for Sean Bell Shooting*, N.Y. TIMES (July 27, 2010), https://www.nytimes.com/2010/07/28/nyregion/28bell.html ("New York City agreed on Tuesday to pay more than $7 million to settle a federal lawsuit filed by the family and two friends of Sean Bell, a 23-year-old black man who was fatally shot by the police in 2006 . . . .").

[16] For some examples of recent nominal damages cases, see Thurairajah v. City of Fort Smith, 3 F.4th 1017, 1026 (8th Cir. 2021); Hum. Rts. Def. Ctr. v. Baxter Cnty., 999 F.3d 1160, 1167–68 (8th Cir. 2021); Hoever v. Marks, 993 F.3d 1353, 1361 (11th Cir. 2021); Kidis v. Reid, 976 F.3d 708, 714 (6th Cir. 2020); Martin v. Marinez, 934 F.3d 594, 605 (7th Cir. 2019); Wilcox v. Brown, 877 F.3d 161, 169 (4th Cir. 2017); Morales v. Fry, 873 F.3d 817, 820–21 (9th Cir. 2017); Moore v. Liszewski, 838 F.3d 877, 878 (7th Cir. 2016); Grisham v. City of Fort Worth,

damages may seem "trivial,"[17] like a "consolation prize"[18] or "a legal fiction."[19] Judge Richard Posner once claimed that if a plaintiff "goes around bragging" that he won nominal damages of $1, "he'll be laughed at."[20] But they do vindicate the plaintiff's rights,[21] at least

837 F.3d 564, 566 (5th Cir. 2016); Six Star Holdings, LLC v. City of Milwaukee, 821 F.3d 795, 805 (7th Cir. 2016); Rentas v. Ruffin, 816 F.3d 214, 224 (2nd Cir. 2016); Poventud v. City of New York, 750 F.3d 121, 135 (2d Cir. 2014); Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 891 (11th Cir. 2013); Guy v. City of San Diego, 608 F.3d 582, 584, 587 (9th Cir. 2010); Mahach-Watkins v. Depee, 593 F.3d 1054, 1063 (9th Cir. 2010); KH Outdoor, LLC v. City of Trussville, 465 F.3d 1256, 1262 (11th Cir. 2006); Pelphrey v. Cobb County, 547 F.3d 1263, 1282 (11th Cir. 2008); Mendez v. Cnty. of San Bernardino, 540 F.3d 1109, 1119 (9th Cir. 2008); Corpus v. Bennett, 430 F.3d 912, 917 (8th Cir. 2005); Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 122 (1st Cir. 2004); Williams v. Kaufman Cnty., 352 F.3d 994, 1015 (5th Cir. 2003); Schneider v. Cnty. of San Diego, 285 F.3d 784, 794 (9th Cir. 2002); Park v. Shiflett, 250 F.3d 843, 853–54 (4th Cir. 2001); Kyle v. Patterson, 196 F.3d 695, 697–98 (7th Cir. 1999); Campos-Orrego v. Rivera, 175 F.3d 89, 99 (1st Cir. 1999); Amato v. City of Saratoga Springs, 170 F.3d 311, 314 (2d Cir. 1999); Garrett v. Clarke, 147 F.3d 745, 747 (8th Cir. 1998); Robinson v. Cattaraugus Cnty., 147 F.3d 153, 159 (2d Cir. 1998); Westcott v. Crinklaw, 133 F.3d 658, 664 (8th Cir. 1998); Briggs v. Marshall, 93 F.3d 355, 360 (7th Cir. 1996); Haywood v. Koehler, 78 F.3d 101, 102 (2d Cir. 1996); Caban-Wheeler v. Elsea, 71 F.3d 837, 842 (11th Cir. 1996); Sockwell v. Phelps, 20 F.3d 187, 192 (5th Cir. 1994); *cf.* Morrison v. Bd. of Educ., 521 F.3d 602, 611 (6th Cir. 2008); Reyes v. City of Lynchburg, 300 F.3d 449, 455, 457 (4th Cir. 2002); Greg Land, *Federal Jury Awards Nothing Despite Finding Man Was Harmed by Wrongful Arrest*, DAILY REP. ONLINE (May 25, 2017), https://www.law.com/dailyreportonline/2017/05/25/federal-jury-awards-nothing-despite-finding-man-was-harmed-by-wrongful-arrest/. Under the Prison Litigation Reform Act, prisoners who have no physical injuries can sue for nominal damages but not for compensatory damages. *See, e.g.*, Hutchins v. McDaniels, 512 F.3d 193, 198 (5th Cir. 2007) ("While Hutchins is certainly barred from recovering any compensatory damages in the absence of physical injury, we hold today that Hutchins may recover nominal or punitive damages . . . if he can successfully prove that McDaniels violated his Fourth Amendment rights.").

[17] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 803 (2021) (Roberts, C.J., dissenting). ("[N]ominal damages can save a case from mootness because any amount of money—no matter how trivial—'can redress a past injury.'" (citation omitted)).

[18] *See id.* at 805 ("[N]ominal damages in such cases were in fact a 'consolation prize,' awarded as a hook to allow prevailing plaintiffs to at least recover attorney's fees and costs." (citations omitted)).

[19] *See id.* at 807 (describing how a token award of nominal damages is a legal fiction).

[20] *See* Moore v. Liszewski, 838 F.3d 877, 879 (7th Cir. 2016) ("If the plaintiff goes around bragging that he won his suit, and is asked what exactly he won, and replies '$1 dollar,' he'll be laughed at.").

[21] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (noting that common law courts "traditionally have vindicated deprivations of certain . . . rights . . . through the award of a nominal sum of money").

to some extent,[22] and they can support an award of attorney's fees, as even Judge Posner acknowledged.[23]

To be sure, the benefits provided by nominal damages come at a cost. Article III principles disallow federal jurisdiction in cases that are moot,[24] in part to avoid a proliferation of requests for advisory opinions and assure adherence to a proper separation of powers.[25] In Chief Justice Roberts's view, as expressed in his dissent in *Uzuegbunam*, the case was moot once the challenged policy was dropped because "an award of nominal damages does not alleviate the harms suffered by a plaintiff, and is not intended to."[26] He worried that removing the mootness check on the jurisdiction of the federal courts "risks a major expansion of the judicial role."[27] He also warned that the majority opinion's holding would turn the Court into "the least expensive source of legal advice."[28] Roberts's objections might be considered overwrought. A different outcome in *Uzuegbunam* would not necessarily prevent much of the litigation he fears because—as he acknowledged—plaintiffs who credibly *claim* past injury have standing to sue.[29] Even so, the practical impact of the ruling is significant. In effect, *Uzuegbunam* eliminates any need to claim past injury, as opposed to a past constitutional

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[22] *See* Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 740 (2014) (stating that courts should seek to maintain an equilibrium between vindication and official immunity, the former being a value that should weigh heavily and deserves attention).

[23] *See Moore*, 838 F.3d at 879–80 (7th Cir. 2016) (noting that some federal statutes authorize awarding the prevailing party attorneys' fees as well as court costs); *see also* Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 830–31 (2016) (discussing whether courts should award attorney's fees when a prevailing plaintiff only recovers nominal damages).

[24] *See, e.g.*, Chafin v. Chafin, 568 U.S. 165, 171–72 (2013) (describing how Article III prevents federal courts from adjudicating those cases that are "no longer 'live' or the parties lack a legally cognizable interest" (quoting Already, LLC v. Nike, 133 S. Ct. 721, 726 (2013))).

[25] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 803 (2021) (Roberts, C.J., dissenting) ("If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar.").

[26] *Id.* at 803.

[27] *See id.* at 807 (noting how the decision would require the judiciary to undertake policies and actions whenever a plaintiff so desires rather than as necessity requires).

[28] *See id.* ("For those who want to know if their rights have been violated, the least dangerous branch will become the least expensive source of legal advice.").

[29] *See id.* 805 (acknowledging the historical role of nominal damages as a "consolation prize"); *see also id.* at 807 (accepting the Court's assertion "that plaintiffs who seek nominal damages will often be able to seek actual damages as well").

violation, thus expanding the set of plaintiffs able to assert § 1983 claims.

Though no other member of the Court joined the Chief Justice's dissent, his views should not be discounted. Roberts proposed a tactic that would undermine the utility of nominal damages as a means for vindicating rights. He suggested that, faced with a nominal-damages-only case like *Uzuegbunam*, a defendant may avoid a ruling on the merits of the constitutional issue by simply depositing $1 in a bank account in the plaintiff's name, even against the plaintiff's wishes.[30] For convenience, call this the Roberts Stratagem, as it is a recurring theme in this article. Justice Kavanaugh joined the Court's opinion but also wrote separately to endorse the Chief Justice's view on this point.[31] The Solicitor General's Office took this view as well, although it styled its brief as one in support of the plaintiff.[32] Justice Thomas's opinion for the Court does not address the viability of the Roberts Stratagem.

Uzuegbunam may herald a new era in § 1983 litigation, in which constitutional violations can be identified, vindicated, and deterred more readily, even without a showing of compensable harm or grounds for an injunction. But the impact of the case remains an open question precisely because of the uncertain future of the Roberts Stratagem. Notably, the majority did not speak to whether the wielding of this tactical tool will work. But if the Chief Justice is right in claiming that this "sweeping exception"[33] to nominal damages litigation exists, *Uzuegbunam* is likely to prove of little

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[30] *See id.* at 808 ("Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff's claims."). On remand, the defendants in *Uzuegbunam* have taken up this suggestion. *See* Defendants' Motion for Leave to Deposit Nominal Damages with the Court, for an Order Directing Payment of the Nominal Damages over to the Pls., and Dismissing This Action for Mootness, Document 58, Uzuegbunam v. Preczewski, No. 1:16-ev-04658-ELR (N.D. Ga. June 22, 2021). At this writing, the plaintiffs have responded, but the district court has not ruled on the issue.

[31] *See Uzuegbunam*, 141 S. Ct. at 802 (Kavanaugh, J., concurring) (noting that his separate concurrence was only to agree that a "defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits").

[32] *See* Brief for the United States as Amici Curiae Supporting Petitioners at 28–29, Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) (No. 19-968). Although the brief was filed in support of Uzuegbunam, its position seems to favor defendants on this point. *See id.*

[33] *Uzuegbunam*, 141 S. Ct. at 808.

value as litigants seek to get rulings on constitutional issues, vindicate their rights, and deter future violations.

In support of his view that the Roberts Stratagem is available to § 1983 defendants, the Chief Justice cited *Campbell-Ewald Co. v. Gomez*.[34] In that compensatory damages case, the Court rejected an attempt by the defendant to moot a class action by offering to satisfy only the class representatives' claims but reserved judgment on a case in which a defendant pays the offered amount into court, or deposits it in an account in plaintiff's name, and the court enters judgment for that amount.[35] The Chief Justice in effect viewed the Court's reservation of judgment on the actually-acting-on-the-offer question as endorsing that tool for bringing litigation to a close. Indeed, he seemed prepared to sign off on that strategy beyond the nominal damages context as well. *Campbell-Ewald* itself involved an attempt to pay off true-blue compensatory damages.[36] Thus, Roberts' approach may keep plaintiffs from vindicating constitutional rights even when plaintiffs seek far more than nominal damages. Stated otherwise, the Roberts Stratagem—in all its glory—could be deployed in *any* § 1983 action involving a claim for money damages, whether nominal or actual in nature.

In this Article, I argue against allowing defendants to use the Roberts Stratagem, at least in § 1983 suits like *Uzuegbunam* in which the plaintiff claims violations of constitutional rights. Part II discusses the Court's common law reasoning and describes Roberts's Article III challenge to the holding. Part III answers the Article III objection put forward by the Chief Justice and bolsters the case made by the majority for allowing stand-alone nominal damages in § 1983 litigation. In a nutshell, I argue that Article III costs must be balanced against the remedial benefits of nominal damages and that the benefits outweigh the costs in the § 1983 context. That, however, does not mean that a request for nominal damages should suffice for all types of litigation in federal court.

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[34] *See id.* (citing Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016)).

[35] *Campbell-Ewald Co.*, 577 U.S. at 166 (refusing to consider the hypothetical); *see also* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 293 (5th ed. 2019) (describing the majority in *Campbell-Ewald*'s fear that "if a claim for nominal damages was enough to avoid mootness, plaintiffs could manipulate the court's jurisdiction and expand its docket").

[36] *See Campbell-Ewald Co.*, 577 U.S. at 158–60 (explaining that the case was in part about whether an unaccepted offer for settlement can moot a plaintiff's claim).

Part IV shows that nominal damages can keep a § 1983 case like *Uzuegbunam* alive without "risk[ing] a major expansion of the judicial role,"[37] as Roberts fears.

In discussing these points, I use "nominal damages litigation" to refer to cases like *Uzuegbunam*, in which the plaintiff seeks nominal damages, either initially, or in addition to compensatory damages, or after a prospective claim is mooted. My aim is to justify § 1983 nominal damages litigation on its own merits, whether or not the claim for such damages is linked to any other remedy. Nominal damages litigation needs a more secure foundation than the status of a "consolation prize,"[38] or a symbolic victory. A satisfactory rationale for nominal damages should not depend on evasive tactics or second-best solutions. It should explain why they are available to a plaintiff who litigates in good faith, who claims no compensatory damages, who seeks no prospective relief, and who nonetheless has suffered a concrete and particularized violation of a constitutional right. That said, one point that emerges from my analysis is that the validity of unalloyed nominal damages claims has implications for other claims as well. In particular, the reasoning underlying § 1983 nominal damages litigation conflicts with the Roberts Stratagem across the board, whether the plaintiff seeks prospective relief, compensatory damages, nominal damages, or all three.[39]

II. ARTICLE III OBJECTIONS TO NOMINAL DAMAGES LITIGATION

Chika Uzuegbunam, then a student at Georgia Gwinnett College (GGC), was confronted by campus police, who told him to stop speaking and handing out religious materials on campus.[40] When

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[37] *Uzuegbunam*, 141 S. Ct. at 807 (Roberts, C.J., dissenting).

[38] *Id.* at 805. In view of the long-standing rule that a plaintiff must establish standing separately for each form of relief sought, see, e.g., Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 185 (2000); Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). The fact that a plaintiff tried but failed to obtain other relief may not be an adequate basis for an award of nominal damages, even if the nominal award is viewed as a consolation prize. At any rate, the widespread practice of awarding nominal damages in such cases, *supra* note 16, seems to be in tension with the *Laidlaw* rule.

[39] With respect to prospective relief, the Court has held that the availability of attorney's fees does not turn on a judicial assessment of the significance of the relief. *See* Lefemine v. Wideman, 568 U.S. 1 (2012) (per curiam).

[40] *See Uzuegbunam*, 141 S. Ct. at 796–97.

told to obey, Uzuegbunam complied.[41] But he also saw a lawyer.[42] GGC is a public school, and its rules severely restricted student speech.[43] Joined by Joseph Bradford—another student who wanted to speak and distribute materials, but who had not been stopped[44]—Uzuegbunam sued college officials under 41 U.S.C. § 1983, asserted a violation of First Amendment rights, and asked for nominal damages and an injunction against enforcement of the restrictive rules.[45] He ultimately sought no compensatory damages.[46]

Early in the litigation, Uzuegbunam's claim for prospective relief was mooted because officials eliminated the restrictions that he challenged,[47] leaving only the request for nominal damages.[48] The district court then dismissed his suit on the strength of an earlier Eleventh Circuit case, which had held that "a prayer for nominal damages cannot save an otherwise moot case."[49] Not surprisingly, the Eleventh Circuit then affirmed.[50]

The Supreme Court reversed in an opinion by Justice Thomas.[51] He reasoned that proper resolution of the "redressability" issue hinged on the role of nominal damages in the history of the common

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[41] *See id.*

[42] *See id.* (noting that "[t]here is no dispute" that the plaintiff established a constitutional violation).

[43] *See id.* at 796–97, 802.

[44] *See id.* at 797 ("Another student who shares Uzuebunam's faith, Joseph Bradford, decided not to speak about religion because of these events.").

[45] *See id.* at 797–98 (providing the procedural background of the case).

[46] *See* Uzuegbunam v. Preczewski, 781 F. App'x 824, 828–30 (11th Cir. 2019) (per curiam) (holding that the plaintiffs had not requested compensatory damages in their ambiguous complaint).

[47] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (noting that although college officials first attempted to defend the policies, they eventually decided to "get rid of the challenged policies" and moved to dismiss). Mootness might have been avoided by application of the "voluntary cessation" doctrine, under which a defendant does not necessarily moot a case by ceasing the challenged activity. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 202 (7th ed. 2015) ("[A]n action for an injunction, or other judgment with continuing force, does not become moot merely because the conduct immediately complained of has terminated . . . ."). But neither the Eleventh Circuit nor the Supreme Court considered this alternative.

[48] *See Uzuegbunam*, 141 S. Ct. at 797 ("[The students] contended that their case was still live because they had also sought nominal damages.").

[49] Flanigan's Enters., Inc. v. City of Sandy Springs, 868 F.3d 1248, 1267 (11th Cir. 2017) (en banc); *see also* Uzuegbunam v. Preczewski, 378 F. Supp. 3d 1195, 1200–02 (N.D. Ga. 2018) (evaluating the students' claim using *Flanigan*). The Court endorsed the view taken by then-Judge Michael McConnell in his concurring opinion in *Utah Animal Rts. Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1262–71 (10th Cir. 2004). *Uzuegbunam*, 141 S. Ct. at 808.

[50] *See Uzuegbunam*, 781 F. App'x at 826.

[51] *See Uzuegbunam*, 141 S. Ct. at 802.

law.[52] On this point, Chief Justice Roberts did not disagree but instead read the historical materials differently than Justice Thomas.[53] History, however, cannot answer hard questions about how *Uzuegbunam* will operate in the future, and in particular, whether the Roberts Stratagem should work. The real-life issues raised in modern § 1983 nominal damages litigation simply have little to do with the historical role of nominal damages. Section A shows why common law history is largely irrelevant to present-day constitutional tort litigation. Section B addresses Roberts's largely nonhistorical argument that nominal damages litigation unduly threatens Article III values. Of particular importance, the Chief Justice embraces the Roberts Stratagem primarily because of his assessment of the operation of Article III values in this context. That assessment, however, turns out to be off the mark, and so, accordingly, is his endorsement of the Roberts Stratagem.

A. REDRESSABILITY IN UZUEGBUNAM

Article III requires the plaintiff to establish an injury in fact, to trace the injury to the challenged conduct, and to "seek a remedy redresses that injury."[54] Chika Uzuegbunam's encounters with GGC police clearly met the first two requirements, and the Court held that his request for nominal damages satisfied the third, the redressability requirement.[55] In his dissent, Chief Justice Roberts subtly shifted attention from redressability to mootness, a related but distinct Article III doctrine.[56] In *Uzuegbunam*, however, the two doctrines were closely linked because the discontinuance of the challenged policy removed any opportunity to redress the continuation of that policy.[57] That left only the request for nominal

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[52] *See id.* at 797–98. ("In determining whether nominal damages can redress a past injury, we look to the forms of relief awarded at common law.").

[53] *See id.* at 804 (Roberts, C.J., dissenting) ("The Court sees no problem with turning judges into advice columnists. In its view, the common law and (to a lesser extent) our cases require that federal courts open their doors to any plaintiff who asks for a dollar.").

[54] *Uzuegbunam*, 141 S. Ct. at 796 (majority opinion)(.

[55] *See id.* ("There is no dispute that Uzuegbunam has established the first two elements.").

[56] *See id.* at 803 (Roberts, C.J., dissenting) ("The case is therefore moot because a federal court cannot grant Uzuegbunam and Bradford 'any effectual relief whatever.'" (quoting Chafin v. Chafin, 568 U.S. 165 (2013))).

[57] *See id.* at 797 (majority opinion) (discussing the college official's argument that the case was moot because they got "rid of the challenged policies").

damages.[58] And the Chief Justice found that the nominal damages claim alone did not remove the mootness problem because "an award of nominal damages does not alleviate the harms suffered by a plaintiff, and is not intended to."[59]

1. Nominal Damages and the Common Law. Justice Thomas's opinion for the Court "look[ed] to the forms of relief awarded at common law"[60] and found that "nominal damages alone could provide retrospective relief."[61] Much of his opinion responds to a series of historical objections raised by Chief Justice Roberts, who identified several differences between Uzuegbunam's case and the typical common law nominal damages case: (1) Requests for nominal damages in common law courts were often used for the purpose of obtaining prospective relief, especially in the era before federal and state statutes authorized declaratory judgments.[62] (2) Because plaintiffs typically asked for both nominal damages and compensatory damages, "the historical record is mixed as to whether legal violations were actionable at all without a showing of compensable harm."[63] (3) Roberts distinguished between the English judicial system, in which nominal damages originated, and the U.S. federal judicial system.[64] In the English system, courts operated under the Crown, and one of their functions was to provide advice.[65] Under Article III, the role of the federal courts is limited by the principle of separation of powers, which permits judicial

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[58] *See id.* (noting that the plaintiff only successfully pleaded for nominal damages).

[59] *Id.* at 803 (Roberts, C.J., dissenting).

[60] *Id.* at 797–98 (majority opinion).

[61] *Id.* at 798.

[62] *See id.* at 805 (Roberts, C.J., dissenting) ("There is no dispute that 'nominal damages historically could provide *prospective relief*,' because such awards allowed 'plaintiffs at common law to "obtain a form of declaratory relief in a legal system with no general declaratory judgment act."'" (quoting *id.* at 798 (majority opinion))).

[63] *Id.* (emphasis omitted).

[64] *See id.* at 804 ("Any lessons that we learn from the common law, however, must be tempered by differences in constitutional design. The structure and function of the 18th-century English courts were in many respects irreconcilable with 'the role assigned to the judiciary in a tripartite allocation of power.'" (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968))).

[65] *See id.* ("[I]n England 'all jurisdictions of courts [were] either mediately or immediately derived from the crown' . . . To give just one example, 'English judicial practice with which early Americans were familiar had long permitted the Crown to solicit advisory opinions from judges.'" (first alteration in original) (citations omitted)).

intervention only when a court could grant the plaintiff effective relief.[66]

Justice Thomas marshalled authorities to rebut each of these points. He showed that, at common law, nominal damages had both backward-looking-remedial and forward-looking law-clarifying functions[67] and that the principle of separation of powers did not deter nineteenth century federal courts from following the English common law tradition.[68] In sum, a request for compensatory relief was not a prerequisite to recovering nominal damages,[69] and this principle was determinative in the case. Justice Thomas devoted just one paragraph to addressing Roberts's fear that the ruling would unduly expand federal court jurisdiction.[70] Thomas noted that the holding would not open the federal courts to anyone who asserts a violation of federal law and asks for nominal damages.[71] The plaintiff must assert "a cognizable cause of action" and satisfy other elements of standing, "such as a particularized injury."[72] His opinion cites a 1792 English case on the "cognizable cause of action" point,[73] but it contains no analysis of modern Article III principles and their application to nominal damages.

2. Shortcomings of the Common Law Model. Justice Thomas's reliance on common law suits his predilection for historical analysis in constitutional adjudication.[74] The common law framework, however, does not provide a reliable guide to the modern law of standing. Before the rise of the "administrative state" in the 1930s, the common law model controlled the types of litigation that federal

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[66] *See id.* at 804–05 (explaining that the court should not act if the "plaintiff cannot 'benefit in a tangible way from the court's intervention,'" so as to "ensure [the Judiciary] does not trespass on the province of the political branches" (citations omitted)).

[67] *See id.* at 798 (majority opinion) (examining the forms of relief available at common law).

[68] *See id.* at 798–800 (explaining how federal courts approached nominal damages during that period).

[69] *Id.* at 795.

[70] *See id.* at 802 (clarifying that the holding "only" concerned redressability and would not "guarantee[] entry to court").

[71] *See id.* ("This is not to say that a request for nominal damages guarantees entry to court.").

[72] *Id.*

[73] *Id.* (citing Planck v. Anderson, 5 T.R. 37, 41, 101 Eng. Rep. 21, 23 (K.B. 1792)).

[74] *See, e.g.*, William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 319–20 (discussing Justice Thomas's concurring opinion in *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019)).

courts would adjudicate.[75] But a whole new range of issues arose with the growth of both government regulation and a body of constitutional and statutory rights held against government bodies.[76] Justice Thomas's history-oriented analysis in *Uzuegbunam* differs from the analysis that appears in most modern-era Supreme Court opinions on Article III. Usually, the Court examines the policies underlying Article III requirements, compares them with the considerations favoring the exercise of jurisdiction, and resolves standing and justiciability questions by determining which set of concerns should prevail in the case at hand.[77] In *Uzuegbunam*, however, the Court simply found that the common law allowed the recovery of nominal damages regardless of the availability of compensatory relief.[78] The Court's lack of attention to Article III values leaves the key issue—the status of the Roberts Stratagem—for later resolution. When the Court turns, as it someday must, to whether a defendant may successfully deploy the Roberts Stratagem, the Court's treatment of the standing, mootness, and remedial issues will determine whether *Uzuegbunam* itself is a decision of any practical consequence.[79] The Court will have no choice but to look beyond the historical practice to underlying matters of Article III policy.

B. SEPARATION OF POWERS AND NOMINAL DAMAGES

Article III authorizes federal courts to adjudicate only "Cases" and "Controversies."[80] A large body of Supreme Court doctrine gives

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[75] *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717–18 (1975) ("Traditionally, the only interests entitled to constitutional protection against governmental interference were those that would enjoy protection at common law against invasion by private parties.").

[76] *See* FALLON ET AL., *supra* note 47, at 116–17 ("During the twentieth century, courts became self-conscious about the concept of standing only after developments in the legal culture subjected the traditional model to unfamiliar strains."); *see also* Hessick, *supra* note 13, at 290–99 (discussing "the development of modern standing doctrine").

[77] *See* FALLON ET AL., *supra* note 47, at 117–27 (collecting cases and materials on basic standing principles).

[78] *See Uzuegbunam*, 141 S. Ct. at 802 (holding that "nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms").

[79] The class action context illustrated by *Campbell-Ewald*, raises the distinct issue of whether a defendant can avoid monetary claims by members of a class by paying the named plaintiff. That issue is not addressed in this article.

[80] U.S. CONST. art III, § 1.

context to those terms, mainly under the headings of "standing to sue," "mootness," and "ripeness."[81] A general idea behind the caselaw is that the questions litigants that bring to the federal courts can be divided into two broad groups: those that need to be resolved and those that do not.[82] More specifically, the Court's doctrine on "standing to sue" distinguishes between litigants with a sufficient stake in the litigation to justify judicial intervention, and those without one.[83] Viewed through this prism, *Uzuegbunam* held that the interest in securing nominal damages relief is enough to give constitutional-tort plaintiffs a sufficient stake in the outcome to warrant federal jurisdiction.[84] But the Court reached that conclusion by borrowing from the "forms of relief awarded at common law,"[85] rather than by applying overarching Article III principles. As a result, the Court did not pause to compare Chika Uzuegbunam's suit to the cases of other plaintiffs whose standing claims the Court resolved in prior rulings.[86] This approach allowed the Court to resolve, but resolve only, the narrow question presented in *Uzuegbunam*.

The historical materials, however, do not address the separate question of whether a defendant may extinguish the plaintiff's claim simply by paying him a dollar, as Roberts proposes. The viability of the Roberts Stratagem does not depend on the forms of relief awarded at common law. Instead, it turns on whether—now that we know what form of relief is available in a § 1983 action—the defendant can preempt full-scale litigation of the underlying constitutional issues through a gambit of procedural maneuvering. The resolution of that issue inevitably will turn on a judicial assessment of Article III principles and policies *in the context of § 1983 constitutional tort litigation*.[87]

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[81] *See Uzuegbunam*, 141 S. Ct. at 796 (distinguishing standing and mootness).

[82] Another theme, of less importance for present purposes, is whether the dispute is fit for resolution, a question that overlaps with "need" but also considers such factors as whether the facts are sufficiently concrete to permit effective adjudication. *See* FALLON ET AL., *supra* note 47, at 212–13.

[83] *See id.* at 101–02, 115–17.

[84] *See Uzuegbunam*, 141 S. Ct. at 802 (holding that nominal damages were sufficient to redress Uzuegbunam's injury).

[85] *Id.* at 797–98.

[86] *See, e.g.*, *id.* at 801 (comparing the case to *Farrar v. Hobby*, 506 U.S. 103 (1992)).

[87] The point of the italics is to emphasize that the assessment of competing values may differ in other contexts. That topic is discussed in Part IV (discussing nominal damages for litigants who do not assert any past violation of constitutional rights, such as Chika

1. Advisory Opinions. Though some state courts issue advisory opinions, especially when other branches of the government ask for them,[88] "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions."[89] The Court's Article III doctrine sharply distinguishes between claims made against named defendants by plaintiffs who have something important at stake in the case, which require judicial intervention, and requests for advisory opinions, which do not.[90] Chief Justice John Jay and the Associate Justices laid the foundation for modern doctrine in 1793.[91] The Secretary of State, Thomas Jefferson, wrote to the Justices on behalf of President Washington, seeking advice about how the United States could maintain neutrality in the war between France and Great Britain.[92] In the "Correspondence of the Justices," the Justices declined to provide advice to the Executive, explaining that "[t]he lines of separation drawn by the Constitution between the three departments of the government . . . afford strong arguments against the propriety of our extrajudicially deciding the questions."[93]

The Article III principle that federal courts should not give "advisory opinions" stems from that episode. Later developments explain, elaborate, and qualify the basic "no advisory opinions" norm. The general principle is that governing "lines of separation" require Article III courts to limit themselves to adjudication of disputes, thus blocking federal judges from intruding on the policy-making roles of the other branches.[94] The term "advisory opinion"

Uzuegbunam's co-plaintiff Joseph Bradford, and for litigants asserting violations of statutory rights).

[88] *See* FALLON ET AL., *supra* note 47, at 58 (noting that various states, such as Massachusetts and Colorado, have constitutional provisions that grant each branch of the legislature and the governor the authority to require the opinions of the justices of the state supreme court).

[89] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 65–66 (7th ed. 2011).

[90] *See id.* (providing an overview of the rule against advisory opinions).

[91] *See id.* (describing the introduction of the rule against advisory opinions).

[92] *See* FALLON ET AL., *supra* note 47, at 50–51 (highlighting Jefferson's letter to the Justices pleading for their advice and opinions because their "knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties").

[93] *Id.* at 52.

[94] *See* MICHAEL L. WELLS, WILLIAM P. MARSHALL & GENE R. NICHOL, CASES AND MATERIALS ON FEDERAL COURTS 262 (4th ed. 2020) ("[T]he lines of separation drawn by the Constitution between the three departments of the government . . . are considerations which

first served only as an apt description of the action requested in 1793, but it since has become a verbal embodiment of the normative idea that there exists a forbidden zone that federal judges may not enter.[95] In building out this principle, the Court has declared that a genuine dispute between two litigants exists only when the plaintiff has a "personal stake in the outcome."[96] This "personal-stake" requirement ensures that federal courts will act "as judges," rather than as policymakers[97] because the essence of the judicial role is to resolve disputes between adverse parties.[98]

Basic Article III doctrines stem from these core notions. Plaintiffs must establish their "standing to sue," which in turn requires that they prove "injury," establish that the injury is "traceable" to the defendant's illegal act, and show that the relief they seek will "redress" the claim of injury.[99] Federal courts may not interfere before a dispute is "ripe," because un-ripe disputes do not (yet) present the raw material of genuine disputes.[100] And once-genuine disputes can disappear with time. Courts are thus duty bound to dismiss cases that, for this reason, have become "moot."[101]

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afford strong arguments against the propriety of our extrajudicially deciding the questions . . . especially united to the *executive* department." (alteration in original) (quoting III CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (H.P. Johnston ed. 1891))).

[95] *See id.* ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (quoting C. WRIGHT & KANE, LAW OF FEDERAL COURTS 65–66 (7th ed. 2011))).

[96] Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[97] Hollingsworth v. Perry, 570 U.S. 693, 700 (2013).

[98] *See, e.g.*, *Gill*, 138 S. Ct. at 1923; *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221–22 (1974). In assessing the strength of this theme, it is important to keep in mind that it is a policy, not a rigid rule. It carries weight but must be weighed against competing policies, and its force varies depending on context. In some circumstances, adverseness is not required. Thus, "non-contentious jurisdiction" is an important part of the federal courts' work. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1359–91 (2015) (collecting examples of non-contentious proceedings in the federal courts).

[99] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021).

[100] *See, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . .'" (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967))).

[101] *See, e.g.*, Already, LLC v. Nike, Inc., 568 U.S. 85, 91–92 (2013) (noting that when a case becomes moot, it is no longer a case or controversy under Article III); *see also* Chafin v. Chafin, 568 U.S. 165, 172 (2013) (noting that "a suit becomes moot . . . when the issues presented are no longer 'live'" (quoting *Already*, 133 S. Ct. at 726)).

2. Nominal Damages and Standing to Sue. Every putative plaintiff asserts an interest in the outcome of litigation, even the plaintiff whose primary goal is simply to obtain a statement of the law rather than a victory over the other side. Standing to sue thus does not depend on "*whether*" a plaintiff has a "stake" in the case. Instead, it depends on *what kind of* stake the plaintiff has in it. A plaintiff's interest will support his standing to sue only if it meets a threshold, though one that has never been fully defined by the Supreme Court.[102] The Article III objection to nominal damages litigation is that Chika Uzuegbunam and others like him fall short of the "personal stake" needed for standing.[103] Once Georgia Gwinnett College abandoned the restrictive policy, Uzuegbunam did not ask for a prospective change in the defendant's behavior, nor for even a penny to compensate him for loss.[104] Nominal damages litigation involves disagreements over the rights to $1. That dollar cannot be linked to any past, present, or future loss.[105] For Chief Justice Roberts, the plaintiff's interest in that $1 is not sufficient to meet the threshold needed to establish a personal stake.[106] Awarding nominal relief, in his view, consists of nothing more than satisfying his desire for "legal advice,"[107] by giving the plaintiff no cognizable relief beyond a declaration of his rights.[108]

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[102] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018) (distinguishing between "the alleged real-world effect that [President Trump's restrictions on entry from several predominantly Muslim nations] has had in keeping [the plaintiffs] separated from certain relatives who seek to enter the country," which was "sufficiently concrete" to support standing, from the plaintiffs' "claimed dignitary interest," which may not be sufficient, as it was less concrete); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 264 (1990) ("The factors relevant to the case determination exist on a continuum, and the Court must unavoidably make choices about where on the continuum a line should be drawn.").

[103] *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) ("[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has 'a personal stake in the outcome . . . .'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

[104] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) ("The students agreed that injunctive relief was no longer available . . . .").

[105] *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1606–07 (2011) ("The suit for nominal damages arose at common law to enable litigants to secure the judicial resolution of a claim of right even in circumstances where the plaintiff did not seek, or could not establish a claim to, compensatory damages.").

[106] *See Uzuegbunam*, 141 S. Ct. at 807 (Roberts, C.J., dissenting) ("To satisfy Article III, redress must alleviate the plaintiff's alleged injury in some way, either by compensating the plaintiff for a past loss or by preventing an ongoing or future harm.").

[107] *Id.*

[108] *See* Laycock & Hasen, *supra* note 35, at 636 ("The most obvious purpose [to seek nominal damages is] to obtain a form of declaratory relief . . . .").

Chika Uzuegbunam's effort to obtain a dollar, a dollar that is not even linked to some loss, may be compared to other interests found insufficient to meet the threshold for a "personal stake." In *Lujan v. Defenders of Wildlife*, environmentalists' interests in the fate of Egyptian and Sri Lankan wildlife did not meet the threshold "injury" needed to sue under the Endangered Species Act, absent concrete plans to visit those locales.[109] Proponents of a state ballot initiative were denied standing to defend it in *Hollingsworth v. Perry* because their interest was, in the Court's view, no greater than any other member of the public.[110] Reporters fearful of government surveillance were denied standing to bring a pre-enforcement Fourth Amendment challenge to a government foreign intelligence gathering program in *Clapper v. Amnesty International USA* because their concerns were too speculative.[111] Citizens whose tax dollars were used to finance construction of a car factory were denied standing to challenge it on Commerce Clause grounds in *DaimlerChrysler Corp. v. Cuno* because their interest as taxpayers was too small to reach the "injury" threshold.[112]

Though all of these plaintiffs had an evident interest in the litigation, the Court justified denial of standing in these cases by

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[109] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992) ("That the [plaintiffs] 'had visited' the areas of the projects before the projects commenced proves nothing."); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 497–99 (2009) (holding that a statistical showing that some members of an environmental organization are affected by environmental harm will not suffice for standing, absent affidavits from particular members asserting personal harm).

[110] *See* Hollingsworth v. Perry, 570 U.S. 693, 705–06 (2013) ("Here, however, petitioners had no 'direct stake' in the outcome of their appeal."); *see also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953–56 (2019) (holding that the Virginia House of Delegates lacked standing to defend the state's redistricting plan when the state attorney general decided not to pursue an appeal of a lower court ruling that had invalidated it).

[111] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–14 (2013) ("[R]espondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending . . . ."). By contrast, a plaintiff may bring an anticipatory challenge by showing a sufficiently high likelihood that the government will enforce it. *See, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–66 (2014) (holding that the petitioners alleged a credible threat of enforcement that amounts to an Article III injury).

[112] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342–46 (2006) ("[Plaintiffs' claims are] no different from similar claims by federal taxpayers we have already rejected under Article III as insufficient to establish standing."). Other recent cases reject taxpayer standing even when the plaintiff claims the government's program violates the First Amendment's Establishment Clause. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 134–45 (2011) (rejecting standing argument in Establishment Clause case); Hein v. Freedom from Religion Found., 551 U.S. 587, 598–609 (2007) (finding no standing in the Establishment Clause claim because the challenged expenditures "were not expressly authorized or mandated by any specific congressional enactment" (citation omitted)).

declaring the lack of a substantial present "injury."[113] The same objection could be raised against Uzuegbunam's standing. Of course, *Uzuegbunam* is not directly controlled by these earlier cases. Comparisons of dissimilar situations are necessarily imprecise but cannot be avoided in the context of standing to sue doctrine. And the plaintiffs' interests in *Lujan*, *Hollingsworth*, *Clapper*, and *DaimlerChrysler* will be seen as no less real than Chika Uzuegbunam's interest in obtaining a nominal award of $1, wholly unconnected to any harm. Uzuegbunam's case differs from the others on account of its congruence with "the forms of relief awarded at common law."[114] But that distinction stands on shaky ground because the forms of relief awarded at common law have nothing to do with modern Article III policies.[115]

3. Federal Jurisdiction After Uzuegbunam. Chief Justice Roberts fears that *Uzuegbunam* may result in "a radical expansion of the judicial power."[116] The holding appears to allow plaintiffs, by simply seeking nominal damages relief, to secure federal jurisdiction over cases that otherwise would be dismissed based on mootness or lack of standing. In *Texas v. Lesage*, for example, the University of Texas rejected Lesage's application for admission to a program of study.[117] In his § 1983 suit, Lesage claimed that the University had impermissibly considered race in admitting students and sought compensatory damages.[118] The injury was an individualized one like Uzuegbunam's, not the abstract one suffered by Uzuegbunam's co-plaintiff, Joseph Bradford.[119] The problem with Lesage's constitutional tort suit was that his own credentials were mediocre.[120] The Court distinguished between prospective and

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[113] *See infra* notes 115–18 and accompanying text.

[114] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797–98 (2021).

[115] *See* FALLON ET AL., *supra* note 47, at 116–17 (discussing the development of modern standing, which has largely taken place since the middle of the twentieth century).

[116] *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C.J., dissenting).

[117] *See* Texas v. Lesage, 528 U.S. 18, 19 (1999) (per curiam) ("Respondent . . . applied for admission to the Ph.D. program in counseling psychology at the University of Texas' Department of Education . . . .").

[118] *See id.* ("[Lesage] alleged that, by establishing and maintaining a race-conscious admissions process, the school had violated the Equal Protection Clause of the Fourteenth Amendment . . . .").

[119] *See Uzuegbunam*, 141 S. Ct. at 802 (discussing the Court's decision to not determine whether Bradford can pursue nominal damages).

[120] *See Lesage*, 528 U.S. at 22 (explaining why it appears that Lesage "abandoned any claim that the school is presently administering a discriminatory admissions process").

retrospective relief.[121] It said that "a plaintiff who challenges an ongoing race-conscious program and sees forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered."[122] But liability for damages depended on showing a causal connection between the Equal Protection violation and the harm: "The government can avoid liability by proving that it would have made the same decision without the impermissible motive."[123]

Lesage evidently did not seek nominal damages.[124] At any rate, the Court did not discuss the question of whether nominal damages would be available even though he could not prove harm.[125] The holding in *Uzuegbunam* seems to make the "nominal damages" strategy available to a plaintiff like Lesage. And this technique for avoiding mootness may apply far beyond the fact patterns of *Uzuegbunam* and *Lesage*, across the whole field of litigation in which (1) suits challenging constitutionally suspect policies are brought by persons subjected to them, (2) officials respond by changing the policies, and (3) the plaintiffs cannot prove the kind of "actual injury"[126] that would entitle them to compensatory damages.[127] Unless defendants are allowed to use the Roberts Stratagem, plaintiffs who seek nominal damages will be able to maintain their challenges. That is why *Uzuegbunam* threatens the Article III anti-advisory opinions policy.

III. NOMINAL DAMAGES IN § 1983 LITIGATION

The Court's historical approach in *Uzuegbunam* enabled it to resolve the standing and justiciability issues without addressing the Article III principles deemed dispositive by Chief Justice Roberts.[128]

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[121] *See id.* at 21 (emphasizing the differences between prospective and retrospective relief).

[122] *Id.*

[123] *Id.*

[124] *See id.* at 19 (discussing that Lesage sought money damages and injunctive relief).

[125] *See id.* at 22 (showing that the Court's opinion did not rule on or discuss the availability of nominal damages).

[126] *But see* Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[E]ven if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process.").

[127] A distinct issue is whether *every* person who has standing to sue for injunctive relief will have standing to sue for nominal damages. *See infra* Section III.A (arguing against that view).

[128] *See* Uzuegbunam v. Preczewski, 141 S.Ct. 792, 803 (2021) (Roberts, C.J., dissenting) (arguing that the Court should place a higher value on Article III).

But Article III objections cannot be ignored forever. Since nominal damages litigation can flourish only if the Court rejects the Roberts Stratagem, Justice Thomas's reliance on common law principles merely defers to another day the question of whether to allow defendants to undermine the practical significance of *Uzuegbunam* by forcing the plaintiff to accept a dollar. Article III values furnish defendants with plausible arguments in favor of Roberts's "sweeping exception" to the holding of the case.

The weakness of the Court's historical analysis is that it does not address those objections and thus does not answer the most important issue that cases of this kind present: Are the Article III values championed by the Chief Justice strong enough to defeat nominal damages litigation by paying $1? Courts might attempt to sidestep this question by permitting plaintiffs to advance "imaginative [compensatory] damages theories."[129] But the question is, at bottom, one of constitutional tort theory, as it involves the aims and limits of suits for damages for constitutional violations. It seems to me better to address it head on.

A. TENSIONS BETWEEN ARTICLE III VALUES AND NOMINAL DAMAGES FOR CONSTITUTIONAL CLAIMS

Both the majority and dissenting opinions in *Uzuegbunam* frame the Article III issue in general terms, as a binary choice that seemingly will apply across all substantive and remedial contexts. In this respect, *Uzuegbunam* reflects a long-standing tendency on the Court's part, which was described by Professor (now Judge) William Fletcher as "tr[ying] to formulate standing principles at too high a level of generality."[130] That tendency gives rise to "confusion, intellectual dishonesty, and chaos" throughout the law of standing.[131]

The basic problem with the Court's tendency to overgeneralize is that the applicability and strength of Article III principles vary depending on the context in which Article III issues arise.[132]

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[129] *Leading Cases*, *supra* note 1, at 330 n.74.

[130] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988).

[131] *Id.*

[132] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–89 (1992) ("In classifying some harms as injuries in fact

Throughout the Court's doctrine on standing and justiciability, broad holdings under the general "no advisory opinions" umbrella eventually come under pressure. Circumstances arise in which other considerations, including the value of vindicating the substantive rights at issue, are deemed to outweigh the "no advisory opinions" principle and justify limitations on it. For example, a case is moot when a court cannot provide any "effectual relief whatever to the prevailing party."[133] But a court may adjudicate a dispute that is otherwise moot, provided the issue is "capable of repetition yet evading review,"[134] or when the defendant's "voluntary cessation" leaves a sufficient possibility of a recurrence.[135] The former principle authorizes courts to intervene in disputes that would otherwise be over before they could act, such as disputes regarding the regulation of political ads within thirty days of an election.[136] Otherwise, some time-sensitive rights could not be vindicated at all. The doctrine of voluntary cessation addresses the ability of defendants to escape litigation by conveniently abandoning—perhaps only temporarily—practices challenged by persons subjected to them. Indeed, this doctrine might have applied in *Uzuegbunam* if the lower courts had found that GGC might well reinstitute the restrictions on speech that it had eliminated in response to the § 1983 suit.[137] As these examples reveal, "no advisory opinions" is not so much a rule that overrides countervailing interests as it is a policy that the Court stands ready to balance against competing policies.[138]

Tensions between Article III values and the proper goals of constitutional tort law have surfaced in many cases over many years, most notably in connection with the qualified-immunity defense. That doctrine shields officers from liability for damages

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and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts." (footnote omitted)).

[133] Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting Knox v. Serv. Emp., 567 U.S. 298, 307 (2012)).

[134] FALLON ET AL., *supra* note 47, at 203.

[135] *See, e.g.*, *Ne. Fla. Chapter of Assoc. Gen. Contractors*, 508 U.S. at 661–63 (holding that the repeal of city ordinance did not moot the case); *see also* FALLON et al., *supra* note 47, at 202 (discussing voluntary cessation).

[136] *See* Fed. Election Comm'n v. Wis. Rt. to Life, Inc., 551 U.S. 449, 461–64 (2007) (explaining the first exception to the mootness argument).

[137] *Cf.* Uzuegbunam v. Preczewski, 781 F. App'x 824, 826 (11th Cir. 2019) (per curiam) (affirming the district court finding that the claim for prospective relief was moot).

[138] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510–11 (1988) (developing the distinction between rules and other types of norms).

unless they violate "clearly established" rights.[139] Thus, a plaintiff may lose either because no substantive violation occurred or because the right, though violated, was not clearly established. Rigid adherence to the "no advisory opinions" policy would call for resolution of the immunity issue first, as this "order of battle"[140] would systematically avoid unnecessary rulings on constitutional issues. But the Court has not taken this approach. Instead, it initially directed that lower courts decide the substantive issue first.[141] Then, in *Pearson v. Callahan*, it relaxed that rule by giving lower courts discretion to determine, on a case by case basis, whether the costs of the merits-ruling-first approach outweigh the benefits.[142] Under *Pearson*, relevant factors include, among others, the novelty of the constitutional issue and the need to develop concrete guidelines in a given area.[143] For present purposes, the important point is that in § 1983 litigation the "no advisory opinions" policy may be outweighed in any given case by the value of providing judicial guidance on a disputed constitutional question.[144]

Judge Fletcher's solution to overly broad rules is "to break down what might appear to be a single, general question into discrete and

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[139] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (noting that reliance upon clearly established rights, and law, are to avoid "disruption of government").

[140] The term "order of battle" may have been coined by Justice Breyer. *See* Scott v. Harris, 550 U.S. 372, 387–88 (2007) (Breyer, J., concurring) (explaining the various results that a "difficult constitutional question" can have under the "order-of-battle" rule).

[141] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) (stressing that the constitutional right question must be addressed before "further inquiries concerning qualified immunity"); *see also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[T]he first step is to identify the exact contours of the underlying right said to have been violated." (citing Graham v. Connor, 490 U.S. 386, 394 (1989))); Siegert v. Gilley, 500 U.S. 226, 232 (1991) (finding that the circuit court should not have assumed a constitutional violation occurred before reviewing whether the law was clearly established).

[142] 555 U.S. 223, 231–36 (2009) ("The [lower courts] should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."); *see, e.g.*, Cunningham v. Shelby Cnty., Tenn., 994 F.3d 761, 764–65 (6th Cir. 2021) (noting that "[b]ecause both prongs must be satisfied by the plaintiff, we are permitted to decide which prong of the qualified immunity equation to tackle first" (citing Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011))); Batyukova v. Doege, 994 F.3d 717, 724–25 (5th Cir. 2021) ("We can base a decision to allow the immunity on either part of the analysis alone." (citing Morrow v. Meachum, 917 F.3d 870, 874 (5th Cir. 2019))).

[143] *See Pearson*, 555 U.S. at 236–37 (discussing the relevant factors); *see also* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 121–31 (discussing the advantages and policy reasons behind merits adjudication).

[144] *See Pearson*, 555 U.S. at 236 (advocating for judicial discretion in the lower courts).

particular questions."[145] The justiciability-of-nominal-damages issue in *Uzuegbunam* involves a "discrete and particular question[]"[146] raised by the intersection of Article III and § 1983 litigation. Section B discusses the plaintiff's standing to seek nominal damages in the § 1983 constitutional tort context. The rationale for upholding standing is that, in this context, the remedial benefits of vindicating constitutional rights and deterring violations outweigh the justiciability costs of nominal damages litigation. That rationale is free-standing. It does not ride piggyback on a request for either prospective relief or compensatory damages.

B. THE VALUE OF NOMINAL DAMAGES

Nominal damages litigation is, in a sense, an application of the proposition that a remedy should be available for every violation of a right. In U.S. constitutional law, a version of this proposition can be traced back to *Marbury v. Madison*.[147] Chief Justice Marshall asserted that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[148] Otherwise, we would not be entitled to call the United States "a government of laws, and not of men."[149] Well before the U.S. Constitution, this principle was part of the common law tradition.[150] Sir William Blackstone wrote that "where there is a legal right, there is also a legal remedy."[151] In line with this view of rights and remedies, the common law rationale for nominal damages is that violation of a right is distinct from

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[145] Fletcher, *supra* note 130, at 290; *see also* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 694 (2006) [hereinafter Fallon, *Linkage*] (endorsing "Judge Fletcher's central insight that the standing inquiry is often inseparable from the merits" (citing Fletcher, *supra* note 130, at 223)).

[146] *See Pearson*, 555 U.S. at 236 (emphasizing the importance of narrowing the question down to the specific matter at hand).

[147] *See* 5 U.S. (1 Cranch) 137 (1803) (defining the power of the federal courts); *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 935 (2019) [hereinafter Fallon, *Bidding Farewell*] (discussing *Marbury v. Madison*).

[148] *Marbury*, 5 U.S. at 163.

[149] *Id.*

[150] *See, e.g.*, C.G. ADDISON & HORACE SMITH, ADDISON ON TORTS: A TREATISE ON WRONGS AND THEIR REMEDIES 74 (6th ed. 1891) (discussing the precept "No wrong without a remedy").

[151] 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

causation of harm.[152] This idea that a remedy should be available for every violation of a right may support nominal damages litigation in federal court despite the absence of actual past, present, or future harm.

1. Remedial Equilibration. Blackstone's maxim is not, by itself, a sturdy foundation for nominal damages litigation because it is only an aspiration, not a reliable principle in practice. Justice Marshall's evocation of that maxim was not part of the holding in *Marbury*, and it is not the law today.[153] A more realistic framework for examining the role of nominal damages litigation is Richard Fallon's "Equilibration Thesis," which "holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[154] These components "form a package, any individual element of which is potentially adjustable to preserve or enhance the attractiveness of the package overall."[155] A corollary is that "[n]ot every victim of a constitutional rights violation has always had an individually effective remedy, . . . especially when the only effective remedy would be damages."[156] Supreme Court Justices broadly agree on this

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[152] *See* DOBBS, *supra* note 13, § 3.3(2), at 294–96. Thus, nominal damages "are awarded . . . when the plaintiff establishes a cause of action against the defendant but is unable to prove damages . . . ." *Id.* at 294. This is the rule for intentional torts such as battery, assault, and false imprisonment. *See id.* at 295. A corollary is that nominal damages are not appropriate for negligence, a tort for which "the plaintiff has no cause of action at all unless and until damages can be shown." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 6 (Am. L. Inst. 2010).

[153] Fallon, *Bidding Farewell*, *supra* note 147, at 935–37 ("*Marbury*'s dictum has constituted a narrower guarantee of remedies than many have grasped, but it has also symbolized an aspiration—albeit one subject to compromise in light of competing values—to redress legal wrongs on an individual basis.").

[154] Fallon, *Linkage*, *supra* note 145, at 637; *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999) (explaining that remedial equilibration means that "constitutional rights are inevitably shaped by, and incorporate, remedial concerns").

[155] Fallon, *Bidding Farewell*, *supra* note 147, at 963; *see also* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 506 (2011) (discussing the Equilibration Thesis in connection with officer immunity); Fallon, *Linkage*, *supra* note 145, at 637 (discussing the Equilibration Thesis in connection with limits on prospective relief).

[156] Fallon, *Bidding Farewell*, *supra* note 147, at 935.

approach,[157] though significant differences emerge among them on specifics.

In my view, the strongest rationale for nominal damages litigation, and the most effective rebuttal of the Roberts Stratagem, involves application of the Equilibration Thesis. The ensuing subsections of this Article use remedial equilibration principles to defend nominal damages litigation against the Roberts Stratagem. This defense of nominal damages concedes the point that a remedy is not always available for violation of a right. The question of whether to allow any backward-looking remedy depends, as the Supreme Court recently put it, on "the costs and benefits of allowing a damages action to proceed."[158] The costs of suits for damages "include the burdens on Government employees" and "costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies."[159] A plaintiff's recovery of nominal damages is not as costly to the government as other constitutional tort litigation. But many of the costs are litigation costs rather than recovery costs, and these are incurred even when the ultimate outcome is a nominal recovery. And nominal damages litigation imposes distinctive costs of its own in the form of the risk identified by Chief Justice Roberts: a proliferation of advisory opinions, issued to plaintiffs who have suffered no real harm.[160] To this, one might add the opportunity cost of judicial resources expended on nominal damages litigation not

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[157] For example, all of the Justices of the Warren Court joined in Chief Justice Warren's opinion in *Pierson v. Ray*, 386 U.S. 547 (1967), in which the Court ruled that a qualified immunity defense protects police officers from liability for damages in § 1983 litigation for constitutional violations. *See id.* at 554. All but Justice Douglas joined the holding that judges are absolutely immune from liability. *See id.* at 557 (Douglas, J., dissenting). Despite recent criticism of qualified immunity, no Justice has called for eliminating it outright. With respect to governmental liability, Justice William Brennan, the leader of the liberal wing of the Court, authored the opinion in *Monell v. Department of Social Services*, 436 U.S.658 (1978), which held that local governments may be sued under § 1983 but are not vicariously liable for constitutional torts committed by their employees. No Justice squarely dissented in the Court's two cases on compensatory damages. *See generally* Carey v. Piphus, 435 U.S. 247 (1978); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

[158] Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

[159] *Id.*

[160] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 803 (2021) (Roberts, C.J., dissenting) ("If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar.").

being available for adjudication of claims brought by plaintiffs who *have* suffered real harm.

But costs are only one side of the ledger. The advantage of a suit for nominal damages is that more conventional remedies, including injunctions and compensatory damages, leave gaps in the protection of constitutional rights. Despite its inroads on the "no advisory opinions" principle, nominal damages litigation plugs these holes in the system of constitutional remedies. The point of constitutional remedies is to enforce constitutional guarantees by vindicating and clarifying constitutional rights and by deterring violations. Backward-looking relief of some kind, whether nominal or compensatory, is often the only potential remedy available for non-recurring constitutional violations. Compensatory damages are inadequate, in part because Supreme Court doctrine does not allow recovery for the abstract value of constitutional rights,[161] and in part because many constitutional claims are denied for reasons that have nothing to do with their merits.[162] Nominal damages litigation meets the need for right-remedy equilibration. It compensates for the remedial shortfall by tilting in favor of plaintiffs who can overcome the hurdles.

2. Backward-Looking Constitutional Remedies. Constitutional tort suits, brought under § 1983 to recover damages for past violations, are a comparatively recent addition to the arsenal of constitutional remedies.[163] This backward-looking remedy was rarely used before 1961, when the Court in *Monroe v. Pape*[164] read the statutory "under color of" language of § 1983 broadly, to allow plaintiffs to sue even if state law provided a remedy.[165] Long before *Monroe*, litigants could assert rights both defensively against civil or criminal liability, and offensively in suits for injunctions,

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[161] *See Ziglar*, 137 S. Ct. at 1866 (explaining that the doctrine of qualified immunity protects officials accused of violating abstract rights).

[162] *See* Michael Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 713–14 (2014) ("Even if the plaintiff can win on the merits of the constitutional claim, the 'official immunity' doctrine blocks many suits for damages against state and federal officers.").

[163] *See* FALLON ET AL., *supra* note 47, at 994 (explaining that § 1983 litigation has increased rapidly since *Monroe v. Pape*, 365 U.S. 167 (1961)); Marshall S. Shapo, *Constitutional Tort*: Monroe v. Pape *and the Frontiers Beyond*, 60 NW. UNIV. L. REV. 277, 295 (1965) (explaining that *Monroe* allowed for a federal remedy to supplement the existing state remedy).

[164] 365 U.S. at 184 (rejecting the view that "'under color of' state law should not be construed to duplicate in federal law what was an offense under state law").

[165] *See* Shapo, *supra* note 163, at 282 (discussing the pre-*Monroe* history).

declaratory judgments, or other prospective relief.[166] The contemporary Supreme Court, including Chief Justice Roberts in particular, sometimes expresses a "preference for injunctive-style litigation of challenges to national policy."[167] If defensive and prospective remedies provide sufficient vindication and deterrence, the benefits of a strong tort remedy may not be worth its costs. Nominal damages in particular may rest on a weak footing when viewed from a cost-benefit perspective. On the benefit side of the ledger, a nominal recovery does not compensate the plaintiff. The costs of a nominal recovery include the risk that nominal damages litigation will discredit Article III's policy against advisory opinions. The rationale for damages in general, and for nominal damages in particular, is that other remedies do *not* suffice.

A brief survey of constitutional remedies illustrates the crucial role of suits for damages. When the holder of a right is the target of a civil suit or criminal prosecution, it is an elementary principle of due process that he may raise his constitutional rights defensively, as a shield against the imposition of a sanction.[168] Often, however, officials and governments violate rights without attempting to impose sanctions on the rights holder. These contexts include, for example, maintenance of segregated schools or inhumane

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[166] *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 168 (1908) (allowing suits for prospective relief against state officers); *see also* FALLON ET AL., *supra* note 47, at 927 (explaining that *Ex parte Young* recognized a cause of action for injunctive relief under the Fourteenth Amendment).

[167] James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 781 (2019) [hereinafter Pfander, *Dicey's Nightmare*]. Pfander also notes that during the *Ziglar* oral arguments, "in response to counsel's argument that *Bivens*-based suits for damages were an appropriate means with which to test national security policy, Chief Justice Roberts countered that 'the normal injunctive action would challenge the constitutionality of the policy, which would seem, at least at first blush, to be a more appropriate way of doing it than . . . individual damages actions against officials responsible.'" *Id.* (quoting Transcript of Oral Argument at 47, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (No. 15-1359) (comments of Roberts, C.J.)).

[168] *See* Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976) (discussing the factors that bear on what process is due in particular contexts); *cf.* Boumediene v. Bush, 553 U.S. 723, 783–85 (2008) (discussing the rights of detainees at Guantanamo Naval Base).

prisons,[169] retaliatory firings for protected speech,[170] rigged voting systems,[171] arbitrary denial of public benefits,[172] and police misconduct,[173] among many others. When the constitutionally objectionable activity is one that persists over time or is threatened in the future, a plaintiff can assert rights by way of a suit for prospective relief, such as an injunction or a declaratory judgment.[174] For example, Chika Uzuegbunam attempted to obtain prospective relief against Georgia Gwinnett College's speech restrictions, but that effort was thwarted when GGC rescinded the policy.[175]

Constitutional tort law provides a remedy for those constitutional violations, illustrated by Uzuegbunam's situation, in which the constitutional violation is entirely in the past. The only remedy available in such a case is a suit for damages, typically brought against state officials and local governments under 42

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[169] *See* Emma Garcia, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price (explaining that "one in three white students . . . attend[s] a high-poverty school, compared with more than seven in [ten] black students"); *see also Prison Conditions,* EQUAL JUST. INITIATIVE, https://eji.org/issues/prison-conditions (last visited Jan. 29, 2022) (describing "overcrowded, violent, and inhumane jails and prisons").

[170] *See, e.g.,* Jerry Iannelli, *'She Just Said She Wanted to Be Believed,'* APPEAL (Dec. 15, 2020), https://theappeal.org/zummer-morel (explaining how the FBI fired Mike Zummer and why Zummer subsequently sued the FBI for violating his First Amendment rights).

[171] *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained,* BRENNAN CTR. FOR JUST. (Aug. 12, 2021), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained (explaining how gerrymandering "influenc[es] who gets elected").

[172] *See, e.g.,* Lisa Rein, *Social Security Expands Public Services, But Field Offices to Remain Closed Until Spring,* WASH. POST (January 29, 2022), https://www.washingtonpost.com/politics/2022/01/29/social-security-pandemic (noting that a person with "degenerative disk disease" was denied public benefits and sought to appeal such denial).

[173] *See 2021 Police Violence Report,* MAPPING POLICE VIOLENCE (2021), https://policeviolencereport.org (synthesizing reports of police violence in 2021 and noting, among other trends, that seventy-eight people killed by police in 2021 were unarmed).

[174] *See* 12 MOORE'S FEDERAL PRACTICE: CIVIL § 57.81, Lexis (database updated 2022) ("An individual seeking to engage in constitutionally protected activity, but who is threatened with prosecution under a state criminal statute, may seek a declaratory judgment in federal court declaring the statute invalid.").

[175] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (discussing the fact that the parties agreed that "injunctive relief was no longer available" because GGC got "rid of the challenged policies").

U.S.C. § 1983.[176] Chief Justice Roberts' suggestion, if adopted, would destroy the role of nominal damages, and evidently low compensatory damages as well,[177] in vindicating constitutional rights. It would do so by denying the plaintiff a court's judgment that the defendant violated a constitutional right or a formal concession of wrongdoing by the defendant. Viewed through a constitutional tort lens, the issue raised by the Roberts Stratagem is not the abstract question of whether nominal damages are sufficient to meet the Article III redressability requirement. The issue is narrower: whether a person stopped by the police for engaging in arguably protected speech may obtain nominal damages in a § 1983 suit.

3. Gaps in the Efficacy of Compensatory Damages. Remedial equilibration consists in part of choices between remedies. For example, the Supreme Court has held that the deterrent value of the exclusionary rule is adequately achieved by applying it at criminal trials[178] and has thus rejected its application in grand jury proceedings, habeas corpus litigation,[179] and many other contexts.[180] The exclusionary rule doctrine illustrates the point that the choice of remedies may turn on fine-grained assessments of the costs and benefits of a particular remedy in a particular context. The lesson for nominal damages litigation is that nominal recovery cannot be sustained merely on the ground that retrospective remedies are necessary. If compensatory damages are sufficient to adequately achieve the vindication and deterrence goals, the marginal benefits of nominal damages may not be worth the costs. Under current § 1983 doctrine, however, compensatory damages often fall short in promoting vindication, and the case for nominal damages is correspondingly strong, partly as a way to fill the gap and partly (as

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[176] *See* 42 U.S.C. § 1983 ("[I]njuctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

[177] *See supra* notes 30–32 and accompanying text.

[178] *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (describing the deterrent effect of the exclusionary rule).

[179] *See* Stone v. Powell, 428 U.S. 465, 481–82 (1976) (finding that Fourth Amendment claims may not be raised in habeas corpus proceedings if the petitioner had a full and fair opportunity to raise them at trial); United States v. Calandra, 414 U.S. 338, 351–52 (1974) (declining to extend the exclusionary rule to grand jury proceedings).

[180] *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363–64 (1998) (declining to extend the exclusionary rule to parole revocation hearings).

Section III.A.*4* will show) because nominal recovery may be adequate by itself to achieve vindication.

The Supreme Court has decided just two cases on compensatory damages in § 1983 litigation and none since 1986.[181] These cases, and the body of lower court caselaw they have spawned,[182] place significant obstacles in the way of recovery. The first is *Carey v. Piphus*, in which two plaintiffs had been suspended from school, one for smoking marijuana and the other for wearing suspected "gang" attire.[183] In each case, school officials acted summarily, without procedural due process in punishing the students.[184] The cases were consolidated for trial and appeal.[185] The Seventh Circuit allowed a recovery of compensatory damages for the due process violations, even while assuming that fair hearings would not have saved the students from suspension.[186] The Supreme Court, however, rejected this ruling, holding that the plaintiffs could not recover damages for the claimed due process violations without proof of individualized injury such as emotional distress.[187] Damages in § 1983 cases were governed by the common law "compensation principle," which meant that the students could not recover for the due process violations unless they could show that the violations "actually caused them some real, if intangible, injury."[188] If the students would have been suspended anyway, they could not recover for lost schooling.[189] Absent proof of harm, *only* nominal damages would be available.[190]

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[181] *See* Carey v. Piphus, 435 U.S. 247, 250–51 (1978) (describing the $5,000 damages sought by the plaintiff); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 301–02 (1986) ("Respondent sought compensatory and punitive damages under 42 U.S.C. § 1983 for these constitutional violations.").

[182] *See, e.g.*, Acevedo-Luis v. Pagan, 478 F.3d 35, 39 (1st Cir. 2007) (following *Stachura*).

[183] *See Carey*, 435 U.S. 247, 249–51 (1978) (providing the facts of the case).

[184] *See id.* at 252 (noting that the respondents had not "received procedural due process").

[185] *See id.* at 251 ("Piphus' and Brisco's cases were consolidated for trial . . . .").

[186] *See id.* at 248 ("The Court of Appeals for the Seventh Circuit held that the students are entitled to recover substantial nonpunitive damages even if their suspensions were justified, and even if they do not prove that any other actual injury was caused by the denial of procedural due process.").

[187] *See id.* (disagreeing with the Seventh Circuit's holding).

[188] *Id.* at 261.

[189] *See id.* at 260 ("[R]espondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions."). For an application of this rule, see Montgomery v. City of Ardmore, 365 F.3d 926, 937 (10th Cir. 2004) (following *Carey*).

[190] *See, e.g.*, *Carey*, 435 U.S. at 266 (affirming the plaintiffs' nominal damages only); Tercero v. Tex. Southmost Coll. Dist., 989 F.3d 291, 301 (5th Cir. 2021) (same); Warren v. Pataki, 823

Eight years later, in *Memphis Community School District v. Stachura*, the Court applied this principle to a First Amendment case.[191] A teacher sued to recover damages, alleging that a suspension with pay violated his free speech rights.[192] The trial judge distinguished *Carey* as a procedural due process case and instructed the jury that they could consider the "value [they] place[d] upon [the] Constitutional right," and "consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in."[193] The opinion in *Carey* seemed to open the door to this type of instruction when substantive rights were at issue. After discussing the damages issue in the context of procedural due process,[194] the Court said that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."[195]

In *Stachura*, however, the Court rejected the distinction between procedural due process and other rights and disapproved this instruction.[196] Because the compensation principle applied to substantive constitutional rights as well as procedural rights, the instruction was faulty in that it did not limit recovery to actual damages.[197] The Court characterized this instruction as one that would allow the jury to award damages "based on the abstract

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F.3d 125, 141 (2d Cir. 2016) (same); Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 122 (1st Cir. 2004) (same).

[191] *See* 477 U.S. 299, 301–02 (1986) (noting the complaint alleged a violation of the respondent's "First Amendment right to academic freedom").

[192] *See id.* at 301 (summarizing the facts of the case).

[193] *Id.* at 302–03 (quoting the jury instruction).

[194] *See Carey*, 435 U.S. at 259–64 (discussing how damages should be awarded when procedural due process is violated).

[195] *Id.* at 264–65.

[196] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 312 (1986) (concluding that the trial court erred in authorizing the jury to award "damages based on the jury's perception of the 'importance' of two provisions of the Constitution").

[197] *See id.* at 306–10 (detailing why compensatory damages are not available for violations of substantive constitutional rights without proof of "actual injury"); *cf.* First Midwest Bank v. City of Chi., 988 F.3d 978, 985 n.3 (7th Cir. 2021) (disapproving counsel's "send a message" summation because the damages amounted to punitive damages, which the City of Chicago was immune to).

'value' or 'importance' of constitutional rights."[198] In his opinion for the Court, Justice Powell explained that the factors mentioned in the instruction did not focus "on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter."[199] The award should not reflect the value of free speech in and of itself; it should only cover the teacher's lost income, emotional distress, or other conventional tort damages.[200]

In a remedial world governed by the principles of *Carey* and *Stachura*, compensatory damages work for some plaintiffs but not others. The goals of constitutional tort law are to vindicate rights and deter violations.[201] The ubiquity of nominal damages, noted earlier,[202] suggests that the common law compensation principle does not fully align with these aims. The common law rules emphasize physical, monetary, and emotional harm.[203] Even when juries award constitutional tort compensatory damages, deterrence is often weak because it is limited by the Court's common-law-based rules on the elements of compensatory damages.[204] Vindication falls short because the ordinary tort damages doctrine does not, and is not intended to, capture the intangible value of constitutional rights.

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[198] *Stachura*, 477 U.S. at 310.

[199] *Id.* at 308.

[200] In a footnote, the Court stated that "nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* at 308 n.11.

[201] *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability."); Harlow v. Fitzgerald, 457 U.S. 800, 813–14, 819 (1982) ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Carey v. Piphus, 435 U.S. 247, 255–57 (1978) (discussing Congress's intent behind enacting § 1983); *cf.* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (discussing similar themes in ordinary tort law).

[202] *See supra* note 16.

[203] *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS 852 (2d ed. 2016) (describing the purposes of common law tort damages).

[204] *See Carey*, 435 U.S. at 256–57 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.").

In *Carey*, the Court suggested that the common law damages rules may need to be adapted to the constitutional tort context when "the interest[] protected by a particular constitutional right [is] not also [] protected by an analogous branch of the common law of torts."[205] But the Court made no mention of this project of adaptation in *Stachura* and has never revisited the idea. Nor, for the most part, have the lower federal courts. For example, in *Taylor v. Howe*, seven voters who were denied the right to vote on account of race recovered "between $500 and $2,000" each.[206] In *Cowart v. Erwin*, a handcuffed detainee recovered only $10,000 when two guards held him in position while a third punched him twice in the face.[207] Then a "'swarm' of officers took Cowart to the ground and began beating him."[208] Cowart was also sprayed with mace and lost consciousness.[209] Another inmate was awarded only $10,000 when a guard "maliciously and sadistically used force against [him] for the purpose of causing him harm."[210] In *Doe v. Santa Fe Independent School District*, the Fifth Circuit found no compensable damages for an Establishment Clause violation when a school district allowed religious instruction in the public schools.[211] In *Stevens v. McHan*, the Eighth Circuit overturned a $4,000 award for eight days of illegal administrative segregation as "arbitrary and excessive."[212] In *Zinna v. Congrove*, the jury found that officials had retaliated against the plaintiff for information he put on his website in violation of his First Amendment rights but awarded only $1,791.[213]

Nominal damages help to fill the gap when the plaintiff cannot prove compensatory damages under the stringent standards of *Carey* and *Stachura*. In practice, nominal damages are often the sole

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[205] *Id.* at 258 (citing Monroe v. Pape, 365 U.S. 167, 171 n.5, 196 (1961)).

[206] 280 F.3d 1210, 1211 (8th Cir. 2002).

[207] *See* 837 F.3d 444, 449, 450 (5th Cir. 2016) (detailing the events of the assault and the resulting damages award).

[208] *Id.* at 449.

[209] *See id.* ("[O]fficers kicked, punched, and stomped upon Cowart, and sprayed him with mace.").

[210] Est. of Davis v. Delo, 115 F.3d 1388, 1393 (8th Cir. 1997).

[211] 168 F.3d 806, 824 (5th Cir. 1999) (finding there was no "evidence establishing a genuine dispute of material fact" that the plaintiff suffered harm regardless of whether the school district "had a policy of tolerating Establishment Clause abuses").

[212] 3 F.3d 1204, 1207 (8th Cir. 1993). The court cited cases in which plaintiffs had received much less per day for solitary confinement. *See id.* (citing, for example, *Maxwell v. Mason*, 668 F.2d 361, 366 (8th Cir. 1981), which awarded "$100 per day for solitary confinement").

[213] 680 F.3d 1236, 1238–39 (10th Cir. 2012) (providing the procedural history of the case).

remedy juries choose to award to victims of constitutional violations, including serious ones.[214] In *Kidis v. Reid*, the jury awarded $1 to a plaintiff who claimed that a police officer "thrust his knee into Kidis[,] started to choke him[, and,] although [Kidis] offered no resistance, . . . continued to punch and strangle Kidis."[215] The estate of Michael Ortiz De Jesus recovered $1 in nominal damages when a jury found that "the defendants' discharge of seventeen rounds from their government-issued firearms after Michael was already lying on the ground constituted excessive force."[216] Nominal damages probably have a bigger role in cases like *Uzuegbunam*, in which the constitutional violation does not invade the body, much less cause physical pain.[217] In *Grisham v. City of Fort Worth*, an evangelical preacher accepted a consent decree that gave him $1 in nominal damages when police stopped him from handing out religious literature at a public festival.[218] In *Williams v. Kaufman County*, plaintiffs received $100 in nominal damages for illegal strip searches.[219] Professor Ward Churchill obtained only nominal damages when he was fired from a tenured position at the University of Colorado for criticizing the United States after the September 11, 2001 attacks.[220]

4. Vindication, Deterrence, and Nominal Damages. Apart from compensatory gap-filling, cases also arise in which compensatory damages are not at issue. In such cases, nominal damages may

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[214] *See supra* note 16.

[215] 976 F.3d 708, 713 (6th Cir. 2020); *see also* Moore v. Liszewski, 838 F.3d 877, 878 (7th Cir. 2016) (noting that the jury awarded the plaintiff only $1 after the jury found that a correctional officer had used excessive force against the plaintiff).

[216] De Jesús Nazario v. Morris Rodríguez, 554 F.3d 196, 198 (1st Cir. 2009). The jury did not make even a nominal award, but it awarded a total of $40,000 in punitive damages. *Id.*

[217] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (noting that the complaint alleged a violation of the plaintiff's First Amendment rights).

[218] 837 F.3d 564, 567 (5th Cir. 2016) (detailing the consent decree); *see also* Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752, 765 (8th Cir. 2008) (holding that the student's "free speech right vindicated was not readily reducible to a sum of money," so nominal damages of $1 were awarded).

[219] *See* 352 F.3d 994, 1001 (5th Cir. 2003) ("[T]he court awarded each plaintiff 'nominal damages' of $100 . . . ."); *see also* Guzman v. City of Chi., 689 F.3d 740, 742 (7th Cir. 2012) (remanding for a new trial on damages after plaintiff was awarded nominal damages of $1 and appealed).

[220] *See* Wendy Kaminer, *The End of Free Speech at University of Colorado?*, ATLANTIC (Sept. 18, 2012) https://www.theatlantic.com/national/archive/2012/09/the-end-of-free-speech-at-university-of-colorado/262494/ (stating that Churchill was awarded $1 in nominal damages but denied his "primary, equitable request for reinstatement").

suffice to vindicate the plaintiff's rights. Vindication is distinct from compensation and may be achieved without compensation.[221] By contrast, the gap-filling role of nominal damages implies that a nominal recovery is always only a second-best solution to the problem of enforcing constitutional rights by way of tort suits. The reasoning in *Carey* seems to reflect this approach: *Carey* states that the aims of constitutional torts are "to compensate persons for injuries caused by the deprivation of constitutional rights"[222] and to "deter the deprivation of constitutional rights."[223] In this approach to constitutional tort law, nominal damages have a decidedly secondary role. According to *Carey*, they are awarded because "the law recognizes the importance to organized society that those rights be scrupulously observed."[224] This view of nominal damages suggests that they are indeed "a rescue operation,"[225] and consequently, that it is unwise to pay much attention to them and useless to allow suits in which the stakes are limited to nominal recovery, especially in light of Article III costs. In this view, the main lesson to draw from the *Carey*/*Stachura* doctrine, and the lower courts' application of that doctrine, is that the *compensatory* damages doctrine needs to be reformed, perhaps by endorsing presumed damages,[226] a doctrine borrowed from defamation law, which allows recovery of substantial compensatory damages without proof.[227]

In *Stachura*, however, the Court seems to recognize a more important role for nominal damages in constitutional torts, even if only in a footnote.[228] Nominal relief does not merely serve an abstract, systemic goal of validating "the importance to organized

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[221] Vindication is a "mixed concept," consisting of several elements. *See* Kit Barker, *Private and Public: The Mixed Concept of Vindication in Torts and Private Law*, *in* TORT LAW: CHALLENGING ORTHODOXY 68 (Stephen G.A. Pitel, Jason W. Neyers & Erika Chamberlain eds., 2013). The relevant sense of the term for constitutional torts is that "[c]ourts vindicate rights . . . when they provide an affirmative, institutional acknowledgement of the right." *Id.* at 59, 69. Barker adds that "[t]he monetary remedy most commonly considered equivalent to a judicial declaration is an award of nominal damages." *Id.* at 69–70.

[222] Carey v. Piphus, 435 U.S. 247, 254 (1978).

[223] *Id.* at 256.

[224] *Id.* at 266.

[225] DOBBS, *supra* note 13 at 296.

[226] *See* F.A.A. v. Cooper, 566 U.S. 284, 310 n.5 (2012) (describing presumed damages).

[227] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310–11 (1985) (declining to uphold the *Stachura* instructions as a form of presumed damages).

[228] *See id.* at 302 n.5 (discussing nominal damages in constitutional rights cases).

society that . . . rights be scrupulously observed," as *Carey* put it.[229] Rather, nominal damages are "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."[230] This role for nominal damages undercuts the notion that the "compensation principle," by itself, can be an adequate base on which to build constitutional tort damages doctrine.

Carey borrowed the "compensation principle" from negligence law, in which proof of damage is an element of the tort.[231] In adopting it for § 1983 litigation, the Court committed a kind of "category mistake," which "arises when things or facts of one kind are presented as if they belonged to another."[232] Compensation may well be viewed as a key aim of tort doctrine in the negligence context, and an even stronger one in strict liability torts.[233] But it is not the principal aim across *all* areas of common law tort.[234] In tort causes of action that guarantee personal interests in bodily integrity and dignity, such as battery, assault, and false imprisonment, nominal damages are a traditional remedy.[235] These dignitary torts provide a more appropriate analogy to constitutional torts.

From a vindication perspective, compensation is a means, not an end in itself. The point of obliging the defendant to pay is not to shift the loss to the defendant, which is often impossible, but to "affirm the message that the conduct in question was wrong and the results

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[229] *Carey*, 435 U.S. at 266.

[230] *Stachura*, 477 U.S. at 316; *see also* N.Y. State Rifle & Pistol Ass'n v. City of N.Y., 140 S. Ct. 1525, 1535 (2020) (Alito, J., dissenting) (discussing *Stachura* to support the assertion that "courts routinely award nominal damages for constitutional violations" (citations omitted)).

[231] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. b (stating that a "factual element[] of a prima facie claim for negligently causing physical harm" is "physical harm"); *see also* DOBBS, *supra* note 13, at 851 (stating that "[i]n negligence cases, however, damages are an essential element").

[232] SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 55–56 (2d ed. 2005).

[233] *See* Mark Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65, 70 (John Oberdiek ed., 2014) (explaining that "a compensatory tort right can justify the default rule of negligence liability" and "justifies a rule of strict liability").

[234] *See* Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 943 (2017) (reviewing ARTHUR RIPSTEIN, PRIVATE WRONGS (2016)) (arguing that "the search for a Grand Unified Theory [of tort] is misguided; we ought not expect simple explanations for complicated and contingent institutions, like tort").

[235] *See id.* at 967 (stating that in the same way as damages, "[a] tort judgment [is expressive in that it] says *this defendant wronged that plaintiff,* and thereby reasserts that the plaintiff had a right not to be treated the way she was . . . whether or not repair is possible").

the wrongdoer's responsibility."[236] Even when the plaintiff receives compensation, the underlying point of requiring the wrongdoer to compensate the person he has wronged may be to vindicate the plaintiff's right.[237] It is important to avoid confusion between compensation as a means and as an end because a nominal award is not necessarily a gap-filling, second-best recovery when the "compensation principle" yields no recovery. Corrective justice does not consist solely in the award of damages that will compensate for loss. The toolbox also includes nominal damages. Whether or not the plaintiff is compensated, and no matter how much or how little the compensatory damages may be, the imposition of liability expresses a considered judgment by impartial judges and jurors that the defendant has wronged the plaintiff.[238] Damages, nominal or compensatory, can provide a measure of "redress" for the wrong,[239] even when they do not make the plaintiff whole.[240] The general point here is that tort law has an expressive function, along with serving compensatory and regulatory goals. The judgment that the defendant wronged the plaintiff "can be significant quite apart from any material consequences that follow," just because of the message it expresses.[241]

In a study of offensive battery, false imprisonment, defamation, and other dignitary torts, Kenneth Abraham and G. Edward White remind us that "[t]ort liability is imposed not only to protect against and compensate for bodily injury, damages to property, emotional

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[236] Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 233, at 97; *see also id.* at 89–92 (explaining that the point of the payment is not to shift the costs of the wrong to the defendant because "we can never get back to where we started").

[237] *See* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405, 443 (2017) [hereinafter Hershovitz, *Treating Wrongs as Wrongs*] (arguing that "corrective justice is not, finally, about repair," that "repair is not the only way of doing corrective justice," and that "[t]ort does justice . . . by saying, clearly and loudly, *this defendant wronged that plaintiff*").

[238] *See id.* at 407 (developing the thesis that "tort liability expresses the judgment that the defendant wronged the plaintiff").

[239] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 574 (2013) ("Redress is a capacious (though not empty) concept that is compatible with judicial provision of remedies ranging from injunctions to nominal damages.").

[240] *See* ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 58 (2001) (stating that "money is an imperfect means of making it as though an injury had never happened" but still "an appropriate way of transferring the loss").

[241] Hershovitz, *Treating Wrongs as Wrongs*, *supra* note 237, at 408.

distress, and economic loss, but also to protect individual dignity of various sorts and compensate for invasions of individual dignity."[242] The prevalence of constitutional tort litigation, despite a track record of low nominal awards, is some indication that, perhaps more often than not, constitutional torts are best understood as a type of dignitary tort. The main point of the litigation may be to obtain vindication of the plaintiff's constitutional rights, even when the plaintiff cannot prove actual damages under the *Carey*/*Stachura* rules, and even when the plaintiff does not even claim actual damage.[243] The role of nominal damages in the common law,[244] and in constitutional tort, is not merely to recognize the societal importance of constitutional rights, but rather to vindicate rights when compensatory damages are not available.[245] The expressive role of tort liability belies the notion that there can be no vindication without a transfer of money.[246] Chief Justice Roberts is wrong to call nominal recovery a "consolation prize" for plaintiffs who cannot prove compensatory damages.[247] The judicial order that the defendant pay damages, whether compensatory or nominal, recognizes that the defendant has committed a wrong and

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[242] Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 319 (2019).

[243] *See* Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1014–21 (2012) ("[T]he basic purpose of a . . . damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.").

[244] *See* DOBBS, *supra* note 13, at 294 ("Nominal damages are damages in name only . . . . Such damages are awarded in tort and contract cases where the plaintiff establishes a cause of action against the defendant but is unable to prove damages . . . .").

[245] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury . . . ." (citation omitted)); *see also* Cummings v. Connell, 402 F.3d 936, 942 (9th Cir. 2005) ("As distinguished from punitive and compensatory damages, nominal damages are awarded to vindicate rights, the infringement of which has not caused actual, provable injury."); Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) ("[T]he deprivation of the constitutional right is itself a cognizable injury . . . ." (citing Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999))); Schneider v. Cnty. of San Diego, 285 F.3d 784, 795 (9th Cir. 2002) (finding the plaintiff was "entitled to" a "mandatory nominal damages award of $1.00 as a symbolic vindication of her constitutional right" because she "secured a favorable jury verdict on her section 1983 claim"); Park v. Shiflett, 250 F.3d 843, 854 (4th Cir. 2001) (finding nominal damages of $1 were appropriate because the plaintiff's civil rights were violated).

[246] *See* Hershovitz, *Treating Wrongs as Wrongs*, *supra* note 237, at 407–09 (discussing the expressive function of tort law and distinguishing it from other aims of tort).

[247] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 805 (2021) (Roberts, C.J., dissenting) ("Notwithstanding the Court's protestations to the contrary, nominal damages in such cases were in fact a 'consolation prize[]' . . . .").

vindicates the plaintiff's right by compelling the defendant to hand over a dollar.

Chief Justice Roberts seems oblivious to the vindication goal, at least at the level of individual plaintiffs suing for violations of their rights. Well before *Uzuegbunam*, he expressed a preference for prospective remedies over constitutional tort suits.[248] His dissent is sensitive to Article III values but seems blind to the value of constitutional tort litigation in vindicating constitutional rights. The Roberts Stratagem echoes that theme. It ignores the vindication goal by allowing defendants to evade recognition of wrongdoing when the plaintiff cannot prove compensatory damages. The weakness of the Court's opinion is that the focus on common law history does not engage this gap in Roberts's reasoning.

Do nominal damages also have a role in providing incentives for officials to follow constitutional norms? By itself, the obligation to pay $1 will not likely deter officers who are not already committed to respecting constitutional rights, even if some will more closely adhere to constitutional rules once they know what the rules are. But nominal damages can also contribute to deterrence in a roundabout way because the ruling on the merits can more clearly define constitutional rights and duties. Officers avoid liability even when they violate rights if the rights are not "clearly established" when they act.[249] Professor James Pfander has proposed a scheme in which constitutional tort plaintiffs would agree to accept only nominal damages; for their part, defendants would give up qualified immunity.[250] A nominal damages award coupled with a ruling on the merits would settle the constitutional issue and influence official behavior in the future, in the following way: Ex ante, before the plaintiff's victory, some officers would not be deterred because immunity would protect them in the absence of the clarity provided

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[248] *See* Pfander, *Dicey's Nightmare*, *supra* note 167, at 781 & n.227 (2019) (discussing Chief Justice Roberts's comments in the course of the oral argument of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)).

[249] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

[250] See Pfander, *supra* note 105, at 1619–22 (outlining the proposed scheme).

by the plaintiff's victory.[251] The resolution of the constitutional merits in the plaintiff's favor may "clearly establish" the law, thus foreclosing the official immunity defense in the future.[252]

5. Roadblocks to Recovery. Constitutional tort plaintiffs do not win their cases simply by proving that an officer deprived them of constitutional rights. They often lose because officers may assert official immunity.[253] Officers are absolutely immune from liability when they violate constitutional rights while performing judicial,[254] prosecutorial,[255] or legislative[256] functions. Absolute immunity applies even when the officer acts maliciously or deliberately, as when a prosecutor knowingly elicits false testimony with the aim of convicting an innocent person.[257] Other officers are entitled to qualified immunity, which shields them from paying damages unless they violate "clearly established" rights,[258] a standard that seems to protect "all but plainly incompetent" officials.[259] Local governments do not enjoy any immunity, but the plaintiff must establish that the constitutional tort was caused by a municipal "policy or custom."[260] They cannot be sued on a respondeat superior

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[251] *See id.* at 1612–13 (explaining how the qualified immunity doctrine "eliminated the inquiry into the officer's subjective good faith and switched to an objective inquiry into the doctrinal clarity of the constitutional rights in question").

[252] *See id.* at 1619 ("The whole point of the litigation would be to clarify the constitutional norm in a world of uncertainty . . . .").

[253] *See Absolute Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A complete exemption from civil liability . . . afforded to officials while performing important functions . . . .").

[254] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (applying absolute official immunity to an Indiana state court judge under Section 1 of the Civil Rights Act).

[255] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 (1976) ("We conclude that the considerations outlined above dictate the same absolute immunity under §1983 that the prosecutor enjoys at common law.").

[256] *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 48–52 (1998) ("[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities.").

[257] *See Imbler*, 424 U.S. at 427 (finding that maliciousness or deliberateness does not bar immunity because "qualifying a prosecutor's immunity would disserve the broader public interest").

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

[259] Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted); *see also* Fallon, *Bidding Farewell*, *supra* note 147, at 956 (emphasizing the Court's "commitment to a robustly protective doctrine of qualified immunity").

[260] Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

basis for constitutional torts committed by their employees in the course of the employment.[261] State governments cannot be sued at all because the Court has held that § 1983 does not apply to them.[262] Claims against the police are often blocked by a "release-dismissal" agreement, which requires the plaintiff to release his claim in exchange for dismissal of criminal charges.[263] A plaintiff who has been convicted of a crime must first get the conviction overturned before suing to recover damages for constitutional violations that "would render a conviction or sentence invalid."[264]

Michael Coenen has asserted that this "division [of legal entitlements] into discrete sets of mutually necessary procedural, substantive, and remedial component parts" will often result in systematic dilution of constitutional rights because defendants win if they prevail on any one of these issues, while the plaintiff must succeed on all of them.[265] Combined with the plaintiff's obligation in any tort case to show cause-in-fact[266] and proximate cause,[267] to dodge problems of issue and claim preclusion,[268] and to bring suit within the time limits set by the relevant statute of limitations,[269]

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[261] *See id.* ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.").

[262] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 62–64 (1989) (holding that states are not "persons" within the statutory meaning of that term).

[263] *See, e.g.*, Town of Newton v. Rumery, 480 U.S. 386, 398 (1987) (upholding a release agreement because it "was voluntary . . . [with] no evidence of prosecutorial misconduct" and enforcing it "would not adversely affect the relevant public interests").

[264] Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).

[265] Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. 129, 134 (2020).

[266] *See, e.g.*, Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1976) (holding that the district court could not properly make a decision without information relevant to cause-in-fact).

[267] *See, e.g.*, Cnty. of L.A. v. Mendez, 137 S. Ct. 1539, 1548–49 (2017) (employing a proximate cause analysis in a suit against officers for an alleged unconstitutional shooting).

[268] *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 83 (1984) ("[I]ssues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."); Allen v. McCurry, 449 U.S. 90, 103–04 (1980) ("Nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims."). A distinct doctrine precludes federal litigation that would effectively overturn prior state court rulings. *See* Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 284–85 (2005) (discussing the history of the *Rooker-Feldman* doctrine).

[269] *See, e.g.*, Owens v. Okure, 488 U.S. 235, 239–40 (1989) (requiring courts "to borrow and apply to all § 1983 claims the one most analogous state statute of limitations").

the effect of these barriers to recovery is to block success on the merits for many plaintiffs with valid constitutional tort claims.[270] Unless the imbalance is somehow corrected, the result will be systematic underenforcement of constitutional norms, weak deterrence of violations, and little vindication of rights. Remedial equilibration implies that the rules on damages should favor plaintiffs, so as to correct the asymmetry.[271] Once the plaintiff has overcome the obstacles that tip the scales in the defendant's favor, damages doctrines can make up for the shortfall in constitutional protection produced by official immunity, "no vicarious liability," cause-in-fact, and other hurdles. The need to address this problem of "asymmetric entrenchment"[272] is a systemic one and may not by itself justify nominal damages litigation or any other particular remedy. That need does, however, make a helpful contribution to the argument against the Roberts Stratagem. It suggests that the anti-advisory opinions policy may be comparatively weak in the § 1983 context.

IV. LIMITS ON NOMINAL DAMAGES LITIGATION

For Chief Justice Roberts, the weakening of the personal stake requirement is a general objection to nominal damages litigation, and the Roberts Stratagem is a general solution. Yet the force of this objection depends in part on *how much* nominal damages litigation will be authorized under *Uzuegbunam*. Before *Uzuegbunam*, litigants typically would either allege past harm and request compensatory damages, claim that the threat of future harm entitled them to injunctive or declaratory relief, or ask for both prospective and compensatory retrospective relief.[273] Most litigants paid little attention to nominal damages.[274] One aspect of the Article III objection to *Uzuegbunam*'s approval of nominal damages is that litigants situated like Chika Uzuegbunam will follow his example,

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[270] *See* Coenen, *supra* note 265, at 152 ("Where a judicial analysis must 'flow' through several different gates along the way to the final issuance of the entitlement itself, the flow can be interrupted by the closing of a single gate . . . .").

[271] *See id.* at 185 (explaining that remedial equilibration is necessary to adjust the current system).

[272] *See id.* at 150–52 (describing "asymmetric entrenchment").

[273] *See supra* Section II.B.*2*.

[274] *See, e.g.*, *supra* note 53 and accompanying text.

seek nominal damages as insurance against mootness, and open the federal courts to more nominal damages litigation. In the § 1983 constitutional tort cases like *Uzuegbunam*, that cost is worth bearing, or so I have argued in Part III.

This does not mean that *Uzuegbunam* should become a general rule for all types of litigation. In other contexts, the cost of nominal damages litigation may be higher or the benefits lower, and remedial equilibration might tilt against nominal damages. Section A discusses cases like that of Joseph Bradford, in which the plaintiff has no claim for a *past* violation of constitutional rights. Section B addresses nominal damages for federal *statutory* violations. In these contexts, a strong case can be made for limits on nominal damages litigation.

A. THE UZUEGBUNAM/BRADFORD DISTINCTION

Chika Uzuegbunam's co-plaintiff was Joseph Bradford, "another GGC student who share[d] Uzuegbunam's religious beliefs and desire to speak publicly concerning those beliefs,"[275] but who "decided not to speak about religion because of" Uzuegbunam's encounters with the campus police.[276] The Court remanded Bradford's case for further proceedings.[277] In a footnote, Justice Thomas explained that "[n]ominal damages go only to redressability and are unavailable where a plaintiff has failed to establish a past, completed injury" and instructed the district court "to determine in the first instance whether the enforcement against Uzuegbunam also violated Bradford's constitutional rights."[278] This instruction to the lower courts strongly suggests that Bradford's suit for nominal damages may be dismissed for lack of a "past, completed injury."[279] But the instruction leaves an important question unanswered: It does not explain *why* the lack of such a past injury should bar Bradford's nominal damages suit. After all, nominal damages are

[275] Uzuegbunam v. Preczewski, 781 F. App'x 824, 826 (11th Cir. 2019) (per curiam).
[276] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021).
[277] *See id.* at 802 (reversing and remanding).
[278] *Id.* at 802 n.*.
[279] *See id.*

available to Chika Uzuegbunam *without* proof of compensatory damages.[280]

This question needs an answer because Chief Justice Roberts asserts in his dissent that the Court's holding "admits of no limiting principle."[281] In his view, the holding means that federal courts will be available "whenever a plaintiff asks for a dollar."[282] But Roberts may jump too quickly from identifying the Article III problem to concluding that the only solution is a wholesale rejection of nominal damages litigation.[283] Roberts's charge that the holding has no limiting principle suggests that no viable distinction can be drawn between Uzuegbunam and Bradford. Put another way, he seems to assume that Bradford's suit for prospective relief established his standing to obtain nominal damages as well. A convincing distinction between Uzuegbunam and Bradford would go far toward rebutting this objection.

This Section answers the question the Court's remand instruction leaves open. Starting with one of the few black letter rules in standing doctrine: A plaintiff must "demonstrate standing separately for each form of relief sought."[284] This means that Bradford must establish that nominal damages would redress an injury without relying on his standing to sue for prospective relief. Under the cost-benefit approach advocated in this Article,[285] Bradford should be denied a cause of action for nominal damages because his interest in vindication is weaker than Uzuegbunam's, while the Article III cost of allowing litigants like Bradford into federal court is higher than for Uzuegbunam.

1. Article III Costs and the Prospective/Retrospective Distinction. Chief Justice Roberts charged that, under the Court's holding, anyone with standing to sue for a prospective remedy at the outset of the litigation would also have available a simple means of saving

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[280] *See id.* at 802 ("[N]ominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.").

[281] *Id.* at 808 (Roberts, C.J., dissenting).

[282] *Id.* at 807.

[283] *See id.* at 809 (condemning nominal damages as "a 'gratuitous' exercise of judicial power" (citation omitted)).

[284] Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000). This principle can be traced back at least as far as *City of Los Angeles v. Lyons*. 461 U.S. 95, 110–11 (1983) (holding that standing to sue for damages does not establish standing to sue for injunctive relief).

[285] *See supra* Section II.B.*1*.

the litigation from mootness later: "If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar." [286] That is, even when prospective relief is eliminated on account of mootness, the plaintiff's request for nominal damages will require the court to resolve the case. Though Roberts does not fully articulate this objection, his assertion that the holding "admits of no limiting principle"[287] seems to rest on the mistaken assumption that a plaintiff's standing to sue for prospective relief will also establish the grounds needed to maintain a suit for damages.[288] Article III doctrine does not allow Bradford to obtain standing to sue for nominal damages just because he started the litigation with standing to sue for prospective relief.

As a practical matter, drawing a distinction between these two litigants may be critical to the viability of nominal damages litigation. If the Eleventh Circuit on remand were to rule in Bradford's favor, Chief Justice Roberts's Article III concerns would take on added weight. Because mootness would no longer exclude plaintiffs in Bradford's position who took care to seek nominal damages as well as prospective relief, the set of litigants and issues allowed into federal court would increase significantly. The increase would exacerbate tensions between nominal damages litigation and Article III. In that scenario, the case for permitting defendants to use the Roberts Stratagem would be considerably strengthened.

This point was made in an opinion by then-Judge Michael McConnell[289] and cited by Chief Justice Roberts as "insightful."[290] Judge McConnell considered the argument that "vindication of such rights remains important even when the legal rights and obligations of the parties will not be affected by the remedy."[291] But he rejected that view because it "proves too much."[292] Thus, "[i]f society's interest in 'vindicating' constitutional wrongdoing in this abstract

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[286] *Uzuegbunam*, 141 S. Ct. at 803 (Roberts, C.J., dissenting).

[287] *Id.* at 808.

[288] *See supra* note 284 and accompanying text.

[289] *See* Utah Animal Rts. Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1262–71 (10th Cir. 2004) (McConnell, J., concurring) (concurring in a First Amendment case regarding the permit process for the 2002 Winter Olympics).

[290] *Uzuegbunam*, 141 S. Ct. at 808 (Roberts, C.J., dissenting).

[291] *Utah Animal Rts. Coal.*, 371 F.3d at 1266.

[292] *Id.*

sense were sufficient to support Article III justiciability, no constitutional case would ever become moot."[293] When directed at litigants like Joseph Bradford, this objection to nominal damages litigation is well-taken. But it may be Judge McConnell's reasoning that proves too much. The mootness objection to Bradford's suit does not necessarily justify denying nominal damages to Chika Uzuegbunam, either directly or by way of the Roberts Stratagem.[294]

The Supreme Court's remand suggests that the Court may well distinguish Chika Uzuegbunam from Joseph Bradford, perhaps along the lines I have suggested. But the Court did not fully clarify the difference between the two litigants. Following Judge McConnell, the Eleventh Circuit did not recognize any difference at all.[295] It relied on its earlier en banc ruling in *Flanagan's Enterprises, Inc. v. City of Sandy Springs*.[296] In *Flanagan's*, Sandy Springs had enacted an ordinance that prohibited the sale of sexual devices.[297] Flanagan's, other businesses, and individuals wanted to buy or sell such devices, but none had been charged with violations.[298] All of them were situated like Joseph Bradford, none like Chika Uzuegbunam.[299] They sued the city on First Amendment grounds and sought both injunctive relief and nominal damages.[300] Sandy Springs then repealed the ordinance.[301] The en banc court held that the repeal mooted the request for prospective relief.[302] It then dismissed the remaining claim for nominal damages on the

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[293] *Id.*

[294] As it happens, the plaintiff in *Utah Animal Rights Coalition* was situated like Chika Uzuegbunam, not Joseph Bradford, because UARC had applied for a permit to demonstrate at the Salt Lake City Olympics and had faced delays due to the content of its speech. *Id.* at 1253–54.

[295] *See* Uzuegbunam v. Preczewski, 781 F. App'x 824, 831–33 (11th Cir. 2019) (per curiam) (dismissing the complaint against both plaintiffs).

[296] *See Uzuegbunam*, 781 F. App'x at 830–32 (citing Flanagan's Enters., Inc. v. City of Sandy Springs, 868 F.3d 1248 (11th Cir. 2017) (en banc)).

[297] *See Flanagan's*, 868 F.3d at 1253 (providing the facts of the case).

[298] *See id.* at 1253–54 (detailing the various plaintiffs involved in the suit).

[299] *See id.* (showing that the plaintiffs "wanted" to purchase the sexual devices but had not withstood compensable harm).

[300] *See id.* (detailing the complaint).

[301] *See id.* at 1254 (noting that the ordinance had been repealed).

[302] *See id.* at 1263 (finding that the claims were not properly before the court because the city repealed the ordinance and there was "no reasonable expectation" that the city would return to the prior rule).

broad ground that "[n]ominal damages . . . are not themselves an independent basis for [federal] jurisdiction."[303]

Given *Flanagan's*, it is easy to understand why the Eleventh Circuit panel in *Uzuegbunam* chose to relegate its opinion in that case to the Federal Appendix. It viewed the issue as settled. *Flanagan's* had conflated all litigants requesting nominal damages and prospective relief, but no compensatory relief.[304] It had drawn no distinction between litigants like Uzuegbunam, who assert both past and threatened future constitutional violations, and litigants like Bradford, who assert only rights against threatened future violations. Chief Justice Roberts did so as well.[305] Since the *Flanagan's* litigation included no plaintiff like Uzuegbunam, meaning one to whom the ordinance had already been applied, the court may have overlooked differences between the litigants before it and the litigant in a hypothetical case that would resemble the later *Uzuegbunam* litigation.[306] Joseph Bradford's case presents both the opportunity and the need to draw that distinction.

If Bradford's case for nominal damages were allowed to go forward, Chief Justice Roberts's and Judge McConnell's fears would be realized. Judge McConnell is correct that nominal damages suits like Bradford's would severely restrict the application of the mootness doctrine in suits that challenge official practices because dropping the practice would no longer produce mootness. Chief Justice Roberts is correct that litigants who start out with Article III standing could keep their cases alive through judgments on the merits by adding requests for nominal damages. The risk of a proliferation of advisory opinions would be increased significantly.

That risk can be limited by allowing only litigants like Uzuegbunam to maintain such suits. When the dilution of Article III values is comparatively small, as it is on the facts of *Uzuegbunam*, competing goals such as vindication of rights and

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[303] *Id.* at 1268–69.

[304] *See id.* at 1263, 1267 (noting that the "claims for declaratory and injunctive relief" were not properly before the court and that nominal damages cannot "preserve an otherwise moot case").

[305] The en banc court endorsed McConnell's view. *See id.* at 1267 ("[A] prayer for nominal damages cannot save an otherwise moot case.").

[306] The issue raised in *Uzuegbunam* was hardly a novel one. *See, e.g.*, Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 345–46 (5th Cir. 2017) (holding that a student who claimed a free speech violation, but who had graduated, could maintain a suit for nominal damages even though her request for prospective relief was moot).

deterrence of violations can overcome the Article III objection. Bradford's suit, if valid, would produce a far higher Article III cost by undermining mootness doctrine. Authorizing his suit would help to validate Chief Justice Roberts's charge that *Uzuegbunam* will result in "a radical expansion of the judicial power"[307] to the detriment of the limited role for the federal courts in our system of separation of powers.

2. Comparing Uzuegbunam's and Bradford's Interests in Vindication. Both Chika Uzuegbunam and Joseph Bradford had interests in vindicating their constitutional rights by challenging GGC's speech restrictions.[308] But they were not similarly situated. Police officers ordered Uzuegbunam to stop speaking.[309] Those orders compelled Uzuegbunam to submit or else to risk arrest.[310] The orders gave rise to a comparatively strong claim for vindication on his part. Bradford was never compelled to do or refrain from doing anything.[311] The point here is not to deny Bradford's interest in obtaining a remedy, at least at the outset of the litigation. But the interest in vindication may be comparatively strong or weak, depending on who is asserting the interest and in what context. Uzuegbunam's case for a retrospective remedy is stronger than Bradford's, as he was the actual target of enforcement. Police officers confronted Uzuegbunam and told him what he may and may not do. No officer told Bradford to do anything.

Modern standing and justiciability doctrines authorize Bradford to sue for prospective relief if he can meet the standing, mootness, and ripeness requirements the Court has set up to safeguard Article III values. At the outset of the litigation in *Uzuegbunam*, Bradford probably had standing to sue for prospective relief. The facts of his case closely track those of *Steffel v. Thompson*.[312] In that case, Steffel and a companion distributed anti-war handbills at a

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[307] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 806 (2021) (Roberts, C.J., dissenting).

[308] *See id.* at 797 (majority opinion) (noting that both students challenged GCC's speech policies).

[309] *See id.* (detailing the police stopping Uzuegbunam's speech).

[310] *See id.* (noting that the officers threatened "disciplinary action").

[311] *See id.* ("Another student who shares Uzuegbunam's faith, Joseph Bradford, decided not to speak about religion because of these events.").

[312] *See* Steffel v. Thompson, 415 U.S. 452, 455–56 (1974) (explaining that after another had been arrested for handbilling at a shopping center, the petitioner did not return even though "he desired to return to the shopping center to distribute handbills" out of fear that he would be arrested).

shopping center.[313] The police told them to leave, and Steffel complied.[314] His companion "continued handbilling[] and was arrested and [charged] with criminal trespass."[315] The warning to Steffel and his companion's arrest established the threat of prosecution Steffel needed to meet Article III requirements.[316] If Steffel could sue for prospective relief, then so could Bradford. Under *Steffel*, Bradford probably could do so at the outset of the litigation.[317] But that vindication interest vanished when the speech regulations were rescinded.

Whether Bradford may sue for nominal damages is a very different question. Given the rule that standing must be established separately for each form of relief sought, his nominal damages claim must look only to the past and cannot trade on his interest in eliminating the threat of future compulsion. Some litigants in Bradford's position seek prospective relief to enforce some "public right," defined as one "held collectively by the community."[318] The vindication rationale for nominal damages is especially weak in that context. Bradford, however, asserts his individual right under the First Amendment.[319] His interest in vindication cannot be so easily dismissed. Still, his claim for vindication by way of nominal damages depends entirely on the psychological experience of anticipating a potential disagreeable encounter with the campus police. Compared to Chika Uzuegbunam's case, this diffuse and abstract injury gives rise to a weaker claim for vindication via nominal damages. Having been stopped by the police, Uzuegbunam may prove "a past, completed injury," which would justify an award

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[313] *See id.* at 452–54 (providing the facts of the case).

[314] *See id.*

[315] *Id.*

[316] *Id.* at 475.

[317] *See, e.g.*, Cassell v. Snyders, 990 F.3d 539, 546–47 (7th Cir. 2021) (finding that Illinois rescinding COVID-19 restrictions did not necessarily render the case moot).

[318] Hessick, *supra* note 13, at 279 (footnote omitted). A state suing to enforce environmental regulations probably falls into this category of enforcing a "public right." *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 510 (2007) (discussing the effect of climate change on general "human health and the environment").

[319] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (noting that the plaintiffs sued for First Amendment violations).

of nominal damages.[320] Joseph Bradford was not stopped and has no such claim. [321]

These comparisons between Uzuegbunam and Bradford's claims suggest that both the costs and the benefits of suits for nominal damages favor Uzuegbunam's suit and weigh against Bradford's. Because remedial equilibration can justify a distinction between their cases, two worthy goals are compatible: (1) nominal damages litigation can vindicate constitutional rights in § 1983 cases involving past violations without allowing defendants to profit from the Roberts Stratagem; and (2) a "radical expansion of the judicial power"[322] can be avoided by distinguishing the two cases and dismissing Bradford's suit.

B. FEDERAL STATUTORY RIGHTS

Remedial equilibration balances Article III values against the plaintiff's interest in a remedy. Even if that balance favors nominal damages litigation when the plaintiff asserts constitutional rights, as in *Uzuegbunam*, it may tip in favor of limiting expansion of federal jurisdiction in other contexts. When a plaintiff's federal *statutory* rights are violated, the considerations favoring nominal damages litigation may be weaker than in the constitutional context, and the shifting balance may justify rejection of nominal damages litigation.

Chief Justice Roberts frames the question of whether to allow nominal damages as a trans-substantive choice between the constitutional values underlying Article III and the "trivial" benefits

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[320] *See id.* at 796, 809 n.* (describing Uzuegbunam's speech being prevented and the requirement of a "past, completed injury").

[321] *Uzuegbunam*, 141 S. Ct. at 797, 802, 809 n.* (2021) (describing the issue as to Joseph Bradford's standing to seek nominal damages, which the lower courts are instructed to address on remand). This distinction between Uzuegbunam and Bradford does not depend on the notion that Bradford was not upset by the actions of the police or did not experience any genuine threat. Granting that Bradford felt upset and threatened, the distinction hinges on the proposition that his psychological reaction (or, rather, the reaction of most people in his position) was probably less intense than that of Uzuegbunam, the actual target of enforcement. It is appropriate to base rules on probabilities. *See* Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, *in* CLARENDON LAW SERIES 27–31 (Tony Honoré & Joseph Raz eds., 1991) (discussing generalization and probability). In addition, the Article III costs of allowing Bradford's suit for nominal damages are significantly higher.

[322] *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C.J., dissenting).

of nominal damages.[323] This polarity does not take account of remedial context. The central insight underlying remedial equilibration is that context should matter because justiciability, rights, and remedies are linked to one another.[324] The law-making goal is not to accord Article III an ordinal priority over other considerations. It is "to try to reach an optimal alignment of substantive, justiciability, and remedial doctrines."[325] A shift in substantive or remedial context may call for a different "alignment" of the three doctrines. Thus, standing doctrine should be framed "in light of remedial concerns better appraised at the right-specific than at a trans-substantive level."[326] As applied to nominal damages litigation, *Uzuegbunam* can be distinguished from litigation seeking nominal damages for violations of federal statutes because the justiciability costs of nominal damages litigation may outweigh the remedial value when the rights at stake are statutory rather than constitutional.

1. Statutory vs. Constitutional Rights. Suppose the plaintiff seeks nominal damages for violation of a statutory entitlement rather than a constitutional right. A variation on *Spokeo v. Robins* illustrates the issue raised by such a case.[327] *Spokeo* involved a claimed violation of the Fair Credit Reporting Act of 1979 (FCRA).[328] Among other things, the FCRA requires consumer reporting agencies, such as Spokeo, to "follow reasonable procedures to assure maximum possible accuracy of" reports.[329] Robins claimed that Spokeo's report on him contained inaccuracies and that the inaccuracies resulted from Spokeo's violations of the FCRA.[330] Though the inaccuracies were not defamatory or obviously harmful, he sued to recover compensatory damages.[331] At the Supreme Court,

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[323] *Id.* at 803 (expressing concern that "nominal damages can save a case from mootness . . . no matter how trivial" the size of the relief is).

[324] *See* Levinson, *supra* note 154, at 873–74 (discussing the relationship between constitutional rights and remedies).

[325] Fallon, *Linkage*, *supra* note 145, at 689.

[326] *Id.* at 698, 705.

[327] 136 S. Ct. 1540 (2016).

[328] *See id.* at 1543 (noting that the complaint alleged "that the company willfully failed to comply with the FCRA's requirements").

[329] 15 U.S.C. § 1681e(b).

[330] *See Spokeo*, 136 S. Ct. at 1544, 1546 (describing the inaccuracies in the search information).

[331] The statute authorizes recovery of "actual damages" or "statutory damages" ranging from $100 to $1000. *See* 15 U.S.C. § 1681n(a).

the issue was whether Robins had sufficiently alleged an "injury" to meet the Court's rule that standing to sue requires a "concrete and particularized" injury.[332] The Court held that he alleged a "particularized" injury because he complained about information pertaining to himself and remanded the case for a determination as to whether that injury was sufficiently "concrete" to meet Article III standards.[333] On remand, the Ninth Circuit panel ruled that he had met the "concreteness" requirement.[334]

Would the outcome be different if Robins sought only *nominal* damages?[335] Uzuegbunam is certainly a strong precedent for allowing nominal damages litigation for FRCA violations. The policy argument in Robins's favor is that allowing the suit to go forward would serve the FCRA's goals because judicial enforcement would provide an incentive to follow the statutory norms and enable Robins to vindicate his rights. Spokeo's side of the nominal damages issue is that the interests protected by the FCRA, or any other statute, are presumptively weaker than the First Amendment rights at stake in *Uzuegbunam*, just because they lack constitutional status. On this premise, the argument against awarding nominal damages is that this statutory context should be distinguished from the constitutional rights asserted in *Uzuegbunam* because the vindication and deterrence goals are not as strong in the FCRA context, and the remedial-justiciability balance should tip in favor of the defendant.[336]

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[332] *See Spokeo*, 136 S. Ct. at 1545 ("[T]he injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized.'" (citation omitted)).

[333] *See id.* at 1550 (concluding that the Ninth Circuit "failed to fully appreciate the distinction between concreteness and particularization").

[334] *See* Robins v. Spokeo, 867 F.3d 1108, 1118 (9th Cir. 2017) ("We are satisfied that Robins has alleged injuries that are sufficiently concrete for the purposes of Article III.").

[335] For purposes of considering this hypothetical case, please ignore the fact that, under the statute, Robins would surely ask for statutory damages of at least $100 if he could not prove higher actual damages. *See supra* note 331. It should also be noted that the litigation was framed as a class action. *Spokeo*, 136 S. Ct. at 1543. That feature helps to explain the practical importance of the questions the Court addressed but is distinct from the damages issue, which is relevant to non-class action suits as well.

[336] Some statutory rights may warrant nominal damages while others do not. It would be far harder to justify a *categorical* constitutional-statutory distinction. For a discussion of the pros and cons of broad distinctions between constitutional and statutory rights, and a skeptical view of the value of drawing them, see Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 688–89 (2013). Professor Coenen is somewhat less antagonistic, though not especially sympathetic, toward the kind of "pragmatically driven" remedial distinctions discussed in this section. *See id.* at 689–90.

The answer to the nominal damages issue should probably turn on how best to implement congressional policy in the context of particular federal statutes, an issue that is peripheral to my topic. For present purposes, the important point is that *Uzuegbunam* does not control the answer to the hypothetical FCRA nominal damages issue. Nor would the answer to the FCRA nominal damages issue control the outcome when the role of nominal damages is raised in connection with a different statute. Federal statutory law covers a variety of topics. Each statutory context should be evaluated on its own merits. Nominal damages litigation may be appropriate in some cases but not others, depending on resolution of the tension between the plaintiff's vindication and deterrence interests and Article III values in a given statutory context. Remedial equilibration suggests only that the balance among rights, remedies, and justiciability may come out differently than in *Uzuegbunam* when the plaintiff asserts statutory rights.

An analogy to a recent Supreme Court case may help to illustrate the distinction I have in mind. Nominal damages resemble "statutory damages," a recovery authorized by the terms of a particular statute without proof of compensatory damages.[337] A few months after *Uzuegbunam*, the Supreme Court provided some support for distinctions among plaintiffs in *TransUnion, LLC v. Ramirez*,[338] a class action case in which the plaintiffs sought statutory damages for violations of the Fair Credit Reporting Act.[339] The relevant part of the case for present purposes involved a distinction between two groups of plaintiffs. One group claimed that TransUnion, a credit reporting agency, had disseminated false information about them to others.[340] The Court held that these plaintiffs had standing to sue for statutory damages.[341] Other members of the class claimed only that TransUnion held the false

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[337] *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 800 (2021) ("Nominal damages are . . . the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.").

[338] 141 S. Ct. 2190 (2021); *see Leading Cases*, *supra* note 1, at 333 (summarizing the case and arguing that the holding "will likely make it more difficult for class action plaintiffs to have their day in federal court").

[339] *See supra* note 331.

[340] *See TransUnion*, 141 S. Ct. at 2200 (noting that 1,853 of the class members claimed that "TransUnion provided misleading credit reports to third-party businesses").

[341] *See id.* at 2208 (connecting the dissemination of the false information to reputational harms associated with defamatory statements).

information in violation of the FCRA.[342] The Court rejected standing for these plaintiffs, explaining that they could not satisfy the "concrete injury" requirement for standing.[343]

The distinction the Court draws between class members who may and may not sue for statutory damages under the FCRA is roughly analogous to the distinction I have suggested between plaintiffs who may or may not sue for nominal damages under a hypothetical federal statute. As with statutory damages in *TransUnion*, Article III values may prevail in some contexts but not others. For example, it might be held that environmental plaintiffs can sue for compensatory damages if they prove particularized harm from a violation of environmental statutes, but that, without proof of harm, they suffer no "concrete" injury entitling them to nominal damages.[344]

2. Section 1983 "Laws" Litigation. One last point should be noted with regard to federal statutes. Some statutory rights may be asserted in § 1983 suits, as § 1983 authorizes suits for violations of some federal "laws."[345] Since *Uzuegbunam* is a § 1983 suit, it may seem appropriate to treat that case as precedent for allowing nominal damages suits to enforce the federal statutes that qualify for § 1983 suits. But that use of *Uzuegbunam* would be confuse the remedial mechanism—§ 1983—with the substantive rights at issue. From the standpoint of remedial equilibration, it is the latter that should be compared because the aspect of *Uzuegbunam* that drives the outcome is the plaintiff's assertion of violation of a constitutional right. That is the element that justifies overriding Article III concerns and thus rejecting the Roberts Stratagem for § 1983

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[342] *See id.* at 2200 (noting that 6,332 class members' information was "*not* provided to third-party businesses").

[343] *See id.* at 2209–13 ("The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.").

[344] See Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992) (requiring a more concrete injury because the the plaintiffs did not have plans to visit the environmental area).

[345] *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (noting that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"). Federal statutory rights may be raised in § 1983 litigation only if the statute creates "enforceable rights" and only if Congress has not foreclosed enforcement by § 1983 suits. *See* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (recognizing two exceptions to applying § 1983 statutory violations for instances where Congress foreclosed private enforcement and where the statute itself "created enforceable 'rights' under § 1983"). *See* SHELDON H. NAHMOD, MICHAEL L. WELLS & FRED O. SMITH, JR., CONSTITUTIONAL TORTS 286–301 (5th ed. 2020) (discussing § 1983 "laws" doctrine).

constitutional claims. These grounds for disallowing the Roberts Stratagem would fully apply to constitutional tort suits brought against federal officers under the federal common law *Bivens* cause of action.[346] Conversely, the fact that *Uzuegbunam* was a § 1983 case is irrelevant when § 1983 is used to enforce statutory rights.

To illustrate the possible distinction I have in mind, compare two § 1983 "laws" cases, each involving the federal Medicaid statute. In *Wheaton v. McCarthy*, a patient sued for denial of benefits.[347] In *BT Bourbonnais Care, LLC v. Norwood*, nursing homes sued to be reimbursed for services.[348] In both cases, the plaintiffs obtained rulings that they could maintain suits under § 1983 to obtain compensatory damages for statutory violations.[349] Now suppose that each plaintiff sued for nominal damages instead. In my view, courts might draw a viable distinction between the two cases because the patient in *Wheaton* has a comparatively strong case for vindication while the nursing homes in *BT Bourbonnais* have a comparatively weak one.

Without getting into the details of either case—none of which are particularly relevant here—the core argument for distinguishing between them is that the *Wheaton* plaintiff has in some measure funded the benefits if he has ever held a job and paid social security taxes.[350] Forced participation gives rise to a claim to fair treatment, as well as for the monetary benefits of the system. Nominal damages may be an appropriate remedy even if the plaintiff can prove no monetary loss. The nursing home in *BT Bourbonnais*

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[346] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("[J]ust as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised." (citations omitted)). I cite *Bivens* only to distinguish constitutional claims from statutory claims. The continuing vitality of *Bivens* is a (much-debated) separate question. In current litigation, courts routinely reject its application to novel claims. *See, e.g.*, Butler v. Porter, 999 F.3d 287, 293–96 (5th Cir. 2021) (declining to extend *Bivens* to First Amendment retaliation claims).

[347] *See* 800 F.3d 282, 285 (6th Cir. 2015) (noting the plaintiffs alleged that "the Department's denial of their applications violated the Medicaid Act").

[348] *See* 866 F.3d 815, 817 (7th Cir. 2017) (noting that ten nursing homes sued to recover funds allegedly owed under Medicaid).

[349] *See Wheaton*, 800 F.3d at 289 (remanding for further proceedings); *BT Bourbonnais Care*, 866 F.3d at 824 (holding that the case was not barred).

[350] Social security taxes are not the only funding for the system. The issue in the case was whether the plaintiff was entitled to assistance with monthly copayments. *See Wheaton*, 800 F.3d at 284–85 (alleging that the state's denial of aid violated the Medicaid Act).

participates voluntarily in the system.[351] It is entitled to payments authorized by the statute,[352] but its interest in vindication of its statutory rights may be weaker than in *Wheaton*. Article III values may carry the day in *BT Bourbonnais*, even if the patient's vindication interest overrides them in *Wheaton*.

V. CONCLUSION

Chief Justice Roberts thinks that nominal damages are a "consolation prize,"[353] and Judge Posner thinks plaintiffs who receive them would do well to say nothing about their recovery, or else risk being laughed at.[354] Professor Dan Dobbs, an expert on the law of remedies, calls nominal damages "a rescue operation."[355] No doubt these sentiments are widely shared. The reasoning behind them is that the point of a tort suit is to receive a monetary award, and plaintiffs' successes are measured by how much they recover. When this attitude is held by judges, it can have important consequences. Chief Justice Roberts would permit defendants to avoid judgments on the merits by paying nominal damages. The prospects of the Roberts Stratagem may depend on whether three more Supreme Court Justices will join Chief Justice Roberts and Justice Kavanaugh in viewing nominal damages as a trivial remedy.

At least in the context of § 1983 litigation, the derision is unwarranted. Under the *Carey*/*Stachura* rules, substantial compensatory damages are typically limited to business cases, in which the loss can be measured in dollars, and to plaintiffs with serious physical injuries or their estates. In many § 1983 cases, nominal damages, or small compensatory damages, are the sole means available to vindicate constitutional rights. So long as nominal damages litigation is confined to cases like *Uzuegbunam*, in which the plaintiff has "establish[ed] a past, completed injury" by

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[351] *See BT Bourbonnais Care*, 866 F.3d at 817 (noting that all ten of the nursing homes had previously obtained a license and Medicare provider number).

[352] *See id.* at 821 (holding that the Medicaid plan benefitting the plaintiffs thus conferred an obligation on states to administer it).

[353] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 805 (2021) (Roberts, C.J., dissenting).

[354] *See* Moore v. Liszewski, 838 F.3d 877, 879 (7th Cir. 2016) ("If the plaintiff goes around bragging that he won his suit, and is asked what exactly he won, and replies '$1 dollar,' he'll be laughed at.").

[355] Dobbs, *supra* note 13, at 296.

the police or other officials,[356] the "advisory opinion" cost of nominal damages cases is small and well worth bearing. The Roberts Stratagem would eviscerate nominal damages litigation and jettison its contribution to the vindication of constitutional rights. For these reasons, the better course is to reject Chief Justice Roberts's "sweeping exception" to the salutary rule laid down in *Uzuegbunam*.[357]

[356] *Uzuegbunam*, 141 S. Ct. at 802 n.*.
[357] *Id.* at 808 (Roberts, C.J., dissenting).