

# MADISON LECTURE

## SECURING FRAGILE FOUNDATIONS: AFFIRMATIVE CONSTITUTIONAL ADJUDICATION IN FEDERAL COURTS

THE HONORABLE MARSHA S. BERZON\*

*In this speech, delivered as the annual James Madison Lecture, Judge Marsha Berzon discusses the availability of judicial remedies for violations of the Constitution. Judge Berzon reflects on the federal courts' tradition of allowing litigants to proceed directly under the Constitution—that is, without a statutorily based cause of action. This is a tradition that extends much further than the mid-twentieth century cases most commonly associated with affirmative constitutional litigation—Brown, Bolling, & Bivens, for example—and has its roots in cases from the nineteenth and early twentieth centuries. Against this long historical tradition of courts recognizing nonexpress causes of action for violations of the Constitution, Judge Berzon surveys the modern Supreme Court's jurisprudence, a jurisprudence that sometimes requires constitutional litigants to base their claims on the same sort of clear congressional intent to permit judicial redress now required before courts will recognize so-called “implied” statutory causes of action. Judge Berzon suggests that requiring litigants seeking to enforce constitutional norms to point to evidence of congressional intent regarding the availability of judicial redress misapplies separation-of-powers concerns.*

### INTRODUCTION

I am so very pleased to be with you today to deliver the fortieth Madison Lecture. This honor is an especially meaningful one for me, as one of my predecessors in the Madison Lecture series was Justice William Brennan, for whom I clerked on the Supreme Court. In fact, Justice Brennan is the only person to have stood at this lectern twice—he gave the Madison Lecture in 1961<sup>1</sup> and again in 1986.<sup>2</sup>

In his first lecture, in 1961, Justice Brennan described a vigorous debate then taking place in the courts about whether and to what extent the federal Constitution constrains state, not just federal,

---

\* Copyright © 2009 by Marsha S. Berzon, U.S. Circuit Judge, United States Court of Appeals for the Ninth Circuit. An earlier version of this lecture was delivered as the James Madison Lecture at the New York University School of Law on November 10, 2008. I would like to thank my law clerk, Kate Desormeau, for her help in researching this lecture.

<sup>1</sup> William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

<sup>2</sup> William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

power.<sup>3</sup> When he returned to this podium to deliver his second lecture in 1986, he used the occasion to reflect upon how much the legal world had changed in the twenty-five years since he had first spoken. He recounted, on the one hand, the step-by-step incorporation of the Bill of Rights' guarantees as against the states, and, on the other, the increasing tendency of the Supreme Court to decline to enforce those guarantees, often "in the name of federalism."<sup>4</sup> Justice Brennan was heartened to find that state courts, in interpreting their own constitutions, were "assum[ing] a leadership role in the protection of individual rights and liberties."<sup>5</sup> Still, he cautioned, federal courts were an "indispensable safeguard of individual rights against governmental abuse,"<sup>6</sup> so that if federal courts abdicated that historic role, both individuals and our federal system would suffer.

In 2008, nearly another quarter century later, we are still grappling with the role of federal courts in enforcing constitutional rights. When may an individual alleging a constitutional violation obtain access to federal court to seek relief? And, once the litigant is in court, what remedies may the court provide? These questions have a ring of contemporary urgency to them because of current controversies surrounding habeas corpus, § 1983, sovereign immunity, and standing doctrine.<sup>7</sup> Underlying those controversies are some of the most basic, vexing questions one can ask about a judicial system—the same questions James Madison and the other Founders faced as they devised our system of government.

Our Constitution is in many respects an extraordinarily laconic document, not least with respect to the judiciary's role in enforcing constitutional rights. Article III vests what it calls the "judicial Power" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>8</sup> What *is* this judicial power? Various provisions of the Constitution set limitations upon the government; others confer rights upon individuals to be free

---

<sup>3</sup> Brennan, *supra* note 1, at 761–69.

<sup>4</sup> Brennan, *supra* note 2, at 539–40, 546–48.

<sup>5</sup> *Id.* at 550.

<sup>6</sup> *Id.* at 552.

<sup>7</sup> See, e.g., *Williams v. Taylor*, 529 U.S. 420 (2000) (considering the availability of habeas corpus in light of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (considering the standards for determining whether a federal statute creates "rights" within the meaning of 42 U.S.C. § 1983); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (considering whether Congress has the power under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to abrogate the states' Eleventh Amendment immunity from suit); *Hein v. Freedom from Religion*, 127 S. Ct. 2553 (2007) (considering taxpayer standing to challenge executive branch expenditures).

<sup>8</sup> U.S. CONST. art. III, § 1.

from certain governmental acts—we see this most obviously in the Bill of Rights and the Reconstruction Amendments<sup>9</sup>—but in what fora, and by what means, are those limitations and rights to be enforced? The Constitution is mostly silent on the subject of remedies,<sup>10</sup> leaving unanswered difficult questions about the extent to which courts may fashion remedies suited to vindicating constitutional rights.

It is something of a truism that the task of interpreting the Constitution's provisions and applying them to particular facts is part of what the "judicial Power" is about. But there is a far more complex story to be told about when, and for whom, the federal courts' doors are open to affirmative constitutional claims in the absence of a statutorily created cause of action, and about the range of remedial powers available to the courts in redressing constitutional violations.<sup>11</sup> These are not new questions, of course, but I hope to demonstrate that the background assumptions upon which we operate today when answering them are quite different from what they were twenty-five and fifty years ago. In the last thirty years especially, the Supreme Court and lower federal courts have dramatically recast the role of the judiciary in adjudicating constitutional issues. In particular, courts are increasingly—but not consistently—insisting upon statutorily granted authority to hear constitutional claims and to fashion appropriate remedies.

As I will suggest, federal courts appear to have conflated the sensible desire for clear legislative direction with respect to enforcement of federal laws with the more dubious proposition that similar congressional authority is required for judicial enforcement of constitutional guarantees. But statutory causes of action (particularly so-called implied causes of action<sup>12</sup>) and direct, affirmative constitutional claims are largely distinct and are not usefully analyzed as though they

---

<sup>9</sup> U.S. CONST. amends. I–X, XIII–XV.

<sup>10</sup> Two exceptions are the writ of habeas corpus, U.S. CONST. art. I, § 9, cl. 2, and the just compensation requirement, U.S. CONST. amend. V.

<sup>11</sup> Affirmative suits to enforce *statutory* rights are another story, one I will address only tangentially in this lecture.

<sup>12</sup> A note on terminology is in order: We tend to use the term "implied" cause of action in the context not only of suits to enforce statutory law but also suits to enforce constitutional norms. As sometimes happens, the now-accepted terminology has gotten in the way of clear thinking. As we all learned in grammar school, a speaker "implies" and a listener "infers." The term "implied" cause of action therefore suggests that the proper focus of judicial inquiry is to determine what the *speaker*—that is, the drafters of a statute or of the Constitution—intends. But as we shall see, to frame the matter that way is to beg the hard questions about the role of the judiciary in shaping affirmative constitutional litigation. So I am for the most part not going to use the phrase "implied cause of action"; I shall speak of "direct constitutional causes of action" and "nonexpress statutory causes of action" instead.

were the same. In developing that point, I will examine the historical roots of direct constitutional actions and, with that history as backdrop, I will explore some inconsistencies in the modern approach to the judicial enforcement of constitutional rights. Ultimately, I conclude that the federal courts' recent hesitancy to hear certain kinds of cases when they arise directly under the Constitution cannot be reconciled with history, or with the judiciary's role of checking the other branches of the federal government and upholding the Constitution.

## I

### AFFIRMATIVE CONSTITUTIONAL LITIGATION: HISTORICAL FOUNDATIONS

#### A. *Brown, Bolling, and Direct Constitutional Actions at Mid-Century*

We now tend to think of affirmative constitutional litigation as beginning in the 1950s, 1960s, and 1970s. Those years did indeed see unprecedented numbers of lawsuits filed in federal court by individuals seeking to enforce their rights under the Constitution. In many of the earliest of these "mid-century cases," as I shall call them, litigants sought injunctive relief against state laws or actions asserted to be unconstitutional. The quintessential such case from the 1950s was, of course, *Brown v. Board of Education*, in which a group of black schoolchildren and their parents filed suit in federal district courts, arguing that segregation in the public schools violated their Fourteenth Amendment right to equal protection.<sup>13</sup> Other litigants sought injunctions against allegedly unconstitutional federal, rather than state, laws. For example, in *Bolling v. Sharpe*, decided in 1954, black schoolchildren and parents argued that segregation in the D.C. public schools violated their Fifth Amendment right to due process.<sup>14</sup> Still other litigants sought damages—not injunctive relief—to redress either state or federal violations of their constitutional rights. Perhaps most well-known among these cases is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>15</sup> the 1971 case in which Webster Bivens sought to recover money damages from the federal officers who searched and arrested him in his home in violation of the Fourth Amendment.

In each of these mid-century cases—*Brown*, *Bolling*, and *Bivens*—the Supreme Court found for the plaintiffs on the merits and ordered that they be granted the relief sought. The Court's opinions

---

<sup>13</sup> 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

<sup>14</sup> 347 U.S. 497 (1954).

<sup>15</sup> 403 U.S. 388 (1971).

in these cases shared some basic intuitions about the judicial role that I think typify the mood of the era. First, the opinions in the mid-century cases reflect a sense that the availability of *some* means of enforcement is implicit in the concept of a “right,” and, more broadly, perhaps implicit in the nature of a constitution. Second, they reveal a pragmatic acknowledgment that, in some situations, the only effective way to enforce the Constitution will be through affirmative litigation. Third, and perhaps most strikingly, the opinions in these mid-century cases either presume or state outright that the lack of a statute expressly creating a federal cause of action does not prevent the federal courts from hearing such claims or from granting legal or equitable relief as appropriate. As long as Congress had conferred jurisdiction on the federal courts, the Court proceeded on the assumption that the courts had authority to hear cases arising directly under the Constitution.

So, for example, in *Brown* the plaintiffs grounded their claim for relief directly in the Fourteenth Amendment.<sup>16</sup> The Court’s opinion did not mention whether the plaintiffs had properly stated a cause of action.<sup>17</sup> A lawyer today might assume that the *Brown* litigants filed their claims in federal court pursuant to what we now call § 1983, originally enacted as part of the Civil Rights Act of 1871.<sup>18</sup> But in the

---

<sup>16</sup> At least two of the plaintiffs’ complaints invoked 8 U.S.C. § 43, the predecessor to § 1983. See, e.g., Complaint at ¶ 1, *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952) (Civ. A. No. 1333); Amended Complaint at ¶ 1, *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (Civ. No. T-316). But the plaintiffs’ filings at the Supreme Court, once the cases had been consolidated, make no mention of § 43 as the basis for suit. See, e.g., Statement as to Jurisdiction at 3, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), 1951 WL 82600 (“The asserted right to injunctive relief is based upon the unconstitutionality of Chapter 72-1724 [of the General Statutes of Kansas], in that the Fourteenth Amendment to the United States Constitution strips the state of power to either authorize or require the maintenance of racially segregated public schools.”).

<sup>17</sup> See Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 19 (1985) (characterizing *Brown* as a § 1983 case—“[p]robably the most significant pre-*Monroe* case”—but noting that “[i]nterestingly, in the Court’s opinion there is no citation of either § 1983 or of the [related] jurisdictional statute”). The federal district courts reversed in *Brown* similarly bypassed any inquiry into whether the plaintiffs had a cause of action under the Fourteenth Amendment or a statute in ruling against the plaintiffs’ claims on the merits. *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952); *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951).

<sup>18</sup> 42 U.S.C. § 1983 (2000). Today, § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken

early 1950s, what is now § 1983 was a more or less dormant statute, limited by arcane case law concerning the meaning of the phrases “under color of [state law]” and “rights, privileges, or immunities secured by the Constitution,” two key phrases in the statute.<sup>19</sup> The *Brown* litigants did not cite the precursor to § 1983 in their briefs, nor did the *Brown* Court cite what is now § 1983 in its opinion.

In *Bolling*, the Court again presumed that it could entertain direct constitutional claims without a statutory predicate. *Bolling* did not elaborate on why the plaintiffs were entitled to bring suit or to obtain a remedy, but, unlike in *Brown*, § 1983, even if it had not been languishing in dormancy, likely would not have applied at that time to authorize a suit against officials acting under color of District of Columbia law.<sup>20</sup> Most likely, the Court tacitly accepted that there was a cause of action directly under the Fifth Amendment—or, put

---

in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

*Id.*

<sup>19</sup> At the beginning of the *Brown* litigation, § 1983’s predecessor, 8 U.S.C. § 43, read: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

8 U.S.C. § 43 (1946); see also 42 U.S.C. § 1983 (1952) (same text).

The statute had been relegated to near-uselessness not long after its passage by a series of Supreme Court cases, beginning with the *Slaughter-House Cases*, that cabined the meaning of the Fourteenth Amendment’s phrase “privileges or immunities of citizens of the United States” and adopted a similarly constricted interpretation of the concept of “state action.” See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–80 (1873); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883). It was not revived until 1961, when the Court reconsidered the meaning of “under color of law” in *Monroe v. Pape*, opening up the possibility of suing state actors for unconstitutional acts. 365 U.S. 167 (1961). This sequence explains why § 1983 was almost never used to sue state actors between 1871 and 1961. See Blackmun, *supra* note 17, at 8–11 (1985); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952).

<sup>20</sup> Whether an official acting “under color of” District of Columbia law could be liable under 8 U.S.C. § 43—the predecessor to the current § 1983—was an open question at the time of *Bolling*. The *Bolling* plaintiffs’ briefs did allege what they called “violations” of § 43 in conjunction with violations of the Fifth Amendment. See Brief for Petitioners on Reargument at 4, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 8), 1953 WL 48705. They also argued that the phrase “any State or Territory” in § 43 included the District of Columbia. *Id.* at 80–81. The Supreme Court did not decide this question in *Bolling*, but later, in *District of Columbia v. Carter*, it concluded that the District of Columbia was not a “State or Territory” for § 1983 purposes. 409 U.S. 418 (1973). It was not until 1979 that Congress revised what is now § 1983 to clarify that it applies to suits for actions taken “under color of [law] . . . of any State or Territory or the District of Columbia.” Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979) (emphasis added).

In any event, the *Bolling* Court never mentioned the Civil Rights Act. The Court’s very short opinion instead appears to have assumed that general federal question jurisdic-

another way, that the Fifth Amendment was self-executing and that the courts therefore had the authority to hear claims alleging violations of its terms and to determine the appropriate remedy.

In these mid-century cases, then, the Court evidently saw it as uncontroversial that the federal courts should be able to hear the plaintiffs' claims and grant the remedies sought without needing to locate a statutory source for the cause of action.<sup>21</sup> We tend now to think of mid-century cases like *Brown* and *Bolling* as marking a sea change in the Supreme Court's willingness to entertain the constitutional claims of individual petitioners. But, as I shall now suggest, the history of direct constitutional litigation in fact stretches back much further. The mid-century Court was in fact expanding upon a tradition with a long historical pedigree.

### B. Early Claims Under the Constitution

Throughout the 1800s and early 1900s, federal courts routinely recognized direct causes of action to enforce provisions of the Constitution.<sup>22</sup> These cases became quite common after 1875, when Congress conferred general federal question jurisdiction on the federal courts.<sup>23</sup> But even before the conferral of federal question jurisdiction, federal courts could exercise jurisdiction over cases involving constitutional issues in certain circumstances.<sup>24</sup>

Generally, courts in the early decades of the nation's history, as in the era of *Brown* and *Bolling*, seemingly viewed their power to interpret the Constitution at the behest of private litigants and to grant appropriate remedies if a constitutional violation was found as an unremarkable exercise of their inherent judicial functions. Although the courts certainly recognized other limits on their jurisdiction and their authority to provide affirmative relief, and although there was

---

tion under § 1331 was all the congressional authorization needed. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>21</sup> Later, in *Davis v. Passman*, the Supreme Court explained that the *Bolling* “[p]laintiffs were clearly the appropriate parties to bring such a suit . . . [for] equitable relief,” seemingly assuming that the *Bolling* plaintiffs indeed had a cause of action directly under the Constitution. 442 U.S. 228, 243 (1979).

<sup>22</sup> Of course, courts in those years did not always use the phrase “cause of action” to explain what they were doing. That term has floated around for a long time, but it did not always have the relatively fixed meaning that it does today. Sometimes courts used the term “jurisdiction” in place of what we would today call a “cause of action” when speaking of a particular plaintiff's entitlement to sue for relief, and sometimes courts bypassed the modern cause-of-action inquiry altogether.

<sup>23</sup> Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

<sup>24</sup> See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817–18 (1824) (holding that federal courts' jurisdiction over cases in which the Bank of the United States was a party had been conferred by statute).

substantial dispute, once federal question jurisdiction was created, about what it meant for a claim to “aris[e] under” federal law,<sup>25</sup> courts assured of their jurisdiction generally did not concern themselves with finding a specific congressional grant of authority to decide constitutional issues affirmatively presented to them. This lack of concern was particularly evident in cases in which, as in *Brown* and *Bolling* decades later, the plaintiffs sought only prospective relief—traditionally referred to as cases “in equity.” Such cases were far more common, but, as we shall see, a similar lack of concern with locating a congressional grant of authority was also evident in cases seeking damages relief—that is, cases “at law.”

### 1. *Direct Constitutional Cases in Equity*

The first notable case in equity in which the plaintiff sought relief directly under the Constitution was *Osborn v. Bank of the United States*,<sup>26</sup> decided in 1824. In *Osborn*, the Bank filed a suit in equity in federal court against the Auditor of the State of Ohio, Ralph Osborn, alleging that Osborn intended to collect an unconstitutional state tax from the Bank. The Supreme Court agreed with the Bank that the state tax offended Congress’s Article I power to constitute the Bank, and, more important for our purposes, it saw “no plausible reason” why it should not grant the injunction “to restrain the [state] agent” from violating the Constitution, even though no statute expressly granted the Bank the right to challenge an unconstitutional state tax in court.<sup>27</sup>

Once Congress conferred general federal question jurisdiction on the lower federal courts in 1875, and continuing throughout the early 1900s, federal courts entertained numerous suits by individuals and corporations<sup>28</sup> who sought to protect their property rights under the

---

<sup>25</sup> 28 U.S.C. § 1331 (2006).

<sup>26</sup> 22 U.S. (9 Wheat.) 738.

<sup>27</sup> *Id.* at 844. Ultimately, *Osborn* held the tax unconstitutional on the basis of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which rested on the Supremacy Clause. *Osborn*, 22 U.S. at 867–68.

<sup>28</sup> The decidedly corporate profile of the early litigants in equity is due in part to the fact that substantive constitutional law, as it had been interpreted by the courts up to that point, was protective largely of corporations’ economic interests. Also, equity was viewed primarily as a mechanism to protect property rights and was relatively inhospitable to claims of civil rights and voting rights. In addition, corporations generally preferred to litigate in federal courts, which they viewed as more favorable fora than state courts of equity, and without juries, which did not exist in federal equity practice. Finally, anticipatory injunctive suits against state officers became so widespread after *Ex Parte Young* that some suits which might have been brought for retrospective damages, i.e. *after* the government official had performed an allegedly unconstitutional action, may have been obviated. See Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope*

Due Process Clause of the Fourteenth Amendment, the Commerce Clause, or the Contracts Clause in Article I, Section 10. For example, a South Carolina resident who imported liquor from other states for his own use brought suit to enjoin various state and county officers from seizing his liquor under an allegedly unconstitutional state law;<sup>29</sup> a railroad company brought suit to restrain a state auditor from seizing property under an allegedly unconstitutional state law forbidding payment of taxes with coupons;<sup>30</sup> and a business calling itself the “American School for Magnetic Healing” brought suit to enjoin the Missouri Postmaster’s allegedly unconstitutional decision to withhold delivery of its mail.<sup>31</sup> In such cases, the federal courts applied the traditional rules of equity without difficulty: So long as the court had jurisdiction, the litigant demonstrated a risk of irreparable injury, and there was no adequate remedy available to him at law, the courts were able to fashion an appropriate equitable remedy.<sup>32</sup>

By far the best-known early example of a direct constitutional cause of action in equity is *Ex Parte Young*,<sup>33</sup> decided in 1908. We tend now to think of *Ex Parte Young* as a case about the limits of state sovereign immunity,<sup>34</sup> but it is equally remarkable as an explanation

---

of Section 1983, 77 GEO. L.J. 1493, 1530–32 (1989) (discussing reasons for the prevalence of corporate litigants in federal courts).

<sup>29</sup> *Scott v. Donald*, 165 U.S. 107, 108–09, 112 (1897).

<sup>30</sup> *Allen v. Balt. & Ohio R.R.*, 114 U.S. 311, 311–13 (1884).

<sup>31</sup> *Am. Sch. of Magnetic Healing v. MacAnnulty*, 187 U.S. 94, 96, 98–99, 102 (1902).

<sup>32</sup> *Am. Sch. of Magnetic Healing*, 187 U.S. at 108, 110; *Scott*, 165 U.S. at 114–15; *Allen*, 114 U.S. at 316–17; see *Bell v. Hood*, 327 U.S. 678, 684 & n.4 (1946) (citing nineteenth-century cases and stating that “it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do” (footnote and citations omitted)); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541 (1972) (noting a “settled practice of granting injunctive relief premised directly upon the Constitution”); see also *City of Mitchell v. Dakota Cent. Tel. Co.*, 246 U.S. 396 (1918); *Phila. Co. v. Stimson*, 223 U.S. 605 (1912); *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65 (1902); *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

Notably, the majority of cases in which the Supreme Court granted prospective relief to remedy a constitutional injury involved negative injunctions, ordering the defendant not to do, or to cease doing, a particular act. It was not until considerably later that the Court began regularly to approve affirmative prospective relief, requiring defendants to perform certain acts. See generally William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

<sup>33</sup> 209 U.S. 123 (1908).

<sup>34</sup> Because the primary focus of my remarks—direct constitutional causes of action against government officials in their private capacity—does not directly implicate Eleventh Amendment or sovereign immunity concerns, discussion of those complex subjects would be a distraction. I therefore do not address them.

of why the federal courts' doors must be open, in appropriate situations, to affirmative suits in equity to enjoin constitutional violations.

The facts of *Young* were as follows: In 1907, the Minnesota state legislature enacted a law limiting the passenger and freight rates railroads were allowed to charge. To discourage railroads from defensively challenging the law's constitutionality, the law prescribed stern criminal penalties, including very high fines and jail time, for violations of the rates limitations. Edward Young, the Attorney General of Minnesota at the time, indicated his intention to enforce the law vigorously.

Challenging the law defensively in criminal proceedings in state court was not feasible, given the draconian penalties. For that reason, and because they preferred the more hospitable federal forum, a group of railroad shareholders decided to challenge the law affirmatively in federal court. They sued Young, seeking an injunction against future enforcement of the rates legislation on the theory that it violated the Fourteenth Amendment's Due Process Clause and the Commerce Clause. When the federal court temporarily restrained Young from enforcing the law, Young disobeyed that order, was held in contempt, and was taken into federal custody. Once he was in custody—he was not in jail, but had to report to a marshal once a day<sup>35</sup>—Young sought habeas relief on an original writ to the Supreme Court. It was in this unusual posture that the constitutionality of the rates legislation was finally litigated.<sup>36</sup>

Obviously, if the court issuing the contempt order had lacked jurisdiction to do so, then Young would have had to be freed from the not-so-onerous “custody” he was in. So the Supreme Court turned to the question of jurisdiction. For our purposes, what is important is that the Court held that the federal court in which the shareholders originally filed suit did have jurisdiction to hear the case under § 1331 because the shareholders' claim for injunctive relief raised several “federal questions” arising directly under the Constitution.<sup>37</sup> The Court did not ultimately decide whether the rates legislation was confiscatory under the Fourteenth Amendment, but it did hold that “the provisions . . . 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, without regard to the question of the insufficiency of those rates.”<sup>38</sup> For this reason, the

---

<sup>35</sup> John Harrison, *Ex Parte Young*, 60 *STAN. L. REV.* 989, 993 (2008).

<sup>36</sup> *Id.* at 992–93.

<sup>37</sup> *Young*, 209 U.S. at 143–45.

<sup>38</sup> *Id.* at 148.

Court dismissed Young's habeas petition and upheld the lower court's injunction.<sup>39</sup>

Whether Young reported to the marshal for the rest of his days or instead gave up trying to enforce the unconstitutional statute I do not know. But *Ex Parte Young*'s legal legacy is still with us: It stands as an example of the importance of affirmative constitutional suits where requiring would-be litigants to wait and challenge an invalid law *after* its enforcement would be, in reality, to close the courthouse doors to any challenge at all. While *Ex Parte Young*'s facts are exceptional, the assumption that the federal court could entertain the case and grant relief was not. In *Young*, as in many cases before it, the courts were not concerned with whether Congress had created a statutory cause of action for the enforcement of the plaintiffs' constitutional rights. Instead, the Constitution itself, coupled with federal question jurisdiction, was enough to permit the federal courts to entertain the shareholders' suit and provide a remedy for the constitutional wrong.

To summarize, the federal courts had, from *Osborn* to *Young*, regularly entertained direct constitutional claims and granted injunctions when they found violations. By the time of *Brown* and *Bolling*, it was truly unremarkable for a court to grant injunctive relief for constitutional violations without seeking a legislatively created "cause of action."

## 2. *Direct Constitutional Cases at Law*

The federal "judicial Power" extends under Article III to suits "in Law and Equity," and the story I have just told about early exercises of federal "equity" jurisdiction has a lesser-known counterpart in "law." In fact, throughout the nineteenth and early twentieth centuries, federal courts entertained suits for damages and other legal remedies grounded directly on the Constitution, although these cases were considerably less plentiful than those in equity. There were a variety of reasons for this imbalance, but perhaps the most important was that, before law and equity were merged in 1938, the interaction of the well-pleaded complaint rule<sup>40</sup> and the differing pleading requirements for law and equity<sup>41</sup> made it relatively more difficult for

---

<sup>39</sup> *Id.* at 168.

<sup>40</sup> See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152–53 (1908) (explaining that for § 1331 jurisdiction to apply, it must be clear from the face of the plaintiff's complaint that the action involves a federal question; it is not enough for the federal question to arise as a response to an anticipated defense); see also Collins, *supra* note 28, at 1514 (noting that the well-pleaded complaint rule "was not fully in force prior to *Mottley*," although it had been applied as early as 1888).

<sup>41</sup> In cases at law, claims, defenses, and answers to defenses were traditionally broken out into a series of responsive filings, which were submitted consecutively to the court. See

a plaintiff at law who wished to raise a constitutional challenge to get into federal court if his constitutional challenge was styled not as an affirmative claim but as an anticipated response to the government officer's defense. Eventually, courts came to view the allegation that a government agent had acted unconstitutionally not just as a response to a government defense but also as the assertion of a claim arising under federal law, which could properly be stated in a plaintiff's complaint and thus support federal question jurisdiction.<sup>42</sup> But until that conceptual shift took hold, the pleading rules for suits at law meant that some litigants could not file suit in (and after 1894 could not remove to<sup>43</sup>) federal court despite having what we would now recognize as an affirmative constitutional claim.

I won't delve further into this question here, but I think it fair to say, as Professor Alfred Hill has suggested, that the relative infrequency of damages actions in the eighteenth and early nineteenth centuries can be attributed largely to contingent historical and procedural factors rather than to some inherent limitation on the power of federal courts to fashion legal, as opposed to equitable, remedies for constitutional violations.<sup>44</sup> When damages cases did reach the Supreme Court, the Court repeatedly affirmed federal courts' power to provide relief, without requiring any congressional authorization other than federal question jurisdiction.

---

Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1128 (1969). In equity, the pleading rules were different: The plaintiff's initial filing—called the “bill”—had to “tell the entire story” of why the defendant's action was unlawful and why an equitable remedy was needed. *Id.* at 1129. Thus, in some, but not all, circumstances, a plaintiff in equity would be able to state his constitutional issue on the face of his initial filing even though he could not have done so had the action been one at law. See Collins, *supra* note 28, at 1517. This difference in pleading conventions muffled to some extent the impact of the well-pleaded complaint rule on cases in equity before equity was merged with law.

<sup>42</sup> In the nineteenth and early twentieth centuries, if a government officer injured an individual, that injury was understood in terms of one of the familiar common law forms of action like trespass and thus was viewed primarily as a creation of state law, with federal issues arising as a response to a defense of immunity. See Collins, *supra* note 28, at 1510–11. The notion was that if an official acted unconstitutionally, he could not take advantage of the defense of official justification. *Id.* Over time, courts gradually came to view cases involving claims about the unconstitutionality of an official's action as grounded in *federal*, not just state, law. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523–24 (1954) (discussing the “almost imperceptible steps” by which courts came to think of the source of law of a plaintiff's suit against a federal officer as federal law, rather than state law). By the time of *Bivens*, the right to be free from unreasonable searches and seizures was seen not as derived from and limited by the scope of state trespass and battery law, but as having an independent source in the Constitution itself. See *Bivens*, 403 U.S. at 392; *id.* at 400 & n.3 (Harlan, J., concurring).

<sup>43</sup> See *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894) (precluding removal based on a federal defense or reply).

<sup>44</sup> See Hill, *supra* note 41, at 1130.

As with the cases in equity, most of the early damages cases involved property rights. For example, in 1885, in *White v. Greenhow*, the Supreme Court reversed a lower federal court's dismissal of a Virginia resident's suit for \$6,000 in damages against a state tax collector who seized his property pursuant to an allegedly unconstitutional state tax law.<sup>45</sup> Concluding that the plaintiff's claim "ar[ose] under the Constitution," the Court held that the suit was within federal question jurisdiction,<sup>46</sup> found in the plaintiff's favor on the merits, and remanded to the lower court to administer the remedy.<sup>47</sup> More recently, in *Jacobs v. United States*,<sup>48</sup> decided in 1933, the Supreme Court held that an individual who alleged that the federal government took his property for public use could sue for damages directly under the Fifth Amendment.<sup>49</sup> The Court's opinion made clear that "the right to recover just compensation . . . rest[s] upon the Fifth Amendment."<sup>50</sup>

Not all of the early direct constitutional damages cases involved property rights. Federal courts also granted damages remedies in other cases, including several concerning the right under Article I, Section 2 of the Constitution to vote in federal elections. Damages were the preferred remedy in the voting-rights context because injunctions—traditionally an extraordinary remedy to be used only when legal remedies were unavailable—were seen as an unduly intrusive means of assuring political rights.

In 1900, for example, in *Wiley v. Sinkler*, the Supreme Court considered the claim of a South Carolina resident who sought \$2,500 in

---

<sup>45</sup> 114 U.S. 307, 308 (1885).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; see also *Carter v. Greenhow*, 114 U.S. 317, 321–23 (1885) (holding that a plaintiff could not file suit in federal court under the precursor to § 1983 to recover damages for a state official's impairment of his rights under the Contracts Clause, but that § 1331 would allow suit so long as the amount-in-controversy requirement was met).

The courts also granted legal remedies other than damages for constitutional violations. For example, in *United States v. Lee*, 106 U.S. 196, 218 (1882), the Supreme Court held that the federal courts could entertain landowners' suit for ejectment, a common-law remedy, to recover possession of a parcel of land from the government, because the plaintiffs had stated a right "of that character which it is intended the courts shall enforce." See also *Patton v. Brady*, 184 U.S. 608, 610–12 (1902) (approving the exercise of jurisdiction over an individual's suit to recover, via suit for assumpsit, the amount of tax taken from him pursuant to an allegedly unconstitutional state statute).

<sup>48</sup> 290 U.S. 13 (1933).

<sup>49</sup> In *Jacobs*, the Court held that the Tucker Act provided jurisdiction over the United States by providing the sovereign's consent to be sued, but it did not provide the cause of action. Instead, "the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain . . . rested upon the Fifth Amendment. Statutory recognition was not necessary." *Jacobs*, 290 U.S. at 16.

<sup>50</sup> *Id.*

damages against the state election officials who refused to accept his vote in the federal election.<sup>51</sup> The Court found the plaintiff's pleadings insufficient because he never alleged that he was registered to vote, indicating that, had he so alleged, he would have stated a claim on which damages could issue under Article I, Section 2. The Court explained that "[t]he right to vote for members of the Congress . . . has its foundation in the Constitution of the United States."<sup>52</sup>

In short, throughout the late 1800s and early 1900s, the Court readily entertained claims for damages arising directly under the Constitution, even without any legislatively created cause of action. Yet the relative scarcity of such cases as compared with their counterparts in equity left several questions unanswered, including how the Supreme Court would approach damages actions brought directly under the Bill of Rights Amendments.

## II

### CONSTITUTIONAL DAMAGES CLAIMS IN THE MODERN ERA: *BELL*, *BIVENS*, AND BEYOND

The Supreme Court finally considered such a case in 1946, in *Bell v. Hood*.<sup>53</sup> *Bell* involved an affirmative claim for damages brought directly under the Fourth and Fifth Amendments. On one level, *Bell* did not decide much. But it set up the playing field for cases arising a quarter of a century later.

In *Bell v. Hood*, Arthur Bell brought a damages action in federal court against several FBI agents, alleging that they had violated his Fourth and Fifth Amendment rights by unlawfully arresting and imprisoning him. As with many of the earlier cases I have mentioned, there was no federal statute expressly giving Bell the right to sue; he relied instead directly on the Constitution. After holding that the district court did have "arising under" jurisdiction over Bell's case, the Supreme Court went on to distinguish between "jurisdiction" and "cause of action."<sup>54</sup> The Court ultimately left the question of whether

---

<sup>51</sup> 179 U.S. 58 (1900).

<sup>52</sup> *Id.* at 62; *see id.* at 6465 (noting that the source of jurisdiction for an action brought against state election officials was federal question jurisdiction); *see also* *Lane v. Wilson*, 307 U.S. 268 (1939) (allowing a damages remedy for a Fifteenth Amendment violation); *Giles v. Harris*, 189 U.S. 475, 485–86, 488 (1903) (holding that, even assuming that a state restriction on voter registration violated the Fifteenth Amendment, a federal court may not grant specific performance relief against state election officials to enforce a petitioner's political rights, but leaving open the possibility that action at law for damages could proceed on the same facts); *Swafford v. Templeton*, 185 U.S. 487, 492–93 (1902) (confirming that federal courts had jurisdiction over right-to-vote claims under Article I, § 2).

<sup>53</sup> 327 U.S. 678 (1946).

<sup>54</sup> On the meaning of the phrase "cause of action," *see* note 95, *infra*.

there was a cause of action for damages under the Fourth or Fifth Amendments for the district court to decide. But the Court did note that there was an “established practice” of granting injunctive relief directly under the Constitution and suggested no reason why damages should be different.<sup>55</sup>

### A. Bivens

The long-delayed answer to the question reserved in *Bell* finally came in 1971, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>56</sup> Bivens was unlawfully strip-searched, manacled, and arrested in his home by federal agents without a warrant. The Federal Bureau of Narcotics ultimately decided not to press charges against him, so the exclusion of any improperly seized evidence was not an available remedy. Nor could Bivens show that the violation was likely to occur again, so prospective injunctive relief was unavailable. For the injury Bivens sustained, it was “damages or nothing.”<sup>57</sup> In an opinion written by Justice Brennan, the Supreme Court held that Bivens could bring suit directly under the Fourth Amendment against the federal officers who arrested him, and that damages were an appropriate remedy.

For our purposes, I want to focus on the difference between Justice Brennan’s majority opinion and Justice Harlan’s concurrence. And, despite my great respect and fondness for my old boss, I want to suggest that Justice Harlan’s concurring opinion is the one that has had staying power and is essential for understanding why direct constitutional damages remedies—appropriately limited—remain both important to the vitality of our constitutional system and consistent with the nature of the federal judicial power.

Justice Brennan in *Bivens* read the Fourth Amendment, by its terms, to “guarantee[ ] to citizens of the United States the *absolute right* to be free from unreasonable searches and seizures carried out

---

<sup>55</sup> 327 U.S. at 684. On remand, the Southern District of California issued a muddled opinion in which it found no constitutional cause of action. Interestingly, the district court suggested that the result would have been different had the action been in equity rather than at law: “If, before defendants committed the alleged acts complained of, plaintiffs here had commenced a suit in equity alleging that defendants were threatening to make unreasonable searches and seizures and to imprison plaintiffs falsely, this court would clearly have had the power to issue an injunction restraining defendants from exceeding the limits of their authority as federal officers.” *Bell v. Hood*, 71 F. Supp. 813, 818–19 (S.D. Cal. 1947). It did not follow, however, that “there is a federal cause of action at law for damages after the threat has become a reality.” *Id.*

<sup>56</sup> 403 U.S. 388 (1971).

<sup>57</sup> 403 U.S. at 410 (Harlan, J., concurring); see also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 295 (1995) (discussing the factual background of *Bivens*).

by virtue of federal authority.”<sup>58</sup> Having identified a right, Brennan invoked *Marbury v. Madison*’s famous principle that any invasion of a right requires a remedy,<sup>59</sup> and concluded that while

the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages[,] . . . “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>60</sup>

A damages remedy, Justice Brennan concluded, was appropriate in *Bivens*’s case both because it is a remedy traditionally administered by the courts and because it was the only available remedy responsive to *Bivens*’s injury. Justice Brennan’s *Bivens* opinion rests upon an assumption that it is properly within the federal judiciary’s role to supply the remedies necessary to vindicate federal rights, even without express congressional authorization. Why wait on Congress, when the Constitution clearly supplies an individual right, when the remedy sought is well within the courts’ traditional competence to dispense, and when the courts’ traditional and constitutionally mandated function is to match remedy with right?

This reasoning was consistent with that of many of the cases described thus far. The trouble with Justice Brennan’s reasoning for modern-day readers is that some of the assumptions upon which it rested are no longer accepted in Supreme Court jurisprudence.

Recall the line from Justice Brennan’s opinion that I just quoted, stating that “it is . . . well settled that where . . . a *federal statute* provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>61</sup> The federal statute Brennan had in mind was not § 1331, granting subject matter jurisdiction. Rather, Justice Brennan was referring to a particular sentence in *Bell v. Hood*,<sup>62</sup> which in turn referred to two early twentieth-century cases that considered whether plaintiffs were entitled to monetary recoveries under various federal revenue laws that

---

<sup>58</sup> *Bivens*, 403 U.S. at 392 (emphasis added).

<sup>59</sup> *Id.* at 397; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[W]here there is a legal right, there is also a legal remedy . . .” (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23 (Oxford, Clarendon Press 1768)); see also *Bell*, 327 U.S. at 684 (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” (citing *Marbury*, 5 U.S. (1 Cranch) at 162, 163)).

<sup>60</sup> *Bivens*, 403 U.S. at 396 (alteration in original) (citation omitted) (quoting *Bell*, 327 U.S. at 684).

<sup>61</sup> *Id.* (first alteration in original) (emphasis added) (quoting *Bell*, 327 U.S. at 684).

<sup>62</sup> 327 U.S. 678 (1946).

did not expressly provide such a right.<sup>63</sup> Justice Brennan's point in invoking this particular line from *Bell* was that if courts can find implied causes of action for retrospective monetary relief in federal statutes, certainly they can do the same with regard to the Constitution.

But the world in which such an analogy had resonance was soon to pass. Brennan's majority opinion in *Bivens* relied on *J.I. Case Co. v. Borak*,<sup>64</sup> a 1964 case that envisioned a relatively active role for the courts to play in applying statutes, explaining that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."<sup>65</sup> Notably, *Borak* did not use the term "implied cause of action,"<sup>66</sup> and I think that term fails to capture what the Court thought it was doing. In *Borak*, it was not so much that Congress "implied" a cause of action in the Securities Exchange Act as that the Court found a cause of action "implicit," in the quite different sense of finding it inherent because necessary to make the statutory scheme work.<sup>67</sup> So the Court in *Borak* recognized a cause of action despite the absence of any guidance from Congress. This process, in Justice Brennan's view, typified the sort of effectuating role that courts should play with regard to enforcing the Constitution as well, one that did not involve any mind-reading of the members of Congress in an effort to determine what they had intended.

Only a few years after *Bivens*, though, the Supreme Court abandoned the *Borak* approach in favor of one that did focus squarely on congressional intent. *Cannon v. University of Chicago*<sup>68</sup> was the turning point—particularly Justice Powell's dissent, which came to be

---

<sup>63</sup> See *Bd. of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 349–53 (1939); *Dooley v. United States*, 182 U.S. 222, 224–25 (1901).

<sup>64</sup> *Bivens*, 403 U.S. at 397 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), which held that a stockholder harmed by an unlawful merger had a federal cause of action for rescission or damages under the Securities Exchange Act even though the Act did not so specify).

<sup>65</sup> *Borak*, 377 U.S. at 433.

<sup>66</sup> The earliest appellate court usage of the phrase "implied cause of action" of which I am aware was in *Petition of Kinsman Transit Co.*, 338 F.2d 708, 718 (2d Cir. 1964), which considered but declined to decide whether a federal regulation governing the operation of drawbridges on navigable waterways "creat[ed] by implication a cause of action" for a party whose ship was damaged by negligent operation. The Supreme Court did not use the term until *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 n.6 (1975), a case in which the Court "express[ed] . . . no opinion" on whether section 17(a) of the Securities Exchange Act "gives rise to an implied cause of action."

<sup>67</sup> See *supra* note 12.

<sup>68</sup> 441 U.S. 677 (1979).

quite influential in later years.<sup>69</sup> In 2001, *Cannon* in turn gave way to the still more stringent approach articulated in *Alexander v. Sandoval*,<sup>70</sup> whereby courts may infer the existence of a nonexpress cause of action in a federal statute only where they find affirmative evidence in the statute that Congress specifically intended private federal court enforcement.<sup>71</sup>

So, in retrospect, Justice Brennan's decision to rely on the implied statutory cause of action cases, rather than on the longer history of direct constitutional suits in equity and law that I described earlier,<sup>72</sup> left his majority opinion in *Bivens* vulnerable to limitation once the nonexpress statutory cause of action cases took the turns that they did.

It also seems apparent—again, in retrospect—that Justice Harlan was acutely aware of this vulnerability. Justice Harlan wrote a detailed concurrence in *Bivens*, shoring up the points at which, it appears, he feared the majority's foundations might give way. To support the majority's conclusion that federal courts have the power both to recognize causes of action directly under the Constitution and to provide damages remedies, Justice Harlan, after a quick nod to the recent history of nonexpress damages actions under federal statutes,<sup>73</sup> looked more generally to the Court's practice of recognizing causes of action directly under the Constitution.

Justice Harlan first noted, as had *Bell*, the long historical support for “the presumed availability of federal *equitable* relief against threatened invasions of constitutional interests.”<sup>74</sup> He then attempted to bridge the divide between suits in equity and suits at law by reasoning that, as the Constitution allowed Congress to give the federal courts the “Power” to decide cases “in Law and Equity,” and as Congress had in fact given the courts that power by enacting § 1331, it made little sense to suppose that the courts required additional congressional authorization to provide damages remedies but no additional authorization to provide equitable relief.<sup>75</sup> Justice Harlan

---

<sup>69</sup> *Cannon*, 441 U.S. at 730–49 (Powell, J., dissenting) (arguing against finding implied causes of action in federal statutes “absent the most compelling evidence that Congress in fact intended such an action to exist”).

<sup>70</sup> 532 U.S. 275 (2001) (holding that there is no implied cause of action to enforce regulations enacted pursuant to Title VI of the Civil Rights Act of 1964).

<sup>71</sup> *Id.* at 286–93 (looking only to the “text and structure of Title VI” to “determine whether it displays an intent to create not just a private right but also a private remedy”).

<sup>72</sup> See *supra* Part I.B.

<sup>73</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 402–03 (1971) (Harlan, J., concurring).

<sup>74</sup> *Id.* at 404 (emphasis added).

<sup>75</sup> *Id.* at 405.

further emphasized that damages awards are well within the courts' traditional remedial power and expertise in appropriate cases.<sup>76</sup>

Finally, and perhaps most importantly, Justice Harlan's concurrence hinted at a reason why courts in fact may have *more* latitude to recognize causes of action under the Constitution than under statutes. He wrote that "the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . . [T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . ." <sup>77</sup>

Justice Harlan's reasoning in *Bivens* provided the approach that Justice Brennan later adopted in his 1979 majority opinion in *Davis v. Passman*, a case allowing the former employee of a U.S. Congressman to seek money damages for sex discrimination directly under the Fifth Amendment.<sup>78</sup> Justice Brennan wrote in *Davis* that, because of the greater textual simplicity of the Constitution and the judiciary's special responsibility to enforce the Constitution's provisions against legislative encroachments, an intent-focused method of identifying implied causes of action in federal statutes is inappropriate in the constitutional context.<sup>79</sup> Instead, in the absence of an "explicit congressional declaration" that a *Bivens*-type suit should *not* be available and that some other remedial scheme should replace it, courts presumptively have the authority to recognize direct causes of action under the Constitution and to develop appropriate remedies.<sup>80</sup>

### B. Post-Bivens: The Judiciary Retreats

Despite Justices Harlan's and Brennan's efforts, *Bivens* today appears to be hanging by a thread. The Supreme Court has, in its own words, "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts"<sup>81</sup> and has therefore allowed *Bivens*-type constitutional damages actions only three times since 1971.<sup>82</sup> Identifying various "special factors" counseling judicial restraint, the Court has declared itself powerless to recognize direct constitutional causes

<sup>76</sup> *Id.* at 399 (explaining that damages are a "traditional judicial remedy"); *see also id.* at 395–96 (majority opinion) (discussing damages as an "ordinary remedy").

<sup>77</sup> *Id.* at 407 (Harlan, J., concurring).

<sup>78</sup> 442 U.S. 228 (1979).

<sup>79</sup> *Id.* at 241–42.

<sup>80</sup> *Id.* at 242, 246–47 (emphasis omitted) (quoting *Bivens*, 403 U.S. at 397).

<sup>81</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

<sup>82</sup> *See Hartman v. Moore*, 547 U.S. 250 (2006) (allowing a manufacturer to sue a federal prosecutor and postal inspectors for prosecuting him in retaliation for his lobbying efforts, in violation of the First Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (allowing suits by prisoners against federal prison officials for the denial of medical care in violation of the Eighth Amendment); *Davis*, 442 U.S. 228.

of action even where Congress has not explicitly set an alternative remedial scheme as the exclusive remedy, and even where the alternative scheme Congress has provided does not meaningfully compensate the individual bringing suit.<sup>83</sup>

A striking example is *Schweiker v. Chilicky*, in which the Court refused to permit individual recipients of disability benefits to bring a *Bivens*-style suit against Social Security Administration officials for violating their due process rights under the Fifth Amendment.<sup>84</sup> The plaintiffs alleged that the officials intentionally had subjected them to an impermissible review system which resulted in their benefits being wrongfully terminated. The Court recognized that the Social Security Act's remedial scheme provided no means of redressing the particular harms alleged and that the Act gave no affirmative indication that Congress had meant that scheme to foreclose a *Bivens*-style suit.<sup>85</sup> But the Court held that Congress's very failure to account for the redress of these injuries in its administrative remedial scheme appeared "not [to have] been inadvertent," and thus was a "special factor" that counseled against allowing a *Bivens*-type suit.<sup>86</sup>

In *Schweiker* and the other cases limiting *Bivens*, it is evident that the Court's increasing emphasis on Congress's intent in the realm of nonexpress *statutory* causes of action, from *Borak* to *Cannon* to *Sandoval*, has encroached—inappropriately so, in my view—upon the Court's understanding of direct *constitutional* causes of action. Thus, *Bivens* has come to be seen by some as an anomaly—in Justice Scalia's words, "a relic of the heady days in which this Court assumed common-law powers to create causes of action."<sup>87</sup> Justice Scalia wrote these words in 2001 in his concurrence in *Correctional Services Corp. v. Malesko*, in which the Court held that a federal prisoner in a privately-operated facility could not bring a *Bivens*-type damages action against the facility operators for their neglect of his known medical needs.<sup>88</sup> Both the *Malesko* majority opinion by Justice Rehnquist and the concurrence by Justice Scalia cited *Alexander v. Sandoval* for the

---

<sup>83</sup> See, e.g., *Schweiker*, 487 U.S. 412 (1988) (refusing to permit damages action under the Fifth Amendment's Due Process Clause by recipients of disability benefits against Social Security Administration officials); *United States v. Stanley*, 483 U.S. 669 (1987) (refusing to permit damages action by members of the armed forces against superiors for non-consensual medical experimentation); *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to permit damages action by a federal civil servant under the First Amendment); *Chappell v. Wallace*, 462 U.S. 296 (1983) (refusing to permit damages action by members of the armed forces against their superiors for racial discrimination).

<sup>84</sup> *Schweiker*, 487 U.S. 412.

<sup>85</sup> *Id.* at 425–26.

<sup>86</sup> *Id.* at 423.

<sup>87</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>88</sup> *Malesko*, 534 U.S. 61.

proposition that the Court was no longer willing liberally to recognize causes of action not expressly sanctioned by Congress, and both opinions indicated that this reluctance should apply equally in the statutory and constitutional contexts.<sup>89</sup> Justice Scalia's concurrence in *Malesko* went further, asserting that "[t]here is *even greater* reason to abandon [the practice of recognizing direct causes of action] in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."<sup>90</sup>

My essential point is that, contrary to the position taken in these *Malesko* opinions, the two matters—nonexpress statutory causes of action and direct, affirmative constitutional enforcement by the courts—are entirely distinct, and are not profitably analyzed as though they were the same. Where Congress enacts legislation under one of its constitutionally conferred powers, it makes sense to look to the legislative intent with regard to how that enactment is to be enforced. Often, agreement as to how a statute is to be enforced comes about through the legislative give-and-take essential to the functioning of Congress. In the enactment of many statutes, agreement upon how the statute is to be enforced—whether through an administrative agency or in a court, before a jury or a judge, through prospective relief or retrospective monetary relief, through complaints to a government agency empowered to bring suit or through direct, private action—is hard to attain.<sup>91</sup> To divorce the agreed-upon remedies from the substantive enactment—especially now that the Court has told Congress, in *Cannon* and thereafter, that Congress can no longer assume it is legislating against a background norm favoring judicial inference of statute-based causes of action—is to disregard this feature of the legislative process, and so, often, to intrude upon the legislative role.

C. *Constitutional Text, Separation of Powers Values, and the Role of Federal Courts in Constitutional Adjudication*

These separation of powers considerations are not easily carried over into the constitutional realm, where other considerations come into play. As between the legislative and judicial branches, why

---

<sup>89</sup> *Id.* at 67 n.3 (majority opinion); *id.* at 75 (Scalia, J., concurring).

<sup>90</sup> *Id.* at 75 (emphasis added).

<sup>91</sup> Although the diversity of interests and concerns in Congress may lead to a carefully balanced agreement as to what specific remedies should be available for a statutory violation, that diversity can lead just as easily to intentionally vague statutory language, leaving courts to work out the details. *See, e.g.,* *Rosado v. Wyman*, 397 U.S. 397, 412 (1970) (Harlan, J., concurring) ("Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.").

should it be the *legislative* branch to which all decisions concerning the judicial enforcement of *constitutional* norms are entrusted?

This distribution of authority is not required by the text of the Constitution. All Article III says on the matter is that Congress has the power to constitute the lower federal courts, and, by implication, the power to confer or withhold the lower courts' subject-matter jurisdiction within the outer limits set by Article III. Within those limits, it is largely up to the courts to work out, as they go, the proper division of powers between the judiciary and the legislature.

Over time, courts have fashioned limitations on their own power, often articulating those limitations by reference to functions that are "essentially" judicial and functions that are "essentially" legislative. The justices deciding *Bivens* differed sharply with regard to this distinction. Justices Brennan and Harlan described the federal courts, when entertaining affirmative constitutional suits, as exercising their constitutionally assigned power to interpret and enforce the Constitution and as providing traditional remedies where appropriate and necessary to its enforcement. The *Bivens* dissenters, in contrast, decried the majority's holding as "judicial legislation."<sup>92</sup> In other words, the dissenters viewed the recognition of causes of action, including constitutional causes of action, as a job primarily entrusted to Congress, a position that has now become in some respects—though not entirely, as we shall see—the prevailing view in the Supreme Court. Why should that be so?

Part of the answer is that we have become mesmerized by language, particularly with respect to the phrase "cause of action," a phrase that does not appear in Article III, or in the Judiciary Act of 1875, or in the Federal Rules of Civil Procedure of 1938. The term came into regular use in the era of code pleading, when it described what facts a litigant had to show in his "declaration," or his initial filing, in a suit at common law to invoke the court's jurisdiction.<sup>93</sup> This requirement grew increasingly formalistic and burdensome over time. As a result, when the Federal Rules of Civil Procedure merged law and equity and did away with the code-pleading system in 1938, the term "cause of action" was consciously omitted. Instead, the Rules required that an injured party's complaint contain "a short and plain statement of the claim."<sup>94</sup> Courts continued to use the term after 1938, fairly loosely, "to refer roughly to the alleged invasion of

---

<sup>92</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting); *see also id.* at 428 (Black, J., dissenting); *id.* at 412, 422 (Burger, C.J., dissenting).

<sup>93</sup> *See* JOHN NORTON POMEROY, *CODE REMEDIES* §§ 347–49, at 460–66 (4th ed. 1904).

<sup>94</sup> FED. R. CIV. P. 8(a)(2).

‘recognized legal rights’ upon which a litigant bases his claim for relief.”<sup>95</sup>

In the last few decades, however, the Supreme Court has come to treat the “cause of action” concept with greater rigidity, as a threshold requirement for suit. And, increasingly, the Court has insisted that implicit in the concept is legislative—as opposed to judicial—instigation. This insistence on legislative primacy sometimes draws on a mistaken, but persistent, reading of the 1938 decision in *Erie Railroad v. Tompkins*, which famously held that “[t]here is no federal general common law.”<sup>96</sup> In fact, *Erie* did not constrain federal courts’ power to act as common law courts when adjudicating questions of federal law. Rather, its purpose was to abolish “federal [general] common law” in order “to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits.”<sup>97</sup>

Nevertheless, *Erie*’s language has repeatedly been marshaled in support of the entirely different proposition that federal courts now lack the power to recognize causes of action, whether statutory or constitutional, except as Congress directs. For example, one year after *Bivens*, in *Carlson v. Greene*, a majority of the Supreme Court extended *Bivens*’s rationale to allow suits by prisoners against federal prison officials for the denial of medical care directly under the Eighth Amendment.<sup>98</sup> Justice Rehnquist dissented, citing *Erie* for the proposition that “the authority of federal courts to fashion remedies based on the ‘common law’ of damages for constitutional violations . . . falls within the legislative domain, and does not exist where not conferred by Congress.”<sup>99</sup> This invocation of *Erie* was echoed again in Justice Scalia’s concurrence in *Malesko*, which characterized *Bivens*, as I mentioned, as “a relic of the heady days in which this Court assumed common-law powers to create causes of action.”<sup>100</sup>

In my view, this analysis is premised on a misreading of *Erie*. *Erie* prohibited federal courts from generating substantive rules of decision while sitting in diversity jurisdiction in cases arising under

---

<sup>95</sup> See, e.g., *Davis v. Passman*, 442 U.S. 228, 237–38 (1979) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949)); see *Larson*, 337 U.S. at 693 (“It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is ‘illegal’ . . . . If he does not, he has not stated a cause of action.”).

<sup>96</sup> 304 U.S. 64, 78 (1938).

<sup>97</sup> *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

<sup>98</sup> 446 U.S. 14 (1980).

<sup>99</sup> *Id.* at 38 (Rehnquist, J., dissenting).

<sup>100</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

state law.<sup>101</sup> But there is nothing in *Erie* that forbids courts, when addressing a question of federal law over which they have federal question jurisdiction, to employ the usual common law methodology to determine whether, given a certain substantive principle, a remedy is appropriate at the behest of a certain class of plaintiffs and, if so, to tailor the remedy to the facts before them. A federal court enforcing legal principles established by the federal Constitution or by federal statute is not generating general common law in the forbidden *Erie* sense.<sup>102</sup> Rather, it is interpreting and giving effect to federal law. Its doing so does not raise the worry that litigants with similar claims in state courts may receive substantively different outcomes than those in federal court, the “mischievous results” that prompted *Erie* in the first place.<sup>103</sup>

So, if we are to explain the recent trend in the *Bivens* line of cases of disfavoring judicial recognition of direct constitutional causes of action, we have to look elsewhere than *Erie*. The obvious candidates are separation of powers concerns and concerns about the constitutionally limited nature of federal court jurisdiction.

There is, indeed, a recent line of cases that relies squarely on separation of powers concerns to identify the limits of the federal courts’ power in this realm. *Northwest Airlines v. Transport Workers Union*,<sup>104</sup> decided in 1981, is one such case. There, an airline that had previously been found to have discriminated against female flight attendants in terms of wages and that had been held liable for back pay filed suit seeking contribution from the union that had negotiated the collective bargaining agreement covering the flight attendants’ wages. The Supreme Court declined to recognize a nonexpress cause of action for contribution under either the Equal Pay Act or Title VII. The majority opinion, written by Justice Stevens, emphasized “that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore federal common law is subject to the paramount authority of Congress.”<sup>105</sup> As this quotation indi-

---

<sup>101</sup> See *Erie*, 304 U.S. at 78 (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

<sup>102</sup> In other words, the concepts of “federal common law” and of “federal general common law” differ, and *Erie* abolished only the latter. See, e.g., Martha A. Field, *Sources of Law: The Federal Common Law*, 99 HARV. L. REV. 881, 908 (1986); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521–25 (1984). In fact, the Court decided a case based on federal common law while it was considering *Erie*. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 388 n.24 (1964).

<sup>103</sup> *Erie*, 304 U.S. at 74.

<sup>104</sup> 451 U.S. 77 (1981).

<sup>105</sup> *Id.* at 95 (internal quotations omitted).

cates, *Northwest Airlines*'s rejection of the common law tradition as a basis for judicial recognition of nonexpress causes of action was not premised on a misreading of *Erie*, but rather was grounded squarely in separation of powers concerns. The opinion explained that where a standard of liability "is entirely a creature of federal statute"<sup>106</sup> (in that case, the Equal Pay Act), the judicial creation of remedies that Congress did not provide may be a usurpation of the legislative function.<sup>107</sup>

But as I have indicated, separation of powers concerns necessarily look quite different in the context of constitutional enforcement than they do where the question is judicial recognition of a private action premised on a statute. The Constitution created and limits Congress, not the other way around. Where Congress did not create, but instead is bound by, the substantive rule that a plaintiff is attempting affirmatively to enforce in court, judicial deference to preserve a primary role for legislative control over the substantive standard and the means of enforcement makes little sense.<sup>108</sup> As between the legislative and judicial branches, there is no apparent separation of powers reason for entrusting all decisions concerning the judicial role in enforcing constitutional norms to the legislative branch.

Nor does the constitutionally limited nature of federal jurisdiction fully explain the recent trend of relegating entirely to Congress

---

<sup>106</sup> *Northwest Airlines*, 451 U.S. at 97.

<sup>107</sup> Parallel to its trend of restricting federal courts' ability to provide damages remedies, the Supreme Court has also made some less dramatic, though still significant, restrictions on the federal courts' powers in equity. In a 1999 case, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the Court imposed a potentially far-reaching limitation on the federal courts' remedial powers in equity: *Grupo Mexicano* held that federal courts lack the power to provide the relief the plaintiffs sought—a preliminary injunction freezing the assets of the defendant, an unsecured creditor, while they pursued a damages action for breach of contract—because such freeze orders were not among the remedies that courts in equity granted in 1789. *Id.* at 332–33. *Grupo Mexicano*'s impact is still unclear, but its reasoning could well limit the relief available in federal court for constitutional claims. See Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 252–53 (2003). Similarly, in 2002, the Court held in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), that ERISA's express authorization of "appropriate equitable relief" did not permit courts to grant an injunction for specific performance of a contract to pay damages, because such a remedy was not "typically available" in equity. *Id.* at 209–11 (internal quotation marks and citation omitted). See generally John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

<sup>108</sup> See Dellinger, *supra* note 32, at 1557 ("[T]here can be no legal right against the authority that makes the law upon which the right depends.' But in a constitutional case, the right involved does not 'depend' upon the government, but rather arises from the basic law which created and seeks to control that government." (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907))).

the shaping of the judicial role in enforcing constitutional standards. The Constitution gives Congress the power to constitute the inferior federal courts and to confer on them subject matter jurisdiction within the limits allowed by Article III. It does not follow from these powers, however, that in the areas where Congress *has* conferred subject matter jurisdiction, the courts may not identify proper litigants and fashion appropriate remedies without further, more specific congressional direction.

In fact, the Framers understood that the Constitution generally, and the Bill of Rights in particular, would be binding upon the federal legislative branch, and they understood that what Article III called the “judicial Power” would enable the courts to enforce the Constitution’s provisions. Arguing in support of amending the Constitution to include the Bill of Rights in 1789, James Madison explained:

If [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>109</sup>

If the federal courts, once constituted by Congress, are to act as the “impenetrable bulwarks” against encroachment by the other two branches of the federal government, they cannot be entirely bound by the actions—let alone the inaction—of those two branches concerning the mode of enforcing those principles.

Justice Powell understood this critical point when he wrote his vehement dissent in *Cannon*. Justice Powell criticized the majority as going too far in recognizing statutory causes of action Congress had not created, but he emphasized that his criticism did not extend to constitutionally protected rights. In that context, he argued, “this Court’s traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action.”<sup>110</sup>

As Justice Powell’s words suggest, the language of the Constitution itself—or the specific intent of its Framers with regard to the means of its enforcement—cannot limit judicial recognition of direct constitutional causes of action in the same manner as does the

---

<sup>109</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834); Letter from James Madison to Edmund Randolph (May 31, 1789), *in* 5 THE WRITINGS OF JAMES MADISON, 1787–1790, at 385 (Gaillard Hunt ed., 1904).

<sup>110</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 733 n.3 (Powell, J., dissenting).

intent of Congress in the statutory context under today's post-*Cannon* case law. The Constitution is for the most part silent as to remedies, but not because the Framers meant for Congress to supply them. As Richard Fallon and Daniel Meltzer have suggested, “[t]o the framers, special provision for constitutional remedies probably appeared unnecessary, because the Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional g[uarantees] would be implemented.”<sup>111</sup> In other words, when they used the term “the judicial Power” in Article III, the Framers understood this phrase in the context of the power that English courts had traditionally exercised at law and in equity, including the power to exercise conferred jurisdiction to shape the contours of appropriate litigation and to fashion remedies as appropriate to new factual situations. Of course, the Constitution limits the federal courts’ “judicial Power” to “Cases” and “Controversies,” which means that plaintiffs must demonstrate that their claim is ripe and that they have standing to sue.<sup>112</sup> The Constitution also limits the federal courts’ judicial power to cases involving certain subject matters, giving Congress the authority to confer jurisdiction—or not—within those designated subjects. But beyond these constitutional limitations, the tasks of identifying appropriate litigants and forms of action, and applying remedies to injuries, were seen as routine judicial tasks, inseparable from the Framers’ concept of the judicial role generally.<sup>113</sup>

It was this fundamental understanding that underlaid *Ex Parte Young* and its predecessors, as well as what I have called the “mid-century cases,” such as *Brown* and *Bolling*, in which the Court was entirely comfortable providing prospective relief for constitutional violations so long as there was, first, federal jurisdiction, and, second, a “Case” or “Controversy,” as Article III requires. And, despite the

---

<sup>111</sup> Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991). See also Dellinger, *supra* note 32, at 1542 (arguing that, given the courts’ routine creation of damages remedies at common law, “it is not unreasonable to presume that the judicial power would encompass such an undertaking on the part of the federal courts, unless there were some contrary indication that the judicial implementation of such a remedy was not to be a part of the [A]rticle III judicial power” (citation omitted)); Resnik, *supra* note 106, at 238–39 (noting that “courts—unlike some other institutions created by the Constitution—were familiar to the Framers through [their] experiences with English, colonial, and fledgling state courts,” and that the text of Article III did not “generate a novel iteration of courts with practices and remedial authority radically divergent from [those] other jurisdictions’ courts”).

<sup>112</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (spelling out modern constitutional standing doctrine).

<sup>113</sup> See Resnik, *supra* note 106, at 240 (“The constitutional charter for ‘courts’ with jurisdiction ‘in law and equity’ can thus be read to authorize institutions that . . . have the capacity to respond to changing demands, so long as federal courts work within the boundaries of their subject matter authority.”).

Court's recent reluctance to recognize constitutional causes of action for damages in *Bivens*-type cases, it is this fundamental understanding, I suspect, that informs the many other cases to which I now turn—cases in which the Court has granted prospective relief for constitutional violations when the two requisites that do appear in the Constitution are met.

*D. The Supreme Court's Continued Recognition of Three Categories of Direct Constitutional Claims*

What is really intriguing here is that, in fact, the Supreme Court and the lower federal courts do still provide quite regularly for the enforcement of provisions of the Constitution without express congressional authorization. Even as *Bivens* is attacked as an anomaly and a departure from courts' supposedly normal passivity in the face of congressional inaction, the Supreme Court and the lower federal courts have continued their long history of entertaining affirmative suits directly under the Constitution in several categories of cases—three in particular—that have not attracted the same sort of backlash that *Bivens* and its progeny have.

*1. Supremacy Clause Preemption Cases*

First, direct constitutional causes of action are alive and well in Supremacy Clause cases against state actors. In the name of giving effect to the Supremacy Clause, federal courts routinely entertain suits brought by private actors—frequently corporations—arguing that a state law is invalid because it is preempted by federal law.<sup>114</sup> Federal courts regularly entertain these cases even when § 1983 is not available as a basis for suit.

---

<sup>114</sup> See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (exercising jurisdiction over a business association's claim that Illinois's licensing requirements for hazardous waste handlers were preempted by the federal Occupational Safety and Health Act); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (exercising jurisdiction over a utility's claim that California's disposal requirements for nuclear power plants were preempted by the federal Atomic Energy Act); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) (exercising jurisdiction over a claim that a Washington state law regulating the design, size, and movement of oil tankers in Puget Sound was preempted by the federal Ports and Waterways Safety Act); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (exercising jurisdiction over Florida avocado growers' claim that a California statute gauging avocado maturity was preempted by applicable federal regulations); see also RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM* 903 (5th ed. 2003) (describing "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision" as "well-established").

Consider, for example, *Shaw v. Delta Air Lines*,<sup>115</sup> decided in 1983. In *Shaw*, a number of airline companies sued New York state agencies and officials, arguing that the state laws they intended to enforce—the Human Rights Law and Disability Benefits Law—were preempted by ERISA, the federal statute regulating pensions. The Supreme Court determined that federal courts had authority over the airline companies’ claim:

A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.<sup>116</sup>

In other words, the Court held that federal jurisdiction existed precisely because the Supremacy Clause was involved.

*Shaw* did not discuss whether the airlines’ cause of action originated in the Supremacy Clause—in fact, the opinion did not separately discuss the existence of a “cause of action” at all—but it certainly proceeded as if one existed, and it ultimately did grant the plaintiffs relief as to one of their claims. It seems that, like some of the direct constitutional cause-of-action cases from the late 1800s and early 1900s that I discussed at the outset,<sup>117</sup> *Shaw* was using the term “jurisdiction” as a loose proxy for “cause of action,” and, based on the Supremacy Clause, it assumed a cause of action to exist.

In 2002, the Supreme Court addressed the cause-of-action question more squarely in *Verizon Maryland Inc. v. Public Service Commission of Maryland*,<sup>118</sup> in which a telephone company sued to enjoin a state agency from enforcing an order that allegedly was preempted by the federal Telecommunications Act. The Telecommunications Act did not clearly provide Verizon with a private cause of action.<sup>119</sup> Rather, the asserted source of federal jurisdic-

---

<sup>115</sup> 463 U.S. 85 (1983).

<sup>116</sup> *Id.* at 96 n.14.

<sup>117</sup> See *supra* Part I.B.

<sup>118</sup> 535 U.S. 635 (2002).

<sup>119</sup> *Id.* at 642. Nor did Verizon rely on § 1983 for a cause of action. Invoking § 1983 as the basis for suit would have entailed some complexities peculiar to § 1983 litigation, including the requirement that a § 1983 plaintiff must assert a “violation of a federal *right*, not merely a violation of federal *law*.” *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). The question then would have become whether the Telecommunications Act or the Supremacy Clause can be said to create such a right. See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 411 (2004).

Notably, the “rights-creating language” requirement that now applies in the § 1983 context has never been applied to direct constitutional causes of action nor could it be without unsettling decades of Supreme Court and lower federal court law. See, e.g., *Indep.*

tion was § 1331, and the asserted cause of action, it appears, arose directly from the Supremacy Clause. Justice Scalia, writing for the Court, endorsed Verizon's assertion:

We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit. Verizon seeks relief from the Commission's order "on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail," and its claim "thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."<sup>120</sup>

The Court then remanded the case so that Verizon's claims could be resolved on the merits. So *Verizon* necessarily recognized a direct constitutional cause of action allowing plaintiffs to seek prospective relief offensively for violations of the Supremacy Clause.<sup>121</sup> Many lower court cases have followed suit, on the understanding that such a cause of action exists.<sup>122</sup>

---

Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1050, 1058–59 (9th Cir. 2008) (exercising jurisdiction over a suit brought by health care providers and Medicaid beneficiaries, who alleged that state medical cuts were preempted by federal Social Security Act); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004) (exercising jurisdiction over plaintiff's claim that a local ordinance was preempted by the federal Telecommunications Act, even though the federal act did not create a private cause of action); Local Union No. 12004, United Steelworkers of America v. Massachusetts, 377 F.3d 64, 75 (1st Cir. 2004) (holding that "in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action"); Ill. Ass'n of Mortgage Brokers v. Office of Banks & Real Estate, 308 F.3d 762, 764–65 (7th Cir. 2002) (exercising jurisdiction over a mortgage lenders' association's claim that state regulations were preempted by the federal Home Ownership and Equity Protection Act); St. Thomas–St. John Hotel & Tourism Ass'n v. Government of the U.S. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000) (holding that "a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption"); Village of Westfield v. Welch's, 170 F.3d 116, 124 n.4 (2d Cir. 1999) (noting that the existence of a cause of action under the Supremacy Clause "do[es] not depend on the existence of a private right of action under the [preempting statute]"); Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor, 107 F.3d 1000, 1005–07 (2d Cir. 1997) (holding that a plaintiff could bring an ERISA preemption claim under the Supremacy Clause, even though it was "beyond dispute" that the plaintiff fell outside ERISA's express enforcement provisions); First Nat'l Bank of E. Ark. v. Taylor, 907 F.2d 775, 776 n.3 (8th Cir. 1990) (noting Supreme Court has made clear party may bring federal suit based on preemption and exercising jurisdiction over a bank's claim that a state insurance department's action was preempted by the federal National Bank Act).

<sup>120</sup> *Verizon*, 535 U.S. at 642 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)).

<sup>121</sup> See also Sloss, *supra* note 119, at 392 ("As is typical in *Shaw* preemption cases, the courts simply assumed the availability of a private cause of action, without questioning the source of that right of action.").

<sup>122</sup> See sources cited *supra* note 114; see also *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985) (describing *Shaw* as "reaffirming the general

## 2. *Dormant Commerce Clause Cases*

A second category of cases in which the federal courts routinely recognize direct constitutional causes of action encompasses suits to enjoin allegedly unconstitutional laws brought by individuals or corporations against state officers under the so-called dormant Commerce Clause.

These claims traditionally were brought as direct constitutional causes of action based on the Commerce Clause itself. What is interesting is that, throughout the twentieth century, courts continued to entertain these cases without questioning the underlying source of the cause of action. It was not until *Dennis v. Higgins* in 1991 that the Court decided such suits could be brought under § 1983.<sup>123</sup> Until then, they came to the courts as direct constitutional claims.

Many of the best known modern Commerce Clause cases came before the Supreme Court directly under the Constitution, including *Hunt v. Washington State Apple Advertising Commission*<sup>124</sup> in 1977. *Hunt* was not premised on a statutory cause of action. Yet the Court did not pause to seek rights-creating language or any other indication that Congress intended for particular litigants to be able to enforce the Commerce Clause in federal court. The Court later explained, in *South-Central Timber Development, Inc. v. Wunnicke*, that the Commerce Clause “has long been recognized as a *self-executing* limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”<sup>125</sup> Similarly, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, the Court held that once a state tax was determined to violate the Commerce Clause, the state owed retrospective relief to those taxpayers who were required to pay taxes before challenging the statute to “cure any unconstitutional dis-

---

rule” that a plaintiff claiming that a state law is preempted under the Supremacy Clause has stated a federal claim for injunctive relief).

<sup>123</sup> 498 U.S. 439, 451 (1991). Importantly, it appears evident that the plaintiff’s argument in *Dennis* that § 1983 was an available basis for suit was not motivated by any doubt that he could have brought suit directly under the Commerce Clause. Rather, the pivotal issue in *Dennis* was the availability of attorney’s fees. If the suit could proceed under § 1983, then fees would be available under 42 U.S.C. § 1988. *Id.* at 464 (Kennedy, J., dissenting) (arguing that “the significance of the Court’s decision, in this and future Commerce Clause litigation, is that a § 1983 claim may permit dormant Commerce Clause plaintiffs to recover attorney’s fees and expenses . . .”).

<sup>124</sup> 432 U.S. 333, 352–53 (1977). Other examples of such cases are *Granholm v. Heald*, 544 U.S. 460, 476 (2005); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 678–79 (1981); and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447 (1978).

<sup>125</sup> 467 U.S. 82, 87 (1984) (emphasis added).

crimination against interstate commerce during the contested tax period.”<sup>126</sup>

### 3. *Suits Against Federal Officers To Enjoin Allegedly Unconstitutional Federal Laws*

Third is the category of suits for prospective relief against federal officers, typically seeking to enjoin federal laws as violative of some structural provision or principle of the Constitution. For these suits, § 1983 is of course not available, as no action taken under color of state law is involved. Nevertheless, courts routinely hear these cases. Examples include the recent challenge to the federal Partial-Birth Abortion Act in *Gonzales v. Carhart*<sup>127</sup> and suits challenging certain applications of federal laws as beyond the federal government’s regulatory power under the Commerce Clause, such as *Gonzales v. Raich*.<sup>128</sup> Much of the dispute in these cases centers on whether the plaintiffs have Article III standing, as required by Article III’s Case or Controversy Clause.<sup>129</sup> But so long as Article III’s prerequisites are met, and so long as there is jurisdiction, federal courts assume that they need no special authorization from Congress to entertain plaintiffs’ constitutional claims and to provide appropriate remedies.

In the three categories of cases I have just described, the Supreme Court has not attempted to explain *why* it so assumes. But it has not sought “rights-creating language”<sup>130</sup> in the relevant provisions of the Constitution, and has not looked for evidence of congressional intent to allow or disallow such cases before proceeding to exercise the judicial power.

## III

### SOME THOUGHTS ON THE REASONS FOR THE COURT’S AVERSION TO RETROSPECTIVE RELIEF

How, then, does one explain the Court’s much less hospitable approach in recent years to *Bivens*-type damages actions against both state and federal officers? What is the distinction between cases involving preemption (like *Shaw* and *Verizon*), the dormant

<sup>126</sup> 496 U.S. 18, 51 (1990).

<sup>127</sup> 550 U.S. 124, 168 (2007).

<sup>128</sup> 545 U.S. 1, 7–9 (2005) (rejecting the claim that a ban on home-grown marijuana is violative of the Commerce Clause).

<sup>129</sup> For example, in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007), the Court recognized that the Establishment Clause creates a cause of action permitting a taxpayer to sue for injunctive relief but emphasized that plaintiffs must still satisfy the requirements of Article III standing.

<sup>130</sup> See *supra* note 119 (regarding the need to show “rights-creating language” in § 1983 cases).

Commerce Clause (like *Hunt*), and structural limits on federal officers' powers (like *Carhart* and *Raich*) on the one hand, and *Bivens* cases on the other? The most obvious answer is that *Shaw*, *Verizon*, *Hunt*, *Carhart*, and *Raich* were all suits for declaratory or injunctive relief. In contrast, much of the judicial discomfort in the *Bivens* line of cases has centered on the fact that *Bivens* litigants are seeking damages.

The appropriateness of particular *remedies* is a distinct question, though, from the analytically prior matter of whether a *cause of action* exists. The Court emphasized this point in its 1992 case, *Franklin v. Gwinnett County Public Schools*.<sup>131</sup> Even as the Court was retrenching with regard to nonexpress causes of action in statutory cases, *Franklin* held, in the context of a nonexpress damages action based on a federal statute, that where there *is* a cause of action, courts “presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.”<sup>132</sup> *Franklin* recognized that this view “has deep roots in our jurisprudence.”<sup>133</sup> *Bell v. Hood* rested upon this understanding as well, as did Justice Harlan’s concurrence in *Bivens*.<sup>134</sup>

Moreover, if we suppose that, having found a cause of action, courts may provide injunctive relief but not damages, we invert the traditional understanding of equity, as *Franklin* emphasized. Any first-year law student knows that equitable relief has traditionally been available only when monetary damages cannot provide an adequate remedy.<sup>135</sup> In that sense, “the present juxtaposition of a hesitancy to grant damages awards with a willingness to allow injunctive

---

<sup>131</sup> 503 U.S. 60, 65–66 (1992). See also Dellinger, *supra* note 32, at 1543 (“It may well be true that the considerations governing a decision to create a damage remedy will differ from those respecting the granting of injunctive relief; this goes to the appropriateness of the remedy created, however, and not to the Court’s remedial power.”).

<sup>132</sup> *Franklin*, 503 U.S. at 66.

<sup>133</sup> *Id.*

<sup>134</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 402–03 (1971) (Harlan, J., concurring); *Bell v. Hood*, 327 U.S. 678 (1946).

<sup>135</sup> See *Bivens* at 395 (“Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 749 (1824) (“All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle, that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages.”); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 26–30, 44 (Boston, Little, Brown & Co. 1861) (explaining that equitable relief was available to litigants who faced a threat of irreparable harm but who, because of the common-law writ system’s rigidity, could not obtain relief in courts at law).

relief . . . gets the traditional interplay between law and equity exactly backwards.”<sup>136</sup>

So why should it be that the Court has remained comfortable recognizing constitutional claims as arising under federal law and as giving rise to the right to prospective relief, yet has increasingly regarded the lack of congressional authorization as a ground for denying damages relief? And why has the Court not undertaken to explain this dichotomy in either the *Bivens* line of cases or in the cases providing prospective relief for constitutional violations under the Supremacy Clause, under the dormant Commerce Clause, and against federal officers?

The answer to the first question may be that, as Richard Fallon and Daniel Meltzer have written, when courts engage in constitutional adjudication, they are serving one of “two basic functions in the constitutional scheme. The first is to redress individual violations. . . . The second . . . [is] to reinforce structural values, including those underlying the separation of powers and the rule of law.”<sup>137</sup> The Court’s greater hospitality to plaintiffs seeking prospective relief for constitutional violations than to plaintiffs seeking compensation for past wrongs may result from its deeper commitment to the second adjudicative function than to the first. Today’s Court views its duty of policing the inter- and intragovernmental balance as central to what the judicial power is all about—more central, in many respects, than the duty to ensure remedies for individuals’ injuries.

To be sure, the current Court has been cautious in the realm of injunctive suits as well. But that caution has concerned the fashioning of limited remedies and the policing of the case or controversy requirement, not the closing of the courthouse doors altogether to prospective plaintiffs alleging constitutional violations. So, while the Court has cut back on structural injunctions (the kind of detailed, institutional injunctions devised in the school desegregation cases from *Brown* onward, as well as in the later prison and mental institution class actions<sup>138</sup>) and on facial constitutional challenges to statutes,<sup>139</sup> it has never as a Court—the musings of some individual

---

<sup>136</sup> Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 V.A. L. REV. 1117, 1135 (1989); see also Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 43 (1968) (“It is an historical anomaly that the ordinary remedy of damages has become extraordinary.”).

<sup>137</sup> Fallon & Meltzer, *supra* note 111, at 1787.

<sup>138</sup> See generally Fletcher, *supra* note 32 (discussing institutional suits and injunctions).

<sup>139</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007) (“The latitude given facial challenges in the First Amendment context is inapplicable [in the context of a challenge to a federal abortion statute]. Broad challenges of this type impose a heavy burden upon the parties maintaining the suit[, requiring at the least that] the Act would be unconstitutional

justices notwithstanding<sup>140</sup>—repudiated the bedrock proposition that the federal courts are open to plaintiffs who seek to assure that state and federal officials comply with the Constitution in the future even if those officials have not done so in the past.

Still, for all the reasons I have surveyed, I do not see how a doctrine imposing an inflexible dichotomy between prospective and retrospective direct constitutional suits can be justified. Justice Harlan's perception in *Bivens* still holds: Once one generally accepts that private litigants have access to federal court to enforce constitutional requirements prospectively without express congressional authorization—as I have shown they do in many instances—one must also accept that the judicial provision of *retrospective* remedies is possible and proper in at least some cases, whether or not Congress has expressly provided for them. Our country's traditional common-law understanding that courts have the authority to fashion effective and appropriate remedies in cases properly before them, the wording of the Constitution (“all Cases, in Law and Equity, arising under this Constitution”), and, perhaps most importantly, the backstopping role of the judiciary in a constitutional regime as the institution with “a particular responsibility to assure the vindication of constitutional interests”<sup>141</sup> all lead me to this conclusion.

So how to determine the cases in which such retrospective relief is appropriate? Here are a few propositions. First, as the case law makes clear, the choice of what remedy is appropriate is one to which the judicial power applies more appropriately than the legislative power. So we judges should not look to Congress's failure to provide a constitutional damages remedy as in any way determinative. Moreover, except for its enactment of the post-Civil War statutes enforcing the Reconstruction Amendments, Congress mostly has been silent about who may enforce particular constitutional standards, and how. This reticence has continued despite many attempts in Congress over the years to enact a counterpart to § 1983 for actions against federal,

---

in a large fraction of relevant cases.”); *see also* *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1190–91 (2008) (rejecting facial challenge to Washington blanket primary system); Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1373–74 (2008) (discussing the Supreme Court's resistance to facial challenges).

<sup>140</sup> *See supra* notes 87–90 and accompanying text.

<sup>141</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

as opposed to state, officers.<sup>142</sup> Congress's failure to act in this area even after *Bivens* is best understood, in my view, as Congress's acquiescence in the understanding that the judicial power includes deciding when damages remedies are necessary to enforce constitutional requirements.

Second, to return to the prescient Justice Harlan, a retrospective damages remedy is of particular importance where the constitutional norm itself is one that is protective of individuals—basically, a norm embodied in the Bill of Rights—rather than a structural norm. Where an individual's constitutional rights are violated, the judicial role in “vindicat[ing] the interests of the individual in the face of the popular will” may include make-whole, retrospective relief, as Justice Harlan recognized in *Bivens*.<sup>143</sup> In contrast, with regard to purely structural constitutional norms, the primary judicial concern is likely to be righting any constitutional dislocation for the future, so that the structure of government runs along its intended course.

Third, there are circumstances—such as in *Bivens* itself—where prospective relief is simply unavailable for practical reasons. In *Bivens*, there was no prosecution in which Bivens would enjoy the protection of the exclusionary rule, and there was also no credible basis for Bivens to claim that he would be faced with a similar search in the future and was thus entitled to equitable relief.<sup>144</sup> Courts should be alert to providing retrospective relief in such circumstances.

Fourth, and relatedly, as federal courts cut back on the availability of injunctive relief because of concerns over judicial competence, the case or controversy requirement, and separation of powers, it becomes more likely that retrospective relief will be the only viable means of vindicating individuals' constitutional rights in certain circumstances. For example, the recent tendency to limit facial challenges to statutes in favor of as-applied challenges necessarily entails a preference for cases in which the facts are fully developed and the need for relief for the individual plaintiff is clear. In many instances, those criteria will be fully met only after the harm has occurred, or

---

<sup>142</sup> See *FDIC v. Meyer*, 510 U.S. 471, 486 n.11 (1994) (noting that “Congress has considered several proposals that would have created a *Bivens*-type remedy directly against the Federal Government” and collecting proposed bills from the 1970s and 1980s).

<sup>143</sup> *Bivens*, 403 U.S. at 407–08 (Harlan, J., concurring).

<sup>144</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, a Los Angeles resident sought injunctive relief from being subjected in the future to the L.A. police department's practice of using chokeholds. Based on a narrow reading of the traditional requirements for relief in equity—the threat of an irreparable injury and the lack of an adequate remedy at law—the Court ordered Lyons's claim dismissed because it was not clear that he personally stood to be subjected to a chokehold again in the future. *Id.* at 111.

there will not be time as a practical matter to seek judicial relief once those criteria are met. Examples are situations in which matters of life and death are at stake—such as restrictions on abortion that could affect the mother’s health, as Justice Ginsburg’s dissent in *Carhart* warned<sup>145</sup>—or circumstances in which it cannot be known in advance who will be affected by a certain restriction, as in challenges to voting identification requirements.

Finally, there is a connected consideration that matters a great deal to me as a judge: Despite the many disadvantages to retrospective damages actions as a means of enforcing constitutional principles, retrospective actions—which most often mean damages actions, or at least actions for monetary relief—do have the advantage that they are in many ways better suited to effective judicial decisionmaking. We know what happened, who was harmed, and how they were harmed, and the relief to be granted need not be created out of whole cloth, as there are centuries of jurisprudence concerning the adjudication of damages. The courts’ constitutional rulings in such cases are likely to be narrowly drawn and case-specific, affecting others as judicial opinions normally do: through *stare decisis*.

We tend to think of constitutional damages actions as more intrusive on legislative and executive prerogatives, and therefore as a less appropriate use of Article III “judicial Power” than claims seeking prospective relief, but I suggest that that is not necessarily so. Particularly in the context of suits against federal officers, where federalism concerns are not an issue, it sometimes may make more sense for courts to fashion damages remedies than injunctive remedies.

At the same time, I am sensitive to—and in large measure share—the unarticulated consideration that probably best explains the reluctance of courts in recent years to recognize the availability of monetary damages directly under the Constitution: namely, the notion that that the bedrock role of the judiciary in our tripartite federal governmental system is not individual recompense but preserving the rule of law by assuring that constitutional norms are respected in cases otherwise properly before the federal judiciary.<sup>146</sup> Given that priority, it makes sense to limit the availability of damages actions to circumstances in which prospective relief is for one reason or another unavailable or impractical. Conversely, there will be cases in which

---

<sup>145</sup> 550 U.S. 124, 189 (Ginsburg, J., dissenting) (“Surely the Court cannot mean that no suit may be brought until a woman’s health is immediately jeopardized . . . . A woman suffering from medical complications needs access to the medical procedure at once and cannot wait for the judicial process to unfold.”) (internal quotations and citations omitted).

<sup>146</sup> See Fallon & Meltzer, *supra* note 111, at 1789–90.

some form of equitable relief will be the only meaningful remedy for a given injury.

### CONCLUSION

So what is the upshot of all this? Most importantly, that we cannot sensibly decide whether constitutional enforcement actions and remedies are available in federal courts by using the same standards we use to decide the scope of enforcement actions and remedies under congressionally enacted statutes—and that, for the most part, we have not. Instead, the tradition exemplified by *Ex Parte Young* of recognizing appropriately structured prospective causes of action directly under the Constitution has continued. And, although there has been a tendency in recent years to regard direct constitutional *damages* actions as unauthorized renegades, that tendency runs counter to historical practice, the language of the Constitution, and the requirements of an effective constitutional regime. Instead, the question of appropriate remedies *is* properly committed to the “judicial Power,” to be exercised carefully and with due regard for considerations of separation of powers and federalism, as well as for judicial competence. As I hope I have shown, the recognition of direct constitutional causes of action, for equitable relief and in some circumstances for damages, is an essential means by which the judiciary fulfills its responsibility to safeguard both the Constitution’s structural principles and individual liberties.

Twenty-two years ago, standing at this lectern, Justice Brennan proclaimed that “[o]ur founders and framers . . . took it as an article of faith that this nation prized the independence of its judiciary and that an independent judiciary could be counted upon to enforce the individual rights and liberties of our citizens against infringement by governmental power.”<sup>147</sup> I hope that my reflections tonight have promoted the accomplishment of that “article of faith” by explaining why the federal courts have remained, and should remain, in Madison’s words, the “impenetrable bulwark against every assumption of power in the Legislature or Executive.”<sup>148</sup>

Thank you so much for listening to these remarks.

---

<sup>147</sup> Brennan, *supra* note 2, at 552.

<sup>148</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (quoting James Madison in 1789).