Legislative Calibration of Constitutional Remedies

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ABSTRACT

The Supreme Court currently faces two very different kinds of criticism. One contends that the Court is not doing enough to remedy violations of the Constitution and asks the Court to adopt a more robust set of such remedies, claiming that the Constitution itself requires more remedies than the Court is currently providing. From this perspective, a decision refusing to enjoin the enforcement of an unconstitutional statute is equivalent to nullification. A second seeks to reform the Court, either to change its membership and thereby its interpretation of the Constitution, or to disempower the Court. Expanding the Court's membership and removing its jurisdiction are among the reforms suggested.

This article takes a different approach, neither pleading with the Court to enforce the Constitution more vigorously nor calling for the Court to be reformed. It contrasts the promise and the reality of *Marbury*: while *Marbury* states that a remedy is required for the violation of every legal right, Marbury himself obtained no remedy. It discusses a wide range of remedies that are not constitutionally required as well as a small number of remedies that are constitutionally required. It discusses potential criticisms, including arguments that existing doctrine limiting remedies is wrong, arguments that it is wrong to analyze remedies separately from each other, and arguments that it is wrong to conceive of constitutional remedies separately from constitutional rights. Finally, it suggests various ways in which legislatures can calibrate constitutional remedies.

This analysis highlights the importance of democratic action by legislatures, especially by Congress, in safeguarding our rights and making them real. The ability of Congress to calibrate the enforcement of constitutional rights is an important tool for implementing its view of the Constitution.

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I. INTRODUCTION

The Supreme Court currently faces two very different kinds of criticism. Broadly speaking, one contends that the Court is not doing enough to remedy violations of the Constitution. The second seeks to reform the Court in order to change its interpretation of the Constitution or to reduce its power.

The first criticism takes inspiration from the famous statement in *Marbury v. Madison* that the "very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and that the government of the United States "will certainly cease to deserve" to be called a "government of laws and not of men," if the "laws furnish no remedy for the violation of a vested legal right."[1]

In *Whole Woman's Health v. Jackson*, the Supreme Court held that a pre-enforcement challenge to a Texas abortion statute (commonly known

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

as the Texas Heartbeat Law or "SB8") was not permissible against a state attorney general, a state court judge, a state court clerk, or a private party—even though the underlying state statute was plainly unconstitutional under then-existing precedent.[2] Citing *Marbury*, the dissenting Justices complained that the Court was allowing the nullification of its rulings.[3] Initially, the Court permitted the action to go forward against health licensing officials based on its reading of Texas state law,[4] but it declined to intervene when the court of appeals certified the state law question to the highest state court.[5] And when the state court took a different view of the state law question than the Supreme Court, the court of appeals ordered dismissal of the claims against the health licensing officials as well.[6]

At the end of the day, the challengers were unable to obtain the relief they sought; they could not get an order preventing the enforcement of a state statute that was plainly unconstitutional under then-existing precedent.

Some might view that result as unique to the abortion context; after all, by the time the Court decided *Whole Woman's Health* on December 10, 2021, it had already heard argument in, and conferenced, *Dobbs*.[7] So, while the decision in *Dobbs* was not leaked until May 2023 and not handed down until June, the members of the Court knew where they stood on overruling *Roe*.

But whether because of respect for the traditional confidentiality of the Court's deliberations or the knowledge that a final decision may differ

2. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021).

3. *See id.* at 545 (Roberts, C.J., dissenting in part) ("The clear purpose and actual effect of S. B. 8 has been to nullify this Court's rulings."). *Id.* at 550 (Sotomayor, J., dissenting in part) ("The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. The Court indicates that they can . . . ."). Chief Justice Roberts also suggested that the Court was allowing a federal court judgment to be annulled, *id*. at 545 (citing United States v. Peters, 9 U.S. 115, 136 (1809)), but that suggestion overlooks the distinction between an opinion and a judgment—between the law of precedent and the law of judgments. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

4. *See Whole Woman's Health*, 142 S. Ct. at 535 ("On the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young's* historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners . . . .").

5. *See In re* Whole Woman's Health, 142 S. Ct. 701 (2022).

6. *See* Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022). The court of appeals left it to the district court to consider whether plaintiffs have standing to challenge a state law provision for attorney's fees.

7. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (argued Dec. 1, 2021 and decided June 24, 2022). The Court held a conference on December 3, 2021. Supreme Court Calendar, October Term 2021. The draft of the majority opinion in *Dobbs* was published by POLITICO on May 2, 2022. *See* Marshal's Report of Findings & Recommendations 1 (Jan. 19, 2023). *Dobbs* overruled Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

from the initial conference, the opinions in *Whole Woman's Health* give no hint that the decision turned on inside knowledge of where *Dobbs* was likely headed. To the contrary, the principles announced in *Whole Woman's Health* are not limited to abortion. Recognizing that those announced principles sweep broadly and do not depend on judicial doubts about the underlying constitutional right, California has already enacted a gun control measure modeled on the Texas abortion statute.[8]

A number of scholars have criticized the Court for failing to intervene and block the enforcement of SB8. Simona Grossi, for example, asserts that the "Texas law reflects . . . Texas's conviction that the U.S. Supreme Court has no authority to review its laws, that the states are independent of—and in some respects superior to—the national government[,] . . . . [a]nd the Court has permitted this abuse and attack to the Constitution."[9] Lauren Moxley Beatty proclaims that "the Supreme Court effectively decided that states may enact laws designed to nullify federal constitutional rights within their borders"[10] and that while "SB8 is far from the first state law to attempt to nullify federal law in U.S. history . . . it is the first to succeed."[11]

Bruce Miller contends that *Whole Woman's Health* "threaten[s] 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 violation of the Constitution a right to a judicial remedy for that injury."[12] As Miller sees it, what Chief Justice Marshall "must have meant in *Marbury*" is that "[i]f 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."[13]

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8. *See* Cal. Bus. & Prof. Code § 22949.60 (Cal. Sess. Laws, Ch. 146, July 22, 2022); *see* Alan M. Dershowitz, *How to mess with Texas' anti-abortion bounty? Apply it to gun sales*, THE HILL (Sept. 10, 2021, 3:16 PM), https://bit.ly/3gqPzqc; *cf.* Jon D. Michaels & David Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023) (discussing statutes similar to SB8); *Link v. Diaz*, 2023 WL 2984726, at *8 (N.D. Fla. April 17, 2023) (dismissing a challenge to a Florida law for lack of standing while describing that law as "apparently designed to chill speech and, though left intentionally toothless for enforcement purposes, remain[ing] hanging over students' and professors' heads like the proverbial sword of Damocles . . . .").

9. Simona Grossi, Roe v. Wade *Under Attack: Choosing Procedural Doctrines over Fundamental Constitutional Rights*, 13 CONLAWNOW 39, 99 (2022).

10. Lauren Moxley Beatty, *The Resurrection of State Nullification—And the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L. J. ONLINE 18, 19 (2022).

11. *Id*. at 20; *see also Note, Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1419 (2022) (stating that the Court's holding leaves "an SB 8-shaped hole in the protection of all constitutional rights").

12. Bruce Miller, *Constitutional Law-Federal Courts: Is the Constitution A Sword?*, 44 W. NEW ENG. L. REV. 451, 512–13 (2022).

13. *Id*. at 457.

In an article published several months before *Whole Woman's Health* was decided, Martin Redish argues more broadly that "remedies for violations of the Constitution must be recognized as just as much a part of the Constitution as the substantive directives are, and therefore" that such remedies are "fully in the control of the countermajoritarian judiciary."[14] As Redish sees it, judicial review entails that constitutional remedies "must be solely the province of the judiciary,"[15] and because "remedies for constitutional violations . . . have constitutional status, . . . the federal judiciary must have the final authority to craft the appropriate remedial scheme with no deference to Congress or the Executive."[16] Redish explicitly relies on a judicial supremacist reading of *Marbury*. He goes so far as to assert that "Congress has no constitutional interpretive authority"[17]—which would come as a surprise to the members of Congress through the centuries who have interpreted the Constitution while debating and voting on legislation.[18] Redish dismisses anyone who rejects judicial supremacy as "fringe"—an adjective he uses three times.[19] Other prominent defenders of judicial supremacy, however, have recognized that "most scholars, most officials, and, we suspect, many ordinary citizens believe that even when the Supreme Court has spoken on a constitutional issue, nonjudicial officials have no more obligation to follow its interpretation than the courts have to follow the constitutional interpretations of Congress or the Executive."[20]

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14. Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C.L. REV. 1865, 1869 (2021).

15. *Id*. at 1875.

16. *Id*. at 1876.

17. *Id*. at 1897; *see also* Beatty, *supra* note 10 at 29, 30 (celebrating Cooper v. Aaron, 358 U.S. 1 (1958) and Ableman v. Booth, 62 U.S. 506 (1859) (Taney, C.J.)); *cf*. Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 353 (1930) (noting that "the state courts, for a period of eighty years, continued to assert a right, through the issue of writs of *habeas corpus*, to take persons out of the custody of federal officials"); *id*. at 357 (noting that "for twelve years after the *Booth* decision, they continued to issue such writs against federal officials").

18. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1999); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 (2007); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (2013).

19. *See* Redish, *supra* note 14, at 1875 (only "the most fringe constitutional scholars challenge the sanctity and security of the precept of judicial review."); *id*. at 1888 ("none but fringe constitutional scholars"); *id*. at 1875 n.36 (stating that it "should suffice for present purposes to describe all such theories as 'fringe'" (referring to departmentalism and popular constitutionalism)).

20. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997) (footnotes omitted) ("According to what appears to be the dominant view, nonjudicial officials, in exercising their own constitutional responsibilities, are duty-bound to follow the Constitution as they see it—they are not obliged to subjugate their constitutional judgments to what they believe are

If one believes that constitutional remedies are "solely the province of the judiciary,"[21] then arguments for more robust constitutional remedies are aimed at the Supreme Court itself. But the Supreme Court shows no sign of adopting a more robust approach. If constitutional remedies were "solely the province of the judiciary," as Redish insists, the result today might well be even less robust remedies than are currently available.[22]

Indeed, while some rely on *Marbury* to argue that robust remedies are constitutionally required, it is important to see that *Whole Woman's Health* has something important in common with *Marbury*: Just as Whole Woman's Health obtained no remedy, William Marbury obtained no remedy.

While some criticize the Court for doing too little to remedy constitutional violations, other critics take a rather different tack. These critics reject the current composition of the Court or its interpretation of the Constitution. They seek to reform the Court itself. These proposed reforms take a variety of forms, such as expanding the size of the Court, imposing term limits,[23] curtailing jurisdiction, establishing supermajority decision rules, and providing for legislative overrides.

These arguments for reform are not addressed to the Supreme Court but to elected officials, seeking legislation or perhaps constitutional amendments. And at least one elected official, President Biden, found the pressure to consider such reforms great enough that he established a Presidential Commission to evaluate them.[24] That Commission issued its final report—which discusses these proposed reforms in depth—a mere two days before the Court's decision in *Whole Woman's Health*.[25]

These proposed reforms, in turn, can be grouped into two categories. As Ryan Doerfler and Samuel Moyn explain in an article published shortly

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the mistaken constitutional judgments of others."); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 456 (2000) (noting that judicial supremacy "has long been subject to withering criticism"); *see also, e.g.*, Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1722 (2017) ("Although the Supreme Court occasionally speaks as if judicial supremacy is the law, reflection on the activity of constitutional adjudication reveals that judicial departmentalism is the law.") (footnote omitted); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005).

21. *See* Redish, *supra* note 14, at 1875.

22. *Id*. While critical of *Whole Woman's Health*, Richard Fallon takes a characteristically more moderate position, urging that "courts appropriately act as Congress's junior partners in developing remedies" for constitutional violations. Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1310 (2023).

23. Some proponents of term limits may be content with the composition and constitutional interpretation of the current Court; term limits would change the Court slowly over time.

24. *See* Exec. Order No. 14,023, 86 Fed. Reg. 19569 (Apr. 9, 2021).

25. *See* THE PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U. S., FINAL REPORT (Dec. 8, 2021).

before the Commission's final report, there are "two fundamentally different reform options: mechanisms that alter personnel and mechanisms that disempower the institution."[26]

Mechanisms that alter personnel can be consistent with a commitment to a constitutionally required, robust judicial enforcement of constitutional rights—just *other* constitutional rights, the *right* rights, the ones favored by the critics and presumably the new members, rather than the existing members, of the Court. Such mechanisms are harder to reconcile with a genuine commitment to judicial supremacy. That is because for them to work, someone (typically, an elected official) must take some action inconsistent with the Supreme Court's interpretation of the Constitution.[27] Perhaps the idea is that judicial supremacy is temporarily suspended while the desired changes in personnel and doctrine are made, but then restored?

Disempowering reforms, on the other hand, are not consistent with a commitment to a constitutionally required, robust judicial enforcement of constitutional rights or with judicial supremacy. Their whole point is to *disempower* the Supreme Court.

Doerfler and Moyn favor "disempowering reforms that meet the contemporary need," rather than "personnel reforms, which confirm Supreme Court power while pursuing ends like institutional legitimacy, rather than progressive change . . . ."[28] As they see it, "legislatures might be fora of principle equal or even superior to [courts in] defending extant rights commitments and propagating new ones."[29] While

> no one should pretend that a legislated rights regime would match the set of entitlements achieved through judicial interpretation precisely[,] . . . . it is pivotal to any genuine comparison [between courts and legislatures] that it is not a matter of exclusive principled defense of rights in judiciaries on one side against unprincipled majoritarian action on the other. Instead, it is a comparison of some schedule of rights and some modicum of protection on both sides of the line.[30]

What Doerfler and Moyn saw as a once-in-a-lifetime opportunity for reform may already have passed. As widely expected, President Biden's

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26. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1706 (2021).

27. *See Testimony of Professor Edward A. Hartnett* Submitted to the Presidential Commission on the Supreme Court 10 (Aug. 13, 2021), https://bit.ly/423Uz60 [hereinafter *Hartnett Testimony*] (observing "an odd disconnect in some proposals for reform: On the one hand, in diagnosing the problem, judicial supremacy seems to be assumed, but on the other hand, the suggested reforms work only if someone . . . takes action inconsistent with Supreme Court opinions").

28. Doerfler & Moyn, *supra* note 26, at 1709.

29. *Id*. at 1741.

30. *Id*. at 1742.

Commission threw cold water on suggested reforms. And the November 2022 midterm election turned control of the House of Representatives over to the Republican Party, which has little interest in reforming the Court. The performance of the respective branches of the federal government in the wake of the 2020 presidential election may also have weakened support for major Supreme Court reform.[31]

This Article takes a different approach, neither pleading with the Court to enforce the Constitution more vigorously nor calling for the Court to be reformed. It argues that few remedies are constitutionally required and that this empowers legislatures to calibrate constitutional remedies. Part II contrasts the promise and the reality of *Marbury*. Part III discusses a wide range of remedies that are not constitutionally required. Part IV discusses a small number of remedies that are constitutionally required. Part V responds to potential criticism. Part VI discusses various ways in which legislatures can calibrate constitutional remedies.

This analysis highlights the importance of democratic action by legislatures, especially by Congress, in safeguarding our rights and making them real. The ability of Congress in particular to modulate the enforcement of rights recognized by the judiciary is an important tool for Congress to implement its view of the Constitution.

II. THE PROMISE AND THE REALITY OF *MARBURY*

The Supreme Court in *Marbury* was clear that Marbury's rights had been violated. It insisted that once his commission as justice of the peace was signed and sealed, he had a vested right to that office for its five-year term.[32] The Court also insisted that the "very essence of civil liberty" is the right to claim protection when injured, and that otherwise we could not claim to be a government of laws, rather than men.[33] And it insisted that delivery of the commission was not a matter left to executive discretion, making for "a plain case for a mandamus."[34]

Yet it did not grant that remedy, holding that it lacked jurisdiction under Article III of the Constitution.[35] Some have thought that all Marbury had to do to secure his commission and his office was to sue in another

31. *See Hartnett Testimony*, *supra* note 27, at 15 ("Under recent stress, Congress bent, but didn't break. The executive branch held, but only by relying on law to resist the President's entreaties. The judiciary, including the Supreme Court, did well.").

32. *See* Marbury v. Madison, 5 U.S. 137, 162 (1803).

33. *See id*. at 163.

34. *Id*. at 173. *See also Mandamus*, *Black's Law Dictionary* (11th ed. 2019) ("[Latin "we command"] (16c) A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu. to correct a prior action or failure to act.").

35. *See Marbury*, 5 U.S. at 176.

court.[36] But no other court was empowered to grant the mandamus relief he sought.

By the time that Marbury lost in the Supreme Court, the circuit courts, created in 1801 with their own judges, had been abolished (more about this in a moment).[37] The old circuit courts, created in 1789 without their own judges but staffed by local district judges and Supreme Court Justices, had been restored when Congress repealed the Judiciary Act of 1801 in 1802.[38] But they lacked the power to issue writs of mandamus to federal officers. The All Writs Act—Section 14 of the Judiciary Act of 1789—is not a freestanding grant of power, but instead it only gives power to issue those writs that are necessary to exercise jurisdiction.[39] The grant of jurisdiction must be found somewhere else. Section 11 of the Judiciary Act of 1789 did not give circuit courts general federal question jurisdiction, so, as the Supreme Court held in 1813, federal circuit courts could not issue a writ of mandamus to compel the register of a federal land office to issue a final certificate of purchase of lands.[40] And this remained true even if a plaintiff invoked the diversity jurisdiction of the circuit courts while relying on federal law as the basis for his substantive claim.[41]

Nor were the state courts available to issue writs of mandamus to federal officials. The Supreme Court explained that because the United States "ha[d] not thought proper to delegate that power to their own [c]ourts," it was "not easy to conceive" a basis for a state court to issue mandamus to a federal officer.[42] Issuing mandamus to a federal officer was not a reserved power of the states.

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36. *See* Susan Low Bloch, *The* Marbury *Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 617 (2001) (claiming that there is "good reason to believe Marbury and his colleagues would have prevailed in the Circuit Court").

37. *See* Act of March 8, 1802, § 2, 2 Stat. 132.

38. *See id*. at § 4.

39. *See* 28 U.S.C. § 1651 (codifying the All Writs Act).

40. *See* M'Intire v. Wood, 11 U.S. 504, 505 (1813). The federal district courts at the time were largely courts of admiralty with jurisdiction over minor federal crimes. *See* Judiciary Act of 1789, § 9.

41. *See* McClung v. Silliman, 19 U.S. 598, 600–01 (1821). Justice Johnson wrote:

> There is, then, no just inference to be drawn from the decision in the case of *M'Intire v. Wood*, in favour of a case in which the Circuit Courts of the United States are vested with jurisdiction under the 11th section. The idea is in opposition to the express words of the Court, in response to the question stated, which are, 'that the Circuit Court did not possess the power to issue the mandamus moved for.'

Id.

42. *Id*. at 604. The Court elaborated:

> It is not easy to conceive on what legal ground a State tribunal can, in any instance, exercise the power of issuing a mandamus to the register of a land office. The United States have not thought proper to delegate that power to their own Courts. But when in the cases of *Marbury v. Madison*, and that of *M'Intire v. Wood*, this Court decided against the exercise of that power, the idea never

It is true that more than three decades after *Marbury*, the Supreme Court held that the United States Circuit Court for the District of Columbia—unlike any other court in the country—did have the power to issue writs of mandamus to federal officers.[43] The Court offered two reasons for this conclusion, both of which have considerable weaknesses.

First, the Court concluded that because the District of Columbia is not in any state but was created by cessions of land from Maryland and Virginia, the United States Circuit Court for the District of Columbia inherited the power of the Maryland General Court to issue writs of mandamus.[44] The problem with this theory is that the United States Circuit Court for the District of Columbia is not the high court of a sovereign—like the King's Bench in England or the Maryland General Court—with power to supervise across the sovereign's territory. The highest court of the federal sovereign, and the federal court with nationwide power, is the Supreme Court.

Second, the Court observed that the Act creating the United States Circuit Court for the District of Columbia gave it the jurisdiction of the other United States circuit courts and, at the time, those other circuit courts had federal question jurisdiction pursuant to the Judiciary Act of 1801.[45] The Court concluded that the United States Circuit Court for the District of Columbia retained federal question jurisdiction, even though Congress had repealed the Judiciary Act of 1801 in 1802.[46] The problem with this theory is that one might instead conclude that the jurisdiction of the United States Circuit Court for the District of Columbia was designed to mirror the jurisdiction of other circuit courts, so when Congress changes the jurisdiction of the circuit courts generally, the jurisdiction of United States Circuit Court for the District of Columbia likewise changes.

But even if these reasons are persuasive, it is highly unlikely that the Supreme Court would have reached the same conclusion in 1803 as it did in 1838. Recall the context: Congress had changed the Supreme Court's schedule so that Marbury's petition that was filed in 1801 wasn't heard until 1803 because the Supreme Court did not meet at all in 1802. And in 1802, Congress had repealed the Judiciary Act of 1801, effectively

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> presented itself to any one, that it was not within the scope of the judicial powers of the United States, although not vested by law, in the Courts of the general Government. And no one will seriously contend, it is presumed, that it is among the reserved powers of the States, because not communicated by law to the Courts of the United States?

Id.

43. *See* Kendall v. United States, 37 U.S. 524, 610 (1838).

44. *See id*. at 620.

45. *See id.* at 624; An Act Concerning the District of Columbia, § 3 (6th Congress, 2nd Sess., ch. 15, 2 Stat. 103, Feb. 27, 1801).

46. *See Kendall*, 37 U.S. at 624–25.

removing supposedly life-tenured Article III judges from their offices as circuit judges. Unlike Marbury, who had never received his commission, these circuit judges had been commissioned and were hearing and deciding cases—their decisions can still be found in the Federal Cases reporter—but were out of their jobs when their courts were abolished and the old circuit courts (the ones from 1789) were re-established.

These two congressional changes worked together so that the Supreme Court was not scheduled to meet before the Justices had to decide whether to resume their work on the re-established circuit courts, thereby acquiescing in the displacement of the circuit judges from their jobs. While the Justices did not meet, they did exchange correspondence, beginning with Chief Justice Marshall raising concerns and inviting discussion.[47]

Justice Chase, after noting that he needed the job to support his large family but needed to do his duty, argued that it was unconstitutional to remove life-tenured circuit judges. He viewed it as "puerile" and "nonsensical" to say that it is permissible to take the office from the judge rather than take the judge from the office.[48] If there were some way to bring the constitutional question before the Supreme Court, he would restore the circuit judges to their office and salary. But no such mode was available. As a result, Chase argued, the Justices must decline to hold the circuit courts because holding those courts would violate the constitutional rights of the circuit judges. The Justices would be taking their jobs and be instrumental in carrying into effect an unconstitutional law by dispossessing the circuit judges. As Chase saw it, the Justices must decide whether removing the circuit judges was constitutional before sitting in circuit courts. While the practice of Supreme Court Justices holding the circuit court without a separate commission had been followed "since the formation of the Federal Government," now there was an important difference: If Supreme Court Justices were to hold the circuit court now, they would injure the rights of circuit judges and assist in excluding them from their offices.[49]

Justice Cushing replied that eleven years of circuit riding constituted a practical exposition of the Constitution that was too late to change. As for the circuit judges, he thought that Supreme Court Justices holding the circuit courts would not violate their rights. He argued that it was "not in our power" to restore the circuit judges' salaries or offices and that

47. *See* Letter from John Marshall to William Cushing (Apr. 19, 1802), *in* THE PAPERS OF JOHN MARSHALL DIGITAL EDITION (Charles Hobson, ed., 2014), https://bit.ly/3JgbSdx [hereinafter MARSHALL PAPERS].

48. *See* Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* MARSHALL PAPERS, *supra* note 47.

49. *See id.*

declining the circuits wouldn't do it.[50] Justice Washington thought that the constitutionality of Supreme Court Justices holding circuit court was settled.[51] Justice Paterson agreed with Justices Cushing and Washington.[52] Chief Justice Marshall hoped that the Justices would agree to resume holding the circuit courts, noting that while judges have the least right to obey policy, policy dictated that conclusion.[53]

And that's what the Justices did. They attended their circuits in the fall of 1802, in place of the displaced circuit judges, thereby acquiescing in the repeal of the Judiciary Act of 1801 and the removal of the supposedly life-tenured circuit judges.[54] The decision upholding circuit riding, handed down a few days after *Marbury*, was anti-climactic.[55] The capitulation to the removal of the circuit judges was a done deal once the Justices began to hold the circuit courts in their place.[56]

In this environment, it is difficult to imagine that the Supreme Court in 1803 would have held that the United States Circuit Court for the District of Columbia could issue mandamus to a federal official, if only Marbury had filed suit there.[57] But even if it so held—or appeared poised to so hold—it is easy to see Congress responding by removing that jurisdiction from the United States Circuit Court for the District of Columbia. Not only might such a statute simply be seen as clarifying its intent for that court's jurisdiction to mirror the jurisdiction of the other re-established circuit courts, but limiting that court's jurisdiction would be a far less radical step than what Congress had already done to the circuit courts established in 1801—and to the judges appointed to those courts.

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50. *See* Editor's footnote in Letter from Samuel Chase to John Marshall (Apr. 24, 1802), with extract of Letter from William Cushing to Samuel Chase found in Letter of Hannah Cushing to Abigail Adams (June 25, 1802), *in* MARSHALL PAPERS, *supra* note 47.

51. *See* Letter from John Marshall to William Patterson (May 3, 1802), *in* MARSHALL PAPERS, *supra* note 47.

52. *See* Editor's footnote in Letter from John Marshall to William Patterson (May 3, 1802), containing a passage from Letter of William Paterson to William Cushing (May 3, 1802) found in Letter of Hanna Cushing to Abigail Adams (June 25, 1802), *in* MARSHALL PAPERS, *supra* note 47.

53. *See* Letter from John Marshall to William Patterson (May 3, 1802), *in* MARSHALL PAPERS, *supra* note 47.

54. *See* Editor's footnote in Letter from William Paterson to John Marshall (June 18, 1802), *in* MARSHALL PAPERS, *supra* note 47.

55. *See* Stuart v. Laird, 5 U.S. 299, 309 (1803). *Marbury* was decided on February 24, 1803; *Stuart v. Laird* was decided the next week, March 2, 1803.

56. *Stuart v. Laird* has been described as having "formally ratified" this acquiescence. Editor's footnote in Letter from William Paterson to John Marshall (June 18, 1802), *in* MARSHALL PAPERS, *supra* note 47.

57. *See* Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 52 n.271 (2003) (claiming that "it seems highly doubtful that the Court, in the politically charged atmosphere of 1803, would have upheld the authority of the D.C. courts to order mandamus relief for William Marbury against James Madison").

These cases make it very difficult to contend that mandamus is a constitutionally required remedy. More generally, they point to the significant difference between the promise and the reality of *Marbury*. While dictum in *Marbury* promises a remedy for a violation of a vested right, its holding is precisely to the contrary: Marbury had no remedy.

It is true that Marbury's vested right was rooted in a statute. No constitutional provision established the length of his term of office, much less granted him life tenure. Some might think that there would be a different result if a constitutional provision, rather than a mere statute, established the tenure of his office.[58]

But the circuit judges did have a constitutional provision to rely on: Article III of the Constitution. Yet they, too, had no remedy. Justice Chase wrote that there was no way to bring the constitutional question before the Supreme Court,[59] and, on this point, Justice Cushing agreed: It was "not in our power" to restore their salaries or offices.[60] Justice Paterson agreed with Justice Cushing,[61] and no Justice suggested any judicial remedy was available. The displaced circuit judges themselves did not sue. Instead, they asked Congress to create a judicial remedy. Congress declined.[62]

At the end of the day neither Marbury nor the circuit judges received any remedy.

III. REMEDIES THAT ARE NOT CONSTITUTIONALLY REQUIRED

A. Damages

When *Marbury* was decided in 1803, the judiciary was quite vulnerable. The case was decided in the wake of the first transition of

58. On the other hand, depriving Marbury of a vested right might itself have been viewed as a constitutional violation. As I have noted previously:

> The language of vested rights has largely fallen from our federal constitutional discourse. But it was a dominant feature of general constitutional law for decades . . . . As Chancellor Kent put it, 'A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void.

Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553, 575 (2005) (footnotes omitted).

59. *See* Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* MARSHALL PAPERS, *supra* note 47.

60. *See* Editor's footnote in Letter from John Marshall to Samuel Chase (Apr. 24, 1802), containing an extract from Letter of William Cushing to Samuel Chase found in Letter of Hanna Cushing to Abigail Adams (June 25, 1802), *in* MARSHALL PAPERS, *supra* note 47.

61. *See* Letter of Hanna Cushing to Abigail Adams (June 25, 1802), containing a passage from Letter of William Paterson to William Cushing, editor's footnote to Letter from John Marshall to William Patterson (May 3, 1802), *in* MARSHALL PAPERS, *supra* note 47.

62. *See* Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 298–301 (2003).

power from one party to another. As part of that transition, the circuit judges who had been appointed by the outgoing party had just been eliminated from the judiciary by the incoming party, and there was nothing that the Supreme Court, or any other court, could do about it.

Plus, *Marbury* involved the writ of mandamus, and the most appropriate remedy for the circuit judges (had it been available) would have been the writ of quo warranto.[63] Both writs were traditionally known as prerogative writs and are now generally called extraordinary writs.

Perhaps a less extraordinary remedy is constitutionally required, and the judiciary would dare to so hold in less fraught times. But case law in ordinary times shows that even the least extraordinary remedy—money damages—is not constitutionally required. That case law, in areas such as sovereign immunity, the limits on implied rights of action, absolute immunity, and qualified immunity, demonstrates the point.

The United States itself has sovereign immunity. Two illustrations are sufficient to make the point. Even when the United States sues a defendant for money damages, and the defendant can prove that the United States owes the defendant more than the defendant owes the United States, the defendant cannot recover that difference absent a waiver of sovereign immunity.[64] Even when federal officials negligently bagged fertilizer and failed to warn of the danger they caused, and their negligence led to more than 560 deaths, some 3000 injuries, and the levelling of much of a city, sovereign immunity barred recovery from the United States for the harms.[65]

The states, too, have sovereign immunity. That immunity is available in federal court even when a state is sued by its own citizens.[66] It is also available in state court.[67] Yes, Congress can abrogate that immunity when acting pursuant to Section 5 of the Fourteenth Amendment.[68] And, yes, there are areas such as bankruptcy,[69] eminent domain,[70] and the armed

63. *Quo Warranto*, Black's Law Dictionary (11th ed. 2019) ("[Law Latin "by what authority"] (15c) 1. A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.").

64. *See* United States v. Eckford, 73 U.S. 484, 491 (1867) (relying on an Act of Congress to permit set-off against the United States' claim, reducing the judgment against the defendant up to discharge of the entire claim, but not a judgment in favor of the defendant for any excess).

65. *See* Dalehite v. United States, 346 U.S. 15, 42 (1953) (construing the "discretionary function" limitation of the Federal Tort Claims Act). Congress did pass a bill for relief of Texas City. Pub. L. 378, 69 Stat. 707 (Aug. 12, 1955).

66. *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Hans v. Louisiana, 134 U.S. 1 (1890).

67. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

68. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

69. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

70. *See, e.g.*, PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244 (2021).

forces,[71] in which Congress can impose liability on the states notwithstanding sovereign immunity. But the very need for congressional action in these areas underscores that these remedies are not constitutionally required.

Even when sovereign immunity is not applicable, as it typically is not when seeking money damages from an individual officer rather than the sovereign itself, there may be no right of action. The traditional way to seek money damages from an individual officer was as follows:

- the plaintiff would sue the officer in a common law action,
- the officer would defend himself by relying on official authority, and
- the plaintiff would reply that the officer was unprotected by official authority because he violated the constitution, leaving him standing before the court as a private individual wrongdoer.

In 1971, the Supreme Court found this approach wanting, and—relying on *Marbury's* dictum—held in *Bivens* that a plaintiff had a right of action directly under the Constitution against federal officers who violated the Fourth Amendment.[72] Dissenting Justices argued that creating a right of action was for Congress, not for the judiciary, and noted that Congress had created such a right of action against state officials, but not federal officials.[73] The majority allowed for the possibility that special factors might lead to the denial of a right of action in some circumstances and that Congress could displace such a right of action with one it thought equally effective. But it envisioned that the default norm would be a right of action under the Constitution.

For a time, this vision carried the day, with the Court recognizing such rights of action in cases decided in 1979 and 1980,[74] but the Court

71. *See, e.g.*, Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022).

72. *See* Bivens v. Six Unknown Agents, 403 U.S. 388, 387 (1971).

73. Justice Black wrote:

> 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. But the 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 such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

Bivens, 403 U.S. at 427–28 (Black, J., dissenting) (footnote omitted) (citing 42 U.S.C. § 1983); *id*. at 411 (Burger, C.J., dissenting) ("I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress."); *id*. at 430 (Blackmun, J., dissenting) (stating that if existing remedies are inadequate, "it is the Congress and not this Court that should act").

74. *See* Davis v. Passman, 442 U.S. 228, 248–49 (1979) (right of action for Congressional employee alleging sex discrimination); *see also* Carlson v. Green, 446 U.S. 14, 24 (1980) (right of action for Eighth Amendment claim against federal prison official).

has not recognized a new right of action for damages directly under the Constitution in the 40-plus years since.[75] While the Court has not overruled those earlier cases recognizing rights of action, it has stated that creating new rights of action is "disfavored."[76] As the Court noted in 2020, "We . . . have gone so far as to observe that if 'the Court's three *Bivens* cases had been . . . decided today,' it is doubtful that we would have reached the same result."[77]

And in *Egbert v. Boule*, the Court (in an opinion written by Justice Thomas) explicitly flipped the presumption articulated in *Bivens*: "[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts . . . ."[78] The Court said that the judicial analysis often boils down "to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."[79] *Egbert* refused to recognize a damages claim under the Fourth Amendment, a claim—as the dissent noted—quite similar to the claim in *Bivens* itself.[80] It also held "that there is no *Bivens* action for First Amendment retaliation."[81]

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75. *See* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) ("And for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*."); *see, e.g.*, Bush v. Lucas, 462 U.S. 367 (1983) (no right of action for federal employee claim that his federal employer dismissed him in violation of the First Amendment); Chappell v. Wallace, 462 U.S. 296 (1983) (no right of action for military personnel claiming that military superiors violated various constitutional provisions); Schweiker v. Chilicky, 487 U.S. 412 (1988) (no right of action for recipients of Social Security disability benefits claiming that benefits had been denied in violation of the Fifth Amendment); F.D.I.C. v. Meyer, 510 U.S. 471 (1994) (no right of action against government agencies rather than particular individuals who act unconstitutionally); Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001) (no right of action for prisoner's Eighth Amendment claim against a private corporation that managed a federal prison); Minneci v. Pollard, 565 U.S. 118 (2012) (no right of action against employees of privately operated federal prison).

76. Ziglar v. Abbasi, 582 U.S. 120, 121 (2017).

77. *Hernandez*, 140 S. Ct. at 742–43 (2020) (citation omitted). The Court concluded that Congress, by exempting constitutional claims from the Westfall Act, "simply left *Bivens* where it found it." *Id*. at 748, n.9. The Solicitor General observed:

> Petitioners more broadly suggest that the combination of the Westfall Act's preemption of state tort suits and Congress's decision not to create a constitutional damages action raises serious constitutional doubts. But petitioners cite no authority for the proposition that, although Congress may permissibly take each of those actions, it may not do both. Instead, petitioners invoke the general principle 'that where there is a legal right, there is also a legal remedy.'

Brief for the United States as Amicus Curiae Supporting Respondent, Hernandez v. Mesa, 2019 WL 4858283 at *33 (2019) (citations omitted).

78. Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

79. *Id*. at 1803.

80. *See id*. at 1800. "The only arguably salient difference in 'context' between this case and *Bivens* is that the defendants in *Bivens* were employed at the time by the (now-defunct) Federal Bureau of Narcotics, while Agent Egbert was employed by CBP." *Id.* at 1814 (Sotomayor, J., dissenting in part).

81. *Id*. at 1807.

Justice Gorsuch added:

> If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could. And if the only question is whether a court is "better equipped" than Congress to weigh the value of a new cause of action, surely the right answer will always be no . . . . I would . . . take the next step and acknowledge explicitly what the Court leaves barely implicit.[82]

Even when there is a right of action for damages for a constitutional violation—either in the narrow range in which *Bivens* survives or in the far broader range of claims against state officials in which § 1983 provides a right of action—other doctrines frequently block the recovery of money damages. In particular, absolute immunity and qualified immunity frequently prevent a plaintiff from receiving the remedy of money damages.

Judges acting in their judicial role, legislators acting in their legislative role, prosecutors acting in their prosecutorial role, and the President acting within the outer perimeter of his duties are all protected by absolute immunity from claims for money damages.[83] Other state and federal officials are protected by qualified immunity.[84]

These immunity doctrines are powerful tools to block damages. Absolute immunity bars such claims even if the official purposefully violates the Constitution. Qualified immunity is a tad less powerful, permitting damages against those who violate clearly established law.[85] But that standard has been implemented in a way that is quite protective of defendants. "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[86]

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82. *Id.* at 1810 (Gorsuch, J., concurring in the judgment); *cf. Hernandez*, 140 S. Ct. at 752–53 (Thomas, J., joined by Gorsuch, J., concurring) ("The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether.").

83. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Tenney v. Brandhove, 341 U.S. 367 (1951).

84. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Kisela v. Hughes, 138 S. Ct. 1148 (2018); Ziglar v. Abbasi, 582 U.S. 120 (2017); *cf. Ziglar*, 582 U.S. at 1870 (Thomas, J., concurring) ("The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.").

85. *See Harlow*, 457 U.S. at 818 ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

86. Mullenix v. Luna, 577 U.S. 7, 12 (2015).

Taken together, these doctrines—sovereign immunity, the severe limitation on *Bivens* claims, absolute immunity, and qualified immunity—make it untenable to assert that the remedy of money damages, the most commonplace of remedies, is constitutionally required.

B. Injunctions

There are enormous impediments to any conclusion that injunctive relief is constitutionally required. Start with the most basic: Injunctions are expressly discretionary and are available only when there is no adequate remedy at law.[87]

In addition, there was considerable hostility to courts of equity at the nation's founding. "Some colonies entirely excluded equity from their judicial systems, instead allowing the governor and governor's council to exercise the equity power. Many Americans were deeply skeptical of the broad discretion entrusted to equity courts, finding the notion of equity antithetical to the rule of law."[88]

While Article III extended the federal judicial power to cases in equity, Charles Warren stated that the debate in the first Congress over whether to give federal courts equity powers "gave rise to one of the hottest contests."[89] He explained:

> It is to be recalled that, at this period, equity jurisdiction existed in only a portion of the States, and that for over a hundred years prior to the Revolution, it had been bitterly attacked in most of the colonies. There were Courts of Chancery, in 1787, in New York, South Carolina, Maryland, Virginia, and to some extent, in New Jersey; in Pennsylvania, Delaware and North Carolina, there were no such

87. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion."). As the Court explained:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id.; *see* Judiciary Act of 1789, § 16, 1 Stat. 73 (1789) ("[S]uits in equity shall not be sustained in . . . courts of the United States, in any case where a plain, adequate and complete remedy may be had at law.").

88. Michael T. Morley, *The Federal Equity Power*, 59 B.C.L. REV. 217, 230 (2018) (footnotes omitted); *see also* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L. J. 1213, 1282–90 (2023) (discussing the criticism of equity, particularly of conscience-based equity as opposed to precedent-based equity). Gallogy argues that federal courts have inherent power to grant equitable remedies, in accordance with a precedent-based system of equity, but that this is a default rule: Congress has the power to "prescribe the remedies that federal courts can issue." *Id*. at 1221, 1266.

89. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96 (1923).

> Courts, though the common law courts had certain equity powers; in Connecticut and Rhode Island, the Legislature exercised some powers of a Court of Chancery; in Massachusetts and New Hampshire, there were common law courts only, having a few very limited equity powers; Georgia had only common law courts.[90]

While Congress did decide to grant federal courts equitable powers in the Judiciary Act of 1789, hostility to equity came through in other ways. Evidence had to be taken orally in open court rather than by deposition, and appellate jurisdiction was implemented by writs of error, thereby confining appellate review to questions of law even though Article III permitted appeal as to law and to fact.[91]

Congress told federal courts to use state procedure in common law proceedings. But this wouldn't work for equity because some states did not have courts of equity. Congress initially told federal courts to follow the course of the civil law and then told federal courts they could promulgate their own rules for equity cases.[92]

If this were not enough to undermine any argument for a constitutional right to injunctive relief, there are also a host of other restrictions on injunctions. For example, the Anti-Injunction Act dates back to 1793 and broadly bars federal courts from issuing injunctions to stay proceedings in a state court.[93] Another Anti-Injunction Act dates back to 1867 and bars suit in any court for the purpose of restraining the assessment or collection of any tax.[94] A similar Tax Injunction Act protects state taxes from federal court injunctions.[95] And the Johnson Act protects state utility rates from federal injunctions.[96]

In addition to these statutory restrictions, there are also comity restrictions on injunctions. For example, even when an exception to the

90. *Id*.

91. *See id*. at 100–02 (describing the former—taking evidence orally in open court—as "a great triumph for the anti-chancery party").

92. *See* Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94; Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

93. *See* 28 U.S.C. § 2283; Act of Mar. 2, 1793, ch. 23, § 5, 1 Stat. 335. The current version allows for exceptions where expressly authorized by Act of Congress, where necessary in aid of a federal court's jurisdiction, and to protect or effectuate a federal court's judgments. *See, e.g.*, Atlantic Coast Line RR v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296–97 (1970).

94. *See* An Act to amend existing Laws relating to Internal Revenue, Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475; 26 U.S.C. § 7421; Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543–46 (2012).

95. *See* 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."); *see also* Fair Assessment in Real Estate v. McNary, 454 U.S. 100, 107 (1981) (barring damage claim to avoid evasion of Tax Injunction Act).

96. *See* 28 U.S.C. § 1342.

Anti-Injunction Act applies—as it does for claims under § 1983[97]—federal courts should not issue injunctions against prosecutors to block them from pursuing pending criminal cases.[98] This comity limitation applies not only to criminal prosecutions, but also to civil enforcement proceedings and civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.[99]

In light of all this, it may be surprising to find that there is some authority to support an argument that injunctions may be constitutionally required in some circumstances. First, in *Truax v. Corrigan*, the Supreme Court reversed a state court's denial of an injunction against labor picketing, despite a state statute barring such injunctions.[100] The Court viewed the state law as operating to make an inherently wrongful act lawful, thereby depriving the property owner of due process.[101] Even if the state court decision were understood only as withholding an injunction, the Court held that there was an equal protection violation because the state statute was limited to labor disputes, so that similar picketing done by (say) a competing business would be enjoined under state law.[102]

Justice Brandeis catalogued in his dissent a wide range of circumstances in which injunctions are denied:

> The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency, in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. In the interest of personal liberty they ordinarily refuse to enforce specifically, by mandatory injunction or

97. *See* Mitchum v. Foster, 407 U.S. 225, 242–43 (1972).

98. *See* Younger v. Harris, 401 U.S. 37, 40 (1971).

99. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 73 (2013).

100. Truax v. Corrigan, 257 U.S. 312, 328 (1921).

101. *See id*. at 328 ("A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment.").

102. *See id.* at 335–36. The Court further explained:

> Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be.

Id.

> otherwise, obligations involving personal service. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights, and have refused to interfere with the operations of the police department. Instances are numerous where protection to property by way of injunction has been refused solely on the ground that serious public inconvenience would result from restraining the act complained of. Such, for example, was the case where a neighboring landowner sought to restrain a smelter from polluting the air, but that relief, if granted, would have necessitated shutting down the plant, and this would have destroyed the business and impaired the means of livelihood of a large community.[103]

It is hard to see how the due process aspect of *Truax* survived the post-New Deal changes in substantive due process. And its holding regarding injunctions against labor picketing likely did not survive *Lauf v. E.G. Shinner & Co.*, which upheld a federal statutory prohibition against federal courts issuing labor injunctions.[104] Justice Butler's dissent in *Lauf* relied on *Truax*, contending that if the statutory prohibition applied to this case, then the statute "attempts to legalize an arbitrary and alien state of affairs wholly at variance with those principles of constitutional liberty by which the exercise of despotic power hitherto has been curbed."[105] As he saw it, "nothing is plainer under our decisions than that if the Act does that, its effect will be to deprive the respondent of its property and business without due process of law, in contravention of the Fifth Amendment."[106]

The equal protection aspect of *Truax*—the aspect that addressed the state court decision as if it only withheld an injunction—turned on the availability of injunctions in non-labor picketing cases. That is, while the state did not have to create courts of equity or empower its courts to issue injunctions, the state had in fact done so. Significantly, Chief Justice Taft began his equal protection analysis by noting that the "Arizona constitution provides that the superior court shall have jurisdiction in all cases of equity and, in pursuance of this provision," the legislature enacted

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103. *Id.* at 374–75 (Brandeis, J., dissenting) (footnotes omitted) (citations omitted). He added that while such limitations on injunctions have ordinarily been imposed by courts, in some instances they have "been expressly commanded by statute." *Id*. at 375–76.

104. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."). *Truax* and *Lauf* might be reconciled by concluding that there is a constitutional right to an injunction in state court but not in federal court. But this conclusion is hard to square with the power of states to structure their judicial systems as they choose and how states handled equity at the founding.

105. *Id*. at 340 (citing *Truax*, 257 U.S. at 327–28).

106. *Id*. at 340 (citing *Truax,* 257 U.S. at 327–28); *cf*. Redish, *supra* note 14, at 1903 (arguing that "*Lauf* concerned purely a statutory matter . . . not a constitutional one").

a statute empowering judges of the superior courts to "grant writs of injunction."[107] Understood as an equal protection case, however, the remedy need not have been an injunction; prohibiting injunctive relief against picketing in non-labor disputes would also remedy an equal protection violation.[108] Thus, while *Truax* lends some support for a claimed constitutional right to an injunction, it is not enough to carry the day.

Two other cases, decided on the same day in 1908, can also be read to support a constitutional right to an injunction.[109] The focus in both cases, one coming from a lower federal court and one coming from a state court, was on whether an action against a state officer to block him from doing something claimed to violate the federal Constitution counted as an action against the state. The answer in both cases was no.

In the state court case, *General Oil Co. v. Crain*, the Court described an error, "which appears with a kind of periodicity . . . that a state is inevitably brought into court when the execution of its laws is arrested by a suit against its officers[,]" while in truth, "to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers."[110] In the case from a lower federal court, *Ex parte Young*, the Court used similar if more familiar language:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is

107. *Truax*, 257 U.S. at 331 ("If the competing restaurant keepers in Bisbee had inaugurated such a campaign against the plaintiffs in error and conducted it with banners and handbills of a similar character, an injunction would necessarily have issued to protect the plaintiffs in the enjoyment of their property and business.").

108. *See infra* Section III.E. *Truax*, then, may include an implicit severability analysis: The state would have preferred to have to issue injunctions against labor picketing than to not be able to enjoin non-labor picketing.

109. *See generally* Gen. Oil Co. v. Crain, 209 U.S. 211 (1908); *Ex parte* Young, 209 U.S. 123 (1908).

110. *Crain*, 209 U.S. at 226.

> subjected in his person to the consequences of his individual conduct.[111]

Ex parte Young involved a challenge to railroad rates enforced by imprisonment and fines. With each ticket sold counting as a separate offense, it "would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the act and orders in question." From the Court's perspective, "[t]he necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity."[112]

The Court insisted that it was *not* holding "that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid."[113] Rate cases are different than ordinary cases because the decision of the legislature or of a commission cannot be conclusive as to the sufficiency of the rates.[114] Instead, "the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment . . . and an inquiry as to that fact is a proper subject of judicial investigation."[115] The Court viewed the distinction as "obvious" between, on the one hand, "a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character," and, on the other hand, "the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."[116] Because of this aspect of rate setting, the provisions of the state statute—which provided no prior hearing before the rates were set—"by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face . . . ."[117]

Having concluded that these provisions were unconstitutional, the Court then turned to the question of remedy.[118] It held that the action could proceed against a state officer for the reasons noted above and that the "attorney general had, by the law of the state . . . [a] duty with regard to

111. *Ex parte Young*, 209 U.S. at 159–60.
112. *Id*. at 145–46.
113. *Id*. at 147.
114. *See id*.
115. *Id*. at 147–48. *See* Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825 (2022).
116. *Ex parte Young*, 209 U.S. at 148.
117. *Id*.
118. *See id*. at 149.

the enforcement of the same."[119] In deciding that an injunction was proper, the Court relied on principles of equity, not on the Constitution. It viewed the remedy at law—defending an enforcement action—as inadequate, and it saw all objections to a remedy at law as "obviated by a suit in equity."[120]

In the end, then, *Ex parte Young* did not hold that an injunction was constitutionally required.[121]

General Oil v. Crain involved a claim that certain oil was exempt from state taxation under then-extant Commerce Clause doctrine. The Tennessee Supreme Court denied relief, concluding that state law denied state courts jurisdiction because the action was one against the state. As noted above, the Supreme Court of the United States concluded that this understanding of the case was wrong because the case was brought against John H. Crain, the inspector of oils, and "to give adequate protection to constitutional rights[,] a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers."[122] On the merits, the Court rejected the Commerce Clause claim.[123] Justice Harlan dissented, arguing that the state court judgment rested on an adequate and independent state ground: the state law barring a state court from issuing an injunction against the state.[124]

On what basis could the majority reach the merits and reject the state court's conclusion that, as a matter of state law, it lacked jurisdiction? The Supreme Court treated the proper characterization of the action—is it properly viewed as an action against the state or not?—as a question subject to its review.

Crain was decided in 1908, well before *Erie*,[125] when the idea of general law, including general constitutional law, was well accepted. The Supreme Court usually applied general constitutional law only in cases arising in the lower federal courts, but occasionally it did so in cases arising in the state courts.[126] Perhaps, then, *Crane* is best understood as a general constitutional law decision holding that the proper characterization of an action against a state officer is a question of general constitutional law.

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119. *Id*. at 160.

120. *Id*. at 165.

121. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537–38 ("This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court.")

122. General Oil Co. v. Crain, 209 U.S. 211, 226 (1908).

123. *Id*. at 228–31.

124. *Id*. at 232–35 (Harlan, J., dissenting).

125. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

126. *See* Gelpcke v. City of Dubuque, 68 U.S. 175, 206–07 (1863)*;* Hartnett, *supra* note 58, at 579 (discussing *Gelpcke*).

Alternatively, *Crain* might be understood as treating the question of the proper characterization of the action as itself a question of federal constitutional law. In holding that "a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers," it said that this distinction was necessary "to give adequate protection to constitutional rights."[127] The Court made clear that the kind of rights it was concerned with protecting included the Fourteenth Amendment.[128]

But even this understanding of *Crain* is a long way from a constitutional right to an injunction. Simply because federal law controls the question of whether an action seeking to block enforcement of a state law alleged to violate the federal Constitution should be understood as one against a state does not mean that there is a constitutional right to an injunction.

It is also significant in *Crain* that the plaintiff contended that it was doubtful that, if it paid the fees under protest, it could recover them—and if they could be recovered it would be necessary to bring suit every thirty days for the charges paid for the preceding thirty days.[129] As other cases demonstrate, if there were a clear way to pay under protest and seek a refund, an injunction would not be needed. Pay first, litigate later, is a standard way for tax disputes to be handled.[130]

Even *Crain*, then, offers insufficient support for a claimed constitutional right to an injunction. If it is the strongest case for a constitutional right to an injunction—and it may well be—it is further weakened by the simple fact that the claim was rejected on the merits. That is, the Supreme Court affirmed the state court judgment denying injunctive relief.[131]

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127. *Crain*, 209 U.S. at 226.

128. *See id*.

129. *See id.* at 215; *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 945 (2019) ("On the facts of the *General Oil* case, the Court appears to have thought that no judicial remedy besides an injunction would suffice. The state had set exorbitantly high penalties for noncompliance with the challenged statute, and it was doubtful that payments made under protest could be recovered."); *id*. ("Nevertheless, one should not leap from the important holding of *General Oil Co. v. Crain* to the conclusion that the Constitution requires tort remedies or even other individually effective redress for all constitutional violations.").

130. *See* Hibbs v. Winn, 542 U.S. 88, 104 (2004) ("Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints. In both 26 U.S.C. § 7421(a) and 28 U.S.C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections."); *see also, e.g.*, Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Rosewell v. LaSalle Nat. Bank, 450 U.S. 503 (1981); Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981); *see infra* Section III.D.

131. *Crain*, 209 U.S. at 231 ("As our conclusion is that no constitutional right of the oil company was violated . . . , it follows that no error prejudicial to the company was

C. Declaratory Judgments

Little needs to be said about declaratory judgments. They are not constitutionally required. They are expressly discretionary:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[132]

When the Declaratory Judgment Act was enacted in 1934, the question was not whether declaratory judgments are constitutionally *required*, but whether they are constitutionally *permitted*. That question was settled in 1937.[133] Permissible declaratory judgment actions come in two flavors (or a blend of the two): One seeks a milder form of an injunction that can, if needed, be turned into an injunction, and the other is brought by a party who could be a defendant in a coercive action who initiates the declaratory judgment action rather than waiting to be sued.[134]

D. Exclusion of Evidence

Damages and injunctions are the two most common remedies under modern practice. Another remedy, available for some constitutional violations that produce evidence, is exclusion of that evidence. When the Supreme Court first extended the exclusionary rule to the states, it described the Fourth Amendment as valueless without exclusion, explaining that exclusion is "logically and constitutionally necessary."[135] Justice Douglas added, in a concurring opinion, that without exclusion, the Fourth Amendment might as well be stricken from the Constitution, viewing other remedies as useless.[136]

Later decisions held that exclusion is not constitutionally required, but is instead designed to deter unlawful police conduct, making it appropriate to weigh the costs and benefits of excluding evidence.[137] As the Court in *Davis v. United States* explained, "expansive dicta" in some decisions suggested that the exclusionary rule was a self-executing

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committed by the Supreme Court of Tennessee, and, for the reasons stated, its judgment is affirmed.").

132. 28 U.S.C. § 2201.

133. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

134. *See* 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

135. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

136. *See id.* at 670 (Douglas, J., concurring).

137. *See, e.g.*, Arizona v. Evans, 514 U.S. 1 (1995); INS v. Lopez–Mendoza, 468 U.S. 1032 (1984); United States v. Havens, 446 U.S. 620 (1980); United States v. Calandra, 414 U.S. 338 (1974).

mandate implicit in the Fourth Amendment itself, but "we came to acknowledge the exclusionary rule for what it undoubtedly is—'a judicially created remedy' of this Court's own making" and, accordingly, "imposed a more rigorous weighing of its costs and deterrence benefits."[138]

For example, the Fourth Amendment exclusionary rule is usually not available on federal habeas.[139] Nor is it available for searches conducted pursuant in reasonable reliance on a search warrant later held invalid,[140] for violations of the requirement to knock and announce before entering a home to search pursuant to a warrant,[141] or when the police conduct a search in objectively reasonable reliance on binding judicial precedent later overruled.[142]

Exclusion of evidence is not a constitutionally required remedy.

E. Harming an Unlawfully Favored Person

It may be odd to even consider harming others as a remedy and particularly odd to consider whether it might be constitutionally required. Indeed, it might be hard to find anyone who would suggest that such a remedy is constitutionally required, and some might question whether it counts as much of a remedy at all.

But the Supreme Court has long recognized that it is possible to remedy a violation of a legal requirement of equality by taking a benefit away from a favored person rather than by providing that benefit to a disfavored person. For example, when a bank claimed that it was taxed in violation of the Equal Protection Clause, the Court stated, "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced."[143] The Court has similarly held, in the context of sex discrimination in social security benefits, that the right is to equal treatment, and the plaintiff can get equal treatment either by a withdrawal of benefits from favored class

138. Davis v. United States, 564 U.S. 229, 237–38 (2011) (internal quotations omitted) (citations omitted).

139. *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976).

140. *See* United States v. Leon, 468 U.S. 897, 924 (1984).

141. *See* Hudson v. Michigan, 547 U.S. 586, 599 (2006).

142. *See Davis*, 564 U.S. at 239; *see also, e.g.*, Illinois v. Krull, 480 U.S. 340, 360 (1987) (extending the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes); *Evans*, 514 U.S. at 15–16 (applying the good-faith exception where the police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees).

143. Iowa–Des Moines Nat'l. Bank v. Bennett, 284 U.S. 239, 247 (1931). If the state had collected the additional tax quickly enough, the Court assumed that there would be no right to a refund; a refund was appropriate here because one taxpayer should not bear the burden of seeking an increase in another's taxes. *See id*.

(wives) or extension of benefits to disfavored class (husbands).[144] And when a federal statute unconstitutionally distinguished between unmarried mothers and unmarried fathers, making it easier for unmarried mothers to convey citizenship to their children, the Court concluded that the proper remedy was to remove the benefit from unmarried mothers.[145] Similarly, when a state violated religious equality by allowing Christian and Muslim chaplains but not Buddhist religious advisors in an execution room, the equality problem was solved by barring all religious advisors.[146]

In some instances, particularly when differential treatment of competitors is involved, a plaintiff may achieve a practical benefit when its competitor is harmed. But in cases not involving competitors, it is difficult to see any concrete benefit a plaintiff receives when he vindicates a right to equal treatment and the remedy is to remove the benefit from others. The significance of these cases for present purposes is certainly not to suggest that harming others is a constitutionally required remedy. Instead, their significance is to underscore that the Constitution frequently does not require any remedy that provides a concrete benefit to the injured party.

F. Punishing Those Who Violate the Constitution

Punishing the person who violates the constitutional rights of another is not a classic remedy for a constitutional violation. But it is a remedy of sorts, deterring and perhaps incapacitating the wrongdoer from repeating the violation, while also deterring others from doing so.

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144. *See* Heckler v. Mathews, 465 U.S. 728, 739–40 (1984). The Court concluded that reliance interests permitted the sex discrimination to continue for a limited period of time. *Id*. at 750–51; *see also* Levin v. Com. Energy, Inc., 560 U.S. 413, 429–32 (2010) (recognizing that equality can be achieved either by reducing the plaintiff's tax or increasing another person's tax and holding that because the former would be barred by the Tax Injunction Act, the latter is barred by comity).

145. *See* Sessions v. Morales-Santana, 582 U.S. 47, 72–76 (2017).

146. In *Murphy v. Collier*, the Court stayed Murphy's execution because the state policy violated the Constitution's guarantee of religious equality. *See* Murphy v. Collier, 193 S. Ct. 1475, 1475 (2019). Texas changed its unconstitutional policy to allow all religious ministers only in the viewing room and not in the execution room, solving the equal-treatment constitutional issue. *Id*. at 1476 (Kavanaugh, concurring). Justice Kavanaugh explained in a later case:

> The bedrock religious equality principle was easy for States to apply: States could either (i) always allow a religious advisor into the execution room or (ii) always exclude a religious advisor, including any state-employed chaplain. But States could not allow religious advisors of some religions while excluding religious advisors of other religions.

Ramirez v. Collier, 142 S. Ct. 1264, 1286 (2022) (Kavanaugh, J., concurring). *Ramirez* itself involved a liberty claim under the Religious Land Use and Institutionalized Persons Act of 2000. *Id*. at 1272.

Congress has criminalized some violations of the Constitution.[147] The Court has construed perhaps the most important of those criminal statutes to require more than "a bad purpose or evil intent," but instead a "specific intent to deprive a person of a federal right made definite by decision or other rule of law."[148]

I am aware of no one who has suggested that the Constitution requires criminal punishment of someone who violates another's constitutional rights. Nor am I aware of anyone who has suggested that the Constitution empowers the judiciary to impose such criminal punishment without legislative authorization. To the contrary, it has long been established that federal courts lack such power.[149]

G. Political Questions

Political questions, of course, are not a remedy. But the clearest example of constitutional rights without judicial remedy (at least in the ordinary courts) is the political question doctrine. Modern doctrine focuses on two primary criteria for identifying a political question: textual commitment to another branch and lack of judicially manageable standards.[150] For example, the Supreme Court has held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts . . . . [because there are] no legal standards to limit and direct their decisions."[151] And it has held that what constitutes a "trial" within the meaning of the Impeachment Clause is a political question, both because the determination is textually committed to the Senate, and, less plausibly, because there are no judicially manageable standards to decide what a "trial" is.[152]

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147. For example, 18 U.S.C. § 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . of the United States . . . [t]hey shall be . . . imprisoned not more than ten years . . . .

148. Screws v. United States, 325 U.S. 91, 103 (1945) (Douglas, J., announcing the judgment of the Court). Three other Justices joined Justice Douglas' opinion; facing a judgment impasse, Justice Rutledge reluctantly agreed to vote to remand in accordance with the disposition required by the Douglas opinion in order to break that impasse. *Id*. at 134 (Rutledge, J., concurring in the judgment).

149. *See generally* United States v. Coolidge, 14 U.S. 415 (1816); United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

150. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

151. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

152. *See generally* Nixon v. United States, 506 U.S. 224 (1993). The result in *Nixon* is better explained as a determination that Article III courts have no appellate jurisdiction over the Senate sitting as a Court of Impeachment. *See* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 301 (1999). Amar writes:

> [T]he House and Senate will be the last word on impeachment . . . . There is indeed 'judicial' review of impeachment issues, but this review occurs in the Senate itself, which sits as a high court of impeachment. Its impeachment verdict

Sometimes, the term "political" in ordinary speech is used to refer to something trivial or superficial, something that only insiders or those playing politics as a sport would care about, rather than something truly significant. But there are some kinds of "political questions" that are outside the competence of courts precisely because they are too big, too important, for courts to resolve. Courts operate inside a particular polity; they do not decide what constitutes that polity.

The leading example of this kind of political question is *Luther v. Borden* and its holding that questions under the Guarantee Clause are political—a holding that *Baker v. Carr* pointedly did not disturb.[153]

The Guarantee Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[154]

After the attack on the Capitol on January 6, 2021, and the rise in both actual and threatened political violence, renewed attention to *Luther v. Borden* is warranted.

Luther v. Borden grew out of a challenge to the legitimacy of the government of Rhode Island, which, in 1841, was still operating under the charter granted by the British crown—a charter that made no provision for amendment.[155] The charter limited voting to freeholders, and changes in population (particularly immigration) and the rise in commerce and manufacturing left many men disenfranchised. And with representation based on real estate, legislative districts varied widely in population. [156]

Those who sought wider access to voting and reapportionment of the legislature created a new constitution, held an election to ratify that constitution, held elections under that new constitution, and set up a new

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> conclusively binds other courts because this special tribunal has exclusive jurisdiction . . . .

Id. If it were otherwise, an Article III court (which operates on majority rule) could reverse the judgment of a Court of Impeachment (which requires a two-thirds vote for conviction).

153. *See* Luther v. Borden, 48 U.S. 1, 42 (1849).

154. U.S. Const. Art. IV, § 4.

155. *See Luther*, 48 U.S. at 35.

156. Justice Woodbury explained:

> By the growth of the State in commerce and manufactures, this requirement [a freehold qualification] had for some time been obnoxious; as it excluded so many adult males of personal worth and possessed of intelligence and wealth, though not of land, and as it made the ancient apportionment of the number of representatives, founded on real estate, very disproportionate to the present population and personal property in different portions and towns of the State.

Id. at 48 (Woodbury, J., dissenting).

government. Thomas Dorr was elected governor, and Martin Luther worked to support the new government.

The pre-existing charter government, however, did not recognize the legitimacy of this new government and imposed martial law. Borden, acting in the military service of the charter government, broke into Luther's house and arrested him.

Dorr failed in his attempt to lead a military force to take possession of the state arsenal, and his government likewise failed. When he was prosecuted in state court, the state court rejected his argument that his government was the legitimate government of Rhode Island and had legally displaced the charter government.[157]

Luther sued Borden for trespass in federal court, with Borden relying on a defense of official authority and Luther contending that the charter government had been displaced by the people of Rhode Island, that Luther was engaged in supporting the lawful authority of the State, and that Borden lacked any legal authority for his trespass. The federal trial court rejected evidence of the legitimacy of the Dorr government and instructed the jury that the charter government and its laws were in full force and effect at the time of Borden's actions.[158]

The Supreme Court of the United States, after noting that these are issues that do not "commonly arise in an action of trespass," affirmed.[159] It did not see how a state court (at least a state court operating under the charter) could reach any other conclusion:

> Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and

157. *See id*. at 39. By the time the case was tried, a new constitution had been adopted with the acquiescence of the charter government. All admitted that the government under this constitution of 1843 was legitimate. *Id.*

158. *See id*. at 18.

159. *Id.* at 35.

> authority of the government under which it is exercising judicial power.[160]

The Court held that the Guarantee Clause "has treated the subject as political in its nature, and placed the power in the hands of that department."[161] It explained that "it rests with Congress to decide what government is the established one in a State,"[162] because "Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." Moreover, "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."[163] Once Congress has done so, "its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[164]

And in implementing the duty to protect each State against domestic violence, Congress empowered the President, in case of an insurrection in any State, to call out the militia on application of the state legislature or (when the legislature cannot be convened) the state executive.[165] To do so, the President "must determine what body of men constitute the legislature, and who is the governor."[166] If two parties claim the right to the government, one is wrong. If there is an armed conflict, "one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress."[167] Once the President has done so, no court of the United States could disagree.[168]

The Court acknowledged that this presidential power might be abused but emphasized that "[a]ll power may be abused if placed in

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160. *Id*. at 40. "Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful established government during the time of this contest." *Id*.

161. *Id*. at 42.

162. *Id*.

163. *Id*.

164. *Id*. The Court added:

> It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

Id.

165. *See* Act of February 28, 1795, 1 Stat. 424.

166. *Luther*, 48 U.S. at 43.

167. *Id.*

168. *See id*.

unworthy hands."[169] Nor did it see any other hands in which this power "would be more safe, and at the same time equally effectual."[170]

> When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.[171]

And what happened if the President is wrong or violates people's rights? "[I]t would be in the power of Congress to apply the proper remedy."[172]

IV. REMEDIES THAT ARE CONSTITUTIONALLY REQUIRED

To recap, neither damages, injunctions, declaratory judgments, nor exclusion of evidence is constitutionally required. Nor is criminal punishment of the offender. And sometimes when a party does obtain a remedy, that "remedy" is limited to harming someone else. Whether a state government is republican is up to Congress, not the courts, to decide—even one operating under martial law to suppress a more democratic competing government. If Congress empowers the President to call out the militia in the case of an insurrection in a state and, the President picks a side in an armed confrontation for control of that state, the courts must follow—any remedy for presidential error or abuse must come from Congress. It may sound like the reality of *Marbury* outstrips its promise. Are there any constitutionally required remedies?

A. Nullity

Marbury itself established one constitutionally required judicial remedy: nullity. That is, because the Constitution creates "a rule for the government of *courts*, as well as of the legislature" and "*courts*, as well as other departments, are bound by that instrument," a court will not itself act unconstitutionally by giving effect to an unconstitutional statute.[173] In

169. *Id.* at 44.
170. *Id.*
171. *Id*.
172. *Id*. at 45.
173. Marbury v. Madison, 5 U.S. 137, 180 (1803).

Marbury, the Court refused to use a power given to it by the Judiciary Act of 1789 because it concluded that to do so would violate Article III of the Constitution.[174]

Notice that the remedy here was obtained by the defendant, Madison. This is not unusual for the remedy of nullity. When a court refuses to enforce an unconstitutional statute, that decision commonly benefits a defendant who is being sued or prosecuted under the statute. The examples used by *Marbury* illustrate the point:

> It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?
>
> The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."
>
> If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
>
> "No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
>
> Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?[175]

Of course, this isn't the only way that nullity can be used. It can also be used to nullify a defense based on an unconstitutional law. The result can be to leave the defendant as a tortfeasor, unprotected by a defense of official authority. Similarly, if a statute repeals a pre-existing remedy in violation of the Contract Clause, the pre-existing remedy may remain available.[176] In either case, a court disregards the unconstitutional law.

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174. *See id.* at 176.

175. *Id*. at 179.

176. *See* Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 FLA. L. REV. 73, 92 (2020) (discussing cases where "the Court did not impose a new jurisdictional or remedial duty on the state courts, but effectively reinstated a duty that continued to exist because the repeal itself was void as a violation of the Contract Clause").

If the unconstitutional law is the basis for a claim or prosecution, the claim or prosecution is dismissed.[177] If the unconstitutional law is the basis for a defense, the claim is decided as if that defense did not exist, which may (or may not) result in that claim prevailing.[178]

Focusing on nullity also helps reveal important ambiguities about so-called "jurisdiction stripping"—a term that should be avoided because it misleadingly assumes some privileged baseline from which jurisdiction is "stripped." Imagine Congress enacts a statute and bars jurisdiction over challenges to that statute. To the extent the statute is understood to bar damage remedies or injunctions, the analysis above concludes that there is no constitutional problem. But what about jurisdiction to enforce the statute? If the statute is construed to bar jurisdiction over enforcement actions, then the statute goes unenforced. And if the statute is construed to permit jurisdiction over enforcement actions, then the enforcement court can enforce the statute only if it is constitutional to do so. If it isn't, nullity prevents judicial enforcement and the statute goes unenforced again.

Nullity is far from full remediation. When it is available to be used by a plaintiff to nullify a defense, whether the plaintiff recovers anything at all will depend on what rights the plaintiff has independently of the constitutional violation. Frequently, that will depend on whether the plaintiff can rely on a common law right of action. There may not be such a right of action, or it may be insufficient.

But nullity is far from nothing. When used by a defendant to defeat a claim or a prosecution, it is a crucial safeguard of liberty. A defendant cannot be sanctioned by a court for violating an unconstitutional law. Whatever other relief a court may or may not be able to give, at least it can say no—no to sanctioning a person for violating an unconstitutional law.[179]

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177. *See, e.g.*, Bond v. United States, 564 U.S. 211, 225–26 (2011) (holding that a defendant can defend against criminal prosecution by arguing that the federal statute she is charged with violating exceeds congressional power under treaty clause or violates the Tenth Amendment); *id.* at 226 (Ginsburg, J., concurring) (stating that "Bond, like any defendant, has a personal right not to be convicted under a constitutionally invalid law") (citing Richard H. Fallon, *As–Applied and Facial Challenges and Third–Party Standing*, 113 HARV. L. REV. 1321, 1331–33 (2000); and then citing Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3); Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (reversing conviction for violating an anti-picketing ordinance because the ordinance had a constitutionally impermissible exception for labor picketing).

178. *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (stating that judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment").

179. *Cf.* Korematsu v. United States, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) ("But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."); *id*. at 248 ("I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient

B. Habeas

If courts refuse to enforce an unconstitutional law, the Executive might attempt to avoid using the courts and instead simply imprison people without judicial process. A remedy explicitly protected by the Constitution deals with this possibility:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.[180]

Traditionally, a judgment by a court of competent jurisdiction was sufficient legal justification for detention.[181] And until 1867, when Congress amended the statute, the general federal habeas statute did not reach those in state custody at all.[182] Today, federal courts have quite limited authority to look behind a state court judgment to revisit the correctness of that judgment.[183]

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that has no place in law under the Constitution."); *see also* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2522 (1998) (noting that "it seems entirely possible that the self-executing force of Section 1 [of the Fourteenth Amendment] is limited to nullification").

To the extent (if any) that there may be circumstances that make it unconstitutional to impose a sanction for violating an otherwise valid law, without first providing an opportunity to raise constitutional objections, nullity may be available for those pre-determination sanctions. *See* Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1867 (2022) ("Under the constitutional tolling doctrine, the Court treats a statute's penalty provisions as severable from the rest of the measure, and unconstitutional as applied in the context of enforcement proceedings against a regulated party that lacked any prior opportunity to challenge the measure's validity.").

180. U.S. CONST. art. I, § 9, cl. 2.

181. *See Ex parte* Watkins, 28 U.S. 193 (1830). *See also* Jones v. Hendrix, 143 S. Ct. 1857, 1872–73 (2023). The Court observed:

> The principles of *Watkins* guided this Court's understanding of the habeas writ throughout the 19th century and well into the 20th . . . . The Suspension Clause does not constitutionalize [a later] innovation. Nor, *a fortiori*, does it require the extension of that innovation to a second or successive collateral attack.

Jones, 143 S. Ct. at 1872–73 (citations omitted). As Hart and Wechsler once put it:

> The underlying premise of the Great Writ is that only legal authority can justify detention . . . . But law is not a simple concept for this purpose, consisting as it does not only of rules that govern the substantive decisions, but also of rules that distribute authority to make those decisions and that determine when an institutional process for deciding should be regarded as definitive.

RICHARD H. FALLON JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1337–38 (4th ed. 1996).

182. *Compare* Judiciary Act of 1789, § 14 *with* Act of February 5, 1867, 14 Stat. 385.

183. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 412–13 (2000) (interpreting 28 U.S.C. § 2254(d)). Between the decision in *Brown v. Allen*, 344 U.S. 443 (1953), and the enactment of Antiterrorism and Effective Death Penalty Act of 1996, federal courts had far more robust authority to look behind a state court judgment to revisit the correctness of that judgment.

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention."[184] The Suspension Clause protects at least that much.[185] While the Supreme Court has kept open the possibility that the Suspension Clause protects more than its historic core, it has never explicitly so held.[186]

Boumediene v. Bush, which held that the Suspension Clause protects aliens held at Guantanamo,[187] might be viewed as such an expansion. As Justice Scalia saw it, "[t]he Court must either hold that the Suspension Clause has 'expanded' in its application to aliens abroad, or acknowledge that it has no basis to set aside the actions of Congress and the President."[188] The Court, however, merely observed that it "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."[189] The debate in *Boumediene* did not concern whether the Suspension Clause protects those in federal

184. INS v. St. Cyr, 533 U.S. 289, 301 (2001); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the judgment) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

185. The name and other aspects can be changed without threatening this core. *See* United States v. Hayman, 342 U.S. 205, 223 (1952).

186. *See St. Cyr*, 533 U.S. at 300–01. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting). Justice Scalia stated:

> Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.

Id. at 554.

187. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

188. *Id*. at 833 n.2 (2008) (Scalia, J., dissenting). He added, "It does neither." *Id.* *Boumediene* might also be thought to overrule *sub silentio Ex parte* Bollman, 8 U.S. 75, 93–94 (1807), which held that the power to issue writs of habeas corpus must be given by statute. But that would be an extraordinary way to treat a foundational decision by John Marshall. *Boumediene* can instead be read as implicitly resting on principles of severability and Congressional intent: upon holding that 28 U.S.C. § 2241(e) was unconstitutional, it could be severed from the rest of § 2241, leaving the basic statutory grant of habeas jurisdiction in § 2241(a) in place. And Congress surely would have preferred that federal courts have habeas jurisdiction for those in federal custody rather than state courts (or even force the question of whether *Tarble's Case* should be reframed as a case of statutory rather than constitutional interpretation). Professors Vázquez and Vladeck have argued:

> *Boumediene* . . . is best understood as resting on Congress's implied exclusion of state jurisdiction . . . . We think this (implicit) choice was based on the Court's reasonable assumption that Congress would have preferred that any constitutionally required remedy for federal detainees be sought in the federal rather than the state courts.

Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 942–43 (2017).

189. *Boumediene*, 553 U.S. at 746.

Executive custody without judicial process. It concerned whether the Suspension Clause protects aliens abroad.[190] If *Boumediene* is an expansion, it is an expansion regarding territory and the citizenship of the detainee. And any such expansion appears to be quite limited. The Court has since said that it is "long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U.S. Constitution," treating *Boumediene* as an example of circumstances in which "foreign citizens . . . in 'a territory' under the 'indefinite' and 'complete and total control' and 'within the constant jurisdiction' of the United States . . . may possess certain constitutional rights."[191]

Montgomery v. Louisiana held that the Constitution "requires state collateral review courts to give retroactive effect" to new substantive rules of constitutional law,[192] but "the Court did not explain which provision of the Constitution requires such retroactive application."[193] One possibility is due process.[194] Another might be the Suspension Clause.[195]

Or perhaps *Montgomery* stands for the proposition that *if* a state establishes a system of collateral review, its collateral review courts must follow Supreme Court precedent regarding substantive rules of federal constitutional law in place at the time of their decisions—just as *if* a state establishes a system of appeals, its appellate courts must follow Supreme Court precedent in place at the time of their decisions.[196] So understood,

190. *Compare id.* at 771 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.") *with id*. at 827 (Scalia, J., dissenting) ("The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.").

191. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020); *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020) (concluding that the habeas petitioner's statement that there was no reason to decide whether the scope of the Clause has expanded since 1789 doomed his Suspension Clause argument because it had not been shown "that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result").

192. Montgomery v. Louisiana, 577 U.S. 190, 200 (2016).

193. Vázquez & Vladeck, supra note 188, at 946.

194. *See id*. at 950 ("With respect to new constitutional interpretations, *Montgomery* may reflect the Court's recognition that there is a fundamental unfairness, perhaps of due process ramifications, in continuing to incarcerate an individual for conduct that the state no longer possesses the power to proscribe.").

195. One could certainly argue that the Suspension Clause applies to the states via the Fourteenth Amendment, *see* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862 (1994), but the Court did not make that argument. Nor did it address the tradition that habeas did look behind a judgment of a competent court.

196. Professors Vázquez and Vladeck reject this view, reading *Montgomery* to hold that the remedy is constitutionally required. And "[w]hen the Constitution requires a remedy for the ongoing violation of a constitutional right involving individual liberty, we

Montgomery is akin to *Griffith v. Kentucky*, in which the Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[197] Turning from the requirement of integrity in its own decisions to decisions by lower courts, *Griffith* added, "As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final."[198]

Of course, *Griffith* distinguished between direct and collateral review, and as the dissent in *Montgomery* emphasized, *Montgomery* involved collateral review.[199] But the reasoning of *Griffith* rested not on a particular text, but on "basic norms of constitutional adjudication" and the Supreme Court's "judicial responsibility."[200] And the *Montgomery* majority invoked opinions by Justice Harlan, whose views were vindicated in *Griffith*, and held that "the same principle should govern the application of substantive rules on collateral review."[201] What the dissent in *Montgomery* viewed as an ipse dixit,[202] the majority may have viewed as a "basic norm of constitutional adjudication" and the Supreme Court's "judicial responsibility" regarding the exercise of its appellate jurisdiction.

Notably, while the Court has repudiated *Montgomery's* approach to determining whether a rule is "substantive" for these purposes, it has not (at least yet) repudiated *Montgomery's* holding that the Constitution requires state collateral review courts to give retroactive effect to new substantive rules of constitutional law.[203]

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believe that the Constitution requires that some court be available to provide the remedy." Vázquez & Vladeck, *supra* note 188, at 927.

197. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

198. *Id*. at 323.

199. *See* Montgomery v. Louisiana, 577 U.S. 190, 222 (2016) (Scalia, J., dissenting) ("There most certainly is a grandfather clause—one we have called *finality*—which says that the Constitution does not require States to revise punishments that were lawful when they were imposed.").

200. *Griffith*, 479 U.S. at 322–23. It relied in part on Article III, which does not apply in state courts, and "the principle of treating similarly situated defendants the same" *Id*. at 323.

201. *Montgomery*, 577 U.S. at 204.

202. *Id.* at 221 (Scalia, J., dissenting). "Ipse dixit" is Latin for "he himself said it"; the expression refers to something asserted but not proved. *Ipse Dixit*, *Black's Law Dictionary* (11th ed. 2019).

203. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1317 n.4 (2021) (stating that "to the extent that *Montgomery's* application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and post-date *Montgomery*, those retroactivity precedents—and not *Montgomery*—must guide the determination of whether rules other than *Miller* are substantive"); *id*. ("[O]ur decision today does not disturb *Montgomery's* holding that *Miller* applies retroactively on collateral review. By now, most offenders who

In sum, absent suspension, habeas is a constitutionally required remedy for those in federal Executive custody to test the legality of their detention. Its protection extends, to a limited extent, beyond the formal sovereign territory of the United States. It may also be a constitutionally required remedy for those in custody pursuant to a judgment of a competent court if that judgment rests on a statute later held to be in violation of substantive federal constitutional law.

C. Just Compensation for Takings

Liberty is constitutionally protected by the combination of nullity and habeas: A court is obligated to refuse to enforce an unconstitutional statute. And if the Executive chooses to incarcerate without bothering to use the judiciary, habeas is available (absent suspension) to test the legality of that detention. Liberty may be further protected by a constitutional right to habeas even after conviction if the statute of conviction is later held to substantively unconstitutional.

But what of property? Nullity protects property the same way it protects liberty: A court is obligated to refuse to enforce an unconstitutional statute. But what if the Executive chooses to take property without bothering to use the judiciary?

Nullity could also work in conjunction with traditional private law remedies: Sue the individual officers holding the property for trespass and defeat their defense of official authority on the grounds of unconstitutionality.

In addition, the Takings Clause provides: "Nor shall private property be taken for public use, without just compensation."[204] Not every exaction by the government counts as a "taking"; taxes are the most obvious

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could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*.").

Montgomery raises a host of issues regarding the interpretation and constitutionality of the federal habeas corpus statute that are beyond the scope of this article. To the extent that *Montgomery* is best understood as requiring as a matter of constitutional law that habeas be available for those in custody pursuant to some judgments of *federal* courts, a further question arises: what court has jurisdiction to do so? I have previously suggested that the competing demands of the Suspension Clause, the Madisonian Compromise, *Marbury*, and *Tarble's Case* can be met by the habeas power of individual justices—a power that has existed from 1789 to this day. *See* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C.L. REV. 251, 271–89 (2005). If one of those four competing demands has to be modified, *Tarble's Case* is the one. *See id*. at 270 ("Concededly, cutting *Tarble's* Case down to size would not be quite so dramatic."). *See also* Vázquez & Vladeck, *supra* note 188, at 942 ("*Tarble's Case* is thus best understood as an 'implied exclusion' case, where the ouster of state court jurisdiction was inferred from the *existence* of federal jurisdiction.").

204. U.S. CONST. amend. V.

example. And some regulations of the use of property do count as a "taking."[205]

But the Supreme Court has held that if there is a taking, even a temporary regulatory taking, compensation is required.[206] The California Court of Appeal had held that compensation was not owed until the regulation "is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it."[207] The Supreme Court agreed that after a court has decided that a taking occurred, "the government retains the whole range of options . . . amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."[208] The Court cannot require the government to exercise the power of eminent domain. But it nonetheless held that when "the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[209]

D. Refund of Unlawful Taxes

As noted earlier in connection with injunctions, it is commonplace to deny injunctions against the enforcement of unconstitutional taxes, requiring taxpayers to pay first and litigate later. But if a taxpayer is required to pay first and litigate later, the taxpayer is constitutionally entitled to a refund of an illegal tax.

In *Ward v. Love County*, members of the Choctaw Tribe claimed that federal law made their lands exempt from taxation, but officers of Love County threatened to sell the lands unless the taxes were paid.[210] The Supreme Court accepted the idea that "if the payment was voluntary, the

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205. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

206. *See* First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987). *See* Jacobs v. United States, 290 U.S. 13, 16 (1933). The Court observed:

> The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim . . . . Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.

Jacobs, 290 U.S. at 16.

207. *First English*, 482 U.S. at 312.

208. *Id.* at 321.

209. *Id*. at 321. "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2170 (2019) (overruling Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

210. *See* Ward v. Bd. of Cty. Comm'rs, 253 U.S. 17, 20 (1920).

moneys could not be recovered back in the absence of a permissive statute . . . ."[211] But because "the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money." Moreover, "[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law," in violation of the Fourteenth Amendment.[212]

A State may require that taxpayers litigate first, may require that they pay first and litigate later, or may afford them both choices.[213] But a State may not "reconfigure its scheme, unfairly, in midcourse" by providing an applicable tax refund statute and then declaring, only after a taxpayer has paid the disputed taxes, that no such remedy exists.[214]

Crain, discussed above as the strongest case for viewing injunctive relief as constitutionally required, may be of a piece with these cases. There was reason to doubt that General Oil, if it paid the fees under protest, could recover them. In that circumstance, since the state did not provide a clear and certain refund remedy, it could not insist on payment. But if it had provided for such a refund remedy, the state could have insisted on payment first.

E. Restitution of Fines Paid Pursuant to Reversed or Vacated Conviction

In *Nelson v. Colorado*, the Supreme Court held that when a state court reverses or vacates a criminal conviction, the state must refund the

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211. *Id*. at 22.

212. *Id*. at 24. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 51 (1990). The *McKesson* Court explained:

> When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a 'clear and certain remedy,' for the deprivation of tax moneys in an unconstitutional manner.

McKesson Corp, 496 U.S. at 15 (citation omitted). In many circumstances, that "clear and certain remedy" calls for a complete refund. But because the tax scheme in *McKesson* violated a constitutional principle of nondiscrimination, the state could "cure the invalidity of the Liquor Tax by refunding . . . the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received." *Id*. at 40. *See supra* Section III.E.

213. *See* Reich v. Collins, 513 U.S. 106, 110–11 (1994).

214. *Id*. at 111. *Reich* described cases such as *Ward* and *McKesson* as standing for the proposition "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." *Id*. at 109–10 (citation omitted). *See* Alden v. Maine, 527 U.S. 706, 740 (1999) (distinguishing *Reich* as involving an obligation that "arises from the Constitution itself").

payments the defendant made that were imposed on him as part of his sentence.[215] It reached this conclusion by applying the *Mathews v. Eldridge* test for procedural due process, evaluating the private interest, the risk of error with the procedures used, and the government's interest, concluding that "[a]ll three considerations weigh decisively against Colorado's scheme."[216]

Justice Thomas dissented, arguing that the Court's approach assumed away the real issue in the case: whether the defendant had a present entitlement to the money he paid.[217] If so, only minimal process could be imposed to get it back. But if the defendant lacked any such entitlement—because once paid, the money belongs to the government—there is nothing to adjudicate.[218]

Although the Court did not formulate its opinion in these terms, *Nelson* might be understood as a case involving constitutionally required remedies. Just as just compensation is owed when the government takes property, and a refund is owed if an illegal tax is exacted under coercion with no opportunity to litigate its legality beforehand, so, too, a refund is owed if its payment was coerced by a conviction later reversed or vacated. In language akin to that used in the tax refund cases, the Court stated, "Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions . . . ."[219]

V. RESPONSES TO POSSIBLE CRITICISM

This account of constitutionally required remedies may strike many as disappointing. It certainly falls far short of the promise of *Marbury's* dictum. Critiques might fall into three broad categories: (1) the existing doctrine is wrong; (2) viewing remedies separately is wrong; or (3) separating right from remedy is wrong.

A. Critique of Existing Doctrine

One critique would be to argue that the *Marbury* dictum is the true principle and that the various doctrines that fall short of that principle should be revised accordingly.

This article is not intended to defend every doctrine that limits remedies—and certainly not to defend every detail of those doctrines. But the sheer breadth of the doctrines that would have to be changed suggests that, at least as a practical matter, that is unlikely to happen. More

215. *See* Nelson v. Colorado, 581 U.S. 128, 139–40 (2017).
216. *Id*. at 135.
217. *See id*. at 149 (Thomas, J., dissenting).
218. *See id*. at 153–54.
219. *Id.* at 136 (majority opinion).

importantly, that breadth also suggests that there are important values served by those doctrines. Consider just a few examples.

Legislative immunity serves the important values of legislative independence and constitutional dialogue. If legislators were held liable in money damages for laws that they pass or enjoined from enacting certain laws (and jailed for contempt if they violated those injunctions), legislators would lose much of their independence and instead could be controlled by judges. Constitutional dialogue—including legislators pushing back against judicial opinions—would be much more difficult, if not impossible.

Today, this point may be easiest to see for those who sought for decades to overturn *Roe* and *Casey*: If legislators who voted for laws restricting abortion could be held liable for money damages or jailed for contempt, it would have been much harder to enact those laws.[220] And if no legislature enacted such laws, there would be no opportunity for the Supreme Court to overrule *Roe* and *Casey*.

Defenders of *Roe* and *Casey*, of course, may think this possibility is a powerful reason to eliminate legislative immunity. If legislators had been subject to injunctions and damages for enacting laws contrary to *Roe* and *Casey*, those cases might well still be good law. But change this shoe from the right foot to the left: Those who think that *Citizens United*[221] or *Heller*[222] or *McDonald*[223] are deeply wrong and should be overruled may be wary of imposing damages or injunctions on legislators who enact laws aimed at limiting and eventually overruling those decisions.

Or consider an example from a century ago over a topic about which there is little dispute today: child labor. In 1916, Congress banned from interstate commerce any product made in factories that employed children under fourteen; the Supreme Court found this statute unconstitutional.[224] Congress responded by imposing a 10% tax on the net income of any manufacturer employing children under 14 years of age; the Supreme

220. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

221. Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering communications violates the First Amendment).

222. District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that District of Columbia's ban on handgun possession in the home violates the Second Amendment).

223. McDonald v. Chicago, 561 U.S. 742 (2010) (applying *Heller*'s interpretation of the Second Amendment to the states under the Fourteenth Amendment). The decision in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), which held unconstitutional a law limiting the public carrying of handguns, may lead more people to seek to limit or overrule the *Heller* line of cases. *See also* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (holding that a federal statute prohibiting the possession of firearms by someone subject to a domestic violence restraining order is unconstitutional under *Bruen*), *cert. granted*, 143 S. Ct. 2688 (2023).

224. *See* Hammer v. Dagenhart, 247 U.S. 251, 280 (1918).

Court found this statute unconstitutional as well.[225] Congress again responded, banning child labor (and more generally regulating minimum wages and maximum hours); finally, the Supreme Court relented and upheld the Fair Labor Standards Act of 1938.[226]

As Justice Jackson once explained for the Court:

> There is ample ground to know that the prospect of conflict in opinion with this Court on constitutional questions was not sufficient so to mute the 74th and 75th Congresses. This was as it should be. There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgments or doctrine. The Court differs, however, from other branches of the Government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy; and if the case requires . . . a statutory basis . . . the new case must have sufficient statutory support.[227]

Without legislative immunity, it would be far more difficult for the Supreme Court to extricate itself from error.

Judicial immunity similarly serves the important value of judicial independence, a value that is not for the protection of the judges but for the protection of the parties. What kind of person would want to be a judge if she had to pay money damages for her errors? The resulting judiciary would probably be some combination of the "most resolute" and the "most irresponsible" people in the society.[228] And who would want to be an appellant, trying to convince an appellate court that the lower court made an error, aware that the appellate judges would know that a reversal would make their colleague liable in damages?

Sovereign immunity is deeply controversial. But if one envisions a world without it—one in which bondholders could literally own the government, renting to it everything from national and state parks to the legislatures' own chambers[229]—the idea of letting elected bodies determine how to pay their debts may look more attractive.[230] Legislatures can and do waive sovereign immunity in many circumstances.

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225. *See* Bailey v. Drexel Furniture Co., 259 U.S. 20, 40 (1922).

226. *See* United States v. Darby, 312 U.S. 100, 116–17 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251, 280 (1918)). *See* Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. REV. 123, 160 (1999).

227. Helvering v. Griffiths, 318 U.S. 371, 400–01 (1943).

228. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.).

229. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).

230. As the Supreme Court put it, controversially:

And qualified immunity, which denies relief to so many injured people, reduces the cost of legal change, thereby making it easier for courts to announce new norms.[231] Depending on one's view of those new norms, this may be highly desirable.

B. Critique of Viewing Remedies Separately

A second kind of critique is to agree that some particular remedy may not be constitutionally required, but instead contend that evaluating the constitutional necessity of each particular remedy is to place a misguided focus on the trees while missing the forest. From this perspective, no particular remedy may be required, but some system of adequate remedies is required.

As Professors Fallon and Meltzer put it, *Marbury's* "remedial ideal"

> reflects just one of two principles supporting remedies for constitutional violations. Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law. Both principles sometimes permit accommodation of competing interests, but in different ways. The *Marbury* principle that calls for individually effective remediation can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress . . . .[232]

In the wake of *Whole Women's Health*, Professor Fallon has returned to this argument, contending that "the most fundamental principle that Meltzer and I posited—requiring sufficient constitutional remedies to keep the government and its officials generally within the bounds of law—directly reflects the ideal of the rule of law."[233]

> While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Alden v. Maine, 527 U.S. 706, 751 (1999).

231. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98–105 (1999).

232. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991). *See also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019).

233. *See* Fallon, *supra* note 22, at 1322–23.

This approach is avowedly in the tradition of Henry Hart.[234] In particular, Fallon and Meltzer observe that "[e]ven in cases in which the Constitution requires some remedy, Hart showed that it frequently leaves an element of discretion or flexibility about what that remedy should be . . . . [and] 'a complaint about the substitution of one remedy for another that is preferred by the claimant can rarely be of constitutional dimension.'"[235]

More generally, the contention that the Constitution requires an overall system of remedies that is effective in maintaining a regime of lawful government bears a family resemblance to Hart's famous contention that the exceptions that Congress makes to the Supreme Court's appellate jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan"[236] because the alternative would be to read the Constitution "as authorizing its own destruction."[237]

One response to this contention is the same given by Herbert Wechsler to Henry Hart: "Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government."[238]

As a matter of good government should we have an overall system of remedies that is effective in maintaining a regime of lawful government? Of course.

And should those responsible for creating remedies treat this as an important goal? Certainly. But as reflected most clearly in the current approach to the *Bivens* line of cases, the Supreme Court does not see itself as an institution that is responsible for creating remedies. Nor does it

234. Henry Hart, along with his co-author Herbert Wechsler, wrote what has been described as "probably the most important and influential casebook ever written." Akhil Reed Amar, *Law Story*, 102 HARV. L REV. 688, 688 (1989). It defined the "pedagogic canon of what has come to be one of the most important fields of public law in late twentieth-century America, variously described . . . as 'federal courts' or 'federal jurisdiction.'" *Id*. at 690. It also defined "what has come to be one of the most important schools of legal thought in late twentieth-century America, typically described as 'the legal process school.'" *Id*. at 691. Hart's Dialogue is canonical in the field of federal courts. *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

235. Fallon & Meltzer, *supra* note 232, at 1787 (quoting Hart, *supra* note 234, at 1366); Fallon, *supra* note 22, at 1310 ("In an article written roughly thirty years ago, Professor Daniel Meltzer and I built on Hart's insight . . . .").

236. Hart, *supra* note 234, at 1365.

237. *Id*.

238. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965). He added, "They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land." *Id*.

appear troubled by the combination of (1) Congress eliminating state tort claims against federal officers and (2) the lack of a *Bivens* remedy.[239]

Perhaps an overall system of remedies that is effective in maintaining a regime of lawful government should be viewed as a constitutional principle binding on nonjudicial actors, but it is harder to see as a judicially enforceable constitutional principle. To be frank, the judiciary is not well suited to thinking about anything systematically. It is a diffuse institution, deciding one case at a time. Even the Supreme Court, which through its hierarchical position can exercise some centralizing power, decides one case at a time. With rare exceptions, it chooses which cases to decide, and there is no reason to think that the cases it selects are representative of the universe of cases filed in court, never mind the much broader set of disputes that never reach a court. With no investigative or factfinding structure, the Court relies on hypothetical questions and amicus briefs to explore the broader implications of the particular case under consideration.

C. Critique of the Separation of Right from Remedy

A quite different critique views the enterprise of separating rights and remedies as misguided. Criticizing what he calls "rights essentialism," Daryl Levinson has argued that "[c]onstitutional discourse has sought to legitimate and protect the privileged status of constitutional rights by sharply separating the realm of rights from the realm of remedies and by emphasizing the priority of rights over remedies."[240] In his view, there is "no such thing as a constitutional right, at least not in the sense that courts and constitutional theorists routinely assume" because "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[241]

This critique goes too far in at least two respects. First, so long as a constitutional right is enforceable with some remedies and not others, it is conceptually useful to distinguish between the two. For example, if a constitutional right can be remedied with nullity, but not with damages or an injunction, describing matters in just that way is conceptually useful—particularly if one remedy is constitutionally required and another is not.

It is true that one might say the constitutional right at issue is only a constitutional right to nullity. But if Congress were to add a right of action

239. *See* Hernandez v. Mesa, 140 S. Ct. 735, 748–50 (2020). The plaintiff had argued that this combination—eliminating a state common law tort claim that traditionally could be used against a federal officer who lost his defense of official authority by acting unconstitutionally while also providing no federal remedy—would raise a serious constitutional question. Brief for the Petitioners, Hernandez v. Mesa, 2019 WL 3714475 at 40–43 (2019).

240. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

241. *Id*. at 857–58.

for damages to vindicate that right, would that mean that Congress has expanded the constitutional right? Or that Congress has created a purely statutory right? Neither description seems accurate. Congress has added a statutory remedy to enforce a constitutional right; it hasn't added to the Constitution, nor has it created a purely statutory right without reference to the Constitution.

Second, at least to the extent that there are constitutional rights that cannot be enforced in the regular courts, as the political question doctrine demonstrates, keeping a distinction between rights and remedies serves as a reminder that those rights remain constitutionally obligatory on the relevant officials. More generally, distinguishing between constitutional rights and remedies helps to make clear—as *Marbury* took for granted—that the Constitution creates "a rule for the government . . . of the legislature" and that "other departments[] are bound by that instrument."[242]

Levinson is surely right that courts seeking to expand the value of certain constitutional rights can do so by expanding the remedies to enforce those rights and that courts seeking to contract the value of certain constitutional rights can do so by contracting the remedies to enforce those rights. What he calls "remedial equilibration" can, and no doubt does, happen.[243]

But when we distinguish between rights and remedies—and distinguish between remedies that are constitutionally required and those that are not—it becomes clear that legislatures, not just courts, have an important role in such equilibration. And they can do more than simply balance out right and remedy to reach some equilibrium. They can calibrate remedies to increase or decrease the "cash value of a right."[244]

VI. LEGISLATIVE CALIBRATION

Distinguishing between remedies that are constitutionally required and those that are not makes it clear that legislatures, not just courts, have an important role in calibrating remedies. Legislatures have room to increase remedies and thereby increase the cash value of a right. They also have room to decrease remedies (apart from those few required by the Constitution) and thereby decrease the cash value of a right.

242. Marbury v. Madison, 5 U.S. 137, 180 (1803).

243. *See also*, Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C.L. Rev. 129, 186–87 (2020) (discussing various examples of remedial equilibration and arguing that entitlement-strengthening initiatives are more vulnerable to down-the-road resistance than their entitlement-weakening counterparts, "just as so many other products of human creation will be harder to create and maintain than they are to target and destroy").

244. Levinson, *supra* note 240, at 887.

Congress could, for example, dramatically increase the cash value of many constitutional rights by eliminating qualified immunity for § 1983 claims. It could also increase the cash value of many constitutional rights by creating a statutory analog to § 1983 for claims against federal officers, effectively codifying a robust regime of *Bivens* claims, particularly if it eliminated qualified immunity for such claims. Or it could repeal the exclusion of constitutional claims from the Westfall Act.[245] Or repeal the preemption of state common law claims, leaving federal officers who violate the constitution liable as ordinary tortfeasors. If Congress chose, it could impose *respondeat superior* liability on municipalities for the constitutional torts of their employees, thereby increasing the cash value of many constitutional rights.[246] It could expand its waiver of the sovereign immunity of the United States.[247] It could abrogate the sovereign immunity of the States.[248] It could abolish many forms of absolute immunity.[249]

And Congress could also make multiple remedial changes at once, such as imposing *respondeat superior* liability on municipalities for the constitutional torts of their employees, while simultaneously allowing municipalities to rely on qualified immunity (or a revised version of

245. *See* 28 U.S.C. § 2679(b)(2)(A) (2021).

246. *Cf*., Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (holding that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory").

247. *See* 28 U.S.C. § 2679 (excluding actions "brought for a violation of the Constitution of the United States").

248. *See* United States v. Georgia, 546 U.S. 151, 159 (2006). Professor Fallon worries about the restriction on Congressionally authorized remedies represented by *City of Boerne* and its progeny. *See* Fallon, *supra* note 22, at 1363–64 (citing City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997)). The problem with the *Boerne* line of cases is its judicial supremacist view of the Fourteenth Amendment, requiring that Congressionally created remedies for violations of the Fourteenth Amendment reflect the *judiciary's* understanding of the Fourteenth Amendment. Where a judicially recognized violation of the Fourteenth Amendment is at issue, the Court has unanimously upheld the robust remedy of abrogation of sovereign immunity. *See* United States v. Georgia, 546 U.S. at 158. The Court in the *Georgia* case noted:

> While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.

546 U.S. at 158 (Scalia, J., for a unanimous Court) (emphasis in original).

249. *See* U.S. CONST., art. 1, § 6, cl 1 (providing that member of Congress "shall not be questioned in any other Place" for "any Speech or Debate in either House"); Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982) (declining to address the immunity question that would arise if Congress expressly created a damages action against the President). State legislators might also have some constitutionally based immunity akin to the Speech and Debate Clause.

qualified immunity).[250] Compromises and tradeoffs like this are the stuff of legislation. But it is hard for courts to make interdependent changes in different doctrines simultaneously. Given the strong norm against trading across cases, it probably isn't enough to have two cases, each presenting one of the issues, in the same term. More likely, it would require a single case that presents both issues, and the Supreme Court would have to grant certiorari on both issues.

On the other hand, Congress could also reduce damage remedies. Perhaps most dramatically, it could, for example, repeal § 1983.

Significantly, Congress has more nuanced options. For example, it could treat the sovereign immunity of the United States differently than that of the States, and the immunity of federal officers differently than the immunity of State officers. And it could act selectively by expanding damage remedies for some constitutional violations but not others.

Similar points can be made about injunctive remedies for constitutional violations. Congress could amend or repeal various statutory bars to injunctions.[251] It could enact a statute rejecting *Younger* abstention.[252] As with damages, it could waive the sovereign immunity of the United States or abrogate the sovereign immunity of the States.

Or Congress could reduce the availability of injunctions. If that seems unthinkable, recall that there was a time when progressives hated *Ex parte Young* as much as they hated *Lochner*.[253] As Judge Henry J. Friendly put it, *Ex parte Young* was the "bête noir of the liberals"—their boogeyman—a century ago.[254] Indeed, *Ex parte Young* was the jurisdictional counterpart to *Lochner*. In recent years, those on the right and the left who seek to use the federal courts to further their views have embraced *Ex parte Young*. Perhaps rather than seeking to capture the Court by expanding its size, progressives might consider whether a dose of the old skepticism is warranted.[255]

Here, too, Congress has more nuanced options. For example, it could explicitly empower the federal Executive to sue a state to enjoin that state

250. *Cf.* Owen v. Indep., 445 U.S. 622, 638 (1980) (holding that a municipality is not protected by qualified immunity).

251. *See* 28 U.S.C. § 2283; 26 U.S.C. § 7421; 28 U.S.C. §§ 1341–42.

252. *See* Younger v. Harris, 401 U.S. 37 (1971).

253. *See* Lochner v. New York, 198 U.S. 45 (1905).

254. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3 n.7 (Colum. Univ. Press, 1973).

255. *Cf.* Fallon, *supra* note 22, at 1325 (noting that "the Court of the *Lochner* era generally did much better in aligning rights with remedies than it did in identifying substantively protected rights"). The successful pre-enforcement challenge in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), might lead some progressives to be more skeptical of such challenges.

from enforcing an unconstitutional state law, obviating the need to determine the extent to which that can be done under current law.[256]

Congress could state the circumstances (if any) when an injunction may be issued for the benefit of non-parties, perhaps requiring that any such injunction be issued by a five-judge district court consisting of five chief district judges selected at random from around the country and appealable to a seven-judge court of appeals consisting of seven chief circuit judges selected at random from around the country.[257] As with damages, Congress could act selectively, expanding the availability of injunctions for some constitutional violations but not others.

Congress could give litigants a right to a declaratory judgment in specified circumstances. It could require the exclusion of evidence in circumstances currently permitted by Supreme Court doctrine. Or it could restore habeas for those in custody pursuant to a conviction that was based on illegally seized evidence.[258]

Congress could make clear, either in general or in particular circumstances, whether a violation of a constitutional norm of equality should be remedied by taking a benefit away from a favored person or by providing that benefit to a disfavored person.

Congress could add or amend statutes providing for the criminal punishment of those who violate the constitutional rights of another. The reason 18 U.S.C. § 241 has been interpreted to require a heightened mens rea requirement is to avoid a vagueness problem.[259] If Congress were to enact sufficiently specific criminal statutes targeting particular constitutional violations, it could utilize more common and less demanding mens rea requirements.

To the extent that the political question doctrine reserves certain constitutional questions to the political branches, Congress may not be able to punt to the Article III courts. For example, it cannot switch the trial of impeachments from the Senate to an Article III court. But when the only problem is the lack of judicially manageable standards, and Congress has appropriate legislative authority, it may be able to create judicially manageable standards.

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256. *See In re* Debs, 158 U.S. 564, 599–600 (1895); *see also* United States v. Texas, 142 S. Ct. 522, 522 (2021) (dismissing writ of certiorari as improvidently granted); *see also* United States v. Texas, No. 1:21-CV-796-RP, 2022 WL 18495065 at *1 (W.D. Tex. 2022) (all claims voluntarily dismissed).

257. *Cf.* Stephen I. Vladeck, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. TIMES (Jan. 7, 2022), https://bit.ly/43v8ymr (suggesting a revival of three-judge district courts).

258. *See* Stone v. Powell, 428 U.S. 465, 494 (1976).

259. *See* Screws v. United States, 325 U.S. 91, 103 (1945) (Douglas, J., announcing the judgment of the Court).

For example, Congress has broad power to set the times, places, and manner of holding federal elections.[260] Were it to use this power to constrain political gerrymandering, it might do so in a way that created judicially manageable standards.[261]

Similarly, if Congress were to use its constitutional power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[262] by establishing specific criteria governing when the militia may—and may not—be called forth, it might do so in a way that created judicially manageable standards.[263]

The current statute, which can be traced to an Act of February 28, 1795, interpreted in *Luther v. Borden*, provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.[264]

Congress may want to revisit this statute in light of the events of January 6, 2021.

To a more limited extent, state legislatures can expand constitutional remedies. Obviously, they can waive sovereign immunity. They can make habeas more broadly available for those in state custody in violation of federal law than it is in federal courts.[265] In addition, they might be able to enact what Akhil Amar has called a "converse-1983" statute, empowering those harmed by federal officers to sue for damages.[266]

Of course, as *Whole Women's Health* illustrates, state legislatures may also act to make remedies for constitutional violations less available. If a statute is created in a way that no public official has enforcement authority, there may be no one to sue for injunctive relief.

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260. *See* U.S. CONST., art. I, § 4, cl. 1.

261. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (stating that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause").

262. U.S. CONST., art. I, § 8, cl. 15.

263. *See* 10 U.S.C § 251.

264. *Id.*

265. *See* Danforth v. Minnesota, 552 U.S. 264, 288 (2008).

266. *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1239 (1994).

The novelty of the Texas Heartbeat Law[267] was not that it allowed for private enforcement of a public norm.[268] That's commonplace. It's obviously true in private attorney general actions and qui tam actions.[269] But it's deeper than that. I would suggest that it is inherently true of all private rights of action: If the law recognizes a private party's right to sue, it must be because there is a public norm supporting that right. For example, if a private party has a right to sue for breach of contract, it is because of a public norm favoring the binding nature of certain agreements.

Nor was the law's novelty the absence of a public enforcement mechanism. That, too, is commonplace in private law litigation. While a private party may sue another private party for breach of contract, government officials do not generally sue one private party for breach of a contract with another private party. While a private party may sue another for negligence, government officials do not generally sue one private party for negligently injuring another private party. While a private party may sue another to enforce a deed restriction, government officials do not generally sue one private party to enforce a restriction in a private deed. Of course, the government sues to enforce its own contract, tort, and property rights.

This commonplace feature of private law litigation means that there is frequently no government official to sue prior to taking action that runs afoul of state law, even when one contends that the state law is unconstitutional.[270]

Consider someone who contends that the state law of intentional infliction of emotional distress violates the First Amendment,[271] or someone who contends that the state law of defamation violates the First

267. Tex. Health & Safety Code Ann. §§ 171.204(a), 171.205(a) (West Cum. Supp. 2021).

268. *See generally* Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 S.M.U. L. REV. 187 (2022).

269. "Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 769 (2000).

270. It is an exaggeration to say that it is "practically impossible to bring a pre-enforcement challenge to statutes that establish private rights of action, because the litigants who will enforce the statute are hard to identify until they actually bring suit." *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1001, n.270 (2018). One reason is that there may be a public right of action as well as a private right of action. Another is that the private right of action may be aimed at regulating a voluntary relationship, such as a contract, where an opposing party can be identified.

271. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

Amendment defense.[272] Or someone who believes that the state law of product liability violates the Equal Protection Clause.[273] Or someone who contends that the application of a state's long arm statute to his conduct violates due process.[274] Or someone who contends that state property law violates the Equal Protection Clause[275] or the Due Process Clause.[276]

Nor is the novelty of the Texas Heartbeat Law that it allows venue based on a plaintiff's residence or that it eliminates the requirement of mutuality of preclusion. Venue based on a plaintiff's residence is hardly novel. From 1887 until 1990, venue was available in diversity cases "either where the plaintiff resided or where the defendant resided."[277] The requirement of mutuality for preclusion, while widely abandoned now, was the longstanding tradition.[278] And abandonment of the mutuality requirement does not mean that a party who wins one case can preclude someone who was not a party to that case.[279]

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272. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators:* New York Times v. Sullivan *as Historical Analogue*, 60 HOUS. L. REV. 93 (2022).

273. *See, e.g.*, *In re* Asbestos Litig., 829 F.2d 1233, 1234 (3d Cir. 1987) (rejecting the equal protection defense over a dissent and affirming an 8-6 en banc decision by the district court). A party contending that state law is preempted may also have no state official to sue. *E.g.*, Riegel v. Medtronic, Inc., 552 U.S. 312 (2008).

274. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011). Someone who contends that state contract law is preempted by the Federal Arbitration Act is in the same position. *E.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

275. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

276. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84–85 (1980) (rejecting the due process claim on the merits).

277. 14D Wright & Miller, Fed. Prac. & Proc. Juris. § 3802, at 18 (4th ed.).

278. *See* 18A Wright & Miller, Fed. Prac. & Proc. Juris. § 4463, at 666–67 (3d ed.). They explain:

> For many years, most courts followed the general rule that the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects. This rule, known as the rule of mutuality, established a pleasing symmetry—a judgment was binding only on parties and persons in privity with them, and a judgment could be invoked only by parties and their privies.

Id.

279. *See* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (recognizing "the 'deep-rooted historic tradition that everyone should have his own day in court'" and the "general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'" and refusing to expand the limited exceptions to "the rule against nonparty preclusion is subject to exceptions"). *But see Whole Woman's Health*, 142 S. Ct. 522, 546 (2022) (Sotomayor, J., dissenting in part) ("It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct."); Beatty, *supra* note 10, at 39. *Cf.* Rhodes & Wasserman, *supra* note 268, at 247 (noting that an abortion provider "faces this burden under ordinary preclusion rules, not unique SB8 preclusion rules").

The novelty of the Texas Heartbeat Law—and the California gun control statute passed in imitation of it[280]—is to take what had been generally seen as a question of public law subject to enforcement by public officials and remove all enforcement by public officials, leaving it only to private enforcement. If there is no enforcement by public officials, and no readily identifiable private enforcer, there may be no ability to secure an injunction against enforcement.[281]

A remedial regime such as the one created by Texas Heartbeat Law and its California imitator certainly reduces the cash value of a right, whether the right to an abortion or the right to keep and bear arms. But that does not mean that Texas and California are able to nullify the Supreme Court's decisions.[282] Nor are they echoing John Calhoun's claim that states can veto or nullify federal law.[283] That's because, if an enforcement action is brought under such a state law, the defendant can rely on the Federal Constitution as a defense. And, if the defendant is correct, it is the state law—not the federal law—that is nullified.

An important criticism of laws such as the Texas Heartbeat Law is the argument that the ability to defend is illusory because the costs of

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Perhaps Justice Sotomayor meant to invoke, not nonmutual preclusion, but the principle that, for certain types of public-law claims that can brought only on behalf of the public at large, Congress and the "States are free to adopt procedures limiting repetitive litigation." *Taylor*, 553 U.S. at 903. *See also* Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 623 (2022) ("Once someone had filed a popular action under English law, no one else could pursue the matter absent evidence of collusion between the defendant and the informer.") But after noting this principle, *Taylor* added, "It hardly follows, however, that *this* Court should proscribe or confine" such successive suits through "extraordinary application of the common law of preclusion*." Taylor*, 553 U.S. at 903.

280. *See* Cal. Bus. & Prof. Code § 22949.60 (Cal. Sess. Laws, Ch. 146, July 22, 2022).

281. The Attorney General and Governor of California have been enjoined from enforcing one provision of the California statute—a provision creating a state right of action to recover attorney's fees from those who brought a federal law claim challenging any California gun regulation. That provision, by its terms, enables a "public official" to bring such a state law action. Miller v. Bonta, No. 22cv1446, 2022 WL 17811114 (S.D. Cal., Dec. 19, 2022); South Bay Rod & Gun Club v. Bonta, No. 22cv1461, 2022 WL 17811113 (S.D. Cal., Dec. 19, 2022). For a discussion of the fee shifting aspects of both the Texas Heartbeat Law and the California gun control statute, see Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 Yale L.J. 2048 (2023).

282. *See Whole Woman's Health*, 142 S. Ct. at 545 (Roberts, C.J., dissenting in part).

283. *See id*. at 550 (Sotomayor, J., dissenting in part). In what may be infelicitous editing in a tight timeframe, Justice Sotomayor seems to suggest that the Civil War was fought over the proposition whether the Supreme Court's interpretation of the Constitution is equivalent to the Constitution itself. *See id*. To the extent that is true, she has her sides wrong: It was Abraham Lincoln and his Republican Party who insisted that the Supreme Court's interpretation of the Constitution need not be followed by Congress and the President. The antebellum Supreme Court was solidly on the side of the slaveholding South.

losing are too high. But to decide whether the costs of losing are too high to run the risk, one needs to know what the chances of losing are. At the time the Texas Heartbeat Law went into effect, abortion providers had to know that there was a very good chance that, if they violated it and were sued, they would ultimately lose on their federal defense. That's because they knew that *Dobbs* was pending in the Supreme Court, and it was not hard to predict that *Roe* and *Casey* might well be overruled.

But imagine that Texas had enacted the very same law in 1974. How many abortion providers in Texas would have been afraid?[284]

Consider, now, the California gun control law modeled on the Texas statute. It is targeted at certain very large-caliber ammunition, assault weapons, and firearms without serial numbers.[285] To the extent that there is a serious argument under current law that these weapons are not protected by the constitutional right to keep and bear arms, perhaps many Californians will be dissuaded from possessing these weapons rather than risk being sued and ultimately losing.

But suppose California had instead created a private right of action—unenforceable by any public official—to recover statutory damages for possession of a handgun in the home? How many Californians would turn in their handguns? How many would be untroubled, confident that they couldn't lose such a case, given *Heller*, *McDonald*, and *Bruen*?[286] Many states continued to have criminal prohibitions on abortion on the books after *Roe*. How many abortion providers feared prosecution or imprisonment or thought that they needed to secure an injunction against enforcing those statutes?

My point is not to praise Texas and California nor to deny that there is value in pre-enforcement relief. As Professor Borchard famously argued in support of permitting declaratory judgments:

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284. To the extent that one thinks that medical professionals and institutions are extremely risk-averse, one should ask why they are so confident that they can act under the protection of an injunction. Has no one told them that it is not clear whether a plaintiff who secures an injunction against enforcement of a statute that is reversed on appeal can be prosecuted for conduct while the injunction was in effect? *See* Edgar v. MITE Corp., 457 U.S. 624, 651 (1982) (Stevens, J., concurring) ("Since a final judgment declaring a state statute unconstitutional would not grant immunity for actions taken in reliance on the court's decision, certainly a preliminary injunction—which on its face does nothing more than temporarily restrain conduct—should not accomplish that result."); Georgina Yeomans, *The Enduring Protection of Prospective Relief,* 3 N.C. CIV. RTS. L. REV. 114, 147 (2023) ("A court's power to protect litigants' conduct from future punishment should an injunction be vacated or otherwise dissolved is an unsettled question.").

285. *See* CAL. BUS. & PROF. CODE § 22949.60 (2022).

286. *See* District of Columbia v. Heller, 554 U. S. 570 (2008); McDonald v. Chicago, 561 U. S. 742 (2010); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

> It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights . . . . The court, in effect, . . . informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it.[287]

Instead, the point is that such statutes do not result in nullification of federal law. Their effect may be closer to that of qualified immunity: Rights that are clearly established—such as the right to abortion in 1974 and the right to possess a handgun at home in 2022—are protected by more effective remedies than rights that are not clearly established.

Providing more effective remedies for clearly established rights than for other rights can also be seen in habeas. Federal courts can grant habeas relief to state prisoners whose convictions were based on state court decisions that were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[288]

It is true that the right to abortion was still clearly established in 2021, despite the pendency of *Dobbs*. But in the habeas context, the Supreme Court has denied relief when a prisoner with competent counsel would have prevailed under binding precedent at the time of his conviction and that precedent was later overruled.[289] The same result follows under qualified immunity: If an officer's action violated clearly established law at the time he acted, but that precedent is overruled, he wins on the merits. The unwillingness of abortion providers to put themselves at risk when *Dobbs* was pending, even though *Casey* was clearly established at the time, is analogous.

These analogies are not perfect. But they do illustrate that this is not the only area in which rights that were—and remain—clearly established are protected by more effective remedies than rights that are not clearly established.

Here, too, Congress has power to act. As noted earlier, Congress can abrogate state sovereign immunity, thereby allowing the state itself to be sued, or expressly authorize a suit by the United States against a state.

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287. Perez v. Ledesma, 401 U.S. 82, 114 (1971) (Brennan, J., concurring) (quoting *Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary*, 70 Cong., 75–76 (1928)).

288. 28 U.S.C. § 2254(d).

289. *See* Lockhart v. Fretwell, 506 U.S. 364, 366 (1993) ("To hold otherwise would grant criminal defendants a windfall to which they are not entitled.").

And if Congress is concerned about hostile state courts, unfriendly state procedure, or the delay involved in working one's way through the state court system before petitioning the Supreme Court, it can allow the removal of such cases from state court to federal district court.[290] Doing so can allow for quick dismissal if the federal defense is well founded.[291] It can also obviate concerns about plaintiffs choosing an inconvenient forum, because federal transfer law will govern on removal,[292] and about frivolous cases, because once a plaintiff does anything to support its complaint after removal, Federal Rule 11 governs.[293]

VII. CONCLUSION

The promise of *Marbury*—the promise of a remedy for violation of every right—is belied by reality, then and now. There are few constitutionally required remedies.

Some may find this conclusion "alarming," fearing that it will "cheapen what it means to have a constitutional right," and even run the risk that some rights "that exist in name" will be "vulnerable to flouting in the absence of political commitments to enforcing them."[294] But as Judge John Gibbons reminded us over thirty years ago, "the status of the Constitution as law depends upon the political will of a present political community."[295]

Elected officials have a crucial role to play in determining how robust the remedies to implement the Constitution's guarantees will be. The ability to calibrate the enforcement of rights recognized by the judiciary is an important tool for Congress to implement its view of the Constitution and contribute to an interbranch constitutional dialogue, especially if it calibrates remedies differently for different rights. These more nuanced tools are available even if more radical reforms are unwise, unavailable,

290. *Cf.* 28 U.S.C. §§ 1442, 1443.

291. *See generally* Georgia v. Rachel, 384 U.S. 780 (1966).

292. *See* 28 U.S.C. § 1404.

293. Federal Rule 11 provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Fed. R. Civ. P. 11.

294. Fallon, *supra* note 22, at 1308.

295. John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613, 622 (1991); *see also* LEARNED HAND, THE SPIRIT OF LIBERTY 190 (3d ed. 1960) ("Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.").

or blunderbuss and even if the Supreme Court is unwilling to expand constitutional remedies on its own.