

SOME REALISM ABOUT CONSTITUTIONAL REMEDIES

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INTRODUCTION

The Supreme Court has wavered between two approaches to questions of executive power, which are often labeled institutional formalism and realism. Formalism treats an institution like the presidency as a “black box” to which the Constitution assigns certain powers.¹ In *Trump v. Hawaii*,² for example, the Supreme Court upheld President Trump’s infamous travel ban³ by focusing not on the “particular President”⁴ and his past call for a “complete shutdown of Muslims entering the United States,”⁵ but rather on “the authority of the Presidency itself.”⁶ That is the language of institutional formalism.

Realism, on the other hand, peers into the “black box,” taking account of how an institution actually works and who actually populates it before defining its powers.⁷ At times, the Roberts Court has shown glimmers of a more realist orientation. In *Department of Commerce v. New York*,⁸ for instance, the Court discredited the Trump Administration’s explanation for why it added a citizenship question to the census by noting that “we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”⁹ That is the language of institutional realism.

One can appreciate the allure of both approaches.¹⁰ On the one hand, formalism may feel credulous and impotent in the face of

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¹ Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (2014).

² 138 S. Ct. 2392 (2018).

³ *Id.* at 2423.

⁴ *Id.* at 2418.

⁵ *Id.* at 2417.

⁶ *Id.* at 2418; *see id.* at 2418–20.

⁷ Pildes, *supra* note 1, at 2.

⁸ 139 S. Ct. 2551 (2019).

⁹ *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

¹⁰ Despite the overlapping terminology, the debate between institutional realism and institutional formalism is analytically distinct from the debate between functionalism and formalism in the separation of powers context. Pildes, *supra* note 1, at 21 n.52; *see* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–44 (2011) (distinguishing functionalism from formalism).

presidential misconduct. On the other hand, the Court must craft rules of presidential power that will apply long after the incumbent administration has departed. Wherever one stands on this jurisprudential debate about presidential power, though, we argue in this Essay that a dose of realism is entirely appropriate when it comes to crafting *remedies* for the executive branch. Remedies, after all, necessarily straddle “the ideal and the real.”¹¹ They aim to effectuate constitutional values in the world as it is. To achieve that aim, constitutional remedies should take account of the nature and propensities of the administration to which they will be addressed.

The Essay has three Parts. In the first Part, we explain why it is generally important to the rule of law that the executive branch “self-apply” legal limits without the involvement of the courts. We then canvass the evidence that the current President and his Administration lack an ethos of self-application. Part II explores two remedial questions now vexing the federal courts. First, the Administration has canceled grants to a broad array of recipients in plain violation of governing statutes and prior obligations of funds. Second, the Administration has purported to remove numerous officials from independent agencies in violation of statutory removal protections. In the ensuing challenges to these aggressive actions, the federal courts have faced a choice of remedy: whether an injured party may seek an injunction in district court to undo or to end the unlawful action, or must instead pursue a damages remedy for lost funds or backpay in the Court of Federal Claims (CFC). We argue that injunctive relief or its functional equivalent in a district court is available in both contexts under existing statutes and precedents.

Putting the first two Parts together, Part III argues that equitable remedies must be available today to make up for a lack of “self-application” by executive officials. Monetary remedies alone are inadequate to constrain an executive branch populated by Holmesian “bad” men — that is, people who view the “law” only as a prediction of what a court will force them to do and who do not heed “the vaguer sanctions of conscience.”¹² A “bad man” Executive facing only damages could achieve all its aims even if the courts ultimately adjudicate its actions to be illegal.

Enter equity. Two of the traditional functions of equity are to step in when legal remedies are inadequate and to prevent opportunism.¹³ If

¹¹ Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983).

¹² O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹³ See Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1076–77 (2021). As Lord Millett once put it, “equity adopts . . . the ‘good man’ theory of law.” Peter Millett, *Bribes and Secret Commissions*, 1 RESTITUTION L. REV. 7, 20 (1993). (We thank Sam Bray for this apt reference.) Indeed, Justice Holmes himself was careful to carve out equity from his “bad man” theory of law. Holmes, *supra* note 12, at 462–63.

an equitable remedy cannot make bad actors good in fact, it can at least force them to abide by a better standard. In practical terms, “generally equity will order to be done that which ought to have been done.”¹⁴ That should be the courts’ remedial lodestar when confronted with a bad man. An injunction, of course, does not need to be *issued* in every case, but it should at least be *available* in accord with traditional equitable principles, both as an external check on the Executive and to fortify any voices within the Executive calling for restraint.

In the end, the adequacy of certain judicial remedies to uphold the rule of law depends on a culture of legality within the executive branch.¹⁵ When officials are not committed to that culture, more robust equitable remedies are needed to protect the underlying constitutional principles at issue. And courts today should indulge some realism about the nature of the current Administration when crafting remedies to keep it within legal bounds.

I. SELF-APPLICATION AND THE PRESIDENCY

A healthy legal system relies pervasively on what Professors Henry Hart and Albert Sacks call “the technique of . . . *self-applying regulation*.”¹⁶ “Overwhelmingly,” they write, “the greater part of the general body of the law is self-applying,”¹⁷ in the sense that it “is susceptible of correct and dispositive application by a person to whom it is initially addressed.”¹⁸ While Hart and Sacks focus on private law, the concept of the “self-applying regulation” has broader relevance.¹⁹ Many legal norms — especially constitutional norms — are addressed to government officials as such.²⁰ In a legal system that functions well, norms of public law guide and constrain the officials to whom they are addressed without the constant need for judicial enforcement.²¹ There is a culture of self-application. The attitude of officials in such a system is often

¹⁴ HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 24, at 53 (2d ed. 1948). This is often the practical upshot of the familiar “maxim that equity regards that as done which ought to be done.” *Id.*

¹⁵ See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018).

¹⁶ HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 120 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

¹⁷ *Id.* at 121.

¹⁸ *Id.* at 120.

¹⁹ JEREMY WALDRON, *THOUGHTFULNESS AND THE RULE OF LAW* 105 (2023) (quoting HART & SACKS, *supra* note 16, at 120–21).

²⁰ See, e.g., U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”); *id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed”).

²¹ See WALDRON, *supra* note 19, at 105.

called the “internal point of view”: “Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behaviour.”²²

In the federal executive branch, self-application is everywhere. It lies behind the phenomena “internal separation of powers”²³ and “internal administrative law.”²⁴ And it is reflected in institutional structure: There are thousands of lawyers in the Department of Justice and executive agencies²⁵ who (ideally) have a culture that facilitates executive self-application of law.²⁶ Indeed, even external checks like court judgments are effective not only because the courts can marshal force but also because executive branch officials share a strong cultural norm that judgments must be respected.²⁷

Self-application is particularly critical for a President. The power that has accumulated in the modern presidency is staggering. President Trump, in just a little over a year in office, has reshaped the global economy through tariff policy, ordered troops to American cities,²⁸ deported alleged gang members with no process,²⁹ bombed foreign countries,³⁰ and even incinerated foreign civilians for allegedly trafficking drugs.³¹ Meanwhile, Congress has proven almost totally unwilling or impotent to constrain him,³² even as the Court has expanded

²² H.L.A. HART, *THE CONCEPT OF LAW* 137 (2d ed. 1994).

²³ Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2317 (2006) (proposing that a “well-functioning bureaucracy” is a key counterweight against unitary presidential control of the entire executive branch).

²⁴ Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *MICH. L. REV.* 1239, 1260 (2017).

²⁵ David Fontana, Response, *Executive Branch Legalisms*, 126 *HARV. L. REV. F.* 21, 21 (2012).

²⁶ See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1564 (2007).

²⁷ See Parrillo, *supra* note 15, at 697 (“The efficacy of judicial review of agency action rests primarily on a strong norm, shared in the overlapping communities that agency officials inhabit, that officials comply with court orders.”). Of course, what constitutes compliance with a court judgment is not always straightforward. See *id.* at 687 (noting that “compliance . . . is imperfect and fraught”).

²⁸ See Ross Douthat, Opinion, *Will Trump's Imperial Presidency Last?*, *N.Y. TIMES* (Sep. 6, 2025), <https://www.nytimes.com/2025/09/06/opinion/trump-caesar-imperial-presidency.html> [<https://perma.cc/DV6D-X7S6>] (“Trump 2.0: It’s an imperial presidency, full stop.”).

²⁹ *Federal Judge Says U.S. Must Give Due Process to Deported Venezuelans*, NPR (Dec. 23, 2025, at 14:43 ET), <https://www.npr.org/2025/12/22/nx-s1-5652187/alien-enemies-act-deportations-case> [<https://perma.cc/YS7U-HN7E>].

³⁰ Abi McGowan et al., *A Guide to Trump's Second-Term Military Strikes and Actions*, COUNCIL ON FOREIGN RELS. (Mar. 3, 2026, at 10:15 ET), <https://www.cfr.org/articles/guide-trumps-second-term-military-strikes-and-actions> [<https://perma.cc/65UJ-WJJB>].

³¹ See Douthat, *supra* note 28.

³² See Russell Berman & Elaine Godfrey, *Does Congress Even Exist Anymore?*, *THE ATLANTIC* (Jan. 7, 2026), <https://www.theatlantic.com/politics/2026/01/congress-trump-venezuela-maduro/685539> [<https://perma.cc/28AS-X9JE>]. This is both because the President’s party controls Congress, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2323–24 (2006), and because Congress can repudiate executive policies or emergency

presidential immunities.³³ Because of these immense powers, a President's failure to self-apply is uniquely corrosive to the rule of law. Indeed, the Constitution's presidential oath and Take Care Clause impose particular duties on the President to self-apply.³⁴ Official indifference to legal constraints always threatens the rule of law,³⁵ but an attitude of indifference is especially damaging in the President, particularly given the strong unitary executive theory now regnant in Washington.

It is troubling, therefore, to consider the evidence of President Trump's indifference — if not hostility — to legal constraints. Exhibit A, of course, is the sheer number of actions that President Trump has taken that seem to be in plain conflict with governing law. Consider, for instance, President Trump's "blatantly unlawful"³⁶ decision not to enforce the TikTok ban passed by Congress with bipartisan support and unanimously upheld by the Supreme Court,³⁷ his "manifestly unconstitutional" orders targeting law firms,³⁸ or the decision to bomb boats of civilians allegedly trafficking drugs in international waters with "no conceivable legal authority."³⁹

Beyond these overt acts, though, President Trump has made his inner attitude toward the law plain.⁴⁰ According to a "senior official" from Trump's first term, the President "was constantly enraged that his

declarations only through legislation, which is subject to presidential veto, *see* Josh Chafetz, *The Chadha Presidency*, 115 GEO. L.J. (forthcoming) (manuscript at 49, 52–54), <https://ssrn.com/abstract=5360131> [<https://perma.cc/K9TV-UH4N>].

³³ *See* Thomas P. Schmidt, *Presidential Immunity: Before and After Trump*, 79 VAND. L. REV. 71, 74 (2026).

³⁴ *See* U.S. CONST. art II, § 1, cl. 8 ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."); *id.* art II, § 3. For the argument that the Take Care Clause imposes primarily duties, not powers, on the President, *see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61–70 (1994).

³⁵ Jonathan S. Gould, *The Public Rule of Law*, 87 LAW & CONTEMP. PROBS., no. 3, 2025, at 159, 160–61.

³⁶ Jack Goldsmith, *Trump's Continuing Illegal Refusal to Enforce the TikTok Ban*, EXEC. FUNCTIONS (June 19, 2025), <https://executivefunctions.substack.com/p/trumps-continuing-illegal-refusal> [<https://perma.cc/R5GN-3EHY>].

³⁷ *TikTok Inc. v. Garland*, 145 S. Ct. 57, 72 (2025) (per curiam); *id.* at 73 (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 75 (Gorsuch, J., concurring in the judgment).

³⁸ J. Michael Luttig, *The End of Rule of Law in America*, THE ATLANTIC (May 15, 2025, at 10:45 ET), <https://www.theatlantic.com/ideas/archive/2025/05/law-america-trump-constitution/682793> [<https://perma.cc/JM75-VZ7M>].

³⁹ David Cole, *Getting Away with Murder*, N.Y. REV. BOOKS (Oct. 23, 2025), <https://www.nybooks.com/online/2025/09/21/getting-away-with-murder-trump-strikes> [<https://perma.cc/E2PL-ZCD4>]; *cf.* John Yoo, Opinion, *What's Wrong with a Military Campaign Against the Drug Trade*, WASH. POST (Sep. 23, 2025), <https://www.washingtonpost.com/opinions/2025/09/23/trump-boat-strikes-drug-cartels-venezuela> [<https://perma.cc/539Z-7KT7>] (arguing that the Trump Administration has not shown "compelling evidence" that the alleged drug smugglers were acting "as instruments of the Venezuelan government," a necessary link to justify the use of force against cartel members).

⁴⁰ Charlie Savage, *The Peril of a White House that Flaunts Its Indifference to the Law*, N.Y. TIMES (Oct. 24, 2025), <https://www.nytimes.com/2025/10/24/us/politics/white-house-boats-law.html> [<https://perma.cc/5QRM-D263>].

Cabinet wouldn't break the law for him."⁴¹ That, to put it mildly, is not the "self-applying" point of view. And the legal guardrails that so enraged the President during his first term now seem to have lost their internal advocates. Chad Mizelle, the former chief of staff to former Attorney General Pam Bondi, said in a recent interview that in President Trump's second term the "handcuffs" are now "off."⁴² He added that "[w]e actually get to do everything that the President wants us to do."⁴³

Other members of the Administration have displayed a startling insouciance about legal constraints. Vice President JD Vance responded to a tweet stating that the immolation of civilians without due process was a war crime with: "I don't give a shit what you call it."⁴⁴ Before the strike, meanwhile, Defense (War?) Secretary Pete Hegseth had fired the top military lawyers in the Army, Navy, and Air Force, referring to them as "roadblocks to orders that are given by a commander in chief."⁴⁵ These "roadblocks" had been organs of self-application. The President, in Professor Jack Goldsmith's words, "is breaking law . . . publicly and without shame or unease."⁴⁶

When President Trump was asked in an interview, "[D]on't you need to uphold the Constitution of the United States as president?," he responded: "I don't know. I have to respond by saying, again, I have brilliant lawyers that work for me, and they are going to obviously follow what the Supreme Court said."⁴⁷ The juxtaposition in that response is revealing. On the one hand, President Trump's indifference to the law is palpable. The question — whether the President has a duty to "uphold the Constitution" — was, to use a Trumpian metaphor, a gimme.⁴⁸ All Presidents swear an oath promising to do just that immediately before assuming the office.⁴⁹ He also describes the lawyers in

⁴¹ Jonathan Blitzer, *Inside the Trump Plan for 2025*, NEW YORKER (July 15, 2024), <https://www.newyorker.com/magazine/2024/07/22/inside-the-trump-plan-for-2025> [<https://perma.cc/33GU-QHXJ>].

⁴² Ruth Marcus, *Pam Bondi's Power Play*, NEW YORKER (Aug. 18, 2025), <https://www.newyorker.com/magazine/2025/08/25/pam-bondi-profile> [<https://perma.cc/SC6A-LYH5>] (quoting Mizelle).

⁴³ *Id.* (quoting Mizelle).

⁴⁴ JD Vance (@JDVance), X (Sep. 6, 2025, at 10:54 ET), <https://x.com/JDVance/status/1964341436096057502> [<https://perma.cc/8V7E-ZA6E>] (responding to Brian Krassenstein (@krassenstein), X (Sep. 6, 2025, at 10:53 ET), <https://x.com/krassenstein/status/1964341267568984402> [<https://perma.cc/JWH8-DBN8>]).

⁴⁵ Dan Lamothe, *Hegseth Rejects Scrutiny of Trump's Joint Chiefs Pick*, WASH. POST (Feb. 24, 2025), <https://www.washingtonpost.com/national-security/2025/02/24/hegseth-trump-dan-caine-charles-q-brown> [<https://perma.cc/7DZ5-NDGC>] (quoting Hegseth).

⁴⁶ Savage, *supra* note 40 (quoting Goldsmith).

⁴⁷ *Read the Full Transcript: President Donald Trump Interviewed by "Meet the Press" Moderator Kristen Welker*, NBC NEWS (May 4, 2025, at 12:00 ET) [hereinafter *NBC Trump Interview*], <https://www.nbcnews.com/politics/trump-administration/read-full-transcript-president-donald-trump-interviewed-meet-press-mod-rcna203514> [<https://perma.cc/TE2P-KARN>].

⁴⁸ See Matthew Purdy, "Gimme": A Word that Explains the President's Worldview, N.Y. TIMES MAG. (May 17, 2025), <https://www.nytimes.com/2025/05/17/magazine/donald-trump-language-gimme-qatar.html> [<https://perma.cc/BU5A-Y7SM>].

⁴⁹ See U.S. CONST. art. II, § 1, cl. 8.

the executive branch as “work[ing] for me”⁵⁰ or “my lawyers.”⁵¹ Contrary to the professional ethic that has generally reigned in the executive branch, President Trump clearly views “his” lawyers as owing their primary loyalty to him, not the law.

On the other hand, President Trump acknowledges one institution he and his lawyers will “follow” — the Supreme Court.⁵² In legal theory, there is a term for such an actor, who will follow the law only when a court so requires: the “bad man.”⁵³ The phrase comes from Justice Holmes, who described the “bad man” as one who looks at the law not as a source of guidance but only as a “prophec[y] of what the courts will do in fact.”⁵⁴ President Trump’s apparent disdain for “the vaguer sanctions of conscience”⁵⁵ combined with his stated commitment to follow the Supreme Court aligns him with the jurisprudential “bad man.”

To be sure, a President is different from a private bad man in an important respect. The reason bad men follow the law, according to Justice Holmes, is that judges have “the command of the public force,” and bad men do not want to “com[e] against what is so much stronger than themselves.”⁵⁶ A President, of course, commands the public force too, and it is far from clear that the judiciary would win in a showdown with the President.⁵⁷ Why, then, would a bad man President follow the courts at all?

The answer to that question is not entirely clear: Perhaps the political costs of defying a court judgment are too great; perhaps the threat of sanctions against lower officials in the executive branch is sufficient to make judgments effective. Whatever the reason, no President has ever publicly defied a judgment of the Supreme Court.⁵⁸ President Trump himself has affirmed that he will follow the Supreme Court, and his Solicitor General represented to the Court explicitly that the Administration “will respect both the judgments and the opinions of this

⁵⁰ *NBC Trump Interview*, *supra* note 47.

⁵¹ *FULL TRANSCRIPT: Trump’s Exclusive 100 Days Broadcast Interview with ABC News*, ABC NEWS (Apr. 29, 2025, at 21:00 ET), <https://abcnews.go.com/US/full-transcript-trumps-exclusive-100-days-broadcast-interview/story?id=121291672> [<https://perma.cc/P553-JT86>].

⁵² *NBC Trump Interview*, *supra* note 47.

⁵³ We are not the first to analogize President Trump to a Holmesian bad man. *See, e.g.*, Richard Primus, *Trump’s Third-Term Ambitions Are Very Revealing*, THE ATLANTIC (May 14, 2025), <https://www.theatlantic.com/ideas/archive/2025/05/trump-third-term-legal-case/682794> [<https://perma.cc/LGQ4-TNHL>]; Daniel T. Deacon & Leah M. Litman, *Legalistic Noncompliance*, 75 DUKE L.J. (forthcoming 2026) (manuscript at 71), <https://ssrn.com/abstract=5241936> [<https://perma.cc/33YP-UBPM>] (describing the executive branch generally).

⁵⁴ Holmes, *supra* note 12, at 461; *see id.* at 459–61.

⁵⁵ *Id.* at 459.

⁵⁶ *Id.* at 457.

⁵⁷ *See* Schmidt, *supra* note 33, at 147–48; Parrillo, *supra* note 15, at 693–94 (arguing that breaking the “norm unbroken since the 1800s that Presidents do not defy federal court orders . . . would trigger a constitutional crisis of high risk to all sides,” *id.* at 694).

⁵⁸ *See* Schmidt, *supra* note 33, at 148 & n.557.

Court.”⁵⁹ We therefore assume, for purposes of this Essay, that a bad man President will abide by the Supreme Court’s judgments. Open defiance of an order of the Supreme Court would put us undeniably in a constitutional crisis, where more technical questions of remedial power (the subject of this Essay) would cede to extraordinary forms of political struggle.⁶⁰

II. INJUNCTIONS FOR UNLAWFUL GRANT TERMINATIONS AND FIRINGS

We turn now to two specific remedial questions presently facing the federal courts: how to remediate illegal grant terminations and how to remediate the illegal firing of tenure-protected officials. In this Part, we explain why injunctive remedies are appropriate under existing laws and precedents. In the next Part, we argue that injunctive remedies are necessary to make up for the current absence of “self-application” in the executive branch.

A. Grant Termination Suits and the Tucker Act

The second Trump Administration has asserted broad control over federal funds. On his first day in office, President Trump signed executive orders freezing U.S. foreign aid⁶¹ and barring federal money from being spent on a variety of subjects the Administration disfavors.⁶² One week later, the Administration went even bigger, with the Acting Director of the Office of Management and Budget (OMB) issuing a memo that froze most federal financial assistance in order “to align Federal spending and action with the will of the American people as expressed through Presidential priorities.”⁶³ Although the OMB freeze was ostensibly rescinded two days later,⁶⁴ the Administration has continued to withhold funds pursuant to President Trump’s executive orders and policies, leading to grant terminations and nondisbursement of billions of dollars in funding across a broad range of agencies.⁶⁵

This broad refusal to spend appropriated funds is unprecedented. As Professor Zachary Price argues, a strong norm of adherence to

⁵⁹ *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562 n.18 (2025).

⁶⁰ See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 739 (2009).

⁶¹ Exec. Order No. 14,169, 90 Fed. Reg. 8619, 8619 (Jan. 30, 2025).

⁶² *E.g.*, Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8355, 8357 (Jan. 29, 2025).

⁶³ Memorandum from Matthew J. Vaeth, Acting Dir., OMB, to Heads of Exec. Dep’ts & Agencies (Jan. 27, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/03/M-25-13-Temporary-Pause-to-Review-Agency-Grant-Loan-and-Other-Financial-Assistance-Programs.pdf> [<https://perma.cc/R7UZ-GD7L>].

⁶⁴ Memorandum from Matthew J. Vaeth, Acting Dir., OMB, to Heads of Exec. Dep’ts & Agencies (Jan. 29, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/03/M-25-14-Rescission-of-M-25-13.pdf> [<https://perma.cc/N8X3-KJ5L>].

⁶⁵ See Matthew B. Lawrence et al., *Appropriations Presidentialism*, 114 GEO. L.J. ONLINE 1, 4–5, 12–13 (2025).

appropriations statutes — that is, a norm of self-application — has dominated from the middle of the twentieth century.⁶⁶ President Richard Nixon famously asserted a presidential impoundment power in the early 1970s,⁶⁷ and, in recent years, Presidents have made some bold assertions of spending authority.⁶⁸ But President Trump’s impoundments dwarf these prior actions.⁶⁹

Many of these actions are also unlawful. That conclusion is clearest when an appropriation statute requires that a set amount be spent on specified functions or recipients.⁷⁰ But, even under more discretionary appropriation statutes, the President lacks authority to refuse to spend appropriated funds because the President disagrees with Congress’s policy choices, unless authorized by Congress to do so.⁷¹ Not only does the Constitution give the power of the purse to Congress, but such policy refusals would also violate the Impoundment Control Act of 1974.⁷² Moreover, refusals to spend can also violate governing substantive statutes and regulations when they prevent an agency from undertaking statutorily mandated programs or actions. And wholesale grant terminations that lack explanation or consideration of reliance may also violate the Administrative Procedure Act’s⁷³ (APA) prohibition on arbitrary and capricious agency action.⁷⁴

Whether these illegalities can be asserted in federal court, however, is another question. Unsurprisingly, the Trump Administration’s impoundments and grant terminations have triggered an avalanche of litigation seeking urgent injunctive relief.⁷⁵ The Administration’s chief line of defense has been to throw up a number of jurisdictional obstacles. One central argument is that challenges to grant terminations cannot proceed in district court but must instead be brought in the CFC under the Tucker Act.⁷⁶ The Tucker Act grants the CFC jurisdiction and

⁶⁶ Zachary S. Price, *Effectuating Congress’s Power of the Purse*, 78 FLA. L. REV. (forthcoming 2027) (manuscript at 4), <https://papers.ssrn.com/abstract=6194119> [<https://perma.cc/84X5-JBS4>].

⁶⁷ *Id.* (manuscript at 65).

⁶⁸ *Id.* (manuscript at 13–15); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1096–100 (2021).

⁶⁹ See Lawrence et al., *supra* note 65, at 3–5.

⁷⁰ See, e.g., National Endowment for Democracy Act, 22 U.S.C. § 4412(a), (d); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2024, Pub. L. No. 118-47, 138 Stat. 729, 737.

⁷¹ *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013); Lawrence et al., *supra* note 65, at 13.

⁷² 2 U.S.C. §§ 682(3), 683(b), 688; see Tony Romm, *Trump Administration Illegally Withheld N.I.H. Funding, Watchdog Finds*, N.Y. TIMES (Aug. 5, 2025), <https://www.nytimes.com/2025/08/05/us/politics/trump-gao-nih-funding.html> [<https://perma.cc/2FMF-62R6>] (listing numerous Government Accountability Office findings of impoundments under the second Trump Administration).

⁷³ 5 U.S.C. §§ 551–559, 701–706.

⁷⁴ *Id.* § 706(2)(A); Am. Pub. Health Ass’n v. Nat’l Insts. of Health, 145 F.4th 39, 43, 53 (1st Cir. 2025).

⁷⁵ Emily Badger & Alicia Parlapiano, *Trump Keeps Finding New Ways to Withhold Money Even After 198 Lawsuits*, N.Y. TIMES: THE UPSHOT (Mar. 3, 2026), <https://www.nytimes.com/interactive/2026/03/03/upshot/trump-funding-lawsuits.html> [<https://perma.cc/2Y3Z-7CHR>].

⁷⁶ 28 U.S.C. § 1491.

waives sovereign immunity over “any claim against the United States founded . . . upon any express or implied contract with the United States” or for “damages in cases not sounding in tort.”⁷⁷ Courts have read this language as implicitly providing the CFC with exclusive jurisdiction over breach of contract actions against the United States that seek more than \$10,000 in damages.⁷⁸ On the other hand, the APA provides for judicial review in federal district court of “final agency action for which there is no other adequate remedy in a court”⁷⁹ and waives sovereign immunity over suits “seeking relief other than money damages,” provided no “other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”⁸⁰

Arguing that plaintiffs challenging grant terminations are seeking enforcement of a contractual obligation to pay money, the government has insisted that such challenges fall outside of the APA’s sovereign immunity waiver and must be brought in the CFC.⁸¹ District courts have largely rejected this argument, but the Supreme Court has proved much more sympathetic in cases arising on its emergency docket. In *Department of Education v. California*,⁸² a 5–4 Court stayed a district court order enjoining the Trump Administration from terminating education-related grants in a suit brought by eight states, on the ground that jurisdiction likely lay in the CFC.⁸³ According to the per curiam majority, the order amounted to “enforce[ment of] a contractual obligation to pay money,” and fell outside of the APA’s waiver of sovereign immunity.⁸⁴ Although a splintered Court subsequently allowed challenges to grant termination *policies* to proceed in district court in *National Institutes of Health v. American Public Health Ass’n*⁸⁵ (APHA), a majority of Justices reiterated that district courts lacked jurisdiction to order payments by reinstating grants, even if the grants at issue had been terminated under policies the district court found to be unlawful.⁸⁶ Moreover, at least two Justices were of the view that even

⁷⁷ *Id.* § 1491(a).

⁷⁸ *See, e.g.,* *Crowley Gov’t Servs., Inc. v. Gen. Servs. Admin.*, 38 F.4th 1099, 1106 (D.C. Cir. 2022) (quoting *Hammer v. United States*, 989 F.3d 1, 2 (D.C. Cir. 2021)).

⁷⁹ 5 U.S.C. § 704.

⁸⁰ *Id.* § 702.

⁸¹ *See, e.g.,* Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 11–12, *Harris County v. Kennedy*, 786 F. Supp. 3d 194 (D.D.C. 2025) (No. 25-cv-01275).

⁸² 145 S. Ct. 966 (2025) (per curiam).

⁸³ *Id.* at 968–69. A 5–4 Court had previously denied a stay in a suit challenging termination of foreign assistance funds, over a dissent by Justice Alito arguing that jurisdiction lay only in the CFC. *Dep’t of State v. AIDS Vaccine Advoc. Coal.*, 145 S. Ct. 753, 753 (2025); *id.* at 755–56 (Alito, J., dissenting from the denial of the application to vacate order).

⁸⁴ *Dep’t of Educ. v. California*, 145 S. Ct. at 968 (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)).

⁸⁵ 145 S. Ct. 2658, 2660 (2025); *see also id.* at 2661 (Barrett, J., concurring in the partial grant of the application for stay) (“[T]he Government is not entitled to a stay of the judgments insofar as they vacate the guidance documents.”).

⁸⁶ *Id.* at 2660 (majority opinion) (quoting *Dep’t of Educ. v. California*, 145 S. Ct. at 968).

policy challenges must proceed in the CFC whenever the underlying dispute or injury involves a grant termination.⁸⁷

These decisions leave much to be desired. To begin with, they are difficult to square with the Court's leading precedent on point, *Bowen v. Massachusetts*,⁸⁸ which upheld a district court's authority under the APA to reverse certain Medicaid payment disallowance decisions by the Secretary of Health and Human Services.⁸⁹ Although Medicaid is a grant program in which federal payments are made pursuant to a grant agreement (each state's Medicaid plan) between state and federal governments,⁹⁰ *Bowen* did not consider these features relevant to mention. Perhaps that was because the claims at issue focused on the underlying statute,⁹¹ but that was also true in *Department of Education v. California* and *APHA*,⁹² and yet the Supreme Court nonetheless held jurisdiction lay only in the CFC because grant agreements were also involved.⁹³

Most notably, *Bowen* held expressly that the fact that a lawsuit might result in a payment of money was not enough to take it outside of the APA and district court jurisdiction. Emphasizing that Massachusetts sought only declaratory and injunctive relief, the Court insisted that any payment would be "a mere by-product of that court's primary function of reviewing the Secretary's interpretation of federal law."⁹⁴ And, "even if the District Court's orders [we]re construed in part as orders for the payment of money[,] . . . they [we]re within the District Court's jurisdiction under [the APA] . . . to award complete relief."⁹⁵ Indeed, the *Bowen* Court appears to have specifically rejected the approach adopted by the Court in *APHA*, under which plaintiffs can invalidate policies in district

⁸⁷ *Id.* at 2665 n.2 (Gorsuch, J., concurring in part and dissenting in part); *id.* at 2665–66 (Kavanaugh, J., concurring in part and dissenting in part). Justices Thomas and Alito also voted to stay the district court's order on both the grant terminations and the policy challenges, *id.* at 2659 (majority opinion), but did not write separately to explain their views.

⁸⁸ 487 U.S. 879 (1988).

⁸⁹ *Id.* at 882–83.

⁹⁰ Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2329, 2336 (2020).

⁹¹ *See id.* at 2340–41; *Bowen*, 487 U.S. at 890, 900; JOSEPH V. JAROSCAK, CONG. RSCH. SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 1–2 (2022) (describing Medicaid as "an open-end reimbursement categorical grant," *id.* at 2); *State Plan*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N (Aug. 14, 2019), <https://www.macpac.gov/subtopic/state-plan> [<https://perma.cc/4732-R57M>].

⁹² *See APHA v. Nat'l Insts. of Health*, 145 F.4th 39, 44, 51–52 (1st Cir. 2025) (following district court in emphasizing statutory and constitutional basis of claims in denying stay); *California v. Dep't of Educ.*, 769 F. Supp. 3d 72, 76, 78 & n.3 (D. Mass. 2025) (stating grant terminations violated statutes and regulations, including the APA's prohibition on arbitrary and capricious action).

⁹³ *Dep't of Educ. v. California*, 145 S. Ct. 966, 968 (2025) (*per curiam*); *Nat'l Insts. of Health v. APHA*, 145 S. Ct. 2658, 2660 (2025).

⁹⁴ *Bowen*, 487 U.S. at 910; *see id.* at 909–10.

⁹⁵ *Id.* at 910. Some scholars and judges have criticized *Bowen* for failing to apply the Tucker Act properly. *See, e.g.*, Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 93 (2013); *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urb. Dev.*, 480 F.3d 1116, 1122 (Fed. Cir. 2007).

court but must go to the CFC to obtain payment for unlawfully terminated grants.⁹⁶

The Court barely acknowledged *Bowen* in its recent decisions, let alone explained how to square these inconsistencies.⁹⁷ Indeed, the decisions offered little explanation at all — although that did not stop Justices Gorsuch and Kavanaugh from castigating district courts for “defy[ing]” the Supreme Court’s instructions by continuing to assert jurisdiction in grant termination challenges.⁹⁸ Moreover, the Court’s current approach in *APHA* — which only found favor with a single Justice⁹⁹ — forces plaintiffs into a “labyrinth”¹⁰⁰ of duplicative litigation that may significantly delay remediation of their harms, given that the CFC is statutorily barred from hearing claims that are pending in other courts when those claims arise from “substantially the same operative facts.”¹⁰¹

More broadly, the Court’s recent decisions fail to engage fully with the APA. In other contexts, the Court has emphasized that the APA embodies a strong presumption of judicial review.¹⁰² To be sure, the APA’s stated concern with ensuring an “adequate remedy in a court”¹⁰³ will not prevent preclusion if Congress expressly so provides, but this concern is surely relevant in determining how broadly to construe an implied preclusion such as that provided in the Tucker Act.

And there are many reasons to question the adequacy of the CFC in these grant termination cases. Perhaps most importantly, the CFC

⁹⁶ *Bowen*, 487 U.S. at 890, 909–12 (rejecting lower court’s bifurcated approach, under which the Secretary’s statutory interpretation could be declared invalid in district court but that court must remand for the agency to determine if payment was proper, with subsequent challenge in the CFC).

⁹⁷ After noting that under *Bowen* the possibility an order may result in payment does not bar jurisdiction, the majority in *Department of Education v. California* simply invoked a non-APA case for the proposition that “the APA’s limited waiver of immunity does not extend to orders ‘to enforce a contractual obligation to pay money’ along the lines of what the District Court ordered here.” 145 S. Ct. at 968 (per curiam) (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)); *id.* at 969 (Kagan, J., dissenting) (emphasizing that *Great-West* was not an APA case); *see also APHA*, 145 S. Ct. at 2660 (simply quoting *Department of Education v. California*).

⁹⁸ *APHA*, 145 S. Ct. at 2663 (Gorsuch, J., concurring in part and dissenting in part). As an example, the Court simply assumed that grant agreements are contracts for purposes of the Tucker Act even when the government does not receive a direct benefit. *See Dep’t of Educ. v. California*, 145 S. Ct. at 968. Lower courts are split on this question. *See Cal. High-Speed Rail Auth. v. U.S. Dep’t of Transp.*, No. 2:25-cv-02004, 2025 WL 3535037, at *3 n.1 (E.D. Cal. Dec. 10, 2025).

⁹⁹ *See APHA*, 145 S. Ct. at 2660–61 (Barrett, J., concurring in the partial grant of the application for stay).

¹⁰⁰ *Id.* at 2674 n.4 (Jackson, J., concurring in part and dissenting in part).

¹⁰¹ *United States v. Tohono O’odham Nation*, 563 U.S. 307, 315 (2011) (discussing 28 U.S.C. § 1500).

¹⁰² *Bowen v. Massachusetts*, 487 U.S. 879, 903–04 (1988); *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 900–01 (2023) (listing factors for determining whether district court review is precluded); *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 144 (1967) (identifying the APA’s presumption of review).

¹⁰³ 5 U.S.C. § 704.

generally cannot order injunctive relief.¹⁰⁴ As discussed below, the lack of injunctive relief makes the CFC inadequate from a systemic perspective.¹⁰⁵ Yet it also means that the CFC is often inadequate from the perspective of individual grantees. Monetary relief, even with the availability of the Judgment Fund to pay awards,¹⁰⁶ is uncertain and often delayed.¹⁰⁷ Many grantees are nonprofits and dependent on government funding;¹⁰⁸ unless their grants are quickly reinstated, they may have to close their doors or dramatically curtail operations.¹⁰⁹ They may also face obstacles proving damages: Their injuries are often the inability to continue to provide services, undertake research, and the like, not lost profits or opportunities.¹¹⁰ And the CFC has no jurisdiction to hear constitutional and statutory claims that are not money-mandating, including separation of powers and First Amendment claims,¹¹¹ nor can it hear suits by those injured by the Administration's grant terminations who lack a contract directly with the government.¹¹²

¹⁰⁴ *Bowen*, 487 U.S. at 905. The CFC has authority to “remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just,” 28 U.S.C. § 1491(a)(2), but this provision is rarely used and its meaning is unclear, *see* GOVERNING FOR IMPACT, SEEKING RECOVERY FOR UNLAWFUL GRANT TERMINATIONS IN THE COURT OF FEDERAL CLAIMS 13–15 (2025), <https://governingforimpact.org/wp-content/uploads/2025/10/CFC-Issue-Brief.pdf> [<http://perma.cc/8EP6-78KQ>].

¹⁰⁵ *See infra* Part III, pp. 1852–56.

¹⁰⁶ *See* 31 U.S.C. § 1304.

¹⁰⁷ *See* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 74 (2020).

¹⁰⁸ LAURA TOMASKO ET AL., URB. INST., HOW GOVERNMENT FUNDING DISRUPTIONS AFFECTED NONPROFITS IN EARLY 2025, at 2 (2025), https://www.urban.org/sites/default/files/2025-10/How_Government_Funding_Disruptions_Affected_Nonprofits_in_Early_2025.pdf [<https://perma.cc/9NGL-EHDY>].

¹⁰⁹ *See* AIDS Vaccine Advoc. Coal. v. U.S. Dep’t of State, 803 F. Supp. 3d 164, 190 (D.D.C. 2025) (noting that plaintiff organizations whose grants were terminated were “on the brink of existential financial threat”), *stay granted*, 146 S. Ct. 19 (2025); TOMASKO ET AL., *supra* note 108, at v (noting that a variety of nonprofits “were forced to suspend programs and lay off staff” in response to federal funds terminations and freezes).

¹¹⁰ *See* GOVERNING FOR IMPACT, *supra* note 104, at 5–11 (detailing obstacles to damages remedies for grantees and possible solutions); *see also* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1330–31 (2020) (explaining that the CFC can award specific, past-due sums “designed to compensate for completed labors,” *id.* at 1331, but is not suited for managing ongoing relations). To be sure, in some instances grantees suing in the CFC may be able to demonstrate damages and recover large amounts, as well as benefit from statutory rights to prejudgment interest. For one potential such case, *see* Complaint ¶¶ 3–9, Md. Clean Energy Ctr. v. United States, Civ. No. 25-1738 C (Fed. Cl. Oct. 15, 2025) (seeking damages for EPA’s cancellation of \$7 billion Solar for All contracts, where the funds had been deposited in grantee accounts and were clawed back).

¹¹¹ *President & Fellows of Harvard Coll. v. U.S. Dep’t of Health & Hum. Servs.*, 798 F. Supp. 3d 77, 107–08 (D. Mass. 2025); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995).

¹¹² *See LeBlanc*, 50 F.3d at 1028 (explaining that constitutional claims that do not entail payment of money cannot be brought in the CFC); *Montano Elec. Contractor v. United States*, 114 Fed. Cl. 675, 680 (2014) (explaining that subcontractors and others affected by breach but not parties to the contract with the government cannot sue in the CFC). Some district courts have underscored these limitations in concluding that they have jurisdiction to hear grant termination challenges post-*Department of Education v. California* and *APHA*, but the government is appealing and the

B. Unlawful Firings and Injunctions

President Trump has fired numerous appointees to independent agencies in violation of their statutory tenure protection.¹¹³ Many of these officials have sued, asking federal courts to protect their tenure in office.¹¹⁴ The government, in response, has contested the federal courts' remedial power, and, in *Trump v. Slaughter*,¹¹⁵ the Supreme Court granted certiorari to decide "[w]hether a federal court may prevent a person's removal from public office, either through relief at equity or at law."¹¹⁶ In this section, we explain why the better answer is yes.¹¹⁷

The government's remedial argument was tentatively endorsed by Justice Gorsuch in a separate opinion in *Bessent v. Dellinger*.¹¹⁸ Justice Gorsuch reasoned in two steps. First, "a federal court may issue an equitable remedy only if, at the time of the Nation's founding, it was a remedy 'traditionally accorded by courts of equity.'"¹¹⁹ Second, "courts of equity at the time of the founding were apparently powerless to 'restrain an executive officer from making a . . . removal of a subordinate appointee.'"¹²⁰ This syllogism, however, overlooks much of the relevant history: At the Founding, the remedies in question were often administered by courts of *law* rather than equity.¹²¹ And they have remained in the federal courts' remedial arsenal after the merger of law and equity.¹²² The fact that these remedies would now be labeled as

Supreme Court has not yet ruled on this argument. *See, e.g.,* Thakur v. Trump, 800 F. Supp. 3d 1044, 1062 (N.D. Cal. 2025) (holding the Tucker Act not applicable because plaintiffs were not contractual parties); *President & Fellows of Harvard Coll.*, 798 F. Supp. 3d at 105–08 (holding that district court has jurisdiction over constitutional and statutory claims but not arbitrary and capricious challenge to grant terminations).

¹¹³ Gabriella Cantor & Hannah Sobran, *Tracking Trump's Unprecedented — Often Illegal — Firings of Political Appointees and Watchdogs*, CREW (Nov. 26, 2025), <https://www.citizensforethics.org/reports-investigations/crew-reports/tracking-trumps-unprecedented-often-illegal-firings-of-political-appointees-and-watchdogs> [<https://perma.cc/25Y5-3AYU>].

¹¹⁴ *See id.*

¹¹⁵ 146 S. Ct. 18 (2025).

¹¹⁶ *Id.* at 18.

¹¹⁷ The Court also granted certiorari to decide whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled. *Slaughter*, 146 S. Ct. at 18. Even if the Supreme Court does overrule that decision this Term, the remedial question will remain relevant, because the Court will almost certainly preserve some limits on the President's removal power. *See* Trump v. Wilcox, 145 S. Ct. 1415, 1417 (2025) (Federal Reserve); Morrison v. Olson, 487 U.S. 654, 691–93 (1988) (inferior officers); Wiener v. United States, 357 U.S. 349, 356 (1958) (adjudicatory bodies).

¹¹⁸ 145 S. Ct. 515, 516–17 (2025) (Gorsuch, J., dissenting from the order holding the application in abeyance). Judge Rao has embraced a similar position, for reasons that track Justice Gorsuch's. *Slaughter v. Trump*, No. 25-5261, 2025 WL 2551247, at *9–11 (D.C. Cir. Sep. 2, 2025) (Rao, J., dissenting).

¹¹⁹ *Dellinger*, 145 S. Ct. at 517 (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)).

¹²⁰ *Id.* (quoting *White v. Berry*, 171 U.S. 366, 377 (1898)).

¹²¹ *See infra* notes 123–41 and accompanying text.

¹²² *See infra* notes 148–54 and accompanying text.

“injunctive” is no basis to regard them as beyond the proper scope of federal judicial power.

Justice Gorsuch relied on two nineteenth-century cases, *In re Sawyer*¹²³ and *White v. Berry*,¹²⁴ to show that courts of equity could not restrain the removal of an executive officer.¹²⁵ Those cases, however, were primarily about the power of a court of equity as opposed to a court of law in the days of the divided bench, and not about the power of a court vis-à-vis the executive branch. *Sawyer* called it “well settled that a court of equity has no jurisdiction over the appointment and removal of public officers.”¹²⁶ But it affirmed that “[t]he jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised” through various writs, like “mandamus, prohibition, [or] *quo warranto*.”¹²⁷ In *White*, ten years later, the Court described *Sawyer* as holding “that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers *would invade the domain of the courts of common law*.”¹²⁸ These cases, in Professor Samuel Bray’s words, are “manifestly incompatible with the idea that a wrongfully removed public officer could seek only damages for lost wages.”¹²⁹ Historically, there were several paths to judicial review of appointments and removals; they just tended to proceed through the courts of law.¹³⁰ Further, neither *Sawyer* nor *White* called into question the well-established power of a court of equity to intervene to protect an incumbent officer while legal proceedings were pending¹³¹ — the posture of *Slaughter* and *Trump v. Cook*.¹³²

*Marbury v. Madison*¹³³ itself is an example of a legal action concerning the appointment of a public officer. William Marbury’s claim to the Supreme Court was that Secretary of State James Madison had unlawfully failed to deliver his commission after his appointment as a justice of the peace.¹³⁴ And the Court held that mandamus — a legal remedy — was appropriate to confirm Marbury’s office.¹³⁵ Chief Justice Marshall specifically considered whether an action for damages — through the

¹²³ 124 U.S. 200 (1888).

¹²⁴ 171 U.S. 366 (1898).

¹²⁵ *Dellinger*, 145 S. Ct. at 517 (quoting *White*, 171 U.S. at 377; *Sawyer*, 124 U.S. at 212).

¹²⁶ 124 U.S. at 212.

¹²⁷ *Id.*

¹²⁸ 171 U.S. at 376 (emphasis added).

¹²⁹ Samuel L. Bray, *Remedies in the Officer Removal Cases*, 17 J. LEGAL ANALYSIS 236, 242 (2025) (collecting other sources).

¹³⁰ See *id.* at 242–43. The “equity tradition” also “developed” to allow for equitable relief “when there are case-specific reasons that legal remedies like *quo warranto* are inadequate.” *Id.* at 243.

¹³¹ See MCCLINTOCK, *supra* note 14, § 167, at 453; Bray, *supra* note 129, at 243.

¹³² No. 25A312 (U.S. argued Jan. 21, 2026).

¹³³ 5 U.S. (1 Cranch) 137 (1803).

¹³⁴ *Id.* at 153–54.

¹³⁵ *Id.* at 172–73.

writ of detinue¹³⁶ — would be an adequate substitute for a mandatory remedy, and answered no: “The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.”¹³⁷

In furnishing a legal remedy, *Marbury* built on English practice. Before the Founding, an important function of mandamus was restoring people to public office.¹³⁸ One eighteenth-century treatise, for instance, noted the “general Rule” that when someone is “wrongfully turned out of any Office . . . that concerns the Public, or the Administration of Justice, he may be . . . restored by *Mandamus*.”¹³⁹ Mandamus, to be sure, was a *legal* remedy issued primarily by the King’s Bench, and so mandamus cases are not technically evidence that reinstatement was a “remedy ‘traditionally accorded by courts of *equity*.’”¹⁴⁰ But *Marbury* and English practice at least show that restoration to office was a remedy traditionally accorded by *courts*, and that should answer any separation of powers objection.¹⁴¹

Another relevant legal form of action besides mandamus was *quo warranto*. “The writ of quo warranto (‘by what authority’) would inquire into the authority by which a public office is held or power to act is claimed,” and could be used “to oust the relevant party from power.”¹⁴² Bray has called *quo warranto* “the primary device at common law for contesting title to an office,” though its contours have shifted over time.¹⁴³ Today, the federal district courts in D.C. have the authority to issue these writs.¹⁴⁴ But, as the D.C. Circuit has recognized, it is a

¹³⁶ For more on detinue, see 3 WILLIAM BLACKSTONE, COMMENTARIES *152, *413. See generally J.B. Ames, *The History of Trover* (pt. 2), 11 HARV. L. REV. 374 (1898) (tracing the history of detinue).

¹³⁷ *Marbury*, 5 U.S. at 173.

¹³⁸ See SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 158 (5th ed. 2019) (“Until the nineteenth century, the commonest purpose of mandamus was the protection of some office or status which could not be recovered by an assize.”); Audrey Davis, Note, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1540 (2020).

¹³⁹ 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW *529 (Dublin, Luke White 6th ed. 1793). See generally 15 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 184–215 (London, G.G.J. and J. Robinson 2d ed. 1793) (surveying mandamus cases); BLACKSTONE, *supra* note 136, at *109–10 (describing the writ of mandamus).

¹⁴⁰ *Bessent v. Dellinger*, 145 S. Ct. 515, 517 (2025) (Gorsuch, J., dissenting from the order holding the application in abeyance) (emphasis added) (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)).

¹⁴¹ Another separation of powers objection would be that the President’s appointment and removal powers are exclusive and therefore courts cannot interfere with them at all. But that puts the remedial cart before the merits horse. We necessarily assume here that some congressional limitations on the President’s removal power are valid; hence, the President’s power is not exclusive to that extent.

¹⁴² WILLIAM BAUDE ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1153 n.6 (8th ed. 2025).

¹⁴³ Bray, *supra* note 129, at 246. In England, “*quo warranto* was abolished in 1938, but the same remedy could still be given by injunction.” BAKER, *supra* note 138, at 156.

¹⁴⁴ D.C. CODE §§ 16-3501 to -3548 (2025).

“difficult and uncertain remedy.”¹⁴⁵ First, it is not clear that a wrongfully fired official could use *quo warranto* to “quiet title” to her office while still in possession of her office de facto, and second, it is not clear that a *quo warranto* suit could be brought over the objection of the Attorney General or U.S. Attorney.¹⁴⁶ It is therefore not an adequate legal remedy that would preclude an injunction, particularly in a preliminary posture.¹⁴⁷ In any event, the existence of *quo warranto* shows again that judicial review of officeholder status was proper.

While it was once true that a federal court had two “sides,” law and equity were merged in federal court in 1938.¹⁴⁸ And, as the divide between courts of law and courts of equity has receded into the past, some remedies that were previously regarded as “legal” have been absorbed into the umbrella category of equitable relief.¹⁴⁹ The absorption of prerogative writs into equity is particularly clear in the case of mandamus. Federal Rule of Civil Procedure 81(b) “abolished” the writ of mandamus but also provided that “[r]elief previously available through [mandamus] may be obtained by appropriate action or motion under these rules.”¹⁵⁰ Meanwhile, 28 U.S.C. § 1361 grants district courts “original jurisdiction of any action in the nature of mandamus.”¹⁵¹ The upshot of these two provisions is that a plaintiff who wants relief previously available through a writ of mandamus can instead file a “civil action” in accord with the Federal Rules of Civil Procedure¹⁵² and ask for an injunction by motion, as authorized by Rule 65.¹⁵³ And the Court, on several occasions after merger, has confirmed that reinstatement is an available remedy when an official is unlawfully removed.¹⁵⁴

¹⁴⁵ *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

¹⁴⁶ *Bray*, *supra* note 129, at 247–48.

¹⁴⁷ *Andrade*, 729 F.2d at 1498 (“[E]quity will not be barred from issuing an injunction to restrain invalidly appointed officers if the alternative remedy of *quo warranto* is inadequate.”).

¹⁴⁸ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283–84 (1988); FED. R. CIV. P. 2.

¹⁴⁹ See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1330 (2020). See generally *id.* (describing how equity absorbed the functions of some of the prerogative writs over time).

¹⁵⁰ FED. R. CIV. P. 81(b).

¹⁵¹ 28 U.S.C. § 1361. Professor Clark Byse, “who was one of the architects of” 28 U.S.C. § 1361, has written that this jurisdictional provision “should be interpreted as authorizing mandatory injunctive relief in original actions even though the relief awarded is essentially the same as, or identical to, that which would be granted by a writ of mandamus, thus developing the equity, rather than mandamus[,] tradition.” Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and “Nonstatutory” Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 308, 320 (1967).

¹⁵² FED. R. CIV. P. 2.

¹⁵³ See FED. R. CIV. P. 65.

¹⁵⁴ See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959); *Service v. Dulles*, 354 U.S. 363, 388–89 (1957). “Reinstatement” is an inexact word, because often the substance of the claim is that the removal was never effective in the first place. In *Sampson v. Murray*, 415 U.S. 61 (1974), though the Court denied a preliminary injunction, *id.* at 91–92, it reaffirmed that “federal courts do have

Beyond injunctive relief, a federal court can also issue a declaratory judgment confirming that an officer was never validly removed.¹⁵⁵ That would be the “practical equivalent” of an injunction in this context, “since it must be presumed that federal officers will adhere to the law as declared by the court.”¹⁵⁶ Plaintiffs can seek a declaratory judgment in federal court as long as they have standing,¹⁵⁷ and it does not matter if another remedy (like mandamus or *quo warranto*) might theoretically be available.¹⁵⁸ In the unlikely event that some federal official did not honor the declaratory judgment, a court could resort to an injunction and contempt at that point.¹⁵⁹

The alternative to an equitable or declaratory remedy is a suit for backpay in the CFC.¹⁶⁰ Justice Gorsuch offers *Humphrey’s Executor v. United States*¹⁶¹ and *Myers v. United States*¹⁶² — both suits for backpay¹⁶³ — as examples of the proper way to proceed.¹⁶⁴ But these cases do not establish that equitable relief is off the table. First, both Myers and Humphrey had died by the time their cases reached the Supreme Court.¹⁶⁵ There was thus no reason for the Court to consider a federal court’s power to prevent an unlawful removal in the first place. Second, Myers likely had a more potent financial motivation than modern officers do. He was a first-class postmaster with a plum annual salary of \$6,000,¹⁶⁶ and postmasters had been important positions in the patronage system.¹⁶⁷ Indeed, the Court of Claims dismissed Myers’s claim for delay, perhaps suspecting that he waited to file suit in order to run up the tab for taxpayers.¹⁶⁸ Third, turning to Humphrey, by the time he

authority to review the claim of a discharged governmental employee,” *id.* at 71 (citing *Service*, 354 U.S. at 370, 388). The Court invoked *White v. Berry* as a thumb on the scale against granting temporary, interim relief to a discharged government employee while the administrative process was exhausted. *See id.* at 83–84.

¹⁵⁵ *See* Bray, *supra* note 129, at 249 (arguing that “a court would be well advised to grant a declaratory remedy to a wrongfully removed officer”).

¹⁵⁶ Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.); *see* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1108 & n.87 (2014).

¹⁵⁷ *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937).

¹⁵⁸ FED. R. CIV. P. 57 (“The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.”); Bray, *supra* note 129, at 249.

¹⁵⁹ Bray, *supra* note 129, at 249; *see* 28 U.S.C. § 2202.

¹⁶⁰ For lower-level officials, the alternative would be a challenge before the Merit Systems Protection Board. *See* United States v. Fausto, 484 U.S. 439, 454 (1988). That procedure does not apply to Senate-confirmed officers. *See* 5 U.S.C. § 2102(a)(1)(B).

¹⁶¹ 295 U.S. 602 (1935).

¹⁶² 272 U.S. 52 (1926).

¹⁶³ *Humphrey’s Executor*, 295 U.S. at 618; *Myers*, 272 U.S. at 106.

¹⁶⁴ *See* Bessent v. Dellinger, 145 S. Ct. 515, 517 (2025) (Gorsuch, J., dissenting from the order holding the application in abeyance).

¹⁶⁵ Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE W. RES. L. REV. 1059, 1065 (2015); *see* *Humphrey’s Executor*, 295 U.S. at 618.

¹⁶⁶ Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 167, 167, 169 (2020).

¹⁶⁷ *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 178 (1982).

¹⁶⁸ *See* *Myers v. United States*, 58 Ct. Cl. 199, 206 (1923), *aff’d*, 272 U.S. 52 (1926).

sued he could not still claim to be a de facto officer in any sense. Not only had the other commissioners of the FTC voted to validate his ouster, but the Senate had also voted unanimously to confirm President Roosevelt's new appointee.¹⁶⁹ One can understand his strategic choice not to seek reinstatement in those circumstances. In any event, the key point is that neither Myers nor Humphrey sought reinstatement and both died while their cases were pending. Those precedents furnish no basis for declining equitable or declaratory relief today.

III. CONSTITUTIONAL REMEDIES FOR A CONSTITUTIONAL BAD MAN

In both these contexts — grant terminations and removals of independent agency heads — the best reading of governing law is that district courts can exercise jurisdiction and grant the injunctive relief sought. Taking a step back, the systemic impact of a contrary approach provides a powerful additional reason for this result. In the context of a Holmesian “bad man” President and an administration lacking an attitude of self-application, monetary relief through the CFC is insufficient to preserve the rule of law.

A bad man President will not be deterred from self-interested lawlessness by the prospect of money damages down the road — especially because the President will not be responsible for paying those money damages personally.¹⁷⁰ This point is particularly true when the likely payout is low or uncertain. Without injunctive relief, for example, the “material consequence[.]”¹⁷¹ of firing the Federal Reserve Chair would be an order to pay their salary (which was \$250,600 in 2025¹⁷²).¹⁷³ And, even when a damages remedy is sizable, its payment through the off-budget, permanently appropriated Judgment Fund — often years later, when another administration may be in office — limits any deterrent effect.¹⁷⁴ A remedy for damages alone relies for its efficacy on self-application, then, not on the pocketbook harm it inflicts.¹⁷⁵

¹⁶⁹ WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 62–63 (1995).

¹⁷⁰ See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

¹⁷¹ Holmes, *supra* note 12, at 459.

¹⁷² See 5 U.S.C. § 5312; *Salary Table No. 2025-EX*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/25Tables/exec/html/EX.aspx> [<https://perma.cc/S6LS-CLDP>].

¹⁷³ See *Myers*, 272 U.S. at 107–08.

¹⁷⁴ See Lawrence, *supra* note 107, at 73–74.

¹⁷⁵ Another constraint that can be potent in these contexts is fear of congressional pushback: The Senate could stall on confirming a replacement, and Congress as a whole could engage in more aggressive legislative oversight or enact more detailed appropriations statutes that limit executive branch discretion. But, as we have seen, partisanship regularly trumps institutional loyalty in our polarized times, muting any realistic congressional response. See Levinson & Pildes, *supra* note 32, at 2313. And even these congressional responses would often depend on the President voluntarily following the constraints that Congress has laid down (or facing meaningful judicial enforcement for failing to comply).

Further, injunctive relief involves more people in the executive branch in the President's illegality. If a government grantee or discharged official wins a judgment for money in the CFC, as long as the money is paid out there would be no formal defiance of a court's judgment. On the other hand, if a court orders that grants cannot be terminated or an official must be kept in their position or reinstated, then numerous executive branch officials will be involved in compliance. An injunction against the government always specifies and binds a host of officials other than the President, and those officials then must comply with the injunction on pain of contempt.¹⁷⁶ Even if the President is a bad man, hopefully the entire executive branch would not be staffed top to bottom by equally unscrupulous people. And the good faith or reputational concerns of those other officials can be made an engine of compliance.¹⁷⁷

Lastly, a CFC damages remedy for individual grantees or appointees fails to address the broader public harm of a bad man presidency. Mass termination of government grants and firing of agency leaders are ways to prevent agencies from performing their statutorily mandated functions. Currently, several agencies lack quorums due to President Trump's removals,¹⁷⁸ and mass termination of grants has decimated a number of government programs.¹⁷⁹ The constitutional harm in these cases is not merely the violation of private rights of the fired officials or grantees; it is the usurpation of congressional power and aggrandizement of executive power.¹⁸⁰

A damages remedy keyed to the particular situation of an individual grantee or officeholder does not capture this critical separation of powers dimension. Equitable relief — which may expressly turn on “the public interest” — can and should be concerned with these broader implications.¹⁸¹ It prevents judicial review from devolving into a “wilderness of

¹⁷⁶ Cf. *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) (noting that litigants can sue to enjoin officers, rather than the President, when seeking to block presidential action).

¹⁷⁷ See Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132–34, 1137 (2013).

¹⁷⁸ See Nicholas R. Bednar & Todd Phillips, *Commission Quorums*, 78 STAN. L. REV. (forthcoming 2026) (manuscript at 9–11 tbl. 1), <https://ssrn.com/abstract=5347384> [<https://perma.cc/CZN6-KQG2>].

¹⁷⁹ See, e.g., Amy Solomon & Betsy Pearl, *DOJ Funding Update: A Deeper Look at the Cuts*, COUNCIL ON CRIM. JUST. (May 2025), <https://counciloncj.org/doj-funding-update-a-deeper-look-at-the-cuts> [<https://perma.cc/JJ84-8WBZ>]; Claire Brown, *Billions in Climate Grants, Frozen for a Year, Are Back in Court*, N.Y. TIMES (Feb. 26, 2026), <https://www.nytimes.com/2026/02/24/climate/billions-in-climate-grants-frozen-for-a-year-are-back-in-court.html> [<https://perma.cc/EZE4-3B7D>].

¹⁸⁰ See Gould, *supra* note 35, at 160–61.

¹⁸¹ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The rise of the injunction as a tool of public law in the late nineteenth century reflects a similar conviction. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 4 (1964) (noting that *Ex parte Young*, 209 U.S. 123 (1908), rested on the “conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity”).

single instances.”¹⁸² It’s true that damages relief, precisely because it is unlikely to thwart the President’s ambitions, may be less likely to provoke the President to reject judicial authority entirely. And we would not deny that concerns about noncompliance can sometimes be a valid prudential ingredient of judicial decisionmaking. But presidential compliance with a remedy that is inadequate to make a plaintiff whole or to preserve the rule of law is nothing to celebrate. To paraphrase Justice Story, sometimes the Court must do its duty, and then let the nation do theirs.¹⁸³

The systemic insufficiency of certain remedies from a rule of law perspective is thus another reason to read governing law more capaciously to allow injunctive relief, at least in the grants and appointments contexts where such a reading is otherwise plausible. Some defenders of the Trump Administration have attacked lower courts for breaking established norms and seizing additional powers — in short, alleging a failure of *judicial* self-application — in responding to the Administration’s actions.¹⁸⁴ We do not agree with that assessment. Instead, we view district courts as responding appropriately to the perceived lawlessness of the Trump Administration by drawing on traditionally available injunctive remedies. In so doing, they are advancing one of the basic and historic functions of equity — ensuring the adequacy of judicial remedies and preventing opportunistic abuse of the powers of the presidency.¹⁸⁵ Indeed, injunctive relief should be seen not as norm breaking but as designed to strengthen the norms that enable our constitutional order to function.¹⁸⁶

Courts may be understandably reluctant to pass judgment on the probity of the executive branch.¹⁸⁷ At the same time, a number of judges are already going down this road, describing governmental bad faith and noncompliance or suggesting the Trump Administration was no

¹⁸² Alfred Tennyson, *Aylmer’s Field*, reprinted in THE POEMS OF TENNYSON 1159, 1172 (Christopher Ricks ed., 1969).

¹⁸³ Letter from Justice Joseph Story to Professor George Ticknor, Harv. Univ. (Mar. 8, 1832) (“The Court has done its duty. Let the nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences.”), quoted in ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION 308 (2024).

¹⁸⁴ See, e.g., Adrian Vermeule, Opinion, *Someone Is Defying the Supreme Court, But It Isn’t Trump*, N.Y. TIMES (July 31, 2025), <https://www.nytimes.com/2025/07/31/opinion/supreme-court-trump-judges-defiance.html> [<https://perma.cc/9QKG-URZG>].

¹⁸⁵ See Bray, *supra* note 129, at 254 (arguing preliminary injunctions protecting de facto officers deter the Executive “from opportunistic but lawless action”); Smith, *supra* note 13, at 1076–77.

¹⁸⁶ Cf. David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949, 950 (2019) (defining “anti-hardball measures as those that reduce the likelihood of constitutional hardball being played by either side”).

¹⁸⁷ See Pildes, *supra* note 1, at 2.

longer entitled to the presumption of regularity.¹⁸⁸ To be clear, we are not suggesting that a court should condemn the Administration as “bad” writ large based on extra-record evidence and then abjure any sense of remedial restraint. But a court should and must, consistent with the traditions of equity, ask whether a particular remedy will realistically be adequate in the circumstances of a case. This means in practice that “bad man” determinations may be localized to a particular case, action, policy, or perhaps agency — even if the bad man behavior is more widespread and originates at the top.¹⁸⁹

In the cases we describe, injunctions are already consistent with governing law. A more challenging question is whether the rule of law concerns raised by a “bad man” presidency suggest that the Constitution *requires* that injunctive relief be available in some challenges to executive action. Though the Court has at times gestured in that direction,¹⁹⁰ a constitutionally compelled remedy would be a marked departure from the standard understanding, expressed famously by Hart and often echoed, “that Congress necessarily has a wide choice in the selection of remedies.”¹⁹¹ The Roberts Court has not shown much sympathy for constitutionally required remedies; consider, for instance, its focus on equity’s *statutory* basis in rejecting national injunctions¹⁹² and its willingness to foreclose injunctive relief against several Texas officials in a suit challenging a state law passed in open defiance of Supreme Court precedent.¹⁹³

On the other hand, norms concerning compulsory jurisdiction or remedies often operate indirectly, through application of constitutional avoidance, rather than directly.¹⁹⁴ We have argued that, as executive self-application dissipates, more robust judicial remedies become necessary to — in the words of one famous account — ensure “a general structure of constitutional remedies adequate to keep government

¹⁸⁸ See Fed. Educ. Ass’n v. Trump, No. 25-5303, 2025 WL 2738626, at *8 (D.C. Cir. Sep. 25, 2025); Ryan Goodman et al., *The “Presumption of Regularity” in Trump Administration Litigation (4th Edition)*, JUST SEC. (Mar. 19, 2026), <https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation> [<https://perma.cc/2XUF-SJJ8>]; Deacon & Litman, *supra* note 53 (manuscript at 13–14, 21).

¹⁸⁹ Cf. William Baude & Samuel L. Bray, *When the Executive Has Unclean Hands*, 135 YALE L.J.F. 567, 591 (2026) (noting that “the unclean-hands doctrine . . . does not consider the inequitable behavior of the claimant *writ large*”).

¹⁹⁰ See, e.g., *Ex parte Young*, 209 U.S. 123, 159–60, 165 (1908); *Gen. Oil Co. v. Crain*, 209 U.S. 211, 225–27 (1908); cf. Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1315–18 (2023) (suggesting the same).

¹⁹¹ 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); accord Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 (1991).

¹⁹² See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025).

¹⁹³ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 531–35 (2021); Fallon, *supra* note 190, at 1305–06.

¹⁹⁴ See, e.g., *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299–300 (2001).

within the bounds of law.”¹⁹⁵ And the traditional flexibility on remedial choice is harder to justify from this systemic perspective if the government will adhere to legal requirements only when forced to do so. That does not mean injunctive relief needs to be available in every instance, but it does suggest that the courts should not read ambiguous statutes and precedents to foreclose equitable relief across the board.

One final point: Injunctive relief may be necessary not just for its own sake but also to facilitate self-application. An injunction from a court serves two functions: It enforces legal constraints on government directly, and it also gives support to voices internal to government urging adherence to the law.¹⁹⁶ Although it is self-application — the executive branch’s voluntary conformity to the legal constraints — that is critical to ensuring the rule of law, external injunctive relief appears increasingly necessary to guarantee that self-application occurs.

CONCLUSION

The jurisprudence of remedies, Professor Paul Gewirtz aptly observes, is “jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.”¹⁹⁷ We have argued in this Essay that courts have the power to limit that deficiency in the case of grant terminations and firings. And our broader point generalizes beyond these contexts: Courts should not shy away from a realistic appreciation of those to whom their orders will be directed when seeking to align the working of government with our constitutional structure.

¹⁹⁵ Fallon & Meltzer, *supra* note 191, at 1736.

¹⁹⁶ See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 442–43 (2009).

¹⁹⁷ Gewirtz, *supra* note 11, at 587.