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ARTICLE

CONSTITUTIONAL REMEDIES:  
IN ONE ERA AND OUT THE OTHER

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## CONSTITUTIONAL REMEDIES: IN ONE ERA AND OUT THE OTHER

*Richard H. Fallon, Jr.\**

*Despite the ringing dictum of Marbury v. Madison that “every right, when withheld, must have a remedy,” rights to remedies have always had a precarious constitutional status. For over one hundred years, the norm was that victims of ongoing constitutional violations had rights to injunctive relief. But the Constitution nowhere expressly prescribes that norm, and recent Supreme Court decisions, involving suits for injunctions and damages alike, have left the constitutional connection between rights and remedies more attenuated than ever before.*

*This Article explores the conceptual and doctrinal connections between constitutional rights and entitlements to judicial remedies. Whole Woman’s Health v. Jackson — which largely vindicated Texas’s strategy for insulating an antiabortion law from judicial challenge via suits for injunctions — furnishes the Article’s primary window into the current doctrinal landscape. But the Article’s perspective is broadly historical. It assumes throughout that we cannot understand the present law without understanding the background from which it developed and, in increasingly important respects, from which it now deviates.*

*The Article’s central thesis combines empirical and normative aspects: Although the modern Supreme Court has wielded separation of powers arguments to truncate constitutional remedies, the Court’s premises are mistaken. The Constitution frequently, though not invariably, requires effective remedies for constitutional rights violations. When Congress fails to authorize such remedies, nothing in the Constitution’s history or tradition precludes a role for the Supreme Court in devising remedies that are necessary to enforce substantive rights. If we have entered an era in which a majority of the Justices believe otherwise, the situation is a deeply regrettable one in which the concept of a constitutional right will be cheapened.*

### INTRODUCTION

“It is a settled and invariable principle,” Chief Justice Marshall once wrote, “that every right, when withheld, must have a remedy.”<sup>1</sup> Not quite. Although some view the idea of a substantive constitutional right without a remedy as oxymoronic,<sup>2</sup> rights to remedies have always had a precarious constitutional status, which the Supreme Court has lately subjected to multifaceted subversion. The rubric of rights to

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*109).

<sup>2</sup> See, e.g., Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. 129, 139 (2020) (defining “legal entitlement” to mean “remedy made available in response to a particular violation of a substantive right” (emphasis omitted)); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 914 (1999) (“[R]ights and remedies operate as part of a single package.”).

constitutional remedies encompasses diverse elements, including (1) the jurisdiction of a court to hear a claim, (2) the existence of a cause of action,<sup>3</sup> and (3) the availability of judicial relief. But the complex interrelationships among these elements should not obscure the practical and conceptual dependence of constitutional rights on mechanisms for their enforcement.<sup>4</sup>

The recent decision in *Whole Woman's Health v. Jackson*<sup>5</sup> exemplifies the Supreme Court's accelerating attenuation of the relationship between substantive constitutional rights and rights to remedies. *Jackson* arose from Texas's attempt to defeat suits for injunctions against an anti-abortion law. In a ruling that epitomizes a sea change in the law of constitutional remedies, the Court, with Justice Gorsuch writing for the majority,<sup>6</sup> allowed Texas largely to succeed in its ambition, even as the majority assumed that the Constitution guaranteed rights of abortion access. (That assumption proved evanescent when, six months after its decision in *Jackson*, the Court overruled *Roe v. Wade*<sup>7</sup> in *Dobbs v. Jackson Women's Health Organization*.<sup>8</sup>)

Legal and even constitutional barriers to the enforcement of rights are familiar in some contexts. Sovereign immunity normally bars unconsented suits against both the federal government and the states, including for constitutional violations.<sup>9</sup> When sovereign immunity is combined with the "official immunity" of government officers such as police and prosecutors, there are many cases in which victims of past

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<sup>3</sup> Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1809 (2016). According to Professors Samuel Bray and Paul Miller, traditional equity did not have causes of action even though appeals to courts exercising equitable jurisdiction "needed to connect" their prayers for relief to "some recurring pattern of equitable intervention." Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. 1763, 1764 (2022). In this Article, I shall not dispute that historical claim, which the authors appear to base principally but not exclusively on private actions seeking relief from the inequities that would result if private law were applied strictly. *Id.* at 1778. In this Article, I am concerned exclusively with "causes of action" as that term is used in modern public law cases in which a plaintiff asks a federal court to provide a remedy for the violation of federal law.

<sup>4</sup> See, e.g., Levinson, *supra* note 2, at 858 (describing rights and remedies as "inextricably intertwined" and noting that rights rely on remedies "for their scope, shape, and very existence").

<sup>5</sup> 142 S. Ct. 522 (2021).

<sup>6</sup> Justice Gorsuch's opinion was joined in full by Justices Alito, Kavanaugh, and Barrett, and was joined in all but Part II.C by Justice Thomas. Chief Justice Roberts wrote an opinion concurring in the judgment in part and dissenting in part in which Justices Breyer, Sotomayor, and Kagan joined, *id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part), and Justice Sotomayor filed an opinion concurring in the judgment in part and dissenting in part in which Justices Breyer and Kagan joined, *id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>7</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>8</sup> 142 S. Ct. 2228.

<sup>9</sup> See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 877–83, 895–922 (7th ed. 2015) [hereinafter HART & WECHSLER] (discussing sovereign immunity).

constitutional violations receive no financial compensation.<sup>10</sup> By contrast, in cases of ongoing constitutional violations, such as school segregation or threats to enforce unconstitutional statutes, courts, for well over one hundred years, have much more routinely issued injunctions necessary to make constitutional rights meaningful in practice.<sup>11</sup> The Supreme Court's decision in the *Jackson* case marked a break in that pattern.

The Texas Heartbeat Act,<sup>12</sup> also known as S.B. 8, combined three elements. First, in defiance of *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>13</sup> S.B. 8 purported to ban abortion as soon as fetal cardiac activity could be detected.<sup>14</sup> Second, to avoid preenforcement suits, S.B. 8 removed prosecutorial responsibility from the state's Attorney General and other executive officials.<sup>15</sup> Instead, it authorized private citizens to bring civil actions against anyone who performed or abetted abortions.<sup>16</sup> Because private citizens can rarely violate the Constitution under the "state action doctrine,"<sup>17</sup> Texas hoped to leave those who wished to procure, abet, or perform abortions with no one to sue. The strictures of standing doctrine also posed obstacles to suits against all potential private enforcers of the Heartbeat Act.<sup>18</sup>

<sup>10</sup> The doctrine of official immunity frequently operates as a barrier to suits for damages against governmental officials when the officials are sued in their individual capacities. *See id.* at 1030–60 (discussing official immunity).

<sup>11</sup> The federal judicial practice of issuing injunctions against ongoing violations of the Constitution by government officials is often traced to *Ex parte Young*, 209 U.S. 123 (1908). *See, e.g.,* Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 254 (2011); Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 437 (2004). On the emergence of federal injunctions as a routine rather than extraordinary constitutional remedy, see, for example, Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1327–30 (2001); and James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1329–33 (2020). *See also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990) ("Injunctions are routine . . .").

<sup>12</sup> 2021 Tex. Sess. Law Serv. ch. 62 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021)).

<sup>13</sup> 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

<sup>14</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021).

<sup>15</sup> *Id.* § 171.207(a) ("[T]he requirements of this subchapter shall be enforced exclusively through . . . private civil actions . . .").

<sup>16</sup> *Id.* § 171.208(a).

<sup>17</sup> *See, e.g.,* The Civil Rights Cases, 109 U.S. 3, 13 (1883) ("[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, . . . no legislation of the United States under [the Fourteenth Amendment], nor any proceeding under such legislation, can be called into activity[,] for the prohibitions of the amendment are against State laws and acts done under State authority."); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350–51 (1974) (setting out distinction between "private" and "State" action for purposes of the Fourteenth Amendment).

<sup>18</sup> To establish standing, a plaintiff must establish (1) "injury in fact" that is (2) causally connected to the conduct challenged by the plaintiff's lawsuit and (3) is likely redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In the case of a future, threatened injury such as being sued to enforce an allegedly unconstitutional statute, the harm-causing action must be "certainly impending" or at least substantially likely. *Compare* Clapper v.

Third, S.B. 8 subjected anyone who performed, aided, or abetted abortions to potentially draconian, multiple penalties.<sup>19</sup>

Unwilling to perform abortions prohibited by S.B. 8 without the protection of a court order, Texas abortion providers quickly sought federal injunctions against the statute's enforcement.<sup>20</sup> In *Jackson*, the Supreme Court framed the question before it as whether the challengers had adequately stated claims for relief against a private Texas citizen, the state's Attorney General, a state judge, a court clerk, and various officials responsible for medical licensing.<sup>21</sup> The Court's majority ruled that the plaintiffs lacked standing to sue the private defendant and the Texas Attorney General,<sup>22</sup> and that sovereign immunity barred suit against Texas judges and clerks,<sup>23</sup> but it found that medical licensing officials retained a role in enforcing S.B. 8's substantive prohibitions and were therefore suable for injunctions under a legal theory long associated with *Ex parte Young*.<sup>24</sup>

The ensuing headline was that the challengers had a federal right to challenge S.B. 8 via a suit against Texas "licensing officials."<sup>25</sup> But the Texas Supreme Court — which is the ultimate authority on the meaning of Texas law<sup>26</sup> — subsequently held that those officials had no authority to enforce S.B. 8.<sup>27</sup> With that ruling, the plaintiffs' hope for an injunction dissolved. It seems doubtful, moreover, that an injunction solely against licensing officials would have emboldened Texas abortion providers to violate S.B. 8. Under doctrines of claim and issue preclusion

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Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (enforcement must be "certainly impending" (emphasis omitted) (quoting *Lujan*, 504 U.S. at 565 n.2; *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))), with *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (risk must be "substantial"). Under this formula, it may be difficult to establish that any particular private citizen is sufficiently likely to bring an enforcement action against any particular plaintiff to be causally responsible for the plaintiff's injury and to show that an injunction against particular defendants would remedy the injury.

<sup>19</sup> S.B. 8 provides for "statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced" in violation of the statute, plus fees and attorney's costs. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b) (West 2021). A party cannot be held liable more than once for the same violation. *Id.* § 171.208(c). S.B. 8 also bars defenses based on (inter alia) "non-mutual issue preclusion or non-mutual claim preclusion," *id.* § 171.208(e)(5), and allows for venue in the county of residence of any private S.B. 8 plaintiff, *id.* § 171.210(a)(4).

<sup>20</sup> See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

<sup>21</sup> See *id.* at 531–35.

<sup>22</sup> *Id.* at 534–35.

<sup>23</sup> *Id.* at 531–34.

<sup>24</sup> 209 U.S. 123 (1908); *Jackson*, 142 S. Ct. at 535–36.

<sup>25</sup> E.g., Adam Liptak, *Supreme Court Allows Challenge to Texas Abortion Law but Leaves It in Effect*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/us/politics/texas-abortion-supreme-court.html> [<https://perma.cc/37E6-QN44>] ("The Supreme Court ruled on Friday that abortion providers in Texas can challenge a state law banning most abortions after six weeks, allowing them to sue at least some state officials in federal court despite the procedural hurdles imposed by the law's unusual structure.")

<sup>26</sup> See, e.g., *Albertson v. Millard*, 345 U.S. 242, 244 (1953) (per curiam) ("The construction given to a state statute by the state courts is binding upon federal courts.")

<sup>27</sup> *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 574 (Tex. 2022).

and precedent, a lower federal court's decision to award such an injunction would probably not have bound the private parties that S.B. 8 empowered to bring suits for damages and other civil penalties.<sup>28</sup> The threat of private actions to enforce S.B. 8 in the Texas state courts, including ones brought after an anticipated overruling of *Roe* and *Casey*, would thus have remained.

In response to Justice Sotomayor's dissenting protest that the Supreme Court should not permit Texas to evade suits for effectual injunctive relief against a statute that was plainly unconstitutional under *Roe* and *Casey*,<sup>29</sup> Justice Gorsuch emphasized that the state had not wholly insulated S.B. 8 from challenge.<sup>30</sup> Apart from the suit against licensing officials that the Court believed to be available, Justice Gorsuch noted that S.B. 8 might be challengeable in preenforcement suits for injunctions in Texas state court<sup>31</sup> — though he did not appear to condition the Court's upholding of S.B. 8 on that uncertain possibility.<sup>32</sup> In any event, Justice Gorsuch wrote, any parties who were sued for violating S.B. 8 could assert their constitutional rights as defenses in the actions against them.<sup>33</sup>

The right of defendants to argue that a statute being enforced against them violates the Constitution is indeed an important, constitutionally mandated component of the relationship between substantive constitutional rights and rights to remedies. Under the Constitution's Supremacy Clause, courts must entertain properly presented constitutional defenses.<sup>34</sup> But reliance on that safeguard requires violating a statute and taking one's chances that a constitutional argument will prevail. That can be a risky strategy in lots of contexts and was especially risky for the plaintiffs in *Jackson* because of the prospect that the Supreme Court might overrule *Roe* and *Casey*. It was to alleviate the chilling effects of threatened criminal and civil enforcement actions that the modern law of constitutional remedies had evolved to allow suits for injunctions as the norm.<sup>35</sup>

The case- and abortion-transcending significance of *Jackson* lies in the Supreme Court majority's treatment of that norm. On the most plausible reading, *Jackson* holds that there is no right to sue for an injunction against the enforcement of a statute even when it creates, and is designed to create, a chilling effect on the exercise of constitutional

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<sup>28</sup> See *infra* notes 293–95 and accompanying text.

<sup>29</sup> *Jackson*, 142 S. Ct. at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>30</sup> *Id.* at 537–38 (majority opinion).

<sup>31</sup> *Id.* at 537.

<sup>32</sup> See *id.* (characterizing the discussion of alternative remedies available to potentially injured parties as a “detour”).

<sup>33</sup> *Id.* at 537–38; *id.* at 530 n.1 (“[A]pplicable federal constitutional defenses always stand fully available when properly asserted.” (citing U.S. CONST. art. VI)).

<sup>34</sup> See U.S. CONST. art. VI, cl. 2.

<sup>35</sup> See *supra* note 11 and accompanying text.

rights — at least, that is, when the right holders could, in theory, assert their rights as a defense against an enforcement action. If so, *Jackson* possesses enormous consequence. In addition to inviting other states to replicate Texas's strategy in efforts to chill the exercise of constitutional rights,<sup>36</sup> *Jackson* pairs with the Supreme Court's 2015 decision in *Armstrong v. Exceptional Child Center, Inc.*<sup>37</sup> — which held that the Supremacy Clause does not directly create a federal right to sue to enjoin the enforcement of unconstitutional state statutes<sup>38</sup> — to raise questions about whether parties ever have a *constitutional* right to equitable relief. If no constitutional mandate underlies the traditional practices of courts of equity in enjoining constitutional violations, then causes of action to sue for injunctions apparently exist only insofar as states choose to grant them as a matter of state law and Congress chooses to tolerate them as a matter of federal law.

For some parties who rely on injunctions to vindicate their substantive rights, moreover, defense against an enforcement action is not even a theoretical alternative. Consider, for example, someone who is subjected to unconstitutional prayer in a public school, or who is denied welfare benefits or fired from a job for unconstitutional reasons, or even the plaintiffs in *Brown v. Board of Education*,<sup>39</sup> who experienced racial segregation. Does the Constitution guarantee none of them rights to sue for injunctions or other remedies adequate to enforce their substantive rights? At the current time, most would-be plaintiffs who believe that state officials have violated their constitutional rights have statutory rights to sue for injunctions under 42 U.S.C. § 1983.<sup>40</sup> But what would happen if Congress took away statutory rights to sue to enjoin enforcement of unconstitutional statutes? Would there be a constitutionally mandated right to an injunction or other efficacious remedies?

Thirty years ago, I would have answered confidently that the answer to this question was yes. Closer to the present but prior to *Armstrong*

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<sup>36</sup> In California, for example, the state legislature has recently enacted S.B. 1327, which creates a private right of action, unenforceable by state officials, against any person who manufactures, imports, or sells assault weapons within the state, with damages of at least \$10,000 for each violation. 2022 Cal. Legis. Serv. ch. 146 (West) (to be codified at CAL. BUS. & PROF. CODE §§ 22949.60–.71 and CAL. CIV. PROC. CODE § 1021.11); see also Hannah Wiley, *Newsom Signs Gun Law Modeled After Texas Abortion Ban, Setting Up Supreme Court Fight*, L.A. TIMES (July 22, 2022, 11:23 AM), <https://www.latimes.com/california/story/2022-07-22/newsom-signs-gun-bill-modeled-after-texas-abortion-ban-setting-up> [<https://perma.cc/5DC3-TEJM>] (discussing the bill's passage).

<sup>37</sup> 575 U.S. 320 (2015).

<sup>38</sup> *Id.* at 327.

<sup>39</sup> 347 U.S. 483 (1954).

<sup>40</sup> Section 1983 provides the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

and now *Jackson*, I still would have thought that the affirmative argument would likely convince a majority of the Justices. But now the argument that there is a constitutional right to effective injunctive relief against ongoing constitutional violations, even when there is no opportunity to vindicate substantive constitutional rights through a defense against an enforcement action, confronts gathering precedent-based headwinds.

In the view of some, it may be an ample response that Congress is unlikely, as a political matter, to preclude effective injunctive remedies for states' ongoing violations of constitutional norms such as those barring segregation in public education,<sup>41</sup> school prayer,<sup>42</sup> or employment discrimination.<sup>43</sup> Viewing political developments as significantly unpredictable, I am less sanguine. But whatever one's political prognostications, *Jackson* provides a reminder that major gaps can exist — sometimes because legislative bodies wish to create them — between constitutional rights and the remedies that would be necessary to enforce those rights in practice. *Jackson* thus provides an occasion for considering broad questions both about where the law of constitutional remedies currently stands and about how it is likely to change in the near future. Although much of my analysis takes *Jackson* as its point of departure, this Article highlights *Jackson*'s connection to other recent doctrinal developments, including the Supreme Court's decision in the same Term to make suits for damages against federal officials who violate constitutional rights nearly impossible to prosecute successfully.<sup>44</sup> Looking back at the 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>45</sup> which had first recognized a right of plaintiffs to sue federal officials for damages,<sup>46</sup> the Court indicated in *Egbert v. Boule*<sup>47</sup> that "if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution."<sup>48</sup>

In addressing questions about the present state and likely future of the law of constitutional remedies, this Article relies on two assumptions. First, we cannot understand what substantive constitutional rights are, or what it means to have a substantive right, without attention to the extent — if any — of available and possibly constitutionally guaranteed remedies. Second, we cannot understand the current law defining the relationship between substantive constitutional rights and rights of access to courts to vindicate them without understanding the historical and constitutional background from which the current law

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<sup>41</sup> See, e.g., *Brown*, 347 U.S. at 495.

<sup>42</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>43</sup> See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986) (plurality opinion).

<sup>44</sup> See *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022).

<sup>45</sup> 403 U.S. 388 (1971).

<sup>46</sup> See *id.* at 397.

<sup>47</sup> 142 S. Ct. 1793.

<sup>48</sup> *Id.* at 1809 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017)).



developed and, in increasingly important respects, from which the current law now deviates.

Against the background of those premises, this Article advances a single, central argument that combines empirical and normative aspects: shaping the right-remedy relationship is a crucial lawmaking function that has historically been shared between Congress and the courts, especially the Supreme Court. Contrary to some of the Court's critics, the relationship between rights and remedies is not conceptually determinate.<sup>49</sup> One cannot deduce entitlements to particular remedies directly from the concept of a right without reliance on other premises and consideration of multiple contingent factors.<sup>50</sup> At the same time, contrary to some originalist-textualist debunkers of the law of constitutional remedies as it existed prior to cases such as *Armstrong* and *Jackson*,<sup>51</sup> nothing in the Constitution's history or tradition mandates that the Supreme Court must leave the provision of remedies that are necessary to the effective enforcement of substantive rights entirely to Congress. Nor is Congress's authority to grant or withhold remedies for constitutional violations, sometimes including damages and injunctions, wholly unconstrained. If we have entered an era in which a majority of the Justices believe otherwise, the situation is, in my view, a deeply regrettable one, which will cheapen what it means to have a constitutional right.<sup>52</sup> Rights that exist in name will increasingly fall vulnerable to flouting in the absence of political commitments to enforcing them. We also risk erosion of the rule-of-law ideal that the government and its officials should be accountable for their violations of law in actions before the courts.<sup>53</sup> Although some of my concerns and theses in this Article are familiar, my aim is to achieve a relatively panoptic perspective on historical trends and normative themes in the law of constitutional remedies, to bring criticisms of the Supreme Court's restrictions of available

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<sup>49</sup> Cf., e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293–94 (1995) (arguing, based on the principle that “the judiciary has a duty to enforce the Constitution,” that “the Court must ensure that each individual before it receives an adequate remedy for the violation of constitutional rights,” *id.* at 293 (footnote omitted)); Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV. 1865, 1875 (2021) (“[C]onstitutional remedies . . . must be solely the province of the judiciary to maintain the power of judicial review . . .”).

<sup>50</sup> For the classic development of this thesis, see 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).

<sup>51</sup> See John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2522 (1998) (arguing that the only constitutionally necessary remedy for violations of the Fourteenth Amendment is judicial nullification of invalid enactments).

<sup>52</sup> For a partly parallel historical account of the judicial role in defining the relationship between constitutional rights and remedies, which also identifies a turn from prior patterns in recent decades, see AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 5–9 (2021).

<sup>53</sup> See, e.g., Gerald J. Postema, *Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 7, 39 (Xiaobo Zhai & Michael Quinn eds., 2014).

remedies up to date, and to forecast likely future developments — a number of which I find alarming.

This Article unfolds as follows. Part I traces the emergence of what I call the traditional law of constitutional remedies from the Founding era through the latter part of the twentieth century. It also offers a brief normative defense, rooted in the ideal of the rule of law, of the doctrine that developed during this period. Part II identifies the beginnings of a revisionary movement in the late twentieth century, partly but not entirely driven by the Supreme Court's increasing (but never complete) commitment to originalist and textualist interpretive methodologies. Part III examines the reasoning of the Court's recent decision in *Whole Woman's Health v. Jackson*. Part IV probes the likely implications of *Jackson* and other recent decisions for a number of important, looming issues concerning the relationship of substantive rights to constitutional remedies. *Jackson*, I suggest, is unlikely to mark the culmination of the Court's project in making the availability of remedies for constitutional violations less a matter of constitutional right than a subject for political judgment and limitation both by state legislatures — as in *Jackson* — and by Congress. Part V considers and rejects the suggestion, offered by the Court in *Jackson*, that its recent decisions restricting constitutional remedies reflect a stance of disciplined restraint and deference to Congress under the separation of powers. The Court, Part V argues, retains and sometimes aggressively employs a variety of nondeferential levers to shape the law of constitutional remedies to its preferences. Part VI concludes with reflections on constitutional change and likely developments in the long-term future.

#### I. CONSTITUTIONAL RIGHTS AND REMEDIES: WHERE WE HAVE BEEN

Although the practical value of a right obviously depends on the availability of remedies to enforce it, there are different possible connections between and combinations of constitutional rights and remedies. In the most influential discussion of the topic, Professor Henry Hart noted that Congress has wide discretion in the choice of which remedies to make available, even if the Constitution might forbid it to withhold or withdraw all remedies.<sup>54</sup> Tax remedies furnished his central example.<sup>55</sup> Even if we assume that a taxpayer has the right to challenge the constitutionality of a tax, Congress can choose whether to require litigation of the issue in a suit for an injunction, a postpayment action for a refund, or, possibly, as a defense against an enforcement action for nonpayment.<sup>56</sup>

<sup>54</sup> Hart, *supra* note 50, at 1366–70.

<sup>55</sup> See *id.* at 1367–70, 1370 n.32.

<sup>56</sup> See *id.* at 1369.

In an article written roughly thirty years ago, Professor Daniel Meltzer and I built on Hart's insight by arguing that the traditional law of constitutional remedies embodied a mix of constitutional, common law, and equitable principles.<sup>57</sup> Perhaps the central substantive principle was that the Constitution requires an adequate scheme of rights to sue and judicial remedies to ensure that federal and state officials will stay generally within constitutional bounds.<sup>58</sup> In tracing that principle to the Constitution and in arguing that it helped to explain and justify a broad range of settled cases and doctrines, Meltzer and I embraced a set of assumptions that we later referred to as a "Common Law Model."<sup>59</sup> Within that model — which we thought warranted by history and necessitated by a Constitution that often demands the existence of *some* constitutional remedy or remedies, without specifying precisely what they must be — courts appropriately act as Congress's junior partners in developing remedies.<sup>60</sup> In cases in which Congress has specifically created or withheld particular remedies, we maintained that courts should almost invariably accede to Congress's lawmaking prerogatives. But even in the absence of express congressional authorization, Meltzer and I argued that the courts had traditionally and appropriately posited that the victims of constitutional violations were presumptively entitled to redress.<sup>61</sup> We acknowledged that the resulting presumption was not a rigid one: it sometimes yielded to doctrines such as those of sovereign and official immunity and to the values that underlie those doctrines.<sup>62</sup> Nonetheless, we argued, the case law reflected a presumption that courts could, should, and would craft remedies designed to promote individual redress, as well as keep the government and its officials generally within constitutional bounds, even when particular remedies were not strictly constitutionally necessary.<sup>63</sup> If the Constitution requires some remedy to vindicate constitutional rights, and if Congress has provided none,

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<sup>57</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–80, 1787 (1991) [hereinafter Fallon & Meltzer, *New Law*].

<sup>58</sup> See, e.g., *id.* at 1789 (describing the "unyielding," or at least comparatively unyielding, principle that the scheme of constitutional remedies must be sufficient to "ensur[e] governmental faithfulness to law").

<sup>59</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2041 (2007) [hereinafter Fallon & Meltzer, *Habeas Corpus*].

<sup>60</sup> For an example of limitation, see *Younger v. Harris*, 401 U.S. 37 (1971), in which eight of the nine Justices agreed that federal courts should nearly always decline to exercise jurisdiction over suits to enjoin pending state criminal prosecutions. *Id.* at 53–54; *id.* at 56 (Brennan, J., concurring in the judgment).

<sup>61</sup> E.g., Fallon & Meltzer, *New Law*, *supra* note 57, at 1791 ("The principle calling for effective redress of all individual wrongs provides an appropriate baseline for analyzing remedies questions."); see also Fallon & Meltzer, *Habeas Corpus*, *supra* note 59, at 2069–70 (describing the interpretive "presumption in favor of [bodily] liberty" in the context of habeas, *id.* at 2070).

<sup>62</sup> See Fallon & Meltzer, *New Law*, *supra* note 57, at 1787, 1791.

<sup>63</sup> See *id.* at 1787.

then a court, we maintained, would need to choose a remedy even though no particular remedy was constitutionally necessary.

Historical scholarship by Professor Ann Woolhandler has emphasized another important piece of the constitutional and doctrinal puzzle.<sup>64</sup> Sometimes a state court remedy for state officials' constitutional violations might be constitutionally adequate if a state provided one. Nonetheless, if a state purports to preclude all remedies, then the Supreme Court, in reviewing state court judgments, must determine which remedy to furnish if the Constitution requires one<sup>65</sup> — even though it would be permissible for a state to substitute a different remedial scheme if it so chose. For example, if a coercively collected state tax violates the Equal Protection Clause, the Supreme Court may require the state to provide a refund, even though the state could, in principle, comply with the Fourteenth Amendment by raising the rates of other taxpayers.<sup>66</sup>

This Part briefly sketches the development of the traditional law of constitutional remedies, and the principles that defined it, prior to the modern era, which I date as having begun shortly after Meltzer and I published our article in 1991. I then offer a brief normative defense of the traditional law, which, I argue, reflected enduringly attractive rule-of-law ideals that more recent developments not only undervalue but also affirmatively subvert.

*A. The Traditional Law of Constitutional Remedies:  
An Opinionated Sketch*

The Constitution makes express reference to only two remedies: Habeas Corpus and Just Compensation.<sup>67</sup> If one asks how the Founders could have paid so little attention to so important a matter, the answer is that the Founding generation presupposed a background scheme of common law and equitable remedies through which the Constitution could be enforced and rights vindicated.<sup>68</sup> The traditional law of constitutional remedies not only grew out of that background scheme but

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<sup>64</sup> See generally Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 120–44 (1997) [hereinafter Woolhandler, *Common Law Origins*].

<sup>65</sup> See *id.* at 111–25.

<sup>66</sup> See *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (Brandeis, J.) (“The right invoked is that to equal treatment; and such treatment will be attained if either their competitors’ taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.”).

<sup>67</sup> See U.S. CONST. art. I, § 9, cl. 2 (Habeas Corpus); *id.* amend. V (Just Compensation).

<sup>68</sup> See Fallon & Meltzer, *New Law*, *supra* note 57, at 1779; see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring in the judgment) (“[T]he authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate . . . federally protected interest[s].”).

also reflected its gradual adaptation to ensure effective enforcement of constitutional norms.

*I. The Founding Era.* — Through the early years of constitutional history and beyond, the remedial law through which the Constitution was enforced against both the federal government and the states was almost entirely made or found by judges. It relied heavily on suits against government officials rather than the government itself. At the time of the Founding, all of the states claimed sovereign immunity from suit in their own courts,<sup>69</sup> though at least three had enacted general-waiver statutes.<sup>70</sup> In *Chisholm v. Georgia*,<sup>71</sup> the Supreme Court held that the Constitution divested the states' immunity in suits in federal court.<sup>72</sup> But that decision provoked what the Court subsequently described as a "shock of surprise."<sup>73</sup> Congress responded by drafting, and the states by ratifying, the Eleventh Amendment. On the prevailing interpretation, the Eleventh Amendment restored the prior status quo, under which the states retained their traditional sovereign immunity, including from suits for constitutional violations.<sup>74</sup>

Even so, the courts did not permit the Eleventh Amendment to frustrate enforcement of the Constitution against the states, nor did federal sovereign immunity preclude constitutional enforcement against the federal government. One important vehicle involved constitutional defenses against unconstitutional laws. When constitutional claims are asserted as defenses, the Supremacy Clause requires state courts to entertain them,<sup>75</sup> subject to the possibility of review by the Supreme Court.<sup>76</sup>

Comparably important was the historical availability of suits against governmental officials.<sup>77</sup> The traditional law distinguished sharply between suits against the sovereign, in which sovereign immunity applied, and suits against government officials, who normally could not claim the sovereign's immunity when sued in their own names.<sup>78</sup> By modern

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<sup>69</sup> *E.g.*, *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) (“[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.” (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434–35 (1793) (Iredell, J., dissenting))).

<sup>70</sup> See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 939 (1997) (noting that New York, Pennsylvania, and Virginia had adopted general-waiver statutes and that a number of other states had enacted more limited waivers).

<sup>71</sup> 2 U.S. (2 Dall.) 419.

<sup>72</sup> See *id.* at 450–51 (opinion of Blair, J.).

<sup>73</sup> *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

<sup>74</sup> See *Alden*, 527 U.S. at 712–13.

<sup>75</sup> See U.S. CONST. art. VI, § 1, cl. 2.

<sup>76</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (holding that the Eleventh Amendment creates no bar to appeals to the Supreme Court from state court judgments).

<sup>77</sup> See HART & WECHSLER, *supra* note 9, at 880–81.

<sup>78</sup> See, *e.g.*, Pfander & Wentzel, *supra* note 11, at 1335–37; see also Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9–18, 21–25 (1963) (describing English and early American practice).

standards, enforcement of the Constitution through officer suits was not always or even typically straightforward. The common law framework of rights and remedies mostly involved the rights of one private citizen against another. But when public officials violated a private right that was cognizable at common law, they could be sued just like anyone else.<sup>79</sup> When sued at common law, the officials typically would plead in defense that they could not be liable because they acted pursuant to governmental authorization.<sup>80</sup> In reply, a plaintiff could invoke the Constitution to override any purported authorization that contravened constitutional limits.<sup>81</sup>

In the antebellum period, the most paradigmatic officer suits were damages actions. But during the Founding era and its aftermath, British and American courts began to develop the common law writs of prohibition and certiorari as mechanisms for controlling administrative action on a broader scale. State courts, in particular, increasingly utilized these writs in the years before the Civil War.<sup>82</sup> Injunctions mandating compliance with the Constitution were initially rare, but not nonexistent. For example, the Supreme Court enjoined state officials from collecting an unconstitutional tax in the well-known case of *Osborn v. Bank of the United States*.<sup>83</sup>

In an important contribution to debates about the relationship between constitutional rights and constitutional remedies, Professor John Harrison maintains that although officer suits were broadly available at the time of the Founding and during early constitutional history, the original Constitution created no affirmative rights to judicial relief against unconstitutional governmental actions.<sup>84</sup> Officer suits were creatures of the common law and equity and were always subject to legislative abrogation, Harrison argues.<sup>85</sup> Nor, Harrison contends, did the Civil War Amendments create rights to affirmative judicial relief from constitutional violations.<sup>86</sup> In his view, the only necessary remedy was “nullification” of constitutionally invalid acts or legislation in any case that was properly brought before a court.

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<sup>79</sup> E.g., HART & WECHSLER, *supra* note 9, at 881; James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 754–55, 762–63 (2019); see also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–73 (2010).

<sup>80</sup> E.g., HART & WECHSLER, *supra* note 9, at 881; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RESV. L. REV. 396, 399 (1987) [hereinafter Woolhandler, *Patterns*].

<sup>81</sup> E.g., Woolhandler, *Patterns*, *supra* note 80, at 399.

<sup>82</sup> See, e.g., Pfander & Wentzel, *supra* note 11, at 1315–18.

<sup>83</sup> 22 U.S. (9 Wheat.) 738 (1824); see, e.g., Pfander & Wentzel, *supra* note 11, at 1324–25 (discussing *Osborn*).

<sup>84</sup> See Harrison, *supra* note 51, at 2516–17.

<sup>85</sup> See *id.* at 2522–23 (discussing the Fourteenth Amendment and *Ex parte Young*, 209 U.S. 123 (1908)).

<sup>86</sup> See *id.* at 2520–21.

As Professor Meltzer pointed out in reply, however, the support for Harrison's argument was "thin."<sup>87</sup> Although constitutional rights were initially enforced mostly through the common law, it does not follow that the Constitution created no entitlement to remedies in any case in which the common law might fail to provide them or Congress or a state legislature might attempt to preclude them.<sup>88</sup> In *Cary v. Curtis*,<sup>89</sup> the plaintiff argued that Congress's withdrawal of a right to sue a customs collector to recover duties paid under protest deprived him of a constitutionally guaranteed right to a remedy for the unlawful exaction of property.<sup>90</sup> The Supreme Court deflected that argument by citing an alternative legal mechanism through which the plaintiff might have asserted his rights.<sup>91</sup> Justice Story went further. In an opinion dissenting on statutory construction grounds, he maintained that if the statute at the heart of the case left the plaintiff with no remedy, it would violate the Constitution.<sup>92</sup>

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In discussing constitutional remedies during early U.S. history, I do not pretend to have identified the Constitution's original, uniquely correct meaning. If anything seems clear about the original meaning of provisions involving judicial power, it is that the Constitution's Framers and ratifiers had not fully thought through the role of the courts.<sup>93</sup> I do mean to claim, however, that it would be legally and historically superficial to infer that the Constitution had a uniquely correct original meaning that marked the provision of remedies to vindicate constitutional rights as matters committed to the plenary discretion of Congress or the states.<sup>94</sup>

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<sup>87</sup> Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2551 (1998).

<sup>88</sup> See *id.* at 2563–64 (offering examples). But cf. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1311 (2003) (noting that many Ratification-era state constitutions offered various explicit protections for traditional common law remedies).

<sup>89</sup> 44 U.S. (3 How.) 236 (1845).

<sup>90</sup> *Id.* at 237; see *id.* at 265 (McLean, J., dissenting).

<sup>91</sup> See *id.* at 250 (majority opinion) ("The claimant had his option to refuse payment . . . [or h]e might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry.")

<sup>92</sup> See *id.* at 252–53 (Story, J., dissenting).

<sup>93</sup> See, e.g., HART & WECHSLER, *supra* note 9, at 1 ("[T]o 'one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention.'" (quoting MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 154 (1913))).

<sup>94</sup> See generally Woolhandler, *Common Law Origins*, *supra* note 64, at 120–44 (tracing nineteenth- and early twentieth-century decisions in which the Supreme Court treated the provision of remedies for constitutional violations by both state and federal courts as constitutionally compelled).

2. *The Evolutionary Past: Injunctions.* — Issues involving the relationship between constitutional rights and remedies became urgent after the ratification of the Civil War Amendments. In response, the Supreme Court increasingly turned to injunctions as mainstays of constitutional enforcement. In terms of historical influence, the Court's most important decisions upholding judicial remedies, and implying a possible right to injunctions in some circumstances, came in two cases decided on the same day in 1908, *Ex parte Young* and *General Oil Co. v. Crain*.<sup>95</sup> Both were suits in equity against state officials charged with enforcing laws that the plaintiffs alleged violated the Fourteenth Amendment.

In *Young*, the defendant, who was sued in his capacity as the Attorney General of Minnesota, claimed that the doctrine of state sovereign immunity barred the action against him.<sup>96</sup> He also invoked the traditional maxim that equity would not enjoin a criminal prosecution.<sup>97</sup> In explaining why sovereign immunity did not preclude the suit, the Supreme Court relied heavily on the Fourteenth Amendment:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character . . . [because t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>98</sup>

*Young* also explained why injunctive relief was necessary and appropriate, notwithstanding the theoretical possibility that the plaintiffs' constitutional rights could be vindicated via defense against an enforcement action. That remedy, the Court held, was "plainly inadequate."<sup>99</sup> Because of the heavy penalties that the state imposed for violating the rate-setting statute that the plaintiffs sought to challenge, including criminal punishment, it might have been a practical impossibility to find employees willing to violate the law and thereby frame a test case.<sup>100</sup>

A further concern in *Young* involved the source of the plaintiffs' cause of action.<sup>101</sup> It was once standard to read *Young* as holding that the right to sue for an injunction against unconstitutional state statutes

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<sup>95</sup> 209 U.S. 211 (1908).

<sup>96</sup> See *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

<sup>97</sup> *Id.* at 161.

<sup>98</sup> *Id.* at 159–60.

<sup>99</sup> *Id.* at 165.

<sup>100</sup> *Id.* at 145–46 (explaining that the statute made it "difficult, if not impossible," for a railroad "to obtain officers, agents or employ[ees] willing to carry on its affairs except in obedience to the act and orders in question," *id.* at 145).

<sup>101</sup> *E.g.*, Pfander & Wentzel, *supra* note 11, at 1287–89 (noting that the *Young* plaintiffs proceeded without "an express or statutory right of action," *id.* at 1287).



sprang directly from the Fourteenth Amendment.<sup>102</sup> Against that view, Professor Harrison maintains that *Young* was instead grounded in and justified by the traditions of equity, within which antisuit injunctions were a familiar tool.<sup>103</sup> Even if some types of antisuit injunction were staples of equity, however, *Young* reflected judicial innovation in adapting traditional forms to enable judicial enforcement of constitutional rights. That transformation — which emerged gradually in the nineteenth century, and which *Young* either extended or ratified — had at least two elements.<sup>104</sup> One involved the partial displacement of the traditional maxim that equity would not enjoin a criminal prosecution.<sup>105</sup> The other involved the explicit and adaptive invocation of equity jurisprudence to furnish a remedy for official action involving the enforcement of an unconstitutional law, not an invasion of property that would have been tortious at common law.<sup>106</sup>

Moreover, however one reads *Young*, it is difficult not to construe *General Oil Co. v. Crain* as relying directly on the Fourteenth Amendment to justify its recognition of the plaintiff's right to relief. *Crain* was a suit brought in Tennessee state court to enjoin state officials from collecting an allegedly unconstitutional tax.<sup>107</sup> The state supreme court denied jurisdiction on sovereign immunity grounds.<sup>108</sup> In reversing that decision, the Supreme Court held that the Federal Constitution required the state courts to entertain the suit:

If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a state to its courts, . . . without power of review by this court, it must be evident

<sup>102</sup> See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523–24, 524 n.124 (1954); Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 962–63 (2009); Woolhandler, *Common Law Origins*, *supra* note 64, at 99–111.

<sup>103</sup> See generally John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008). According to Harrison, *Young* “did not rest on a novel cause of action derived from the Fourteenth Amendment.” *Id.* at 990. Instead, he argues, the plaintiffs asserted a traditional, equitable cause of action to enjoin a prosecution on the basis of what would have been a valid defense. See *id.* But cf. James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 213 & n.240 (2016) (arguing that *Young* “broke new ground” by “authorizing a new kind of injunction that was untethered to established antisuit forms,” partly because it involved an injunction against a criminal prosecution, and that the decision’s novelty was recognized by commentators at the time).

<sup>104</sup> See Pfander & Dwinell, *supra* note 103, at 156 n.8; Pfander & Wentzel, *supra* note 11, at 1280–81, 1281 n.48; David L. Shapiro, *Ex parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86–87 (2011).

<sup>105</sup> *E.g.*, Pfander & Wentzel, *supra* note 11, at 1342 (characterizing *Young* as involving “a transition from an old world in which equity steered clear of public law proceedings,” including criminal prosecutions, “to a new world where equity had largely replaced [prior] forms of public law oversight”).

<sup>106</sup> *Id.* at 1359 (linking *Young* to “a venerable tradition” in which judicial remedies “fill[] gaps in the law that might arise either from misadventures or misguided legislative interventions”); Meltzer, *supra* note 87, at 2559–60; Shapiro, *supra* note 104, at 86–87.

<sup>107</sup> See *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226, 231 (1908).

<sup>108</sup> See *id.* at 232 (Harlan, J., concurring).

that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.<sup>109</sup>

As Professors Woolhandler and Michael Collins explain, when the Court, “due to constitutional concerns, . . . require[d] state courts to entertain a . . . cause of action similar to that which the federal courts would have supplied in cases originating in the lower federal courts, it suggest[ed] that the Court saw the cause of action as constitutionally necessary in both contexts.”<sup>110</sup> Similar reasoning explains the Supreme Court’s ruling, during the *Lochner* era, that the Fourteenth Amendment obliged state courts to “entertain challenges to the reasonableness of [railroad] rates.”<sup>111</sup>

Following *Young* and *Crain*, injunctive relief progressively became the normal mechanism for enforcing the Constitution against governmental officials who violated or threatened to violate constitutional rights.<sup>112</sup> In the wake of *Brown v. Board of Education* and suits for “structural injunctions” to reform a variety of state governmental institutions, controversy erupted over how far injunctive relief ought to

<sup>109</sup> *Id.* at 226 (majority opinion).

<sup>110</sup> Ann Woolhandler & Michael G. Collins, *Was Bivens Necessary?*, 96 NOTRE DAME L. REV. 1893, 1902 (2021). Woolhandler provided a slightly more nuanced statement in an earlier article: *Crain* presents an odd combination of the compulsory and the voluntary. The Supreme Court in *Crain* would not have forced the state to supply equitable remedies. But if the state court exercised general equitable jurisdiction it could be required to exercise such jurisdiction to enjoin an imminent trespass by a government officer, just as the state courts might be required to entertain a damages action for a completed trespass . . . . That states were not forced generally to have equitable remedies did not exactly mean that equitable remedies were not constitutionally compelled, since the federal courts were often available to provide them when jurisdiction existed. The availability of federal equity kept the issue of when state courts must entertain injunction actions from surfacing very often.

Woolhandler, *Common Law Origins*, *supra* note 64, at 151 n.382.

<sup>111</sup> Woolhandler, *Common Law Origins*, *supra* note 64, at 129 (citing *Lochner v. New York*, 198 U.S. 45 (1905); *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362, 396–97 (1894); *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 435, 457–58 (1890); *id.* at 459–60 (Miller, J., concurring)). During the same era, when state law provided for enforcement of state regulatory and rate-setting statutes exclusively through private causes of action, a few Supreme Court cases developed an equitable tolling doctrine under which, if such statutes’ penalty provisions were excessively draconian, they would be deemed unconstitutional under the Due Process Clause and therefore unenforceable until the substantive meaning and validity of the regulatory schemes had been established through litigation. For citations and discussion, see Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825 (2022).

<sup>112</sup> *See, e.g.*, Woolhandler & Collins, *supra* note 110, at 1911 (“There was, moreover, no pretense during the *Lochner* era or thereafter that every unconstitutional regulatory scheme that could occasion an injunction could also occasion a claim for damages.” (footnote omitted)); Karlan, *supra* note 11, at 1327–29; Pfander & Wentzel, *supra* note 11, at 1332–33. Although a showing of irreparable injury is a formal requirement for the issuance of an injunction, “[w]hen an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary.” 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2022) (footnotes omitted); *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

go.<sup>113</sup> But it was widely taken for granted that injunctions were both a broadly available and at least sometimes a constitutionally necessary means of enforcing constitutional guarantees.<sup>114</sup>

3. *The Evolutionary Past: Damages Compensation.* — During the late nineteenth and early twentieth centuries, the Supreme Court also recognized that the Constitution sometimes requires compensatory remedies for completed constitutional violations. In *Poindexter v. Greenhow*,<sup>115</sup> for example, the Supreme Court treated Virginia's abrogation of a trespass action against a tax collector as a constitutional violation. The Court explained: "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."<sup>116</sup>

In *Ward v. Board of County Commissioners*,<sup>117</sup> the Court held that an Oklahoma county was obliged to pay back tax money that it had coercively collected in violation of federal treaties, despite the absence of any state law authorizing the refund. As in *Young, Crain*, and *Poindexter*, the Court cited the imperative of enforcing the Fourteenth Amendment as a ground for its decision: "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property . . . arbitrarily and without due process of law . . . in contravention of the Fourteenth Amendment . . ."<sup>118</sup>

*Ward* implied no direct threat to state sovereign immunity, which the Supreme Court has held that cities and counties do not possess.<sup>119</sup> In the evolutionary expansion of constitutional remedies, sovereign immunity had always provided the largest stumbling block, and it has continued to do so. But in *First English Evangelical Lutheran Church v.*

<sup>113</sup> Compare ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT*, at vi–vii (2003) (arguing not very far), Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661–62 (1978) (same), and John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1121–24 (1996) (same), with Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5–8 (1982) (arguing otherwise), and Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016, 1020–21 (2004) (same).

<sup>114</sup> See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–58 (2017) (assuming the availability of injunctive remedies as background to determination of whether to uphold a damages remedy under *Bivens*).

<sup>115</sup> 114 U.S. 270 (1885).

<sup>116</sup> *Id.* at 303; see also Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1778–79 (1997) (citing *Poindexter* as establishing that state courts are required to furnish constitutionally necessary or appropriate remedies).

<sup>117</sup> 253 U.S. 17 (1920).

<sup>118</sup> *Id.* at 24.

<sup>119</sup> See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

*County of Los Angeles*,<sup>120</sup> the Court suggested in dictum that the right to a Just Compensation remedy for takings of private property would be judicially enforceable because it would be constitutionally mandated.<sup>121</sup> And *Reich v. Collins*<sup>122</sup> stated unequivocally as a matter of federal law that an obligation to refund tax monies exacted in violation of the Fourteenth Amendment exists notwithstanding “the sovereign immunity States traditionally enjoy in their own courts.”<sup>123</sup>

Another important development in the evolutionary expansion of compensatory remedies for constitutional violations came in 1961, when the Supreme Court decided *Monroe v. Pape*.<sup>124</sup> In 1871, as part of the Ku Klux Klan Act,<sup>125</sup> Congress enacted 42 U.S.C. § 1983, which provides a federal statutory cause of action against state officials who violate federal constitutional and statutory rights.<sup>126</sup> But § 1983 lay substantially moribund until *Monroe* revived it,<sup>127</sup> and many earlier suits against state officials that might have been brought under § 1983 were pleaded as common law actions instead. Since 1961, § 1983 suits have become the preferred vehicles for pursuing damages remedies against state officials who violate constitutional rights because prevailing plaintiffs in § 1983 actions are eligible to collect attorneys’ fees.<sup>128</sup>

In cases involving alleged constitutional violations by federal officials, Congress has provided no analogue to § 1983. Accordingly, suits at common law — which, after the Supreme Court’s 1938 decision in *Erie Railroad Co. v. Tompkins*,<sup>129</sup> mostly became suits under state law — remained a primary remedy for constitutional violations by federal officials well into the twentieth century. But the protections afforded by state tort law did not always map precisely onto those created

<sup>120</sup> 482 U.S. 304 (1987).

<sup>121</sup> *Id.* at 316.

<sup>122</sup> 513 U.S. 106 (1994).

<sup>123</sup> *Id.* at 110. This statement came in dictum since the state did not base its denial of a refund on sovereign immunity grounds. *Id.* at 108–09. Also without reference to sovereign immunity, a series of pre-*Reich* cases had held that state courts could not invoke nonretroactivity principles to deny refunds of tax payments exacted under laws subsequently held to be unconstitutional. See *Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 100 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (plurality opinion); *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 188 (1990).

<sup>124</sup> 365 U.S. 167 (1961).

<sup>125</sup> Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

<sup>126</sup> *Id.* § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983).

<sup>127</sup> On the proliferation of suits in the aftermath of *Monroe v. Pape*, see HART & WECHSLER, *supra* note 9, at 994–95.

<sup>128</sup> See 42 U.S.C. § 1988(b) (providing that, in cases involving § 1983 claims, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs”).

<sup>129</sup> 304 U.S. 64 (1938).

by the federal Constitution.<sup>130</sup> In response to the mismatch, the Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, upheld a federal cause of action for damages against federal officials who violated constitutional rights. Although “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation,”<sup>131</sup> the Court wrote, “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>132</sup>

Some language in Justice Brennan’s opinion for the Court suggested that *Bivens*’s holding reflected a constitutional mandate of federal damages remedies for constitutional violations.<sup>133</sup> But any categorical intimations to that effect were unpersuasive for at least two reasons. First, state law tort remedies were presumably constitutionally adequate in cases in which they provided redress for constitutional violations.<sup>134</sup> Second, the Court left the traditions of sovereign and official immunity unchallenged. Indeed, in *Bivens* itself, after affirming that the plaintiff had stated a valid cause of action, the Court remanded the case for consideration of whether the defendants might nonetheless deserve to prevail based on an immunity defense.<sup>135</sup> Justice Harlan’s concurring opinion was both more explicit and more persuasive in recognizing that the Court’s authorization of *Bivens* actions reflected an exercise in federal common lawmaking. “[I]f a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief . . . , then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law,” he wrote.<sup>136</sup>

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<sup>130</sup> See Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 134–38 (2012) (arguing that common law remedies that were available in early U.S. history had grown inadequate to enforce many modern rights); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 136 (2009); Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 636–37 (1997).

<sup>131</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

<sup>132</sup> *Id.* (omission in original) (internal quotation marks omitted) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>133</sup> See *id.* at 395–98 (citing *Marbury v. Madison* for the proposition that for every right, there must be a remedy, *id.* at 397 (quoting 5 U.S. (1 Cranch) 137, 163 (1803)), and affirming the availability of suits for damages against officials who violate the Fourth Amendment in the absence of “special factors counselling hesitation,” *id.* at 396, or a congressional declaration that injured parties “may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress,” *id.* at 397).

<sup>134</sup> See Woolhandler & Collins, *supra* note 110, at 1913–14 (“To say that a damages remedy is constitutionally necessary does not require that remedy must take the form of a federal action (or an action against the individual officer as opposed to the government).”).

<sup>135</sup> See *Bivens*, 403 U.S. at 397–98.

<sup>136</sup> *Id.* at 405 (Harlan, J., concurring in the judgment).

In affirming the Supreme Court's prerogative to craft remedies for constitutional violations so long as Congress has not validly precluded them, Justice Harlan might also have pointed to other widely accepted developments in the law of constitutional remedies. Prominent among these was the emergence of a number of remedies, including the exclusionary rule, that the Court introduced to protect the rights of criminal defendants.<sup>137</sup> Over the course of the twentieth century, the Court also developed the doctrine of third-party standing, under which it allows one party, who has suffered a judicially cognizable injury, to predicate a claim to judicial relief on another party's constitutional rights.<sup>138</sup>

4. *Congressionally Authorized Remedies.* — One more element of the traditional relationship between substantive rights and judicial remedies merits highlighting: when Congress sought to create new or more expansive remedies to protect constitutional rights, its claims of authority typically elicited judicial deference. Once again, I do not mean to paint a picture that is wholly unmixed. In the *Civil Rights Cases*,<sup>139</sup> for example, the Court ruled that because the Fourteenth Amendment establishes no direct prohibition against "private" discrimination, Congress could not use its power to enforce the Fourteenth Amendment to ban private discrimination or provide remedies for it.<sup>140</sup>

In the 1930s, however, the Supreme Court ratified the power of Congress to authorize declaratory judgments that courts of equity could not have awarded in the Founding era.<sup>141</sup> Although the federal declaratory judgment jurisdiction extends to nonconstitutional as well as

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<sup>137</sup> See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 252 (1988) (listing the exclusionary rule and the reversal of convictions after racial discrimination in jury selection as examples).

<sup>138</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 194–95 (1976). For diverse efforts to explain and rationalize the doctrine, see generally Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1 (2021); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); and Henry P. Monaghan, *Third-Party Standing*, 84 COLUM. L. REV. 277 (1984).

<sup>139</sup> 109 U.S. 3 (1883).

<sup>140</sup> *Id.* at 13.

<sup>141</sup> See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (affirming that "[i]n providing remedies . . . in relation to cases and controversies in the constitutional sense" — as gauged by the presence of a concrete dispute about the rights and obligations of the parties — "Congress is acting within its delegated power over the jurisdiction of the federal courts"). As the principal proponent of the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, pointed out, however, courts of equity sometimes entered quasi-declaratory decrees, including in quiet title actions. See Edwin M. Borchard, *The Uniform Declaratory Judgments Act*, 18 MINN. L. REV. 239, 240, 246 (1934). See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 n.80 (2015) (noting that "[t]he Supreme Court has not given a consistent answer" to the question whether there are "any limits on Congress's ability to change the law of equitable remedies"); Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2048 (2022) ("[I]f the Court were to hold tomorrow that an exercise of equitable power that the Court regarded as authorized by a federal statute was nonetheless unconstitutional because of Article III's reference to 'Cases, in . . . Equity,' then that would be [the] first time it had done so." (omission in original) (quoting U.S. CONST. art. III, § 2, cl. 1)).

constitutional cases, declaratory judgments can serve as mechanisms to vindicate constitutional rights even when courts might hesitate to enter the more “intrusive” remedy of an injunction.<sup>142</sup>

During the 1960s, the Supreme Court affirmed that Congress had very broad authority to enact nontraditional and prophylactic remedies to ensure that constitutionally guaranteed voting rights were implemented effectively. In *South Carolina v. Katzenbach*,<sup>143</sup> the Court upheld a provision of the 1965 Voting Rights Act<sup>144</sup> that required states with histories of discrimination to preclear certain changes in their election laws with the U.S. Department of Justice.<sup>145</sup> In *Katzenbach v. Morgan*,<sup>146</sup> the Court ruled that Congress could adopt further prophylactic and nontraditional “remedies” to forestall or correct for violations, the occurrence of which would otherwise be hard to prove in court. Section 5 of the Fourteenth Amendment, the Court wrote, “authoriz[ed] Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>147</sup>

### B. Explanatory Themes

When Professor Meltzer and I described the traditional law of constitutional remedies as reflecting both substantive premises and structural assumptions about the judicial role, we sought to offer a legal theory — capable of identifying how courts ought to decide cases as a matter of law — and not merely a normative proposal.<sup>148</sup> We claimed that the substantive principles we had identified — requiring sufficient remedies to keep the government within constitutional bounds and recognizing a presumptive entitlement to individually effective redress for constitutional violations — not only fit the case law reasonably well but also had sufficient normative allure to warrant extension into the future. With section A having sought to vindicate the descriptive accuracy of our claims, I now want to say a few words about the normative attractiveness of the traditional law’s premises.

As Henry Hart emphasized, the Constitution aspires to create a regime of law.<sup>149</sup> In light of that purpose, the most fundamental principle that Meltzer and I posited — requiring sufficient constitutional

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<sup>142</sup> See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 471–72 (1974) (holding that even if an injunction were not appropriate due to the absence of irreparable injury, no showing of irreparable injury is needed for a declaratory judgment).

<sup>143</sup> 383 U.S. 301 (1966).

<sup>144</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

<sup>145</sup> *Katzenbach*, 383 U.S. at 325–26.

<sup>146</sup> 384 U.S. 641 (1966).

<sup>147</sup> *Id.* at 651.

<sup>148</sup> See Fallon & Meltzer, *New Law*, *supra* note 57, at 1779–87.

<sup>149</sup> See Hart, *supra* note 50, at 1363 (noting the challenge of explaining how Congress’s power to control the jurisdiction of the federal and also the state courts “can . . . be reconciled with the basic presuppositions of a regime of law and of constitutional government”).

remedies to keep the government and its officials generally within the bounds of law — directly reflects the ideal of the rule of law. The rule of law is a complex, multifaceted ideal, which understandably provokes disagreement along some dimensions.<sup>150</sup> It should be uncontroversial, however, that the rule of law — like the idea of law itself — entails both empowerment and constraint. On the one hand, law requires the empowerment of officials to develop and enforce norms of conduct.<sup>151</sup> On the other hand, official power, once conferred, is potentially dangerous to, as well as protective of, liberty, property, and security that the rule of law ought to safeguard.<sup>152</sup> If a single, central idea runs through discussions and debates about the rule of law, it is, accordingly, that the rule of law must somehow constrain officials as well as citizens and, in particular, must furnish a bulwark against official abuses of power.<sup>153</sup> In light of that aim, a demand for enforcement of constitutional norms against government officials, typically if not invariably through judicial processes, lies within the core of any defensible conception.<sup>154</sup>

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<sup>150</sup> See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971); Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6–9 (2008). For an examination of some of the contests as played out in American constitutional discourse, see generally Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

<sup>151</sup> See, e.g., H.L.A. HART, THE CONCEPT OF LAW 79–99 (2d ed. 1994) (characterizing law as the union of primary rules of conduct, which “impose duties” and require people “to do or abstain from certain actions,” *id.* at 81, and secondary rules of change and adjudication, which confer powers to enforce, create, and vary such obligations, *id.* at 96–97, and help to “centraliz[e] . . . social pressure” and deter “the use of physical punishments or violent self help by private individuals,” *id.* at 97).

<sup>152</sup> See, e.g., JOHN STUART MILL, ON LIBERTY (4th ed. 1869), reprinted in ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 1, 79, 86 (Mark Philp & Frederick Rosen eds., 2015) (describing the necessity of law to prevent the violation of “distinct and assignable obligation[s] to any other person,” *id.* at 79, but noting the risk that the lawmaker might overreach and enact “gross usurpations upon the liberty of private life,” *id.* at 86).

<sup>153</sup> See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed. reprinted 1979) (defining the rule of law as guaranteeing against at least some types of official arbitrariness); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114–19 (2004) (describing the idea of sovereign constraint — “that the sovereign, and the state and its officials, are limited by the law,” *id.* at 114 — as one of the core demands of the rule of law); F.A. Hayek, Professor, Univ. of Chi., National Bank of Egypt Fiftieth Anniversary Commemoration Lectures: The Political Ideal of the Rule of Law (Feb. 1955), in 15 THE COLLECTED WORKS OF F.A. HAYEK 119, 166–67 (Bruce Caldwell ed., 2014) (explaining his belief that the rule of law requires that laws “apply[] equally to all people” and “apply whenever certain abstractly defined conditions are satisfied,” *id.* at 166).

<sup>154</sup> See, e.g., DICEY, *supra* note 153, at 197 (noting that although the English constitution lacks “those declarations or definitions of rights so dear to foreign constitutionalists,” such principles are derivable through judicial decisions and enforceable through robust common law remedies); Hayek, *supra* note 153, at 169 (arguing that judicial review of executive action is the “only way to ensure that” the government is “bound by rules” that meaningfully constrain both “where it may act” and “how it has to act”); see also Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 514 (2018) (“In nearly all theories of the nature and requirements of the rule of law . . . officials must be subject to the law in ways that restrain the exercise of arbitrary power.”).



The second remedial norm that Meltzer and I posited, involving a presumption in favor of effective remediation for individual victims of constitutional violations, also captures a familiar component of the rule-of-law ideal, which is that governmental officials should be accountable, through law, to those on whom their breaches of legal duty inflict harms.<sup>155</sup> Accountability is a complex idea, which can be realized more or less fully.<sup>156</sup> But the opportunity for those whose rights have been violated to seek redress is a presumptively just and desirable mechanism for holding wrongdoers to account. To be sure, damages may not always be strictly necessary for this purpose. Officials can be held accountable in other ways, including through criminal prosecutions and removals from office.<sup>157</sup> And making officials potentially liable for damages for every constitutional misstep — even if they acted in good faith and with the aim of promoting the public interest — could be thought unnecessary from the perspective of justice and imprudent in its practical effect, due to the diversion of public resources and other litigation-related costs that it would inflict.<sup>158</sup> But Meltzer and I acknowledged these concerns, as the traditional law always had, by recognizing that countervailing considerations could surmount the presumption in favor of individually effective financial compensation in some cases.

The final normative challenge involves justifying a judicial role in defining rights to sue and entitlements to remedies that are not strictly constitutionally mandated. The response depends on substantially Burkean premises that look to traditional practices as a source of accreted wisdom.<sup>159</sup> As originally written, our Constitution presupposed a judicial role in crafting and adapting remedies in accordance with the traditions of the common law and equity. Through most of U.S. history, judicial practice in accord with those admittedly evolving traditions generally worked well, in my view, in promoting the rule of law, assuring official accountability to law, and avoiding undue dislocations of effective government as measured by reasonable definitions of social costs.

<sup>155</sup> See Postema, *supra* note 53, at 25 (“[L]aw can rule only when those who are subject to it . . . are bound together in a thick network of mutual accountability with respect to that law.”).

<sup>156</sup> See generally Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 974–78 (2019) (discussing accountability mechanisms that fall short of full damages liability for all constitutional violations).

<sup>157</sup> See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 757–58 (1982) (discussing accountability mechanisms other than damages for ensuring that the President of the United States is not “above the law,” *id.* at 758).

<sup>158</sup> See Fallon, *supra* note 156, at 975 (discussing considerations that sometimes weigh against complete damages liability for constitutional violations not involving clearly established rights).

<sup>159</sup> Cf. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 40–41 (2010) (championing a common law–like approach to constitutional interpretation animated by “attitudes of humility and cautious empiricism,” *id.* at 40, that were most famously championed by Edmund Burke); Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923, 1929 (2021) (citing history to establish that “the understanding when the Constitution was ratified, and subsisting long thereafter, [was] that damages were an appropriate remedy for constitutional violations” even in the absence of express legislative authorization).

In offering this summary, I do not claim that the Supreme Court has always judged wisely in determining which substantive rights to uphold. During the late nineteenth and early twentieth centuries, the Court did scandalously little to protect the rights of racial and other minorities even as it aggressively overprotected economic rights.<sup>160</sup> That said, the Court of the *Lochner* era generally did much better in aligning rights with remedies than it did in identifying substantively protected rights.

## II. SEA CHANGE: BEGINNINGS OF THE CURRENT ERA

The course of evolution in the relationship between constitutional rights and remedies has changed significantly since 1991 in what I shall henceforth refer to as the “the current era.” This Part traces developments prior to *Whole Woman’s Health v. Jackson* in three central areas, involving (1) federal equity jurisdiction, (2) suits for damages to redress constitutional violations, and (3) judicial assessment of congressional legislation creating causes of action to enforce constitutional rights. Although the doctrinal changes reflect a multitude of occasionally cross-cutting considerations, three themes merit foreshadowing. First, a majority of the Justices of the Supreme Court have exhibited increased skepticism about the constitutional necessity of remedies for constitutional violations apart from defenses against the enforcement of invalid statutes. Second, the Justices have adopted a truncated view of the judicial role in recognizing causes of action not authorized by Congress. Third, the Justices have manifested a heightened sensitivity to the costs, including to federalism and separation of powers values, of suits against the government and its officials, apart from those challenging the constitutional legitimacy of federal administrative agencies.<sup>161</sup> All of these developments are loosely associated with modern judicial “conservatism” in its substantive as well as methodological dimensions.<sup>162</sup> It is not obvious to me why skepticism of constitutional remedies should be an attitude that correlates strongly with conservatism, but that appears to be the case. The Court’s decisions restricting the availability of

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<sup>160</sup> See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 23–185 (2004) (tracing history of decisions involving minority rights).

<sup>161</sup> With regard to challenges to action by regulatory agencies, see, for example, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), which allowed a regulated party to sue to enjoin an enforcement action by a regulatory agency, despite the absence of any alleged violation of an individual right, based on the theory that the agency’s composition violated the Appointments Clause. *Id.* at 491 n.2.

<sup>162</sup> On the relationship between the current Court majority’s methodological and substantive commitments, see *infra* section V.A, pp. 1358–61.

constitutional remedies recurrently pit majorities consisting of conservative Justices against liberal minorities.<sup>163</sup>

A. *Rights of Access to Injunctive Relief*

*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,<sup>164</sup> decided in 1999, signaled the Supreme Court's embrace of an originalist historical test for federal courts' authority to issue injunctions. In an opinion by Justice Scalia, the Court cited past cases, all from the 1940s or earlier,<sup>165</sup> linking the equitable jurisdiction conferred by the 1789 Judiciary Act<sup>166</sup> to "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."<sup>167</sup> Because the English Court of Chancery would not then have enjoined a debtor from disposing of its assets before a plaintiff creditor had obtained a legal judgment, the Court held that the district court lacked authority to do so.<sup>168</sup>

Dissenting in part, Justice Ginsburg protested that the Court "relie[d] on an unjustifiably static conception of equity jurisdiction."<sup>169</sup> "[W]e have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor," she wrote.<sup>170</sup> In support of that proposition, as research by Professor James Pfander has subsequently revealed,<sup>171</sup> Justice Ginsburg might have cited *Georgia v. Brailsford*,<sup>172</sup> decided in 1792, just three years after the enactment of the 1789 Judiciary Act. In *Brailsford*, the Supreme Court "issued an asset-freeze injunction on behalf of the state of Georgia, a pre-judgment creditor, staying other parties from asserting control over the proceeds of a penalty bond pending the determination of Georgia's claim"<sup>173</sup> — precisely the remedy that *Grupo Mexicano* disclaimed federal judicial authority to provide in the absence of Founding-era precedent. Although

<sup>163</sup> See, e.g., *Vega v. Tekoh*, 142 S. Ct. 2095, 2101 (2022) (6–3 decision) (holding that the violation of a person's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), does not form the basis for a § 1983 claim); *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020) (5–4 decision) (holding that no remedy exists to recover damages from federal officers for an allegedly unconstitutional cross-border shooting); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (5–4 decision) (holding that claims of unconstitutional partisan gerrymandering present nonjusticiable political questions).

<sup>164</sup> 527 U.S. 308 (1999).

<sup>165</sup> *Id.* at 318 (citing *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949); *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945); *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939); *Gordon v. Washington*, 295 U.S. 30, 36 (1935)).

<sup>166</sup> Ch. 20, 1 Stat. 73.

<sup>167</sup> *Grupo Mexicano*, 527 U.S. at 308 (quoting *Atlas Life Ins. Co.*, 306 U.S. at 568).

<sup>168</sup> *Id.* at 333.

<sup>169</sup> *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).

<sup>170</sup> *Id.*

<sup>171</sup> James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 738 (2020).

<sup>172</sup> 2 U.S. (2 Dall.) 402 (1792).

<sup>173</sup> Pfander & Formo, *supra* note 171, at 738.

Justice Ginsburg would surely have welcomed that precedential support, her concerns focused largely on *Grupo Mexicano*'s implications for constitutional remedies. Among the remedies that might prove unprecedented in "the specific practices . . . of the pre-Revolutionary Chancellor,"<sup>174</sup> she cited "a series of cases implementing the desegregation mandate of *Brown v. Board of Education*."<sup>175</sup> Perhaps due to wariness of the implications of reading *Grupo Mexicano* broadly, the lower courts mostly have construed it to stand only for the narrow principle that federal courts cannot issue injunctions when a plaintiff's claims are exclusively legal rather than equitable or mixed.<sup>176</sup>

A more unmistakably portentous development for the future of rights to constitutional remedies came in *Armstrong v. Exceptional Child Center, Inc.* The plaintiffs in *Armstrong* were healthcare providers who claimed that the State of Idaho reimbursed them at lower rates than federal law required.<sup>177</sup> In seeking an injunction ordering state officials to pay them at higher rates, they maintained that they had a cause of action arising directly from the Supremacy Clause.<sup>178</sup> The plaintiffs based that argument partly on *Ex parte Young*, which, on their account, involved a cause of action under the Supremacy Clause to enforce the Fourteenth Amendment as the supreme law of the land.<sup>179</sup>

The Supreme Court rejected that argument in an opinion by Justice Scalia. 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," he wrote.<sup>180</sup> Because of the equitable rather than constitutional origins of the plaintiffs' cause of action, the Court ruled that it was subject to implied congressional withdrawal.<sup>181</sup> And there was abundant evidence, Justice Scalia concluded, that when Congress enacted the funding statute on which the *Armstrong* plaintiffs relied, it had

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<sup>174</sup> *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part).

<sup>175</sup> *Id.* at 337 n.4.

<sup>176</sup> See, e.g., *Iantosca v. Step Plan Servs., Inc.*, 604 F.3d 24, 33–34 (1st Cir. 2010); *Rubin v. Pringle (In re Focus Media Inc.)*, 387 F.3d 1077, 1084–85 (9th Cir. 2004).

<sup>177</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323–24 (2015).

<sup>178</sup> *Id.* at 326.

<sup>179</sup> See, e.g., Brief for Respondents at 11, *Armstrong* (No. 14-15), 2014 WL 7387000 (characterizing relevant precedents as authorizing "[i]njunction actions to enforce the Supremacy Clause"); see also *id.* at 15 (citing *Ex parte Young*, 209 U.S. 123, 149, 167 (1908)) (arguing that *Ex parte Young* supports this contention).

<sup>180</sup> *Armstrong*, 575 U.S. at 327 (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 LAW Q. REV. 345 (1956)). In rejecting the once-standard reading of *Ex parte Young* as involving a constitutionally created cause of action, see *supra* note 106 and accompanying text, Justice Scalia substantially echoed a dissenting opinion by Chief Justice Roberts in *Douglas v. Independent Living Center of Southern California, Inc.*, see 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting).

<sup>181</sup> *Armstrong*, 575 U.S. at 328–29.

not intended to make the states' payment obligations enforceable through private suits for injunctions.<sup>182</sup>

In my view, *Armstrong* reached the right result but not for the reasons that Justice Scalia asserted. Notwithstanding the plaintiffs' attempted reliance on *Young*, suits to compel compliance with federal spending mandates differ materially from actions to enjoin violations of the Fourteenth Amendment. In enacting spending statutes, Congress should be able to authorize whatever enforcement mechanisms it chooses in cases not involving alleged deprivations of constitutional rights. By contrast, the availability of remedies necessary to thwart ongoing Fourteenth Amendment violations should not be a matter of unconstrained congressional choice. Regrettably, the Court did not distinguish *Armstrong* from *Young* on this basis. Instead, all of the Justices in *Armstrong* seemed to accept that the right to sue in *Young* was grounded in the traditions of equity and that it was therefore vulnerable to express or implied congressional elimination.<sup>183</sup> The Court's analysis thus raised important questions along several dimensions. One set of questions involved which developments in the modern law of remedies are and are not consistent with the traditions of equity. Another question was whether the Constitution ever limits Congress's power to withdraw traditional equitable remedies for constitutional violations without providing reasonable substitutes.

In *Rucho v. Common Cause*,<sup>184</sup> the Supreme Court rebuffed suits seeking injunctive relief from partisan gerrymanders by invoking the political question doctrine. According to Chief Justice Roberts's majority opinion, the complainants presented nonjusticiable political questions due to the absence of judicially manageable standards for determining when partisan gerrymanders violate the Constitution.<sup>185</sup> Writing in dissent, Justice Kagan insisted that the majority had implicitly conceded that its ruling would leave rights violations unremedied. In the absence of a "settled and shared understanding"<sup>186</sup> that gerrymanders violate the Constitution if they go "too far,"<sup>187</sup> she maintained, "the question of whether there are judicially manageable standards for

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<sup>182</sup> *Id.*

<sup>183</sup> See *id.* at 327–29; *id.* at 329 ("The dissent agrees with us . . . that Congress may displace the equitable relief that is traditionally available to enforce federal law."); *id.* at 333–34 (Breyer, J., concurring in part and concurring in the judgment) (similar); *id.* at 337 (Sotomayor, J., dissenting) (acknowledging as much, but limiting displacement to cases in which Congress has created a "detailed [alternative] remedial scheme" for statutory enforcement).

<sup>184</sup> 139 S. Ct. 2484 (2019).

<sup>185</sup> See *id.* at 2498–507 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506–07.).

<sup>186</sup> *Id.* at 2515 (Kagan, J., dissenting).

<sup>187</sup> *Id.* at 2497 (majority opinion) ("The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)) (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (plurality opinion))).

resolving [gerrymandering cases] would never come up.”<sup>188</sup> In response, the Chief Justice offered a carefully equivocal formulation of the question before the Court. In his rendition, it was whether the plaintiffs’ claims “are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.”<sup>189</sup> Yet Chief Justice Roberts nowhere flatly denied Justice Kagan’s assertion that, through its invocation of the political question doctrine, “[f]or the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”<sup>190</sup>

### B. Officer Suits Seeking Damages Remedies

Although the Supreme Court began to restrict *Bivens* actions as early as the 1980s,<sup>191</sup> the cutbacks have grown increasingly severe over time. The Court’s most recent decisions have characterized *Bivens* as a product of bygone “heady days [when] this Court assumed common-law powers to create causes of action,”<sup>192</sup> before it came “to appreciate more fully the tension between’ judicially created causes of action and ‘the Constitution’s separation of legislative and judicial power.’”<sup>193</sup> “At bottom, creating a cause of action is a legislative endeavor,” the Court has now concluded.<sup>194</sup> According to *Hernández v. Mesa*,<sup>195</sup> common law precedents that permitted damages actions against federal officials in federal courts were irrelevant because they preceded the Supreme Court’s recognition in *Erie Railroad Co. v. Tompkins* that “[t]here is no federal general common law.”<sup>196</sup>

Notably, however, the Court has conjoined its cutback of *Bivens* actions with an extension of judge-made official immunity doctrine that often bars successful suits for damages even in congressionally authorized suits under § 1983.<sup>197</sup> Within the traditional scheme of common law remedies, judges and legislators enjoyed an absolute immunity from suits for damages.<sup>198</sup> Other officials could sometimes assert other, less absolute defenses, which typically were linked to the elements of the

<sup>188</sup> *Id.* at 2515 (Kagan, J., dissenting).

<sup>189</sup> *Id.* at 2494 (majority opinion).

<sup>190</sup> *Id.* at 2509 (Kagan, J., dissenting).

<sup>191</sup> See *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to apply the *Bivens* cause of action “to permit a federal employee to recover damages from a supervisor who [allegedly] . . . improperly disciplined him for exercising his First Amendment rights”); *Schweiker v. Chilicky*, 487 U.S. 412, 428–29 (1988) (declining to extend the *Bivens* remedy to permit “disabled workers who were dependent” on “Social Security benefits” to sue when federal officials “unconstitutionally terminated them,” *id.* at 428 (quoting Brief for Respondents at 11, *Schweiker* (No. 86-1781), 1988 WL 1026243)).

<sup>192</sup> *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

<sup>193</sup> *Id.* (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 741–42 (2020)).

<sup>194</sup> *Id.*

<sup>195</sup> 140 S. Ct. 735.

<sup>196</sup> *Id.* at 742 (alteration in original) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 78 (1938)).

<sup>197</sup> For a survey of leading decisions, see HART & WECHSLER, *supra* note 9, at 1030–55.

<sup>198</sup> See *id.* at 1043–44 (judges); *id.* at 1045–46 (legislators).

specific torts that they allegedly committed.<sup>199</sup> Over time, the courts recharacterized the patchwork of defenses once available to government officials as a general “immunity” of officials who were sued for tortious misconduct.<sup>200</sup>

In a series of steps, the Supreme Court adapted the immunity defenses that were available to officials sued at common law and applied them to constitutional tort actions. In damages suits against state officials under § 1983, the Court ruled that the statute was not intended to displace the official immunities that existed at common law.<sup>201</sup> In cases against federal officials under *Bivens*, the Court has relied on policy grounds in upholding immunity defenses.

The beginnings of the current standard for qualified immunity trace to a 1982 decision in *Harlow v. Fitzgerald*,<sup>202</sup> a *Bivens* action against White House aides to President Richard Nixon.<sup>203</sup> In *Harlow*, the Court sought to devise a formula for “qualified immunity” that would allow swift dismissals of what the Court believed to be a swelling number of harassing, meritless suits alleging abuses of official power.<sup>204</sup> To permit dismissals without extensive discovery, the Court ruled that executive branch officials normally should be immune from damages liability for constitutional violations unless they violated “clearly established . . . rights of which a reasonable person would have known.”<sup>205</sup> Whether the constitutional norms that officials were alleged to have violated were “clearly established” could typically be resolved either on a motion to dismiss or at the summary judgment stage, the Court anticipated.<sup>206</sup> In a somewhat casual footnote, the *Harlow* Court affirmed the holding of a prior case that it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials

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<sup>199</sup> See *id.* at 1041–42.

<sup>200</sup> See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–62 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972) (recounting this history); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801–03 (2018).

<sup>201</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (describing *Tenney v. Brandhove*, 341 U.S. 367 (1951), as “establish[ing] that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them”); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (reasoning that § 1983’s legislative history evinced no intention to abrogate the common law doctrine of judicial immunity).

<sup>202</sup> 457 U.S. 800 (1982).

<sup>203</sup> *Id.* at 802.

<sup>204</sup> See, e.g., *id.* at 813–14 (emphasizing that “[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative,” *id.* at 813–14, and that any appropriate standard for qualified immunity must allow “[i]nsubstantial lawsuits” to be “quickly terminated,” *id.* at 814 (alteration in original) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978)) (citing *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part))).

<sup>205</sup> *Id.* at 818 (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

<sup>206</sup> *Id.* at 818–19.

under [§] 1983 and suits brought directly under the Constitution against federal officials.”<sup>207</sup>

By nearly all accounts, the *Harlow* formula conferred a broader immunity from damages than most officials had ever received in suits at common law.<sup>208</sup> But the Court was not done. In a 1987 case, the Court said that for qualified immunity to be defeated, plaintiffs must show that the constitutional right that an official allegedly violated was so clearly established, with such specificity, “that a reasonable official would understand that what he is doing violates that right.”<sup>209</sup>

In the current era, the Court has gone further still. *Ashcroft v. Iqbal*<sup>210</sup> raised the pleading threshold for plaintiffs’ complaints to survive a motion to dismiss,<sup>211</sup> seemingly in the teeth of clear language in the Federal Rules of Civil Procedure.<sup>212</sup> *Iqbal* also held that there is no supervisory liability in constitutional tort actions.<sup>213</sup> Two years later, *Ashcroft v. al-Kidd*<sup>214</sup> expanded the protections to defendants that the judge-crafted doctrine of qualified immunity affords by establishing that immunity would attach unless “every ‘reasonable official’” who contemplated the action in which a defendant engaged would understand that the conduct violated the Constitution.<sup>215</sup> Although that standard applies in § 1983 actions as much as in suits against federal officials under *Bivens*,<sup>216</sup> the Court has not sought to explain how its expansion of

<sup>207</sup> *Id.* at 818 n.30 (quoting *Butz*, 438 U.S. at 504).

<sup>208</sup> See, e.g., Baude, *supra* note 200, at 51–55 (arguing that (1) “there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment”; (2) the “good-faith defense [that] did exist in some common-law suits” arose from the elements of some common law torts, “not a general immunity”; and (3) the qualified immunity standard formulated in *Harlow* “is much broader than a good-faith defense,” *id.* at 55). *But cf.* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021) (“[T]he common law around 1871 did recognize a freestanding qualified immunity protecting all government officers’ discretionary duties — like qualified immunity today.”). For critical rejoinders to Keller, see generally William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022); and James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148 (2021).

<sup>209</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>210</sup> 556 U.S. 662 (2009).

<sup>211</sup> *Id.* at 677–79.

<sup>212</sup> Rule 8 provides that a pleading should contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Although the Court relied on its earlier decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), its decision has been much criticized. See generally, e.g., Luke Meier, *Why Twombly Is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709 (2012); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

<sup>213</sup> *Iqbal*, 556 U.S. at 677.

<sup>214</sup> 563 U.S. 731 (2011).

<sup>215</sup> *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); see also *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam) (relying on the “every reasonable official” standard (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012))).

<sup>216</sup> See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018).



qualified immunity in § 1983 cases can be justified as a matter of statutory interpretation rather than judicial common lawmaking.<sup>217</sup>

*C. Limitations on Congressional Power to Authorize Remedies*

In *City of Boerne v. Flores*,<sup>218</sup> the Supreme Court held that any prophylactic legislation enacted by Congress with the aim of preventing the states and their officers from violating the Constitution must be congruent with and proportional to an identified pattern of judicially cognizable violations.<sup>219</sup> *Shelby County v. Holder*<sup>220</sup> imposes similarly severe constraints on congressional power under the enforcement clause of the Fifteenth Amendment.<sup>221</sup> In *Shelby County*, the Court, by 5–4, invalidated a provision of the Voting Rights Act of 1965 that required states with histories of restricting voting rights as of the 1964 elections to secure prior federal approval before changing their voting procedures.<sup>222</sup> In support of its ruling, the Court cited a lack of adequate modern evidence that jurisdictions that had once infringed voting rights continued to do so.<sup>223</sup> The Court also relied on what it described as an “equal sovereignty” principle, implicit in the Constitution’s structure and reflected in the Court’s case law, that precluded Congress from subjecting some states to restrictions that it did not impose on others.<sup>224</sup>

Justice Ginsburg’s angry dissent protested that the Court had usurped the authority of Congress to provide for effective enforcement of the Civil War Amendments’ nondiscrimination guarantees.<sup>225</sup> Critics in the legal academy were even more scathing, with one writing that “[t]o begin interpretation of the Civil War Amendments with a demand that Congress justify departures from equal sovereignty effaces the history of the Civil War and the Second Reconstruction, and elevates

<sup>217</sup> See, e.g., Baude, *supra* note 200, at 47 (“The modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes . . .”); *id.* at 51–77 (describing the Court’s justifications for qualified immunity, none of which rest on ordinary statutory interpretation). Qualified immunity has occasioned a good deal of recent controversy. See, e.g., Symposium, *Federal Courts, Practice & Procedure: The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018); see also, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court’s “one-sided approach to qualified immunity” in recent decisions); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his “growing concern” with the Court’s “qualified immunity jurisprudence,” *id.* at 1870).

<sup>218</sup> 521 U.S. 507 (1997).

<sup>219</sup> See *id.* at 519–20.

<sup>220</sup> 570 U.S. 529 (2013).

<sup>221</sup> See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1557–78 (2020) (comparing and contrasting restrictions on Fourteenth and Fifteenth Amendment enforcement).

<sup>222</sup> See *Shelby County*, 570 U.S. at 544, 557 (holding that the coverage formula for one of the Act’s provisions violated a constitutional “equal sovereignty” norm, *id.* at 544, that requires powerful justification for subjecting some states to restrictions that do not apply to others).

<sup>223</sup> *Id.* at 547.

<sup>224</sup> *Id.* at 544.

<sup>225</sup> *Id.* at 566–70 (Ginsburg, J., dissenting).

concern about the equality and dignity of states over the equality and dignity of citizens.”<sup>226</sup>

### III. JACKSON AND CONSTITUTIONAL REMEDIES

Following the developments that Part II recounted, *Whole Woman’s Health v. Jackson* breaks important new ground yet contains few outright surprises. Although it would have marked a sharp break with the traditional law of constitutional remedies if it had been written in 1990 or before, its main themes have grown commonplace in the years since. In the sweep of time, *Jackson* is likely to be judged for its significance as a bridge to a future that, as of now, is only partly defined.

Justice Gorsuch, who wrote for a 5–4 majority in all but one part of his opinion in *Jackson*, framed the question for decision as “whether, under our precedents, certain abortion providers can pursue a pre-enforcement challenge to a recently enacted Texas statute.”<sup>227</sup> He dealt briskly with the sole private defendant.<sup>228</sup> Because that person disavowed any plans to sue anyone, the claim against him failed for lack of standing.<sup>229</sup> In light of that ruling, Justice Gorsuch had no occasion to say whether a suit challenging the enforcement of S.B. 8 by any private defendant could ever succeed under the state action doctrine.<sup>230</sup>

In addressing the suits against official defendants, the Court began by holding that judges and clerks fell within the scope of Texas’s sovereign immunity.<sup>231</sup> In their briefs, the plaintiffs had cited cases suggesting that sovereign immunity might not always bar actions against state judges.<sup>232</sup> In response to those cases, none of which the Court adjudged to be on point,<sup>233</sup> Justice Gorsuch relied on *Ex parte Young*. *Young*, he

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<sup>226</sup> Reva Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 71 (2013) (footnote omitted).

<sup>227</sup> See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 529–30 (2021).

<sup>228</sup> *Id.* at 537.

<sup>229</sup> *Id.*

<sup>230</sup> See *supra* note 17 and accompanying text (noting the possible state action issue).

<sup>231</sup> See *Jackson*, 142 S. Ct. at 531–34.

<sup>232</sup> See Petitioners’ Brief at 31–33, *Jackson* (No. 21–463), 2021 WL 5016691 (citing, for example, *Pulliam v. Allen*, 466 U.S. 522, 536–43 (1984); *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972); and *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948)).

<sup>233</sup> See *Jackson*, 142 S. Ct. at 533–34. Justice Gorsuch engaged only with those cases cited by the dissents. He distinguished *Pulliam v. Allen*, 466 U.S. 522, principally on the ground that it dealt with the doctrine of judicial immunity rather than that of sovereign immunity. *Jackson*, 142 S. Ct. at 533 (citing *Pulliam*, 466 U.S. at 541–43). In addition, *Pulliam* involved enjoining a judge from enforcing a judicially created rule, not a state statute. *Id.* (citing *Pulliam*, 466 U.S. at 526). He distinguished *Mitchum v. Foster*, 407 U.S. 225, on the ground that the Court ruled only on the scope of the Anti-Injunction Act, not sovereign immunity or *Ex parte Young*. *Jackson*, 142 S. Ct. at 534 (citing *Mitchum*, 407 U.S. at 242–43; *Mitchum v. Foster*, 315 F. Supp. 1387, 1388 (N.D. Fla. 1970) (per curiam)). And he distinguished *Shelley v. Kraemer*, 334 U.S. 1, on the ground that it involved a constitutional defense against the enforcement of a covenant rather than a pre-enforcement action against a public official. *Jackson*, 142 S. Ct. at 534 (citing *Shelley*, 334 U.S. at 14). Justice Gorsuch also noted that none of these cases involved a suit against state court clerks. See *id.* at 533–34.

recognized, allowed suits against state officials with responsibilities for enforcing state law. But he emphasized that *Young* included a passage — which he quoted in part in two places in his opinion — specifically acknowledging that federal courts must not enjoin the “machinery” of the courts.<sup>234</sup>

In further support of that conclusion, Justice Gorsuch also invoked Article III, which “affords federal courts the power to resolve only ‘actual controversies arising between adverse litigants.’”<sup>235</sup> Judges and clerks were not the plaintiffs’ legal adversaries, he reasoned.<sup>236</sup> Overall, Justice Gorsuch cast the plaintiffs as asserting a novel and potentially boundless legal theory, which, “[i]f it caught on,” would permit federal courts to enjoin state clerks and courts from docketing complaints and enforcing state law in a myriad of disputes between private parties.<sup>237</sup>

Next, Justice Gorsuch held that the Texas Attorney General could not be sued because he had no role in enforcing S.B. 8.<sup>238</sup> And even if he did, Justice Gorsuch continued, the plaintiffs could not “parlay” a suit against the Attorney General into a basis for injunctive relief against the private parties whom S.B. 8 more straightforwardly authorized to bring enforcement actions.<sup>239</sup> Once again, Justice Gorsuch sought to invoke the mantle of judicial traditionalism, now linked to constitutional originalism and textualism. “The equitable powers of federal courts are limited by historical practice,” he wrote.<sup>240</sup>

Justice Gorsuch devoted Part III of his opinion to answering the allegation in the partial dissenting opinions of Chief Justice Roberts and Justice Sotomayor that the majority had allowed Texas to thwart the enforcement of what Justice Gorsuch, for the sake of argument, had assumed to be a constitutional right to abortion as recognized in *Roe* and *Casey*.<sup>241</sup> Justice Gorsuch rejected the dissenters’ premise. The plaintiffs, he emphasized, had, and constitutionally had to have, a right to defend against suits seeking to enforce S.B. 8 against them on the ground that the statute was invalid.<sup>242</sup> Justice Gorsuch also noted other remedies possibly available to the plaintiffs in Texas state courts.<sup>243</sup>

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<sup>234</sup> *Jackson*, 142 S. Ct. at 532, 533 (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908)).

<sup>235</sup> *Id.* at 532 (quoting *Muskrat v. United States*, 219 U.S. 346, 361 (1911)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 534.

<sup>239</sup> *Id.* at 535.

<sup>240</sup> *Id.* (citing *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

<sup>241</sup> *See id.* at 537–38.

<sup>242</sup> *Id.* at 537 (“[A]ny individual sued under S.B. 8 may pursue state and federal constitutional arguments in his or her defense.”); *id.* at 530 n.1 (“[W]hatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted.” (citing U.S. CONST. art. VI)).

<sup>243</sup> *Id.* at 537.

Justice Thomas joined Justice Gorsuch's opinion except insofar as Justice Gorsuch — as discussed in the Introduction<sup>244</sup> — found that the plaintiffs could sue medical licensing officials for an injunction.<sup>245</sup> As Justice Thomas read S.B. 8, it assigned no role to the licensing officials in enforcing the statute's prohibitions.<sup>246</sup> Given that it did not, Justice Thomas thought that the plaintiffs had no right to an injunction against them.<sup>247</sup>

Although both Justice Gorsuch and Justice Thomas indicated that they did not disagree about any relevant principle of federal law, but only about the proper application of agreed principles to S.B. 8,<sup>248</sup> they did apparently disagree about one point. In Justice Thomas's view, the plaintiffs should not have been able to sue for an injunction even if the defendant licensing officials had direct responsibility for enforcing S.B. 8.<sup>249</sup> The reason lay in his rejection of the doctrine of third-party standing.<sup>250</sup> The abortion right that the Supreme Court upheld in *Roe* and *Casey* was a right of pregnant people to terminate their pregnancies, not of medical professionals to perform abortions.<sup>251</sup> In allowing doctors to assert their patients' rights, the Court has relied on the practical, functional ground that permitting abortion providers to assert their patients' rights may be important in securing the vindication of those rights.<sup>252</sup> Justice Thomas rejects that functional rationale for judicial authorization of rights to sue.<sup>253</sup>

Chief Justice Roberts concurred in the judgment in part and dissented in part in an opinion that Justices Breyer, Sotomayor, and Kagan

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<sup>244</sup> See *supra* p. 1304.

<sup>245</sup> *Jackson*, 142 S. Ct. at 539 (Thomas, J., concurring in part and dissenting in part).

<sup>246</sup> *Id.* at 540.

<sup>247</sup> See *id.* at 540–42.

<sup>248</sup> *Id.* at 536 (plurality opinion); see also *id.* at 539 (Thomas, J., concurring in part and dissenting in part).

<sup>249</sup> *Id.* at 539 n.1.

<sup>250</sup> *Id.*

<sup>251</sup> See *id.* *Roe* contained some language that could be read as protecting rights of physicians to perform abortions as well as of pregnant people to procure them. See, e.g., *Roe v. Wade*, 410 U.S. 113, 165–66 (1973) (“[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.” *Id.* at 166.), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). But reference to physicians’ rights faded from subsequent opinions. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[*Roe*] is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”), *overruled by Dobbs*, 142 S. Ct. 2228.

<sup>252</sup> See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020) (plurality opinion) (collecting nine cases where the Supreme Court allowed abortion providers to invoke the rights of their patients); see also *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment) (providing a fifth vote for the reaffirmation of allowing abortion providers to invoke third-party standing to challenge restrictions on abortion rights).

<sup>253</sup> See *Jackson*, 142 S. Ct. at 539 n.1 (Thomas, J., concurring in part and dissenting in part); see also *June Med.*, 140 S. Ct. at 2142–49 (Thomas, J., dissenting); *Kowalski v. Tesmer*, 543 U.S. 125, 134–36 (2004) (Thomas, J., concurring).

joined.<sup>254</sup> Sounding themes that had dominated the Court's remedial jurisprudence in a prior era, the Chief Justice stressed that S.B. 8 "has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution."<sup>255</sup> Although he agreed with the majority that the plaintiffs were barred from seeking injunctions against state judges, he would have allowed the entry of relief against state court clerks as well as the Texas Attorney General.<sup>256</sup> As Chief Justice Roberts read relevant Texas statutes, the Attorney General "maintains authority coextensive with the Texas Medical Board to address violations of S.B. 8" and was therefore suable under *Ex parte Young*.<sup>257</sup> As to the court clerk who was named as a defendant, the Chief Justice suggested that the deliberate construction of S.B. 8 to escape preenforcement review mattered to his analysis:

[B]y design, the mere threat of even unsuccessful suits brought under S.B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S.B. 8 cases are unavoidably enlisted in the scheme to enforce S.B. 8's unconstitutional provisions, and thus are sufficiently "connect[ed]" to such enforcement to be proper defendants.<sup>258</sup>

Partly because Chief Justice Roberts thought that the courts should not allow clever statutory design to defeat the authority of the federal Constitution in establishing constitutional rights, he criticized Justice Gorsuch for failing to accord significance to the necessity of federal injunctive relief, on the facts of the case, to make federal rights meaningful.<sup>259</sup> "Any novelty in [the] remedy" of an injunction against court clerks was "a direct result of the novelty of Texas's scheme," Chief Justice Roberts wrote.<sup>260</sup> Accordingly, he thought, his approach aligned with "the entire thrust of" *Young*:

Just as in *Young*, those sued under S.B. 8 will be "harass[ed] . . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment." Under these circumstances, where the mere "commencement of a suit," and in fact just the threat of it, is the "actionable injury to another," the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme.<sup>261</sup>

<sup>254</sup> *Jackson*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>255</sup> *Id.*

<sup>256</sup> *See id.* at 544. Although Chief Justice Roberts never explicitly stated that he believed the lawsuit could not proceed against state judges, he noted that "[j]udges are in no sense adverse to the parties subject to the burdens of S.B. 8." *Id.* Justice Gorsuch also characterized the Chief Justice as saying that a suit would be improper against state judges, *id.* at 533 (majority opinion), a characterization that the Chief Justice did not dispute.

<sup>257</sup> *Id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>258</sup> *Id.* (second alteration in original) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)).

<sup>259</sup> *Id.* at 545.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 544–45 (alteration and omission in original) (citations omitted) (quoting *Young*, 209 U.S. at 153, 160).

Justice Sotomayor's opinion, which Justices Breyer and Kagan joined, also highlighted the connection within the American constitutional tradition between substantive rights and rights to judicial remedies.<sup>262</sup> Justice Sotomayor emphasized that S.B. 8 had apparently succeeded in its ambition to "depriv[e] pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy,"<sup>263</sup> despite the continuing existence — at that time — of the right to abortion access that *Roe* and *Casey* nominally guaranteed.<sup>264</sup>

A generation or two ago, the views of the partial dissenting opinions in *Jackson* — including both Chief Justice Roberts's conclusion about the implications of "the principles underlying *Young*"<sup>265</sup> and Justice Sotomayor's arguments about the necessary connections between rights and remedies<sup>266</sup> — would almost surely have prevailed. But the Court's composition has changed, and the terms of constitutional argument have shifted. *Jackson* epitomizes the current Supreme Court's ongoing revision of the traditional law of constitutional remedies<sup>267</sup> — which is not to say that it marks that revision's culmination.

#### IV. JACKSON'S IMPLICATIONS

This Part explores *Jackson*'s significance, not merely as a deviation from once-traditional norms, but as a bridge to the future. For the moment, more clarity exists about what the current Supreme Court has rejected to date than about what steps it may take next. By permitting Texas to preclude the only judicial relief that would avoid the chilling of a constitutional right, *Jackson* poses many questions, including: (1) whether parties who can assert their constitutional rights as defenses against enforcement actions ever have a constitutional right to pre-enforcement equitable relief; (2) whether Congress could preclude injunctive remedies for constitutional violations in cases, such as *Brown v. Board of Education*, in which the victims would have no opportunity to assert their rights as defenses against a criminal prosecution or civil suit; (3) whether "traditional equitable principles,"<sup>268</sup> which the Court cited in *Jackson* as limiting the federal courts' equitable powers,<sup>269</sup> may significantly restrict the capacity of federal courts to issue injunctions in other kinds of constitutional cases; (4) whether there may be emerging limits to the right of defendants to challenge the constitutional validity

<sup>262</sup> See *id.* at 547–50 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>263</sup> *Id.* at 545.

<sup>264</sup> *Id.*; see also *id.* at 543–45 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>265</sup> *Id.* at 545 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>266</sup> *Id.* at 544–45.

<sup>267</sup> See *id.* at 547–50 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>268</sup> *Id.* at 535 (majority opinion).

<sup>269</sup> *Id.* at 538.

of statutes in coercive actions; and (5) whether the principles that preclude judicial recognition of suits for damages for constitutional violations should also apply to suits for injunctions.

This Part takes up each of those questions and looks for answers, or clues to answers, in the Court's reasoning in *Jackson* and other recent decisions. Even when specific answers are unavailable, trend lines in the Court's thinking are clear. Increasingly, the Court is skeptical about the constitutional necessity of remedies apart from defenses against the enforcement of invalid statutes, and it believes that the separation of powers requires a truncated judicial role in recognizing causes of action for constitutional violations. For those who accept the normative premise that the ideal of the rule of law requires judicial remedies adequate to protect constitutional rights, *Jackson* should provoke abortion-transcending apprehension.

#### A. *Constitutional Remedies and the Due Process Clause*

A pressing question in the aftermath of *Jackson* is when, if ever, the Constitution gives plaintiffs a right to injunctive relief against unconstitutional governmental action. Although different factual situations may present different issues, *Jackson* implies that plaintiffs have no constitutional right to injunctions, even against ongoing constitutional violations, in many and probably most circumstances. If the Supreme Court pursues the path that *Jackson* suggests it will, the divergence from once-settled understandings will be profound.

1. *Injunctions as an Alternative to Defense Against Enforcement Actions.* — The *Jackson* plaintiffs did not argue explicitly that they had a constitutional right to preenforcement injunctive relief. Instead, they claimed — without distinguishing between constitutional and traditions-of-equity readings of *Ex parte Young* — that *Young* and its progeny “[s]quarely [p]ermitted” their challenge to S.B. 8.<sup>270</sup> Under these circumstances, one might maintain that the Supreme Court neither faced nor ruled on any claim asserting a constitutional right to an injunction. I would be pleased to see the Court adopt this interpretation, which might minimize *Jackson*'s significance for other plaintiffs in other cases. But it is also arguable — and I fear more strongly so — that *Jackson* confirmed *Armstrong v. Exceptional Child Center* in denying that *Young* had constitutional foundations<sup>271</sup> and in further implying that there is no constitutional right to injunctive relief against a statute's threatened enforcement through any judicial proceedings in which constitutional defenses could be asserted. Among the reasons to infer that this second interpretation will prevail, the Court's majority asserted seemingly categorical, constitutionally grounded reasons for denying relief against all

<sup>270</sup> See Petitioners' Brief at 25, *Jackson* (No. 21-463), 2021 WL 5016691.

<sup>271</sup> See *supra* p. 1328.

the defendants whom it ordered dismissed.<sup>272</sup> Judges and court clerks, it maintained, partook of the state's sovereign immunity from suit.<sup>273</sup> The Court's only allusion to a constitutional right to judicial relief under any circumstances involved the entitlement of defendants in enforcement actions to contest the validity of the statutes being invoked against them.<sup>274</sup>

If *Jackson* is read to hold that the opportunity to challenge an invalid statute in an enforcement proceeding is always a constitutionally adequate remedy, it goes an important step beyond *Armstrong* in limiting — and arguably in revising — *Young*. *Armstrong* rejected an argument that the Supremacy Clause creates a right to injunctions whenever state officials violate federal law on an ongoing basis,<sup>275</sup> but it did not involve a threat of coercive action by state officials, as in *Young* and *Jackson*, that arguably violated the Due Process Clause. Rather, the *Armstrong* plaintiffs sought to enforce a federal funding statute that, as written, had not vested them with any judicially enforceable statutory rights.

If *Jackson* disallows claims of constitutional entitlement to injunctive relief predicated on the Due Process Clause whenever the victims of attempted deprivations of liberty or property can assert their rights as a defense against a criminal or civil enforcement action, its significance would be both large and, in my view, unfortunate. In *Thunder Basin Coal v. Reich*,<sup>276</sup> decided in 1994, the Supreme Court rebuffed an argument that the Constitution guaranteed parties who were threatened with enforcement actions a right to injunctive relief against an order that arguably violated statutory restraints on the powers of a federal agency.<sup>277</sup> But *Thunder Basin Coal* said specifically that the “practical effect” of the “coercive penalties for noncompliance was [not] to foreclose all access to the courts” and that the situation was not one “in which compliance” with the challenged order involved “coercive penalties sufficiently potent that a constitutionally intolerable choice might be

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<sup>272</sup> See *Jackson*, 142 S. Ct. at 532.

<sup>273</sup> *Id.* (noting that the *Young* exception to states' sovereign immunity “does not normally permit federal courts to issue injunctions against state-court judges”).

<sup>274</sup> *Id.* at 530 n.1 (noting that the Supremacy Clause requires recognition of properly asserted federal constitutional defenses (citing U.S. CONST. art. VI)).

<sup>275</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (“If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law, by imposing mandatory private enforcement — a limitation unheard-of with regard to state legislatures.”); *id.* at 327 (“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. It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.” (citation omitted) (citing Jaffe & Henderson, *supra* note 180)).

<sup>276</sup> 510 U.S. 200 (1994).

<sup>277</sup> See *id.* at 216–18.



presented.”<sup>278</sup> If my fears about the intimations of *Jackson* are borne out, the Court has closed the door that *Thunder Basin Coal* held open. Henceforth, it has signaled, no choice that includes violating a state statute and asserting its unconstitutionality as a defense against an enforcement action will be deemed “constitutionally intolerable.” One might argue that the threats of multiple suits for \$10,000 penalties under S.B. 8 did not rise to the “coercive” level of the criminal penalties threatened in *Young*. Again, I do not pretend to foreclose that possibility. In a variety of contexts, the Court has held that the government’s application of coercive pressure to discourage the exercise of constitutional rights or prerogatives violates the Constitution.<sup>279</sup> But nothing in the *Jackson* opinion indicated that the Court viewed itself as distinguishing what would need to be characterized as the noncoercive penalties in the case before it — despite their demonstrated chilling effect — from the coercive ones in *Young* for purposes of gauging constitutional tolerability.

In a characteristically insightful piece written from within what I identified above as the traditional framework for gauging rights to constitutional remedies, Professor Meltzer suggested that Congress, if it so chose, could, “at least in general,” withdraw rights to challenge statutes in preenforcement suits and require all would-be plaintiffs to assert their rights as defenses against enforcement actions.<sup>280</sup> Meltzer rested his judgment partly on the entrenched doctrine of *Younger v. Harris*,<sup>281</sup> which bars federal courts from issuing antisuit injunctions against pending coercive actions brought by state officials to enforce state laws.<sup>282</sup> By itself, *Younger* is too narrow to support the conclusion that plaintiffs never have a right to preenforcement injunctions against statutes that coercively chill the exercise of constitutional rights. In *Younger*, the sole plaintiff found to have standing had already violated the statute against which he sought federal injunctive relief and did not allege that he was

<sup>278</sup> *Id.* at 218.

<sup>279</sup> See, e.g., *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012) (holding that Congress may not so alter conditions attached to the provision of federal funds as to coerce states into compliance (citing *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987))); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the state “may not coerce anyone to support or participate in religion or its exercise” (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989), *abrogated by Town of Greece v. Galloway*, 572 U.S. 565 (2014))).

<sup>280</sup> See Meltzer, *supra* note 87, at 2563 (“[W]ere the anticipatory remedy withdrawn, the remaining remedy — defense in an enforcement proceeding — would be, if less efficacious, nonetheless adequate, at least in general, to satisfy both of the broad remedial imperatives required by the Constitution.”). In the next sentence, however, Meltzer sufficiently qualified his view to raise doubts about whether he would have agreed with the Court’s application of this general principle in *Jackson*. See *id.* (citing *Thunder Basin Coal*, 510 U.S. at 218) (declining “to foreclose the possibility that there may be particular cases, of which *Ex parte Young* may be an illustration, in which the penalties are so multiplicitous or severe or the burdens of defense so disproportionately high that the remedy of defense would not be adequate and therefore anticipatory relief would be constitutionally required”).

<sup>281</sup> 401 U.S. 37 (1971).

<sup>282</sup> *Id.* at 41.

chilled from engaging in future violations.<sup>283</sup> More nearly on point are cases in which someone against whom a prosecution has been filed for a past offense seeks federal equitable protection against further prosecutions for future violations of an allegedly unconstitutional statute.<sup>284</sup> Although the question is close, I think that those cases are distinguishable, too: a person against whom an enforcement action is pending cannot claim practical denial of access to a judicial forum to press her constitutional argument.<sup>285</sup> Based on that analysis, I would regard the Court in *Jackson* as having committed an unforced error. A ruling that makes it possible for states or Congress to create a situation in which a constitutional right is wholly unenforceable as a practical matter due to the unavailability of preenforcement relief was both constitutionally unnecessary, for reasons laid out in section I.A, and deeply regrettable, for reasons sketched in section I.B.

If my guess as to *Jackson*'s implications is realized, the decision possesses importance for at least two kinds of cases. Cases of the first kind seem likely to arise under statutes in which states other than Texas employ S.B. 8's strategy of outsourcing the enforcement of state law and authorizing multiple suits for daunting penalties.<sup>286</sup> For example, California has enacted stringent restrictions on the sale and manufacture of some kinds of firearms and made the prohibitions enforceable exclusively through private lawsuits.<sup>287</sup> The likely success of such strategies may depend partly on the clarity with which the conduct that a state seeks to chill is constitutionally protected. As my colleague Professor Stephen Sachs has noted, much of "the chilling effect [of S.B. 8] ultimately [came] from the fact that no one [knew] whether the Court [would] uphold *Roe* and *Casey*."<sup>288</sup> But if private plaintiffs were motivated to bring multiple suits for alleged statutory violations, the costs associated with mounting defenses could have a partly independent

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<sup>283</sup> See *id.* at 41–42.

<sup>284</sup> See HART & WECHSLER, *supra* note 9, at 1139–40; Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 197 (1978).

<sup>285</sup> Cf. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1248–54 (2004) (arguing that the American legal tradition reflects a "Don't Break the Law" principle, *id.* at 1248, disfavoring claims to federal equitable relief by parties who have already violated the law that they wish to challenge).

<sup>286</sup> In Florida, for example, Governor Ron DeSantis has proposed the creation of a private right of action for parents to sue school districts teaching critical race theory. See Timothy Bella, *DeSantis Invokes MLK as He Proposes Stop Woke Act Against Critical Race Theory*, WASH. POST (Dec. 15, 2021, 3:59 PM), <https://www.washingtonpost.com/politics/2021/12/15/desantis-stop-woke-act-mlk-crt/> [<https://perma.cc/V3E2-KQC9>].

<sup>287</sup> With regard to other rights, California has enacted legislation authorizing private citizens to sue to enforce selected state prohibitions involving firearms. See *supra* note 36 and accompanying text.

<sup>288</sup> Stephen E. Sachs, *Limiting Principles and SB8*, REASON: VOLOKH CONSPIRACY (Nov. 2, 2021, 8:15 AM) (emphasis omitted), <https://reason.com/volokh/2021/11/02/limiting-principles-and-sb8> [<https://perma.cc/4LDT-D6D3>].

chilling effect even if the likelihood that a defendant would actually incur penalties were low.

Another kind of case, which has provoked less discussion, strikes me as potentially just as important. Suppose that Congress sought to withdraw federal equitable remedies in an area of substantive constitutional uncertainty — so that the outcomes of litigation were not clearly foreordained — and thereby force anyone who wanted to challenge a state or federal statute to take her chances with a criminal prosecution. Although challengers might contend that a statute barring preenforcement injunctions reflected a constitutionally forbidden intent to chill the exercise of constitutional rights,<sup>289</sup> arguments to that effect would likely be rejected as question-begging if the scope of a right was reasonably debatable. Given reasonable uncertainty about whether a right existed at all, Congress might have legitimate reasons to prefer that litigation occur in the narrowly defined framework of specific parties' past conduct and its known consequences — if we assume, post-*Jackson*, that there is never a constitutional right to preenforcement injunctive relief.<sup>290</sup>

Before concluding this discussion, I should consider the possibility that the outcome in *Jackson* depended on the asserted right that was at stake: the assumed but soon-to-be-rejected abortion right. This possibility cannot be discounted entirely, even though the Supreme Court insisted in *Jackson* that the limits on federal judicial power on which it rested its decision would apply equally if “the challenged law in question [were] said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right.”<sup>291</sup> To begin, parties to a future case might attempt to distinguish *Jackson* on the ground that, when the Supreme Court decided that case, it assumed that the plaintiffs could procure a preenforcement remedy by suing state licensing officials. The Texas Supreme Court subsequently falsified that assumption.<sup>292</sup> But even if the Texas court had not ruled as it did, it would be pointless formalism to insist that the Constitution mandates an opportunity to sue at least one official for an injunction — in the face of threats of

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<sup>289</sup> *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), averred flatly that in appraising the constitutionality of withdrawals of jurisdiction, “[w]e are not at liberty to inquire into the motives of the legislature.” *Id.* at 514. But there is language in the Court’s decision just two years later in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), that arguably looks the other way. *See id.* at 145. In addition, a number of twentieth- and twenty-first-century precedents establish the pertinence of legislative motives to constitutional permissibility. *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1063 (2010). Perhaps even more pertinently, Professor Caleb Nelson argues persuasively that even at the time of *McCordle*, the Supreme Court invalidated statutes based on forbidden legislative purposes that were evident on the statutes’ faces. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1812–25 (2008).

<sup>290</sup> *See* Fallon, *supra* note 289, at 1095 (questioning the persuasiveness of motive-based objections to withdrawal of district court jurisdiction when other avenues for raising constitutional issues remain).

<sup>291</sup> *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 538 (2021).

<sup>292</sup> *See supra* note 27 and accompanying text.

multiple suits and draconian penalties — without inquiring whether relief against that official would significantly diminish a statute’s chilling effect.

In the case of S.B. 8, an injunction running solely against state licensing officials would probably not have alleviated the chill. Such an injunction would not have directly bound private plaintiffs. With regard to claim and issue preclusion,<sup>293</sup> the normal rule is that “one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”<sup>294</sup> Nor would a ruling by a federal court (other than the Supreme Court) on the constitutionality of S.B. 8 have had binding precedential effect in a Texas court.<sup>295</sup>

Second, in *Jackson*, Justice Gorsuch specifically noted that in addition to the opportunity to assert their rights in a potential defense against an action to enforce S.B. 8, the plaintiffs might have preenforcement opportunities to challenge S.B. 8 in suits under state law brought in state court.<sup>296</sup> Under these circumstances, it might be argued, the plaintiffs had failed to establish that they would be irreparably harmed by the inability to procure a federal injunction, since state law remedies might protect them just as well. This asserted basis for distinction is also unconvincing. *Monroe v. Pape* held unequivocally that plaintiffs seeking relief from a constitutional violation under § 1983 need not first exhaust state law remedies.<sup>297</sup>

Perhaps the Justices who constituted the majority in *Jackson* would and could engage in some form of “stealth overruling” in a case with a

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<sup>293</sup> Although S.B. 8 purports to establish that “non-mutual issue preclusion [and] non-mutual claim preclusion” “are not . . . defense[s],” TEX. HEALTH & SAFETY CODE ANN. § 171.208(e), (e)(5) (West 2021), the preclusive effect of a federal judgment is governed by federal law, which would preempt any contrary state statute, *see Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938); *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 290–91 (1906); *Deposit Bank v. Frankfort*, 191 U.S. 499, 514–15 (1903)).

<sup>294</sup> *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Martin v. Wilks*, 490 U.S. 755, 761 (1989); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 110 (1969)).

<sup>295</sup> *See, e.g., Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation.”); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (“While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.”).

<sup>296</sup> *See Jackson*, 142 S. Ct. at 537.

<sup>297</sup> *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Parties seeking to distinguish *Jackson* might also imaginably argue that the plaintiffs could have obtained effectual injunctive relief if they had named other parties as defendants — possibly, for example, by framing the suit as a defendants’ class action against all private parties who might seek to enforce S.B. 8. But Justice Gorsuch’s opinion, while noting that other remedies either might or might not be available, appeared to disavow reliance on such remedies’ existence as a ground for decision. *See Jackson*, 142 S. Ct. at 537 (noting that the Court did not “prejudge the possibility” whether there might be other “viable avenues to contest the law’s compliance with the Federal Constitution”).

different substantive valence.<sup>298</sup> But a subsequent decision that somehow left *Jackson* and S.B. 8 in a category by themselves would reflect no credit on the Court unless it represented a principled change of direction. For now, I conclude, regrettably, that *Jackson* likely denies that plaintiffs ever have constitutional rights to preenforcement injunctive relief against unconstitutional statutes in any case in which they could, in theory, raise their constitutional objections as defenses against subsequent actions to enforce the statutes.

2. *Rights to Injunctions in the Absence of Enforcement Actions.* — If *Jackson* establishes or implies that plaintiffs have no constitutional right to injunctive relief from a statute or governmental policy that they could potentially challenge via a defense against an enforcement action (though they may, of course, have judge-made or statutory rights to sue), one must wonder about the implications for plaintiffs who cannot, even in theory, raise their constitutional claims as defenses. Many people who suffer constitutional violations will never be the targets of enforcement actions. Consider plaintiffs who want to challenge prayer in the public schools or unconstitutional deprivations of welfare or employment benefits. In cases involving constitutional violations by state officials, § 1983 provides statutory authorization for suits for injunctions. In cases involving federal officials, various enactments authorize either officer suits or judicial review of administrative action.<sup>299</sup> In addition, the Supreme Court has held that provisions conferring federal jurisdiction normally include authorizations to award injunctions consistent with the traditions of equity.<sup>300</sup> But what would happen if Congress eliminated all causes of action to sue for all remedies for constitutional violations, including injunctions? For Congress to do so would be unprecedented, or at least nearly so.<sup>301</sup> But it is not unthinkable that a

<sup>298</sup> See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

<sup>299</sup> See HART & WECHSLER, *supra* note 9, at 895–904 (discussing statutorily authorized review of federal official action and federal legislation waiving the sovereign immunity of the United States).

<sup>300</sup> See *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); Judge Marsha S. Berzon, U.S. Ct. of Appeals for the Ninth Cir., James Madison Lecture at the New York University School of Law: Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts (Nov. 10, 2008), in 84 N.Y.U. L. REV. 681, 691 (2009). See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 398–411 (1971) (Harlan, J., concurring in the judgment) (discussing the relative significance of judicially inferred injunctive relief and damages relief for constitutional and statutory violations).

<sup>301</sup> *Cary v. Curtis* involved a constitutional challenge to Congress's apparent withdrawal of a traditional cause of action against customs inspectors, but the Supreme Court, in upholding the statute, emphasized that other avenues remained through which the plaintiff might have asserted his claimed legal rights. See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 250 (1845). In a number of modern cases involving statutes that could have easily been read as precluding judicial review of alleged constitutional violations, the Supreme Court has adopted a strong interpretive presumption against finding preclusions of judicial review of constitutional issues. See, e.g., *Webster v. Doe*, 486

future Congress might selectively withdraw the causes of action that now exist under § 1983 to sue for injunctive relief against some constitutional violations — for example, those arising from prayer in public schools.

Even within the traditional law of constitutional remedies, as I have acknowledged, parties who have suffered past constitutional violations have frequently found themselves with no individually effective redress.<sup>302</sup> By contrast, in the line of cases epitomized by *Ex parte Young*, federal courts have routinely upheld causes of action to sue for injunctions.<sup>303</sup> Seeking to explain the pattern more than thirty years ago, Professor Meltzer and I argued that suits for prospective injunctions have a distinctive practical urgency in ensuring that the government and its officials stay generally within the bounds of law.<sup>304</sup>

In *Webster v. Doe*,<sup>305</sup> the Supreme Court strained to read a federal statute that precluded judicial review of personnel actions by the Director of the Central Intelligence Agency as not applying to constitutional claims largely based on the premise that their preclusion would raise serious constitutional questions.<sup>306</sup> If all that was at stake was compensation for a past constitutional violation, *Webster's* worries about the constitutionality of precluding review would make no sense. There is frequently no meaningful opportunity for judicial challenges to constitutional violations that only damages could remedy. But if one views *Webster* as an action seeking judicial relief from a continuing,

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U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986) (arguing that interpreting a Medicare statute to allow judicial review permitted the Court to “avoid[] the ‘serious constitutional question’ that would arise if” the Court “den[ie]d a judicial forum for constitutional claims” (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975))); *Johnson v. Robison*, 415 U.S. 361, 366 (1974) (reasoning that complete preclusion of judicial review of a First Amendment claim “would, of course, raise serious questions concerning . . . constitutionality”); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1313–15 (2014).

<sup>302</sup> If they seek damages from the state or federal government, sovereign immunity bars unconsented suits. See *supra* note 9 and accompanying text. In actions against officials in their individual capacities, official immunity often precludes damages relief. See *supra* note 10 and accompanying text. Even before official immunity comes into play, *Bivens*-based causes of action are often unavailable. See *supra* notes 44–48 and accompanying text. And since 1988, the Westfall Act, 28 U.S.C. §§ 2671, 2674, 2679, which amended the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, has barred state law tort actions against federal officials based on job-related misconduct. The Westfall Act made the Federal Tort Claims Act, which authorizes suits against the United States based on tortious misconduct by federal officials, the exclusive remedy for officials’ tortious misconduct. 28 U.S.C. § 2679(b).

<sup>303</sup> See Karlan, *supra* note 11, at 1326 (“[T]he usual rule [is] that a plaintiff who can show a likely deprivation of her constitutional rights has thereby met the ‘irreparable injury’ prong of the test for preliminary injunctive relief.”). In suits for injunctive relief, the Supreme Court has developed an important distinction between injunctions against officials to mandate future compliance with constitutional norms, from which they cannot invoke the sovereign’s immunity from suit, and injunctions to compensate for past wrongs, to which the sovereign immunity bar applies even when officials are the nominal defendants. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 666–71 (1974).

<sup>304</sup> See Fallon & Meltzer, *New Law*, *supra* note 57, at 1789–91.

<sup>305</sup> 486 U.S. 592.

<sup>306</sup> See *id.* at 603–04.

allegedly unconstitutional exclusion of Doe from federal employment on the basis of his sexual orientation, the decision can be read as implicitly recognizing that the Constitution may require judicial remedies for ongoing constitutional violations.

Especially because Justice Scalia dissented in *Webster*,<sup>307</sup> the current Supreme Court might view it as the suspect residue of a now-faded regime of constitutional remedies.<sup>308</sup> Yet if the link between substantive constitutional rights and rights to remedies disappears with regard to ongoing constitutional violations that cannot be challenged in enforcement actions, the break with our constitutional tradition would be stark and stunning,<sup>309</sup> Professor Harrison's originalist arguments to the contrary notwithstanding.<sup>310</sup>

It would be possible for the Supreme Court, in considering the question of constitutionally necessary remedies, to hold that the Constitution requires effective remedies against persisting, coercive deprivations of traditional liberty and property rights — such as those implicated by tax collection<sup>311</sup> — but not necessarily for alleged unconstitutionality in the distribution of governmental benefits.<sup>312</sup> According to the often-cited case of *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>313</sup> “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”<sup>314</sup> Although the boundaries of the public rights

<sup>307</sup> *Id.* at 606–21 (Scalia, J., dissenting).

<sup>308</sup> *Cf.* *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (declining to rule on whether an opportunity for judicial review of an administrative decision revoking a patent was constitutionally required). In *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the Court held that Congress could channel review of government employment decisions to a particular court, but it implicitly reaffirmed *Webster's* requirement that a “heightened showing” would be required before it would construe a federal statute “to deny any judicial forum for a colorable constitutional claim.” *Id.* at 9 (quoting *Webster*, 486 U.S. at 603).

<sup>309</sup> See Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 47 (2019) (“[G]iving complete finality to administrative deprivation of common law liberty and property rights (and other ‘rights’) would run sharply counter to our entire constitutional history.”).

<sup>310</sup> See *supra* notes 84–86 and accompanying text (discussing Harrison's views about historically understood entitlements to constitutional remedies).

<sup>311</sup> See, e.g., *Iowa–Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (holding that taxpayers had a federal right to refunds for taxes unconstitutionally exacted from them).

<sup>312</sup> Writing in 1953, Professor Hart appears to have adopted this view. See Hart, *supra* note 50, at 1384 (characterizing judicial review as unnecessary when agencies rule against parties who claim the benefit of the federal statutes that those agencies administer and opining that there was no inequity when “the protected groups in an administrative program [are made to] pay for their protection by a sacrifice of procedural and litigating rights”).

<sup>313</sup> 59 U.S. (18 How.) 272 (1856).

<sup>314</sup> *Id.* at 284. The notion that benefits disputes involve public rights and do not necessarily require judicial review appears to be rooted partly in the concept of sovereign immunity. See *id.*;

doctrine are notoriously unsettled,<sup>315</sup> disputes about government officials' application of law to fact and other matters of administration that do not result in physical detention appear to fall within the core.<sup>316</sup> But even if distinguishing continuing governmental deprivations of private rights from deprivations of public rights might have historical support,<sup>317</sup> many of the constitutional rights that have assumed the greatest salience in the twentieth and twenty-first centuries involve benefits such as public employment and education. One would expect even the originalist Justices to hesitate before concluding that the right to sue for an injunction in *Brown v. Board of Education* existed solely as a matter of congressional discretion or sufferance.

The conclusion that efficacious remedies are never constitutionally required in cases involving ongoing constitutional violations is not a necessary implication of *Jackson*. Justice Gorsuch emphasized that the plaintiffs could have violated S.B. 8 and asserted their constitutional arguments as a defense against any resulting enforcement actions. Even after *Jackson*, it thus remains arguable that the idea of a constitutional right implies the availability of at least some remedy — available to at least some people under at least some circumstances — to vindicate it. Yet nothing in *Jackson* affirmatively supports that argument either.<sup>318</sup> From the perspective of the historical tradition described in section I.A

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N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion); cf. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 583–84 (2007) (asserting that benefits disputes were historically understood to involve “privileges” rather than “rights,” *id.* at 584).

<sup>315</sup> See HART & WECHSLER, *supra* note 9, at 384–85.

<sup>316</sup> See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373–74 (2018).

<sup>317</sup> See generally Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1415 (2010) (observing that by early in the twentieth century, federal “offices and bureaus . . . were deciding tens of thousands of cases every year, many of them with complete finality,” and that “the Article III question that exercised the legal mind at the close of the nineteenth century was not whether administrative jurisdiction invaded judicial prerogatives, but whether the judiciary could, consistent with the Constitution, be given jurisdiction to hear appeals from adjudications statutorily allocated to the administrative process”); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942 (2011) (arguing that the modern model in which federal courts engage in appellate review of agency action replaced an earlier “bipolar” approach in which courts either employed “prerogative writs such as mandamus” to review agency action on a nondeferential basis on a court-made record or provided “no judicial review at all” (quoting Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1736 (2007))).

<sup>318</sup> Because S.B. 8 penalized the performing and abetting of abortions, rather than the undergoing of one, those who wanted to procure abortions in Texas, but were unable to do so, could not themselves have challenged S.B. 8 by asserting its unconstitutionality by way of defense. It seems highly doubtful, however, that a person seeking an abortion, if one or more had appeared as a plaintiff, would have had a right to injunctive relief from S.B. 8 that the actual plaintiffs in *Jackson* did not. The Court’s rationales would have continued to apply: within the traditions of equity, state judges and clerks could invoke the state’s sovereign immunity from suit, and the Attorney General would presumably still not have been suable due to a lack of enforcement responsibilities.



and the supporting rule-of-law ideal elaborated in section I.B, this lacuna in *Jackson*'s analytical framework is unsettling.

*B. The Traditions of Equity and Their Limits*

Although *Jackson* squarely affirmed that “[t]he equitable powers of federal courts are limited by historical practice,”<sup>319</sup> the majority was unclear about how that practice bears on a range of issues of constitutional and statutory interpretation that it failed to differentiate. For example, historical equitable practice could imaginably be invoked as a gauge of the inherent judicial powers that the federal courts possess under Article III,<sup>320</sup> the authority conferred by Congress in general grants of statutory jurisdiction running back to the 1789 Judiciary Act, the scope of specific congressional authorizations of injunctive relief such as that afforded in § 1983, or the outer limits of the equitable authority that Article III would permit Congress to confer if it so chose. As a result of *Jackson*'s analytical imprecision, any effort to plumb the decision's significance for future suits for injunctions needs to proceed with caution. There should be no doubt, however, that *Jackson* raises new questions about the permissibility of equitable remedies that federal courts once would have issued routinely.

Read narrowly, Justice Gorsuch's opinion in *Jackson* cited the traditions of equity principally to identify the protective reach of state sovereign immunity.<sup>321</sup> With regard to that issue, as discussed above, the Court rested directly on a dictum in *Ex parte Young* that “‘an injunction against a state court’ or its ‘machinery’ ‘would be a violation of the whole scheme of our Government.’”<sup>322</sup> But that dictum, which was misleading if not mistaken, muddled the Court's sovereign immunity analysis from the outset. *Fitzpatrick v. Bitzer*,<sup>323</sup> of which Justice Gorsuch took no notice, holds squarely that Congress, when legislating to enforce the Fourteenth Amendment, can abrogate the states' sovereign immunity and authorize unconsented suits against them as a remedy for constitutional violations.<sup>324</sup> And if Congress can abrogate the states' immunity from suit, then it could presumably also abrogate any sovereign immunity barrier to suit against state judges and court clerks that otherwise might exist. If so, one potential interpretation of *Jackson*'s sovereign immunity analysis would construe it as assuming that Congress's authorization of federal courts to provide relief against state

<sup>319</sup> *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (citing *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

<sup>320</sup> For a historically rich and penetrating exploration of this issue, see generally Owen W. Gallogly, *Equity's Constitutional Source*, 132 *YALE L.J.* (forthcoming 2023), <https://ssrn.com/abstract=4058852> [<https://perma.cc/8UVD-2LV7>].

<sup>321</sup> See *Jackson*, 142 S. Ct. at 532.

<sup>322</sup> *Id.* (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908)).

<sup>323</sup> 427 U.S. 445 (1976).

<sup>324</sup> *Id.* at 456–57.

officials in suits under § 1983 was limited by the traditions of equity and that those traditions, as gauged by *Young*, put suits against state judges and clerks off limits.

Still unexplained, however, would be how this interpretation could be reconciled with the amendment to § 1983 that Congress adopted in 1996,<sup>325</sup> after *Pulliam v. Allen*<sup>326</sup> had upheld a federal injunction against a state magistrate over an objection based on “judicial,” as distinguished from “sovereign,” immunity.<sup>327</sup> As amended in 1996, § 1983 provides that “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”<sup>328</sup> This language would be read most naturally as contemplating if not explicitly authorizing suits (in equity) under the Declaratory Judgment Act<sup>329</sup> in at least some circumstances. It also appears to contemplate (if not authorize) injunctive relief against state judicial officers in a more limited class of cases.<sup>330</sup>

It is tempting, therefore, to conclude that *Jackson*’s invocation of the traditions of equity to identify sovereign immunity barriers to federal equitable relief was simply confused. As we look to the future, however, and seek to forecast *Jackson*’s significance, I expect lower courts to view the case as having relied on the traditions of equity as a measure of a federal court’s statutory authority under § 1983 in cases, like *Jackson*, that seek to enjoin judicial officers as a means of stopping the enforcement of allegedly unconstitutional state statutes that regulate private conduct. It would be astonishing if the *Jackson* majority meant to hold the 1996 amendment to § 1983 unconstitutional even in part. Among other things, such an implication would be in serious tension with Justice Gorsuch’s assurance that Congress retained the authority to create alternative remedies if it so chose.<sup>331</sup>

If we view the traditions of equity as a limit on the federal courts’ remedial authority under § 1983, however, we immediately encounter the difficulty — emphasized by both Chief Justice Roberts and Justice Sotomayor in *Jackson* — that the traditions of equity are not self-defining. To my mind, this difficulty is not insuperable. Having relied on an American constitutional “tradition” connecting substantive rights to entitlements to judicial remedies, I can hardly mock reliance on tradition as a reference point for analyzing judicial power. Nevertheless,

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<sup>325</sup> See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983).

<sup>326</sup> 466 U.S. 522 (1984).

<sup>327</sup> *Id.* at 541–42.

<sup>328</sup> 42 U.S.C. § 1983.

<sup>329</sup> 28 U.S.C. §§ 2201–2202.

<sup>330</sup> See S. REP. NO. 104-366, at 37 (1996) (explaining that the revised language “does not provide absolute immunity for judicial officers,” against whom “litigants may still . . . obtain injunctive relief”).

<sup>331</sup> See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 538 (2021).

there is always a question about how to interpret traditions, most if not all of which include elements of dynamism.

*Ex parte Young* — which the Supreme Court cited as having identified the outer limits of a federal court's powers to enjoin state judges and clerks in *Jackson* — provides a case study. As Part I documented, *Young* reflected a dynamic, evolving — rather than a fixed, snapshot-like — conception of the traditions of equity. It revised or adapted the traditional adage that equity would not enjoin a criminal prosecution and continued the ongoing judicial adjustment of traditional frameworks to secure effective enforcement of constitutional as distinguished from common law rights.<sup>332</sup> Under these circumstances, the Supreme Court's invocation of a static conception to bar equitable relief against judges and court clerks in *Jackson*, in a suit under § 1983 to enforce constitutional rights unknown to pre-Revolutionary English Chancellors, invites the derision as “wooden” that Justice Sotomayor directed against it.<sup>333</sup>

*Jackson*'s sovereign immunity analysis exemplifies the inadequacy of wooden interpretation. As highlighted by the first Justice Harlan's dissenting opinion in *Young*, state officials seldom if ever have a personal stake in the outcome of antisuit injunctions against the enforcement of state laws.<sup>334</sup> Such officials are named as parties solely as stand-ins for the state.<sup>335</sup> Since it is always a “fiction” that a plaintiff's grievance is with the defendant officer, rather than with the state,<sup>336</sup> the crucial question in *Jackson* — especially if the question involved the interpretation of § 1983, but potentially also if the outer reaches of Article III judicial power were at issue — was whether state judges and court clerks were suitable surrogates. The same is true in response to Justice Gorsuch's alternative argument that state judges and court clerks lacked any personal stake in the outcome of S.B. 8 litigation and thus failed to qualify as concretely adverse parties for purposes of Article III.<sup>337</sup> There, too, the question should be which state officials, if any, should be suable as representatives of the state in order to stop the state from avoiding its responsibility to comply with the Constitution.<sup>338</sup>

When the issue is so framed, Chief Justice Roberts and Justice Sotomayor offered better interpretations of the traditions of equity —

<sup>332</sup> See *supra* note 105 and accompanying text.

<sup>333</sup> *Jackson*, 142 S. Ct. at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>334</sup> See *Ex parte Young*, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting).

<sup>335</sup> See *id.*

<sup>336</sup> *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104–05 (1984) (referring to “the fiction of *Young*” that the state was not the real party in interest, *id.* at 105).

<sup>337</sup> See *Jackson*, 142 S. Ct. at 532.

<sup>338</sup> See *Pennhurst*, 465 U.S. at 105 (“Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.” (citing *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952))).

and of § 1983, Article III, and the Fourteenth Amendment — than did the *Jackson* majority. The reasons echo those that Professor Meltzer and I advanced for our interpretation of the traditional law of constitutional remedies roughly thirty years ago: in addition to fitting relevant judicial precedents tolerably well, an interpretation that portrays courts as presumptively authorized to furnish remedies that are needed to ensure the vindication of constitutional rights promotes constitutional justice and the rule of law better than the interpretation that the *Jackson* majority adopted.<sup>339</sup> Among other relevant authorities, both *Ex parte Young* and *General Oil Co. v. Crain* justified their holdings partly by emphasizing that injunctions against the defendant officials were functionally necessary to enforce the Fourteenth Amendment.<sup>340</sup>

Justice Gorsuch's majority opinion maintained that to allow injunctions barring court clerks from processing complaints would set a dangerous precedent:

If it caught on and federal judges could enjoin state courts and clerks from entertaining disputes between private parties under *this* state law, what would stop federal judges from prohibiting state courts and clerks from hearing and docketing disputes between private parties under *other* state laws? . . . How notorious would the alleged constitutional defects of a claim have to be before a state-court clerk would risk legal jeopardy merely for filing it?<sup>341</sup>

In response, Justice Sotomayor suggested that the Court could have linked the authorization of relief against court clerks tightly to the facts of a law that (1) deliberately sought to frustrate the award of injunctive protection against a clearly unconstitutional statute and (2) “create[d] special rules for state-court adjudication to maximize harassment.”<sup>342</sup> When the coercive effects of S.B. 8 are thrown into the mix, one might also conclude that the overall Texas scheme violated the Due Process Clause and that under these extraordinary circumstances, preenforcement relief against court clerks became necessary and appropriate.

My principal point, however, is not about where lines should be drawn. It is, rather, that it is unworkable to maintain that the traditions of equity that constrain the jurisdiction of the federal courts can be specified by reference to the precise forms of relief that were available in any particular year or at the time of any particular case, including *Young*. As the Supreme Court had previously said in *Virginia Office for Protection & Advocacy v. Stewart*,<sup>343</sup> “the principles undergirding the *Ex parte Young* doctrine” may “support its application” to new

<sup>339</sup> See *supra* section I.B, pp. 1322–25.

<sup>340</sup> See *supra* section I.A.2, pp. 1315–18.

<sup>341</sup> *Jackson*, 142 S. Ct. at 532–33.

<sup>342</sup> *Id.* at 549 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (citation omitted).

<sup>343</sup> 563 U.S. 247 (2011).

circumstances, “novelty notwithstanding.”<sup>344</sup> In seeking a historically fixed measure of the outer limits of federal equity jurisdiction, whether under § 1983 or more generally, the *Jackson* opinion embarks on a path that I doubt it can pursue with analytical consistency.

One potential example of looming difficulties lies in an aspect of *Jackson* that the majority overlooked. In *Jackson*, the plaintiffs were healthcare providers seeking to assert what the Court viewed as their patients’ rights of abortion access.<sup>345</sup> Under these circumstances, one might have expected the Court to ask whether the traditions of equity authorized antisuit injunctions in cases in which the plaintiffs asserted third-party rights. Although I have not done the research necessary to resolve that question, by many accounts, “[t]he traditional rule . . . was that parties to a lawsuit could only assert their own rights.”<sup>346</sup> Nevertheless, Justice Thomas’s dissent on this point notwithstanding,<sup>347</sup> the Court made no inquiry in *Jackson* concerning whether the traditions of equity authorized suits based on third-party standing.<sup>348</sup> It is not clear why.

It is also not clear what the implications of *Jackson* — when viewed together with *Armstrong* and *Grupo Mexicano* — may be in other kinds of cases in which defendants might claim that the traditions of equity insulate them from suit. It seems likely that the Supreme Court will soon address the permissibility of so-called universal injunctions that confer protections on nonparties as well as parties.<sup>349</sup> There is a dispute

<sup>344</sup> *Id.* at 261.

<sup>345</sup> See *Jackson*, 142 S. Ct. at 529–30.

<sup>346</sup> HART & WECHSLER, *supra* note 9, at 164; see also Monaghan, *supra* note 138, at 277 (citing *Cnty. Ct. v. Allen*, 442 U.S. 140, 154–55 (1979); *United States v. Raines*, 362 U.S. 17, 21–22 (1960); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912)).

<sup>347</sup> *Jackson*, 142 S. Ct. at 539 n.1 (Thomas, J., concurring in part and dissenting in part).

<sup>348</sup> In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court allowed an economic and charitable corporation to seek an injunction against a state statute that required children to attend public schools and thus, the Court concluded, interfered with the parents’ right to control the upbringing of their children. See *id.* at 534–35. But the *Pierce* Court appeared also to view the Society of Sisters as asserting its own rights: “[Appellees] asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property.” *Id.* at 536. In any event, in *Grupo Mexicano*, the Court pointed to the principles of equitable practice that prevailed in the English Court of Chancery during the colonial era — not Supreme Court practice of a later era — as the measure of the federal equitable power conferred by the Judiciary Act of 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

<sup>349</sup> See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring in the grant of stay) (citing Article III problems, *id.* at 600, and “equitable and constitutional” issues with universal injunctions, *id.* at 601); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.2 (2018) (Thomas, J., concurring) (“Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts.”); see also Notre Dame Law School, *Notre Dame Law Review 2022 Symposium Keynote Address: Justice Amy Coney Barrett*, YOUTUBE, at 39:55 (Feb. 14, 2022), <https://www.youtube.com/watch?v=noLA-z-SW5w&t=2395s> [<https://perma.cc/6KTV-AEMM>] (declining to answer a question on the propriety of nationwide injunctions “because that is [an issue] that could come before me [as a Justice]”).

in the academic literature about how far back into history injunctions that protect nonparties can be traced.<sup>350</sup> But the dispute about nationwide injunctions also raises complex questions about whether analysis should proceed according to a static or dynamic conceptualization of the traditions of equity. According to Pfander and Wentzel, the traditional legal writs of prohibition and certiorari were used as early as the eighteenth century to protect nonparties against abuses of official power.<sup>351</sup> If equity later absorbed the functions once performed by legal writs, one might argue that the traditional equitable jurisdiction of the federal courts encompassed the authority to adapt remedies that protected the rights of nonparties as well as parties.<sup>352</sup> But I do not mean to prejudge that issue.

One might also question how the *Jackson* majority's general pronouncement that "[t]he equitable powers of federal courts are limited by historical practice"<sup>353</sup> relates to Justice Thomas's more specific dictum that "a federal court's jurisdiction in equity extends no further than 'the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.'"<sup>354</sup> Under either formulation, questions would arise concerning the permissibility of the remedies ordered in the school desegregation cases to which Justice Sotomayor's opinion in *Jackson*<sup>355</sup> — like Justice Ginsburg's earlier dissenting opinion in *Grupo Mexicano*<sup>356</sup> — alluded.<sup>357</sup> If traditional practice and especially

<sup>350</sup> Compare, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425–27, 437–38 (2017) (arguing that national injunctions did not traditionally exist at equity and did not arise until the 1960s), and Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 623 (2017) (identifying the Supreme Court's blessing of nationwide class actions in *Califano v. Yamasaki*, 442 U.S. 682 (1979), as a substantial increase in district courts' nationwide authority), with Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080–81 (2018) (arguing that there is no historical understanding of "the judicial power" that forbids nationwide injunctions (quoting U.S. CONST. art. III, §§ 1, 2)), and Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924–28 (2020) (disputing Professor Samuel Bray's thesis and instead arguing that universal injunctions trace back to at least the 1910s, making them as old as *Ex parte Young* itself).

<sup>351</sup> Pfander & Wentzel, *supra* note 11, at 1278, 1303–05.

<sup>352</sup> See generally Bray & Miller, *supra* note 3, at 1796 (supporting "the argument by James Pfander and Jacob Wentzel that relief in equity has to change and adjust as the relief in law does").

<sup>353</sup> *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (citing *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

<sup>354</sup> *Id.* at 540 (Thomas, J., concurring in part and dissenting in part) (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)).

<sup>355</sup> *Id.* at 551–52 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (citing *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)).

<sup>356</sup> *Grupo Mexicano*, 527 U.S. at 337 n.4 (Ginsburg, J., concurring in part and dissenting in part).

<sup>357</sup> These have sometimes included compensatory education as a remedy for historic school segregation. See, e.g., *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 778 F.2d 404, 408 (8th Cir. 1985) (finding that violations could "be remedied by . . . providing compensatory and

practice in 1789 were taken as fixing the outer bounds of federal equity jurisdiction under Article III, broadly worded congressional authorizations of injunctions under a variety of modern statutes — and judicial practice in awarding them — could also be in constitutional jeopardy.<sup>358</sup> But the Court has not definitively committed itself to that position yet.

Without a deep foray into modern statutes and equitable practice as well as legal history, I think it doubtful, looking ahead, that the Supreme Court will find it attractive to link the outer limits of permissible federal injunctive relief to a static interpretation of the traditions of equity as they existed on any single date. That said, *Jackson* and other recent cases have laid a foundation for reconsidering whether a potentially broad range of modern injunctive remedies lies beyond the historical and thus the currently permissible jurisdiction of a court of equity.

### *C. The Right to Present Constitutional Defenses Against Enforcement Actions*

Among the welcome affirmations of *Jackson* was that defendants in actions to enforce a statute can always assert the defense that the statute is unconstitutional as applied to them. *Armstrong* had given the same assurance.<sup>359</sup> Yet there are potential complications within the shifting and straitening tenets of modern remedial doctrine, as *Jackson* reveals.

The complicating issue in *Jackson* again arose from the plaintiffs' reliance on third-party standing. The Supreme Court has asserted repeatedly that whether to uphold third-party standing is a matter of judicial discretion.<sup>360</sup> If the federal courts cannot create rights to sue not

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remedial programs for black children"); *Adams v. United States*, 620 F.2d 1277, 1296 (8th Cir. 1980) (indicating that desegregation relief may require "[d]eveloping and implementing compensatory and remedial educational programs" (citing *Milliken v. Bradley*, 433 U.S. 267 (1977))); *Plaquemines Par. Sch. Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969) (approving remedial programs that were "an integral part of a program for compensatory education" to redress school segregation).

<sup>358</sup> An example may come from the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482, which authorizes the federal courts to "grant such relief as the court determines is appropriate," *id.* § 1415(i)(2)(C)(iii) (originally codified at 20 U.S.C. § 1415(e)(2) (1976)), and which the Supreme Court has read as conferring very broad judicial discretion, including to issue "prospective injunction[s] directing . . . school officials to develop and implement" individualized education plans to meet students' needs, *Sch. Comm. of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985).

<sup>359</sup> See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) ("For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits. Similarly, a court may not hold a civil defendant liable under state law for conduct federal law requires." (citations omitted) (citing *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486–87 (2013); *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 509 (1956))).

<sup>360</sup> See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (opinion of Stevens, J.); *Craig v. Boren*, 429 U.S. 190, 194 (1976); *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975). Although the Court appeared to express some hesitancy about this characterization in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S.

grounded in the traditions of equity, as *Jackson* pronounces,<sup>361</sup> one has to wonder how federal courts can authorize defenses against criminal and civil statutes that are neither statutorily licensed nor constitutionally required.

Justice Thomas believes that no justification exists.<sup>362</sup> Accordingly, he would disallow third-party standing and, more generally, deny criminal defendants the opportunity to mount facial challenges to statutes that do not violate their personal constitutional rights. Justice Alito, joined in relevant part by Justices Thomas and Gorsuch, adopted a similar position in the pre-*Dobbs* abortion case of *June Medical Services LLC v. Russo*.<sup>363</sup> If Justice Thomas's premise concerning the federal courts' constrained role in recognizing causes of action is granted, his conclusion may seem hard to resist.

Among the strongest objections to Justice Thomas's premise is a practical one: abolition of third-party standing doctrine would abound with pitfalls. To begin with the pre-*Dobbs* abortion right that was at stake in *June Medical*, I believe that it would have violated the personal rights of doctors and other medical professionals under the Due Process Clause to subject them to legal sanctions for performing abortions that their patients had a constitutional right to procure.<sup>364</sup> If so, the line between third-party-rights cases and cases in which parties assert their personal rights not to be sanctioned under an invalid law would need to be redrawn.

Also potentially requiring rethinking would be the doctrinal premise, to which conservative Justices seem as committed as liberals, that defendants in enforcement suits can challenge the constitutionality of statutes that violate structural constitutional norms — such as the Commerce Clause and the Appointments Clause — that do not directly confer individual rights.<sup>365</sup> The English Court of Chancery would have had no

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118, 125–27, 127 n.3 (2014), the Court returned to it in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017), and *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion).

<sup>361</sup> See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535, 538 (2021).

<sup>362</sup> See cases cited *supra* note 253.

<sup>363</sup> 140 S. Ct. 2103; *id.* at 2165–71 (Alito, J., dissenting) (maintaining that abortion providers should not be able to assert their patients' rights due to the absence of a close relationship and the patients' ability to assert their own rights).

<sup>364</sup> See, e.g., Fallon, *supra* note 138, at 1359–64; Monaghan, *supra* note 138, at 297–301; see also *supra* note 348 (discussing the mixture of first- and third-party standing analysis in *Pierce v. Society of Sisters*).

<sup>365</sup> See, e.g., *Bond v. United States*, 564 U.S. 211, 220–24 (2011) (declining to apply the prohibition against third-party standing to a criminal defendant's challenge to a law as violating Article I and the Tenth Amendment in part because “[f]ederalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions,” *id.* at 222 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))); *INS v. Chadha*, 462 U.S. 919, 935–36 (1983) (finding that a noncitizen subject to removal from the United States had standing to challenge whether the legislative veto violated the separation of powers



occasion to enforce structural constitutional limits on the authority of Parliament.<sup>366</sup>

#### D. Equitable Versus Legal Remedies

*Jackson* leaves untouched, for now, a puzzling disparity between the Supreme Court's treatment of judge-authorized equitable remedies for constitutional violations, on the one hand, and judge-authorized damages remedies, on the other. In explaining the Court's upholding of an injunction in *Young*, Justice Scalia asserted in *Armstrong* that suits to enjoin unlawful official action originated as "the creation of [English] courts of equity."<sup>367</sup> This reasoning dovetailed with his conclusion in *Grupo Mexicano* that the statutory grants of equitable jurisdiction to the federal courts encompassed an authority to implement "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."<sup>368</sup> Although Justice Scalia did not note the parallel, the Court, in authorizing a right to sue for damages in *Bivens*, had similarly appealed to an implicit authorization in the statutory grant of federal question jurisdiction: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>369</sup>

More recently, of course, the Supreme Court has impugned *Bivens* and its progeny as involving lawmaking that overreaches the federal judicial role under the separation of powers.<sup>370</sup> But why? If judicial allowance of *Bivens* suits represents constitutionally suspect judicial lawmaking, why does the same indictment not also apply to awards of injunctive relief against federal officials? So far as I can tell, the Court's

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because he would not be deported if the provision was unconstitutional and severable); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 237–39 (1959) (allowing a labor union to argue that the National Labor Relations Act preempted California law); see also HART & WECHSLER, *supra* note 9, at 167 n.7. For the argument that private parties lack rights under most structural constitutional provisions and therefore should ordinarily have no standing to complain of violations, see Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1436–37 (2013). But see Kent Barnett, *Standing For (and Up To) Separation of Powers*, 91 IND. L.J. 665, 695–703 (2016) (arguing that structural challenges are analogous to "procedural" challenges for which causation and redressability requirements are relaxed and that injured parties may come within the zone of interests that structural provisions protect).

<sup>366</sup> The traditionally controlling principle of British law was one of parliamentary sovereignty, under which Parliament could "make or unmake any law whatever; and, further, that no person or body [was] recognised by the law of England as having a right to override or set aside the legislation." DICEY, *supra* note 153, at 40.

<sup>367</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (citing Jaffe & Henderson, *supra* note 180).

<sup>368</sup> *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

<sup>369</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (omission in original) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>370</sup> See *supra* notes 191–96 and accompanying text.

response depends substantially on ascriptions of congressional intent. Absent evidence to the contrary, the Court assumes that grants of jurisdiction to the federal courts normally confer authority to award injunctions consistent with traditions of equity,<sup>371</sup> but not authority to uphold nonstatutory damages remedies,<sup>372</sup> even for kinds of wrongs that would traditionally have been remediable in damages at common law. But the Court has not justified its disparate imputations of congressional intent, nor has it offered a clear and convincing answer to the question — discussed above — of whether Article III permits Congress to confer equitable jurisdiction broader than existed in 1789. Grounds thus exist, if the Court should choose to invoke them, for a sweeping reconsideration of the availability of equitable remedies long taken for granted.

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The Supreme Court's next steps following *Jackson* are not easy to predict. What seems unmistakable, however, is that the connections between constitutional rights and constitutional remedies that prevailed for most of American history — and certainly during the period from *Ex parte Young* in 1908 through nearly the remainder of the twentieth century — are now subject to an ongoing process of reevaluation and, in many instances, of rejection and replacement. In other words, *Jackson* both continues and epitomizes a revolution in the law of constitutional remedies that does not yet appear to have run its course.

#### V. ORIGINALISM, TEXTUALISM, AND DEFERENCE TO THE PREROGATIVES OF CONGRESS?

In charting changes over the past thirty years, and especially in probing the Supreme Court's decision in *Whole Woman's Health v. Jackson*, I have offered frequent criticisms, mostly based on the consequences that the Court's revisions of the traditional law seem likely to produce. But I have not yet addressed the defenses that champions of the Court's recent course would likely mount, highlighting constraints on judicial power rooted in the Court's commitments to originalism, textualism, and stare decisis. Justice Gorsuch's opinion in *Jackson* evoked the need for disciplines such as these. Justice Gorsuch also avowed that if Congress wanted to provide more protections for constitutional rights that might be chilled by S.B. 8 or other, similar state legislation, "Congress is free to provide them."<sup>373</sup>

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<sup>371</sup> See *Grupo Mexicano*, 527 U.S. at 318.

<sup>372</sup> See, e.g., *Hernández 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 . . . ." (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001))).

<sup>373</sup> *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021).

This Part offers a skeptical appraisal of the current Supreme Court's pretensions to methodological discipline and judicial modesty in the domain of constitutional remedies. Section A argues that the modern Court's decisions withdrawing, limiting, and invalidating judicial remedies for constitutional violations have shown at most an inconsistent commitment to originalism and textualism. Section B concludes that the Justices seldom if ever treat *stare decisis* as obligating them to adhere to decisions that they view as substantially misguided on normative grounds. Much more commonly, Justices in the modern era rely on *stare decisis* as a source of permission to uphold past decisions that they view as having good consequences, even if they would have thought those decisions hard to justify in the first instance — due, for example, to a lack of persuasive originalist or textualist support. Finally, section C argues that, far from exhibiting consistent deference to Congress's decisions to authorize constitutional remedies, the Court has deployed purpose-based rather than textualist reasoning to invalidate congressional authorizations of constitutional remedies that rankle the sensibilities of the conservative majority.

A. *Originalism and Textualism as Guarantors  
of Interpretive Modesty?*

Supreme Court Justices who look askance at judicially created constitutional remedies have frequently invoked originalist and textualist interpretive methodologies to support their positions.<sup>374</sup> But the

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<sup>374</sup> There are many varieties of originalism. See, e.g., Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1626–27 (distinguishing five varieties of originalism); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–62 (2009) (noting the shifting and conflicting strains of originalist thought throughout the movement's development). Textualists concur in their emphasis on the meaning of words and phrases in the context of their utterance but sometimes arrive at divergent conclusions. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749–51 (2020) (disagreeing, in an opinion written by Justice Gorsuch, with Justice Alito's dissent over whether the ordinary public meaning of Title VII's prohibition on discrimination "because of sex" encompasses sexual-orientation discrimination); *Bond v. United States*, 572 U.S. 844, 865–66 (2014) (disagreeing, in an opinion by Chief Justice Roberts, with Justice Scalia's concurrence in the judgment over whether to rely on the literal statutory definition of "chemical weapon" or its natural meaning to an ordinary person); *Smith v. United States*, 508 U.S. 223, 225, 229–30 (1993) (disagreeing, in a textualist opinion written by Justice O'Connor, with Justice Scalia's dissent over whether an individual "uses" a firearm in relation to a drug trafficking crime when he exchanges it for narcotics). See generally Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265 (2020) ("*Bostock* was not a case about textualism; it was a case about *textualisms*." *Id.* at 267.). Originalism and textualism are often associated with judicial conservatism. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545–46 (2006) (observing that originalism has been "proudly embraced" by conservative Justices, *id.* at 545–46, and has become a "powerful vehicle for conservative mobilization," *id.* at 546); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 771 (2008) (noting the "conventional wisdom" that textualism is a conservative methodology). But some originalists and textualists are political progressives. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 23 (2011) (defending a form of "framework originalism" that is compatible with living constitutionalism).

application of originalist premises to issues involving constitutional remedies poses complicated challenges. As Part I argued, many if not most members of the Founding generation counted on the availability of a preexisting scheme of remedies, most of them not specifically required by the Constitution nor explicitly authorized by statute, through which constitutional norms could be enforced.<sup>375</sup> As a result, there are plausible originalist as well as nonoriginalist paths to the conclusion that federal judicial recognition of remedies that were not specifically authorized by Congress accords with the constitutional separation of powers, at least in the absence of legislation limiting or withdrawing such remedies.<sup>376</sup> Indeed, once Congress has conferred federal equity jurisdiction, even the Supreme Court's conservative majority appears to believe that equitable remedies are permissible and appropriate if they accord with the traditions of equity.<sup>377</sup>

In debunking judicial authorization of *Bivens* remedies, the Court has not denied that the Founding generation broadly anticipated that courts, including the federal courts, would rely on common law causes of action to vindicate constitutional rights. Instead, the Court has pointed to the recognition in *Erie* that “[t]here is no federal general common law”<sup>378</sup> as a basis for retreat from upholding federal common law causes of action. But that line of argument ignores pre-*Erie* cases, including *Poindexter v. Greenhow*, in which the Court rested holdings of entitlement to legal rather than equitable relief on constitutional foundations.<sup>379</sup> It also fails to explain why nonstatutory suits to enforce the Constitution via injunctions are not as tainted as actions for damages in

<sup>375</sup> See *supra* section I.A.1, pp. 1312–14.

<sup>376</sup> See Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019–2020 CATO SUP. CT. REV. 263, 267–70 (2020) (“At the Founding, and for much of American history, there was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers. Not only did federal courts routinely provide such relief, but the Supreme Court repeatedly blessed the practice.” *Id.* at 267.); see also Pfander & Wentzel, *supra* note 11, at 1292–305, 1324–33, 1358–59 (arguing that under American law prevailing at the time of the Founding, equitable remedies could “legitimately change in response to the shifting contours of the rest of the remedial system without the need for a constitutional amendment,” *id.* at 1358); Woolhandler & Collins, *supra* note 110, at 1896 (concluding that “the *Bivens* decision itself may have been justified under” stringent criteria including whether “the framers of the Constitution or relevant statutes contemplated the trespass action as a vehicle for enforcement of constitutional prohibitions”). Pfander and Wentzel cite Professors William Baude and Stephen Sachs as supporting this line of analysis, according to which *Ex parte Young*'s recognition of the availability of injunctions against ongoing violations of the Constitution by government officials was a legally legitimate change on originalist grounds. Pfander & Wentzel, *supra* note 11, at 1324–33, 1358–59. See generally William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) (advocating for and defining “original-law originalism,” *id.* at 1488).

<sup>377</sup> See *supra* note 164–67 and accompanying text.

<sup>378</sup> *Hernández v. Mesa*, 140 S. Ct. 735, 742 (2020) (alteration in original) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

<sup>379</sup> *Poindexter v. Greenhow*, 114 U.S. 270, 279 (1885). For discussion, see *supra* notes 115–16 and accompanying text.

a post-*Erie* world.<sup>380</sup> If taken at face value, the modern Supreme Court's separation of powers rationale for rejecting *Bivens* actions would also condemn other forms of federal common lawmaking from which the Court has not retreated, including the recognition of federal common law defenses against state law causes of action.<sup>381</sup>

In cases involving constitutional remedies, moreover, the Supreme Court does not always adhere to textualist principles. The Court's interpretation of § 1983 as implicitly incorporating "official immunity" defenses for state officials who violate constitutional rights furnishes a much-noted, increasingly controversial, case in point.<sup>382</sup> By nearly all accounts, the Court has expanded qualified immunity in ways unknown to the common law in 1871.<sup>383</sup> The Court has also held that § 1983 includes an implied, nontextual exception for suits to enjoin state tax collection;<sup>384</sup> barred use of § 1983 as a vehicle for prisoners to seek release from allegedly unconstitutional incarceration;<sup>385</sup> and ruled that doctrines of claim and issue preclusion can limit the availability of § 1983 actions, even when relevant barriers have developed subsequent to § 1983's enactment.<sup>386</sup> Several cases have found that Congress, when enacting statutes that confer federal rights that are accompanied by specified remedies, impliedly withdrew the cause of action for damages or injunctive relief that otherwise would have existed under either § 1983 or *Ex parte Young*.<sup>387</sup>

The Supreme Court has similarly held that suits for injunctions under § 1983 are subject to judge-made exceptions.<sup>388</sup> The most famous and important of the relevant doctrines, the *Younger* abstention doctrine, bars federal injunctions against actions by state officials to enforce allegedly unconstitutional statutes if state enforcement proceedings were already pending when the plaintiff brought suit under § 1983.<sup>389</sup>

<sup>380</sup> See *supra* section IV.D, pp. 1356–57.

<sup>381</sup> See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

<sup>382</sup> See *supra* note 208 and accompanying text (discussing criticisms).

<sup>383</sup> See *supra* section II.B, pp. 1329–32.

<sup>384</sup> See *Nat'l Priv. Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 590 (1995).

<sup>385</sup> See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

<sup>386</sup> See *Allen v. McCurry*, 449 U.S. 90, 97–105 (1980); see also *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 794–99 (1986).

<sup>387</sup> See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (holding that the specific remedial provisions of the federal Telecommunications Act impliedly precluded a § 1983 remedy); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74–76 (1996) (holding that remedial provisions of the Indian Gaming Regulatory Act impliedly precluded a right to sue for injunctive relief under § 1983 and *Ex parte Young*).

<sup>388</sup> For a survey of abstention doctrines and other judge-made limitations on federal jurisdiction, see HART & WECHSLER, *supra* note 9, at 1094–192. For the argument that the abstention doctrines violate the separation of powers, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). For a thoughtful and provocative rejoinder, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

<sup>389</sup> See *Younger v. Harris*, 401 U.S. 37, 53–54 (1971).

The Court has also identified constitutional barriers to constitutional remedies that are not traceable to specific provisions of the Constitution's text. As Dean John Manning<sup>390</sup> and Professor Thomas Colby<sup>391</sup> both have pointed out, many of the Court's decisions promoting constitutional federalism depend on structural inferences, supported by ascriptions of purposes to the Constitution's Framers but not otherwise traceable to specific constitutional language, that textualists deride in other cases. *Shelby County v. Holder*, which relied on a judicially inferred "equal sovereignty" principle to invalidate a crucial provision of the Voting Rights Act of 1965, furnishes a potent example.<sup>392</sup>

Overall, the Court's pattern of decisions reveals a greater willingness — including on the part of Justices who purport to be originalists and textualists — to identify implied constitutional or statutory limitations on expressly authorized constitutional remedies than to find implicit authorizations. Although originalism and textualism may exert some influence on the conservative Justices' thinking, anyone who wanted to predict the Court's decisions about the availability of constitutional remedies would need to introduce more than a tincture of legal realism into her predictive methodology.

### B. *Stare Decisis*

The doctrine of *stare decisis* provides a weak and partial explanation, at most, for modern trends in the law of constitutional remedies.<sup>393</sup> In one familiar characterization, *stare decisis* is a "principle of policy,"<sup>394</sup> not an "inexorable command."<sup>395</sup> In another, the Justices should not vote to overrule a precedent absent "special justification."<sup>396</sup> When the Court overrules prior decisions, dissenting Justices frequently protest

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<sup>390</sup> See, e.g., John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 32 (2014) (cautioning that the modern Court's federalism and separation of powers doctrines rest on abstract values, distilled from constitutional structure, that "leave judges with a great deal of discretion").

<sup>391</sup> See Thomas B. Colby, Essay, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1322–34 (2019) (arguing that originalists frequently rely on structural arguments in cases involving structural constitutional provisions).

<sup>392</sup> See *Shelby County v. Holder*, 570 U.S. 529, 544, 557 (2013).

<sup>393</sup> The literature on *stare decisis* is vast. Noteworthy recent contributions include RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017); William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313 (2020); and Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121 (2019).

<sup>394</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

<sup>395</sup> *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

<sup>396</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

that the majority has failed to give *stare decisis* its due.<sup>397</sup> Increasingly, however, commentators have concluded that, in the modern era, the doctrine's obligatory force is vanishingly weak in the Supreme Court in any case in which Justices believe that the practical effects of overruling would be desirable.<sup>398</sup>

Modern cases involving constitutional remedies confirm this appraisal. Although the Court has so far stopped just short of overruling *Bivens*, it has renounced *Bivens*'s rationale as reflecting the erroneous suppositions of an "*ancien regime*"<sup>399</sup> and limited the decision nearly to its facts.<sup>400</sup> The Court has similarly rejected the traditional interpretation of *Ex parte Young* and recast it as reflecting the traditions of equity, not a constitutional mandate, and thus as susceptible to congressional override.<sup>401</sup> As part of a "Federalism Revolution" under the Rehnquist Court that included controversial expansions of the doctrine of state sovereign immunity,<sup>402</sup> the Court overruled a precedent holding that Congress could abrogate the states' immunity when legislating under the Commerce Clause.<sup>403</sup> Then, having done so, it substantially walked back the holding of *Reich v. Collins* that the Due Process Clause

<sup>397</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2333–48 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1574 (2021) (Kagan, J., dissenting) ("In overruling a critical aspect of *Teague*, the majority follows none of the usual rules of *stare decisis*."); *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting) ("Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered."); *Citizens United v. FEC*, 558 U.S. 310, 414 (2010) (Stevens, J., concurring in part and dissenting in part) ("Today's ruling thus strikes at the vitals of *stare decisis*, 'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion' that 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986))).

<sup>398</sup> See, e.g., Baude, *supra* note 393, at 329–34; Schauer, *supra* note 393, at 129–35.

<sup>399</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

<sup>400</sup> See, e.g., *id.* at 1857 (noting "that expanding the *Bivens* remedy is now a 'disfavored' judicial activity" and that the Court "has 'consistently refused to extend *Bivens* to any new context or new category of defendants'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)); *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022) (affirming that "if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution," but concluding that "to decide the case before us, we need not reconsider *Bivens*" (citing *Ziglar*, 137 S. Ct. at 1856–57)); *Hernández v. Mesa*, 140 S. Ct. 735, 743–44 (2020) (ruling that a cross-border shooting by a border agent constituted a new context in which *Bivens* did not apply, even though both cases involved alleged Fourth Amendment violations).

<sup>401</sup> See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

<sup>402</sup> See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431–38 (2002) (charting interconnections among aspects of a purported federalism "revolution").

<sup>403</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989), overruled by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) ("We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.").

requires states to provide a refund remedy for the coercive collection of constitutionally invalid taxes.<sup>404</sup>

Building on the work of those who depict stare decisis as having little force in the Supreme Court, Professor Richard Re argues that the doctrine functions less as a source of obligation for the Justices than as a grant of permission.<sup>405</sup> On that interpretation, perhaps the most practically important effect of stare decisis in the Supreme Court is to authorize the Justices to stand by decisions that they would have thought insupportable as an original matter whenever they think that overruling would have regrettable consequences.

Developments in the law of constitutional remedies accord with this appraisal. As noted above, originalist-textualist Justices have applied and even extended precedents that give officials sued under § 1983 a far more protective form of “qualified immunity” than would appear sustainable on textualist interpretive principles (as Justice Thomas has acknowledged).<sup>406</sup> The permission granted by precedent likely also explains the Court’s continuing adherence to a number of earlier decisions recognizing similarly nontextual exceptions to the § 1983 cause of action, including many of those discussed in section V.A.<sup>407</sup> Overall, when a weak, permission-granting version of stare decisis is put into the same frame with the originalist-textualist methodologies that a majority of the modern Justices often embrace, the Justices can claim a license to retain as much of the traditional law of constitutional remedies as they like, citing stare decisis as their justification, while invoking originalist-textualist premises mostly only when they believe that those premises support revising elements of the traditional law that they do not approve.

### C. *Deference to Congressional Judgment in the Current Era*

Notwithstanding Justice Gorsuch’s assertion in *Jackson* that if Congress wishes to create constitutional remedies, it has the authority to do so, a number of the Court’s modern decisions — some of which were discussed in section II.C — severely constrain Congress’s express powers to enforce the Civil War Amendments. *City of Boerne v. Flores*, decided in 1997, demands that remedial legislation under section 5 of the Fourteenth Amendment be congruent with and proportional to an identified pattern of judicially cognizable constitutional violations.<sup>408</sup> In applying that test, the Supreme Court has invalidated parts of a number

<sup>404</sup> See *Alden v. Maine*, 527 U.S. 706, 740 (1999) (reading *Reich* as establishing only that when a state promises taxpayers a “‘clear and certain’ postdeprivation” opportunity to dispute a tax assessment, “due process requires the State to provide the remedy it has promised” (quoting *Reich v. Collins*, 513 U.S. 106, 108 (1994)) (citing *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O’Connor, J., concurring); *Fair Assessment in Real Est. Ass’n, Inc. v. McNary*, 454 U.S. 100 (1981))).

<sup>405</sup> See Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 912–22 (2021).

<sup>406</sup> See *supra* note 217 and accompanying text.

<sup>407</sup> See *supra* notes 374–92 and accompanying text.

<sup>408</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).



of important federal statutes, including a provision of the Violence Against Woman Act (VAWA) that sought to authorize private suits by female victims of domestic violence.<sup>409</sup> Congress had sought to justify its creation of a private cause of action against the perpetrators of domestic violence partly as a remedy for state officials' failure to furnish women who are the victims of domestic violence with the equal protection of the laws.<sup>410</sup>

Following *City of Boerne, Shelby County v. Holder* struck down a crucial provision of the Voting Rights Act of 1965 that was designed to protect against race-based discrimination.<sup>411</sup> As when invalidating the VAWA, the Court divided by 5–4, with all of the Justices customarily characterized as conservatives in the majority and the liberals in dissent.<sup>412</sup> As noted above, the *Shelby County* Court predicated its holding on a purported structural constitutional principle requiring congressional respect for the states' "equal sovereignty."<sup>413</sup> But when enacting regulatory and spending legislation under Article I, Congress has frequently differentiated among states.<sup>414</sup> In light of this practice, Professor Leah Litman plausibly interprets *Shelby County* as holding that structural constitutional principles more stringently limit Congress's power to provide remedies for constitutional violations under the Reconstruction Amendments than to enact other types of legislation under Article I.<sup>415</sup>

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My basic point in this Part has been a simple one. In rejecting what Professor Meltzer and I once referred to as a "common law model" of the judicial role in recognizing causes of action and crafting remedies to enforce the Constitution, the modern Supreme Court has repeatedly derided that traditional approach as one of reckless judicial indiscipline,

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<sup>409</sup> 42 U.S.C. § 13981 (2000) (current version at 34 U.S.C. § 12361), *invalidated* by *United States v. Morrison*, 529 U.S. 598, 601–02 (2000).

<sup>410</sup> H.R. REP. NO. 103-711, at 385–86 (1994) (Conf. Rep.); S. REP. NO. 103-138, at 38, 41–55 (1993); S. REP. NO. 102-197, at 33–35, 41, 43–47 (1991); *see also Morrison*, 529 U.S. at 620 (citing and describing this legislative history).

<sup>411</sup> *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

<sup>412</sup> *Compare id.* at 532 (Roberts, C.J., joined by Scalia, Kennedy, Thomas & Alito, JJ.), *with id.* at 559 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.).

<sup>413</sup> *See id.* at 544–45 (majority opinion); *see also supra* notes 224–26 and accompanying text.

<sup>414</sup> *See, e.g.*, 16 U.S.C. § 3635 (requiring only "the States of Alaska, Idaho, Oregon and Washington" to provide information to the federal government regarding statutory and regulatory provisions relating to salmon harvesting); 20 U.S.C. § 7861(a)(1) (allowing the Secretary of Education to waive conditions attached to state receipt of federal education funding on a state-by-state basis); 42 U.S.C. § 7543(e)(2) (allowing California special privileges in adopting vehicle-emission standards); 49 U.S.C. § 31112(c) (establishing "[s]pecial [commercial driving] [r]ules for Wyoming, Ohio, Alaska, Iowa, Nebraska, Kansas, and Oregon"); *see also* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1242–46 (2016) (collecting these and other examples of statutes that "identify particular states for differential treatment or adopt a rule that has differential effects on different states," *id.* at 1243).

<sup>415</sup> Litman, *supra* note 414, at 1215.

insensitive to Congress's prerogatives under the separation of powers. That portrayal of the traditional approach is misleading. As Part I suggested, the adaptations that characterized the traditional law mostly came gradually and cautiously, often in response to changes in substantive constitutional doctrine and surrounding practical exigencies. Equally misleading is the implied contrast with the modern Court's approach. However one judges the wisdom of the Court's recent revisions of the traditional law of constitutional remedies, no one should applaud the Court's approach for its disciplined commitment to originalist-textualist interpretive methodologies, to *stare decisis*, or to judicial deference to Congress.

### CONCLUSION

In this Article, I have examined the relationship between substantive constitutional rights and rights to judicial remedies as it emerges from recent decisions by the Supreme Court, especially *Whole Woman's Health v. Jackson*. Using traditional understandings as my reference point, I have appealed throughout to the idea that the concept of a constitutional right normally implies the availability of at least some judicial remedy to enforce the right and thereby make it meaningful in practice.

In a historical and analytical vein, I have argued that the current Supreme Court has substantially deviated from the traditional understanding of the relationship between constitutional rights and constitutional remedies, including by weakening the presumption that the victims of ongoing rights violations are entitled to injunctive relief. In particular, I have maintained, the Court has rejected the idea of a congressional-judicial partnership in creating rights to constitutional remedies that undergirded the traditional law. Normatively, I have argued that the Court's current course is regrettable in its rejection of the implicit, accreted wisdom that the prior, traditional approach embodied.

Sometimes implicitly and sometimes explicitly, my normative arguments in this Article have reflected a simple but vague ideal that admittedly requires contestable judgment in implementation: the rule of law, which I take to be an immanent constitutional value, requires adequate remedies to keep the government and its officials generally within the bounds of their authority, and it supports a further presumption that individuals whose rights are violated should be able to hold official wrongdoers to account. Ideals can be realized more or less completely. I have not hidden from the need for complex accommodations of rule-of-law desiderata to sometimes competing considerations such as those that underlay the traditional doctrines of sovereign and official immunity. But it is crucial, I have argued, that the Supreme Court approach cases involving the law of constitutional remedies with an ideal in view and with a recognition of the junior partnership role that courts have

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long played in upholding legal and equitable causes of action against government officials.

Disliking recent changes in the law of constitutional remedies, principally because they devalue the idea of a constitutional right, I hope that many of the innovations that I have discussed in this Article will be reversed and that others, which I have forecast, will never come to pass. Although I am pessimistic about short-term developments, I would like to be proven wrong. In any event, I do not expect the hostility to judge-created and occasionally even congressionally authorized constitutional remedies to endure indefinitely. Sometimes for better and sometimes for worse, the sitting Justices of any one era are only temporary custodians of a tradition that inevitably develops and adjusts the relationship of constitutional rights and remedies over time.