Western New England Law Review

Volume 44 *44*
Issue 3

Article 5

2022

CONSTITUTIONAL LAW—FEDERAL COURTS: IS THE CONSTITUTION A SWORD?

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WESTERN NEW ENGLAND LAW REVIEW '

Volume 44 2022 Issue 3

CONSTITUTIONAL LAW—FEDERAL COURTS: IS THE CONSTITUTION A SWORD?

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In Marbury v. Madison*, Chief Justice Marshall proclaimed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he [sic] receives an injury." This pronouncement has shaped a widespread assumption that the rule of law under our Constitution entails a right to seek a judicial remedy when constitutional rights are violated. But, perhaps surprisingly, the Supreme Court has never squarely held that such a right exists. And some recent decisions, most particularly* Whole Woman's Health v. Jackson*, decided in December of 2021, cast serious doubt on the truth of Marshall's bold proposition.*

This Article claims, in contrast to the Supreme Court's recent direction, that much of our law of constitutional remedies depends on the premise that a person who is injured by a constitutional violation has a right to sue for judicial relief for that injury. Specifically, the injunctive relief exception to sovereign immunity established by Ex parte Young*, the* Bivens *damage remedy for (some) constitutional violations by federal officers, the duty of state courts to remedy constitutional violations by their own governments, and the assumption that some court of competent jurisdiction must be available to hear suits raising constitutional claims all rely, at least tacitly, on the proposition that the Constitution is a sword.*

Were the Supreme Court openly to acknowledge and endorse this

1*. Bruce Miller, Professor Emeritus, Western New England University School of Law. I am grateful to the students in my Federal Courts and Jurisdiction classes in 2020–22 for the rich discussions that led to this Article. Thanks also to Tori Thomas, Senior Articles Editor for this volume of the *Western New England Law Review*, for soliciting and overseeing its production, and to the staff of the *Law Review*, particularly Meaghan Collins and Sean Buxton, for many helpful suggestions for improving it. Above all, I am deeply indebted to Melissa Bailey, Western New England University School of Law, Class of 2022, for her tireless and accurate research, endless patience and tenacity, and overall good cheer.

> *proposition, the remedial regime available for constitutional violations and, with it, the rule of the Constitution as our supreme law, would inevitably become far more secure than they are today. On the other hand, the current Court's apparent indifference to Chief Justice Marshall's* Marbury *description of "the very essence of civil liberty" undermines the coherence of this regime and thus threatens its stability and vitality.*

INTRODUCTION: *MARBURY V. MADISON* AS NARRATIVE

Chief Justice Marshall's opinion in *Marbury v. Madison*[2] may be as significant for the story it tells about the rule of law under the American Constitution as it is for its foundational contribution to the institution of judicial review. Every constitutional law student learns that in the second part of that opinion, Marshall claims the inevitability of a special, and final, role for the judicial branch in deciding constitutional meaning by pointing to what courts do: "It is emphatically the province and duty of the judicial department to say what the law is."[3] That special and final role justified the Supreme Court's invalidation of Congress's conferral of original jurisdiction over William Marbury's effort to secure a writ of mandamus to Secretary of State James Madison, directing the delivery of Marbury's commission to serve as a Justice of the Peace for the District of Columbia. Perhaps less emphasis in the education of American lawyers is given to Marshall's explanation, in the first part of his opinion, of why Marbury was entitled, as a matter of law, to the mandamus to begin with:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> . . . .
>
> 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.
>
> . . . .
>
> . . . [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.
>
> . . . .

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3. *Id.* at 177.

> It is not by the office of the person to whom the writ is directed . . . that the propriety or impropriety of issuing a mandamus, is to be determined.
>
> . . . .
>
> . . . [W]here [the head of a department] is directed by law to do a certain act affecting the absolute rights of individuals . . . it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual . . . .[4]

This account of the essential role of law and of courts in curbing the abuse of official power in the name of protecting individual rights shapes the understanding that most Americans share about how our legal system is supposed to work.[5] And it is the audacity of the account, that the operation of law, given force by the declaration of a judge, could constrain the power of a cabinet officer carrying out a presidential policy, as much as Marshall's justification for constitutional judicial review, that explains the dismay with which *Marbury v. Madison* was received by Secretary Madison and President Jefferson.[6] Marshall's straightforward narrative—that a person harmed by conduct that violates the law may count on the courts to remedy that harm no matter how powerful the violator—anchors our cherished convictions that *no one is above the law*,[7] that Presidential power "is not a blank check,"[8] and that the commander in chief of the Army *is not* the commander in chief of the country.[9] It explains why a foreign national held for two decades without trial, and abused in American military custody at Guantanamo Bay Prison, could plausibly

4. *Id.* at 163–71.

5. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972); *Marbury*, 5 U.S. at 163.

6. *See* Robert M. Casale, *Revisiting One of the Law's Great Fallacies: Marbury v. Madison*, 89 CONN. B.J. 62 (2015).

> My construction of the Constitution is . . . that each department is truly independent of the others and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal.

Letter of Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed. 1903).

7. *See* Dellinger, *supra* note 5; *Marbury*, 5. U.S. at 163; *see also, e.g.*, Theodore Roosevelt, *Third Annual Message to Congress, 7 Dec. 1903*, *in* THE YALE BOOK OF QUOTATIONS 648 (Fred R. Shapiro ed., 2006) ("No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it.").

8. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

9. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

still express conviction that his faith remains in the law.[10]

Still, a closer read of Marshall's promise of judicial protection for the unlawfully injured reveals it to be considerably more conditional, nuanced, and complex than it first appears. The *Marbury* opinion's great paradox is, of course, that the judicial remedy so resoundingly guaranteed in its first part is just as emphatically pulled back in the second, because of Marshall's conclusion that the Supreme Court could not constitutionally accept jurisdiction over Marbury's suit.[11] So the most obvious qualification to Marshall's guarantee is that a litigant who seeks to redeem it must proceed in a court of competent jurisdiction.

Three more potential barriers to a litigant's success lie just beneath the surface of Marshall's opinion. The first is that the court must determine that the plaintiff was injured by the unlawful conduct she points to.[12] Marbury plainly was injured through the denial of his confirmed appointment to a federal judgeship.[13] But our voluminous and vigorously contested law of standing to sue shows how formidable, if often subtle, this obstacle can be.[14] Second, although Chief Justice Marshall places very high public officers and cabinet secretaries, certainly, and, in principle, presidents as well, within the reach of judicial power, he disclaims authority to decide the illegality of all official activity undertaken by these high officers.[15] This distinction between justiciable and non-justiciable government action manifests itself today in the political question and government and official immunity doctrines, all also fraught with controversy and complexity.

The last prerequisite to a litigant's successful request for judicial

10. *See* Carol Rosenberg, *The Legacy of America's Post-9/11 Turn to Torture*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/09/12/us/politics/torture-post-9-11.html [https://perma.cc/KPF5-9VMX]. "I only have the law." *Id.* (quoting Mohamedou Slahi).

11. *Marbury*, 5 U.S. at 138.

12. Allen v. Wright, 468 U.S. 737, 738 (1984).

13. *Marbury*, 5 U.S. at 162.

14. *See, e.g.*, *Allen*, 468 U.S. at 738; Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–09 (2013).

15. "The intimate political relation, subsisting between president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate . . . ." *Marbury*, 5 U.S. at 169. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 165–66.

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Id. at 166.

relief is perhaps the most mysterious. Even if a plaintiff has plainly been injured by allegedly unlawful conduct, has commenced suit in a court of competent jurisdiction, and has named defendants whose unlawful actions are within reach of judicial power, a court can only adjudicate her suit if an appropriate source of law grants her a right to sue.[16] In *Marbury v. Madison*, the right to sue, historically often called a cause of action—or since 1938, a claim for relief—was conferred by Congress's authorization of common law judicial writs of mandamus against public officers, confirmed by the Judiciary Act of 1789.[17] Even if Marbury had, as Marshall held, a right to his commission, and even if Secretary Madison had a duty to deliver it, a court would not have the power to vindicate that right or to enforce that duty in the absence of such a right to sue.[18]

This separation of the unlawfulness of a defendant's conduct from the right of an injured plaintiff to seek a judicial remedy for that unlawfulness, can seem invisible. But it can also be crucial, especially in suits aimed at enforcing obligations imposed by federal law. In state law proceedings growing out of common law rights and duties, the illegality of a defendant's conduct is usually coterminous with the plaintiff's right to sue. What it means to violate a common law obligation is that one can be sued by the victim of that violation.[19]

For rights and duties created by federal law, as well as those conferred by state statutes, the situation is quite different. Whether a federal statute authorizes judicially enforceable remedies at the behest of private parties is up to Congress. New law students also learn that not every federal statutory violation is redressable in court by someone injured by that violation.[20] The test normally is whether Congress has conferred, by specific statutory language, a private right to sue.[21] Sometimes, of course, though rarely in recent decades, federal courts have recognized that a federal statute grants an implied private right to sue for its violation

16. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 839–41 (D.C. Cir. 2010); Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012); *Marbury*, 5 U.S. at 167–68, 170, 173–80.

17. *See* FED. R. CIV. P. 8 (adopting "claim for relief" over "cause of action"); FED. R. CIV. P. 12(b)(6) (referencing motions to dismiss for "failure to state a claim upon which relief can be granted").

18. *See* Cort v. Ash, 422 U.S. 66, 74–76 (1975); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18, 26–27 (1990); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 22 (1920); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 331–32 (2015) (illustrating that an explicit right to sue is normally needed to get into court).

19. A common law cause of action is conventionally defined as "the fact or combination of facts that gives a person *the right to seek judicial redress or relief against another*." *Cause of Action*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008) (emphasis added).

20. *See generally* Smith v. Kansas City Title & Tr. Co., 255 U.S. 180 (1921) (involving a federal statute with no explicit right to sue); Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368 (2012) (same); Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (same).

21. *Smith*, 255 U.S. at 199; *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

notwithstanding the absence of explicit authorizing language.[22] And some statutory rights—though again with decreasing frequency in recent years—have been held to be enforceable through the generic right of action granted by 42 U.S.C. § 1983 to redress violations of the Constitution and laws of the United States committed by persons acting under the color of state law.[23] Finally, federal statutory rights can be enforced in state, and sometimes federal, courts when state law grants a right to sue for violation of the standard they set.[24]

But the recognition of several paths toward judicial redress of federal statutory violations via suits filed by injured plaintiffs does not suggest that Marshall's *Marbury* Part I maxim, that for every violation of law there is a judicial remedy, applies to all interests protected by federal statutes. Congress remains free to adopt methods of its own choosing to enforce its statutes, such as criminal prosecutions, civil fines, or federal department or agency enforcement, instead of or in addition to private claims for judicial relief. Examples of federal statutory protections which rely largely or completely on government rather than private litigation enforcement include those provided by the Food and Drug Act, Occupational Safety and Health Act, Clean Air Act, and Consumer Product Safety Act.[25]

The rights conferred and obligation imposed by federal statutes do, of course, carry the force of law through the Supremacy Clause of the Constitution.[26] At the same time, because these rights and duties were brought into existence only through the exercise of the plenary, wholly discretionary, political powers held by the Congress, we see their scope, nature, and limits, including how they are to be enforced, as within Congress's ultimate control as well.[27]

Constitutional rights and duties have a very different pedigree. They are part of our supreme law not because they were created by Congress or the executive, or for that matter, the judicial branch, but because we the people endowed them with that supremacy through our acts of

22. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433–34 (1964); *see also Cannon*, 441 U.S. at 717 (1979); Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

23. *See* Maine v. Thiboutot, 448 U.S. 1, 1 (1980); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

24. *See, e.g.*, *Smith*, 255 U.S. at 212–13 (involving a common law cause of action that borrows a federal statute as a standard of disability).

25. *See generally* Pure Food and Drugs Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (codified as amended in various sections of 21 U.S.C.); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–75, 677–78; Clean Air Act, 42 U.S.C. §§ 7401–7671; Consumer Product Safety Act, 15 U.S.C. §§ 2051–58, 2060–61, 2063–90.

26. U.S. CONST. art. VI, cl. 2.

27. *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

constitutional ratification and amendment.[28] In this sense, constitutional rights are transcendent, for their obligatory character does not depend on any person's or institution's subsequent exercise of political power or discretion. The transcendent legal status of constitutional rights has practical implications for our understanding of their place in Marshall's *Marbury* account of the powers and duties of courts to guarantee remedies for unlawfully inflicted injuries. If the Constitution is supreme law, and if it confers rights, the holders of these rights must enjoy a right to sue when they are violated, and both the federal and state courts are correspondingly obliged to grant an appropriate remedy. That, at any rate, is what Marshall must have meant in *Marbury*, Part I.

"Must have meant" is, though, a necessary hedge to this claim. For even if Americans broadly assume that our aspirational legacy of government under the rule of law entails a right, guaranteed by the Constitution's supremacy, to seek judicial remedies for its violation, *Marbury* alone does not provide a secure foundation for such a right. His compelling narrative notwithstanding, Marshall's conclusion that Marbury was entitled to his writ of mandamus, and thus to his judgeship, was not, as many commentators have pointed out, a "holding" arrived at by the *Marbury* opinion.[29] Because it was withdrawn by the failure of Supreme Court jurisdiction, the mandamus order was never granted, leaving its legal force at least somewhat diminished.

More importantly, Marbury's right to sue for his writ, because it was granted by Congress's adoption of the common law, in no way stands for a right of judicial access drawn from the Constitution itself. And finally, it is very likely that Marbury's suit did not seek to enforce a constitutional right at all. Though the matter is not entirely clear, Part I of Marshall's opinion asserts that Marbury's right to become a federal judge derived from "acts of congress [sic] and the general principles of law."[30] *Marbury*, then, was not itself a suit that directly tested whether the Constitution confers a right to sue for its violation. At most, Marshall's Part I opinion tells a convincing story about how such a suit ought to fare, or perhaps, how we wish it might fare.

Our subsequent constitutional history, perhaps surprisingly, has not satisfactorily resolved the question. The *Marbury* story still resonates,

28. *See* U.S. CONST. art. VI, cl. 2.; McCulloch v. Maryland, 17 U.S. 316, 377 (1819) ("[T]he constitution acts directly on the people, by means of powers communicated directly from the people. . . . It springs from the people, precisely as the state constitution springs from the people, and acts on them in a similar manner."); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 780 (1995).

29. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803); *see also*, *e.g.*, Samuel R. Olken, *The Ironies of* Marbury v. Madison *and John Marshall's Judicial Statesmanship,* 37 J. MARSHALL L. REV. 391, 422 (2004); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 6–7 (1969).

30. *Marbury*, 5 U.S. at 170.

probably often unconsciously, in our popular legal imagination. And, in the aftermath of the Civil War, an unprecedented burst of reformist energy from Congress yielded a federal statutory right to sue for redress of constitutional violations resulting from state and local laws, policies, and actions. That right, codified at 42 U.S.C. § 1983, lay largely moribund for nearly a century. But since 1960, § 1983 has been interpreted to authorize a comprehensive array of legal and equitable remedies for unconstitutionally inflicted injuries committed by state and local officers and by city and county governments.[31]

Section 1983 does not, however, authorize suits which either are directly against the states or seek damage remedies payable from state treasuries.[32] Nor is there any federal statutory parallel to § 1983 authorizing analogously comprehensive relief against unconstitutional federal policies or actions.[33] Relief for constitutional violations by the states and by federal officers is nonetheless sometimes granted by the state and federal courts, respectively.[34] But the basis for their authority to do this is surprisingly uncertain, and therefore worryingly unstable. The Supreme Court has never squarely held that the Constitution itself grants a right to sue for its own violation.[35] And seven years ago, albeit in a case involving only statutory rights, the Court appeared to suggest that in the absence of an authorizing statute, access to a judicial remedy for a violation of any source of federal law, including the Constitution, was not a plaintiff's right, but instead was entirely a matter of judicial discretion.

In that case, *Armstrong v. Exceptional Child Center*, the Court unanimously held that the Supremacy Clause does not authorize a claim for relief for violations of federal law.[36] Although the case exclusively concerned federal statutory violations, the holding, and its unanimity, appear to be unqualified, thus perhaps extending to infringements of

31. *See* Monroe v. Pape, 365 U.S. 167, 186 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Owen v. City of Independence, 445 U.S. 622, 623 (1980); Hafer v. Melo, 502 U.S. 21, 28 (1991); Quern v. Jordan, 440 U.S. 332, 338 (1979).

32. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 67–68 (1989).

33. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427–30 (1971) (Black, J., dissenting).

34. *See id.*; Davis v. Passman, 442 U.S. 228, 242 (1979); Carlson v. Green, 446 U.S. 14, 21–22 (1980); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18, 31 (1990); Reich v. Collins, 513 U.S. 106, 109–10 (1994).

35. *Bivens*, *Ex parte Young*, 209 U.S. 123 (1908), and *Reich* come close to granting a right to sue from the Constitution itself, though. *Bivens* holds that a person whose Fourth Amendment rights are violated is entitled to redress his injury through a remedy "normally available in the federal courts." *Bivens*, 403 U.S. at 397. *Young* obligates states to provide a right to challenge state officer action in federal court seeking an injunction. *Young*, 209 U.S. at 168. *Reich* holds that withdrawing a right to sue is unconstitutional. *Reich*, 513 U.S. at 106–07.

36. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015).

constitutional rights as well.[37]

Last December, the Supreme Court appeared to reaffirm the view it expressed in *Armstrong*, this time extending its application to claims seeking remedies for constitutional violations. In *Whole Woman's Health v. Jackson*, the Court denied emergency injunctive relief against state judicial officers from entertaining private suits authorized by a Texas statute against providers of abortion services in direct contravention of *Roe v. Wade*.[38]

The aim of this Article is to suggest that the perspective on constitutional remedies expressed in *Armstrong* and underscored in *Jackson* underestimates the role Marshall's *Marbury* Part I narrative has played in the judicial enforcement of constitutional rights. The Article will not contend that *Marbury*'s implicit endorsement of a self-enforcing Constitution, however embedded it might be in our legal consciousness, is necessarily required by the most accurate reading of our history and law. It will claim, however, that several doctrinal pillars of our current constitutional practice appear to depend on an assumption that a person who is injured by a constitutional violation has a right to sue for judicial relief for that injury. Foremost among these are the officer injunctive relief exception to governmental sovereign immunity rooted in *Ex parte Young* and the *Bivens* damage remedy for some constitutional violations by federal officials.[39] This same assumption also helps to explain the long-recognized obligation of state courts to remedy constitutional violations by their own governments, even, perhaps especially, when the governments are immune from federal court accountability, and the deep reluctance of the Supreme Court to sustain restraints on judicial jurisdiction that would prevent the enforcement of constitutional rights.[40]

If these features of our regime of constitutional adjudication do rely on the proposition that the Constitution entails a right to an adequate remedy for its violation, then the Supreme Court's apparent conclusion to the contrary in *Armstrong* and *Jackson* may threaten their vitality by undermining their coherence. On the other hand, recognition that some venerable premises of our constitutional practice depend on the basic truth of Marshall's *Marbury* story would both bolster the foundation of these practices and enhance their usefulness in protecting constitutional rights.

The remainder of this Article will proceed by first reviewing the Supreme Court's 2015 *Armstrong* decision rejecting the Supremacy Clause as a source of a right to sue and its 2021 decision in *Jackson* denying injunctive relief against a state law in open violation of the

37. *See id.*

38. Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); *see also* Roe v. Wade, 410 U.S. 113 (1973), *as modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

39. *See Young*, 209 U.S. at 159; *Bivens,* 403 U.S. at 395–96; *Reich*, 513 U.S. at 109–10.

40. *See McKesson Corp.*, 496 U.S. at 39.

Constitution. This review will be followed by an offer of the evidence that the doctrinal pillars mentioned above—*Young*, *Bivens*, the state court duty to remedy state constitutional violations, and the presumption against legislative withdrawals of constitutional jurisdiction—depend on the contrary assumption that the Constitution does entail a right to sue for its violation. Finally, this Article will conclude by suggesting some ways in which recognition of this dependence might fortify judicial vindication of constitutional rights. If judges are more confident in a conviction that Marshall's *Marbury* story is essentially correct, the rule of law under our Constitution will similarly become more secure.

I. *ARMSTRONG*'S AND *JACKSON*'S UNDERSTANDING OF CONSTITUTIONAL REMEDIES AS ROOTED EXCLUSIVELY IN THE COMMON LAW

A. Armstrong*'s Rejection of the Supremacy Clause as a Source of a Right to Sue*

Armstrong was a suit by service providers under the Medicaid program to enjoin Idaho State Officials to reimburse them at rates authorized by the federal Medicaid statute.[41] The Medicaid program provides federal funds to the states to provide health care to indigent people.[42] In order to secure Medicaid funds, states must agree to spend them in accordance with conditions imposed by federal law.[43] The question raised by the Idaho providers' suit was whether any source of federal law authorized a federal court to adjudicate their claim for injunctive relief.[44]

The rights the providers sought to enforce in *Armstrong* were, as Marbury's likely were as well, wholly statutory, and thus within Congress's plenary remedial control.[45] *Armstrong* thus did not, at least not directly, address a right to sue for constitutional violations at all. Nevertheless, both the plurality and dissenting opinions adopted a view of the Constitution's Supremacy Clause that casts significant doubt on whether the current Supreme Court would recognize such a right.[46]

The legal standards governing the Medicaid program are enforceable through two avenues besides private suits for injunctive relief. First, whenever the federal department that administers the program, in this case the Department of Health and Human Services, adopts regulations to carry it out, affected parties may seek judicial review of these regulations under

41. *Armstrong*, 575 U.S. at 322–24.

42. 42 U.S.C. § 1396.

43. *Armstrong*, 575 U.S. at 323.

44. *Id.* at 322.

45. *Id.* at 323.

46. *Id.* at 327–29; *id.* at 338–39 (Sotomayor, J., dissenting).

the Administrative Procedure Act.[47] Second, whenever a state fails to follow relevant federal requirements, such as the rate standards at issue in *Armstrong*, the Secretary of Health and Human Services is authorized to withhold the state's Medicaid funding.[48]

In addition, as noted in the Introduction to this Article, violations of federal statutory rights by state actors can be actionable under 42 U.S.C. § 1983.[49] The Supreme Court has held that some requirements imposed on states under the federal Social Security Act are enforceable through § 1983.[50] But none of these holdings are at all recent, and their applications have been significantly limited by subsequent decisions.[51] No Justice in *Armstrong* suggested that the case could have proceeded under § 1983.

The *Armstrong* plurality opinion by Justice Scalia held that the Idaho providers' suit was not authorized by the Medicaid statute itself, either.[52] Obviously, the statute included no right to sue provision available to the providers. And its indirect conferral of rights on Medicaid providers (the Medicaid statute's requirements take the form of directives to the Secretary of Health and Human Services[53]) precluded a finding that the statute granted them an implied right to sue. Finally, Congress's designation of the fund withholding remedy as the only way for the Secretary to enforce the "judgment-laden" reimbursement rate standard showed that Congress wanted to make that agency remedy exclusive.[54]

The four dissenters, spoken for by Justice Sotomayor, disagreed only on the plurality's final point. Justice Sotomayor argued that the fund withholding regime did not displace what she identified as the traditional equitable authority of the federal courts to restrain state official actions which conflict with the substantive requirements of federal law.[55]

The *Armstrong* service providers did not rely only on the Medicaid statute as a source of authority for their right to sue. They argued further that the Supremacy Clause of the Constitution grants anyone harmed by a violation of federal statutory law by a state government officer a right to seek injunctive relief for that violation.[56] There is no doubt that the "and

47. *Id.* at 323–24 (plurality opinion).

48. *See* 42 U.S.C. § 1396.

49. *See supra* note 30 and accompanying text.

50. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 420–22 (1970); Maine v. Thiboutot, 448 U.S. 1, 10–11 (1980).

51. Recent decisions have rejected using this avenue, though. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119–21 (2005).

52. *Armstrong*, 575 U.S. at 328.

53. *Id.* at 331.

54. *Id.* at 336 (Breyer, J., concurring).

55. *Id.* at 336–37 (Sotomayor, J., dissenting).

56. *Id.* at 324 (plurality opinion).

the laws" portion of the Supremacy Clause applies with equal force to both statutory and constitutional rights. But if the rights conferred by federal statutes are created by, and thus within the plenary control of, Congress, it is hard to see how this argument could help the providers' position. To recognize Medicaid rights, and the remedies by which these rights are to be enforced, as the supreme law of the land, is to endow everything Congress has enacted in the Medicaid statute, including the statute's limitations, with that supremacy. The remedies available for *statutory* violations under the Supremacy Clause are just those provided for, either expressly or impliedly, by federal statute. This Article argues that the Constitution's supremacy as law has properly been understood differently when remedies for constitutional violations are at stake. But if the Medicaid statute did not authorize the *Armstrong* providers' suit, the supremacy of federal statutory law only underscores that failure. The providers' contrary contention would mean that, at least in the absence of Congressional prohibition, every standard established by federal law effectively presumes a right to sue for injunctive relief against its violation.

Both the plurality opinion by Justice Scalia and Justice Sotomayor's dissent apparently read the providers' Supremacy Clause argument as authorizing only efforts to enjoin state actions that are inconsistent with federal statutory law.[57] But neither opinion explains why a presumption that authorizes injunctive relief in these statutory preemption actions would not also apply to suits seeking similar relief against federal or private defendants who fail to comply with federal statutory requirements. Such a presumption is at odds both with the principles of "arising under" jurisdiction conferred by 28 U.S.C. § 1331 and with seemingly settled limits on the availability of implied private rights of action to enforce federal statutes.

The *Armstrong* Justices, plurality and dissenters alike, rejected the providers' Supremacy Clause argument. But rather than declare that the supremacy of federal law reinforces the exclusivity of statutory remedies for statutory violations, all the Justices appeared instead to agree that the Supremacy Clause operates only as a "rule of decision" and never confers a right to sue.[58] This understanding may in turn imply that federal court remedies, even for constitutional violations, may similarly be limited to those fashioned or authorized by Congress. Per Justice Scalia's plurality opinion:

> It is apparent that this clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land". . . . It is equally apparent that the Supremacy Clause is not the "source of any federal rights," and

57. *Id.* at 340 (Sotomayor, J., dissenting); *id.* at 326 (plurality opinion).

58. *Id.* at 324 (plurality opinion); *id.* at 339 (Sotomayor, J., dissenting).

> certainly does not create a cause of action. It . . . is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.[59]

Justice Sotomayor's dissent appeared to accept this characterization of the Supremacy Clause, albeit grudgingly perhaps, and not without nuance. She concurred that "the Court is correct that it is somewhat misleading to speak of 'an implied right of action contained in the Supremacy Clause.'"[60] But in the same breath, she added that "that does not mean that parties may not enforce the Supremacy Clause by bringing suit to enjoin preempted state action."[61] With respect to unconstitutional state action, Justice Sotomayor was even more emphatic: "That parties may call upon the federal courts to enjoin unconstitutional government action is not subject to serious dispute. . . . [W]e have characterized 'the availability of prospective relief of [this] sort' . . . as giving 'life to the Supremacy Clause.'"[62]

But like the plurality, and Justice Breyer in concurrence, Justice Sotomayor ultimately explained the Court's history of enjoining illegal government action as an exercise of discretionary equitable power, derived from our common law history and subject to complete displacement by Congress.[63] Her disagreement with the plurality rested only on her conclusion that the enforcement scheme established by Congress for the Medicaid program did not displace this equitable power.[64]

Justice Scalia made only a passing reference to *Young*, the foundational Supreme Court decision recognizing the power—and, perhaps, the duty—of federal courts to enjoin unconstitutional government action, notwithstanding the immunities enjoyed by the government entities and officers carrying out that action.[65] And that reference made no mention of the fact that *Young* protected constitutional, as opposed to merely statutory, rights.[66] Justice Breyer's concurrence relied entirely on previous cases involving statutory rights with no mention of *Young* at all.[67] It is, perhaps ironically, Justice Sotomayor's unsuccessful effort to apply *Young* that places the Supremacy Clause's authorization of a right to sue for constitutional violations in the most jeopardy. Her emphasis on the proposition that the federal courts are

59. *Armstrong*, 575 U.S. at 324–25 (citation omitted).
60. *Id.* at 339 (Sotomayor, J., dissenting).
61. *Id.*
62. *Id.* at 337–39 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).
63. *Id.* at 342; *id.* at 346 (Sotomayor, J., dissenting).
64. *Id.* at 346 (Sotomayor, J., dissenting).
65. *Id.* at 326–27 (plurality opinion); *Ex parte* Young, 209 U.S. 123 (1908).
66. *Id.* at 340 (Sotomayor, J., dissenting).
67. *Id.* at 333–36 (Breyer, J., concurring).

empowered to enjoin unconstitutional governmental action relied squarely on *Young* as the "most famous exposition of this principle."[68] She then accused the *Armstrong* majority of "threaten[ing] the vitality of our *Ex parte Young* jurisprudence."[69] But by conceding that the same majority had correctly identified the roots of *Young* as deriving from the common law rather than the Constitution, she acceded, perhaps inadvertently, to Congress's ultimate plenary control over the judicial remedies available even for violations of constitutional rights, and thus to the ultimately contingent character of these remedies.

B. Jackson*'s Rejection of a Constitutional Right to an Adequate Remedy for a Constitutional Violation*

The contingency of constitutional remedies implied by *Armstrong* became explicit in the Supreme Court's December 2021 decision in *Whole Woman's Health v. Jackson*.[70] *Jackson* involved Texas's now notorious statutory scheme aimed at evading the requirements of the Court's decision protecting women's constitutional right to seek abortion services. The Texas statute prohibited physicians from performing or inducing an abortion if they detected a fetal heartbeat. This prohibition was in direct contravention of the Supreme Court's interpretation of the Constitution to protect prevention abortion rights in *Roe v. Wade,*[71] *Planned Parenthood v. Casey*,[72] and *Whole Woman's Health v. Hellerstadt*.[73] Texas opted to enforce this abridgment of women's constitutional rights by authorizing private individuals to bring civil actions for injunctive relief, substantial statutory damage awards, and attorney's fees against abortion providers. The Texas statute permitted providers to raise their constitutional rights only in defense to these civil actions.[74]

In response to a federal court suit by Texas abortion providers against a Texas state court judge and court clerk, as representatives of similarly situated classes of defendants, the Supreme Court, by a 5–4 vote, affirmed the Fifth Circuit's reversal of a district court judge's award of preliminary injunctive relief against any action to enforce the statute.[75] Justice Gorsuch's opinion for the Court held that the injunction was barred by the sovereign immunity of the states from federal court suits, even those

68. *Id.* at 337 (Sotomayor, J., dissenting).

69. *Id.* at 341.

70. Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

71. Roe v. Wade, 410 U.S. 113 (1973), *as modified by by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

72. *Casey*, 505 U.S. 833.

73. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016). 74.

TEX. HEALTH & SAFETY CODE ANN. § 171.209(f) (West 2021).

75. Jackson, 142 S. Ct. at 532; *see also*, Whole Woman's Health v. Jackson, 13 F.4th 434 (5th Cir. 2021).

seeking to enforce constitutional rights.[76] Justice Gorsuch saw the providers' suit as falling outside *Ex parte Young*'s authorization of federal court injunctive relief against state officers' enforcement of unconstitutional state policies because the enjoined Texas defendants were judicial rather than executive officers.[77] For Justice Gorsuch, *Young* recognized only "a narrow exception" to sovereign immunity, grounded in "traditional equity practice.[78] So limited, *Young* did "not normally permit federal courts to issue injunctions against state-court judges or clerks."[79] Under *Young*, Justice Gorsuch claimed, such an injunction "would be a violation of the whole scheme of our Government."[80]

Justice Gorsuch's opinion omitted *Young*'s approval of federal court injunctions against state court proceedings

> brought to enforce an alleged unconstitutional state statute, after the unconstitutionality thereof has become the subject of inquiry in a suit pending in a Federal court which has first obtained jurisdiction thereover . . . . [U]nder such circumstances, the federal court has the right in both civil and criminal cases to hold and maintain such jurisdiction to the exclusion of all other courts.[81]

Nor did he mention the Supreme Court's subsequent application of this principle to justify federal injunctive relief against state judicial officers in order to protect constitutional rights.[82]

More fundamentally, though, Justice Gorsuch's identification of *Young* as having only common law rather than constitutional roots allowed him to avoid addressing the question whether the injunction at issue in *Jackson* was necessary to protect the plaintiffs from unconstitutional injury. Had the *Jackson* majority considered itself obligated to address this question, it would have been hard pressed to ignore the practical impact of the Texas enforcement scheme on Texas women's constitutional rights.

Justice Sotomayor's dissent emphasized the chilling purpose and impact of Texas's enforcement design on abortion providers' ability to provide constitutionally protected services.[83] Contrary to her apparent view in *Armstrong*, Justice Sotomayor also now saw the relief required by *Young* to derive from the Constitution itself, not just the common law's

76. Jackson, 142 S. Ct. at 532 (2021).

77. *Id.*

78. *Id.* at 531.

79. *Id.* at 532.

80. *Id.* (quoting *Ex parte* Young, 209 U.S. 123, 163 (1908)).

81. *Young*, 209 U.S. at 125.

82. Mitchum v. Foster, 407 U.S. 225, 228–29 (1972)*;* Pulliam v. Allen, 466 U.S. 522, 523 (1984).

83. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in part and dissenting in part).

equitable tradition:

> Like the stockholders in *Young*, abortion providers face calamitous liability from a facially unconstitutional law. To be clear, the threat is not just the possibility of money judgments; it is also that, win or lose, providers may be forced to defend themselves against countless suits, all across the State, without any prospect of recovery for their losses or expenses. Here, as in *Young*, the "practical effect of [these] coercive penalties for noncompliance" is "to foreclose all access to the courts," "a constitutionally intolerable choice."[84]

Chief Justice Roberts also dissented in part. His opinion emphasized that "court clerks who issue citations and docket [such] cases are unavoidably enlisted in the scheme to enforce [Texas's] unconstitutional provisions."[85] Like Justice Sotomayor, Roberts pointed to *Young*'s constitutional roots, quoting its condemnation of state authorization of "harass[ment] . . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment."[86]

Chief Justice Roberts also recognized the role of *Marbury v. Madison* itself in shaping our understanding of the obligation of the judicial branch to enforce the Constitution: After observing that "[t]he clear purpose and actual effect of [Texas's law] has been to nullify this Court's rulings,"[87] the Chief Justice channeled Chief Justice Marshall's venerable justification for judicial review: "It is, however, a basic principle that the Constitution is the 'fundamental and paramount law of the nation,' and '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[88]

C. *The Inadequacy of the Common Law Explanation for Constitutional Remedies*

The *Armstrong* Court was no doubt correct in seeing the power of courts to enjoin unlawful executive action as "exceedingly well established"[89] by "a long history of judicial review."[90] But, as the recent *Jackson* decision shows, to rely exclusively on common law history as the basis for the judicial power to remedy unconstitutional government conduct does not adequately explain or justify this power. First, such reliance is in some tension with our now well-established post-*Erie* tradition of limited federal court authority to fashion federal common law.

84. *Id*. at 547–48 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994)).

85. *Id*. at 544 (Roberts, J., concurring in part and dissenting in part).

86. *Id*. (quoting Young, 209 U.S. at 160).

87. *Id*. at 545 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

88. *Id.* (alteration in original).

89. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 337 (Sotomayor, J., dissenting).

90. *Id.* at 327 (plurality opinion).

To be sure, the Supreme Court has recognized such a power in the face of congressional silence when important federal interests are at stake.[91] On the other hand, some of the Justices have recently expressed skepticism about the federal courts' authority in the absence of a statute to "assume[] common-law powers to create causes of action" because of "the mere existence of a . . . constitutional prohibition."[92]

More importantly, there is ample evidence in our history of an assumption by the Supreme Court that the Constitution itself, most likely—though probably not solely—through the Supremacy Clause, confers a right to sue for its own violation. The Court's establishment of several doctrines protecting access to constitutional remedies appears to depend on such an assumption. The first of these is the "*Ex parte Young* jurisprudence" to which Justice Sotomayor referred in her *Armstrong* dissent,[93] at issue in both *Armstrong* and *Jackson,* to which this Article now turns.

II. THE CONSTITUTIONAL ROOTS OF THE *EX PARTE YOUNG* REMEDY

The Supreme Court's landmark 1908 decision in *Ex parte Young*[94] defies easy explanation. There is no doubt that the key proposition for which it is taken to stand, the power of federal courts to enjoin the enforcement of unconstitutional state policies—notwithstanding the apparently contrary prohibition of the Eleventh Amendment—is crucial to the practical enforcement of constitutional rights.[95] At the same time, it is hard to know what to make of a foundational case that appears to rest on a legal fiction, to be a product of a now discredited First Gilded Age view of the Constitution, to depend on an internally contradictory understanding of what counts as state action under the Fourteenth Amendment, and to be easily explicable, in contemporary terms, on grounds far less dramatic than its pathbreaking significance would suggest.

On the merits, *Young* is a substantive due process relic of the *Lochner*[96] era. A powerful railroad challenged a populist state statute limiting the rates it could charge as an unconstitutional restraint on its economic liberty.[97] The railroad's claim was credible only because of the Supreme Court's late nineteenth-century transformation of the Fourteenth Amendment from a guarantor of the legal and political equality of African

91. *Id.* at 331.

92. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

93. *Armstrong*, 575 U.S. at 341 (Sotomayor, J., dissenting).

94. *Ex parte* Young, 209 U.S. 123 (1908).

95. *Id.* The Supreme Court allowed for suits in federal courts for injunctions against an official acting on behalf of a state to proceed despite the State's sovereign immunity when the State officer acts contrary to federal law or to the Constitution. *Id.* at 142–45.

96. Lochner v. New York, 198 U.S. 45 (1905).

97. *Young*, 209 U.S. at 127–28.

Americans to a protector of corporate economic power.[98] The liberty protected by the Fourteenth Amendment had come to be defined through the laws of the Social Darwinist economic doctrines called for by, as Justice Holmes aptly put it, "Mr. Herbert Spencer's Social Statics."[99]

The sole obstacle to the railroad's success in a Supreme Court in thrall to laissez-faire was that it sought to use the Constitution as a sword to enjoin implementation of the rate statute, rather than just as a shield to protect it against criminal prosecution or other state enforcement measures. This offensive deployment of constitutional liberty rights seemed to be barred by the 1890 decision in *Hans v. Louisiana.*[100] In *Hans*, the Court had read the Eleventh Amendment to preclude the federal courts from exercising jurisdiction over any suits, including those claiming violations of constitutional rights, seeking relief against the states.[101]

The Supreme Court's solution was the famous "*Young* fiction": although the railroad's challenge, as in *Hans*, sought a judicial remedy for injuries caused by an alleged unconstitutional state policy, the Court held that it was not really a suit against the state in violation of the teaching of *Hans*.[102] Justice Peckham's opinion reasoned that if the rate statute really was unconstitutional, any state officer charged with enforcing it thereby forfeited their official authority to do so.[103] This fiction led to the strange conclusion that even though the Fourteenth Amendment prohibits unconstitutional actions only if they are engaged in by the states,[104] the railroad's suit to enforce that prohibition sought to enjoin a state officer as if he were a private party, and thus did not seek relief against the state itself. However mind-numbing it may sound a century later, Peckham's dodge elegantly solved the railroad's Eleventh Amendment problem. Its suit to enjoin unconstitutional state action as a violation of the Fourteenth Amendment was no longer a suit against the state for purposes of the ban on adjudicating such suits imposed by the Eleventh Amendment.

Beyond this murky pedigree, *Young*'s foundational stature in the law of constitutional remedies has been diminished at least somewhat by the emergence of a convincing alternative explanation for its outcome. Beginning with *Monroe v. Pape* in 1960, Supreme Court interpretations of 42 U.S.C. § 1983 have revolutionized our understanding of the remedies Congress has provided for unconstitutional injuries caused by

98. *See generally* Larry Yackle, *Young Again*, 35 U. HAW. L. REV. 51 (2013); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

99. *Lochner*, 198 U.S. at 75.

100. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

101. *Id.* at 16–17.

102. *Young*, 209 U.S. at 159–60.

103. *Id.* at 157–60.

104. *Id.* at 159–60.

state policies and actors.[105] Under this revised understanding, the railroad plaintiff in *Young* could, without resort to any legal fictions, sue the enforcing state officer in either federal or state court for either damages or injunctive relief under the authority of 42 U.S.C. § 1983.[106] Such a suit would be one against a "person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution."[107] Seen retroactively, through the lens provided by this contemporary reading of § 1983, *Young*'s force might be fairly easily blunted, at least by anyone inclined to do so.[108] If the *Young* remedy for Fourteenth Amendment violations was in fact authorized by a federal statute available to the Court when the case was decided, perhaps the case should now be read as nothing more than an example of that authority.

Despite its arguably unsavory origins, and the alternative § 1983 justification for its outcome, *Young* continues to carry iconic status in our law of constitutional remedies.[109] The question is why. The plurality opinion in *Armstrong* suggests that the origins of *Young* lie purely in the English common law tradition of discretionary equitable remedies against public officers, which became part of the received heritage of the American legal system.[110] If this is true, the *Young* remedy, like all common law doctrines, abides only as long as it is not altered or withdrawn by Congress.[111] This is apparently the teaching of the unanimous *Armstrong* court, and insofar as its applies to remedies for violations of statutory rights, it seems unassailable. But *Young* matters because of the route it opened to the enforcement of constitutional rights.

105. *See* Monroe v. Pape, 365 U.S. 167 (1961), *partially overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see also* Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737 (1991).

106. *See Monroe,* 365 U.S. at 159–60 (authorizing § 1983 suits against state and local government officers even if conduct was unauthorized by state law); Hafer v. Melo, 502 U.S. 21, 31 (1991) (holding that state officers may be held liable for damages under § 1983 for actions taken in their official capacities); Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, n.10 (1989) (confirming that state officers sued for injunctive relief in their official capacity are considered persons under § 1983).

107. 42 U.S.C. § 1983.

108. It must be acknowledged that the late twentieth-century Supreme Court's revival of § 1983 was significantly influenced by an understanding of the liability of states and state officers to restraint by federal law that was powerfully shaped by *Young*. *See* Quern v. Jordan, 440 U.S. 332 (1979); *Will*, 491 U.S. 58; Edelman v. Jordan, 415 U.S. 651 (1974); Green v. Mansour, 474 U.S. 64 (1985); *Hafer*, 502 U.S. 21.

109. *See generally Ex Parte Young Symposium: A Centennial Recognition,* 40 U. TOL. L. REV. 819 (2009); David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011); John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008).

110. *Armstrong*, 575 U.S. 320 at 326.

111. *Id.* at 324–25.

And the *Young* opinion appears to reflect an understanding that these rights create judicial obligations beyond the exercise of traditional equitable discretion.

To be sure, the *Young* opinion repeatedly acknowledged that the injunction at issue was issued against a state officer by a "[f]ederal court of equity," and that the question before it was whether such a court of equity had jurisdiction in the case.[112] Nevertheless, the opinion's emphasis from the outset was on the injury to the railroad's constitutional rights, inflicted both by the rate statute and, just as important, by the methods chosen by the state to enforce it.

The opinion opened by presenting the dilemma the statute forced on the railroad by calling for prosecution of any of its employees who might violate it.[113] The only method authorized by the state to challenge the statute's constitutionality was for the railroad to direct its employees to flout the rate limit and run the risk of imprisonment.[114] Completely aside from the constitutionality of the rate statute itself, this Sword of Damocles method of enforcement had "the necessary effect" of "preclud[ing] a resort to the courts . . . for the purpose of testing its validity."[115] This preclusion of an unfettered path to a judicial remedy for a possible constitutional violation was itself "unconstitutional on [its] face."[116] The similarity to the enforcement scheme authorized by Texas, and sustained by the Court in *Whole Woman's Health v. Jackson*,[117] could hardly be more striking.

The *Young* opinion's opening focus on the unconstitutionality of the state's enforcement scheme is significant in two respects. First, it suggests that the states are obliged by the Constitution itself to provide adequate remedies for their own potential constitutional violations, including, where necessary, a right to sue in their own courts. Second, it is the absence of a constitutionally adequate state law remedial scheme that justifies the intervention of a federal court to protect the due process rights of an injured plaintiff.

When the *Young* opinion turned to the authority of a federal court to hear the railroad's challenge to the rate regulation itself, it is again the constitutional character of the challenge that warrants setting aside the Eleventh Amendment prohibition of suits against states:

> [We] must give to the [Eleventh] Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any

112. *Ex parte* Young, 209 U.S. 123, 149 (1908).
113. *Id.* at 126–27.
114. *Id.*
115. *Id.* at 146.
116. *Id.* at 148.
117. *See* discussion *supra* Section I.B.

> more narrow than the language, fairly interpreted, would warrant. . . .
>
> . . . [W]e have ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings . . . to enforce against parties affect[ing] an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[118]

So, while the suit sought equitable relief against a state officer, it was the alleged unconstitutionality of the state statute the officer was charged to enforce that overcame the constitutional defense the Eleventh Amendment would otherwise have afforded.

Finally, the opinion pointed to the uncontested availability of federal habeas corpus relief against unconstitutional state imprisonment.[119] Although the "[p]rivilege of the Writ of Habeas Corpus"[120] is protected against abridgment by the Constitution, the right to sue for habeas relief in federal court was established, as the opinion acknowledged, by federal statute.[121] If the habeas analogy is helpful to the *Young* opinion's assertion of authority to enjoin the rate statute, an authority which at the time could claim no statutory support, the reason is that both remedies are deployed to enforce constitutional rights.[122] As the opinion made clear, they each derive from the "supreme authority [of the United States], which arises from the specific provisions of the Constitution itself."[123]

The constitutional roots of the right to sue in *Young* are confirmed by its later elaboration, and limitation, in *Edelman v. Jordan*.[124] The *Edelman* litigation sought to expand *Young*'s authorization of injunctive relief to encompass claims for damages payable from state treasuries as well, effectively overruling *Hans*.[125] The federal rights at stake in *Edelman* were purely statutory, conferred by since-repealed provisions of the 1935 Social Security Act.[126] These provisions offered federal support, conditioned on compliance with federally mandated conditions, to state programs of financial assistance to impoverished, aged, blind, and disabled people.[127] The Court had previously determined that suits to enforce conditions imposed on states by their acceptance of federal funds under this program were included within the 42 U.S.C. § 1983 right of

118. *Young*, 209 U.S. at 150–56.
119. *Id.* at 167–68.
120. U.S. CONST. art. I, § 9, cl. 2.
121. *Young*, 209 U.S. at 167–68.
122. *Id.* at 191.
123. *Id.* at 167.
124. Edelman v. Jordan, 415 U.S. 651 (1974).
125. *Id.* at 663–64.
126. *Id.* at 653–54.
127. *Id.*

action against state officers for violations of the laws of the United States.[128] The question presented by *Edelman* was whether the state sovereign immunity protected by the Eleventh Amendment precluded damage awards against state officers for violating the Social Security Act, if the damages were ultimately paid by the states themselves.[129]

By a five to four margin, the Court held that the *Young* remedy was limited to claims seeking injunctive relief, and that the Eleventh Amendment continued to bar damage remedies against state governments.[130] Explaining this distinction, the *Edelman* majority described the rationale for the claim for relief in *Young* in purely constitutional terms:

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.[131]

To serve dependably as a sword, the Constitution must have the capacity to be unsheathed, regardless of whether a statute or the common law authorizes the sword to be drawn. Hence, the *Edelman* majority opinion included no reference to the historical availability of equitable remedies against public officials, or to § 1983 as the legitimizing source of judicial remedies for constitutional violations. The only limitation to the force of the constitutional sword confirmed by *Edelman* is the textual demand to preserve the meaning of a competing constitutional value, the principle of state sovereignty recognized by the Eleventh Amendment. As a matter of constitutional *realpolitik*, once it is clear that the protection of constitutional rights is assured by a claim for injunctive relief for their violation, an extension of that claim to permit a damage remedy against states as well "would appear . . . to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."[132]

The Constitution as our supreme law thus plays a major explanatory role in the Supreme Court's balancing of the enforceability of constitutional rights against the immunity from federal court suits enjoyed by the states. To be sure, it remains possible, at least technically, to identify the right to sue for relief from a constitutional violation authorized

128. *Id.* at 674–75; Rosado v. Wyman, 397 U.S. 397, 426 (1970).

129. *Edelman*, 415 U.S. at 663–64.

130. *Id.* at 651–52.

131. *Id.* at 664.

132. *Id.* at 664–65 (quoting Rothstein v. Wyman, 467 F.2d 226, 237 (2d Cir. 1972)).

by *Young* and confirmed by *Edelman* as deriving from the common law or a federal statute—§ 1983. But it is much harder to explain the rationale for these foundational cases in a way that does not depend on the existence of a right, granted by the Constitution itself, to seek judicial relief for its violation.

III. THE RISE, AND NEARLY COMPLETE DEMISE, OF *BIVENS* DAMAGE CLAIMS BASED ON THE CONSTITUTION

If the injunctive relief claim authorized by *Young* may, despite its constitutional rationale, find roots in the equity traditions of common law, the damage remedy for constitutional violations by federal officers inaugurated by the landmark *Bivens v. Six Unknown Named Agents*[133] case does not. Before the Supreme Court decided *Bivens* in 1971, it had authorized claims for injunctive relief against the unconstitutional actions of federal officers, albeit with sparse explanation.[134] Long before the *Young* remedy was limited in *Edelman*, the Court had also held this authorization inapplicable to officer suits seeking to recover money or property from the federal government in the absence of an act of Congress.[135] Dissenting from one of these holdings, Justice Frankfurter pointedly rued the dubious legal status of the federal government's sovereign immunity:[136]

> [A] steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. . . . In varying degrees, at different times, the . . . historic doctrine is . . . deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice.[137]

Notwithstanding Justice Frankfurter's doubts, the Supreme Court has uniformly seen the Constitution's conferral on Congress of exclusive power over federal expenditures as precluding damage awards payable from the federal treasury without federal statutory authorization.[138] Rooted in the separation of national governmental power, this immunity affords the federal government a constitutionally based defense—even to constitutional claims—that is analogous to, and most likely even stronger than, the protection of the states from federal court suits recognized by the Eleventh Amendment.

133. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

134. *See* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682 (1949).

135. *Id.* at 686–89.

136. *Id.* at 709 (Frankfurter, J., dissenting).

137. *Id.* at 708–09.

138. U.S. CONST. art. I, § 8 (defining Congress's spending powers).

In seeking a damage remedy against the federal narcotics officers—as opposed to the government itself—who had searched his home and arrested him in violation of the Fourth Amendment, Bivens also faced the possibility that judicial power to award monetary relief against these officers would be dependent on a right to claim such relief granted either by a federal statute or by state law.[139] Hence, the position of the Justice Department charged with defending the officers who victimized Bivens was that his remedy lay in a state law tort claim against the officers, which could then be removed to a federal district court.[140] If their actions were indeed unconstitutional, the officers' pre-emption defense against the state lawsuit would fail and Bivens could accordingly be made whole.[141]

In a similar vein, Justice Black, dissenting in *Bivens*, argued that suits against federal officers, even for constitutional violations, can proceed only when authorized by federal or state statute:

> [T]he point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating . . . a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.[142]

Justice Black's argument evidently rested on the proposition that Congress's presumed plenary control over federal court jurisdiction entails the (lesser included) power to determine the sources of law from which judicial relief could be claimed.[143] In support of this position, Justice Black pointed to 42 U.S.C. § 1983:

> There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against state officials acting under color of state law, it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties.[144]

In its pathbreaking holding in *Bivens*, the Court rejected Justice Black's contention that only Congress may authorize suits to remedy

139. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

140. *Id.* at 390.

141. *Id.* at 392–94.

142. *Id.* at 428 (Black, J., dissenting).

143. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850). *See generally Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868); Bell v. Hood, 327 U.S. 678, 685–86 (1946).

144. *Bivens*, 403 U.S. at 427–28 (Black, J., dissenting) (footnote omitted).

constitutional violations.[145] But why? If *Young* and its application to claims for injunctive relief against federal officers were grounded solely in the common law equitable tradition, it would be of no use to Bivens since that tradition did not extend to the provision of damage remedies against public officials.[146] A more promising lesson from *Young*, for the purpose of supporting a more generalized authority for constitutional remedies, might be drawn from Justice Peckham's holding that a state's failure to provide unfettered access to judicial relief from an unconstitutional policy was a separate and independent constitutional violation from the one caused by the policy itself.[147] If the states, under full governance by the Constitution only since the post-Civil War Amendments, were obligated to assure access to judicial review of the constitutionality of their laws and policies, surely so was the national government, whose sovereignty had been both authorized and limited by the original Constitution since 1787, and further constrained by the Bill of Rights since 1791.

Both Justice Brennan's majority opinion in *Bivens* and Justice Harlan's concurrence indeed did rely on the constitutional sources of *Young*. Justice Brennan's opinion for the court began by citing *Bell v. Hood* for the proposition that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[148] Brennan did not here directly suggest any particular solicitude for constitutionally protected rights, and, like the passage he quoted from *Bell*, he was biblically vague about the origins of the power he sought to defend. "From the beginning" neither needs nor can claim any more ultimate source of support.

Brennan's opinion then offered the unhelpful observation, again from *Bell*, that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[149] Obviously, as Justice Black pointed out, the problem facing the *Bivens* Court was that, beyond 28 U.S.C. § 1331, authorizing federal district court jurisdiction over cases "arising under" federal law, which does not itself confer a right to sue,[150] *Bivens* could point to no such

145. *Id.* at 396–97 (majority opinion).

146. *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1988); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 190 (2d ed. 1988).

147. *Ex parte* Young, 209 U.S. 123, 146–48 (1908); *see also supra* notes 112–23 and accompanying text.

148. *Bivens*, 403 U.S. at 392 (quoting *Bell*, 327 U.S. at 684).

149. *Id.* at 396 (quoting *Bell*, 327 U.S. at 684).

150. 28 U.S.C. § 1331; *see also* Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 214–15 (1921) (Holmes, J., dissenting); Macon Grocery Co. v. Atl. Coast Line R.R., 215 U.S. 501, 506–07 (1910); Shulthis v. McDougal, 225 U.S. 561, 570 (1912).

statute. Still, *Bell* was itself a case that drew no authority from a claim-authorizing statute. In *Bell*, the Court held that the federal district courts could exercise § 1331 jurisdiction over claims for damages against federal officers for violations of the Fourth and Fifth Amendments, but did not decide whether the Constitution alone could authorize relief for such claims.[151] The Court's opinion, perhaps ironically in light of his position in *Bivens*, was by Justice Black.[152] It was premised largely on the Court's "established practice . . . to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the [Fourteenth] Amendment forbids the state to do."[153] If this "established practice" justifies damage awards against these officers as well, it is obviously not because of something unique or exclusive about jurisdiction to award equitable relief. The justification lies instead in the more general power to protect legal rights, including in both *Bell* and *Bivens*, "rights safeguarded by the Constitution."[154]

Justice Brennan eventually focused specifically on the constitutional character of Bivens' claim. After pointing out that state law can neither authorize federal agents to violate the Fourth Amendment nor limit the exercise of federal authority,[155] he emphasized that, lawfully, "[t]he inevitable consequence of this dual limitation on state power is that the federal question [whether Bivens' Fourth Amendment rights were violated] becomes . . . an independent claim both necessary and sufficient to make out the plaintiff's cause of action."[156]

After next examining the relationship between the respective roles of the federal courts and Congress in fashioning remedies for constitutional violations,[157] Justice Brennan held that Bivens had indeed made out such a *separate and independent claim*.[158] His opinion then concluded by appropriately pointing to Marshall's *Marbury* narrative: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[159] For Justice Brennan, it is the status of the Constitution as supreme law, paired with the general judicial power to remedy violations of that law, that does the work in *Bivens*. The equitable relief authorized by *Young* is simply one example of this general power, as opposed to the historically unique and limited exception portrayed in *Armstrong* and *Jackson*.

151. *See Bell,* 327 U.S. at 684.
152. *Id.* at 678.
153. *Id.* at 684 (footnote omitted).
154. *Id.*
155. *Bivens*, 403 U.S. at 395.
156. *Id.*
157. *Id.* at 396–97.
158. *Id.* at 397.
159. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

Justice Harlan's concurring opinion in *Bivens* was, if anything, more explicit than Justice Brennan's about the constitutional basis for the right to sue established by the decision. Justice Harlan opened with the following eloquent statement of the question:

> I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not entirely free of ambiguity, I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R. Co. v. Tompkins*, that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Thus the interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. Therefore, the question of judicial power to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.[160]

To answer this question, Justice Harlan initially noted that

> it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies . . . —is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.[161]

He then moved to the power of the federal courts, conceded because of *Young*, to enjoin constitutional violations, observing that this power does not depend on congressional authorization.[162] Although Harlan was careful here to caution that the availability of such injunctive relief was not a matter of right but depends on an "exercise of equitable remedial

160. *Id.* at 399–402 (Harlan, J., concurring) (citations omitted).

161. *Id.* at 403–04.

162. *Id.* at 404.

discretion,"[163] he also emphasized that the availability of "equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization."[164] Again, it is the general remedial power of the federal courts when constitutional rights are at stake, not a special exception for injunctions, that warrants judicial protection for Bivens.

Equally as important, Justice Harlan then concluded by strongly implying that the absence of any judicial remedy for the violation of Bivens' Fourth Amendment rights would be constitutionally intolerable:

> Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.[165]

If this description of Bivens' situation carries its intended rhetorical weight, it is because "nothing" is an unacceptable judicial response to a violation of constitutional rights. For injuries that are purely statutory, "nothing" might well be the judicial response Bivens would receive, and without controversy, if Congress had displaced the judicial authority Justice Harlan defends. Justice Harlan's justification for the *Bivens* remedy is thus ultimately convincing because the injuries Bivens suffered at the hands of the federal narcotics agents were prohibited by the Constitution, and thus demanded a remedy even in the face of congressional silence.

Subsequent decisions applying the *Bivens* right to sue initially sought to spell out its relationship to federal statutory remedies. The relationship was, of course, anticipated in some depth by Justice Brennan's *Bivens* opinion. Far from denying the force of Justice Black's defense of Congress's primary role in designing remedial schemes to address constitutional violations, Brennan explicitly welcomed "affirmative action by Congress."[166] Furthermore, the free-standing constitutional

163. *Id.* at 405.
164. *Id.* at 404.
165. *Id.* at 409–10.
166. *Id.* at 396.

remedy *Bivens* authorized could be expected to recede if and when Congress did act. Thus, Justice Brennan emphasized, "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[167]

The judicial power asserted in *Bivens* is thus far from a claim to exclusive authority over judicial remedies for constitutional violations by federal officers. It is instead designed to be reciprocal and often interstitial. Because they would have the greatest impact when there were no statutory remedies, the prospect of *Bivens* suits might be expected to serve as a prod to Congress to enact analogs to 42 U.S.C. § 1983 to redress constitutional violations by federal officers. This posture of anticipatory deference may reflect a wise recognition both of the influence the structure of the Constitution gives to Congress over the exercise of federal judicial power, [168] and of the presumed greater political legitimacy of constitutional remedies when they are fashioned by a more directly accountable branch of government.

At first, the Court's applications of *Bivens* largely reflected Justice Brennan's dialogic outlook. In both *Davis v. Passman* and *Carlson v. Green*, the Court authorized damage remedies for violations of the Equal Protection guarantee embedded in the Fifth Amendment and of the Eighth Amendment prohibition against Cruel and Unusual Punishment, respectively.[169] Both decisions were arrived at only after a thorough examination of the availability (or not) and effectiveness of federal statutory remedies.[170] *Carlson* in particular, no doubt the high-water mark for the *Bivens* remedy in the Supreme Court, contained a detailed explanation by Justice Brennan of what he took to be a constitutionally sufficient remedial regime, leading to reasonable expectations that such a regime would be required by *Bivens*.[171]

Since *Carlson*, though, decided more than four decades ago, the Supreme Court has disallowed *Bivens* damage remedies in every case it has taken up.[172] In recent years, the Court has referred to every proposed

167. *Id.* at 397.

168. *See* U.S. CONST. art. III, § 1. The lower courts' existence is up to Congress, as is the Supreme Court's appellate jurisdiction.

169. Davis v. Passman, 442 U.S. 228, 248–49 (1979); Carlson v. Green, 446 U.S. 14, 24–25 (1980).

170. *See Davis*, 442 U.S. at 241–42; *Green*, 446 U.S. at 18–19.

171. *See Carlson*, 446 U.S. at 21–23.

172. *See* Bush v. Lucas, 462 U.S. 367, 390 (1983) (refusing to allow a *Bivens* claim for a federal employee fired in violation of First Amendment when adequate civil service remedies were available); Schweiker v. Chilicky, 487 U.S. 412, 428–29 (1988) (denying *Bivens* remedy to Social Security disability recipients deprived of benefits without due process even though

application of *Bivens* as "new," and has made clear that it views the *Bivens* remedy as one it is free to allow or disregard as it sees fit.[173] At least three Justices have expressed regret that the Court ever recognized the *Bivens* right to sue at all,[174] and have urged that its application be limited to cases involving facts precisely identical to those presented by *Davis*, *Carlson*, and *Bivens* itself.[175]

For a while, the Court's opinions declining to permit *Bivens* damage remedies remained attentive to Justice Brennan's concern for the sufficiency of alternative forms of relief for unconstitutional injuries provided by federal statutes. But in *Schweiker v. Chilicky*, the Court denied *Bivens* damages to plaintiffs who had suffered unconstitutionally inflicted injuries that were admittedly left without any remedy.[176] And, in *United States v. Stanley*, the Court held that neither *Bivens* nor any other remedies were available to military service personnel victimized by unconstitutional medical experimentation by their superior officers.[177] The rationale for this outcome was that only Congress could authorize relief for unconstitutional harms inflicted on enlisted military personnel.[178]

Since *Stanley*, the Court has made clear that any remedial scheme provided by Congress will supplant *Bivens*, without regard to its adequacy in redressing unconstitutional injuries.[179] The Court has also held that even if Congress provides no statutory remedy for an unconstitutionally inflicted injury, any request for a *Bivens* damage remedy is to be granted only after undertaking "the kind of remedial determination that is appropriate for a common-law tribunal."[180] When striking the appropriate remedial balance, the Court has further admonished the district courts to make sure "that a general *Bivens* cure would [not] be worse than the

some of their injuries were left unremedied); United States v. Stanley, 483 U.S. 669, 685–86 (1987) (denying *Bivens* remedy to enlisted army officer for harms suffered from unconstitutional administration of LSD by his superiors); Wilkie v. Robbins, 551 U.S. 537 (2007) (holding that *Bivens* remedies are both discretionary and not available if there is an alternative process for protecting the constitutional right at stake); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (holding *Bivens* inapplicable to challenges to government policy decisions); Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (denying *Bivens* remedy to Mexican national shot and killed across the border by U.S. immigration agents).

173. *See Wilkie*, 551 U.S. at 550; *Hernandez*, 137 S. Ct. at 2006–07.

174. *See Wilkie,* 551 U.S. at 568 (Thomas, J., joined by Scalia, J., concurring); *Hernandez*, 137 S. Ct. at 2008 (Thomas, J., joined by Gorsuch, J., concurring).

175. *See Wilkie* 551 U.S. at 568 (Thomas, J., concurring); *Hernandez*, 137 S. Ct. at 2008 (Thomas, J., dissenting).

176. *Schweiker*, 487 U.S. at 427–29.

177. Stanley, 483 U.S. at 686.

178. *Id.* at 679–84.

179. *Wilkie*, 551 U.S. at 537–38.

180. *Id.* at 538, 550 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

disease" of unconstitutional injuries,[181] and to pay "particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation."[182] This last limitation, "special factors counseling hesitation," is drawn directly from *Bivens* itself.[183] Justice Brennan coined the phrase there to distinguish damage claims brought by the United States as a plaintiff to recover for injuries suffered by one of its soldiers, and suits seeking damages against a federal employee for actions that though unauthorized, were not contrary to any constitutional prohibition.[184] Each of these situations, of course, already fell well outside the ambit of the right to sue recognized in *Bivens.*

The Supreme Court's most recent rejections of *Bivens* have invoked the "special factors counseling hesitation" caution, despite its innocuous origin, to preclude damage actions seeking to challenge harms caused by unconstitutional federal policies,[185] apparently restricting the remedy's availability to the unconstitutional excesses of rogue federal actors. Even further, any suits presenting a significant risk of "disruptive intrusion by the Judiciary into the functioning of other branches," also presents "special factors," apparently ruling out *Bivens* claims in contexts involving national security or international relations.[186] In the most recent of these cases, *Hernandez v. Mesa*, decided in 2020, Justice Alito's opinion for the Court expressed deep skepticism about *Bivens*'s legitimacy: "With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . and no statute expressly creates a *Bivens* remedy."[187]

It is plain that the place of the *Bivens* remedy in our law has fallen considerably over the five decades since Justice Harlan could observe that for the violation of Bivens's constitutional rights, "it is damages or nothing," with justifiable confidence that his audience would deem "nothing" an unacceptable answer. Still, *Bivens*'s premise, that the Constitution itself requires relief for its own violation, may not be entirely dead, even in the Supreme Court. In *Ziglar v. Abbasi*—the 2017 decision ruling out *Bivens* remedies for challenges to federal policies—Justice Kennedy's opinion for the Court emphasized that even though they can recover no damages, the injured plaintiffs had been entitled to seek injunctive relief for unconstitutional injuries, as authorized by *Young*.[188]

181. *Id.* at 561.

182. *Id.* at 538, 550 (quoting *Bush*, 462 U.S. at 378).

183. *Id.* at 550 (quoting *Bush*, 462 U.S. at 378); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

184. *Id.* at 396–97.

185. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1848–50 (2017).

186. *Id.* at 1849.

187. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020).

188. *Ziglar*, 137 S. Ct. at 1862–63.

Kennedy gave no sign of awareness of the irony of reinforcing the ideas that spawned *Bivens* in an opinion that helped to bury it. It is nevertheless hard to understand why he would trouble to offer this reassurance if it were not an important, even essential, element of the Constitution's status as our supreme law that injuries suffered in violation of it warrant an adequate remedy.

IV. THE REQUIREMENT OF A CLEAR AND CERTAIN REMEDY FOR CONSTITUTIONAL VIOLATIONS IN STATE COURTS

The federal courts have probably always been seen as more hospitable to suits seeking relief from unconstitutional injuries than their state counterparts. As far back as *Chisholm v. Georgia*, plaintiffs have often sought a federal rather than state forum to contest the actions of a state government, if only to avoid having their fate determined by another branch of the same sovereign they are challenging.[189] And it is anything but clear whether state courts have either the legal or practical capacity to adjudicate claims against federal officers.[190] Over the century following the Civil War, the advent of general "arising under" jurisdiction, the development of the *Young* and *Bivens* right to sue, and the reinvigoration of 42 U.S.C. § 1983, and with it, its jurisdictional companion, 28 U.S.C. § 1343,[191] enabled the federal courts to exercise constitutional judicial review reasonably effectively.

Still, as we have seen, these sources of law have not provided a complete or entirely coherent remedial regime for constitutional violations. For the *Young* and *Bivens* remedies, at least, the gaps may be owing in part to an insufficiently clear conceptual foundation. In addition, the Supreme Court has interpreted the Eleventh Amendment to preclude, in the absence of a clear congressional override for purposes of enforcing the post-Civil War Amendments, the exercise of federal court jurisdiction over suits against states.[192] This restriction effectively bars monetary relief against state governments, even if the result is that the federal courts

189. *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

190. *See generally In re* Tarble, 80 U.S. 397 (1871). Since *Tarble*, injunctive relief against federal officers has conventionally been seen as beyond the power of the state courts. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1084–85 (2010). *But see* Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964) (arguing that state courts are indeed equipped to grant and enforce relief against federal officers).

191. 28 U.S.C. § 1343 (authorizing federal district court jurisdiction over suits seeking damages or other relief under any act of Congress providing for the protection of civil rights).

192. Hans v. Louisiana, 134 U.S. 1, 10 (1890); *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

are disabled from providing any remedy for an unconstitutional injury.[193]

The state courts, even if historically seen as less reliable forums for the vindication of constitutional rights,[194] nevertheless occupied a prominent place in the Constitution's original design of judicial remedies. Recall that under the Madisonian Compromise, the lower federal courts owe their existence and power to exercise jurisdiction to Congress.[195] Equally important, the Supremacy Clause of the Constitution is addressed explicitly to the state courts.[196] It is fair to say that the 1787 Constitution envisioned that the state courts would be the primary, and perhaps the exclusive sources, of judicial remedies for violations of federal law, at least at the level of original jurisdiction. So, it is fair to ask what obligations, if any, this initially central constitutional role now requires them to meet.

The Supreme Court has considered these obligations mainly in the course of exercising appellate review of the disposition of questions of federal law by the states' highest courts.[197] In this capacity, the court has made clear that in cases within their general jurisdiction, the Supremacy Clause requires the state courts at least to rely on federal law as a "rule of decision," setting aside any conflicting sources that state law might suggest.[198] State courts must thus, unless precluded by Congress, entertain claims for relief authorized by federal statutes—e.g., those authorized by § 1983[199]—must reject any state law defenses to those

193. *See Hans*, 134 U.S. 1, 10 (stating the premise that state courts are also unavailable in these circumstances). However, this Article challenges that aspect of *Hans*.

194. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105–06 (1977) (arguing that federal courts are far better able than state courts to adjudicate constitutional claims).

195. Article III, Section 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Congress did not confer general federal question jurisdiction on the lower federal courts until 1875. Act of March 3, 1875, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331(a)).

196. U.S. CONST art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

197. *See, e.g.*, Haywood v. Drown, 556 U.S. 729 (2009); Alden v. Maine, 527 U.S. 706 (1999); Reich v. Collins, 513 U.S. 106 (1994); Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356 (1990); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18 (1990); Gen. Oil v. Crain, 209 U.S. 211 (1908); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

198. *See Haywood*, 556 U.S. at 734–36; *Howlett*, 496 U.S. at 357; Testa v. Katt, 330 U.S. 386, 389–93 (1947).

199. *See Howlett*, 496 U.S. at 357.

claims,[200] and may not enforce jurisdictional or other court access restrictions that treat federal claims less favorably than state law claims or otherwise discriminate against them.[201]

State courts also have obligations with respect to suits presenting constitutional claims without the support of a federal authorizing statute. These suits often proceed in the state courts because they seek monetary relief from state governments, the remedy that federal courts are barred by the Eleventh Amendment from providing.[202] The most instructive of these cases is probably *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*.[203] On the merits, *McKesson* was a challenge to a Florida tax on wine and spirits on the grounds that it discriminated against out of state distributors in violation of the Dormant Commerce Clause.[204] The Florida Supreme Court approved a prospective injunction against the differential treatment but denied the plaintiff's demand for a refund of excess taxes it had already paid.[205]

On review, the Court first held that the Eleventh Amendment did not preclude it from considering McKesson's appeal because a case commenced against a state in the state's own courts did not implicate the sovereign immunity protected by that Amendment's withdrawal of federal court jurisdiction over suits against state governments.[206] Justice Brennan's opinion for the Court then found that the Florida courts failed to meet their obligations to McKesson under the Due Process Clause of the Fourteenth Amendment.[207] Due Process, Justice Brennan held, requires state courts to afford an injured party "a clear and certain remedy" for harm caused by a state government in violation of the Constitution.[208] With respect to the discriminatory tax imposed by Florida, this obligation demanded that the state either collect back taxes equivalent to those paid by McKesson from in-state liquor distributors or refund the excess amount

200. *See id.*; *Haywood*, 556 U.S. at 734–36; FERC v. Mississippi, 456 U.S. 742, 784–85 (1982) (O'Connor, J., concurring in part, dissenting in part) (discussing discrimination against federal claims in state court).

201. *See*, *e.g.*, *Howlett*, 496 U.S. 356 (holding that a state court's refusal to hear a category of § 1983 claims when it entertained analogous state law claims violates the Supremacy Clause); *Haywood*, 556 U.S. at 739 (holding that a state statute precluding state court jurisdiction over a category of § 1983 claims violated the Supremacy Clause when it operates as a device to undermine federal law); Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377, 386–87 (1929) (affirming authority of state courts to decline to decide federal claims under the authority of a state venue statute that applied to both state and federal claims).

202. *See McKesson*, 496 U.S. at 26–27.

203. *Id.*

204. *Id.* at 22–23.

205. *Id.* at 22.

206. *Id.* at 26–27.

207. *Id.* at 51.

208. *Id.* (quoting Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 285 (1912)).

unlawfully collected from McKesson.[209] The latter option, of course, imposed a duty on Florida which would have been beyond the power of the federal courts to impose without the state's consent.

The *McKesson* opinion's demand that state courts provide a "clear and certain remedy" for constitutional violations by their own state governments echoes Justice Brennan's analogous concern in *Bivens* that the federal courts stand ready to redress unconstitutional injuries by federal officers.[210] The *McKesson* requirement, however, does not appear to share the qualifications that have come to blunt *Bivens*'s force. There are no "special factors counseling hesitation" in *McKesson*, nor any concern for "another remedy, equally effective in the view of Congress."[211]

We have seen the Supreme Court invoke these limits again and again since 1980 to justify denying the *Bivens* damage remedy, emphasizing both that it views the remedy as discretionary, and thus optional, and that it is supplanted altogether by any statutory remedy for the relevant constitutional violation, even if that remedy is concededly inadequate.[212] The *McKesson* obligation, on the other hand, plainly applies even when Congress has provided a remedial scheme for constitutional violations under the color of state and local law that is generally seen as excellent overall, even if it is incomplete. That remedial scheme is, of course, the one provided by 42 U.S.C. §§ 1983 and 1988, which authorizes every form of relief in the judicial arsenal save for one—damages payable by a state government.[213]

On the same day that the Court handed down its *McKesson* decision, it also decided *Howlett ex rel. Howlett v. Rose*, a case that clarified the obligation of state courts to entertain § 1983 claims and to disregard sovereign immunity defenses to damage relief asserted by local government defendants.[214] Section 1983 was, of course, also available to the *McKesson* plaintiffs, and would have authorized the injunction they secured, though obviously not the damage award ultimately authorized by the Court under the direct authority of the Constitution itself. Justice Brennan's opinion in *McKesson* did not so much as mention *Howlett*, which he also authored. For the Court that decided *Howlett* and

209. *Id.* at 40–41.

210. *See supra* notes 171–86 and accompanying text.

211. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971). *See generally McKesson*, 496 U.S. 18.

212. Wilkie v. Robbins, 551 U.S. 537, 561–62 (2007).

213. Section 1983 allows people to sue the government when civil rights protected by the Constitution and federal statutes are violated by someone acting under the color of state or local law. Section 1988 authorizes federal courts to award reasonable attorney's fees to prevailing parties in civil rights litigation.

214. Howlett *ex rel*. Howlett v. Rose, 496 U.S. 356, 375 (1990). It is notable that both *Howlett* and *McKesson* were decided at the same time.

McKesson, then, the constitutional duties of the state courts seemingly are both impervious to parallel remedies provided by Congress and require that an adequate remedy be afforded against every defendant responsible for an unconstitutional injury.[215]

This independence of the constitutional responsibilities of the state courts from congressional influence also stands in sharp contrast to the diminished availability of federal court injunctive relief under *Young* if remedies are authorized by federal statutes. As we have seen, the Supreme Court's *Armstrong* decision makes clear that the *Young* remedy may be eliminated or supplanted by Congress with respect to rights guaranteed by federal statutes.[216] This outcome had been foreshadowed nineteen years earlier by another decision limiting *Young*: *Seminole Tribe of Florida v. Florida*.[217] In *Seminole Tribe*, the Court held that Congress could not deploy its Article I legislative powers to override the states' Eleventh Amendment immunity from suit in federal court.[218] But the Court further held that Congress's impermissible effort to authorize suits against states effectively displaced *Young* injunction suits against state officers seeking to enforce Article I statutory rights.[219] *Armstrong* and *Seminole Tribe* thus together underscore Congress's plenary control over whether and which judicial remedies are available for violations of federal statutory rights.

The *Seminole Tribe* opinion's explanation of the role of the *Young* remedy relied heavily on *Schweiker v. Chilicky*,[220] a decision involving constitutional rights drawn from the Court's *Bivens* line of decisions.[221] In that case, the Court disallowed a *Bivens* damage remedy on the ground that a federal court's authority to grant it had been supplanted by forms of federal statutory relief that remedied some, but not all, of the injuries inflicted by the federal officers whose unconstitutional conduct was at issue.[222]

The Court's reliance on *Chilicky* thus could be taken to suggest an

215. The Court held in *McKesson* that

> if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the due process clause requires that the state afford a meaningful post-payment remedy for taxes paid pursuant to an unconstitutional tax scheme; . . . the remedy to a distributor for having paid taxes higher than those paid by favored competitors would require a refund of the excess tax or a partial retroactive assessment of tax increases on the favored competitors; and . . . there were no "equitable considerations" that would justify refusal to award retroactive relief.

McKesson, 496 U.S. at 18.

216. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–28 (2015).

217. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

218. *Id.* at 56–57.

219. *Id.* at 74–76.

220. *Id.* at 74.

221. Schweiker v. Chilicky, 487 U.S. 412, 428–29 (1988).

222. *Id.*

analogous congressional power to supplant *Young* in cases involving constitutional rights as well.[223] Obviously, because the injunctive relief against state and local officers authorized by § 1983 is largely equivalent to, and at least as effective as, a *Young* injunction,[224] this concern is so far mostly theoretical. But like the limitation on *Bivens* remedies, it apparently does not affect *McKesson*'s guarantee of a "clear and certain remedy" for constitutional violations in the state courts.[225] Perhaps this is because the textual directive to state courts from the Supremacy Clause imposes remedial obligations to constitutional plaintiffs that are less qualified than those owed by the federal courts, whose constitutional responsibilities are more circumscribed by virtue of being shared with Congress.

There is another sense, though, in which this "clear and certain" constitutional remedy called for by *McKesson* may stand on weaker ground than its *Bivens* and *Young* analogs. In *McKesson*, Florida offered no sovereign immunity defense under either federal or state law.[226] The Florida courts therefore uncontestedly exercised jurisdiction over McKesson's suit.[227] Further, that suit was apparently authorized by a Florida state statute permitting claims for refunds of allegedly unlawfully collected tax payments.[228] Hence, while the *McKesson* plaintiffs' relief was ultimately derived from the Constitution, their right to sue probably was not.

We do not know, then, how the *McKesson* plaintiffs would have fared if Florida had offered a robust sovereign immunity defense to constitutional litigation against the state in its own courts. Such a defense could take the form of a prohibition on state court jurisdiction over suits against the state, a possibility to be considered directly in the next section of this Article. It is also unclear how the plaintiffs would have fared if Florida had not enacted the statute authorizing McKesson's suit or had not otherwise consented to or authorized any awards of monetary relief against the state by any court. Would the *McKesson* plaintiffs nevertheless have been able to proceed directly under the Constitution, using the same kind of argument that best explains both *Young* and

223. 42 U.S.C. § 1983 authorizes injunctive relief against officers for constitutional violations. The Supreme Court has interpreted that authorization to be coterminous with the *Young* remedy. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989). *But see* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 340 (2015) (Sotomayor, J., dissenting) (discussing the differences between suits brought under § 1983 as a cause of action and "equitable preemption actions" under *Young*).

224. The *McKesson* remedy against the State is *not* supplanted by a § 1983 remedy against a state or local officer.

225. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18, 19 (1990).

226. *Id.* at 49 n.34.

227. *Id.* at 26.

228. *Id.* at 24–25, 49 n.34.

Bivens?

The Supreme Court decisions relating to a right to sue in state court under the Constitution alone do not yield an entirely decisive resolution of the question. They are, however, promising for constitutional plaintiffs. The most prominent of these decisions is *Reich v. Collins*,[229] decided four years after *McKesson*. *Reich* also involved a state taxpayer's effort to recover discriminatory back taxes collected in violation of the Constitution.[230] The suit was filed in the Georgia state courts under the authority of a state statute which provided that "[a] taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily."[231] The Georgia Supreme Court, however, held this statutory right to relief to be unavailable to Reich because he had not pursued pre-deprivation remedies also offered by Georgia law.[232]

Following *McKesson*, the Court's opinion by Justice O'Connor first observed that "'a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' . . . the sovereign immunity States traditionally enjoy in their own courts notwithstanding."[233] Justice O'Connor next noted that the Eleventh Amendment barred Reich from pursuing his constitutional right to a tax refund in federal court.[234]

Applying these principles, Justice O'Connor then reiterated *McKesson*'s holding that the state courts are obligated to provide "a clear and certain remedy" for constitutional violations committed by their state governments.[235] Although an entirely pre- or post-deprivation remedy might satisfy this requirement, the Georgia Supreme Court's decision to nullify a statutory post-deprivation remedy mid-litigation did not.[236] Accordingly, Georgia was constitutionally obligated to grant Reich the tax refund,[237] a remedy that would have been closed off to him in federal court by the Eleventh Amendment.[238]

The Supreme Court's application of the "clear and certain remedy" standard in *Reich* sheds light on some of the questions left open by *McKesson*. First, *Reich* strongly suggests that a sovereign immunity

229. Reich v. Collins, 513 U.S. 106 (1994).
230. *Id.* at 108–09.
231. *Id.* at 109 (quoting GA. CODE ANN. §§ 48-2-35(a)).
232. *Id.* at 110.
233. *Id.* at 109–10 (quoting Carpenter v. Shaw, 280 U.S. 363, 369 (1930)).
234. *Id.* at 110.
235. *Id.* at 110–11.
236. *Id.* at 111.
237. *Id.* at 109–10.
238. Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 375–77 (1990).

defense on the merits is not available to a state government when a plaintiff seeks relief from a constitutional violation in the state's own courts. Obviously, the assertion of such a defense under state law would be barred by the Supremacy Clause if that plaintiff's right to sue is conferred by the Constitution.[239] More importantly, the sovereign immunity of states—recognized by the Eleventh Amendment as a constitutional bar against federal court jurisdiction over suits against them—evidently does not protect state governments against relief sought in their own courts in suits raising constitutional claims.[240] But since Georgia did not invoke a sovereign immunity defense under either state or federal law, the Court's failure to recognize its availability in *Reich* may not by itself be completely dispositive on this latter point. Nor, since the Georgia courts adjudicated the case under authority of their general jurisdiction, is the Supreme Court's *Reich* opinion directly instructive on the question of whether a state may constitutionally withdraw such jurisdiction over cases seeking the "clear and certain remedy" required for constitutional violations.

It is, however, difficult to escape the *Reich* opinion's necessary reliance on the Constitution itself as the source of the plaintiff's claim. The unconstitutionality of Georgia's treatment of taxpayer Reich lay precisely in its withdrawal of a statutory right to sue to recover state taxes, themselves unconstitutionally levied.[241] But if the right to sue under state law had been withdrawn, what source of law did authorize Reich's challenge to that withdrawal? Though the *Reich* opinion does not explicitly say so, an infinite regression can be avoided only if Reich's right to sue was based on the Constitution itself.

This view of *Reich* is underscored by the Court's decision in *Alden v. Maine*, which recognized the states' Eleventh Amendment immunity as extending to suits in their own courts seeking to enforce federal statutory rights.[242] *Alden* concerned a state employee's claim for back wages withheld in violation of the federal Fair Labor Standards Act.[243] As a consequence of the Court's decision in *Seminole Tribe*, which, as we have seen, interpreted the Eleventh Amendment to be incapable of override by the exercise of Congress's Article I legislative powers, the employee's suit could not have been adjudicated by a federal court.[244] In *Alden*, the court held that the immunity enjoyed by states from federal court suits to enforce Article I statutory rights also barred such suits in the states' own courts.[245] This conclusion made clear that the sovereign immunity

239. *Reich*, 513 U.S. at 110; *Howlett*, 496 U.S. at 367.
240. *Reich*, 513 U.S. at 109–10.
241. *Id.* at 108–10.
242. Alden v. Maine, 527 U.S. 706, 742–43 (1999).
243. *Id.* at 711–12.
244. *Id.*
245. *Id.*

recognized by the Eleventh Amendment was not just a jurisdictional limitation on the exercise of federal judicial power. It also afforded the states a substantive federal defense, grounded in the *Alden* majority's understanding of the original Constitution, to any judicial relief in suits authorized by Congress's exercise of its Article I powers.[246]

But did this substantive defense also apply to constitutional claims made against the states under the authority of *McKesson*'s and *Reich*'s "clear and certain remedy" requirement? The answer, apparently, is no. Although the *Alden* majority opinion by Justice Kennedy expressed the, no doubt sincere, hope that the "good faith of the States . . . provides an important assurance that the 'Constitution . . . shall be the supreme Law of the Land,'"[247] it also specifically recognized that *Reich* remains available as a backstop should that good faith falter.[248]

After recognizing that the constitutional violation at issue in *Reich* was Georgia's holding out a post-deprivation remedy for unconstitutionally collected taxes only then to declare that the remedy did not in fact exist, Justice Kennedy reiterated that "due process requires the state to provide the remedy it has promised."[249] He then emphasized that this "obligation arises from the Constitution itself," distinguishing *Reich* from *Alden* on the ground that "*Reich* does not speak to the power of Congress to subject States to suits in their own courts."[250]

Justice Kennedy's distinction of *Reich* from *Alden* is convincing only if the state courts are obliged to adjudicate constitutional claims against their respective states. After *Alden*, the constitutional plan apparently assures state governments a substantive immunity from the imposition of legal liability by Congress in all courts, state and federal alike, except, of course, for purposes of enforcing rights secured by the post-Civil War amendments. But that plan does not exempt the states from the duty they assumed, by ratifying the Constitution, to provide a clear and certain judicial remedy, in their own courts, for their violations of the rights that the Constitution guarantees. *Alden* thus resolves any uncertainty remaining after *Reich* about the limits—as well as the scope—of the substantive immunity available to the states after ratification of the Constitution. As emphasized in *Young*, the states cannot use the sovereign immunity they enjoy to "preclude a resort to [their] courts . . . for the purpose of testing [the Constitutional] validity" of their actions.[251]

246. *Id.* at 748.

247. *Id.* at 755 (quoting U.S. CONST. art VI, cl. 2).

248. *Id.* at 740.

249. *Id.*

250. *Id.*

251. *Ex parte* Young, 209 U.S. 123, 146 (1908).

V. IMPLICATIONS OF THE PRESUMPTION OF JURISDICTION OVER CASES RAISING CONSTITUTIONAL CLAIMS

The claims for relief from constitutional violations recognized by *Young* and *Bivens* for the federal courts and by *McKesson* and *Reich* for the state courts appear to be inescapably premised on the Constitution itself as their source. Still, in our system, these claims, like all others, can proceed only in courts authorized to assume jurisdiction over them. A failure of jurisdiction was, of course, the reason why Marbury's otherwise valid effort to secure his judgeship ultimately foundered.[252]

The defining characteristic of our federal courts is that they exercise only limited jurisdiction, and that jurisdiction may well be subject to unfettered control by Congress.[253] While the state courts, by contrast, are originally courts of general jurisdiction, that jurisdiction is also susceptible to subject matter limitations enacted by state legislatures. Whether federal or state legislative limitations on their courts' jurisdiction over cases raising constitutional claims are themselves constitutionally permissible is a question that is much debated and remains unsettled.[254] But, like *Young*, *Bivens*, and *McKesson*/*Reich*, the Supreme Court's consideration of this question reflects an assumption that the justiciability of these constitutional cases does not depend on a right to sue granted by the common law or conferred by statute, but one drawn from the Constitution itself.

A. *The Lower Federal Courts*

The conventional understanding of the subject matter jurisdiction of the lower federal courts is that it is ultimately subject to plenary congressional control, even in cases presenting constitutional claims.[255] For example, in *Sheldon v. Sill*, the Court held that because the lower federal courts owe their existence to Congress, they are permitted to exercise only that portion of the subject matter jurisdiction authorized by the Constitution which Congress has conferred on them.[256] Although *Sheldon* was not itself a constitutional case,[257] its holding has served as the starting point for the Supreme Court's later opinions in *Johnson v.*

252. *See supra* note 10 and accompanying text.

253. Sheldon v. Sill, 49 U.S. (8 How.) 441, 442–43 (1850); PETER LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS, 515–17 (9th ed. 2018).

254. *See* LOW ET AL., *supra* note 253, at 499; Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting a letter from friend and scholar William Van Alstyne, who described the literature as "choking on redundancy").

255. *Sheldon*, 49 U.S. at 442–43; LOW ET AL., *supra* note 253, at 515–17.

256. *Sheldon*, 49 U.S. at 442.

257. *Id.* at 448. *Sheldon* was really about collusion to create diversity jurisdiction in order to get into federal court. *Id.* at 450.

Robison,[258] and then in *Webster v. Doe*.[259]

Both *Johnson* and *Webster* presented the question whether federal statutes alleged by federal officer defendants to preclude lower court jurisdiction over constitutional claims against them could constitutionally be given effect.[260] In both cases, the Court avoided this question by interpreting the relevant statutes not to withdraw the ordinary exercise of "arising under" jurisdiction by the federal district courts.[261] The reason for the narrow interpretation was that any complete curtailment of the exercise of federal judicial power to determine the constitutionality of the actions of federal officers itself raised a "serious constitutional question."[262] Thus, any statute purporting to accomplish such a complete curtailment was required to use unmistakably clear language in order to be construed to do so. The relevant statutes in *Johnson* and *Webster* did not meet this clarity requirement and therefore did not succeed in precluding the exercise of jurisdiction.[263]

The significant constitutional question avoided by this "clear statement" requirement is whether Congress can "deny any judicial forum for a colorable constitutional claim."[264] That question would not be a serious one if the justiciability of a constitutional claim depended on a common law or statutory right to sue, both already subject to Congress's plenary control in any event. Just as with rights established by federal statutes, Congress could grant, preserve, or withhold rights of action to enforce constitutional rights as it saw fit, confident that its exercise of unfettered power would be sustained. In the absence of congressional recognition of a right to sue, a district court exercising jurisdiction over a case raising a constitutional claim would simply, and uncontroversially, dismiss it on the ground that no relief could be granted. Only if the Constitution itself provides a right to sue for its violation does an effort by Congress to cut off that right present a meaningful threat to its supremacy as law.

Thus, it is unsurprising that the Court's opinion in both *Johnson* and *Webster* viewed the rights to sue threatened in the two cases as themselves arising from the Constitution.[265] In both cases, the plaintiffs sought injunctive relief against allegedly unconstitutional actions by federal officials.[266] Both cases also proceeded without aid of a federal statutory

258. Johnson v. Robison, 415 U.S. 361 (1974).

259. Webster v. Doe, 486 U.S. 592 (1988).

260. *Johnson*, 415 U.S. at 366–74; *Webster*, 486 U.S. at 601–05.

261. *Johnson*, 415 U.S. at 366; *Webster*, 486 U.S. at 599.

262. *Webster*, 486 U.S. at 603 (quoting Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986)).

263. *Id.* at 601, 603; *Johnson*, 415 U.S. at 373–74.

264. *Webster*, 486 U.S. at 603.

265. *Id.* at 603–04; *Johnson*, 415 U.S. at 365–66.

266. *Webster*, 486 U.S. at 601–02; *Johnson*, 415 U.S. at 361.

right to sue, presumably under the authority of an uncontroversial application of *Young*. In *Johnson*, the plaintiff's suit collided with an explicit statutory preclusion of federal court jurisdiction.[267] The statute's failure of clarity was an absence of specific language including constitutional claims within the scope of the preclusion.[268] If the *Young* remedy itself could be eliminated by Congress, it is hard to imagine that omission could be fatal to the application of the jurisdictional bar. Only if *Young* has a constitutional basis does its withdrawal by way of a jurisdictional restriction become problematic.

In *Webster*, the plaintiff's claim ran up against a statutory restraint that was, linguistically at least, quite different from the one at issue in *Johnson*. Far from explicitly prohibiting the exercise of jurisdiction over the plaintiff's claim, Congress had provided only that "[t]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States."[269] This language is not only silent about federal court jurisdiction over suits challenging the CIA Director's unconstitutional exercise of his employment termination power; it does not even address any aspect of the judicial power, at least directly, at all. It is not obvious that the statute's grant of, apparently unlimited, discretion to the Director is designed to operate as a jurisdictional bar, like the provision at issue in *Johnson*. It could instead be intended to curtail the availability of *Young* injunctive relief against the potentially unlawful exercise of that discretion. Conceivably, the language does not limit judicial power at all, but merely confirms the CIA Director's authority over Agency employment matters, subject to otherwise applicable legal restraints.

The last of these understandings of the statute at issue in *Webster* obviously presents no threat to judicial review of the constitutionality of the CIA Director's employment decision. The second reading, remedial rather than jurisdictional, would also have allowed the Court to avoid the jurisdictional restriction conundrum, but at the price of forcing it to face the question of whether Congress has plenary authority over rights to sue to redress constitutional violations.

Chief Justice Rehnquist's opinion for the court in *Webster* chose neither of these exits, instead adopting the first, jurisdictional, reading of the statute.[270] He then held that, so understood, the provision did effectively bar all judicial review of statutory challenges to the Director's decisions.[271] Brought face to face with the "'serious constitutional

267. *Johnson*, 415 U.S. at 373–74.

268. *Id.*

269. *Webster*, 486 U.S. at 594 (quoting 50 U.S.C. § 403(c)).

270. *Id.* at 601–02.

271. *Id.*

question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," Chief Justice Rehnquist reiterated *Johnson*'s clear statement requirement and concluded that Congress's failure to satisfy it left the district court's constitutional jurisdiction intact.[272] Chief Justice Rehnquist's disposition of *Webster* implies that the second possible reading of the statute, above, is constitutionally impermissible. The question of jurisdictional preclusion can be a serious one only if Congress is not free to adopt the sort of abridgment of *Young* suggested by that reading. The Court's *Webster* decision, like that in *Johnson*, depends on the proposition that the Constitution requires access to an adequate judicial remedy for its violation.

The Supreme Court's most recent examination of congressional power to curtail lower federal court jurisdiction in cases raising constitutional claims occurred in the special context of the habeas corpus clause. In *Boumediene v. Bush*, the Court invalidated a federal statute withdrawing jurisdiction from any "court, justice, or judge" to hear an application for a writ of habeas corpus "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[273] This restraint on the exercise of jurisdiction over habeas corpus applications in the federal district courts was held unconstitutional because it amounted to an impermissible suspension of "The Privilege of the Writ of Habeas Corpus," in violation of Article I, Section 9, Clause 2 of the Constitution, as applied to persons held at the U.S. Naval Base in Guantanamo Bay, Cuba.[274] The Constitution authorizes suspension of habeas corpus, but only when "in Cases of Rebellion or Invasion the public Safety may require it."[275] These conditions had concededly not been met with respect to the Guantanamo detainees.

Boumediene was most significant for its holding that non-citizens held in military custody outside the formally sovereign territory of the United States were entitled to seek habeas corpus relief.[276] But the Court's decision, like those in *Johnson* and *Webster*, also assumed that persons harmed by constitutional violations enjoy a right to sue to redress the violation.

Habeas corpus is different from other rights protected by the Constitution because the privilege protected by the writ is itself a

272. *Id.* at 603–04.

273. Boumediene v. Bush, 553 U.S. 723, 736 (2008) (quoting 28 U.S.C. § 2241(e)).

274. *Id.* at 743.

275. *Id.*; U.S. CONST. art. I, § 9, cl. 2.

276. *Boumediene*, 553 U.S. at 770; Fallon, *supra* note 190, at 1046–47.

guarantee of access to judicial review.[277] For this reason, Congress's effort to deny jurisdiction to all courts over habeas corpus claims by alleged enemy combatant detainees is itself a denial of a constitutionally protected interest. By contrast, when Congress purports to withdraw jurisdiction over suits seeking to vindicate other constitutional rights, such as those protected by the Equal Protection Guarantee, as in *Webster*, or the Free Exercise Clause, as in *Johnson*, it is not necessarily violating the rights themselves. Instead, as the Court put it in *Webster*, it is merely seeking to deny access to a judicial forum to protect them.[278] Whether such a denial is permissible is the serious constitutional question identified by the *Webster* and *Johnson* opinions. But for habeas corpus, to deny access to court is to deny the right itself.

Thus, the impact of *Boumediene* on the questions raised by other congressional attempts to curtail jurisdiction over constitutional claims may be limited. Still, the *Boumediene* opinion does shed some light onto our question of whether the Constitution provides a right to sue for its violation. Since the Judiciary Act of 1789, Congress has uninterruptedly authorized the federal courts to grant habeas corpus relief to persons held in custody under the authority of the federal government.[279] The jurisdiction curtailment unsuccessfully attempted by Congress in *Boumediene* is thus an example of a decision by Congress to preclude the exercise of judicial review over a claim for relief that it had created. But if federal habeas relief were within the exclusive domain of Congress, Congress could accomplish a withdrawal of judicial review in a class (or even all) habeas corpus cases (at least in federal court) by merely limiting or repealing statutes authorizing the relief. No resort to a jurisdictional bar would be necessary. But at the same time, a federal statute curtailing the habeas corpus jurisdiction of the federal courts would be unproblematic, since Congress would only be denying judicial power to decide claims already subject to its plenary control.

The *Boumediene* opinion by Justice Kennedy did not see the curtailment of habeas corpus jurisdiction this way. The opinion barely mentioned the statutes authorizing habeas corpus relief in the federal courts and nowhere suggested that a habeas applicant's right to sue could be argued to depend on them.[280] Instead, its rationale rested entirely on an understanding of the Suspension Clause of Article I as the source of the right to seek that relief.[281] *Boumediene* would thus be incomprehensible if a person's right to bring a habeas corpus claim

277. *See Boumediene*, 553 U.S. at 737 (defining habeas corpus to be "a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal" (citing *Habeas Corpus*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

278. Webster v. Doe, 486 U.S. 592, 593 (1988).

279. Judiciary Act of 1789, ch. 20, 1 Stat. 73; *see also* 28 U.S.C. § 2241.

280. *Boumediene*, 553 U.S. at 723–24.

281. *Id.* at 725.

depended on a right of action granted by Congress. Perhaps unsurprisingly, given the unique character of the privilege, it is evident that the *Boumediene* Court saw the judicial obligation to adjudicate habeas corpus applications as deriving directly from the Constitution.

B. *The Supreme Court*

The Supreme Court's consideration of Congress's control over its own appellate jurisdiction over cases raising constitutional claims also supports the understanding that the Constitution confers a right to sue for relief from its violation. To be sure, a curtailment of appellate jurisdiction is less problematic than the complete preclusions at issue in *Johnson*, *Webster*, and *Boumediene*. If the Constitution provides a right to sue for its violation, a successful denial by Congress of original jurisdiction to the federal district courts necessarily interferes with the exercise of this right, even if the suit may be pursued in state courts. But a right to sue need not necessarily entail a right to appellate review, much less to Supreme Court appellate review. A denial of such review thus may not raise the same "serious constitutional question" at issue in *Johnson* and *Webster*.[282] In addition, Congress's power to limit the Supreme Court's appellate jurisdiction is spelled out in the text of Article III,[283] while its ability to control the original jurisdiction of the lower federal courts depends on a structural argument derived from the Madisonian Compromise.[284] The Supreme Court may view its own interpretive power to be more constrained by the first sort of limitation.

The Court famously reviewed a restriction on its appellate jurisdiction in *Ex parte McCardle*,[285] decided a century and a half ago. *McCardle*, like *Boumediene*, was a habeas corpus case, resolved against the applicant in the lower federal courts.[286] Congress enacted a statute withdrawing the Supreme Court's jurisdiction over McCardle's appeal as the appeal was pending.[287] The Supreme Court nonetheless sustained Congress's power to terminate its jurisdiction, pointing to the plenary control granted by Article III, Section 2, Clause 2 of the Constitution.[288] That clause authorizes the Supreme Court to exercise appellate jurisdiction in all cases within the federal judicial power conferred by Article III, "with such Exceptions, and under such Regulations as the Congress shall make."[289] This language marked the beginning and end of

282. *See supra* note 262 and accompanying text.
283. U.S. CONST. art. III, § 2, cl. 2.
284. Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850).
285. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).
286. *Id.* at 514.
287. *Id.* at 508.
288. *Id.* at 513.
289. U.S. CONST. art. III, § 2, cl. 2.

the Court's examination of Congress's jurisdiction repeal. The repeal was effective, regardless of its purpose or impact: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[290] Since *McCardle*, the power of Congress to curtail the Supreme Court's appellate jurisdiction has conventionally been viewed as unlimited, even in cases presenting constitutional claims.[291]

To the extent that *Boumediene* can fairly be read to express skepticism about any effort by Congress to curtail federal habeas corpus jurisdiction without satisfying the "invasion or rebellion" prerequisites of the Suspension Clause, the decision may qualify *McCardle*'s thoroughgoing deference to Congress, at least in habeas cases. On the other hand, the combination of explicit textual grounding for Congress's power to limit the Supreme Court's appellate jurisdiction and the less drastic character of such a limitation may leave that authority untouched by *Boumediene*'s protection of the original jurisdiction of the federal district courts.

Boumediene may even cast doubt on the vitality of the conventional understanding as it might apply, beyond habeas corpus cases, to constitutional claims more generally. Professor Richard Fallon has persuasively suggested that after *Boumediene*, the argument that the Supreme Court's appellate jurisdiction may be wholly closed to constitutional claims is far less convincing than it may once have been.[292] Professor Fallon's argument may founder on the *sui generis* character of habeas corpus claims. But if it does not, it may have been prefigured by *McCardle* itself. As has often been noted, after deferring to Congress's plenary textual control over the Supreme Court's appellate jurisdiction, Chief Justice Chase's opinion concluded by observing that Congress's repeal of the jurisdictional source McCardle relied on did not deny "the whole appellate power of the court, in cases of *habeas corpus*."[293] The repeal left intact the "jurisdiction which was previously exercised" to review habeas cases via writs of certiorari.[294] Presumably, Chief Justice Chase added this qualification because he suspected that a complete foreclosure of Supreme Court review to a colorable constitutional claim would raise a "serious constitutional question."[295] If that is so, it is, as *Johnson* and *Webster* suggest, because the right to advance such a claim is itself granted by the Constitution.

290. *McCardle*, 74 U.S. at 514.
291. LOW ET AL., *supra* note 253, at 515–17.
292. Fallon, *supra* note 190, at 1093–94.
293. *McCardle*, 74 U.S. at 514.
294. *Id.*
295. *See supra* note 262–72 and accompanying text.

C. *The State Courts*

In his famous dialogue article from 1953, Professor Henry Hart suggested that a constitutional claimant denied access to federal court jurisdiction could turn to the general jurisdiction of a state court for relief.[296] Under the Supremacy Clause, the state court would be obligated to hear and decide the claim, even in the face of an effort by Congress, such as that at issue in *Boumediene* to preclude the exercise of jurisdiction by state and federal courts alike.[297] Hart's argument appeals, convincingly, to the proposition that the Constitution requires that some court, somewhere, be available to remedy a plaintiff's unconstitutionally inflicted injuries.[298]

But what happens if the general jurisdiction Hart assumed would be available in the courts of every state is curtailed by a state legislature rather than by Congress? Suppose, for example, that the Georgia legislature precluded all Georgia courts from exercising jurisdiction over Reich's claim against the state government. Do the obligations of the state courts under the Supremacy Clause overcome a state's power to deploy its governmental resources, including judicial ones, as it sees fit? The Supreme Court has been reluctant to provide a decisive answer to this difficult constitutional question.[299]

The Court has held, in a line of decisions running from *Testa v. Katt* through *Howlett v. Rose* to *Haywood v. Drown*, that the Supremacy Clause requires state courts to adjudicate claims authorized by federal statutes that fall within their general jurisdiction.[300] In *Haywood*, the Court then fell just short of holding that the Supremacy Clause further required that state courts remain open to all federal statutory claims, even in the face of a state statute barring their exercise of jurisdiction over such claims.[301]

Haywood concerned a New York statute that precluded its state courts from adjudicating any claims for damages against corrections officers, remitting claimants instead to a specialized forum that was authorized to compensate them from state funds for harms unlawfully inflicted by the officers.[302] The Court held that New York's courts were nonetheless required by the Supremacy Clause to adjudicate § 1983 claims against the officers, finding the jurisdictional restraint unconstitutional on the ground

296. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953).

297. *Id.*

298. *Id.* at 1401.

299. Haywood v. Drown, 556 U.S. 729, 737–42 (2009) (discussing difficulty of the question whether state courts are compelled by the Supremacy Clause to exercise jurisdiction over all federal claims).

300. Testa v. Katt, 330 U.S. 386, 389–90 (1947); Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 367 (1990); *Haywood*, 556 U.S. at 756.

301. *Haywood*, 556 U.S. at 741–42.

302. *Id.* at 733–34.

that it effectively treated these claims less favorably than those arising under state law.[303]

Justice Stevens's opinion adamantly insisted that it did not impose a constitutional command that state courts assume jurisdiction over all federal claims.[304] It may be difficult, however, to conjure a jurisdictional limitation that would satisfy his understanding of the non-discrimination principle. After all, the restriction at issue in *Haywood* applied to all damage suits against state correctional officers, not distinguishing state from federal claims.[305] Justice Thomas's vehement dissent objected that the *Haywood* majority did effectively impose such a jurisdictional mandate on the states, a mandate which in his view improperly infringed on their sovereign power to control their own governmental institutions, including their courts,[306] at least in the absence of a clear statement from Congress.

Whatever the ultimate impact *Haywood* may have on state law limits on state court jurisdiction over federal claims, it is clear that the decision formally imposes obligations on the state courts only with respect to claims, including those asserting constitutional rights, authorized by federal statutes. The decision neither assumes nor depends on any view of the question whether the Constitution confers a right to sue when those rights are violated. But it is also clear that the justification for this obligation is that the claims it applies to are federal, rather than that they are statutory. If the Constitution were understood to entail a right to sue for its violation, the *Haywood* Court's rationale for requiring state courts to exercise jurisdiction over § 1983 suits would also apply with at least equal force to suits based only on that constitutional right.

Even Justice Thomas's view that the exercise of jurisdiction by the state courts as beyond Congress's power to command would not rule out such a command from the Constitution. Justice Thomas's defense of state court immunity from congressional control is analogous to the position taken by the Supreme Court majority in *Alden*.[307] Under both *Alden* and *Haywood*, per Justice Thomas, the states are free to resist intrusions on their sovereignty imposed by Congress's imposition of federal statutory obligations. In *Alden*, the tangible embodiment of state sovereignty was the state treasury; in *Haywood,* it was the adjudicative resources of the state courts.[308] But in neither case does its sovereignty allow a state to resist the obligations of the Constitution itself, obligations to which it submitted by the act of ratification.

303. *Id.* at 736–37.

304. *Id.* at 741–42.

305. N.Y. CORRECT. LAW § 24 (McKinney 2011).

306. *Haywood*, 556 U.S. at 749–50 (Thomas, J., dissenting).

307. *See supra* notes 242–50 and accompanying text.

308. Alden v. Maine, 527 U.S. 706, 757 (1999); *Haywood*, 556 U.S. at 765.

Haywood not only echoes the Supreme Court's acknowledgement in *Alden* of rights to sue required by the Constitution; it also recalls the Court's disposition of a 1908 companion case to *Young*: *General Oil v. Crain*.[309] *Crain* involved an oil company's state court challenge to an inspection fee charged by the state of Tennessee.[310] The suit alleged that the fee violated the Dormant Commerce Clause and sought injunctive relief against its enforcement.[311] As in *Young*, no federal statute authorized the suit, though today it probably could have proceeded under § 1983.[312]

The Tennessee Supreme Court held that a state statute precluded the state courts from exercising jurisdiction over the oil company's suit.[313] On review, the Supreme Court disregarded the state law jurisdictional bar and reached the merits of the oil company's constitutional claim, but then decided that the inspection fee did not violate the Dormant Commerce Clause.[314]

Justice Harlan, who also dissented in *Young*, would have dismissed the oil company's appeal on the ground that Tennessee had the right to determine, exclusively under its own law, whether its courts could entertain jurisdiction of the oil company's suit.[315] This right was part of the state's more general power "to say of what class of suits its own courts may take cognizance."[316]

The *Crain* majority disagreed, observing that

> [i]f a suit . . . is precluded in the national courts by the [Eleventh] Amendment to the Constitution, and may be forbidden by a state to its courts . . . without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the [Fourteenth] Amendment, which is directed at state action, could be nullified as to much of its operation.[317]

Crain no doubt provides significant support for the contention that the state courts are obligated by the Supremacy Clause to exercise jurisdiction over cases presenting constitutional claims.[318] But the *Haywood* majority's unwillingness to recognize such an unqualified obligation for statutory claims shows that the jurisdictional duties imposed

309. Gen. Oil Co. v. Crain, 209 U.S. 211 (1908).
310. *Id.* at 213–15.
311. *Id.*
312. *See supra* text accompanying notes 94–107.
313. *Crain*, 209 U.S. at 220–21.
314. *Id.* at 231.
315. *Id.* at 233–34 (Harlan, J., dissenting).
316. *Id.* at 233.
317. *Id.* at 226 (majority opinion).
318. *See supra* notes 298–300 and accompanying text.

by the Supremacy Clause on the state courts are far from settled.[319] The *Crain* opinion itself did not directly find the Tennessee jurisdictional restraint to be unconstitutional, but rather decided only that its enforcement by the Tennessee courts could not preclude Supreme Court review of the merits of the oil company's claim.[320] This conclusion may have been supplanted by the Supreme Court's later development of "the adequate and independent state ground" doctrine as a justification for declining to review the merits of federal claims rejected by state courts on state law grounds.[321]

But if it remains uncertain whether any state law jurisdictional restriction can properly permit a state court to avoid adjudicating a case raising a constitutional claim, *Haywood* and *Crain* make clear that, as with similar restraints on the federal courts, such a restriction presents a "serious constitutional question."[322] And, as *Webster* and *Johnson* show, that question becomes serious only if the Constitution confers a right to sue to persons injured by its violation.

VI. SOME CONSEQUENCES OF SEEING THE CONSTITUTION AS A SWORD

This Article has argued that the coherence of significant elements of our law of constitutional remedies depends on an understanding that the Constitution itself grants persons injured by its violation a right to a judicial remedy for their injury. It remains true, however, that the Supreme Court has never directly endorsed such an understanding. Nor is it even clear just what specific provisions of the Constitution might support it. As we have seen, *Haywood* relies on the Supremacy Clause as the source of a—formally, at least, conditional—duty of the state courts to exercise jurisdiction over claims authorized by federal law.[323] The decisions on the remedial duties of the state courts, *McKesson* and *Reich*, interpret the Due Process Clause of the Fourteenth Amendment to require a "clear and certain" state court judicial remedy for constitutional violations.[324] If this interpretation is correct, the same protection provided by the Fifth Amendment would presumably impose an analogous demand on the federal courts. And yet, the foundational decisions on federal judicial power, *Young* and *Bivens*, do not appear to rest on any particular constitutional clause as the source of a right to sue. They instead point, in

319. *See supra* notes 303–05 and accompanying text.

320. *Crain*, 209 U.S. at 228.

321. *See* Henry v. Mississippi, 379 U.S. 443, 447–48 (1965); Michigan v. Long, 463 U.S. 1032, 1037–44 (1983). Both cases discuss and apply the "adequate and independent state ground" doctrine.

322. *See supra* notes 257–71 and accompanying text.

323. *See supra* notes 299–306 and accompanying text.

324. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18, 19 (1990); Reich v. Collins, 513 U.S. 106, 106–07 (1994).

Young, to "superior authority of [the] Constitution,"[325] and in *Bivens*, to "federally protected rights,"[326] *Marbury*'s "essence of civil liberty,"[327] and to the decision's "vindication of a federal constitutional right."[328] The basis for the Supreme Court's presumption of jurisdiction for cases raising constitutional claims is similarly general. It is designed simply to avoid "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[329]

To specify particular doctrinal consequences that might result from a general acceptance of the proposition that the Constitution contains its own right to sue is also an elusive task. Perhaps the most that can be securely said is that the starting points for argument about our law of constitutional remedies would be more firmly rooted in premises that favor constitutional plaintiffs. The first, and most fundamental, of these premises, is that the rule of law established by our Constitution includes a right to "test the validity" of any government action plausibly challenged by an injured plaintiff as unconstitutional.[330] This right means, in turn, that if the challenge is successful the court adjudicating it must assure the plaintiff an appropriate remedy for the constitutional violation, and that our federal system must offer a court of competent jurisdiction with the power to fulfill these promises.

These premises are qualified, of course, by limitations established in the Constitution itself. For example, some constitutional claims are not justiciable because responsibility for their resolution is assigned by the Constitution itself to Congress, the Executive Branch, or both.[331] Second, because Article I confers exclusive power over federal expenditures on Congress, damage awards of federal, though not state, funds are impermissible without authorization by a federal statute.[332] And third, the state sovereign immunity protected, or restored, by the Eleventh Amendment precludes the lower federal, though not the state, courts from adjudicating constitutional claims against states without authorization by a federal statute enacted under the authority of Section 5 of the Fourteenth

325. *Ex parte* Young, 209 U.S. 123, 160 (1908).

326. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

327. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

328. *Bivens*, 403 U.S. at 402 (Harlan, J., concurring).

329. Webster v. Doe, 486 U.S. 592, 603 (1988) (quoting Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 (1986)).

330. *Young*, 209 U.S. at 174.

331. *See* United States v. Nixon, 418 U.S. 683, 693 (1974); Baker v. Carr, 369 U.S. 186, 200–01 (1962).

332. *See* U.S. CONST. art. I, § 8, cl. 1; Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 703–04 (1949).

Amendment.[333] Within these limits, though, recognition of a right to sue from the Constitution can be expected to change how we think about the remedial obligations and jurisdiction guarantees owed by the federal and state courts in constitutional cases.

A. *The Federal Courts*

Even if a plaintiff has a right to sue drawn directly from the Constitution, the remedial responsibilities of the federal courts are shared with Congress. The specific grants of power to Congress both in Article III and to enforce the post-Civil War amendments might even mean, per Justice Black's dissent in *Bivens*, that Congress's role in shaping judicial remedies for constitutional violations is primary, with the federal courts serving as guarantors of a basic standard of adequacy. Justice Brennan's opinion for the Court in *Bivens* envisioned something like this approach, acknowledging that the officer damages remedy it authorized ought not to be awarded if "another remedy, equally effective in the view of Congress,"[334] were made available. Justice Brennan recognized that there can be many ways by which courts can protect constitutional rights and that our constitutional structure encourages Congress to fashion what it takes to be an optimal remedial scheme.[335] Judicial deference to such a scheme, when Congress does invest the political capital needed to design it, offers that encouragement, with the *Bivens* damage remedy held in reserve as a backstop against sometimes inevitable congressional inattention. As Justice Harlan observed, for Bivens, it was "damages or nothing."[336]

The Court's approach to the *Bivens* remedy in *Bush v. Lucas*, the first in what has now become a long string of decisions denying it, illustrates this approach.[337] In *Bush*, a federal employee, relying on *Bivens*, sought damages from a supervisor who had fired him, allegedly in violation of the First Amendment.[338] In an opinion by Justice Stevens, the Court rejected the claim, but emphasized what it saw as the adequacy of the alternative civil service remedies Congress had designed.[339] These remedies included back pay, restoration—with retroactive seniority—to the position from which the employee had been unlawfully discharged, and a comprehensive administrative process that offered substantial

333. U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1, 13 (1890); Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976).

334. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

335. *Id.*

336. *Id.* at 410 (Harlan, J., concurring).

337. *See* Bush v. Lucas, 462 U.S. 367 (1983).

338. *Id.* at 370.

339. *Id.* at 378.

automatic discovery rights and an opportunity to appeal.[340] The shortcomings of the civil service system—no jury trial, no punitive damages, no compensation for emotional harms—did not require a *Bivens* remedy as an alternative or supplement.[341] Congress's decision to provide "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations,"[342] warranted deference from the federal courts. Justice Stevens saw Congress as "in a far better position than a court"[343] to design remedies for the denial of federal employees' First Amendment rights, even if they "do not provide complete relief," so long as these remedies are "meaningful" and do not allow the wrong to "go unredressed."[344] The civil service remedies afforded to Bush satisfied this standard because they were intended to put him "in the same position he would have been in had the unjustified . . . action not taken place."[345]

This reciprocal relationship between judicially fashioned and statutory remedies, with the former receding as the latter advances, and vice versa, has, as we have seen, been abandoned, even forgotten, by the Court over the nearly four decades since *Bush*.[346] The requirement of an adequate remedy for a constitutional violation that flows from a recognition of the Constitution as a source of a right to sue might well prompt its recall and revival.

The *Young* injunctive remedy against constitutional violations by government officers also shares a reciprocal relationship with federal statutory remedies. Because of the comprehensive remedial regime provided by 42 U.S.C. § 1983, the *Young* remedy is mostly redundant with respect to deprivations of constitutional violations by persons acting "under color" of state law.[347] But in cases where § 1983 may not authorize a claim, including virtually all cases against federal officers, an understanding of the *Young* remedy as deriving from a constitutional right to relief from unconstitutional injury, rather than as merely an exercise of equitable discretion, would allow it to serve as the same kind of default guarantor of remedial adequacy that the *Bush* approach suggests for *Bivens*.

340. *Id.* at 375–76.

341. *Id.* at 388–90.

342. *Id.* at 388.

343. *Id.* at 389.

344. *Id.* at 388.

345. *Id.* (quoting S. REP. NO. 89-1062 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2097).

346. *See supra* notes 176–88 and accompanying text; Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV. 1865 (2021) (describing the competing view that judicial power to fashion remedies for constitutional violations is exclusive rather than shared with Congress).

347. 42 U.S.C. § 1983.

Similarly, in a case like *Whole Woman's Health v. Jackson*,[348] the Supreme Court's focus would necessarily have been on its responsibility to deploy the *Young* remedy to assure adequate and timely relief to the Texas abortion providers against the harm to their rights under the Supreme Court's reproductive freedom decisions caused by the prospect of private damage suits. The approach actually taken by the *Jackson* majority, declaring that *Young* relief was a narrow, discretionary exception to state sovereign immunity, available under the common law only against state executive officers, would have been much more difficult to sustain under an understanding of the Constitution itself as requiring an adequate judicial remedy for its violation.[349]

Chief Justice Roberts's invocation of *Marbury v. Madison* warned against the dire consequences he saw in his colleagues' refusal to enjoin the Texas enforcement scheme at issue in *Jackson*:

> [Texas law] has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.
>
> [It] has employed an array of stratagems designed to shield its unconstitutional law from judicial review. [Under *Marbury v. Madison*], it is a basic principle that the Constitution is the "fundamental and paramount law of the nation" and "[i]t is emphatically the province and duty of the judicial department to say what the law is."
>
> . . . .
>
> . . . "[If the states] may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery."[350]

To this, the Chief Justice might only have added *Marbury*'s further admonition that

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> . . . .
>
> 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

348. Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

349. *Id.* at 534–35.

350. *Id.* at 543, 545 (Roberts, J., concurring) (citations omitted) (quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809)).

of a vested legal right.[351]

Judicial acceptance of a right to sue grounded in the Constitution could also be expected to reduce reliance on prudential considerations to justify withholding remedies for unconstitutionally inflicted injuries. If the Constitution provides access to a judicial remedy for its violation it may become more difficult for courts to deny such a remedy on grounds that are not themselves based on the Constitution.

In its landmark *one person, one vote* decision, *Baker v. Carr*, the Court famously held that the Guarantee Clause of Article IV of the Constitution did not, by its text, commit the resolution of all Equal Protection challenges to the composition of state legislative districts to Congress.[352] But in rejecting the application of the political question doctrine in *Baker*, Justice Brennan's majority opinion listed a number of prudential grounds, not drawn from the Constitution, that might justify application of the doctrine to dismiss subsequent cases.[353] These grounds included

> a lack of judicially discoverable and manageable standards for resolving [a case]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[354]

These open-ended, nearly standardless, rationales for declining to adjudicate were, even before their announcement in *Baker*, criticized as an abdication of judicial responsibility. Professor Herbert Wechsler argued that

> the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. . . . [W]hat is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is [totally] different from a broad discretion to abstain or intervene.[355]

Professor Wechsler's criticism notwithstanding, the prudential

351. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

352. Baker v. Carr, 369 U.S. 186, 234 (1962).

353. *Id.* at 217.

354. *Id.*

355. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

political question doctrine has been regularly invoked by both the Supreme Court and the U.S. Courts of Appeals as the reason for denying remedies that might otherwise have been available under the authority of *Young* or *Bivens*. Most notably, the Supreme Court recently held that federal courts could not enjoin unconstitutional, non-racial gerrymandering, because it concluded that challenges to the construction of legislative districts could not be resolved through the application of judicially manageable standards.[356] And numerous circuit courts have denied *Bivens* claims for allegedly unconstitutional detention and torture of prisoners in American military custody, relying in part on the "lack of respect," "unquestioning adherence," and "embarrassment" strands of the prudential political question doctrine.[357]

If the *Bivens* and *Young* remedies are themselves purely creatures of common law discretion, the deployment of discretionary grounds to withhold them may not be particularly noteworthy. But if *Young* and *Bivens* were themselves understood to derive from the Constitution, constitutional plaintiffs might be expected to overcome the doctrine more often. Judges would likely feel more compelled to explain why a remedy called for by the Constitution could justifiably be withheld on non-constitutional, purely prudential, grounds. At the least, a decision to award such a remedy could not so easily be dismissed as "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a . . . constitutional prohibition."[358] Instead, more secure in the legitimacy of its power, the Supreme Court might return to the project of elaborating what a constitutionally sufficient remedial scheme requires, an effort begun in *Carlson* and *Bush*, but abandoned ever since.[359]

B. *The State Courts*

At least since the 1992 decision in *Howlett*, it has been clear that the Supremacy Clause requires state courts of general jurisdiction to adjudicate claims authorized by federal law.[360] In *Howlett*, and in the decisions which prefigured it, the federal claims at stake had all been authorized by statutes.[361] But if, as hypothesized here, the Constitution were acknowledged to provide a basis for a claim for relief, the *Howlett* mandate would logically encompass that claim as well. As a consequence, the Supremacy Clause would be understood to require the state courts to

356. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–09 (2019).

357. *See, e.g.*, Rasul v. Myers, 563 F.3d 527, 532 (D.C. Cir. 2009); Arar v. Ashcroft, 585 F.3d 559, 565 (2d Cir. 2009); Vance v. Rumsfeld, 701 F.3d 193, 198–99 (7th Cir. 2012).

358. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

359. *See supra* notes 185–87 and accompanying text.

360. *See supra* notes 214–15 and accompanying text.

361. *See* Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 358 (1990); *see also* Testa v. Katt, 330 U.S. 386 (1947).

provide the clear and certain remedy called for by *McKesson*, and reaffirmed by *Reich*, for any constitutional violation established in a case falling within their respective jurisdictions.

So far, this obligation may appear to be similar to the duty of a federal court, implied from the readings of *Young* and *Bivens* just suggested, to assure an adequate remedy to a constitutional plaintiff, whether that remedy is drawn from a federal statute or from the court's inherent power to enforce the Constitution. But the two duties, though analogous, are not exactly the same, because the state courts occupy a different position from the lower federal courts in our constitutional scheme.

Recall that under the Madisonian Compromise, the lower federal courts owe their existence and power to adjudicate federal claims to Congress.[362] That power was not comprehensively extended until 1875 with the first general conferral of original, "arising under federal law" jurisdiction on the federal trial courts.[363] Until then, if federal claims, including constitutional claims, could be initiated anywhere, it was in the state courts. Hence the Supremacy Clause's instruction, addressed explicitly and only to "the Judges in every State," that they are bound by the Constitution and laws of the United States,[364] was from the beginning indispensable to the rule of law under the Constitution.

By contrast, the constitutional duties of the lower federal courts are more indirect, and, as we have seen, inevitably mediated by their structural dependence on Congress. The responsibility to provide remedies for violations of constitutional rights is, by design, shared by the two branches. The state courts' remedial responsibilities are both less dependent on Congress and "uniquely" more directly specified by the Constitution.

Thus, in both the *Bivens* and *Young* lines of decision, the Supreme Court has sometimes appropriately deferred to statutory remedies for constitutional violations. But the responsibilities of the state courts of general jurisdiction in constitutional cases are not necessarily satisfied by their implementation of even robust statutory remedies. Though they are, of course, obligated to grant all required federal statutory relief, such relief does not displace the state courts' direct, unqualified duty under the Supremacy Clause to provide any additional remedies that the Constitution may demand.

The constitutional damages remedy against the state government required by *McKesson*[365] illustrates this difference. The out-of-state liquor distributors' Dormant Commerce Clause challenge to Florida's differential tax rate could have proceeded in federal court under 42 U.S.C.

362. *See supra* note 195 and accompanying text.

363. *Id*.

364. U.S. CONST. art. VI., cl. 2.

365. *See supra* notes 201–15 and accompanying text.

§ 1983. Section 1983 authorizes a range of remedies for unconstitutional state laws and policies, including injunctive relief against their enforcement, attorney fees through § 1988 payable from state treasuries, and, subject to higher protective qualified immunity defenses, damages against official state officers.[366] Section 1983 does not, however, authorize damage remedies against the states themselves.[367] Nor is it clear whether Congress has the power to authorize such remedies, which the Eleventh Amendment places beyond the jurisdictional power of the federal courts. On the one hand, Congress can use Section 5 of the Fourteenth Amendment to override the states' Eleventh Amendment immunity by enacting remedial measures designed to enforce Fourteenth Amendment rights.[368] And the Court held, in *McKesson* itself, that the Fourteenth Amendment Due Process Clause may require a damage remedy against a state for a violation of the Dormant Commerce Clause.[369] On the other hand, the substantive constitutional interests protected by the Dormant Commerce Clause were established by the original 1787 Constitution, not the Fourteenth Amendment, and may therefore be beyond the reach of Congress's Section 5 override power.[370]

These limitations, actual and potential, would not affect the remedial calculus of a federal court adjudicating McKesson's challenge. The logic of *Bivens* and *Young*, linked by their common application in *Seminole Tribe*,[371] would call on that court to look first to the statutory remedies made available to the plaintiff by § 1983. Since those remedies, despite being incomplete, are plainly adequate, that first look is also the last one. No additional relief, drawn directly from the Constitution itself, need be made available to McKesson by a federal court.

The constitutional responsibilities of the Florida state courts that heard the actual *McKesson* challenge were more exacting. Section 1983 remedies are equally available to state court and federal court plaintiffs. Nevertheless, these remedies do not, as the *McKesson* decision shows, supplant those required by the Constitution and thus do not exhaust the remedial inquiry required of state court judges. The "clear and certain" remedy for constitutional violations sets an independent, sometimes more demanding, standard than the mere constitutional adequacy required by *Bivens* and *Young*.

366. 42 U.S.C. §§ 1983, 1988.

367. *See* § 1983.

368. *See* 1983, 1988; Quern v. Jordan, 440 U.S. 332, 342–43 (1979); Fitzpatrick v. Bitzer, 427 U.S. 445, 450–51 (1976).

369. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul., 496 U.S. 18, 22 (1990).

370. *Id.* at 34–35.

371. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996); *see also supra* notes 217–22 and accompanying text.

C. *The Allocation of Constitutional Jurisdiction*

If the right to sue to remedy an unconstitutionally inflicted injury is itself conferred by the Constitution, a court of competent jurisdiction must be available to adjudicate such a suit. That court may not need to be a federal court. The apparently optional character of "arising under" jurisdiction authorized by Article III, reinforced by Congress's failure to implement it generally until 1875, and fully until 1980,[372] suggests strongly that Congress may control its exercise by the lower federal courts, even in constitutional cases.

Nor does a constitutional right of access to a court of competent jurisdiction necessarily entail a right of appeal to the Supreme Court. There are, of course, formidable arguments, dating back to Justice Story's opinion in *Martin v. Hunter's Lessee*, that the values of uniformity, finality, and supremacy support the necessity of Supreme Court review to resolve disputed questions of federal law.[373] This view also draws support from the *McCardle* opinion's recognition that the ban on habeas corpus jurisdiction sustained there did not close off all avenues to Supreme Court appellate review.[374] Still, the plenary language of Article III's Exceptions Clause,[375] and the enduring force of *McCardle*'s unyielding reading of that clause,[376] continues to support the conventional understanding that Congress may constitutionally restrict the Supreme Court's appellate jurisdiction.

The power of these conventional concessions of congressional control over the constitutional jurisdiction of the federal courts does not, however, mean that the control is without limits. If a plaintiff claiming an unconstitutional injury has a constitutional right to seek a judicial remedy, then an attempt by Congress to entirely foreclose that plaintiff's access to a court of competent jurisdiction is itself a violation of the Constitution and cannot be sustained. This means that a federal statute, such as the one at issue in *Boumediene,* that purports to deny both federal and state courts the power to adjudicate cases presenting constitutional claims, is beyond Congress's constitutional authority.[377] Congress's control over the jurisdiction of the federal courts to hear constitutional claims may be plenary, but it is also necessarily only allocative. If the federal courts are to be closed to constitutional claims, the rule of the Constitution as law requires that the state courts remain open.

372. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331) (removing amount in controversy requirement from § 1331).

373. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

374. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513–14 (1868).

375. U.S. CONST. art. III, § 2, cl. 2.

376. *McCardle*, 74 U.S. at 514.

377. *See supra* notes 274–75 and accompanying text.

This proposition draws on and may augment, if slightly, the understanding proposed by Henry Hart's classic dialogue article.[378] In the dialogue, Hart posited that the state courts may be the ultimate guarantors of our constitutional rights.[379] Acceptance of the Constitution as a source of a right to sue for its own violation would reinforce the implications of Hart's idea for how our courts ought to treat federal jurisdiction curtailment statutes that violate the principle of allocation.

Thus, while Congress may plainly preempt the exercise of state court jurisdiction over constitutional claims, it may do so only if the power of the federal courts to adjudicate these claims is left undisturbed. A state court could not give effect to a blanket ban on jurisdiction. Similarly, while Congress may, and obviously has, made liberal use of its power to authorize the removal of cases presenting federal claims from the state courts to the lower federal courts, it cannot authorize removal of cases raising constitutional claims only then to direct their dismissal from federal court for lack of jurisdiction. And finally, while state courts may not, under the doctrine in *Tarble*'s case, be permitted to supervise the conduct of federal officers by granting injunctive, mandamus, or habeas corpus relief against them,[380] that limitation is dependent, as *Tarble* itself suggests,[381] on the availability of a federal court endowed with jurisdiction to award these forms of relief. Indeed, Hart himself drew on *Johnson v. Eisentrager*, a case sustaining Congress's power to withdraw federal court jurisdiction over a habeas corpus petition by a German prisoner held overseas in American military custody, as an example of the residual jurisdictional power of the state courts.[382]

The Hart dialogue does not directly argue that the state courts are invariably required by the Supremacy Clause to exercise jurisdiction over cases raising constitutional claims. Professor Hart appeared to assume that their general jurisdiction, conferred by state law, would always be available, not envisioning that states might carve out exceptions for particular kinds of cases.[383] The New York statute invalidated in *Haywood*, however, provides an example of a state legislature's willingness to enact such an exception, with the effect, and perhaps the aim, of seeking to preclude its courts from adjudicating particular classes of federal claims.[384] The *Haywood* decision, as we have seen, showed that the Supreme Court is both skeptical as to whether this kind of exception is consistent with the Supremacy Clause, but also reluctant to hold directly

378. *See* Hart, *supra* note 296.

379. *Id.* at 1401.

380. *In re* Tarble, 80 U.S. (13 Wall.) 397, 403–05 (1871).

381. *Id.* at 400–01; Fallon, *supra* note 190, at 1084–85.

382. Fallon, *supra* note 190, at 1093–95; *see also* Johnson v. Eisentrager, 339 U.S. 763, 776–77 (1950).

383. Fallon, *supra* note 190, at 1047–48.

384. Haywood v. Drown, 556 U.S. 729, 732–34 (2009).

that neutral state law limitations may never exclude federal claims from the general jurisdiction of their courts.[385]

It is possible that the robust immunity of state governmental institutions endorsed by the current Supreme Court[386] may provide a measure of independence to the states from congressional impositions on the jurisdiction of their courts. But if the Constitution itself is the source of a claim for relief by persons harmed by its violation, that claim should override an assertion of state court jurisdictional immunity. The state courts might therefore be free, even after *Haywood*, to decline, under some circumstances, to adjudicate claims of official misconduct brought to them under the authority of § 1983. But if challenged directly under the Constitution, the Supremacy Clause, which has bound the states since ratification, should be understood to require their courts to be competent to provide the "clear and certain remedy" for such misconduct required by *McKesson* and *Reich*.[387]

The Supreme Court's suggestion in *Crain* that the constitutional jurisdiction of the state courts is mandatory would then be correct.[388] That mandatory jurisdiction could not be supplanted by state legislatures, but only by Congress's exercise of its power to preempt it by placing exclusive jurisdiction over, some or all, constitutional claims in the federal courts. If the Constitution confers a right to sue for its own violation, some court, somewhere, must have jurisdiction to grant the relief sought by that suit. That understanding, at any rate, would redeem the premise of the story about our Constitution that we hope is told by *Marbury v. Madison*.

CONCLUSION

The Supreme Court has never held that the Constitution contains a right to sue for its own violation. This Article has, however, claimed that many of the Court's decisions protecting constitutional rights may depend on an assumption that it does. Were the Court squarely to recognize, and validate, this assumption, the remedies available to constitutional plaintiffs would become significantly more secure than they appear to be now. But on the evidence of its decisions in *Armstrong* and, most recently (and strikingly), in *Jackson,* the current Court seems to be moving rapidly in the opposite direction. These decisions threaten the structure of constitutional remedies by undermining one of its central premises: that the rule of law in the United States guarantees anyone who is injured in

385. *Id.* at 735–36.

386. *See* Alden v. Maine, 527 U.S. 706, 713 (1999); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 523 (2012); New York v. United States, 505 U.S. 144, 178–79 (1992); Printz v. United States, 521 U.S. 898, 907–08 (1997).

387. *See supra* notes 201–41 and accompanying text.

388. *See supra* notes 309–21 and accompanying text.

violation of the Constitution a right to a judicial remedy for that injury. This premise, that the Constitution is indeed a sword, has shaped our understanding of that rule of law since *Marbury v. Madison*. We can only hope that *Marbury*'s constitutional narrative is not inexorably on the way to becoming just another old story we share when we wax nostalgic about how things used to be.