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## INTERPRETING CONGRESS'S CREATION OF ALTERNATIVE REMEDIAL SCHEMES

How far must Congress go to foreclose a preexisting federal remedial scheme? A number of statutes and judicially crafted doctrines offer plaintiffs recourse for the violation of constitutional or statutory rights.<sup>1</sup> Plaintiffs can enjoin unlawful acts or sue for damages, but Congress can presumptively shape or foreclose those remedies. When it explicitly prescribes remedies available to a plaintiff, its command controls.<sup>2</sup> But if Congress fails to speak clearly, the inquiry proves thorny. When Congress creates alternative remedial schemes, courts purportedly attempt to read the tea leaves to divine whether it intended to foreclose other typical paths of relief.<sup>3</sup> If that task sounds difficult, that's because it is.

The question has serious implications. *Marbury v. Madison*<sup>4</sup> tells us that "every right, when withheld, must have a remedy."<sup>5</sup> Yet that lode-star has never been fully realized.<sup>6</sup> Congress explicitly authorized suits for damages or injunctive relief against state officials in 1871,<sup>7</sup> but has neglected to do the same for suits against federal actors.<sup>8</sup> Courts have filled in some gaps. For instance, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>9</sup> provides for damages where federal officials violate (some) constitutional rights.<sup>10</sup> And plaintiffs may presumptively pursue claims for injunctive relief where officials run afoul

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<sup>1</sup> See, e.g., 42 U.S.C. § 1983 (providing for damages and injunctive relief against state officials for violations of the Constitution or other federal laws); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (providing for damages where federal actors violate the Fourth Amendment); *Ex parte Young*, 209 U.S. 123, 167–68 (1908) (permitting prayers for injunctive relief against state actors to enjoin constitutional and federal statutory violations).

<sup>2</sup> See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552–53 (1972) ("Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy."); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 185 (1969).

<sup>3</sup> See, e.g., *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

<sup>4</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>5</sup> *Id.* at 147.

<sup>6</sup> See, e.g., Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 970 (2019) ("[W]e should not assume that a scheme of federal remedies for constitutional rights violations would include full compensation for every victim."); John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 88 (1999) ("Since no remedial scheme will be optimal for all plaintiffs, legislative power to provide one remedy and withhold another strongly implies that there will be situations where individual victims of constitutional violations do not receive effective redress.").

<sup>7</sup> See 42 U.S.C. § 1983.

<sup>8</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

<sup>9</sup> 403 U.S. 388.

<sup>10</sup> See *id.* at 389.

of the Constitution.<sup>11</sup> But in each context — § 1983,<sup>12</sup> *Bivens*, and *Ex parte Young*<sup>13</sup> — the Supreme Court has instructed that Congress may foreclose relief where it enacts its own remedial scheme.<sup>14</sup> As a result, inferences drawn from the creation of congressional alternatives make or break a plaintiff's case: if Congress has authorized one exclusive path of relief, plaintiffs must walk that road, even where it might fail to afford a complete remedy.<sup>15</sup>

This Note surveys the Supreme Court's evolving approach to congressional alternatives. Part I traces the Court's inquiry across *Bivens*, § 1983, and *Ex parte Young*. It shows that the Court's emphasis on alternatives emerged after *Bivens* because it doubted its authority to weigh policy considerations inherent in designing remedies — policy is Congress's prerogative, not the Court's.<sup>16</sup> But the inquiry soon spread. It bled into the § 1983 context in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.<sup>17</sup> And it more recently reached injunctive relief claims under *Young* in *Seminole Tribe of Florida v. Florida*.<sup>18</sup> Doctrinally, the Court purports to treat the existence of congressional alternatives similarly across each remedial scheme.<sup>19</sup> Operationally, differences emerge.<sup>20</sup> For instance, the Court has far more willingly allowed alternative remedies to displace *Bivens* claims than § 1983 suits.

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<sup>11</sup> See *Ex parte Young*, 209 U.S. 123, 167–68 (1908); see also *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (“It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials.” (citations omitted) (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 838–39 (1824); *Young*, 209 U.S. at 150–51; *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902))).

<sup>12</sup> 42 U.S.C. § 1983.

<sup>13</sup> 209 U.S. 123.

<sup>14</sup> See *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (“When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the court's power should not be exercised.”); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.”).

<sup>15</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 428–29 (1988) (refusing to recognize a *Bivens* damages remedy even where the alternative scheme devised by Congress did not “fully remed[y]” the plaintiff's injuries, *id.* at 428).

<sup>16</sup> See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (“With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy.” (citation omitted)).

<sup>17</sup> 453 U.S. 1, 20.

<sup>18</sup> 517 U.S. 44, 74.

<sup>19</sup> See *infra* section I.A, pp. 1501–07.

<sup>20</sup> See *infra* section I.B, pp. 1507–12.

This Note suggests that divergent treatment may be for good reason. Part II compares *Young* suits to enjoin unconstitutional actions and statutory violations to show that separation of powers and federalism concerns wax and wane by context. Drawing on *Armstrong v. Exceptional Child Center, Inc.*<sup>21</sup> and *Alexander v. Sandoval*,<sup>22</sup> this Note argues that inquiries into congressional alternatives are not ultimately about reading statutory text to divine intent. Instead, in deciding whether a plaintiff has a right of action, the Court has silently enacted a series of default rules to decide when to permit suit to enjoin unlawful action — rules that ratchet up and down depending on the nature of the violation (constitutional or statutory) and the relief sought (injunctive or damages). That framework accounts for the divergent treatment of congressional alternatives across *Bivens*, § 1983, and *Young*. It also helps explain the Court’s invocation of equitable rights of action to enjoin unlawful state enforcement actions.

## I. CONGRESSIONAL ALTERNATIVES IN THEORY AND PRACTICE

### A. *Theoretical Alignment Across Bivens, 42 U.S.C. § 1983, and Ex parte Young*

*Bivens*, § 1983, and *Young* each rest on a distinct doctrinal foundation. *Bivens* is an invention of federal common law, a judicially crafted doctrine permitting suits for damages against federal actors for violating the Fourth Amendment.<sup>23</sup> Recent precedent has eroded its already-shaky footing.<sup>24</sup> Section 1983, by contrast, is an express statutory right of action authorizing suits for damages or injunctive relief against state officials.<sup>25</sup> *Young* permits injunctive relief claims against either state or

<sup>21</sup> 135 S. Ct. 1378 (2015).

<sup>22</sup> 532 U.S. 275 (2001).

<sup>23</sup> See Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975) (“[*Bivens*] apparently derives the right to damages from the fourth amendment itself. But, unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee, it is not constitutional interpretation, but common law.” (footnote omitted)); see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 120 (2009).

<sup>24</sup> See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 742–43 (2020); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) (“What started out as a presumption in favor of implied rights of action has become a firm presumption against them. The Supreme Court has not recognized a new *Bivens* action in the 40 years since *Carlson*. And it has repeatedly declined invitations . . . to create such actions.”).

<sup>25</sup> See Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 415 (1982) (explaining that “[r]ecognition of a right of action under section 1983 avoids most of the problems associated with implied causes of action” because “[m]ost fundamentally, the critical problem — that of judicial authority — disappears” given that “Congress itself has created the cause of action”).

federal actors, at least in some circumstances.<sup>26</sup> Each doctrine (or statute) authorizes different kinds of relief and is founded upon its own legal substructure.

Yet despite these obvious differences, when a plaintiff walks into court and brings a claim under *Bivens* or § 1983, or a claim premised on *Young*, a question lingers across all three: Did Congress enact an alternative scheme to address this violation?<sup>27</sup> If the answer is yes, courts must decide whether the existence of that scheme implies Congress's intent to foreclose relief. If not, the plaintiff's claim clears a critical threshold.

I. *Bivens Claims for Damages Against Federal Officers*. — Begin with *Bivens*, which permits damages claims against federal officers for constitutional violations. After an invasive, aggressive, warrantless search, *Bivens* sued the federal agents involved for damages.<sup>28</sup> Yet the Fourth Amendment says nothing about damages.<sup>29</sup> And Congress has not authorized damages against federal actors for running afoul of the Amendment's requirements.<sup>30</sup> Writing for the Court, Justice Brennan cast those roadblocks aside. He explained that the case "involve[d] no special factors counselling hesitation"<sup>31</sup> and that Congress did not affirmatively bar legal relief.<sup>32</sup> And because "[t]he 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,"<sup>33</sup> the Court concluded that *Bivens* had stated a right of action "under the Fourth Amendment" and held him entitled to money damages.<sup>34</sup>

*Bivens* ceded ultimate control to Congress. For one, were Congress to explicitly bar damages remedies, that would foreclose relief.<sup>35</sup> For

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<sup>26</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (noting the availability of injunctive relief against federal officers). This Note refers to these claims as *Young* actions, though some iterations might be more accurately characterized as equitable rights of action. See *Armstrong*, 135 S. Ct. at 1384. Part II explores the issue in greater depth.

<sup>27</sup> See sources cited *supra* note 14.

<sup>28</sup> *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971).

<sup>29</sup> See U.S. CONST. amend. IV.

<sup>30</sup> Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1118 (1989) ("There is, however, no counterpart to section 1983 for federal officials. If, for example, an FBI agent or a Treasury officer exceeds the strictures of the fourth amendment, any available damages claim must be rooted in the Constitution itself.")

<sup>31</sup> *Bivens*, 403 U.S. at 396.

<sup>32</sup> *Id.* at 396–97.

<sup>33</sup> *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see also *Davis v. Passman*, 442 U.S. 228, 247 (1979). In *Davis v. Passman*, 442 U.S. 228, the Court extended *Bivens* to allow a damages claim under the Fifth Amendment's Due Process Clause to remedy sex discrimination. See *id.* at 229–30. In so concluding, the Court found that § 717 of Title VII of the Civil Rights Act of 1964 did not implicitly foreclose relief. See *id.* at 247. Justice Brennan wrote for the majority and doubled down on his view in *Bivens*: "There is no

another, if Congress created another “equally effective” remedy, that may give cause for pause.<sup>36</sup> But absent those circumstances or any other “special factors counselling hesitation,”<sup>37</sup> courts could permit damages claims against federal officers.<sup>38</sup> Along the way, the Court said nothing about suits for violations of statutory, rather than constitutional, rights. But while acknowledging Congress’s override power, *Bivens* paved the way for cases recognizing damages remedies against federal officers for constitutional violations.

Subsequent decisions cemented *Bivens*’s basic approach to congressional alternatives. One early follow-up, *Carlson v. Green*,<sup>39</sup> extended *Bivens* to Eighth Amendment violations, seemingly putting a heavy burden on Congress by requiring that it “intend[] the statutory remedy to replace, rather than to complement, the *Bivens* remedy.”<sup>40</sup> But *Carlson* proved a high-water mark.<sup>41</sup> *Bush v. Lucas*<sup>42</sup> considered (and rejected) a federal employee’s right of action to sue his former supervisor for damages for violating his First Amendment rights.<sup>43</sup> Because civil servants are “protected by an elaborate, comprehensive scheme . . . by which improper action may be redressed,” courts could not augment that system with a judicially crafted damages remedy.<sup>44</sup> Never mind that the Court “found no indication that Congress intended the remedial provisions of the civil service rules to be a ‘substitute’ for a *Bivens* action.”<sup>45</sup> The mere existence of an alternative proved enough.

So too in *Schweiker v. Chilicky*.<sup>46</sup> The Court reasoned that “[w]hen the design of a Government program suggests that Congress has

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evidence . . . that Congress meant § 717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from the ‘clearly discernible will of Congress’ perceived by the Court of Appeals.” *Id.* (quoting *Davis v. Passman*, 571 F.2d 793, 800 (5th Cir. 1978)).

<sup>36</sup> *Bivens*, 403 U.S. at 397; see also T. Ward Frampton, Comment, *Bivens’s Revisions: Constitutional Torts After Minneci v. Pollard*, 100 CALIF. L. REV. 1711, 1727 (2012) (explaining that the inquiry into alternative remedial schemes emanated from “separation-of-powers principles” and the federal judiciary’s “respect for Congress”).

<sup>37</sup> *Bivens*, 403 U.S. at 396.

<sup>38</sup> See Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1251 (1988) (noting that adequate alternative remedies and special factors are the two primary exceptions to *Bivens* damages awards).

<sup>39</sup> 446 U.S. 14 (1980).

<sup>40</sup> *Id.* at 19 n.5.

<sup>41</sup> Fallon, *supra* note 6, at 950.

<sup>42</sup> 462 U.S. 367 (1983).

<sup>43</sup> *Id.* at 368.

<sup>44</sup> *Id.* at 385.

<sup>45</sup> See Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, *supra* note 38, at 1255 (quoting *Bush*, 462 U.S. at 378).

<sup>46</sup> 487 U.S. 412 (1988). *Chilicky* considered, and rejected, a damages claim under the Fifth Amendment’s Due Process Clause against federal officials administering the Social Security disability program for unlawfully denying benefits. See *id.* at 414.

provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.”<sup>47</sup> Indeed, Congress need not “fully remed[y]” the constitutional violation for its provision of an alternative scheme to control.<sup>48</sup> Taken together, *Chilicky* and *Bush* make clear what *Bivens* suggests.<sup>49</sup> Of course, Congress’s creation of an alternative is just one of many off-ramps the Court now uses to justify cabining *Bivens*. But that has been and remains one common path. When Congress enacts its own remedial scheme to cover the violation at issue, that gives reason for courts to back off. That’s true even if that alternative leaves a plaintiff with no recourse for prior constitutional violations.

2. *Claims for Injunctive Relief and Damages Against State Actors Under § 1983.* — Turn next to 42 U.S.C. § 1983, which permits suits for both damages and injunctive relief against state officers for both statutory and constitutional violations.<sup>50</sup> Note that § 1983, which applies only to state officers, goes far beyond what *Bivens* allows. It permits suit not only for damages, but also for injunctive relief. And it applies not only to constitutional violations, but also to statutory ones. Still, the Court’s § 1983 cases purportedly use the same congressional alternative approach to decide when Congress implicitly forecloses a remedy against state officials.

*Sea Clammers* is the leading case. It considered whether plaintiffs could sue state officials and entities in New York and New Jersey<sup>51</sup> for discharging sewage into New York Harbor and the Hudson River.<sup>52</sup> Writing for the Court in language closely paralleling the *Bivens* cases, Justice Powell explained that “[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”<sup>53</sup> He went on: “As discussed above, the [statutes] do provide quite comprehensive enforcement mechanisms. It is hard to believe that Congress intended to preserve the § 1983 right of action when it created

<sup>47</sup> *Id.* at 423.

<sup>48</sup> *Id.* at 428; *see id.* at 428–29 (“We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the ‘belated restoration of back benefits.’ . . . Congress, however, has addressed the problems created by state agencies’ wrongful termination of disability benefits.”).

<sup>49</sup> Recent cases only reaffirm the point. *See, e.g.,* *Wilkie v. Robbins*, 551 U.S. 537, 552 (2007) (declining to allow a damages claim premised on *Bivens* where the plaintiff “had some procedure to defend and make good on his position” using administrative channels); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (doing the same where “state tort law authorizes adequate alternative damages actions”).

<sup>50</sup> *Maine v. Thiboutot*, 448 U.S. 1, 4–5 (1980).

<sup>51</sup> The case also considered a damages claim against federal officials and agencies. *See Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 4 & n.3 (1981).

<sup>52</sup> *See id.* at 4–5.

<sup>53</sup> *Id.* at 20.

so many specific statutory remedies, including the two citizen-suit provisions.<sup>54</sup> And if mirroring language were not enough, Justice Powell cited *Carlson v. Green* to hammer his point home.<sup>55</sup> On its face, *Sea Clammers* embraces the same congressional alternatives inquiry from the *Bivens* progeny.

Subsequent § 1983 cases reaffirm *Sea Clammers*'s approach. Absent some explicit congressional command, the Court continues to infer congressional intent (or tries to, anyway) by assessing Congress's creation of alternatives.<sup>56</sup> That approach is not without critique, of course. Some have suggested that because § 1983 is an affirmative statutory cause of action, permitting a congressionally created alternative to impliedly foreclose relief violates the canon against implied repeal.<sup>57</sup> Others have proposed a nuanced approach that turns on various factors, including whether there is "manifest inconsistency between the statutory enforcement scheme and a private cause of action."<sup>58</sup> But the Court has held fast to the congressional alternatives approach that sprang from *Bivens*.<sup>59</sup>

3. *Suits for Injunctive Relief Under Ex parte Young*. — Finally, consider *Young*. It allows courts to issue injunctions against state officials for violating federal law.<sup>60</sup> While *Bivens* is a creature of federal common law and § 1983 a statutory grant of authority, a *Young* injunction is most often conceived of as an equitable remedy.<sup>61</sup> One might

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 21 ("We therefore conclude that the existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." (citing *Carlson v. Green*, 446 U.S. 14, 23 (1980))).

<sup>56</sup> See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1011 (1984) (noting the "comprehensive nature of the procedures and guarantees" in the statutory scheme); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (reiterating the comprehensive scheme approach).

<sup>57</sup> See Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims*, 77 *FORDHAM L. REV.* 775, 781 (2008) ("[T]he Court's adoption of a strict textualist approach militates against its use of a doctrine founded on judicial 'inference' of unstated congressional intent."). But see *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 n.2 (2005) (explaining that the alternative scheme approach "does not contravene the canon against implied repeal because we have held that canon inapplicable to a statute that creates no rights but merely provides a civil cause of action to remedy 'some otherwise defined federal right'" (citation omitted) (quoting *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979))).

<sup>58</sup> Sunstein, *supra* note 25, at 426.

<sup>59</sup> See, e.g., *Fitzgerald*, 555 U.S. at 252.

<sup>60</sup> See *Ex parte Young*, 209 U.S. 123, 148 (1908); see also Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 *HARV. L. REV.* 1731, 1786 & n.290 (1991). It may go even further than this and allow parties to bring freestanding equitable causes of action for the violation of federal statutory rights against federal officials, see *infra* section II.B, pp. 1515–18.

<sup>61</sup> See Alfred Hill, *Constitutional Remedies*, 69 *COLUM. L. REV.* 1109, 1129 (1969); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 *N.Y.U. L. REV.* 495, 530 (1997).

wonder when a plaintiff would even invoke *Young*, given that § 1983 provides for injunctive relief against state actors. One instance is where a plaintiff seeks to sue a party that is not a “person” under § 1983.<sup>62</sup> In that way, *Young* actions are both broader and narrower than § 1983 suits. They provide a right of action where § 1983 might otherwise not, but allow only injunctive relief at equity, rather than damages. Still, the Court has applied the same congressional alternatives test to claims for injunctive relief premised on *Young*.<sup>63</sup>

*Seminole Tribe* considered, among other things, whether *Young* permits an injunctive suit against a state official to “enforce the good-faith bargaining requirement” of the Indian Gaming Regulatory Act.<sup>64</sup> The Court’s answer: no.<sup>65</sup> In language mirroring *Bivens* and the § 1983 cases,<sup>66</sup> Chief Justice Rehnquist reasoned that the Act was a “carefully crafted and intricate remedial scheme”<sup>67</sup> and that, “[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.”<sup>68</sup> His majority opinion also cited *Chilicky* (a *Bivens* case), making clear that the congressional alternatives approach from the *Bivens* line applies to injunctive relief cases too.<sup>69</sup>

More recently, *Armstrong* confirmed that *Seminole Tribe*’s basic formulation still holds. It addressed “whether Medicaid providers can sue to enforce § (30)(A) of the Medicaid Act.”<sup>70</sup> The Court framed

<sup>62</sup> See, e.g., *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 474–75 (5th Cir. 2020) (noting that plaintiffs could not sue under § 1983 but permitting a suit at equity under *Young* instead).

<sup>63</sup> See *Jackson*, *supra* note 61, at 532–33. Note that the question whether a plaintiff has a cause of action is different from the issue of sovereign immunity, typically thought of as *Young*’s core holding. The sovereign immunity question asks whether a state official may be sued, the Eleventh Amendment notwithstanding. The cause of action question focuses on what hook permits the plaintiff to sue in the first place. While *Young*’s sovereign immunity holding is relevant where a plaintiff sues a state official under § 1983, this section focuses instead on *Young*’s conferral of a cause of action.

<sup>64</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996).

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* text accompanying notes 44, 53.

<sup>67</sup> *Seminole Tribe*, 517 U.S. at 73–74.

<sup>68</sup> *Id.* at 74.

<sup>69</sup> *Id.*; see also David P. Currie, Response, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 549 (1997) (“Doctrinally speaking, *Seminole Tribe* was just another application of the *Sea Clammers* principle that specific statutory remedies may preempt actions under section 1983, for *Ex parte Young* today is a section 1983 case.” (footnotes omitted)). Still, *Seminole Tribe* acknowledged that the *Bivens* context isn’t a perfect match: “Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer.” *Seminole Tribe*, 517 U.S. at 74. But it held that distinction irrelevant because it thought that “the same general principle applie[d]. Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.” *Id.*

<sup>70</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015).

injunctive relief under *Young* as a creature of “[its] equitable powers” and found that Congress intended to foreclose relief.<sup>71</sup> Two factors animated that result. First, the “sole remedy Congress provided for a State’s failure to comply with Medicaid’s requirements . . . is the withholding of Medicaid funds by the Secretary of Health and Human Services.”<sup>72</sup> Second, the Act’s text is “judicially unadministrable” so it can only be implemented by agencies with relevant expertise.<sup>73</sup> Those reasons in mind, the Court held that Congress must have intended to foreclose relief under *Young* by providing for alternative mechanisms for enforcing the Medicaid Act.<sup>74</sup> *Armstrong* reaffirmed *Seminole Tribe*’s basic holding: congressionally created alternatives can impliedly foreclose relief under *Young*, just as they can limit claims under *Bivens* and § 1983.

### B. Alternative Remedial Schemes in Practice

It is one thing for doctrines to align in theory. In language, cross-references, and methodology, the Supreme Court embraces the same approach for interpreting congressional alternatives across *Bivens*, § 1983, and injunctive relief claims under *Young*. But look closer and practice mocks theory. Functionally, it is far easier for a congressionally created remedy to displace a *Bivens* damages claim than for it to impliedly foreclose relief under § 1983. Injunctive relief claims under *Young* are different still: the Court has seemingly charted a middle course that falls between *Bivens* and § 1983. This section assesses the key cases and shows that the question posed at the beginning of this piece (“How far must Congress go?”) varies according to context.

1. *Displacing Bivens Claims.* — Begin again with *Bivens*. Despite the Court’s early willingness to extend damages claims for constitutional violations,<sup>75</sup> cases beginning in the 1980s “convey the impression that *Bivens* skepticism has fed upon itself and gained momentum with each claim the Court has rejected.”<sup>76</sup> Initial cases rejecting new damages rights of action “emphasized the availability of congressionally approved alternatives that could provide remedies similar to those contemplated by *Bivens*.”<sup>77</sup> The Court has read “similar” capaciously.

*Bush v. Lucas* and *Schweiker v. Chilicky* both show that Congress need not do much to displace a *Bivens* claim and indeed can provide something less than full relief. *Bush* found that the Civil Service

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<sup>71</sup> *Id.* at 1385.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See* *Carlson v. Green*, 446 U.S. 14, 18–19 (1980); *Davis v. Passman*, 442 U.S. 228, 248–49 (1979).

<sup>76</sup> James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 575 (2020).

<sup>77</sup> *Id.*

Commission appeals process displaced a damages claim.<sup>78</sup> The “Court treated Congress’s silence — the omission of a damages remedy — as tantamount to a congressional declaration that no *Bivens* remedy should be entertained.”<sup>79</sup> And it did so despite acknowledging that the civil service remedies provided “a less than complete remedy for the wrong.”<sup>80</sup>

*Chilicky* charted the same course. It denied “certain social security disability benefits” because Congress provided an alternative remedy.<sup>81</sup> The plaintiffs had sought damages for “physical, emotional, and material harms resulting from delay in the receipt” of Social Security disability benefits.<sup>82</sup> Justice O’Connor acknowledged that “exactly as in *Bush*, Congress has failed to provide for ‘complete relief’: respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits.”<sup>83</sup> No matter. Even where Congress offers a remedial scheme that fails to afford the victims of constitutional violations their full due, its scheme can still prove comprehensive enough to displace a damages action under *Bivens*.<sup>84</sup> “*Chilicky* . . . made clear that *Bush* meant all that it had said, and more.”<sup>85</sup>

2. *Foreclosing Relief Under § 1983*. — An eye trained on the *Bivens* cases would rightly conclude that Congress need barely lift a finger for courts to deny creating a damages remedy. But that hair-trigger approach looks foreign against the backdrop of the Court’s § 1983 jurisprudence. The Court has found a § 1983 remedy foreclosed by alternative remedies in only three cases.<sup>86</sup> And in “all three cases, the statutes at issue required

<sup>78</sup> *Bush v. Lucas*, 462 U.S. 367, 387–88, 390 (1983). Justice Stevens highlighted the “comprehensive nature” of the remedies Congress created, and emphasized that the “question [was] not what remedy the court should provide for a wrong that would otherwise go unredressed,” but was instead “whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy.” *Id.* at 388.

<sup>79</sup> *Nichol*, *supra* note 30, at 1130 n.62.

<sup>80</sup> *Bush*, 462 U.S. at 373; *see Fallon*, *supra* note 6, at 952.

<sup>81</sup> *Nichol*, *supra* note 30, at 1147–48.

<sup>82</sup> *Id.* at 1148; *see id.* at 1148–49.

<sup>83</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

<sup>84</sup> Indeed, *Congress* need not act at all. In *Minneci v. Pollard*, 565 U.S. 118 (2012), the Court considered whether it could “imply the existence of an Eighth Amendment–based damages action (a *Bivens* action) against employees of a privately operated federal prison.” *Id.* at 120. It explained that the existence of *state tort law* remedies rendered a damages action under the Constitution unnecessary: “Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions — actions that provide both significant deterrence and compensation — we cannot [authorize a *Bivens* claim].” *Id.* And, just as in *Bush* and *Chilicky*, that a plaintiff may not obtain a complete remedy did not give reason for pause. *See id.* at 129.

<sup>85</sup> *See Nichol*, *supra* note 30, at 1147.

<sup>86</sup> *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120–21 (2005); *Smith v. Robinson*, 468 U.S. 992, 1011–13 (1984); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20–21 (1981).

plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit.”<sup>87</sup> Indeed, the Court has specifically placed the “burden to demonstrate that Congress has expressly withdrawn the remedy . . . on the defendant.”<sup>88</sup> So it takes a “difficult showing” to establish that Congress has foreclosed a § 1983 remedy by creating an alternative remedy.<sup>89</sup> No *Bivens* case imposes a comparable burden. That leaves § 1983 on far sturdier ground: “Implied preemption of a section 1983 remedy on the basis of the assertedly comprehensive nature of the remedial scheme created by the federal legislation is not favored . . . .”<sup>90</sup>

Drawing an even sharper contrast to *Bivens*, the Court has wrested the § 1983 foreclosure inquiry from the question whether Congress has authorized a private right of action. After halting its longstanding habit of implying statutory causes of action,<sup>91</sup> the Court put *Bivens* on the same nonexistent foundation as those now-defunct cases.<sup>92</sup> Thanks to recent efforts explicitly tying recognition of damages claims to implied statutory rights of action, *Bivens* finds itself in quicksand.<sup>93</sup>

Compare that to the Court’s treatment of congressional alternatives and § 1983. Rather than tie the foreclosure of § 1983 claims to implied statutory causes of action, as in the *Bivens* line, it explicitly pried the inquiries apart. *Wilder v. Virginia Hospital Ass’n*<sup>94</sup> admonished that § 1983 foreclosure arguments should not be analyzed in light of the jurisprudence on implied rights of action: “This is a different inquiry than that involved in determining whether a private right of action can be

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<sup>87</sup> *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009). And, in each case, “[o]ffering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits — such as damages, attorney’s fees, and costs — that were unavailable under the statutes.” *Id.*

<sup>88</sup> *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *see also Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 520–21 (1990) (“The burden is on the State to show ‘by express provision of other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.’” (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987))).

<sup>89</sup> *Blessing v. Freestone*, 520 U.S. 329, 346 (1997).

<sup>90</sup> Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 247 (1991).

<sup>91</sup> *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

<sup>92</sup> *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) (“*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred ‘causes of action’ that were ‘not explicit’ in the text of the provision that was allegedly violated.” (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017))).

<sup>93</sup> *See id.* at 742 (“With the demise of federal general common law, a federal court’s authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress and no statute expressly creates a *Bivens* remedy.” (citation omitted)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action — decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional provision.”).

<sup>94</sup> 496 U.S. 498 (1990).

implied from a particular statute.”<sup>95</sup> Because the separation of powers concerns animating the Court’s abandonment of implied rights of action (and *Bivens* claims) are not present where Congress specifically authorizes a remedy via legislation, the foreclosure inquiry in the § 1983 context plays out far differently.<sup>96</sup>

Given those bedrock distinctions, some of the § 1983 cases break decisively with the reasoning in the *Bivens* line. Consider *Golden State Transit Corp. v. City of Los Angeles*.<sup>97</sup> It addressed whether the National Labor Relations Act “granted [plaintiffs] rights enforceable under § 1983.”<sup>98</sup> While acknowledging that alternative enforcement mechanisms could evince Congress’s intent to foreclose relief, the majority still held a § 1983 remedy available.<sup>99</sup> Along the way, Justice Stevens explained that the “availability of administrative mechanisms to protect the plaintiff’s interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy.”<sup>100</sup> But wait — in the *Bivens* context, Congress’s creation of administrative remedies is enough to displace a damages claim. *Wilkie v. Robbins*<sup>101</sup> confirms as much. It reasoned that because “administrative review was available”<sup>102</sup> and “Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating” his claims,<sup>103</sup> the Court need not allow for a *Bivens* damages remedy.<sup>104</sup> What’s good for the goose isn’t for the gander.

Pause for a moment and consider whether the inquiry into congressional alternatives does the same work in the *Bivens* context as in the § 1983 cases. After all, the *Bivens* line debates whether to create a right of action in the first place, looking to congressionally created alternatives as a reason to pump the brakes.<sup>105</sup> Contrast that with the § 1983

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<sup>95</sup> *Id.* at 508 n.9.

<sup>96</sup> *See id.* (explaining that in the implied statutory causes of action context, “[t]he test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes” and that “these separation-of-powers concerns are not present in a § 1983 case”).

<sup>97</sup> 493 U.S. 103 (1989).

<sup>98</sup> *Id.* at 105.

<sup>99</sup> *See id.* at 108–09.

<sup>100</sup> *Id.* at 106.

<sup>101</sup> 551 U.S. 537 (2007).

<sup>102</sup> *Id.* at 552.

<sup>103</sup> *Id.* at 553.

<sup>104</sup> *See id.* at 552–54. That same divide between *Bivens* and § 1983 exists with respect to state law alternatives. Compare *Minnecci v. Pollard*, 565 U.S. 118, 120 (2012) (denying a damages remedy under the Constitution where state tort law alternatives exist), with *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 523 (1990) (“We also reject petitioners’ argument that the existence of administrative procedures whereby health care providers can obtain review of individual claims for payment evidences an intent to foreclose a private remedy in the federal courts. The availability of state administrative procedures ordinarily does not foreclose resort to § 1983.”).

<sup>105</sup> *See Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

line, where a cause of action already exists, and we instead ask whether Congress has implicitly foreclosed its use.

But there are good reasons to think that is a distinction without a difference. If *Bivens* is a creature of federal common law,<sup>106</sup> we can look to other cases finding congressional displacement of a preexisting federal common law suit as instructive. *City of Milwaukee v. Illinois*<sup>107</sup> (*Milwaukee II*) concluded that amendments to the Federal Water Pollution Control Act created a “comprehensive regulatory program” sufficient to displace a federal common law action for nuisance over interstate water pollution.<sup>108</sup> So long as Congress has “spoken to a particular issue,” that is enough to displace a preexisting cause of action premised on federal common law.<sup>109</sup> *Milwaukee II*’s bar is easy to clear — no clear statement is necessary, and all Congress must do is “speak directly” to the issue, rather than provide comprehensive and equally effective alternative remedies.<sup>110</sup> That low threshold sheds light on how far Congress must go to foreclose a *Bivens* remedy that already exists, even if the cases discussed above more directly assess whether to create a damages remedy in the first place.

3. *Foreclosing Injunctive Relief Under Ex parte Young*. — Next consider suits to enjoin unlawful action. The sample size here is small. By incorporating the alternative remedies approach from *Bivens* in the injunctive relief context, and by finding a *Young* action foreclosed, *Seminole Tribe* suggested the Court might take a deferential posture toward Congress.<sup>111</sup> But *Virginia Office for Protection & Advocacy v. Stewart*<sup>112</sup> shows the inquiry is not so forgiving. It considered whether the federal government’s ability to “exercise oversight of a federal spending program” and its authority to “withhold or withdraw funds” evinced Congress’s intent to foreclose injunctive relief.<sup>113</sup> Though Congress created alternatives, the Court found them inadequate.<sup>114</sup> The oversight

<sup>106</sup> Pfander & Baltmanis, *supra* note 23, at 117.

<sup>107</sup> 451 U.S. 304 (1981).

<sup>108</sup> *Id.* at 317.

<sup>109</sup> *Id.* at 313.

<sup>110</sup> See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (“The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.” (alterations in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))).

<sup>111</sup> See, e.g., Jackson, *supra* note 61, at 530–41 (arguing that *Seminole Tribe* was a harbinger of the retrenchment of federal equitable power). But see Currie, *supra* note 69, at 547 (“My message is one of calm placidity: Not to worry; *Ex parte Young* is alive and well and living in the Supreme Court.” (footnote omitted)); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 42.

<sup>112</sup> 563 U.S. 247 (2011).

<sup>113</sup> *Id.* at 256 n.3.

<sup>114</sup> See *id.*

provisions offered some relief, but not enough to preclude suits enjoining unlawful conduct.

*Armstrong* is the latest episode in the saga. It reasoned that the “sheer complexity associated with enforcing” the Medicaid Act, “coupled with the express provision of an administrative remedy” precluded private enforcement via an injunction under *Young*.<sup>115</sup> *Armstrong* found the exercise of oversight authority inadequate by itself to foreclose relief, but enough when coupled with the “judicially unadministrable nature” of the statutory text.<sup>116</sup> That reasoning seems to put injunctive relief on less firm ground than a right of action under § 1983.<sup>117</sup>

Where the Court will go from here is anyone’s guess. But nothing suggests it is hungry to reject injunctive relief claims under *Young* for constitutional — rather than federal statutory — violations.<sup>118</sup> Justice Breyer, concurring in *Armstrong*, intimated that while foreclosing injunctive relief to enforce complex statutory schemes makes sense, that same logic may not hold where officials run afoul of constitutional provisions that are traditionally fair game for judicial adjudication.<sup>119</sup>

We might read the Court’s *Young* foreclosure jurisprudence as functionally falling somewhere between § 1983 and *Bivens*. The Court casually finds that alternate remedies displace *Bivens* claims even where government officials violate the Constitution.<sup>120</sup> That suggests it is easier for Congress to displace a *Bivens* damages remedy than injunctive relief under *Young*. Conversely, alternative administrative remedies are enough (at least in some cases) to foreclose injunctive relief under *Young* but are generally inadequate in the § 1983 context.

## II. INJUNCTIVE RELIEF AFTER *ARMSTRONG*

This Part ventures an explanation for the Court’s disparate treatment of congressional alternatives across *Bivens*, § 1983, and *Young*. It does so by way of a question. Recall the gaps laid out above. *Bivens*

<sup>115</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

<sup>116</sup> *Id.*

<sup>117</sup> Cf. Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 910 (2016) (book review) (explaining that even “liberal Justices have joined decisions restricting private rights of action” in part because “they have expressly invoked the need to protect administrative discretion and policymaking against interference by litigants and judges”).

<sup>118</sup> See Currie, *supra* note 69, at 551 (“Like *Sea Clammers*, *Seminole Tribe* will have its most significant effect on actions involving statutory, not constitutional rights.”). Professor David Currie’s prediction that the “test will be the same as in *Sea Clammers*,” *id.*, may not accord with the Court’s interpretation of alternative administrative remedies, but no cases currently challenge the notion that injunctive relief is an available remedy where officials violate the Constitution, rather than federal statutes.

<sup>119</sup> See *Armstrong*, 135 S. Ct. at 1388–89 (Breyer, J., concurring in part and concurring in the judgment) (“The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges. . . . Reading [the Medicaid Act] underscores the complexity and nonjudicial nature of the rate-setting task.” *Id.* at 1388.).

<sup>120</sup> See *Schweiker v. Chilicky*, 487 U.S. 412, 414, 423 (1988).

permits constitutional claims against federal actors for money damages and is largely unavailable unless a suit hews closely to the facts in *Bivens*, *Davis*, or *Carlson*. Section 1983 allows most claims against state officials, based on constitutional and statutory violations, for both injunctive relief and damages. When § 1983 does not apply, a plaintiff might still sue a state official under *Young*. But consider suits against federal (not state) officials to enjoin unconstitutional action. *Armstrong* posits that an equitable right of action permits injunctive relief. How can that be?

This Part explores how the Court's historical approach to congressional alternatives might justify *Armstrong's* conclusion. And it applies the lessons from *Bivens*, § 1983, and *Young* along the way.

Separating the analysis into constitutional and statutory claims helps show what might be going on under the hood in evaluating congressionally created remedies. When plaintiffs sue to enjoin unconstitutional conduct, there are good reasons to think congressional alternatives are irrelevant.<sup>121</sup> Conversely, when plaintiffs sue to enjoin statutory violations, we care very much what Congress thinks. After all, it created the right sought to be enforced.

In short, context matters. The Court purportedly seeks to infer congressional intent from the text of alternative remedies. But that reflects theory, not practice. The Court has functionally adopted a series of background presumptions based on circumstance and what relief the rule of law demands. That helps explain *Armstrong's* allowance of equitable rights of action. And it shows why the Court treats congressionally created alternatives differently across the three remedial schemes covered in Part I.

#### A. Enjoining Constitutional Violations

*Armstrong* assumes that plaintiffs may bring an equitable right of action to enjoin federal and state officials from violating the Constitution.<sup>122</sup> “The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”<sup>123</sup> Justice Scalia's framing identifies both the right of action (the “ability to

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<sup>121</sup> See Fallon & Meltzer, *supra* note 60, at 1788 (“The Constitution . . . contemplates a judicial ‘check’ on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values — one of the hallmarks of the rule of law.”).

<sup>122</sup> *Armstrong's* framing expands *Young's* premise. Scholars have framed *Young* as allowing “a federal action [to] lie to enjoin a state officer from going to state court to seek civil or criminal enforcement of a state law when the action is based on the ground that enforcement will violate the constitutional rights of the plaintiff.” David L. Shapiro, *Ex parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 74 (2011). But *Armstrong* extends the principle to apply to constitutional violations by federal and state officers. See 135 S. Ct. at 1384.

<sup>123</sup> *Armstrong*, 135 S. Ct. at 1384.

sue”) and the remedy (“to enjoin”). And *Armstrong* labels such an injunctive suit a “judge-made remedy.”<sup>124</sup> But it doesn’t answer whether Congress may foreclose relief.

The answer seems to be that Congress cannot. The Court has long assumed that injunctions against unconstitutional action are available as a matter of course.<sup>125</sup> Congressional alternatives have been beside the point. In *Bell v. Hood*,<sup>126</sup> Justice Black explained that “it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do.”<sup>127</sup> Justice Harlan said much the same in his *Bivens* concurrence. He challenged the notion that a federal right of action would not exist were *Bivens* to have argued that he was “entitled to be free from the type of official conduct prohibited by the Fourth Amendment.”<sup>128</sup> Indeed, “[s]uch a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies.”<sup>129</sup> At base, both *Bell* and *Bivens* take as a given that plaintiffs may sue to enjoin constitutional violations when committed by state and federal officers.

More modern cases reflect the same idea. Remember that *Carlson v. Green* recognized a damages remedy under *Bivens* where federal officers violated rights secured by the Eighth Amendment.<sup>130</sup> Justice Rehnquist dissented<sup>131</sup> but still noted that “federal courts have historically had broad authority to fashion equitable remedies.”<sup>132</sup> *Ziglar v. Abassi*<sup>133</sup> sang a similar tune. It rejected a *Bivens* claim for damages brought by prisoners who endured harsh conditions of confinement.<sup>134</sup> Even so, Justice Kennedy explained that “[r]espondents . . . challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees

<sup>124</sup> *Id.*

<sup>125</sup> Marsha S. Berzon, Lecture, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 691 (2009) (“[F]ederal courts had, from *Osborn* to *Young*, regularly entertained direct constitutional claims and granted injunctions when they found violations. By the time of *Brown* and *Bolling*, it was truly unremarkable for a court to grant injunctive relief for constitutional violations without seeking a legislatively created ‘cause of action.’”).

<sup>126</sup> 327 U.S. 678 (1946).

<sup>127</sup> *Id.* at 684 (footnotes omitted).

<sup>128</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in the judgment).

<sup>129</sup> *Id.*

<sup>130</sup> *Carlson v. Green*, 446 U.S. 14, 25 (1980).

<sup>131</sup> *Id.* at 31 (Rehnquist, J., dissenting).

<sup>132</sup> *Id.* at 42 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

<sup>133</sup> 137 S. Ct. 1843 (2017).

<sup>134</sup> *Id.* at 1860.

may seek injunctive relief.”<sup>135</sup> From *Bell* to *Ziglar*, the Court has assumed that injunctive relief is available by default to those seeking to enjoin unconstitutional conduct by state and federal officers. And there has been no intimation along the way that the Court would allow Congress to impliedly foreclose relief, as it might where plaintiffs seek damages.

What might justify injunctive relief’s de facto availability for constitutional violations? Look to the nature of the violation and the type of remedy sought. For one thing, to find that the victims of constitutional violations may bring suit for injunctive relief does not offend the separation of powers given that the Constitution — not Congress — created the right sought to be enforced.<sup>136</sup> And a basic interest in the rule of law supports vigorous judicial intervention to remedy “ongoing governmental lawlessness.”<sup>137</sup> For another, suits for injunctive relief are less intrusive than those for damages.<sup>138</sup> Damages claims raise a number of “economic and governmental concerns,” which are less potent where a plaintiff seeks only to enjoin action.<sup>139</sup> Money damages “create substantial costs,” which heighten separation of powers concerns.<sup>140</sup> While injunctive relief “stop[s]” the government “in its tracks,” it is also the case that “certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.”<sup>141</sup> With that in mind, it makes good sense that courts need not consider congressional alternatives when plaintiffs seek only to halt unconstitutional conduct.

### B. Enjoining Statutory Violations

Just as *Armstrong* suggests that injunctive relief be available for constitutional violations, so too is it for (some) statutory ones. *Young* offers the long-standing example of suits for injunctive relief against state officials threatening to violate federal law. But *Armstrong* extends the principle: “[T]hat has been true not only with respect to violations of

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<sup>135</sup> *Id.* at 1862.

<sup>136</sup> *Cf.* *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting) (“For a court to reach a contrary conclusion under its general equitable powers would raise the most serious concerns regarding both the separation of powers (Congress, not the Judiciary, decides whether there is a private right of action to enforce a federal statute) and federalism (the States under the Spending Clause agree only to conditions clearly specified by Congress, not any implied on an ad hoc basis by the courts).”); *see also* Fallon & Meltzer, *supra* note 60, at 1787–89.

<sup>137</sup> Fallon & Meltzer, *supra* note 60, at 1788.

<sup>138</sup> *Ziglar*, 137 S. Ct. at 1861 (“These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.”).

<sup>139</sup> *Id.* at 1856.

<sup>140</sup> *Id.*

<sup>141</sup> *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 704 (1949).

federal law by state officials, but also with respect to violations of federal law by federal officials.”<sup>142</sup> This creates a puzzle.

To understand how we got here, it’s useful to consider where we started from. Two developments are worth briefly canvassing: (1) the Court’s modern approach limiting implied statutory rights of action, and (2) the use of equitable rights of action to remedy official conduct violating federal law. These parallel innovations came to a head in *Armstrong*, which implies that even where a statute fails to allow private suit explicitly, a plaintiff may nonetheless seek relief under an equitable right of action.

To bring suit in federal court, a plaintiff must have a right of action capable of providing relief.<sup>143</sup> Congress can, of course, explicitly create a right of action through statutory text. But sometimes it doesn’t. In a prior era, captured best by *J.I. Case Co. v. Borak*,<sup>144</sup> the absence of a textually conferred right of action proved only a roadblock, not a bar. The Court articulated its view that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”<sup>145</sup> In other words, *if Congress fails to provide a right of action, we will*. *Cort v. Ash*<sup>146</sup> modified the framework into a multifaceted approach,<sup>147</sup> but the Court continued to imply statutory rights of action for a generation.

The Court effectively pulled the plug on that approach in *Alexander v. Sandoval*. Justice Scalia, writing for the majority, reasoned that absent statutory authority, a right of action “does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”<sup>148</sup> *Sandoval* — a case for injunctive relief — ignored the existence of congressional alternatives.<sup>149</sup> Instead, where a plaintiff seeks to enforce a federal statute, the only question is whether the statute evinces Congress’s affirmative intent to confer a private right of action. A year after *Sandoval*, the Court reiterated this principle, noting that “even where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent ‘to create not

<sup>142</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

<sup>143</sup> See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

<sup>144</sup> 377 U.S. 426 (1964).

<sup>145</sup> *Id.* at 433.

<sup>146</sup> 422 U.S. 66 (1975).

<sup>147</sup> Under *Cort*’s approach, to decide “whether a private remedy is implicit in a statute not expressly providing one,” courts should consider whether (1) the plaintiff is in the class protected by the statute, (2) there are “explicit or implicit” indications of legislative intent to create a cause of action, (3) doing so would be “consistent with the underlying purposes of the legislative scheme,” and (4) state law typically provides the cause of action. *Id.* at 78.

<sup>148</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

<sup>149</sup> *Id.* at 291 (“The question whether § 602’s remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.”).

just a private *right* but also a private *remedy*.”<sup>150</sup> Put simply, *Sandoval* makes clear that Congress must create a right of action and must do so clearly.

Even while the Court has curbed the use of implied statutory rights of action, courts still recognize *equitable* rights of action, at least in some defined and narrow circumstances.<sup>151</sup> Equitable rights of action are free-standing: they permit plaintiffs to sue to enjoin “unlawful executive action.”<sup>152</sup> A leading case is *Shaw v. Delta Air Lines, Inc.*,<sup>153</sup> which stands for the proposition that a plaintiff may sue, absent a statutory right of action, when “threatened with any enforcement proceeding like the one in *Ex parte Young*.”<sup>154</sup> But other cases seem to reach beyond situations in which plaintiffs are threatened with an imminent enforcement proceeding. *Dart v. United States*,<sup>155</sup> a D.C. Circuit decision in the 1980s, explained that while the Administrative Procedure Act did not confer a right to sue to redress the violation of a federal statute, the court could still exercise review under its “jurisdiction to correct . . . lawless behavior.”<sup>156</sup> More recently, the Ninth Circuit embraced similar logic to permit suit by the Sierra Club against the Trump Administration for diverting funds to construct the border wall.<sup>157</sup> These cases, which presented no looming enforcement action, seemingly logic that sometimes statutes fail to afford a cause of action when, well, they really should.<sup>158</sup>

*Armstrong* preserved — indeed embraced — the existence of equitable rights of action, at least insofar as they permit suit to enjoin a state

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<sup>150</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Sandoval*, 532 U.S. at 286 (emphasis added)).

<sup>151</sup> See Dellinger, *supra* note 2, at 1532–33; see also Edelman v. Jordan, 415 U.S. 651, 664 (1974).

<sup>152</sup> Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1823 (2016) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015)).

<sup>153</sup> 463 U.S. 85, 108–09 (1983); see David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 357 (2004).

<sup>154</sup> *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting); *Shaw*, 463 U.S. at 96 n.14.

<sup>155</sup> 848 F.2d 217 (D.C. Cir. 1988).

<sup>156</sup> *Id.* at 224.

<sup>157</sup> *Sierra Club v. Trump*, 963 F.3d 874, 882, 892 (9th Cir. 2020) (“These cases support our holding here that Sierra Club has an equitable *ultra vires* cause of action to challenge DoD’s transfer of funds. Where it is alleged that DoD has exceeded the statutory authority delegated by Section 8005, plaintiffs like Sierra Club can challenge this agency action.” *Id.* at 892.); see also *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“To be sure, if Congress precluded non-statutory judicial review, a showing the government does not even attempt to make, that would be another matter. But we have never held that a lack of a statutory cause of action is *per se* a bar to judicial review.”).

<sup>158</sup> See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1806 (2019); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1669 (1997).

official from imminently violating federal statutory law. And in that context, courts turn not to statutory text, but to the existence of congressionally created alternative remedies to decide whether a right of action is valid.

That creates clear tension with the Court's requirement in *Sandoval* that Congress must affirmatively confer a private right of action in the statutory text. As a result, there appears to be a no man's land. When Congress is silent, *Sandoval* suggests no right of action exists, while *Armstrong* suggests a plaintiff may sue anyway.

### C. Making Sense of Congressional Alternatives and Equitable Rights of Action

This section takes *Armstrong* at its word that an equitable right of action permits at least some suits for injunctive relief for statutory violations. One might well then ask: Why didn't *Armstrong* simply insist on what *Sandoval* requires?

Here's one unsatisfying answer: doing so would overrule much recent precedent. *Shaw v. Delta Air Lines* may stand for the proposition that plaintiffs can wield *Young* against enforcement proceedings preempted by federal law, but it has good company.<sup>159</sup> Even Chief Justice Roberts, ever the stickler on implied statutory rights of action, has recognized that where a plaintiff is "threatened with any enforcement proceeding like the one in *Ex parte Young*," a private right of action codified in statute is merely a nice-to-have<sup>160</sup> — an upgraded stereo, not the steering wheel. But the Court has hardly shied away from overruling long lines of precedent. Just look to its rejection of implied statutory causes of action.

A longer answer to *Armstrong*'s divergence from *Sandoval* may lie in the Court's treatment of congressional alternatives in other remedial contexts. Look to the *Bivens* and § 1983 cases addressed in Part I, and consider what the Court does by ratcheting up and down the inquiry into congressionally created remedies. It is not a simple matter of reading statutory text — if that were the case, the inquiry should operate similarly across remedial doctrines. Instead, the Court assumes a default based on the type of relief sought (equitable or legal) and the nature of the violation (constitutional or statutory).

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<sup>159</sup> See, e.g., *Va. Off. for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 255–56 (2011); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002).

<sup>160</sup> *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting); see also *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) ("Why wasn't relief under *Ex parte Young* available [in *Sandoval*]?" The plaintiffs had sued a state officer in his official capacity after all, and they sought only prospective injunctive relief. If those were the only two requirements needed to trigger *Ex parte Young*, the Court's dismissal[] in *Sandoval* . . . make[s] no sense.").

Think back to *Bivens*. If a plaintiff sues for damages, the *Bivens* cases suggest we should be skeptical. Congress controls the purse strings, and courts have been understandably hesitant to ring up charges absent assurances that Congress will pick up the tab.<sup>161</sup> As a result, when Congress has created some alternative, it speaks volumes and is rightly offered deference. On the flip side, if a plaintiff sues a state actor under § 1983, Congress has already signed a blank check for both injunctive relief and damages. Where it has created an alternative, courts are careful to ensure Congress wants to abrogate a remedy it has already approved — an exacting standard indeed. *Young* claims seem to vary by the same token. If a plaintiff seeks to enjoin unconstitutional conduct, Congress presumably would care little if courts ordered the official, state or federal, to stop. After all, Congress did not create the right a plaintiff seeks to enforce.<sup>162</sup>

In short, how far Congress must go to foreclose a preexisting remedy turns on what kind of violation the plaintiff alleges and whether they seek to enjoin behavior or collect damages. While statutory text matters, other considerations largely animate the Court's interpretation of congressionally created alternative remedies — and help explain the divergence in its approach across various remedial schemes.

Applying that framework to the *Armstrong-Sandoval* puzzle suggests it's not a puzzle at all. *Armstrong* and *Sandoval* both involved injunctive relief claims, both based on the violation of a federal statute, both written by Justice Scalia. But while *Sandoval* commanded that Congress must always create a right of action in statutory text, *Armstrong* reasoned that *Sandoval's* strict command sometimes yields.

The Court's allowance of equitable rights of action — even absent statutory authority — fits comfortably with its posture toward remedies in the cases Part I discusses. Indeed, its admission in *Armstrong* that whether to permit an equitable right of action turns on more than just statutory text closely accords with its approach in the *Bivens*, § 1983, and *Young* cases. Consider what a plaintiff asks for when they seek injunctive relief against state action preempted by federal law. Concerns over damages do not enter the equation. And the plaintiff seeks to use injunctive relief as a shield against impending harm, not as a sword to secure other forms of relief. With those limits in mind, the Court assumes that Congress would tolerate an equitable right of action despite its failure to put in text what *Sandoval* requires.<sup>163</sup> Even if

<sup>161</sup> See Dellinger, *supra* note 2, at 1533; cf. *Edelman v. Jordan*, 415 U.S. 651, 665 (1974).

<sup>162</sup> Cf. Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13, 17 (2012) (“Congress has all but plenary power to define the parameters of federal nonconstitutional rights and remedies, and there is little to the view that the Constitution ever compels the existence of statutory remedies to vindicate wholly statutory rights.”).

<sup>163</sup> To be sure, Congress's creation of an alternative gives reason for pause. But it is a far different matter to assume the existence of a cause of action *absent* some alternative than to require Congress itself to create a cause of action in statutory text.

*Armstrong* did not recognize a right of action stemming from the Supremacy Clause itself, its creation of an equitable right to sue presumes a plain and unsurprising reality: Congress knows federal law is supreme and need not say it every time it passes new laws.

That should sound familiar. The same logic in *Borak* and *Cort* — logic authorizing the creation of implied statutory rights of action — lurks behind *Armstrong*. Justice Scalia admonished in *Sandoval* that “[h]aving sworn off the habit of venturing beyond Congress’s intent, we will not accept [the] invitation to have one last drink.”<sup>164</sup> Old habits die hard. Some chafe (understandably so) at *Armstrong*’s willingness to sneak around *Sandoval*’s strictures.<sup>165</sup> But its conclusion should come as no surprise. Just look at how the Court has treated congressional alternatives in the *Bivens* and § 1983 contexts: it has long looked past Congress’s intent and instead calibrated remedies according to context. That answer hardly supplies a bedrock foundation upon which equitable causes of action can comfortably rest. But it shows that *Armstrong* falls squarely in line with the Court’s longstanding approach to remedies.

#### CONCLUSION

Beginning in the 1970s with the *Bivens* line of cases, the Court has increasingly looked to Congress’s enactment of remedial schemes in determining its intent to foreclose other kinds of relief. Having extended that same approach to claims against state officials under § 1983 and for injunctive relief suits under *Young*, deference to congressional alternatives has become a looming issue for any victim of federal constitutional or statutory violations. But while the test might look similar at the surface level across those three remedial regimes, it is not in practice. The separation of powers concerns prompting deference are far more potent where a plaintiff seeks damages, rather than injunctive relief. So too where a plaintiff seeks to use a codified right of action (as in § 1983) than when they use an equitable right of action detached from statutory text. The Court’s inquiry into alternative remedies flexes by context because it calibrates remedies according to what the rule of law demands. That goes a long way toward explaining why equitable rights of action persist in certain cases, and why the inquiry into congressionally created alternatives is hardly uniform as applied in practice.

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<sup>164</sup> *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

<sup>165</sup> *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 499–502 (5th Cir. 2020) (Oldham, J., concurring) (“In the end, there are plenty of reasons to worry about inferring ‘a cause of action against [state officials] at equity.’” *Id.* at 502 (quoting *id.* at 475 (majority opinion) (alteration and emphasis added))).