

## RETHINKING REMEDY SKEPTICISM

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### INTRODUCTION

In a time of “constitutional crisis,”<sup>1</sup> scholars are asking how federal courts can preserve a basic “imperative”<sup>2</sup> of constitutional structure: “[A] system of constitutional remedies adequate to keep government generally within the bounds of law.”<sup>3</sup> But that system has been in jeopardy for decades at the Court’s own hands. The Court’s case law has been marked by expansions of qualified immunity,<sup>4</sup> refusals to allow *Bivens*<sup>5</sup> claims,<sup>6</sup> limitations on injunctive relief,<sup>7</sup> and an overall squeamishness concerning 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>8</sup>

Strikingly, “[a]ll of these developments are loosely associated with modern judicial ‘conservatism’ in its substantive as well as methodological dimensions.”<sup>9</sup> The Justices frequently divide on *remedial* questions along the same ideological lines that they divide on questions of substantive constitutional law and interpretive methodology.<sup>10</sup> As Professor Richard Fallon commented, “[i]t is not obvious . . . why skepticism of

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<sup>1</sup> Katherine Mims Crocker, *Introduction: To Keep Government Generally Within the Bounds of Law*, 139 HARV. L. REV. 1734, 1734 (2026).

<sup>2</sup> Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991).

<sup>3</sup> *Id.* at 1778–79.

<sup>4</sup> See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

<sup>5</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>6</sup> See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022); *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020).

<sup>7</sup> See, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328–29 (2015); *Seminole Tribe v. Florida*, 517 U.S. 44, 74–76 (1996).

<sup>8</sup> Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1325 (2023); see Crocker, *supra* note 1, at 1738–41.

<sup>9</sup> Fallon, *supra* note 8, at 1325.

<sup>10</sup> See *id.* at 1325–26.

constitutional remedies should be an attitude that correlates strongly with conservatism, but that appears to be the case.”<sup>11</sup>

Why is it that a general “skepticism of constitutional remedies . . . correlates strongly with conservatism”?<sup>12</sup> Conservatives’ rights get violated, too; the rule of law and official accountability to legal norms do not solely benefit liberals.<sup>13</sup> Yet conservative Justices recurrently vote to narrow or deny constitutional remedies,<sup>14</sup> while liberal Justices (who elsewhere laud politically accountable institutions<sup>15</sup>) often vote in favor of empowering life-tenured Article III judges to give remedies.<sup>16</sup> The puzzle is not that conservatives *sometimes* invoke judicial restraint; everybody does *that*. It is that remedy skepticism has become so reliably conservative — even as conservatives on the Court have simultaneously been willing to deploy judicial review aggressively to disable federal regulation and reshape rights.<sup>17</sup>

To shed light on this puzzle, this brief Essay advances a historical hypothesis: that remedy skepticism became closely associated with conservatism during the Reagan era, when the Department of Justice, led by Attorney General Edwin Meese III, articulated it as part of a broader constitutional agenda. The Meese DOJ sought to confront and oppose the constitutional jurisprudence of the Warren and Burger Courts, and one part of that endeavor was a wide-ranging critique of various judicial remedies for constitutional wrongs. Casting such remedies as constitutionally suspect, the Meese DOJ sought to redirect constitutional enforcement away from affirmative suits and toward defensive litigation and executive branch self-policing. In notable respects, the remedy skepticism of the Roberts Court was presaged in the Meese DOJ’s views.

If conservative remedy skepticism is mostly, or even partly, downstream of that decades-old association, then today’s conservative Justices should reevaluate its risks. When the executive branch is pushing

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<sup>11</sup> *Id.* at 1325.

<sup>12</sup> *Id.*

<sup>13</sup> *Cf.* Fallon & Meltzer, *supra* note 2, at 1787–88 (describing the broader structural and rule-of-law functions served by constitutional remedies).

<sup>14</sup> *See, e.g.*, *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022); *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2550 (2025); *see also* Fallon, *supra* note 8, at 1302–07 (using the Supreme Court’s decision in *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021), as an illustration of the “accelerating attenuation of the relationship between substantive constitutional rights and rights to remedies,” Fallon, *supra* note 8, at 1302).

<sup>15</sup> *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting); *West Virginia v. EPA*, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *Shelby County v. Holder*, 570 U.S. 529, 593–94 (2013) (Ginsburg, J., dissenting).

<sup>16</sup> *See, e.g.*, *CASA*, 145 S. Ct. at 2581–85 (Sotomayor, J., dissenting); *Hernández v. Mesa*, 140 S. Ct. 735, 753–64 (2020) (Ginsburg, J., dissenting).

<sup>17</sup> *See, e.g.*, *West Virginia*, 142 S. Ct. at 2610–16; *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

the boundaries of the law in unprecedented ways,<sup>18</sup> the Court should not operate from a bequeathed playbook for judicial power that was crafted at a very different political moment, for a very different President, and by those focused on the interests of the executive branch, not the judiciary. At least when it comes to injunctive relief against the executive branch, today's conservative Justices should not be remedy skeptics.

## I. THE EXECUTIVE BRANCH AND REMEDY SKEPTICISM

Remedy skepticism, as this Essay uses the term, encompasses antipathy toward implied causes of action, whether constitutional or statutory; the curbing of damages remedies against state and federal officials; a reluctance to grant injunctive relief against unlawful conduct or to give such relief expansive reach; and an overall sensitivity to the perceived “costs” that suits against government officials impose on the separation of powers and federalism (except for challenges to “the constitutional legitimacy of federal administrative agencies”).<sup>19</sup> All have come to be “correlate[d] strongly with conservatism.”<sup>20</sup> Why?

The association is not politically inevitable. In a country of blue cities, blue states, and not-infrequent blue Presidents, conservatives have sound reasons to want robust remedies against official action. Conservatives have opposed qualified immunity.<sup>21</sup> Business groups (often allied with conservatives) have supported sweeping remedies against federal governmental action.<sup>22</sup> Civil libertarian groups (ditto) have lauded *Bivens* liability.<sup>23</sup> Historically, the pendulum has swung both

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<sup>18</sup> See Thomas P. Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 HARV. L. REV. 1834, 1837 (2026) (“President Trump . . . has reshaped the global economy through tariff policy, ordered troops to American cities, deported alleged gang members with no process, bombed foreign countries, and even incinerated foreign civilians for allegedly trafficking drugs.” (footnotes omitted)).

<sup>19</sup> See Fallon, *supra* note 8, at 1325.

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

<sup>21</sup> See, e.g., George F. Will, Opinion, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It*, WASH. POST (May 13, 2020), [https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659doe-9478-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659doe-9478-11ea-9f5e-56d8239bf9ad_story.html) [<https://perma.cc/JZ53-MGL5>]; Jordain Carney, *GOP Senator Introducing Bill to Scale Back Qualified Immunity for Police*, THE HILL (June 23, 2020, at 10:40 ET), <https://thehill.com/homenews/senate/504065-gop-senator-introducing-bill-to-scale-back-qualified-immunity-for-police> [<https://perma.cc/F4NW-YHXM>].

<sup>22</sup> See, e.g., Brief of the Restaurant Law Center et al. as Amici Curiae in Support of Respondents at 1, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (Nos. 24A884, 24A885 & 24A886) (urging the Court to preserve nationwide injunctions); Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia and for Immediate Administrative Vacatur at 1, *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (No. 21A23) (urging the Court to vacate a stay of the lower court’s universal vacatur of a federal agency’s eviction moratorium).

<sup>23</sup> See Clark Neily et al., *Accountability for Government Agents*, in CATO HANDBOOK FOR POLICYMAKERS 187, 187–88, 197 (9th ed. 2022); Brief of Amicus Curiae the Institute for Justice in Support of Petitioners at 1, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

ways: *Ex parte Young*<sup>24</sup> was the invention of the conservative *Lochner*<sup>25</sup> Court and loathed by that era's progressives.<sup>26</sup>

Is the association a matter of principle — the inevitable result when legal conservative commitments to originalism, textualism, and judicial restraint are applied in the remedial sphere? Certainly, the skeleton of a principled account is easy to sketch. Legal conservatism (in a typical telling) means no more and no less than honoring constitutional structure: Congress makes the law, the Executive enforces the law, and courts resolve cases and controversies under the law rather than “legislating from the bench.” Remedy skepticism is said to follow tidily from those premises. Judicial recognition of implied causes of action, for example, is unwarranted judicial lawmaking that usurps Congress's role,<sup>27</sup> and damages liability for government officials threatens to chill effective enforcement.<sup>28</sup> Injunctive relief is perhaps the worst of all, for it can transform judges into roving administrators who lack both democratic accountability and institutional competence.<sup>29</sup>

But the pursuit-of-principle explanation does not easily account for the correlation between conservatism and remedy skepticism either.<sup>30</sup> *Bivens* is a favorite target of remedy skeptics,<sup>31</sup> but the long history of officer suits, including federal damages actions, sits awkwardly with the idea that imposing damages on federal officials is a novel judicial encroachment on legislative prerogatives.<sup>32</sup> The implied right of action for injunctive relief against state<sup>33</sup> and federal<sup>34</sup> officers does not cohere with the remedy skeptic's antipathy to other implied rights of action.<sup>35</sup> The conservative Justices' freelancing of qualified and absolute

<sup>24</sup> 209 U.S. 123 (1908).

<sup>25</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>26</sup> See Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247, 272 (Vicki C. Jackson & Judith Resnik eds., 2010) (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 3 n.7 (1973)).

<sup>27</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>28</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

<sup>29</sup> See *Brown v. Plata*, 563 U.S. 493, 550, 555 (2011) (Scalia, J., dissenting).

<sup>30</sup> See Fallon, *supra* note 8, at 1358–64 (critiquing the “Supreme Court's pretensions to methodological discipline and judicial modesty in the domain of constitutional remedies,” *id.* at 1358); *id.* at 1356 (highlighting the “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”).

<sup>31</sup> See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017)).

<sup>32</sup> See Michael G. Collins, “*Economic Rights*,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 *GEO. L.J.* 1493, 1496 (1989); Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019–2020 *CATO SUP. CT. REV.* 263, 267–70 (2020); see also Fallon, *supra* note 8, at 1360 (contrasting the Court's skepticism of *Bivens* with its continuing recognition and acceptance of “federal common law defenses against state law causes of action”).

<sup>33</sup> See *Ex parte Young*, 209 U.S. 123, 162 (1908).

<sup>34</sup> See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

<sup>35</sup> Fallon, *supra* note 8, at 1359–60; Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 *NOTRE DAME L. REV.* 1869, 1871 (2021).

immunities<sup>36</sup> stands in contrast to the remedy skeptic's insistence upon originalist and textualist methodologies.<sup>37</sup> And judicial modesty and judicial deference to Congress are selectively invoked virtues.<sup>38</sup>

A more fruitful approach instead recasts the puzzle in historical terms: When did remedy skepticism become associated with conservatism? Professor Fallon identified the “current era” — the “[s]lea [c]hange” in constitutional remedies — as commencing in 1991,<sup>39</sup> soon after the Reagan Administration ended. The timing is telling. That Administration served as an incubator for conservative legal thought; a slew of renowned conservative judges, lawyers, and legal scholars worked there,<sup>40</sup> including founding members of the Federalist Society.<sup>41</sup> In speeches, reports, and other writings, the Meese DOJ adopted the discourse of originalism to advocate for “changes in constitutional and other legal doctrine on the great issues of the day.”<sup>42</sup> The Meese DOJ certainly did not cut from whole cloth its vision of constitutional law and judicial power.<sup>43</sup> It did, however, play an important role by articulating that vision systematically and by placing behind it the sponsorship of a venerated Republican President.<sup>44</sup>

The role of the federal courts in granting constitutional remedies was among the topics the Meese DOJ addressed. Consider a question of especially great salience today: equitable remedies for constitutional violations by the executive branch.<sup>45</sup> The Meese DOJ made at least two

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<sup>36</sup> See Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1922 (2007); Fallon, *supra* note 8, at 1331–32, 1363; Thomas P. Schmidt, *Presidential Immunity: Before and After Trump*, 79 *VAND. L. REV.* (forthcoming 2026) (manuscript at 155) (on file with the Harvard Law School Library).

<sup>37</sup> With respect to qualified immunity and section 1983, Justices Scalia and Thomas have admitted as much, though they have defended this invention as a necessary patch for *Monroe v. Pape*, 365 U.S. 167 (1961), which they have deemed wrongly decided. See *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., joined by Thomas, J., dissenting).

<sup>38</sup> Fallon, *supra* note 8, at 1363–65.

<sup>39</sup> *Id.* at 1325.

<sup>40</sup> One such renowned scholar — Professor John Harrison — is a participant in this Symposium. See Logan Everett Sawyer III, *Originalism and the Path to Partisan Jurisprudence: The Guidelines on Constitutional Litigation Inside the Reagan Administration*, 3 *J. AM. CONST. HIST.* 337, 356 (2025).

<sup>41</sup> STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 141–42 (2008).

<sup>42</sup> Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 *HARV. L. & POL'Y REV.* 239, 244 (2007); see, e.g., OFF. OF LEGAL POL'Y, DOJ, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* iii–iv (1998) [hereinafter DOJ, *CONSTITUTION IN 2000*].

<sup>43</sup> Then-Justice Rehnquist, for example, penned numerous opinions in the 1970s and 1980s that advocated positions that the Meese DOJ would later approve. See, e.g., *Carlson v. Green*, 446 U.S. 14, 31–32 (1980) (Rehnquist, J., dissenting) (arguing that *Bivens* was a “wrong turn,” *id.* at 32).

<sup>44</sup> For scholarship examining the diaspora of ideas and personnel from the Meese DOJ to the bar, bench, and legal academy, see sources cited *infra* note 62.

<sup>45</sup> This Essay focuses on this piece of remedy skepticism, but the Meese DOJ was also critical of *Bivens* and judicial recognition of implied rights of action. See OFF. OF LEGAL POL'Y, DOJ,

arguments relevant to this issue. First, Meese advanced the theory of departmentalism — the idea that executive branch officials have the authority and obligation to interpret the Constitution and to act upon their interpretation, independent of Supreme Court decisions.<sup>46</sup> The Court’s opinions, on this view, should be limited to “bind[ing] the parties in a case and also the executive branch for whatever enforcement is necessary.”<sup>47</sup> But the Court’s opinions, Meese argued, were not the Constitution;<sup>48</sup> ergo, their effect on the executive branch would depend on whether its officials were “persuade[d]” to abide by them out of practical considerations and “respect for the judiciary.”<sup>49</sup>

Second, the Meese DOJ levied an originalist attack on the courts’ usage of injunctions.<sup>50</sup> It argued that “the federal courts’ use of injunctive power had ‘strayed outside’ the ‘historical development of equity and the original meaning of Article III’s grant of equitable jurisdiction.’”<sup>51</sup> It complained that the reasoning of *Ex parte Young* was “[c]learly . . . a sophistry”<sup>52</sup> and that it had allowed federal courts “to supervise the public policy of the states.”<sup>53</sup> And after the “turning-point case of *Ex parte Young*,”<sup>54</sup> matters further deteriorated. By *Brown v.*

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GUIDELINES ON CONSTITUTIONAL LITIGATION 68–69 (1988) [hereinafter GUIDELINES] (criticizing *Bivens*); OFF. OF LEGAL POL’Y, DOJ, THE SEARCH AND SEIZURE EXCLUSIONARY RULE 39–40 (1986) (same); OFF. OF LEGAL POL’Y, DOJ, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 116–17 (1989) (criticizing implied rights of action). On its view of standing, see Mark Tushnet, “Meet the New Boss”: *The New Judicial Center*, 83 N.C. L. REV. 1205, 1212 (2005) (noting the GUIDELINES’ “import was clear[.] . . . standing should not be afforded generously”).

<sup>46</sup> Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) (“Each of the three coordinate branches of government . . . has a duty to interpret the Constitution in the performance of its official functions.”).

<sup>47</sup> *Id.* at 983; see also *id.* at 987 (“Obviously constitutional decisions are binding on the parties to a case . . .”).

<sup>48</sup> *Id.* at 985.

<sup>49</sup> *Id.* at 987 n.26 (“In addition to binding the parties in the case at hand, a decision is precedent in that it binds lower federal courts as well as state courts. . . . Arguments from prudence, the need for stability in the law, and respect for the judiciary will and should persuade officials of these other institutions to abide by a decision of the court. Supreme Court decisions thus have applicability beyond the instant case, but they are not ‘the supreme law of the land.’”); Edwin Meese III, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003, 1004 (1987) (same); see John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORN. L. REV. 371, 372 (1988) (“Does [the President] . . . have any obligation to follow precedent where there is no binding judgment in the situation? I do not know of one.”); *id.* at 373 (rejecting the argument that “the executive branch must follow precedent” because “it is not an argument about legal obligation. It is an argument about what is a sane way to run a government”).

<sup>50</sup> See Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 963–64 (2023).

<sup>51</sup> *Id.* at 964 (quoting OFF. OF LEGAL POL’Y, DOJ, JUSTICE WITHOUT LAW: A RECONSIDERATION OF THE “BROAD EQUITABLE POWERS” OF THE FEDERAL COURTS 5 (1988) [hereinafter DOJ, JUSTICE WITHOUT LAW]; see DOJ, JUSTICE WITHOUT LAW, *supra*, at 35–46).

<sup>52</sup> DOJ, JUSTICE WITHOUT LAW, *supra* note 51, at 84.

<sup>53</sup> *Id.* at 85.

<sup>54</sup> *Id.* at 82.

*Board of Education*<sup>55</sup> (*Brown II*), “[e]quity [had] become[] a special judicial superpower that gives little recognition to issues of jurisprudence, constitutionalism, separation of powers, or federalism.”<sup>56</sup> Although its many criticisms were variegated and not easily distilled,<sup>57</sup> the Meese DOJ was clearly focused upon — and incensed by — the federal courts’ issuance of desegregation decrees and other mandatory (especially structural) injunctions, contending that “even the English kings never dreamt of” such power.<sup>58</sup>

These two arguments dovetailed to produce a theory that would dramatically constrain the judicial power to issue injunctive relief. If the President and other executive branch officials have the power and duty to interpret the Constitution independently, then they are entitled to apply their interpretations unless directly precluded by a binding judgment. Courts, including the Supreme Court, may issue decisions that “bind[] the parties in a case,” but may go no further.<sup>59</sup> And if federal courts were never intended to issue even *negative* injunctions against enforcement (like that blessed by *Ex parte Young*<sup>60</sup>), and certainly were not authorized to issue *affirmative* injunctions (like those in *Brown II*<sup>61</sup> and its sequels), then the federal courts’ role in shielding constitutional rights *even as to the parties in a case* is relegated to defensive nullification. Taken altogether, these propositions would profoundly curtail the federal courts’ capacity to give meaningful remedies for constitutional violations.

In these and other ways, the Meese DOJ enunciated and defended remedy skepticism both as to injunctive relief specifically and as to constitutional remedies more broadly. Its arguments were surely familiar to key members of the conservative legal movement. Scholars have documented the Meese DOJ’s central role in developing conservative legal thought and have charted how ideas propagated from the DOJ to the academy, the bar, and the bench through the Federalist Society and other institutional vectors.<sup>62</sup> Viewed in this historical light, the reason

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<sup>55</sup> 349 U.S. 294 (1955).

<sup>56</sup> DOJ, JUSTICE WITHOUT LAW, *supra* note 51, at 94.

<sup>57</sup> *See id.* at 147–57.

<sup>58</sup> *Id.* at 153; *see also id.* at 120–21 (criticizing scope of injunctive relief in school desegregation cases); Sohoni, *supra* note 50, at 961–63 (explaining early originalists’ opposition to *Brown* and that although by the 1980s “it had become politically challenging to attack *Brown I* head-on,” *id.* at 962, “remedial originalism in this era offered a politically palatable means to criticize *Brown*’s implementation without frontally attacking *Brown I* itself,” *id.* at 963).

<sup>59</sup> Meese, *supra* note 46, at 983.

<sup>60</sup> *See* 209 U.S. 123, 159 (1908).

<sup>61</sup> 349 U.S. 294, 301 (1955).

<sup>62</sup> *See, e.g.,* Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787, 788, 797–802 (2019) (explaining the Meese DOJ’s pivotal role in originalism’s “rapid, rags-to-riches advance,” *id.* at 788, including its “role in developing originalism outside of the law schools,” *id.* at 797, and its “role in popularizing originalism within conservative circles,” *id.* at 802);

for the correlation between remedy skepticism and conservatism comes into clear focus. The Reagan Administration linked them together, and legal conservatives thereafter have been following the trails that the Meese DOJ blazed.<sup>63</sup>

It is striking how modern-day opinions by various conservative Justices concerning remedies, and in particular injunctions, have carried forward aspects of the Meese DOJ's remedy skepticism. In *Trump v. Hawaii*,<sup>64</sup> Justice Thomas's concurrence attacked universal injunctions — injunctions that protect those who are not parties to the case — as exceeding federal courts' authority under Article III.<sup>65</sup> Invoking the original meaning of equity, Justice Thomas drew upon many of the same arguments and sources as the Meese DOJ did decades earlier — including a book written by Meese's speechwriter at the DOJ.<sup>66</sup> In *Whole Woman's Health v. Jackson*,<sup>67</sup> in which the Court refused to extend *Ex parte Young* even modestly but preserved a (fleeting) possibility of an affirmative suit for injunctive relief in federal court,<sup>68</sup> Justice Thomas would have denied that possibility altogether.<sup>69</sup> In *Trump v. CASA, Inc.*,<sup>70</sup> the Court held that federal courts generally lack the authority to issue universal injunctions.<sup>71</sup> Though *CASA* rested on statute, not Article III, *CASA* nonetheless channeled the core claim made by the Meese DOJ: that equitable remedies should adhere to the law of equity inherited from England at the Founding.<sup>72</sup> *CASA*'s instruction that equity requires that injunctions be “party-specific”<sup>73</sup> costumes Meese's departmentalism — that decisions may bind only “the parties

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*id.* at 804 (noting the “revolving door” between the legal academy and the Meese DOJ’s “academy in exile”); Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1132 (2023) (“Originalism took shape as a value-laden, goal-oriented politics in the Justice Department of the Reagan Presidency before originalism was elaborated as a presumptively value-neutral method of interpretation in the legal academy.”); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 1–5 (2015); Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 61 (2009).

<sup>63</sup> See Siegel, *supra* note 62, at 1167 (noting the importance of these “inaugural years” to the subsequent development of originalism and the conservative legal movement).

<sup>64</sup> 138 S. Ct. 2392 (2018).

<sup>65</sup> *Id.* at 2425 (Thomas, J., concurring).

<sup>66</sup> See *id.* at 2426–27 (citing GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 24 (1982)); see DOJ, JUSTICE WITHOUT LAW, *supra* note 51, at 118 (same).

<sup>67</sup> 142 S. Ct. 522 (2021).

<sup>68</sup> *Id.* at 532, 535–36. The state supreme court subsequently blocked that path. See *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

<sup>69</sup> 142 S. Ct. at 539 (Thomas, J., concurring in part and dissenting in part).

<sup>70</sup> 145 S. Ct. 2540 (2025).

<sup>71</sup> *Id.* at 2550 & n.4. See generally Mila Sohoni, *In CASA You Missed It*, 78 STAN. L. REV. (forthcoming 2026) (discussing *CASA*).

<sup>72</sup> *CASA*, 145 S. Ct. at 2553 n.7, 2553–54; cf. *supra* notes 51–58 and accompanying text (discussing DOJ, JUSTICE WITHOUT LAW).

<sup>73</sup> *CASA*, 145 S. Ct. at 2552 (stating that “party-specific principles . . . permeate [the Court’s] understanding of equity”).

in a case<sup>74</sup> — in equitable garb.<sup>75</sup> And while a footnote in *CASA* carefully recorded that “the Solicitor General [had] represented that the Government will respect both the judgments and the opinions of this Court,”<sup>76</sup> the fact that the Court rested on “executive branch assurances”<sup>77</sup> suggested that the Court regarded the respect due to its opinions as dependent on executive grace.

Taken together, affirmative suits for injunctive relief are disfavored; enforcement of constitutional rights is relegated to defensive litigation; the power to issue injunctions is limited by party-specific and ostensibly originalist parameters; and the binding status as to nonparties of even Supreme Court opinions depends on executive-branch concession. All told, the Meese DOJ might have found much to celebrate.

## II. THE COURT AND REMEDY SKEPTICISM

Neither the explanation for remedy skepticism advanced above, nor its reflection in modern doctrine, should come as much of a surprise. Several elements of the Meese DOJ’s agenda for substantive constitutional law have recently found their way into doctrine — or appear about to. *Roe v. Wade*<sup>78</sup> has been overturned.<sup>79</sup> The Court is “more tolerant of aid to religious schools.”<sup>80</sup> The Court seems poised to hold that, under the “unitary Executive” theory, “the ‘independent’ agencies do not have a place in the constitutional structure.”<sup>81</sup> That remedy skepticism, too, has its roots in the Meese DOJ is a piece that fits neatly into this overall picture.

That is not at all to say that this piece *ought to be* part of the picture. The Meese DOJ’s stances were predicated upon certain assumptions and shaped by the particular moment and circumstances from which they emerged. In advocating for departmentalism, the Meese DOJ took it as a premise that officials — including the President — would feel bound by their oath to the Constitution<sup>82</sup> and that they would feel “respect for the judiciary.”<sup>83</sup> In advocating against equitable remedies, the

<sup>74</sup> Meese, *supra* note 46, at 983.

<sup>75</sup> See Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1121 (2020) (arguing that “injunctions must be particularized and non-universal” *in order to allow departmentalism*, because only such orders “leave the political branches free to engage [in] judicial departmentalism and enforce a law against non-parties to the injunction”).

<sup>76</sup> *CASA*, 145 S. Ct. at 2562 n.18.

<sup>77</sup> Jack Goldsmith, *The Supreme Court, 2024 Term — Essay: Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 124 (2025).

<sup>78</sup> 410 U.S. 113 (1973).

<sup>79</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022); see Siegel, *supra* note 62, at 1163–64 (describing the Meese DOJ’s “attack[.]” *id.* at 1163, on *Roe*).

<sup>80</sup> DOJ, CONSTITUTION IN 2000, *supra* note 42, at 75.

<sup>81</sup> *Id.* at 180.

<sup>82</sup> See Meese, *supra* note 46, at 986.

<sup>83</sup> *Id.* at 987 n.26.

Meese DOJ was overwhelmingly focused on targeting that era's affirmative structural injunctions involving state and local governments,<sup>84</sup> which it regarded as costly to "federalism and separation of powers."<sup>85</sup> And the institutional context ought not be ignored: Everything the Meese DOJ had to say about constitutional remedies came from the pens of executive branch lawyers.

Today's circumstances call for a different calculus. Rather than striving to "preserve, protect and defend the Constitution,"<sup>86</sup> a President may claim sweeping authority from thin air, dismiss constitutional constraints as optional, and display profound contempt for the judiciary.<sup>87</sup> Rather than appearing too dear, the costs of injunctions against the executive branch may seem slight when compared with the tolls upon constitutional rights and structure that would come from judicial *non-intervention*.<sup>88</sup> Today, adherence to the remedy skepticism developed by the Reagan Administration in response to the Warren and Burger Courts would risk allowing grave overreaches by the Trump Administration to go unchecked by the Roberts Court.

These changed circumstances should prompt conservatives — including those on the Court — to revisit their approach to remedy skepticism, at least when it comes to injunctions against the executive branch. Remedy skepticism must yield when the executive branch threatens serious incursions on the separation of powers or the nullification of core constitutional rights, for a system of constitutional remedies that fails to meet such exigencies is not one worthy of the name.<sup>89</sup>

Recent cases suggest that this is not as far-fetched a possibility as it may at first appear. Even staunchly conservative Justices have recognized that there are circumstances in which a strict adherence to remedy skepticism must yield. In *Noem v. Abrego Garcia*,<sup>90</sup> the Court addressed a case in which the Trump Administration had unlawfully deported a man without due process and proposed to abandon him forever in a foreign terrorist prison; the Court ordered the executive branch to

<sup>84</sup> See DOJ, JUSTICE WITHOUT LAW, *supra* note 51, at 1–2; see also *supra* pp. 1885–86.

<sup>85</sup> DOJ, JUSTICE WITHOUT LAW, *supra* note 51, at 158.

<sup>86</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>87</sup> See, e.g., Schmidt & Metzger, *supra* note 18, at 1839 (quoting President Trump as saying he “didn’t know” if he had to uphold the Constitution, despite having recently taken an oath to do so (quoting *Read the Full Transcript: President Donald Trump Interviewed by “Meet the Press” Moderator Kristen Welker*, NBC NEWS (May 4, 2025, at 12:00 ET), <https://www.nbcnews.com/politics/trump-administration/read-full-transcript-president-donald-trump-interviewed-meet-press-mod-rcna203514> [<https://perma.cc/7VEM-9Y2R>])).

<sup>88</sup> See, e.g., *Abrego Garcia v. Noem*, No. 25-cv-1404, 2025 WL 1135112, at \*1–2 (4th Cir. Apr. 17, 2025). The Justices perceived this tension at the *CASA* oral argument, in which “[a] central concern was whether elimination of universal injunctions would leave broad swaths of clearly illegal presidential action beyond federal court redress.” Goldsmith, *supra* note 77, at 121.

<sup>89</sup> Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

<sup>90</sup> 145 S. Ct. 1017 (2025).

“facilitate” his return.<sup>91</sup> It is far from clear that this injunction had any “founding-era antecedent,”<sup>92</sup> nor did the Court (to its immense credit) seem to care in the least whether it did. In *A.A.R.P. v. Trump*,<sup>93</sup> the Court forbade the executive branch from deporting a putative (i.e., not-yet-certified) class of detainees,<sup>94</sup> notwithstanding the executive branch’s objection that courts lack Article III authority to give relief to “non-parties to the dispute.”<sup>95</sup> In both cases, at least two conservative Justices must have voted for these outcomes. In *Whole Woman’s Health v. Jackson*, Chief Justice Roberts argued for a principled expansion of *Young* to preserve a then-blackletter constitutional right from being “nullified]” by state law<sup>96</sup> — a stance indicating his awareness of the importance of *Young* as well as his wariness of countenancing curtailments of injunctive relief that would extinguish constitutional rights altogether.<sup>97</sup> With respect to administrative law, Justice Kavanaugh’s separate writings<sup>98</sup> have suggested that he may be unwilling to treat remedies against federal agencies as confined by the “parties to a case”<sup>99</sup> straitjacket that Meese advocated and that *CASA* elsewhere embraced.<sup>100</sup> Indeed, while *CASA* rebuked the idea that lower court orders require universal adherence from the executive branch,<sup>101</sup> *CASA* may also be read as reflecting, *contra* Meese,<sup>102</sup> that “the Court believes *its* rulings — not just equitable remedies, but ‘judgments and opinions’ — *have universal effect* . . . both vertically (in lower courts) and *horizontally (in executive branch practice)*.”<sup>103</sup>

Admittedly, this is a small handful. But these opinions indicate that the link between remedy skepticism and conservatism is not ironclad. Today, national politics reflects a partial scrambling of conservative and

<sup>91</sup> *Id.* at 1018; see *Abrego Garcia*, 2025 WL 1135112, at \*1–2.

<sup>92</sup> *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2554 (2025).

<sup>93</sup> *A.A.R.P. v. Trump (A.A.R.P. I)*, 145 S. Ct. 1034 (2025) (mem.); *A.A.R.P. v. Trump (A.A.R.P. II)*, 145 S. Ct. 1364 (2025) (per curiam).

<sup>94</sup> *A.A.R.P. I*, 145 S. Ct. at 1034; *A.A.R.P. II*, 145 S. Ct. at 1369–70 (noting that “courts may issue temporary relief to a putative class,” *id.* at 1369).

<sup>95</sup> Respondents’ Opposition to Emergency Application at 12, *A.A.R.P. I*, 145 S. Ct. 1034 (No. 24A1007), 2025 WL 1171736, at \*12.

<sup>96</sup> 142 S. Ct. 522, 545 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>97</sup> See Fallon, *supra* note 8, at 1336–37.

<sup>98</sup> See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2567 (2025) (Kavanaugh, J., concurring); *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsr. Sys.*, 144 S. Ct. 2440, 2460 (2024) (Kavanaugh, J., concurring).

<sup>99</sup> See *supra* p. 1885.

<sup>100</sup> Cf. *CASA*, 145 S. Ct. at 2554 n.10 (treating remedies under the Administrative Procedure Act as a “distinct question”).

<sup>101</sup> See *id.* at 2548, 2560, 2563.

<sup>102</sup> Cf. *supra* p. 1885.

<sup>103</sup> Goldsmith, *supra* note 77, at 125 (emphases added); see *id.* at 125–26 (noting that *CASA* embraced “a law-declaration function,” *id.* at 125, as both “needed and justified” for the Court itself, *id.* at 126).

liberal stances on questions ranging from free speech to trade.<sup>104</sup> Some degree of “realignment”<sup>105</sup> has similarly occurred in the positions of conservatives and liberals on the Court around standing, textualism, and *Chevron*<sup>106</sup> deference.<sup>107</sup> Perhaps there is a sliver of hope, if no more, that the alignment between remedial skepticism and conservatism is likewise not set in stone.

### CONCLUSION

Professor Fallon identified a simple but important puzzle: Why has remedy skepticism become conjoined with conservatism? This Essay has probed that puzzle and asked: Must it so remain? The linkage is not logically necessary, nor is it explicable as a matter of principle. Rather, this Essay has argued, the two became linked during the Reagan Administration, when remedy skepticism was part and parcel of that era’s conservative backlash against the jurisprudence of the Warren and Burger Courts.

If remedy skepticism is understood, even in part, as a contingent inheritance from a particular institution and time, that may help to reveal that the connection between remedy skepticism and conservatism is not inevitable — and that it can be undone. Conservatives do not always control the political branches, and neither do liberals. Both sides wield tremendous power to infringe on each other’s rights. Both sides should want “a system of constitutional remedies”<sup>108</sup> robust enough to answer that challenge. At a moment when the executive branch is severely testing the limits of constitutional constraint, it is time — past time — to rethink remedy skepticism.

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<sup>104</sup> See, e.g., Evelyn Douek & Genevieve Lakier, Essay, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. CHI. L. REV. ONLINE (June 6, 2022), <https://lawreview.uchicago.edu/online-archive/first-amendment-politics-gets-weird-public-and-private-platform-reform-and-breakdown> [https://perma.cc/QQC7-J6JR]; Molly Ball, *In Trump 2.0, “Free Trade” Republicans Are a Dying Breed*, WALL ST. J. (May 3, 2025, at 00:04 ET), <https://www.wsj.com/politics/policy/in-trump-2-0-free-trade-republicans-are-a-dying-breed-04eca4bo> [https://perma.cc/CG9W-VXWF].

<sup>105</sup> See Richard M. Re, Essay, *Legal Realignment*, 92 U. CHI. L. REV. 1965, 1966 (2025) (emphasis omitted).

<sup>106</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>107</sup> See Re, *supra* note 105, at 1966.

<sup>108</sup> Fallon & Meltzer, *supra* note 2, at 1778–79.