

# Bidding Farewell to Constitutional Torts

Richard H. Fallon, Jr.\*

*The Supreme Court displays increasing hostility to constitutional tort claims. Although the Justices sometimes cast their stance as deferential to Congress, recent cases exhibit aggressive judicial lawmaking with respect to official immunity. Among the causes of turbulence in constitutional tort doctrine and the surrounding literature is a failure—not only among the Justices, but also among leading scholarly critics—to see interconnected problems in a sufficiently broad frame.*

*This Article refocuses analysis along four interconnected dimensions. First, it examines relevant constitutional history, centrally including that of the maxim “for every right, a remedy.” That maxim has exerted significant generative force, but it has also been widely misunderstood. Second, the Article reviews and critiques recent Supreme Court decisions involving constitutional tort claims, many of which reflect fallacious assumptions. Third, the Article addresses the question, What role would damages and injunctive remedies for constitutional violations play in a justly and prudently designed legal system unfettered by historical accidents and path dependence? Commentators almost invariably assume that any gap between constitutional rights and individually effective, make-whole remedies is inherently regrettable. This Article refutes that premise. Although an ideal regime would substitute entity liability for officer liability and afford broad opportunities for victims of constitutional violations to vindicate their rights, it would not always authorize recovery of money damages.*

---

DOI: <https://doi.org/10.15779/Z38NK3654F>

Copyright © 2019 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

\* Story Professor of Law, Harvard Law School. I am grateful to Rachel Bayefsky, John Goldberg, Tara Grove, Henry Monaghan, Jim Pfander, Joanna Schwartz, Mike Wells, and Ann Woolhandler for helpful comments on a prior draft, and to Grayson Clary, Isaac Park, and Steve Schaus for outstanding research assistance.

*Finally, the Article considers reforms that the Supreme Court could effectuate in the absence of action by Congress. Among other proposals, it calls for expansion of municipal liability in suits under 42 U.S.C. § 1983 and for reinvigoration of Bivens actions, but it defends the main outlines of qualified immunity doctrine against a spate of recent critics.*

Introduction .....	935
I. Historical Background: Constitutional Rights and Tort Remedies .....	941
A. Remedies and the Constitution .....	941
B. Common Law Tort Actions Against Government Officers .....	942
C. Section 1983 .....	946
D. Constitutional Tort Actions against Federal Officials .....	947
1. Injunctions .....	947
2. Bivens Actions .....	948
E. Constitutional Tort Doctrine Circa 1980 .....	950
II. Recent Supreme Court Hostility to Constitutional Tort Actions .....	951
A. Bivens Actions .....	951
B. Official Immunity Doctrines .....	954
C. Hostility to Constitutional Remedies: Substantive Rights and Procedural Doctrines .....	957
D. Armstrong and Injunctions .....	959
E. Provisional Assessment .....	961
III. Constitutional Tort Actions: A Normative Vision .....	961
A. The Equilibration Thesis .....	963
B. The Diverse Functions of Constitutional Remedies .....	969
C. Causes of Action to Seek Redress for Constitutional Violations .....	972
1. Causes of Action to Sue for Injunctive Relief .....	972
2. Causes of Action to Sue for Damages .....	973
D. Sovereign Immunity and Entity Liability .....	978
E. Heightened Pleading Requirements .....	982
IV. Issues of Institutional Authority and the Judicial Role .....	983
A. The Judicial Role .....	983
1. Framing Assumptions and Principles .....	983
2. Four Fallacies Rejected .....	984
B. Proposed Revisions of Current Doctrine .....	985
1. Causes of Action to Seek Redress for Constitutional Violations .....	985
a. Injunctive Remedies: Ex parte Young and Armstrong .....	985
b. Damages Remedies .....	987
i. Bivens and Related Questions .....	987
ii. Official Immunity .....	989

2. Entity Liability.....	994
3. Heightened Pleading Requirements under the Federal Rules of Civil Procedure.....	996
Conclusion .....	996

## INTRODUCTION

Judge-made tort law that furnishes remedies for official wrongdoing, including constitutional violations, is as old as the Constitution itself. The Supreme Court’s most famous pronouncement came in *Marbury v. Madison*:<sup>1</sup> for every violation of a vested legal right, the laws must supply a remedy.<sup>2</sup> Otherwise, the Court continued, the United States would forfeit the “high appellation” of “a government of laws, and not of men.”<sup>3</sup> Over the past two hundred years, multitudinous commentators have cited *Marbury*’s dictum as instantiating the ideal of the rule of law in American constitutional jurisprudence. By nearly all accounts, the rule of law requires judicial remedies for official wrongdoing so that officials neither are nor appear to be above the law.<sup>4</sup>

Truth to tell, *Marbury*’s purported restatement of the law of remedies is frequently, perhaps typically, misunderstood. Not every victim of a constitutional rights violation has always had an individually effective remedy,<sup>5</sup> providing compensation for or otherwise redressing the victim’s resulting losses, especially when the only effective remedy would be damages.<sup>6</sup> Doctrines of sovereign immunity and official immunity have often precluded damages relief. Nevertheless, the promise of the *Marbury* dictum has meaningful content. Apart from the political question doctrine, within the American constitutional tradition, nearly every constitutional right has been enforceable by at least some right-holders under at least some circumstances. As a historical matter, the law has also authorized damages actions, typically against governmental officials rather than the government itself, in some cases. Overall, *Marbury*’s dictum has

---

1. 5 U.S. (1 Cranch) 137 (1803).

2. *See id.* at 163. The principle traces to the Latin maxim *ubi jus, ibi remedium*, and it received perhaps its classic statement in the Anglo-American tradition in 3 WILLIAM BLACKSTONE, COMMENTARIES \*23: “where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.” For reasons that appear to have had more to do with rhetorical structure than with substance, however, Chief Justice Marshall used different language: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Marbury*, 5 U.S. (1 Cranch) at 163.

3. 5 U.S. (1 Cranch) at 163.

4. *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 349 (1965); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) [hereinafter Fallon, *The Rule of Law*].

5. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–86 (1991).

6. JAFFE, *supra* note 4, at 239.

constituted a narrower guarantee of remedies than many have grasped, but it has also symbolized an aspiration—albeit one subject to compromise in light of competing values—to redress legal wrongs on an individual basis.

*Marbury*'s core promise and its broader aspiration have played an important role in shaping the regime of remedies for constitutional violations that has evolved over U.S. history. In part because the Constitution makes almost no reference to judicial remedies, the contours of that regime have varied over time. One could organize the relevant history in myriad ways, but any competent recitation would emphasize change as well as continuity and would demarcate three overlapping yet discernibly distinctive eras. In the first, the Founding and immediately subsequent generations relied on a preexisting background system of common law rights and remedies to ensure that public officials, as much as ordinary citizens, remained subject to law. Though not without exceptions, the disarmingly simple strategy was “to apply the same body of law to government officials as was applied to private individuals.”<sup>7</sup> Within the original regime, a federal official who effected an unconstitutional seizure of private property—to take just one example—would be subject to an ordinary tort action, likely for trespass. In defense, an official could plead official authorization, but that plea would fail if the official's action violated the Constitution. The Constitution would thus enter the lawsuit as a reply to a defense of official authority, not as the foundation for a right to redress.

Second, gradually and over time, Congress and the Supreme Court jointly developed a scheme of official liability that put constitutional violations, and remedies for them, into a class apart from the system of liability for private wrongs. A signal development came in 1871, when Congress enacted 42 U.S.C. § 1983, which creates a cause of action for damages or injunctive relief against state officials who violate federal constitutional rights. On the judicial front, the Supreme Court moved toward a distinctive scheme of remedies for constitutional violations with decisions that made injunctions widely available to stop breaches of federal rights by either state or federal officials, even when the challenged unconstitutional action would not have been tortious at common law.<sup>8</sup> Then, in 1971, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>9</sup> held that victims of constitutional misconduct by federal officials had a federal cause of action to sue for damages, wholly independent of “ordinary” tort law that, in the post-*Erie* legal universe, was mostly state (rather than federal) law. As a scheme of federal remedies for violations of the federal Constitution

---

7. James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 744 (2019) [hereinafter Pfander, *Dicey's Nightmare*] (describing the approach favored by the nineteenth-century British rule-of-law theorist A.V. Dicey); see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1915) (“With us every official . . . is under the same responsibility for every act done without legal justification as any other citizen.”). For critical assessment of how well the Diceyan model fits U.S. practice, see JAFFE, *supra* note 4, at 237.

8. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

9. 403 U.S. 388, 394 (1971).

emerged, focused on the distinctive powers and responsibilities of governmental officials, the Supreme Court also developed doctrines of official immunity—lacking precise parallels in private litigation—that it thought necessary or appropriate in light of a balancing of private and public interests. Characteristically, the Supreme Court, in *Bivens*, cited *Marbury* for the proposition that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>10</sup> With no sense of inconsistency, however, it did so just a few paragraphs before it remanded the case to a lower court to rule on the defendants’ claim of official immunity.<sup>11</sup>

More recently, the historical evolution of the system of remedies for constitutional violations by public officials has entered a third phase, marked by assaults on and threats to the modern network of distinctively constitutional remedies for constitutional violations that came to fullest flowering in the *Bivens* case. Assaults on that modern scheme of constitutional remedies for constitutional violations—which was largely disconnected from the “ordinary” tort law that the Founding generation relied on to subject officials to control by law—provide the occasion for this Article. My concern is with remedies for violations of individual rights. It does not include infringements of structural or other norms that do not generate individual rights, but it does encompass some rights violations that would not have been tortious at common law (including, for example, deprivations of rights to freedom from invidious discrimination and to procedural fairness both in criminal trials and in the distribution of constitutionally gratuitous benefits). My ambition is to rethink the availability of damages and injunctive remedies for rights violations within this category by taking simultaneous account of historical, separation-of-powers, policy-based, and rule-of-law considerations.

In my view, the recent developments involving constitutional tort actions—in the somewhat specialized sense in which I just defined them, to include suits for redress of some constitutional violations that would not have constituted common law torts—are troubling. Much of what the Supreme Court has done bespeaks misunderstanding about the role of judicially crafted remedies in our constitutional tradition. Taken as a whole, the Court’s pattern does not reflect a principled conception of the judicial role as much as hostility to awards of monetary relief against the government and its officials.<sup>12</sup>

That said, a number of the Court’s critics have also missed the mark. Critics too readily assume that the maxim “for every right, a remedy” has historically implied, and ought to imply, a promise of an individually effective tort remedy

---

10. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

11. *Id.* at 397–98. On one possible interpretation, the quoted language from *Marbury* might refer to a right to seek judicial relief, not necessarily to a right to receive any particular remedy, or possibly any remedy at all, if applicable law made no remedy available.

12. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

for every violation of a constitutional right.<sup>13</sup> Sensibly, our tradition has never held out such a promise. Among other things, the availability of damages remedies for all constitutional violations would likely result in a shrinking of constitutional rights. For example, if damages were automatically available for every search and seizure that a court deemed “unreasonable” under the Fourth Amendment—regardless of any legally plausible or good faith belief of the police officer who conducted it that it was lawful under the circumstances—then we could expect a narrowing of operative standards of constitutional “reasonableness.”<sup>14</sup> Otherwise the social costs of Fourth Amendment rights would grow intolerably high.

In examining the necessary and proper role of tort remedies in vindicating constitutional rights, this Article addresses three large questions. The first is historical and doctrinal: What role have tort remedies for constitutional violations and the maxim “for every right, a remedy” played in our constitutional tradition? Historically, I argue, tort remedies have performed three functions. First, they provide compensation to those whose rights have been violated and protection to those who face future or ongoing deprivations. Second, even in the absence of full compensation or protection, remedies such as dismissal of criminal prosecutions, declarations of constitutional rights, and nominal damages furnish a mode of redress by which victims can hold wrongdoers accountable both to them and to the law.<sup>15</sup> Third, remedies perform a systemic function. Again, even in the absence of full compensation to every victim of every constitutional violation, the scheme of constitutional remedies historically has been, and ought to be, adequate to maintain a rule-of-law regime in which officials are widely accountable to law and generally remain within constitutional bounds. As my historical discussion also emphasizes, however, the scheme of constitutional remedies has evolved, and justifiably so, from one

---

13. See, e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CALIF. L. REV. 289, 293–94, 305–11 (1995) (“Where Congress has failed to provide adequate remedies, or any remedies at all, against unconstitutional actions by the political branches, the courts must step in and ensure that such remedies exist.”); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1484–91 (1987) (describing the *Marbury* principle as a constitutional “postulate” and “structural principle” that ensures that, “[w]hensoever [governments] do act unconstitutionally, they must in some way undo the violation by ensuring that victims are made whole”); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665–66, 678–81 (1987).

14. See Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 489 (2011) [hereinafter Fallon, *Asking the Right Questions*]; Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999).

15. See Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003 (2012) (distinguishing between the goals of providing full compensation for harms occasioned by constitutional torts and furnishing a mode of civil recourse to victims of tortious wrongdoing that may result in less-than-full financial compensation). Professor Wells builds on the “civil recourse” theory of general tort law developed by Professors John Goldberg and Benjamin Zipursky. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

rooted in “ordinary” common law tort doctrine to one specifically tailored to officials’ violations of distinctively constitutional norms.

With a distinction between common law tort doctrine and a separate scheme of constitutional remedies laid out, my second question is normative: What remedies for constitutional violations should a legal system that is committed to rule-of-law ideals provide? In particular, when and on what terms should it furnish the traditional tort remedies of injunctions and damages to victims of constitutional rights violations? In asking this question, I initially put aside concerns about judicial role and focus on issues of institutional design, involving justice and policy. Establishing ideals will not only help to identify issues concerning which Congress ought to act, but also clarify the target that more constrained judicial lawmaking should strive to approximate.

My normative analysis begins with a fundamental premise: it is a mistake, when thinking about constitutional remedies from the perspective of institutional design, to conceive of rights as constants, fixed in advance, and then to treat causes of action to enforce those rights,<sup>16</sup> along with immunity doctrines, as the only potential variables. Decisions involving how to define constitutional rights, which causes of action to authorize, and which immunity doctrines to create should all reflect a kind of interest-balancing, aimed at yielding the best overall package. Sometimes we may be best off, on balance, with relatively expansive definitions of rights but with limitations on damages remedies that would make those rights’ social costs inordinately large.

My more specific normative conclusions are sharp. First, we should substantially jettison the ordinary, private-law tort system as an anchor for thinking about constitutional remedies, including damages and injunctions. Even if we could return to a common law regime in which governmental officials were subject to the same liability rules as ordinary citizens, we should not.<sup>17</sup> On the one hand, officials cloaked with governmental authority pose distinctive threats to individual rights and the rule of law. On the other, remedies for official lawbreaking should be shaped with an awareness of their potential impact on distinctive public interests.

---

16. By “cause of action,” here and throughout this Article, I mean what Henry Hart and Albert Sacks termed “a right of action”: “A right of action is a species of power—of remedial power. It is a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

17. *But cf.* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 609–10 (2005) (praising a conception of tort law in which the “obligations owed by individual government actors to citizens and entities (e.g., a police officer’s duty to refrain from unjustifiably arresting or beating a person) . . . are for the most part obligations owed by nongovernment actors to other nongovernment actors”); Pfander, *Dicey’s Nightmare*, *supra* note 7 (criticizing the Court for adopting an interest-balancing approach and abandoning “the common law model of the nineteenth century”).

I also argue that when damages liability properly attaches, an ideal scheme of constitutional remedies would make governmental entities responsible for the wrongs of their officials. This proposal would effect a dramatic change in the structure of suits seeking redress for constitutional violations. For the most part, our constitutional tradition has accorded both the federal government and state governments sovereign immunity from suit. Accommodating the hoary doctrine of sovereign immunity, we have relied on suits against individual officials to keep the government adequately within the bounds of law. But the historical accident of sovereign immunity—extended to governments on a categorical basis, without regard to the interests or exigencies at stake in particular cases—lacks a defensible normative rationale. Considerations of both justice and policy support making the government assume financial responsibility for constitutional violations that its officials could not commit without a cloak of governmentally conferred authority.

My final normative conclusion is that not every constitutional-rights violation should always elicit, or authorize a plaintiff to demand, an individually effective remedy, especially if the only effective remedy would be damages. Those who maintain otherwise characteristically do so within a frame that omits the multitude of constitutional violations committed by legislatures and judges and the real costs that those violations impose. It would be colossally imprudent to furnish damages remedies to everyone in whose case a judicial ruling wrongly rejects a constitutional claim or to everyone inconvenienced by a law that is found to be constitutionally invalid. Nonetheless, an optimal regime of constitutional remedies would afford more damages remedies than current law affords, especially after cutbacks on *Bivens* and expansion of qualified immunity doctrine.

My third large question in this Article is institutional, involving the judicial role: In the absence of action by Congress in authorizing tort remedies for constitutional violations and defining relevant immunities, what lawmaking responsibilities should courts assume? In addressing this question, I accept sovereign immunity as a fixed point, capable of waiver or abrogation by Congress and the state legislatures but not eliminable by courts in the doctrine's central range of operation. Apart from sovereign immunity, I argue that a relatively robust judicial role in designing constitutional tort law is both consistent with our traditions and normatively desirable. The Supreme Court ought to restore the approach to authorizing suits for damages to redress constitutional violations that characterized the *Bivens* regime. It should continue to craft official immunity doctrine, both in *Bivens* actions and under § 1983, but it should trim back its most recently articulated standard, which goes too far in denying remedies for constitutional lawbreaking.

The Article comprises five Parts. Part I sketches relevant historical background to current debates. Part II describes and critically assesses the Supreme Court's recent cutbacks on available tort remedies for constitutional



violations. Part III outlines the considerations that system-designers should consider in structuring a just yet practical scheme of remedies for constitutional violations. Part III defends an Equilibration Thesis, under which institutional designers, including courts if assigned that role, should think simultaneously about constitutional rights, causes of action to enforce rights, and official immunity doctrine and should seek the best overall packages. Among its specific recommendations, Part III argues for waivers or abrogation of sovereign immunity that would allow direct suits against the government to redress all actionable constitutional torts. It stops short, however, of arguing that the government should furnish damages remedies for all constitutional violations.

Part IV addresses issues of judicial role that arise when nonjudicial decisionmakers have failed to adopt an optimal scheme. It argues for restoring *Bivens* actions and for retrenching from recent expansions of qualified immunity. But Part IV calls for leaving larger changes to Congress. It specifically rejects arguments that the main elements of qualified immunity doctrine in § 1983 actions lack any principled justification.

## I.

### HISTORICAL BACKGROUND: CONSTITUTIONAL RIGHTS AND TORT REMEDIES

Although or perhaps because the Constitution makes almost no express provision for judicial remedies for constitutional violations, courts, from the beginning, have played an active role in crafting such remedies. That the courts would do so could fairly be described as a constitutional presupposition.<sup>18</sup> Without judicial remedies, the Constitution could not establish the rule-of-law regime that the Founding generation understood it as creating.

#### A. Remedies and the Constitution

The Constitution says almost nothing about remedies for constitutional violations. Article I, Section 9, clause 2 contemplates the availability of habeas corpus relief for unlawful detentions. It says that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public safety may require it.”<sup>19</sup> The Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.”<sup>20</sup> Even now, however, debate persists about whether this provision mandates judicial remedies for takings or leaves decisions about compensation to the political branches.<sup>21</sup>

---

18. See Fallon & Meltzer, *supra* note 5, at 1779.

19. U.S. CONST. art. I, § 9, cl. 2.

20. *Id.* amend. V.

21. Compare *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (asserting that the Just Compensation Clause “dictates the remedy for interference with property rights amounting to a taking”), with *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 714 (1999) (suggesting that the defense of sovereign immunity might preclude Just

Apart from habeas corpus, probably the least historically controversial, constitutionally mandated remedy for constitutional violations is nullification.<sup>22</sup> When a court is called upon to impose a criminal or civil penalty for the violation of a purported law, and a party puts the law's constitutionality in question, *Marbury v. Madison* holds that a court must address the challenge.<sup>23</sup> Under *Marbury*, a court must deny effect to any purported law that violates the Constitution and thereby nullify any constitutionally impermissible threat that the law otherwise would pose.<sup>24</sup>

As will be readily apparent, neither habeas corpus nor nullification will avail all victims of constitutional rights violations. The *Bivens* case exemplified the shortfall. Federal officials had subjected Bivens to an unconstitutional search and seizure. But the officials did not detain Bivens long enough for him to benefit from habeas. Nor did the offending officials' actions result in a prosecution in which Bivens might have invoked the exclusionary rule to bar the introduction of wrongfully seized evidence or challenged the validity of any statute. As Justice Harlan wrote in a concurring opinion, "For people in Bivens' shoes, it is damages or nothing."<sup>25</sup> And if Bivens had sought damages from the federal government, sovereign immunity would have barred his claim.

As a historical if not a logical matter, the reason for the Constitution's inattention to causes of action to enforce the Constitution and judicial remedies for unconstitutional official action is plain. The Framers assumed the existence of a going regime of common law and equitable remedies through which government officials could be held accountable for unlawful conduct, including constitutional violations.<sup>26</sup> Strikingly, however, the common law system took relatively little account of the special powers and responsibilities of governmental officials. Nor, for the most part, did it afford officials special immunities (though there were exceptions for judges and legislators). Rather, the common law system pursued the strategy of holding government officers to the same standards of lawful conduct as ordinary citizens.

### B. Common Law Tort Actions Against Government Officers

When harmed by official misconduct at the dawn of constitutional history, aggrieved parties could normally seek redress by invoking forms of action

---

Compensation claims against a state or state entity). For the view that sovereign immunity bars Takings claims unless waived, see Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999).

22. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513 (1998), offers the provocative thesis that nullification of void enactments is the sole constitutionally necessary remedy for constitutional violations. For a powerful critique, see Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549–65 (1998).

23. See 5 U.S. (1 Cranch) 137, 178 (1803).

24. See *id.*

25. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

26. See Fallon & Meltzer, *supra* note 5, at 1779.

available at common law and in equity that included suits against governmental officials under ordinary tort law.<sup>27</sup> Tort law, to a rough approximation, is the body of law that provides redress for civil wrongs such as assault, battery, libel, and trespass. Classic remedies are damages and injunctions. Ordinary tort law does not carve out constitutional violations as a category of wrongs that distinctively call for civil remediation. But many constitutional violations also represent ordinary torts. For example, a search and seizure of the kind involved in *Bivens* may also constitute a trespass, battery, or false imprisonment.<sup>28</sup>

An example comes from *Little v. Barreme*.<sup>29</sup> After his ship was seized by Captain Little, who had acted pursuant to presidential orders, Barreme sought to recover by bringing a common law trespass action. Little invoked his obedience to presidential orders as a defense. But the Supreme Court, in an opinion by Chief Justice Marshall, ruled that the president's seizure order was unlawful and therefore supplied no adequate authorization. Accordingly, Little was liable for his trespass.<sup>30</sup>

The structure of Barreme's tort claim and of Captain Little's defense precisely paralleled those that would have appeared in a suit alleging a constitutional violation. The plaintiff would have brought an ordinary common law tort action (if one were available). The defendant official would have claimed federal authorization as a defense. And the plaintiff, at that point, would have countered that the defense must fail due to the official's violation of the Constitution. Where an official acted unconstitutionally, a common law damages action could therefore succeed.

According to a study by Professor Ann Woolhandler,<sup>31</sup> the Supreme Court did not take a wholly consistent approach to claims against government officials

---

27. See generally Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (outlining mechanisms by which English officials could be held liable at common law and in equity and tracing how suits against officers continued to be available under post-Revolutionary American law); FINAL REP. OF THE ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, S. DOC. NO. 77-8, at 81 (1st Sess. 1941):

[T]he basic judicial remedy for the protection of the individual against illegal official action [was historically] a private action for damages against the official in which the court determine[d], in the usual common-law manner and with the aid of a jury, whether or not the officer was legally authorized to do what he did in the particular case. . . . To maintain the suit the plaintiff [had to] allege conduct by the officer which, if not justified by his official authority, [was] a private wrong to the plaintiff, entitling the latter to recover damages.

28. See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 71, 73 n.39 (1999).

29. 6 U.S. (2 Cranch) 170 (1804).

30. *Id.* at 178–79. As Marshall had apparently contemplated, Congress came to Captain Little's rescue by voting an appropriation to cover the damages judgment against him. More generally, early Congresses set up a system to process the claims to indemnification of officials who violated ordinary tort law in the course of their official duties. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863–64 (2010).

31. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987) [hereinafter Woolhandler, *Patterns of Official Immunity and Accountability*]; see also

under ordinary tort law during the first half of the nineteenth century. She identifies two competing modes of response: a “legality” model, which awarded relief for unauthorized violations of ordinary tort law, and a “discretion” model, which excused some officials who confronted an apparent conflict of duties.<sup>32</sup> In Woolhandler’s account, the Supreme Court generally favored the former approach during the tenure of John Marshall as Chief Justice but increasingly adopted the latter under Roger Taney.<sup>33</sup> By contrast, Professor James Pfander portrays nineteenth-century practice as more consistent: “[T]he courts of the nineteenth century took the view that the judicial duty was to focus quite specifically on the invasion of the legal right and ask only if it was justified by law.”<sup>34</sup>

Disagreement and possible inconsistency notwithstanding, the early practice in adapting ordinary tort law and associated remedies into a mechanism for enforcing constitutional norms reflects an insight about the Constitution as a rule-of-law regime. The Constitution embodies rule-of-law ideals that, in turn, contribute importantly to the moral legitimacy of constitutional government. The rule of law requires that governments and their officials be accountable to law.<sup>35</sup>

Even so, early practice was imperfectly structured for its rule-of-law function of ensuring official compliance with constitutional norms. “Ordinary” tort law is not designed with government officials’ conduct centrally in mind. On the one hand, officials, by virtue of their office, can pose special threats. On the other hand, the nature of officials’ responsibilities might sometimes justify endowing them with distinctive immunities against liability for alleged misconduct. In the early days, responsibility for adjusting normally available remedies to accommodate the special situation of federal officials fell to Congress. In one response, perceiving that it would often be unfair to saddle individual officers with liability for actions taken in conscientious discharge of their official duties—as in the case of Captain Little in *Little v. Barreme*—Congress established an elaborate legislative system to indemnify federal officials who were adjudged liable for tort damages.<sup>36</sup> In other instances, Congress withdrew remedies against public officials that the common law and equitable practice otherwise would have furnished.<sup>37</sup> When Congress abolished or restricted causes of action against government officials—whether to preclude

---

Pfander & Hunt, *supra* note 30, at 1871–76 (asserting that federal officials generally enjoyed no immunity from suit during the Antebellum Era and that Congress routinely provided indemnification for official action taken in good faith discharge of official duties).

32. See Woolhandler, *Patterns of Official Immunity and Accountability*, *supra* note 31, at 409–13.

33. See *id.* at 414–32.

34. JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 16 (2017) [hereinafter PFANDER, CONSTITUTIONAL TORTS].

35. See Gerald J. Postema, *Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in BENTHAM’S THEORY OF LAW AND PUBLIC OPINION 7, 7 (Xiaobo Zhai & Michael Quinn eds., 2014).

36. See Pfander & Hunt, *supra* note 30, at 1863–64.

37. See, e.g., *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

damages actions against customs collectors or to bar suits to enjoin the collection of allegedly unlawful taxes—the Supreme Court largely acceded.<sup>38</sup>

As Professor Henry Hart maintained in a classic article,<sup>39</sup> “the denial of one remedy while another is left open, or the substitution of one for another,” rarely raises a problem “of constitutional dimension.”<sup>40</sup> In determining whether “ordinary” tort remedies should be available against governmental officials, Congress and the state legislatures were entitled to weigh public as well as private interests. Hart intimated, however, that the denial of all remedies for a category of constitutional violations might be intolerable.<sup>41</sup>

*General Oil Co. v. Crain*,<sup>42</sup> in which the Supreme Court held that a state court must allow a suit to enjoin state officials from collecting an allegedly unconstitutional tax, exemplified that prospect. Over the defendants’ protest that state law barred the action, the Court reasoned that allowing state law to preclude all effective remedies for constitutional violations would leave “an easy way . . . open to prevent the enforcement of many provisions of the Constitution.”<sup>43</sup> Without adequate remedies for violations, “the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.”<sup>44</sup> Sensibly enough, the Court deemed that result constitutionally unacceptable. On the facts of the *General Oil* case, the Court appears to have thought that no judicial remedy besides an injunction would suffice. The state had set exorbitantly high penalties for noncompliance with the challenged statute, and it was doubtful that payments made under protest could be recovered.

Nevertheless, one should not leap from the important holding of *General Oil Co. v. Crain* to the conclusion that the Constitution requires tort remedies or even other individually effective redress for all constitutional violations. Some constitutional violations always fell beyond the reach of ordinary tort law for the plain reason that not all violations of constitutional norms were tortious. Rarely if ever were judges or legislators subject to suit based on their judicial or legislative acts, even if they violated constitutional norms.<sup>45</sup> By the latter part of the nineteenth century, courts had also begun to develop doctrines that by the

---

38. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1367–69 (1953). But see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 120–25 (1997) (noting nineteenth-century instances in which the Supreme Court required state courts to furnish remedies against state officials in order to protect constitutional rights) [hereinafter Woolhandler, *The Common Law Origins*].

39. See Hart, *supra* note 38.

40. *Id.* at 1366.

41. See *id.*; see also Woolhandler, *The Common Law Origins*, *supra* note 38, at 120–48 (discussing nineteenth-century origins of constitutionally compelled remedies).

42. 209 U.S. 211 (1908).

43. *Id.* at 226.

44. *Id.*

45. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (observing that “[f]ew doctrines were more solidly established at common law than the immunity of judges”); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (tracing legislative immunity to Parliamentary privileges).

twentieth century would blossom into a qualified or “good faith” immunity for many executive officials sued for their performance of executive functions.<sup>46</sup>

### C. Section 1983

In 1871, a Reconstruction Congress enacted 42 U.S.C. § 1983. Originally a part of the Ku Klux Klan Act,<sup>47</sup> § 1983 created a cause of action for damages or injunctive relief against state officials to redress “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States.<sup>48</sup> For most of the ensuing eighty years, § 1983 had little practical consequence.<sup>49</sup> But the Supreme Court dramatically revitalized the statute in its 1961 decision in *Monroe v. Pape*.<sup>50</sup> Since the 1960s, § 1983 has emerged as an omnibus grant of authority to sue state officials for either damages or injunctive relief for constitutional violations.

For purposes of tracing the connections between substantive constitutional rights and remedies for constitutional violations, § 1983 was important in two ways. First, it put constitutional violations at the center of suits for redress of official wrongs. In § 1983 actions, the operative question is not whether an official committed a wrong that would be deemed tortious at common law, but whether an official has violated the Constitution, laws, or treaties of the United

---

46. The origins of official immunity for executive officials are often traced to *Spalding v. Vilas*, which ruled—in a suit against the postmaster general—that “the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply, to a large extent, to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law.” 161 U.S. 483, 498 (1896). As originally described in *Spalding*, however, the immunity extended only to actions within the scope of an official’s federally prescribed discretionary duties, not to unconstitutional actions that would lie beyond the power of Congress or the Executive Branch to authorize. Indeed, it would be possible to read *Spalding* even more narrowly, not as establishing an immunity from suit in the modern sense, but only as affirming that no common law cause of action would lie against executive officials for actions taken within the scope of their official authority, even if they acted for malicious purposes. See James E. Pfander, *Suits Against Officeholders*, in CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 360, 367 (Karen Orren & John W. Compton eds., 2018) [hereinafter Pfander, *Suits Against Officeholders*]. Whatever *Spalding* initially established, subsequent decisions, beginning with *Barr v. Matteo*, 360 U.S. 564 (1959), have unambiguously read it as recognizing an immunity from suit even for unlawful action (not within the scope of an official’s duties or authority). See Pfander, *Suits Against Officeholders*, *supra*, at 367–68.

47. Ch. 22, § 1, 17 Stat. 13.

48. 42 U.S.C. § 1983 (2012).

49. One commentator could document only nineteen cases brought under § 1983 in the first sixty-five years of its existence. See Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 & n.4 (1969). Another locates the cause in the Supreme Court’s 1873 decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which rendered the Privileges or Immunities Clause of the Fourteenth Amendment an effective constitutional dead letter. Because the language of § 1983 partly tracks that of the Privileges or Immunities Clause, both litigants and courts may have assumed that the former had been interred with the latter. See Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737 (1991).

50. 365 U.S. 167 (1961).

States. Second, § 1983 raised a myriad of new questions under the constitutional separation of powers. On the one hand, § 1983 is written in categorical terms that, if read literally, would authorize damages actions against judges and state legislators as well as executive officials and would also sweep away all immunities. As a result, it poses nearly endless questions of statutory interpretation: Should the words of § 1983 be read literally and, if not, then how should they be read, and why? On the other hand, Congress's action in expressly authorizing suits against state officials gives rise to questions, at least in some minds, about the judicial role, if any, in authorizing parallel actions against federal officials who are alleged to have violated the Constitution.

#### D. Constitutional Tort Actions against Federal Officials

The modern doctrine involving expressly constitutional tort actions against federal officials developed in a complicated interaction with doctrines authorizing suits against state officials, including statutory actions under § 1983. This Section first discusses suits seeking injunctive relief, then turns to actions for damages under *Bivens*.

##### 1. Injunctions

The leading case involving injunctive relief to remedy constitutional violations through suits in federal court is *Ex parte Young*.<sup>51</sup> Shareholders of various Minnesota railroads brought derivative actions seeking to enjoin the Attorney General of Minnesota from enforcing a rate statute that the plaintiffs alleged to be confiscatory in violation of the Fourteenth Amendment. The attorney general opposed the action by claiming that state sovereign immunity and the Eleventh Amendment barred the suit since the state was the real party in interest. But the Supreme Court rejected that argument. Consistent with diverse cases pleaded against state officials under ordinary tort law, the Court ruled that officials who violate the federal Constitution forfeit any cloak of state immunity. Whatever other authority a state might have, it cannot immunize officials from suits to redress constitutional violations.

According to what was once the traditional understanding of *Ex parte Young*, the case's innovation came in recognizing an explicitly federal, constitutionally predicated right to sue—not dependent on state tort law—for injunctive relief from constitutional violations.<sup>52</sup> More recently, controversy has erupted about whether *Young* marked a significant innovation or merely applied a traditional equitable doctrine permitting suits to enjoin the filing of baseless

---

51. 209 U.S. 123 (1908).

52. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 n.124 (1954); Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 962–63 (2009).

lawsuits.<sup>53</sup> At the very least, however, *Young* appears to have moved beyond customary practice by enjoining a criminal prosecution—something that equity traditionally had not done—and by doing so on expressly constitutional grounds.<sup>54</sup> Moreover, the cause of action recognized in *Ex parte Young* expanded over time to encompass suits to enjoin myriad forms of unconstitutional action by state and federal officials alike. Within the space of a few decades, it was widely accepted that a party suffering from or threatened with a constitutional violation by federal officials had a federal cause of action for injunctive relief, without regard to the vagaries of traditional equitable practice or state tort law.

## 2. *Bivens* Actions

With *Ex parte Young* and its immediate progeny having established a federal-law cause of action to enjoin constitutional-rights violations, the Supreme Court first upheld a federal right to sue federal officials for damages in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>55</sup> By 1971, the absence of a federal cause of action for damages against federal officials for constitutional violations had become anomalous. Suits for injunctions against both state and federal officials were routine. In addition, damages actions against state officials who violated the Constitution had grown familiar under § 1983. Finally, the traditional mechanism of enforcing the Constitution against federal officials via state-law tort actions seemed both convoluted and antiquated. In its historical context, *Bivens* could be viewed as applying to damages suits against federal officials the insight that already governed in suits for damages against state officials and for injunctions against state and federal officers alike: violations of constitutional rights pose distinctive issues to which “ordinary” tort doctrines will not always be well adapted.

Justice Brennan’s Court opinion in *Bivens*, upholding a federal cause of action for damages for a constitutional violation, wove several threads into a sometimes-confusing pattern. One thread involved the significance of the Fourth Amendment, which *Bivens* claimed that the defendants had violated. “We think that” the defendants’ opposition to a federal cause of action for damages relief “rests upon an unduly restrictive view of the Fourth Amendment’s protection

---

53. See, e.g., John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008) (arguing that *Ex parte Young* merely applied an equitable tradition of granting anti-suit injunctions); James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 213 (2016) (maintaining that “[t]he Court . . . broke new ground in *Ex parte Young*, authorizing a new kind of injunction that was untethered to established antisuit forms,” and was recognized by commentators at the time as having done so); David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86–87 (2011) (depicting *Ex parte Young* as an evolutionary point in “two gradual transitions: (1) from the granting of relief against wrongs to tangible property to the granting of relief against the constitutional wrong of enforcing an invalid law, and (2) from the development of remedies without concern over the source of law to the federalization, and even constitutionalization, of those same forms of relief”).

54. See Pfander & Dwinell, *supra* note 53, at 213–14.

55. 403 U.S. 388 (1971).



against unreasonable searches and seizures by federal agents,”<sup>56</sup> Brennan wrote, as if the case turned on the requirements of the Fourth Amendment itself. Any suggestion to that effect reflected confusion. The Fourth Amendment creates substantive rights, but it does not, by itself, create a right to sue—or what I call a “cause of action”—for damages.<sup>57</sup> Absent statutory authorization, a right to sue for redress of a constitutional violation is a species of common law, crafted by the courts to implement the Constitution in the absence of a necessary one-to-one correlation between a constitutional right and a particular remedy for the right’s violation.<sup>58</sup> *Bivens*’s innovations were to ground a cause of action in federal rather than state common law and to put alleged constitutional violations at the core of the right to sue.<sup>59</sup>

Another thread emphasized the potential mismatch between federal interests in vindicating constitutional rights and the aims of state tort law.<sup>60</sup> As Justice Brennan put it:

[W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another’s house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.<sup>61</sup>

A third thread of potentially great significance then emerged in the final paragraph of the Court’s opinion, and somewhat incongruously so, only after the Court had pronounced that “petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment.”<sup>62</sup> That third thread involved official immunity doctrine. Noting that the defendants had claimed official immunity from damages liability, the Court remanded the case for the lower court to rule on that defense<sup>63</sup>—in a

---

56. *Id.* at 391.

57. The relevant distinction is between what Hart and Sacks called a “primary right” and a “remedial right” to damages. HART & SACKS, *supra* note 16, at 136. According to the authors, “[a] system of analysis which permits confusion between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance is dangerous at best.” *Id.*

58. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 1–3 (1975).

59. See *Bivens*, 403 U.S. at 392–94.

60. See *id.* at 394–95.

61. *Id.* at 394 (citations omitted).

62. *Id.* at 397.

63. See *id.* at 397–98.

context in which the Court itself had already upheld official immunity defenses in some cases under § 1983.<sup>64</sup> Official immunity reflects a further recognition of the disjunction between constitutional tort doctrine and the ordinary tort law that governs suits between private parties.

Official immunity aside, *Bivens* appeared to contemplate the availability of suits for damages against federal officials for constitutional misconduct in the absence of either of two potentially countervailing considerations. “The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress,” the Court wrote.<sup>65</sup> Nor, the Court continued, did it confront an “explicit congressional declaration that persons injured by a federal officer’s violation of the [Constitution] may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”<sup>66</sup>

Two early decisions took an expansive view of the *Bivens* cause of action and, correspondingly, adopted a narrow conception of the “special factors” that might inhibit judicial recognition of federal rights to sue federal officials for constitutional wrongs. In *Davis v. Passman*,<sup>67</sup> the Court permitted a *Bivens* action against a former member of Congress for alleged sex discrimination in violation of the Fifth Amendment’s equal protection guarantee. In doing so, the Court treated it as irrelevant that Congress had exempted the personal staff of its own members from the protections of Title VII of the 1964 Civil Rights Act.<sup>68</sup> A year later, the 1980 decision in *Carlson v. Green*<sup>69</sup> upheld a damages claim against federal prison officials alleged to have violated the Eighth Amendment by failing to provide adequate medical attention to an inmate. Although a 1974 amendment to the Federal Tort Claims Act (FTCA) authorized a statutory remedy against the United States for intentional torts, the Court found no indication that Congress had intended the FTCA remedy as a substitute for, rather than an alternative to, a *Bivens* action.<sup>70</sup> In support of its ruling, the Court noted that *Bivens* suits offered a variety of advantages to plaintiffs that an FTCA action would not.<sup>71</sup>

#### E. Constitutional Tort Doctrine Circa 1980

*Carlson v. Green* represented the high-water mark for constitutional tort actions. It signaled the routine availability of *Bivens* suits against federal

---

64. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967).

65. *Bivens*, 403 U.S. at 396.

66. *Id.* at 397.

67. 442 U.S. 228 (1979).

68. *Id.* at 247. The Court also deemed it of scant importance that a federal suit would give rise to constitutional questions under the Speech and Debate Clause. See *id.* at 246; see also *id.* at 249 (Burger, C.J., dissenting).

69. 446 U.S. 14 (1980).

70. See *id.* at 19–20.

71. See *id.* at 20–23.

officials, notwithstanding plausible bases for identifying special factors counseling hesitation. In cases involving alleged constitutional violations by state officials, the § 1983 cause of action had flowered.

Even in 1980, however, there were important holes in the web of available remedies for constitutional violations, occasioned principally by immunity doctrines. Significantly, even the most pro-*Bivens* Justices offered no strong protest against the availability of official immunity defenses in constitutional tort actions. In addition, a few non-immunity cases reflected judicial concerns that doctrines authorizing damages actions for constitutional violations had expanded disturbingly far. A notable signal came in *Paul v. Davis*,<sup>72</sup> which ruled that a state official's defamation of a § 1983 plaintiff did not invade a liberty interest protected by the Due Process Clause.<sup>73</sup> In explaining its decision, the Court expressed anxiety that the Due Process Clause should not become a "font of tort law."<sup>74</sup>

## II.

### RECENT SUPREME COURT HOSTILITY TO CONSTITUTIONAL TORT ACTIONS

Since the early 1980s, the Supreme Court has exhibited an increasingly assertive hostility to a broad range of suits to enforce the Constitution against federal and state officials, especially actions seeking damages relief.

#### A. *Bivens* Actions

In the years following *Davis v. Passman* and *Carlson v. Green*, the Supreme Court has rejected *Bivens* claims in every context in which it has ruled on them.<sup>75</sup> In one set of cases, beginning with *Bush v. Lucas*<sup>76</sup> in 1983, the Court has based its decisions on Congress's provision of alternative remedies.<sup>77</sup> In *Bush*, an

---

72. 424 U.S. 693, 701 (1976).

73. For criticisms of the decision, see Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 423–29 (1977), and David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324–28 (1976).

74. *E.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

75. *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.").

76. 462 U.S. 367 (1983) (holding that petitioner lacked a cause of action for damages under the First Amendment for retaliatory demotion because Civil Service Commission regulations provided alternative remedies). Over the same period, however, the Court has assumed the availability of *Bivens* actions in a number of cases, presenting such issues as pleading standards for retaliatory prosecution claims, *see Hartman v. Moore*, 547 U.S. 250 (2006), and official immunity defenses, *see, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

77. *See, e.g.*, *Hui v. Castaneda*, 559 U.S. 799 (2010) (holding that *Bivens* actions against Public Health Service personnel for constitutional violations arising from their official duties are precluded by the Public Health Services Act); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to afford a

aerospace engineer alleged that his supervisor had demoted him in retaliation for exercising free speech rights. The Civil Service Commission agreed with the gist of Bush's complaint and restored him to his former position, with back pay. Although acknowledging that the civil service appeals mechanism afforded "less than complete" relief,<sup>78</sup> the Court refused to create "a new judicial remedy" in light of the "elaborate remedial system" that Congress had created.<sup>79</sup>

Another set of cases, also beginning in 1983, has emphasized the presence of "special factors counseling hesitation" even "in the absence of affirmative action by Congress." This line began with two actions by past and present service members.<sup>80</sup> In these cases, the Court emphasized its reluctance to interfere with officer-subordinate relationships and military discipline. The restrictive turn accelerated thereafter, with Justices Scalia and Thomas repeatedly maintaining that "*Bivens* and its progeny should be limited 'to the precise circumstances that they involved.'"<sup>81</sup> In deriding *Bivens*, Justices Scalia and Thomas associated it with the Court's onetime but subsequently repudiated approach of recognizing private rights to sue to enforce federal statutes (as distinguished from the Constitution) in the absence of an express, congressionally created cause of action.<sup>82</sup>

The Court's mounting resistance to authorizing *Bivens* actions came to an apparent culmination in *Ziglar v. Abbasi*.<sup>83</sup> The plaintiffs in *Ziglar*, all of Arab or South Asian descent, sought damages for alleged constitutional violations that occurred when they were arrested on immigration charges in the aftermath of the 9/11 terrorist attacks and held without bail in a maximum-security facility under a "hold-until-cleared" policy.<sup>84</sup> They alleged that the defendants, who included high-level national security officials and a prison warden, deprived them of substantive due process rights by detaining them in "harsh pretrial conditions for a punitive purpose," violated the equal protection component of the Fifth Amendment by discriminating against them based on their "race, religion, or national origin," and subjected them to strip searches without "any legitimate penological interest," in contravention of the Fourth and Fifth Amendments.<sup>85</sup>

---

damages remedy for the improper denial of Social Security disability benefits, resulting from alleged due process violations, where statutory remedies existed).

78. *Bush*, 462 U.S. at 373.

79. *Id.* at 388. The Court described the civil service remedy as "constitutionally adequate," *id.* at 378 n.14, even though it was not an "equally effective substitute" for the cause of action that the Court had upheld in *Bivens*. *Id.* at 378. Subsequent cases involving alternative remedies have echoed similar themes.

80. *See* *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983).

81. *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

82. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

83. 137 S. Ct. 1843 (2017).

84. *Id.* at 1852.

85. *Id.* at 1853–54.

Writing for the majority, Justice Kennedy posited that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”<sup>86</sup> The Court, he wrote, had “consistently refused to extend *Bivens* to any new context or new category of defendants” over a period of thirty years.<sup>87</sup> Although careful not to overrule *Bivens*, Justice Kennedy allowed that “it is possible that the analysis in the Court’s three . . . cases [upholding *Bivens* remedies] might have been different if they were decided today.”<sup>88</sup> Courts, he wrote, possess doubtful competence to weigh such pertinent factors as “the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.”<sup>89</sup> He continued:

[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.<sup>90</sup>

Pursuant to that premise, the Court rejected the plaintiffs’ *Bivens* claims, which would have called sensitive national security policies into question and required intrusive inquiries into the functioning of the executive branch.

In comparison with earlier denunciations of *Bivens* by Justices Scalia and Thomas, the Court’s opinion in *Ziglar* adopted a measured tone. The Court acknowledged that implied causes of action to enforce constitutional rights raise issues different from those in cases involving implied statutory causes of action. It further recognized that “if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations” under some circumstances.<sup>91</sup> As a practical matter, however, it is not clear that much space exists between the Court’s *Ziglar* ruling and the earlier demand of Justices Scalia and Thomas that *Bivens*, *Davis*, and *Carlson* “should be limited ‘to the precise circumstances that they involved.’”<sup>92</sup>

Overall, moreover, the *Ziglar* Court’s stance was far less modest and deferential to Congress in weighing the costs and benefits of constitutional tort actions than it acknowledged. Following its rejection of the plaintiffs’ *Bivens* theory, the *Ziglar* majority turned to a claim to relief under a federal statute, 42 U.S.C. § 1985, which creates a cause of action against officials who conspire to violate constitutional rights to the equal protection of the laws. Although the

---

86. *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

87. *Id.* (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

88. *Id.* at 1856.

89. *Id.* at 1858.

90. *Id.*

91. *Id.*

92. *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)).

statute makes no reference to official immunity, the Court's majority, following the approach of its § 1983 cases, upheld a qualified immunity defense.<sup>93</sup> Without discussion of how that defense related to § 1985's language or legislative history, the majority held that officials sued under § 1985 should receive the same immunity as those sued under § 1983, apparently for policy reasons. "The qualified immunity rule seeks a proper balance between . . . competing interests,"<sup>94</sup> Justice Kennedy explained. He then proceeded to recite the formula that the Court had devised to reach an optimal accommodation: the defendants were immune from damages liability unless, "in the light of pre-existing law," the unlawfulness of [their] conduct" should have been "apparent."<sup>95</sup> "To subject officers to any broader liability" he wrote, "would be to 'disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.'"<sup>96</sup> Insofar as immunities are involved, the Court thus affirmed a judicial competence and responsibility to balance interests that it had appeared to disavow in its *Bivens* analysis.

### B. Official Immunity Doctrines

The Supreme Court first upheld an official immunity defense in an action seeking damages for a constitutional violation in *Tenney v. Brandhove*<sup>97</sup> in 1951. *Tenney* involved a suit against state legislators for actions taken in their legislative capacity. In ruling on an immunity defense, the Court pronounced that it simply could not "believe" that Congress, "by the general language of" section 1983, "would impinge on a tradition [of legislative freedom]" that was "well grounded in history and reason" by allowing liability for legislative activity.<sup>98</sup> In *Imbler v. Pachtman*,<sup>99</sup> a 1976 case involving prosecutorial immunity, the Court described *Tenney* as having "established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."<sup>100</sup>

Meanwhile, *Scheuer v. Rhodes*,<sup>101</sup> in 1974, had taken the important step of extending an immunity from suit to executive officials sued for constitutional violations. In suits at common law, there appears not to have been a general executive immunity.<sup>102</sup> The origins of official immunity for executive officials

---

93. *Ziglar*, 137 S. Ct. at 1865–69.

94. *Id.* at 1866.

95. *Id.* at 1867 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

96. *Id.* (emphasis added) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

97. 341 U.S. 367 (1951).

98. *Id.* at 376.

99. 424 U.S. 409 (1976).

100. *Id.* at 418.

101. 416 U.S. 232 (1974).

102. See Woolhandler, *Patterns of Official Immunity and Accountability*, *supra* note 31, at 453–57; see also Baude, *supra* note 12, at 55–60.

are often traced to the Supreme Court's 1896 decision in *Spalding v. Vilas*, decided twenty-five years after Congress enacted § 1983.<sup>103</sup> As *Scheuer* recognized, moreover, "government officials, as a class, could not be totally exempt" from suit for damages under § 1983, which specifically provides for damages relief against state officials who violate constitutional rights.<sup>104</sup> Seeking to reconcile competing considerations, the Court insisted that § 1983 should be read as consistent with the general tradition of common law immunity that prevailed in 1871, but it apparently viewed that tradition as flexible and dynamic. In an important adaptation, *Scheuer* looked to policy considerations to shape the precise immunity, which it labeled as "qualified immunity," that executive officials could claim in suits seeking damages for constitutional violations.<sup>105</sup> In an early post-*Scheuer* formulation, in *Wood v. Strickland*, the Supreme Court framed qualified immunity as mixing objective and subjective elements: officials would normally be immune from damages liability unless they "knew or reasonably should have known" that their actions violated the Constitution or they acted "with the malicious intention to cause a deprivation of constitutional rights or other injury."<sup>106</sup>

The Supreme Court revised that standard, for the explicit purpose of giving officials more protection against damages actions, in the now-iconic 1982 case of *Harlow v. Fitzgerald*.<sup>107</sup> *Harlow* was a *Bivens* action alleging First Amendment violations by high-level White House aides in the Nixon Administration. Writing for the Court, Justice Lewis Powell framed the immunity issues that the case presented almost entirely in policy-based terms:

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from

---

103. 161 U.S. 483 (1896); see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1040 (7th ed. 2015) [hereinafter HART & WECHSLER]. Previously, a number of specific common law torts—such as that of arrest without a warrant—had made the defendant's status as an official relevant to liability. In the case of arrest without a warrant, an officer could arrest for a felony based on a reasonable ground for suspicion, whereas the lawful authority of a private person depended on a crime's actually having been committed. WILLIAM L. PROSSER, THE HANDBOOK OF THE LAW OF TORTS 132 (4th ed. 1971).

104. *Scheuer*, 416 U.S. at 243.

105. See *id.* at 247–48.

106. 420 U.S. 308, 322 (1975).

107. 457 U.S. 800 (1982).

acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>108</sup>

With the competing considerations thus framed, Powell concluded that an acceptable immunity standard should, among other things, facilitate the dismissal of “insubstantial lawsuits” prior to trial and even before extensive discovery.<sup>109</sup> In pursuit of that aim, *Harlow* reformulated the qualified immunity test solely as one of objective reasonableness: “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known.”<sup>110</sup> The Court anticipated that whether “clearly established rights” were at stake could ordinarily be resolved on a pre-discovery motion to dismiss.<sup>111</sup>

Multiple subsequent decisions have sought to clarify the proper application of the *Harlow* standard, especially by emphasizing that officials are protected from liability unless they should have known that their specific conduct violated the Constitution.<sup>112</sup> As the Court put it in *Anderson v. Creighton*, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>113</sup> *Ashcroft v. al-Kidd*<sup>114</sup> subsequently altered this language, apparently to enhance the scope of the qualified immunity to which officials are entitled. Without explanatory comment, Justice Scalia’s Court opinion quoted the *Anderson* formulation in part, but substituted “every ‘reasonable official’” for “a reasonable official.”<sup>115</sup> On one plausible interpretation, that obviously deliberate change of wording significantly revised the legal test. In *Williams v. Taylor*, the Court treated a lower court’s inquiry into whether “all” reasonable jurists would regard a determination as unreasonable as having “transform[ed]” an objective reasonableness test into a “subjective one,” depending on whether a single judge who reached a contrary decision would necessarily be unreasonable.<sup>116</sup> At the very least, the altered wording signals the Court’s commitment to a robustly protective doctrine of qualified immunity. In recent Terms, the Court has repeatedly granted certiorari and then reversed lower courts for failing to uphold immunity defenses, often by affirming that qualified

---

108. *Id.* at 813–14 (internal citations and quotation marks omitted).

109. *Id.* at 814–15.

110. *Id.* at 818.

111. *Id.* at 818–19.

112. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987).

113. *Id.* at 640.

114. 563 U.S. 731 (2011).

115. *Id.* at 741 (quoting *Anderson*, 483 U.S. at 640).

116. 529 U.S. 362, 410 (2000).



immunity serves vital social purposes and protects all but plainly incompetent officials.<sup>117</sup>

C. *Hostility to Constitutional Remedies: Substantive Rights and Procedural Doctrines*

When the Rehnquist and Roberts Courts' *Bivens* and immunity cases are put together, the dominant pattern is one of judicial hostility to official or governmental liability for constitutional torts. *Ziglar* accurately characterized *Bivens* as the product of another era. But it mischaracterized the contrast of eras insofar as it cast the *Bivens* period as one of freewheeling judicial lawmaking and the current era as one of judicial deference to Congress in determining when officials should be liable to damages actions based on allegedly unconstitutional conduct. Rather, in the Rehnquist and Roberts eras, the Supreme Court has recurrently engaged in what could fairly be called conservative judicial lawmaking in the general domain of governmental and official liability for violations of federal constitutional and statutory rights.<sup>118</sup> Besides cutting back on *Bivens* and expanding official immunity, the Court has ruled that federal statutes impliedly repeal the right to sue state officials for federal constitutional and statutory violations that § 1983 expressly creates,<sup>119</sup> found an implied exception to the § 1983 cause of action for suits to enjoin the collection of allegedly unconstitutional state taxes;<sup>120</sup> erected multiple barriers to the recovery of damages from local governments in suits under § 1983;<sup>121</sup> and expanded the previously recognized reach of state sovereign immunity from suit.<sup>122</sup>

An especially vivid example of the Court's hostility to damages claims against governmental officials comes from *Ashcroft v. Iqbal*.<sup>123</sup> *Iqbal* was a *Bivens* action brought against former Attorney General John Ashcroft and FBI Director Robert Mueller. Javaid Iqbal, a Pakistani Muslim who was detained in

---

117. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]; Baude, *supra* note 12, at 82 (reporting that the Supreme Court has found a violation of clearly established law in just two of thirty qualified immunity cases since 1982).

118. On the Court's pattern during the Rehnquist era, see Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

119. See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.")

120. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) ("Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases. . . .")

121. See HART & WECHSLER, *supra* note 103, at 998–1003.

122. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (holding that state sovereign immunity bars a federal administrative agency from adjudicating a private party's complaint against a state).

123. 556 U.S. 662 (2009).

the United States following the September 11, 2001 terrorist attacks, alleged that Ashcroft and Mueller adopted a policy of discriminatorily designating Arab Muslims for investigation and of detaining them in harsh conditions. The plaintiff further alleged that Ashcroft knew of and approved his mistreatment pursuant to the discriminatory policies.<sup>124</sup>

In a 5–4 decision written by Justice Kennedy, the Supreme Court found Iqbal’s complaint deficient on two grounds. First, in a ruling that effectively elevated the pleading requirements that a plaintiff must satisfy in order to survive a motion to dismiss, the Court held that Iqbal had failed to satisfy Rule 8 of the Federal Rules of Civil Procedure, which provides that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>125</sup> According to a majority of the Justices, an earlier case that ordered the dismissal of an antitrust complaint<sup>126</sup> had laid down two principles that now applied to constitutional tort actions, among other cases. First, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”<sup>127</sup> The Court relied on this principle to reject a number of Iqbal’s averments, including that the defendants knew of and condoned his mistreatment and that it reflected a policy of discrimination based on race, religion, or national origin. Second, the Court ruled that a complaint could not survive a motion to dismiss unless it stated a “plausible claim for relief,” as gauged by a reviewing court in light of its “judicial experience and common sense.”<sup>128</sup> Pursuant to this standard, the Court found allegations that the defendants “adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin” insufficiently plausible to merit discovery or trial.<sup>129</sup>

Technically, *Iqbal* is a general ruling about the requirements of Rule 8, not one distinctively applicable to constitutional tort actions. Nonetheless, Justice Kennedy clearly crafted his opinion with *Bivens* and § 1983 suits in mind. Correspondingly, *Iqbal*’s implications for constitutional tort cases are especially large.<sup>130</sup> Nearly without exception, commentators have agreed that *Iqbal*’s first

---

124. *Id.* at 668–69.

125. *Id.* at 677–78.

126. That earlier decision, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007), held that the previously iconic formulation of *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)—that a complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”—had “earned its retirement” and should no longer control.

127. *Iqbal*, 556 U.S. at 678.

128. *Id.* at 679.

129. *Id.* at 682. According to the Court’s majority, *Iqbal* “would need to allege more by way of factual content to ‘nudge[e]’ his claim of purposeful discrimination ‘across the line from the conceivable to the plausible.’” *Id.* at 683 (alteration in original) (quoting *Twombly*, 550 U.S. at 570).

130. In specific response to the burdens of constitutional tort litigation, a number of lower federal courts had imposed a heightened pleading standard specifically for § 1983 and *Bivens* cases, but the Supreme Court ruled in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,

holding is difficult if not impossible to square with the language and history of Rule 8 of the Federal Rules of Civil Procedure.<sup>131</sup>

In a further holding, the Court found that Iqbal's complaint was deficient based on a substantive ground that the defendants had not presented in their petition for certiorari: the defendants Mueller and Ashcroft could not be liable based on their mere "knowledge and acquiescence in" lower officials' unconstitutional acts.<sup>132</sup> "In a § 1983 suit or a *Bivens* action," Justice Kennedy wrote, there is no cause of action for "supervisory liability."<sup>133</sup> The Court's rejection of all forms of "supervisory liability" has proved nearly as controversial as its elevation of pleading requirements, not only because the Court acted without benefit of briefing and argument, but also because it took a blunderbuss approach. As Justice Souter pointed out in dissent:

[T]here is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces; or where supervisors "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see"; or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate; or where the supervisor was grossly negligent.<sup>134</sup>

The Court rejected these and all other possibilities in one fell swoop.

#### D. *Armstrong and Injunctions*

The Supreme Court's skepticism of suits against officials to redress constitutional violations has also manifest itself in the domain of suits for injunctive remedies, where *Ex parte Young*<sup>135</sup> has long stood as the leading case. As read by many, *Young* held that the Constitution mandates the availability of a cause of action to enjoin unconstitutional official conduct. In *Armstrong v. Exceptional Child Care Center, Inc.*, the Supreme Court rejected that view and demoted the *Ex parte Young* cause of action, or right to sue to enjoin constitutionally unlawful action, to judge-made status.<sup>136</sup>

*Armstrong's* facts were peculiar. The case involved a direct suit under the Supremacy Clause to compel compliance with state obligations under the

---

507 U.S. 163 (1993), that this approach contravened the notice pleading system that the Federal Rules of Civil Procedure establish.

131. See, e.g., Luke Meier, *Why Twombly Is Good Law (But Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709 (2012); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010). For a rare defense, see Adam McDonnell Moline, Comment, *Nineteenth-Century-Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 159 (2010).

132. See *Iqbal*, 556 U.S. at 677.

133. *Id.*

134. *Id.* at 693–94 (Souter, J., dissenting) (citations omitted).

135. 209 U.S. 123 (1908).

136. 135 S. Ct. 1378, 1384 (2015).

Medicaid Act.<sup>137</sup> In enacting the statute, Congress had not authorized private suits under the relevant provision. With Congress having elected not to create enforceable rights, the plaintiff alleged a violation of, and sought an injunction to enforce, the state's obligations under the Supremacy Clause. Injunctions to enforce the Constitution, the plaintiff argued, were constitutionally mandated. Rejecting that view, Justice Scalia's majority opinion characterized the cause of action involved in *Ex parte Young* as judge-made, reflecting the traditions of equity, and not as directly flowing from or mandated by the Constitution.<sup>138</sup>

The import of *Armstrong*'s flat holding that the Supremacy Clause does not create or mandate a right to equitable relief in cases of federal preemption of state law remains to be seen. In prior rulings, centrally including *Shaw v. Delta Air Lines, Inc.*,<sup>139</sup> the Supreme Court had upheld causes of action to enjoin state officials from enforcing state laws on the ground that they were preempted by federal statutes. Although it was possible to characterize those decisions as recognizing a broad-based cause of action to enjoin state officials' violations of the Supremacy Clause, the earlier cases also fit within a narrower equitable tradition allowing suits to enjoin legally baseless lawsuits, including those predicated on constitutionally invalid state and federal statutes.<sup>140</sup>

If cases such as *Shaw v. Delta Airlines* remain good law—and there is no reason to suspect that they do not<sup>141</sup>—then *Armstrong* may be another example of a conservative antiregulatory and anti-liability preference on the part of the Supreme Court.<sup>142</sup> In cases such as *Shaw*, a federal injunction against enforcing a state regulatory statute on grounds of federal preemption eliminates a regulatory burden. In cases such as *Armstrong*, by contrast, the Court will refuse to enjoin state officials to comply with mandates of federal statutes when Congress has not created statutory causes of action or conferred individual rights that might be enforceable in suits under § 1983. In cases of this kind, a federal injunction would enforce federal regulations, and a denial of relief effectively excuses noncompliance.

For reasons that I shall explain below, *Armstrong* was defensible on its facts. Nevertheless, it was startling to see Justice Scalia—who railed against judge-made causes of action to enforce the Constitution in the *Bivens* context—

137. See *id.* at 1382–83.

138. *Id.* at 1384.

139. 463 U.S. 85, 96 n.14 (1983) (emphasizing, in upholding injunction against allegedly preempted state statute, that “[i]t is beyond dispute that federal courts have jurisdiction to enjoin state officials from interfering with federal rights.”).

140. See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting) (arguing that no cause of action existed under the Supremacy Clause because the plaintiffs “are not subject to or threatened with any enforcement proceeding” but rather “seek a private cause of action Congress chose not to provide.”).

141. See *Armstrong*, 135 S. Ct. at 1384 (“And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.”).

142. For further explication of this point, see *infra* note 245 and accompanying text.

put equitable causes of action to enforce the Constitution in cases such as *Ex parte Young* on the same judge-made footing, but without raising any objection to judge-authorized suits for injunctions. If *Ex parte Young* stands on the same foundation as *Bivens*—which the Court now regards as problematic under the constitutional separation of powers—future cases could imaginably bring more extensive doctrinal revisions than *Armstrong* directly effects.

### *E. Provisional Assessment*

Taken as a whole, the Supreme Court's performance in shaping constitutional tort doctrine during the Rehnquist and Roberts eras reveals a methodologically untethered activism in service of the apparent goal of limiting suits to enforce the Constitution against government officials, especially in suits for damages and, more selectively, in suits for injunctions. The Court's approach has been neither originalist nor textualist, especially in its interpretations of § 1983. The Court's qualified immunity decisions and its interpretation of the Federal Rules of Civil Procedure in *Iqbal* have invited criticism as overstepping any defensible conception of the judicial role. With regard to history, the Court has shown little appreciation of the rule-of-law premises that underlay Founding-era and early nineteenth-century reliance on common law norms and traditional rules of equitable practice to hold officials accountable for constitutional violations.

Moreover, although the Court has rejected or limited large elements of the scheme of specifically constitutional tort law that began to take shape following the Civil War and emerged from *Bivens*, the Justices have shown no inclination to revert to the prevailing regime of the Founding era—which included no immunity from ordinary tort actions for executive officials—as an alternative mechanism for providing redress for official wrongdoing and keeping government officers within the bounds of law. Normatively, a majority of the Justices have set themselves against what they clearly regard as excessive and burdensome litigation and liability rules. But the prevailing majority has not so far articulated a guiding, affirmative vision of the constitutional remedies that a rule-of-law regime ought to provide. Apart from habeas corpus and nullification, the Court does not appear to have thought through the appropriate or even the necessary roles of judicial remedies within the constitutional scheme. The next two Parts embark on the needed project of normative theorizing.

## III.

### CONSTITUTIONAL TORT ACTIONS: A NORMATIVE VISION

Looking backward to the legal past and forward to the future, sound thinking about remedies for constitutional violations needs to address two questions, preferably in sequential order. The first involves normative vision: In light not only of ideals of justice and the rule of law, but also practical and fiscal constraints, how, generally, should a regime of liability and redress for

constitutional violations be structured? Second, if Congress has failed to take steps to implement significant elements of a defensible vision, what role should the federal judiciary play in recognizing rights, fashioning causes of action, and crafting immunities?

This Part addresses the first of these questions. It focuses mostly on matters of systemic design for two reasons. First, it is important to highlight Congress's powers and responsibility. Second, it will prove beneficial to have a clear picture of normative ideals before taking up issues of judicial role. Arguments about what the Supreme Court can and should do about *Bivens* or official immunity law, to take just two examples, risk heading off in the wrong direction if we do not first assess what a robustly defensible system of remedies for constitutional violations would look like.

Although the argument of this Part encompasses many elements, two themes predominate. First, analysis of constitutional tort issues should begin with the premise that constitutional rights, causes of action to enforce those rights, and immunity doctrines are practically and conceptually interconnected. All exist to protect individual and social interests. And the sometimes competing individual and social interests need to be balanced and accommodated to produce the best overall package. Although every constitutional violation should not give rise to an actionable suit for damages, suits to redress constitutional violations serve vitally important purposes. Identifying the best mechanisms for promoting those purposes requires careful thought and imagination, grounded not only in conceptual understanding and sound normative values but also in empirical evidence.

Second, in imagining the contours of an aptly designed scheme of remedies for constitutional violations, we should not feel wedded to the organizing assumptions of historical tort doctrine. Historical tort doctrine may be mismatched to current needs in a variety of ways, including in its strategy of looking to private-law principles to restrain governmental misconduct and in accepting the historic principle of sovereign immunity.

In addressing the large policy question of how best to structure a network of constitutional tort remedies, my arguments unfold in two stages. Each Section of this Part propounds and defends general principles that should guide the design of a scheme of remedies for constitutional violations. Where appropriate, I also, within each Section, advance specific recommendations for action by Congress if not the courts. Part IV will consider more specifically what the courts should do in the absence of congressional legislation.

### A. *The Equilibration Thesis*

Those charged with designing systems of remedies for constitutional violations—beyond the nullification of invalid statutes<sup>143</sup> and habeas corpus—should proceed on the analytical assumption that substantive constitutional rights, causes of action to enforce those rights, and immunity doctrines form a package, any individual element of which is potentially adjustable to preserve or enhance the attractiveness of the package overall. In offering this Equilibration Thesis,<sup>144</sup> I begin with the premise that rights exist to protect interests. As the philosopher T.M. Scanlon puts it, claims of right are “generally backed” by (1) a “claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights,” (2) a value-based claim that “this result would be unacceptable,” and (3) a “further empirical claim about how the envisaged assignment of rights will produce a different” and normatively preferable outcome.<sup>145</sup>

That framework also illuminates constitutional analysis. Adapting it to constitutional law, we can say that rights reflect interests and that which interests should be protected in which ways depends partly on enduring values, often as reflected in constitutional language, but partly also on historically contingent, instrumental reasoning.<sup>146</sup> To take a clear example, the Fourth Amendment exclusionary rule reflects an expressly strategic calculation of the costs and benefits of deterring official lawbreaking. It applies on direct review, but not on habeas corpus, when the Supreme Court believes that deterrent purposes have already been achieved adequately.<sup>147</sup>

---

143. The question of whether nullification should extend to statutes on their faces or whether rulings should be limited to statutes as applied is itself a complex one that the Justices have not thought through adequately. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011).

144. See Fallon, *Asking the Right Questions*, *supra* note 14, at 507; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006) [hereinafter Fallon, *Linkage Between Justiciability and Remedies*].

145. T.M. Scanlon, *Rights, Goals, and Fairness*, 11 ERKENNTIS 81, 89 (1977), reprinted in T.M. SCANLON, *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 26, 34–35 (2003).

146. The concept of “interests” is itself a vague one, but I mean it to refer loosely to goods, protections, and opportunities that we as citizens under the Constitution, like other reasonable and rational creatures, have good reason to care about securing for ourselves and our posterity. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 180 (1986) (grounding rights in interests); Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 94–95 (1992) (asserting that constitutional liberties are recognized to protect corresponding interests); T.M. Scanlon, *Rights and Interests*, in 1 ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN 68 (Kaushik Basu & Ravi Kanbur eds., 2008). If we conceptualize the calculations of the parties behind Rawls’s veil of ignorance as being interest-based, it becomes clear that not all of our interests are necessarily reducible to the common currency of utility or welfare: Rawls argued against, not for, utilitarianism. See JOHN RAWLS, *A THEORY OF JUSTICE* 144–53, 160–68 (rev. ed. 1999). An account of rights as reflective of interests is thus as consistent with deontological theories that recognize rights that sometimes frustrate utility maximization as it is with pervasively consequentialist frameworks that focus exclusively on the overall or average wellbeing within a community as a whole. See, e.g., ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); THOMAS NAGEL, *MORTAL QUESTIONS* 128–141 (1979).

147. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976).

Viewing constitutional rights as reflecting interests helps to explain the common phenomenon of interest balancing in constitutional law. Balancing occurs, for example, when courts, applying strict judicial scrutiny, must determine whether compelling governmental interests defeat a claim of constitutional right that would prevail otherwise.<sup>148</sup> So far as I am aware, no one has ever successfully linked the strict scrutiny formula—or many other judicial tests of constitutional validity—to the language or original history of the Constitution. In applying such tests, the Court not only engages in interest balancing, but also assumes that interest balancing is consistent with the fundamental nature of constitutional rights. Those charged with implementing the Constitution should do so with deep respect for the interests that rights guarantees reflect. But policymakers should not ignore social costs, including opportunity costs.<sup>149</sup>

Within an interest-based framework, the interconnections among substantive rights, causes of action to enforce those rights, and immunity doctrines are both pragmatic and conceptual.<sup>150</sup> The connections emerge with sharpest clarity in the relationship between constitutional causes of action and the absolute official immunity that judges and legislators have historically possessed and retain under current law.<sup>151</sup> To say that judges are absolutely immune from suits for damages based on their judicial acts and that legislators are immune from suits based on their performance of legislative functions is the

---

148. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1333 (2007) [hereinafter Fallon, *Strict Scrutiny*] (arguing that the strict scrutiny formula, in practice, requires courts to “determine whether infringements of constitutional rights, which can be more or less grievous, can be justified in view of the benefits likely to be achieved, the scope of infringement of protected freedoms, and the available alternatives.”).

149. Many of these social costs may involve harm to individual interests that the Constitution empowers the government to protect. Cf. RAZ, *supra* note 146, at 5 (“[Governments] do[] not have an interest independent of, one which is not a reflection of, the interests of its subjects.”). For example, the government has interests in maintaining national security or in providing health care to as many citizens as possible. Although these governmental interests may compete with the individual interests of some citizens—for example, their liberty interests in being free from unwanted restrictions or obligations—the stakes on the other side of the balance may also involve interests of a kind that could give rise to individual rights, such as interests in receiving adequate health care. Constitutional designers might think that they could best protect some interests by creating judicially enforceable constitutional rights but better secure others by empowering the government to enact appropriate legislation. In the sense in which I use the term, an impediment to the government’s protecting important individual interests through legislation would register as a “social cost.”

150. Further, similar interconnections exist among doctrines defining substantive rights, authorizing remedies, and regulating standing and justiciability. See generally Fallon, *Linkage Between Justiciability and Remedies*, *supra* note 144 (advancing an “equilibration thesis” to explain how courts sometimes choose which doctrine to utilize or adjust to achieve desired outcomes).

151. As *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), makes clear, immunity attaches to functions, not offices. Accordingly, judges have only qualified immunity when sued for non-judicial actions such as firing a probation officer. See *Forrester v. White*, 484 U.S. 219 (1988). Correspondingly, executive officials can claim absolute judicial immunity for actions taken in a judicial capacity. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978).



practical and conceptual equivalent of saying that there is no cause of action against judges and legislators for damages relief.

Nor should we regard it as a regrettable evil that legislators who violate the Constitution by enacting unconstitutional laws or judges who render mistaken constitutional rulings need not pay damages to the victims of their mistakes.<sup>152</sup> If the situation were otherwise, the social costs of imposing damages liability for all constitutional violations—measured in terms of costly litigation, diversions of resources, and altered incentives for legislators and judges in performing their functions—might exceed acceptable limits. And if the social costs were too high, then, in the absence of immunity doctrine, the scope of the right to sue for damages remedies for constitutional violations would presumably be cut back to exclude suits based on judges' and legislators' official actions. In other words, we should not think of the right to sue legislators and judges for damages relief as a constant and of immunity as a variable. The availability of a right to sue is as much a variable as official immunity.

The same conceptual and pragmatic points hold with respect to qualified immunity. Qualified immunity, which also operates as a limit on constitutional causes of action, is no more necessarily regrettable than absolute immunity. Once again, system designers should view official immunity, including qualified immunity, not as a regrettable necessity, but as a valuable, adaptable device for achieving the best overall regime of substantive rights, rights to sue for tort remedies, and immunity defenses.

Opposition to this conceptualization comes naturally from a traditional, tort-law-based framework for thinking about the relationship between rights and remedies and the demands of the rule of law. According to a persisting strand of thought, a necessary and sufficient safeguard of the rule of law is to hold officials to the same legal norms as everyone else, within a scheme in which every tortious wrong entitles the victim to a remedy.<sup>153</sup> Within this analytical scheme, most constitutional violations by judges and legislators fall outside the domain of tort law. Moreover, because ordinary citizens can neither legislate nor adjudicate, absolute legislative and judicial immunity may appear to pose little threat to the rule-of-law idea that officials should be held to the same legal standards as private wrongdoers.<sup>154</sup> By contrast, qualified immunity sometimes exempts

---

152. See Fallon, *Asking the Right Questions*, *supra* note 14, at 479. *But see, e.g., Harlow*, 457 U.S. at 813–14 (“The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”); Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 587 (1983) (characterizing the law of remedies as “a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy”).

153. See, e.g., Pfander, *Dicey's Nightmare*, *supra* note 7.

154. There may be some threat insofar as judges and legislators, acting within the scope of their official duties, engage in conduct that would incur tort liability absent the officials' cloak of immunity. An example might come from judicial orders that lead to legally unjustified imprisonments that would be tortious if effected by a private person. Accordingly, it is not evident to me why champions of a tort-law-based vision of the rule of law would be as untroubled by absolute judicial and legislative immunity as they appear to be. Nonetheless, there would ordinarily be other available remedies for judicial and

executive officers from liability when they engage in constitutionally impermissible actions that would potentially violate state tort law and that do not fall within a centuries-old tradition of absolute judicial or legislative immunity. For example, qualified immunity frequently bars tort or tort-like suits seeking redress for unlawful searches and seizures, detentions, and applications of deadly force.<sup>155</sup>

However serviceable a tort-law-based mode of controlling official misconduct may have been in the Founding era,<sup>156</sup> a framework built on common law concepts and categories is outdated, misleading, and potentially dangerous as a guide to thinking about constitutional and rule-of-law issues in the current day. Since the collapse of the *Lochner* era, it has been widely recognized that modern legislatures should have broad authority to displace common law assignments of private rights and duties. And just as the common law fails to provide a reliable baseline for identifying constitutionally protected rights,<sup>157</sup> a tort-law-based conceptual scheme fails to mark the categories of legal norms that most urgently require judicial enforcement against public officials for the rule of law to thrive in the modern era. Today, many of the most important constitutional norms—including those reflected in equal protection and First Amendment doctrine—have no analogues in the traditional ordering principles of private tort law. To take just the plainest example, the school segregation involved in *Brown v. Board of Education*<sup>158</sup> would not have registered as tortious at common law, nor would many infringements on free speech and religious liberty.

Twenty-first-century analysis of schemes of rights and remedies should reflect the changed legal and constitutional landscape. On the one hand, it would make no functional sense to have a regime of constitutional rights and remedies that prioritized remedies for relatively minor official torts over remedies for various forms of unconstitutional discrimination. On the other hand, there is no reason not to consider doctrines immunizing some executive misconduct from *damages* liability—just as we exempt constitutional violations by legislators and judges—as a possible mechanism for achieving the best overall package of constitutional rights and remedies.

---

legislative misconduct, including criminal appeals and habeas corpus. As a practical matter, moreover, the traditional Anglo-American system of tort remedies, as supplemented by criminal appeals and habeas corpus, seemed to serve rule-of-law values tolerably well.

155. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) (ruling on an action seeking redress from police officer who shot a suspect); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam) (holding an officer immune from liability for use of deadly force).

156. JAFFE, *supra* note 4, at 237, rejects the premise that the Diceyan model ever fit the pattern of official liability and non-liability in the United States: “The availability of suit against an officer did not flow from an established principle of ‘legal equality,’ but rather . . . was the result of a deliberate effort to protect the citizen from governmental misuse of authority.” Professor Jaffe added that “instances of official nonliability,” which unquestionably existed due to immunity and related doctrines, “may be exceptions to Dicey, but not to the common law.” *Id.* at 239.

157. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987).

158. 347 U.S. 483 (1954).

Outside of immunity law, critics of Supreme Court decisions in constitutional tort cases frequently grow caustic when they believe that perceptions of the social costs of constitutional causes of action or constitutional remedies have led the Court to narrow the reach of judicially recognized constitutional rights.<sup>159</sup> The definition of rights, critics sometimes seem to assume, should not vary with social costs, or at least not with the social costs of constitutional remedies.<sup>160</sup>

This premise may appear tempting when the Supreme Court adjusts or defines rights in ways that we disapprove. I think, for example, that the Court was wrong to read the Constitution as rejecting all possible forms of supervisory liability in *Iqbal*. Likewise, I believe it was wrong for the Court to adopt the sharply truncated definition of protected “liberty” under the Due Process Clause that it did in *Paul v. Davis*. That said, it is fallacious to maintain that the Supreme Court should not, as a general matter, take social costs into account when defining constitutional rights. Nor is it specifically objectionable for the Court to take cognizance of the social costs of constitutional tort litigation.

As even many originalists now agree, the Constitution’s language and history frequently stop short of giving determinate shape to constitutional rights.<sup>161</sup> The familiar strict scrutiny test, which the Supreme Court has devised to guide the judicial application of constitutional language that it declines to read as absolute, illustrates the point.<sup>162</sup> In order to apply strict scrutiny, courts first must identify “triggering rights,” or rights the infringement of which will trigger elevated judicial review.<sup>163</sup> As the Supreme Court occasionally makes explicit, it takes social costs into account in defining triggering rights. For example, in

---

159. See *supra* note 73.

160. See John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 (1999) (“Ever since John Marshall insisted that for every violation of a right, there must be a remedy, American constitutionalists have decried the right-remedy gap in constitutional law.”); Monaghan, *supra* note 73, at 432 (criticizing *Paul v. Davis*, 424 U.S. 693 (1976), on the grounds that it “provides an unacceptable answer to the question of the constitutional status” of an individual defamed by the government); Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194 (2006) (granting that “[t]he consequences and feasibility of granting a particular remedy” will influence the “shape of constitutional decision rules,” but denying that this amounts to a statement about “the shape of constitutional operative propositions or rights” (emphasis added)); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (“Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns . . . , it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question.”).

161. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

162. See generally Fallon, *Strict Scrutiny*, *supra* note 148 (tracing the emergence of the strict judicial scrutiny formula as a compromise between absolutism and balancing as mechanisms for defining and enforcing constitutional rights).

163. See *id.* at 1315–21.

*Washington v. Davis*,<sup>164</sup> which presented the question whether racially disparate impact is sufficient to provoke strict judicial scrutiny, the Supreme Court relied heavily on an analysis of the consequences to justify its negative answer.<sup>165</sup> The Court cited similar, consequence-based concerns in *Employment Division v. Smith*,<sup>166</sup> which ruled that facially neutral laws that nonetheless impose substantial burdens on religious exercise do not, in the absence of discriminatory intent, trigger strict judicial scrutiny under the Free Exercise Clause. Daryl Levinson has characterized the Court's reasoning in cases such as these as involving "remedial deterrence": the apprehension of the costs of remedies for a right, if the right were recognized, deters the Court from recognizing a substantive constitutional right at all.<sup>167</sup>

When we view rights and remedies as part of a package, moreover, it may sometimes be better to have more broadly defined rights with a set of partially incomplete remedies than to have individually effective remedies for every constitutional violation.<sup>168</sup> To give a pair of concrete examples, if the costs of the Supreme Court rulings in cases such as *Brown v. Board of Education*<sup>169</sup> and *Miranda v. Arizona*<sup>170</sup> had included damages remedies against school officials who had maintained racially segregated classrooms or against judges who had allowed the admission of confessions obtained without *Miranda* warnings, the Court might have felt unable to decide *Brown* and *Miranda* as it did. If so, we are better off with a package that couples decisions such as *Brown* and *Miranda* with immunity doctrines than with a package that omits immunity doctrines but would have made the Supreme Court's *Brown* and *Miranda* rulings pragmatic impossibilities.

Admittedly, a Supreme Court that grew self-conscious about its capacity to minimize the social costs of rights might use that power to hollow them out by withholding remedies in ways that undervalue the interests that rights exist to protect.<sup>171</sup> I take that risk seriously. Some decisions by the Rehnquist and

---

164. 426 U.S. 229 (1976).

165. *See id.* at 247–48 (“However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. . . . A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”).

166. 494 U.S. 872 (1990).

167. *See* Levinson, *supra* note 14, at 889–99.

168. *See, e.g.*, Jeffries, *supra* note 160.

169. 347 U.S. 483 (1954).

170. 384 U.S. 436 (1966).

171. *See, e.g.*, Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117 (2018); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504 (1996).

Roberts Courts exemplify it.<sup>172</sup> Nevertheless, an effective response to the worry about rights being gutted by judicial invocation of doctrines that limit available remedies needs to acknowledge that equilibration is not an inherent evil. It is a mechanism that can be used either wisely or misguidedly, benevolently or disingenuously.

Viewing rights, causes of action, and immunity doctrines as a package should also produce enhanced appreciation of Henry Hart's emphasis on Congress's role in designing an optimal scheme of remedies.<sup>173</sup> The task includes irreducible elements of practical and policy-based judgment. Congress could, for example, authorize damages actions against federal officials to enforce some constitutional rights but not others. In authorizing damages actions for redress of constitutional violations, Congress, if troubled by social costs, could impose liability caps.<sup>174</sup> It could also license suits for nominal damages, unimpeded by immunity doctrines, that would provide a mode of recourse by which the victims of rights violations could hold the perpetrators accountable, even though full monetary compensation would not be available.<sup>175</sup> I shall say more about the possible costs and benefits of this approach below. Overall, policymakers should think more imaginatively about how best to promote the interests that underlie constitutional rights guarantees by taking account of the full range of equilibrating strategies at their disposal.

### B. *The Diverse Functions of Constitutional Remedies*

Even and perhaps especially when viewed as parts of a package that includes other potentially adjustable elements, constitutional remedies serve three important functions. First, they provide compensation to the victims of official misconduct.<sup>176</sup> Second, they afford a mechanism for holding wrongdoers

---

172. Examples that I would assign to this category include *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), which held that qualified immunity attaches unless “every ‘reasonable official’” would have known that conduct violated the Constitution, *id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), and *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), which held that federal habeas corpus petitioners could not benefit from any legal principle announced subsequent to the time their convictions became final unless the new rule was already “dictated by precedent.” *Id.* at 301.

173. See *supra* notes 39–41 and accompanying text.

174. Cf. Goldberg, *supra* note 17, at 621–22 (2005) (defending a “civil recourse” theory of tort damages that does not always dictate the appropriate level of compensation and would tolerate some, though not all, liability caps).

175. To make nominal damages an attractive remedy for plaintiffs, Congress would almost certainly need to guarantee the payment of attorneys' fees to prevailing plaintiffs, but Congress could do that, too. For a valuable discussion of whether plaintiffs who recover only nominal damages should be eligible to recover attorneys' fees under existing statutes and Supreme Court precedent, and an argument that they generally should, see Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829 (2016).

176. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 254 (1978) (“[T]he basic purpose of a [section] 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . .”).

individually accountable to those whom they have injured.<sup>177</sup> Nominal damages awards testify to the importance of this function. When people's constitutional rights are violated, they often, and understandably, have a sense of personal injury and grievance. The law should recognize that they also have an interest in calling offending officials to account—even if that interest does not necessarily hold a lexical priority over competing interests, such as those that sometimes support immunity doctrines.

Third, through deterrent and related effects, constitutional remedies help maintain a rule-of-law regime in which officials do not stray systematically or routinely outside of constitutional bounds.<sup>178</sup> The systemic functions are most vivid in exclusionary rule cases. The Supreme Court has recurrently characterized the exclusionary rule as a deterrent remedy, not designed to vindicate personal rights of its beneficiaries.<sup>179</sup> But tort damages can serve a similar purpose in cases in which they are available.

In the case of constitutional violations, an optimal regime of official and governmental liability would—as under *Bivens* and § 1983—furnish causes of action for official misconduct that specifically violates the Constitution. As the Supreme Court recognized in *Bivens*, the alignment between state interests in remedying ordinary torts and national interests in holding officials specifically accountable for and remedying constitutional violations will often not be perfect.<sup>180</sup> Indeed, in light of the distinctive national and rule-of-law interest in identifying and remedying expressly constitutional lawbreaking, the alignment will never be perfect.

As I have suggested, however, we should not assume that a scheme of federal remedies for constitutional rights violations would include full compensation for every victim. Critics routinely pillory the Supreme Court's retreat from *Bivens*, like its expansive interpretations of official immunity doctrines, as betrayals of *Marbury*'s promise of an individually effective remedy for every violation of an individual right.<sup>181</sup> But *Marbury*, as properly interpreted

---

177. See, e.g., Wells, *supra* note 15. Although I agree with “civil recourse” theorists that it is among the purposes of constitutional tort law to provide those whose rights have been violated with an opportunity to seek some form of civil redress, see, e.g., Goldberg & Zipursky, *supra* note 15; Wells, *supra* note 15, I also believe that constitutional tort law both is and ought to be accommodating of public and private interests that sometimes compete with the goal of providing redress to the victims of rights violations.

178. See Fallon & Meltzer, *supra* note 5, at 1787.

179. See, e.g., Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016); Herring v. United States, 555 U.S. 135, 140–42 (2009) (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” (second alteration in original) (quoting United States v. Leon, 468 U.S. 897, 909 (1984))).

180. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394–95 (1971).

181. See, e.g., Bandes, *supra* note 13, at 305–11; cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 797 (1982) (White, J., dissenting) (“I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring ‘the right of every individual to claim the protection of the laws . . . .’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803))).

in the context of our tradition, made no such promise. The Supreme Court awarded no remedy to William Marbury. It is not clear that any other court would have done so either.<sup>182</sup>

Pressing their mistaken reliance on *Marbury*, critics of the Supreme Court's anti-*Bivens* and pro-immunity decisions sometimes hold up the provision of individually effective remedies for all rights violations as a requirement of the rule of law.<sup>183</sup> But this criticism misfires too. The rule of law is a complex, multifaceted ideal that legal systems either satisfy or fail to satisfy to varying degrees.<sup>184</sup> There would be a severe threat to the rule of law if officials could violate rights with impunity and reduce some nominal rights to practical nullities. But there can be a middle ground in which a legal system, such as ours, falls short of affording individually effective remediation for every official deviation from constitutional norms but nevertheless furnishes sufficient remedies—linked to a defensibly generous scheme of individual rights—to maintain a practically defensible rule-of-law regime.<sup>185</sup>

Overall, as Dan Meltzer and I once wrote:

Within a historically defensible yet normatively appealing account of our constitutional tradition, the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command. Its force may vary with the nature of the constitutional violation for which a remedy is

---

182. A state court could not have done so. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821). Nor did the lower federal courts have mandamus jurisdiction under the 1789 Judiciary Act. *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). Thirty-five years after *Marbury*, in *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court ruled that the Circuit Court for the District of Columbia was uniquely possessed of mandamus jurisdiction in actions against federal officials. But in the politically charged atmosphere of 1803, it seems uncertain, at best, that the Supreme Court would have found that any court could grant William Marbury the mandamus relief that he sought. See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 52 n.271 (2003). For an examination of the legal and political framework within which the various parties to the *Marbury* drama made their decisions, both before and after the Supreme Court's ruling, see Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in Marbury v. Madison*, 107 AM. POL. SCI. REV. 241 (2013).

183. See sources cited *supra* note 182; see also Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability at 6–7, *Almighty Supreme Born Allah v. Lynn Milling*, (No. 17-8654), 2018 WL 3388317 (U.S. July 11, 2018) (arguing that “the doctrine of qualified immunity finds itself increasingly out of step” with the dictum that “[t]he government of the United States has been emphatically termed a government of laws, and not of men” (quoting *Marbury*, 5 U.S. (1 Cranch) at 163)); Jay Schweikert, *Leading Scholars and Most Diverse Amici Ever Assembled File Briefs Challenging Qualified Immunity*, CATO AT LIBERTY (July 11, 2018), <https://www.cato.org/blog/leading-scholars-most-diverse-amici-ever-assembled-file-briefs-challenging-qualified-immunity> [<https://perma.cc/4P7S-FC57>] (describing Brief of Cross-Ideological Groups, *supra*, as “the single most ideologically and professional diverse amicus brief ever filed in the Supreme Court,” representing the shared view of organizations from the American Civil Liberties Union to Americans for Prosperity).

184. See, e.g., Fallon, *The Rule of Law*, *supra* note 4, at 9; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 43 (2008).

185. Fallon & Meltzer, *supra* note 5, at 1789.

sought. For example, our constitutional tradition recognizes a stronger interest in relief from continuing coercion—for instance, in reversing an unconstitutional conviction—than in obtaining remedies for the government’s violation of the contract clause. Whatever the weight of the individual interest, however, the remedial calculus also must include [a] second principle, which demands an overall structure of remedies adequate to preserve separation-of-powers values and a regime of government under law.<sup>186</sup>

### C. Causes of Action to Seek Redress for Constitutional Violations

In considering when a well-designed legal system would provide causes of action for relief from constitutional violations by the government and its officials, we should distinguish between suits for injunctions and suits for damages. But policymakers should not restrict their deliberations to these traditional tort remedies.

#### 1. Causes of Action to Sue for Injunctive Relief

Injunctions against ongoing official violations of the Constitution and threatened enforcement of unconstitutional laws play an indispensable role in maintaining the rule of law. The Supreme Court recognized as much in both *Ex parte Young* and *General Oil Co. v. Crain*, which affirmed the necessity of injunctions when no other remedy could reasonably alleviate ongoing, otherwise irreparable harms. Both cases involved threatened enforcement of allegedly unconstitutional statutes by draconian penalties. In both, the Court recognized that the threatened sanctions would chill the exercise of constitutional rights, possibly draining the Fourteenth Amendment of its intended protective force, in the absence of anticipatory judicial relief.

*Young* and *General Oil* were once thought to mark a watershed in the development of a regime of constitutional remedies distinctively crafted to protect constitutional rights.<sup>187</sup> At the very least, they epitomize two gradual transitions. One involves a movement from the common law of torts to constitutional norms to define the standards to which the rule of law most urgently requires official adherence. The second is from damages to equitable remedies as the more indispensable safeguard of constitutional rights. Since the emergence of the modern regulatory state, the greatest threat to constitutional rights comes from statutes and regulations that are enforceable through criminal and civil penalties, not isolated acts of traditionally tortious lawlessness by individual officials. *Brown v. Board of Education*,<sup>188</sup> the one-person, one-vote cases,<sup>189</sup> and challenges to statutes that infringe First Amendment rights have all

---

186. *Id.*

187. See HART & WECHSLER, *supra* note 103, at 927.

188. 347 U.S. 483 (1954).

189. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).



depended on federal injunctions that directly enforce constitutional norms, not damages remedies or common-law measures of tortious misconduct.

Even in an ideal remedial regime, rights to injunctive relief for constitutional violations would not be absolute or untrammelled. Standing and related doctrines reasonably demand a clear framing of disputed issues, including participation by a concretely affected challenger.<sup>190</sup> In a few cases, the traditional requirement that a court of equity must balance competing public and private interests could also preclude immediate injunctive relief.<sup>191</sup> In circumstances that involve statutory rather than constitutional challenges to regulations, whether to permit pre-enforcement suits for injunctions could depend on a complex analysis of competing interests.<sup>192</sup> That said, Professor Hart's reminder that Congress often and perhaps typically has wide latitude to substitute one constitutional remedy for another should not blind us to rule-of-law imperatives of the present day. In paradigmatic cases of ongoing constitutional violations, including those effectuated by the threatened enforcement of unconstitutional laws, it would be intolerable under rule-of-law principles not to provide pre-enforcement judicial redress in the form of injunctions or declaratory judgments. As of now, further legislation is not necessary, but both rule-of-law and constitutional principles place limits on what Congress could do permissibly if it were otherwise motivated to reduce the availability of injunctive and declaratory relief.

## 2. *Causes of Action to Sue for Damages*

Causes of action for damages based directly on violations of the Constitution should be the norm for tort-like constitutional misconduct by government officials. In offering this prescription, I use the term "tort-like constitutional misconduct" advisedly. I do not mean to re-embrace the ordinary law of torts as an apt mechanism for enforcing the Constitution. Rather, as a first approximation, I intend to signal the importance of damages remedies for constitutional wrongdoing that distinctively targets identifiable individuals and does not involve judicial or legislative action or the enforcement of generally written statutes by prosecutors.

For reasons more of policy than of principle, historical doctrines that have precluded suits for damages against legislators acting in their legislative

---

190. See HART & WECHSLER, *supra* note 103, at 75.

191. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (explaining the four-part test for a preliminary injunction and emphasizing that courts must consider the effect on each party and give "particular regard for the public consequences in employing the extraordinary remedy" (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (explaining the same for permanent injunctions); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1039–41 (2015) (arguing that discretion is a "theme in the Court's [recent] treatment of equitable principles," and noting that this view is "deeply rooted in the tradition of equity").

192. See, e.g., Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 235–36 (1994).

capacities and judges in their judicial capacities seem to me to deserve acceptance. To begin with, remedies other than tort damages are available to those who suffer harm from the enactment of unconstitutional statutes and from erroneous judicial rulings on constitutional issues—even if they do not compensate for all of the costs that the victims of rights violations incur. These remedies include dismissals of criminal prosecutions under unconstitutional statutes, suits to enjoin such statutes' enforcement, and appeals of mistaken lower court rulings. Although these remedies fail to provide full compensation for harms incurred, they offer partial redress. In addition, governmental compensation for the costs imposed by unconstitutional statutes and judges' mistaken constitutional rulings would drain available resources for programs pursuing other worthy, possibly urgent, social goals, possibly including provision of good education to children, better health care to the poor, or improved living conditions to those in prisons and other state facilities. Indeed, if either governments or judges had to provide full compensation for every lower court ruling that appellate judges deemed to have violated someone's constitutional rights, appellate judges might grow more hesitant to reverse lower court rulings than they are now.

Accepting absolute legislative and judicial immunity, my reference to a category of "tort-like constitutional misconduct" seeks to exclude paradigmatically legislative and judicial action, even when it violates the Constitution, but it is not limited by common law tort doctrine. It would include, for example, discriminatory conduct directed at particular individuals and infringements of the free speech rights of public employees. I assume that most constitutional violations committed by executive officials not performing judicial, legislative, or prosecutorial functions would fall within my loose category of tort-like misconduct.

All of the values that have historically supported constitutional remedies point to the conclusion that causes of action for damages should normally exist within this residual category. In many (though not in all) cases, injunctive relief would not be available. Standing to sue for injunctions typically requires a significant threat of future harm to a particular plaintiff. Absent such a threat, the Supreme Court held in *Los Angeles v. Lyons*, past injury will not suffice.<sup>193</sup> In my view, *Lyons*'s standing rule reflects an equilibrating strategy: viewing injunctions that would intrude on the day-to-day operations of government agencies as potentially disruptive and excessively costly, the Court deployed standing doctrine to preclude such injunctions except in cases involving significant threats to specifically identified individuals, even when alleged governmental practices risk violating the rights of other, not-yet-identifiable

---

193. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (concluding that victim of police chokehold lacked standing to seek injunctive relief against the practice without showing that he personally was likely to be harmed again).

people.<sup>194</sup> I have criticized *Lyons* elsewhere.<sup>195</sup> But if we accept its standing holding as a provisional fixed point, damages remedies become vitally important in cases in which *Lyons* and other, similar decisions would bar injunctive relief. In such cases, damages perform an important function not only in furnishing individual redress, but also in deterring official misconduct that otherwise might occur in the future. The threat of damages may also encourage better training and supervision of government personnel.

Obviously, however, there are competing considerations, which have driven the development of official immunity, as well as other doctrines limiting recovery for constitutional violations. First, unanticipated drains on the public fisc could upset budgetary planning and withdraw resources from other needful programs. Second, there is a worry about frivolous and distracting litigation. Third, to echo a point made earlier, we have to think about the social costs that would accrue if prospects of retrospective damages liability deterred courts from expanding the recognized scope of constitutional rights. Professor Jeffries' example of *Brown v. Board of Education* makes the point vividly.<sup>196</sup> If damages liability to all past victims of school segregation had been an entailment of a decision for the plaintiffs, the Supreme Court might well have ruled differently, possibly awaiting legislative action by Congress. One might counter that the era of revolutionary constitutional holdings such as those in *Brown* and *Miranda* has concluded. But the mid- and long-term future are unknowable. Even in the present, moreover, judges might hesitate to award injunctive relief in institutional reform suits—involving, for example, the conditions of confinement of prison inmates<sup>197</sup> or detainees in facilities for those with psychological disturbances or mental retardation—if the price implicitly included damages awards to all those adversely affected.

In light of the competing concerns, the basic approach adopted in *Harlow v. Fitzgerald* strikes a judicious balance: officials (or their employers) should be required to provide full financial compensation for tort-like acts that violate clearly established constitutional rights, but not for actions that they reasonably might have thought both constitutionally permissible and appropriate to protect the public interest. Although it is intolerable for officials to flout settled constitutional norms, not every adjudicated violation is morally culpable, nor should every public-spirited testing of constitutional limits be deterred.

In imagining a better-designed remedial regime, we should also recall that the choice is not always between full compensatory damages and nothing. Interests in allowing victims to hold those who violated their rights accountable for breaches of constitutional norms frequently retain potency even if full,

---

194. See Fallon, *Linkage Between Justiciability and Remedies*, *supra* note 144, at 649–51.

195. See *id.* at 698–702; Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984).

196. See Jeffries, *supra* note 160.

197. See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011).

compensatory liability is ruled out. Accordingly, Professors Pfander and Wells, among others, have proposed that Congress should remove the qualified immunity bar to suits seeking nominal damages for past constitutional violations.<sup>198</sup> This approach has much to commend it. If accompanied by awards of attorneys' fees to prevailing plaintiffs, it would promote accountability and redress as well as occasion judicial rulings that would clarify the law for the future.

There is, however, a further factor to be considered. *Harlow* worried not only about the possible social costs of damages awards, but also about the costs and distractions of discovery in actions that ultimately prove unfounded.<sup>199</sup> The question of how much significance to attach to those costs has an obvious empirical dimension. According to a study by Professor Joanna Schwartz, qualified immunity defenses seldom succeed in pre-discovery motions to dismiss.<sup>200</sup> If this finding is correct and generalizable, allowing suits for nominal damages should not bring about a significant increase in the discovery costs and intrusions on official time that insubstantial suits can impose.

As Professor Schwartz acknowledges, however, her research did not test the possibility that lawyers' screening decisions about which suits to file, often on a contingent-fee basis, might reflect *Harlow*'s limitation of recovery to violations of clearly established rights.<sup>201</sup> And whatever the current situation, screening effects will likely increase over time as experience instructs repeat-players on the potency of the qualified immunity defense. If a significant screening effect exists, then allowing nominal damages recoveries in suits not involving clearly established rights would increase the number of *Bivens* and especially § 1983 actions, with attendant costs as well as benefits. As presently informed, I would opt for more opportunities to achieve limited redress and to clarify the law for the future—a systemic good associated with the ideal of the rule of law. But more reliable information about litigation effects could require a rethinking of this conclusion. For now, the point is that a well-designed system of constitutional remedies would include elements not found in the traditional common law of torts.

When thinking about partial remedies for victims of constitutional violations, we should also take note of the costs imposed by legislative and judicial action that violates constitutional rights. Suppose Congress or a state legislature enacts an unconstitutional statute that purports to criminalize conduct, such as free speech, that a court subsequently holds to be constitutionally

---

198. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011); Wells, *supra* note 15.

199. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

200. See Schwartz, *How Qualified Immunity Fails*, *supra* note 117, at 9–10, 48. Among other possible causes, Professor Schwartz suggests that it may often be necessary to establish the facts before determining whether an official reasonably should have known that alleged conduct would violate clearly established rights. *See id.* at 53.

201. *See id.* at 50–51.

protected. Even if a court ultimately rules a statute unconstitutional, the enactment may impose costs on parties who must either adjust their conduct to avoid prosecution or pay legal fees to mount a constitutional challenge. Should costs such as these require compensation? Or suppose a judge rules incorrectly on a constitutional issue at trial. The judge's error necessitates a costly appeal. Should there be a cause of action, either against the judge or the government, to recover resulting costs?

Our tradition, through its longstanding recognition of absolute legislative and judicial immunity from damages liability, and its more recent provision for prosecutorial immunity, might appear to reflect an implicit assumption that there are some costs of constitutionally forbidden action that neither the government nor its officials should have to absorb, including those that accrue from legislative enactments of invalid statutes. But there can and sometimes should be halfway measures. For example, as a matter of policy rather than constitutional mandate, Congress has authorized the payment of attorneys' fees to plaintiffs who win civil judgments that challenge unconstitutional laws.<sup>202</sup> Congress could similarly pay attorneys' fees for defendants in civil or criminal cases who prevail on constitutional grounds.

In my view, the most appropriate response to constitutional violations by legislators acting in their legislative capacities (by enacting unconstitutional statutes), judges in their judicial capacities (by ruling erroneously on constitutional issues), and prosecutors in their prosecutorial capacities (by attempting to enforce unconstitutional statutes) would be governmental reimbursement of the reasonable costs of successful litigation to vindicate constitutional rights.<sup>203</sup> Congress should act to make reasonable reimbursement (which would not necessarily include multimillion dollar charges by law firms to large corporations) available to prevailing private parties in constitutional litigation where it is not available already. Beneficiaries should include those who succeed in constitutional defenses against the enforcement of invalid statutes and those who successfully appeal from constitutionally mistaken

---

202. A number of statutory provisions authorize the award of attorneys' fees in particular kinds of actions against the United States. *See, e.g.*, JOEL P. BENNETT, WINNING ATTORNEYS' FEES FROM THE U.S. GOVERNMENT (rev. ed. 2011); ROBERT L. ROSSI, 1 ATTORNEYS' FEES (3d ed. 2018)). In suits against state officials under § 1983, the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988, provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

203. Whereas judicial and legislative immunity have attracted relatively little criticism, prosecutorial immunity is highly controversial, and the issues that it presents are admittedly troubling. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (2005) (arguing that neither history nor considerations of policy lend support to absolute prosecutorial immunity); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509 (2011) (asserting that current law does not sufficiently deter prosecutorial misconduct); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537 (2011) (finding too little oversight of prosecutors).

judicial rulings in either criminal or civil proceedings brought by the government.<sup>204</sup>

#### D. Sovereign Immunity and Entity Liability

Our tradition has relied principally on suits against government officers, rather than the government itself, to remedy and deter official lawbreaking. A better-designed system would hold the government responsible for the wrongs committed by its officials while acting within the outer perimeters of their duties.<sup>205</sup> In systems of private-law rights and remedies, we largely rely on invisible-hand principles, which assume that if people and businesses seek to advance their own welfare, the pursuit of private economic benefit will normally have socially desirable consequences.<sup>206</sup> With the government and those who act on its behalf, matters are different. We hope and expect that public officials will internalize the values that their offices exist to serve and that they will act accordingly. In cases in which rights are not clearly established, selfless action in the public interest may involve speculation and risk-taking about what a court might later decide. Absent indemnification, overdeterrence of official action to protect public interests would likely occur. Moreover, depending on the available schemes of immunity and indemnification, individual officer liability could be unfair to the officer in many instances. Of equal significance, a pattern of official violations of constitutional norms would raise worries that inadequate training or supervision was at least partly responsible. All of these considerations militate in favor of a system in which governmental entities are subject to liability (if anyone is liable in damages) for constitutional violations committed by their officials.

The qualification regarding whether anyone is liable is important. Above I defended the rough outlines of the modern law of official immunity. Immunity doctrines could easily be reframed as limitations on the causes of action available to victims of constitutional violations who wish to seek redress. For example, instead of saying that officials have qualified immunity unless they violate clearly established rights, we could say that plaintiffs have a cause of action to seek damages for violations of clearly established law, but not for violations of rights that were not clearly established at the time of a defendant's alleged conduct. By proposing entity liability, I do not mean to suggest that governmental employers should be liable for their employees' constitutional violations in all cases, but only on the same terms as the employees would

---

204. *But cf.* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683 (2013) (arguing that constitutional violations are frequently no more harmful than, and should not get favored treatment compared with, other legal violations).

205. This proposal largely follows that of PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

206. *See, e.g.*, Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1418–25 (2010) (providing an overview of the invisible-hand explanations generally proffered as justifications for various legal and political institutions).

themselves be liable if they were suable parties. In other words, government defendants should be able to invoke the functional equivalent of what is now denominated as official immunity. This restriction should stop my proposal from putting public treasuries recklessly at risk.

Recent empirical work, again by Professor Schwartz, indicates that even in the absence of a legal mandate, governmental entities normally, even if not always, indemnify police officers for tort judgments against them based on their official conduct.<sup>207</sup> If that finding generalizes to other officials, then adoption of a formal system of entity liability should not have a huge impact on governmental outlays based on their officials' constitutional violations. Nevertheless, the formal change should have welcome effects. Even if most governmental bodies indemnify their officials for adverse constitutional tort judgments, not all of them do. Insofar as compensation of victims is a goal, governmental bodies are better situated than individual officers to provide it. And insofar as indemnification happens anyway, it would be better to dispel confusion about where financial responsibility lies. As matters now stand, both voters and jurors may be confused or even misled about who will bear the burden of a damages award.

Entity liability should also have desirable consequences regarding the structure of incentives that governmental bodies and their policy-making officials confront in hiring, training, and promoting employees. Increased public awareness that official misconduct costs taxpayer money should bring pressure to bear for public agencies to hire and promote carefully and to train employees more assiduously. Admittedly, arguments that governmental liability would have good incentive effects include a speculative aspect.<sup>208</sup> Daryl Levinson has argued that public officials respond more to political than to standard economic incentives.<sup>209</sup> In addition, in an empirical examination of § 1983 actions against police and police departments in contexts in which the departments indemnify their officers, Professor Schwartz found little evidence that damages judgments significantly affected police operating budgets or otherwise altered relevant incentives.<sup>210</sup> In a nearly contemporaneous study, however, Professor John Rappaport reached a more optimistic conclusion that insurance providers

---

207. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter Schwartz, *Police Indemnification*].

208. See, e.g., Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (1987); see also David J. Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183 (2005) (arguing that nineteenth-century common law principles call for respondeat superior liability in § 1983 actions against municipalities).

209. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

210. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (reporting a survey of one hundred law enforcement agencies in which well over half felt no direct budgetary implications from judgments and settlements because the costs were absorbed by insurance or by jurisdiction-wide risk-management funds, for example).

frequently impose training and oversight obligations on police departments as conditions of coverage or pricing.<sup>211</sup>

Given the mixed evidence, we should perhaps not anticipate that transparent governmental liability would optimize training and supervision of government employees, but we could dare to hope for improvement. At the least, governmental liability would relieve fears that officials may be excessively chilled in the performance of their duties by threats of personal liability—a recurring theme in the Supreme Court’s official immunity cases.<sup>212</sup> Nor should governmental liability create undue risks of moral hazard. Under a regime of entity liability, governments could easily establish separate penalties for misbehaving officials or subject them to personal liability for malicious misconduct.

In light of all of these considerations, Congress should enact necessary statutes to make the federal government, the states, and local and county governments liable for their officials’ constitutional violations (to the extent that causes of action to remedy those violations exist and that other barriers to suit do not apply). Congress has the authority to waive the sovereign immunity of the United States and to make the government the only suable defendant in suits alleging official misconduct. Indeed, it has already done so on an impressively broad scale, including under the Federal Tort Claims Act<sup>213</sup> (FTCA), initially enacted in 1946, which permits private parties to recover damages from the United States for most nonconstitutional torts committed by federal employees in the course of their official duties. As amended by the Westfall Act,<sup>214</sup> the FTCA makes the government the exclusive defendant in FTCA actions and otherwise precludes actions against federal officials under state tort law.<sup>215</sup>

Congress should further amend the FTCA to authorize suits to recover for constitutional violations. In its current form, the FTCA predicates liability on

---

211. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017).

212. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (“[The] qualified immunity defense . . . reflect[s] . . . ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’” (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978))).

213. 28 U.S.C. § 1346(b) (2012).

214. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679 (2012)).

215. The FTCA is subject to significant exceptions. Among the most important are those that apply to acts involving the performance of a “discretionary function” and to acts involving the execution of statutes or regulations, “whether or not . . . valid.” 28 U.S.C. § 2680(a) (2012). Another exception applies to injuries that arise out of military service. Further, significant exceptions apply to “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,” to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” and to “[a]ny claim arising in a foreign country.” *Id.* § 2680(h), (j), (k). The effect of these exceptions is to preclude official liability under either the FTCA or—because the Westfall Act makes the FTCA an exclusive remedy—under state tort law. See PFANDER, CONSTITUTIONAL TORTS, *supra* note 34, at 102–03.



“the law of the place [which is typically a state] where the act or omission occurred.”<sup>216</sup> That reliance on state law made sense at the time of the FTCA’s initial enactment in 1946. The Supreme Court had decided *Erie Railroad Co. v. Tompkins*<sup>217</sup> only eight years earlier. There was no federal common law of torts. In addition, most of the Bill of Rights had not yet been incorporated against the states. Many of the most important extensions came later, during the constitutional rights revolution that occurred under the Warren Court.<sup>218</sup> Following that burgeoning of constitutional rights jurisprudence, the FTCA’s dependence on state law as a measure of federal official lawbreaking borders on the archaic. The *Bivens* approach of basing liability directly on constitutional violations, when they occur, is much preferable. It establishes specific liability for and provides redress of recognized constitutional violations. Congress could and should adopt that approach through an amendment of the FTCA.<sup>219</sup>

Apart from remedial schemes provided by state law, state officials’ liability for constitutional violations depends on § 1983, under which the Supreme Court has held that states are not suable persons<sup>220</sup> and that local and county governments are not subject to liability for their officials’ constitutional violations absent proof of direct causal responsibility.<sup>221</sup> Congress could, and should, reverse both of these rulings by statutory amendment. Insofar as constitutional violations are concerned, the Court held in *Fitzpatrick v. Bitzer*,<sup>222</sup> and substantially affirmed in *United States v. Georgia*,<sup>223</sup> that Congress can abrogate the states’ sovereign immunity from suit if it chooses to do so. Cities and counties have no sovereign immunity to begin with.<sup>224</sup>

In its decisions involving state sovereign immunity, the Supreme Court has insisted that for states to be subjected to unconsented suits affronts their

---

216. 28 U.S.C. § 1346(b)(1).

217. 304 U.S. 64 (1938).

218. See, e.g., Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 9 (1993).

219. According to PFANDER, CONSTITUTIONAL TORTS, *supra* note 34, at 58–59, the government already assumes liability for some *Bivens* claims by structuring settlements so that suits pressing both FTCA and *Bivens* claims are formally settled, and paid by the government out of the federal Judgment Fund, on the FTCA ground alone.

220. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989).

221. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

222. 427 U.S. 445 (1976).

223. 546 U.S. 151 (2006).

224. *Lincoln Cty. v. Luning*, 133 U.S. 529 (1890); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977); *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189 (2006).

dignity.<sup>225</sup> The notion of state “dignity” is not easy to parse.<sup>226</sup> States are not the kinds of entities that can suffer embarrassment in any psychologically recognizable sense. State sovereign immunity decisions have also worried about disruptions of states’ finances if they were subjected to large, unforeseeable liabilities.<sup>227</sup> It would be better to respond to that perceived problem with a more narrowly tailored solution. Consistent with arguments offered above, Congress could, and should, limit states’ liability for their officials’ constitutional violations to cases involving breaches of clearly established law. Either alternatively or in addition, Congress could consider liability caps.

### E. Heightened Pleading Requirements

Whether a well-designed legal system would adopt stiff pleading requirements as devices to screen out frivolous constitutional tort actions is a hard question. The Supreme Court believes that many frivolous actions are brought.<sup>228</sup> The costs of legal fees and the burdens of discovery can be great. The qualified immunity rule allowing the dismissal of suits that do not plead a violation of clearly established law constitutes a partial response to these considerations. But it is only a partial response, incapable of catching many suits that involve frivolous factual allegations. Armchair analysis cannot determine how serious this problem is or how much heightened pleading requirements could alleviate it. A decision about elevating pleading requirements should depend on empirical realities, some of which may be ascertainable, and projections based on relevant facts.<sup>229</sup> But system designers should proceed judiciously. Modern research in cognitive psychology strongly suggests that asking judges to gauge the plausibility of factual allegations based on their personal judgment and experience—as the Supreme Court did in *Iqbal*—creates

---

225. See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *Alden v. Maine*, 527 U.S. 706, 709 (1999) (“Immunity from suit in federal courts is not enough to preserve that dignity, for the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum.”).

226. For critical discussion, see Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038–42 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1960–62 (2003); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7 (2003).

227. See, e.g., *Alden*, 527 U.S. at 706.

228. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982); *id.* at 827 (Burger, C.J., dissenting); *Butz v. Economou*, 438 U.S. 478, 508 (1978).

229. See Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1622 (2012) (defending *Iqbal* (and the prior decision in *Twombly*) as sensibly seeking “to recalibrate plaintiffs’ discovery rights in light of the exponential increases in discovery costs that have developed in the years since the Federal Rules were first promulgated in 1938.”).

too large a risk of bias.<sup>230</sup> Absent a retrenchment by the Court, Congress should overrule that aspect of the *Iqbal* decision by statute.

#### IV.

##### ISSUES OF INSTITUTIONAL AUTHORITY AND THE JUDICIAL ROLE

Holding in mind the normative ideals and proposals that Part III laid out, this Part proposes revisions of current doctrine that the Supreme Court ought to effectuate, even absent action by Congress. My argument unfolds in two stages. I first articulate general principles for thinking about the judicial role in crafting remedies for constitutional violations, then develop concrete suggestions for doctrinal reform.

##### A. *The Judicial Role*

Although I cannot delve deeply into issues of constitutional theory and statutory interpretive methodology, I should lay bare the guiding principles on which my specific recommendations depend. It will also expedite further analysis for me preliminarily to identify and scotch four familiar fallacies about the nature of the judicial role in recognizing causes of action and fashioning remedies for constitutional violations.

##### 1. *Framing Assumptions and Principles.*

The Justices of the Supreme Court cannot simply rewrite the law of constitutional remedies to their own normative specifications. They must abide by applicable norms of constitutional and statutory interpretation and principles of stare decisis. But those norms—even though they mark many cases as “easy” ones<sup>231</sup>—are vague, indeterminate, or contestable in their application to some questions, characteristically including issues disputed in the Supreme Court.

My most important assumption about the nature of the judicial role—for which I have argued elsewhere<sup>232</sup>—follows from this crude division of the terrain of constitutional law between clear and more or less contestable cases. In resolving both disputed substantive questions and controverted issues about the scope of judicial power, the Supreme Court must simultaneously look backward and forward. It must look backward to determine what past legitimate authorities—including the Constitution and federal statutes—have established. The Court derives its legitimate authority from the Constitution and widespread acceptance of the Constitution as valid law. But insofar as the Constitution, relevant statutes, and standards of legal interpretation are vague or indeterminate, the Court must look forward, to ascertain which legally eligible decisions would

---

230. See Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1786–89 (2014) (criticizing “plausibility pleading” in light of psychological research on cognitive biases).

231. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 408–09 (1985).

232. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 127–32 (2018).

establish the best law for the future.<sup>233</sup> The Court's legitimacy in the normative sense—its entitlement to respect and obedience—depends partly on its characteristically making good decisions in resolving reasonably disputed legal questions.<sup>234</sup> Sometimes conclusions about the best understanding of the judicial role will make it impossible for the Court to do what it would be best for Congress to do, as discussed in Part III. In some instances, however, it will be either necessary or appropriate for the Court to determine which outcome would be best among the array of substantive options open to it. In these cases, the normative arguments that were developed in Part III will bear on what the Court ought to do, even though other constraints apply and may sometimes control.

## 2. *Four Fallacies Rejected.*

Many factors can sometimes constrain the Supreme Court from implementing the Equilibration Thesis in particular cases. These include prior case holdings, doctrinal structures, reliance interests, demands for reasoned consistency, and related considerations of judicial role. Upon analysis, however, other purported constraints prove chimerical. In particular, the Court should reject the siren call of four familiar fallacies about the judicial role in shaping remedies for constitutional rights violations.

Two of those fallacies were addressed in Part III, and I repeat their refutations here solely for emphasis. First, controlling, practice-based norms do not require courts to act on the premise that every constitutional rights violation requires an individually effective remedy, especially if the concept of an effective remedy implies full compensation for past harm suffered. Second, it is equally fallacious to think that the availability of remedies for constitutional violations, including the traditional tort remedies of damages and injunctions, is always a matter of constitutional indifference. The Constitution requires sufficient remedies to keep government officials generally within the bounds of law. Sometimes, as in *General Oil Co. v. Crain*, the requisite remedies are injunctions.<sup>235</sup> There may even be cases where the Constitution requires damages or comparable financial recompense.<sup>236</sup>

Third, beyond constitutionally mandated remedies, it is wrong to think that courts can have no policy-making role in upholding causes of action not

---

233. *See id.* at 129–30.

234. *Cf.* Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1035 (2006) (“It seems implausible to think that one can be a legitimate authority however bad one is at acting as an authority.”).

235. *See supra* Part III.C.1.

236. *See, e.g.*, *Reich v. Collins*, 513 U.S. 106 (1994) (affirming a constitutional right to a refund of unconstitutionally collected taxes); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that the Takings Clause mandates payment of just compensation for regulatory takings in cases not involving sovereign immunity). Caution is in order because subsequent cases have spoken more narrowly or equivocally. *See HART & WECHSLER, supra* note 103, at 880.

authorized by Congress. Our tradition has always depended on federal judicial lawmaking and equitable discretion in recognizing rights to sue for damages and injunctive relief from constitutional violations.<sup>237</sup>

Fourth, if it is a mistake to embrace a rigid version of textualism as a general approach to statutory interpretation—as I believe to be the case<sup>238</sup> but shall not pause to argue here—it is equally mistaken to insist that courts should adhere to a narrow textualism in suits seeking redress for constitutional violations brought under § 1983. I apprehend inconsistency when Justices who lecture about separation-of-powers reasons to leave decisions about damages remedies to Congress in *Bivens* cases then expand immunity doctrines to diminish governmental and official liability (rather than leaving it to Congress to do so) in damages actions that Congress has authorized. But if the Justices err in the latter cases, it is not by failing to adhere to a sufficiently rigorous brand of textualism. Among the factors that bear consideration, principles of stare decisis pose strong challenges to textualists and non-textualists alike—a consideration that I shall specifically discuss below in connection with § 1983.

### B. Proposed Revisions of Current Doctrine

In considering the Supreme Court’s proper role in shaping or reshaping the doctrines that Parts I and II laid out, this Section largely tracks the issues that Part III discussed in sketching normative ideals, but not always in the same order. I first review, and propose judicial adjustments of, doctrines involving the award of injunctive and damages remedies for constitutional violations, including immunity doctrines. This Section also advocates the scaling back of heightened pleading requirements in constitutional tort action.

#### 1. Causes of Action to Seek Redress for Constitutional Violations

In considering the wisdom and justifiability of the Supreme Court’s practices in cutting back on suits to redress alleged constitutional violations, it is important to distinguish—but also to align next to one another—suits for injunctions and suits for damages. Recent decisions go wrong with respect to both. Reforms are therefore in order.

##### a. Injunctive Remedies: *Ex parte Young* and *Armstrong*

Prior to the recent decision in *Armstrong v. Exceptional Child Care Center*, no reason would have existed for the Supreme Court to effect significant changes in current law governing the availability of injunctions against constitutional

---

237. See, e.g., JAFFE, *supra* note 4, at 336 (terming it “our common law, and in a lesser measure a corollary of our constitutions” that “an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity”); Woolhandler, *The Common Law Origins*, *supra* note 38, at 82.

238. See Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).

violations. Under *Ex parte Young*, courts routinely grant injunctive relief to plaintiffs who satisfy traditional requirements for the exercise of equity jurisdiction, including either ongoing irreparable injury or imminent threat of future injury. In suits against state officials, § 1983 provides statutory authorization for injunctions against constitutional misconduct.<sup>239</sup> *Young* establishes that sovereign immunity almost never bars actions seeking prospective relief. Congress has waived sovereign immunity in federal court suits against the United States seeking relief other than money damages.<sup>240</sup> In addition, the Supreme Court has recognized that the Constitution sometimes requires injunctive relief in the absence of other effective remedies.

In the view of some, *Armstrong* partially unsettled the prior, longstanding doctrinal equilibrium.<sup>241</sup> That view depends on the premise that the Constitution mandates the traditional *Ex parte Young* cause of action. *Armstrong* held to the contrary.<sup>242</sup>

*Armstrong*'s account of the origins of the *Ex parte Young* cause of action in traditions of equity may be literally accurate, but it is also potentially misleading, due to the Constitution's demand for adequate remedies to keep the government within the bounds of law. There are some cases, *Young* among them, in which injunctions respond to a constitutional imperative. In an appropriate case, the Supreme Court should clarify the constitutional principles that provide *Ex parte Young*, like *General Oil Co. v. Crain*, with deeper, more robust foundations than equitable traditions that either Congress or the federal judiciary could reject. In particular, the Court should affirm that the Constitution mandates an adequately effective scheme of remedies to stop constitutional rights from being demoted to precatory status. The Court should also recognize explicitly that the Constitution presupposes the existence of—rather than relying exclusively on Congress to provide—enforcement mechanisms, which have always included judge-crafted remedies for constitutional violations.<sup>243</sup>

Despite *Ex parte Young*'s quasi-constitutional status, *Armstrong* was at least defensible, and I believe rightly decided, on its facts. As Justice Scalia emphasized in his opinion for the Court, the Necessary and Proper Clause confers significant congressional discretion in determining how to enforce

---

239. 42 U.S.C. § 1983 (2012) (providing only limited exceptions to the availability of injunctive relief).

240. 5 U.S.C. § 702, as amended by 90 Stat. 2721 (1976) (“An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.”).

241. See *supra* notes 136–138 and accompanying text.

242. *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015) (“The ability to sue to enjoin unconstitutional actions . . . is the creation of courts of equity . . . . It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.”).

243. See Fallon & Meltzer, *supra* note 5, at 1786–91.

federal statutes.<sup>244</sup> In light of that discretion, the Court should not read the Supremacy Clause as generating a cause of action to enforce all federal spending-related mandates to state officials, regardless of Congress's preference concerning private suits for injunctions. The choice about whether and when to authorize private suits to enforce spending directives should reside with Congress.<sup>245</sup>

*b. Damages Remedies.*

Under current doctrine, the Supreme Court approaches questions about the availability of damages remedies for constitutional violations in two stages. It first inquires whether the plaintiff has a judicially cognizable cause of action. If so, the Court asks next whether official immunity doctrine furnishes a valid defense. The Court should correct recent mistakes at both stages.

*i. Bivens and Related Questions*

The Supreme Court should partially reverse its sharp retreat from the *Bivens* doctrine, as epitomized in *Ziglar v. Abbasi*. The Court's intimations to the contrary notwithstanding, *Bivens* lay well within the federal judiciary's traditional, common lawmaking power. The analogy to *Ex parte Young* is strong, as are analogies to the exclusionary rule and other judge-made remedies for constitutional violations, including mandates to state courts to entertain damages

---

244. *Armstrong*, 135 S. Ct. at 1383–84.

245. I agree with Henry Monaghan that it is mysterious why plaintiffs should have causes of action in cases such as *Shaw v. Delta Airlines* if not in cases such as *Armstrong*. See Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1828–29 (2016). Normally, a cause of action exists to protect a substantive right or entitlement. Accordingly, before turning to the question whether a plaintiff has a cause of action, a court must determine what right the plaintiff seeks to enforce. In *Armstrong*, it is tempting to say that because the Medicaid Act created no right in the plaintiffs, they had no substantive right for the Supremacy Clause to protect and therefore no right (or cause of action) to sue. But in *Shaw*, too, it is hard to find a statutory foundation for the substantive right that the Supreme Court upheld the plaintiffs' cause of action to assert. It is hard to read a federal regulatory statute as creating a right in regulated parties not to be further regulated by state law. If the Court is prepared to read regulatory statutes that preempt state law as creating "rights" against the enforcement of state law, the Court's practice would exemplify what I referred to above as "a conservative antiregulatory and anti-liability preference." See *supra* note 142 and accompanying text. See also Monaghan, *supra*, at 1829 ("Why such a rigid bias in favor of regulated entities over regulatory beneficiaries insofar as equitable relief is concerned?"). The mystery, in my view, arises from another consideration. If the plaintiffs in *Shaw* had been defendants in an action to enforce the state statute, they could undoubtedly have relied on the federal regulatory statute's preemptive effect to provide them with a constitutionally valid defense under the Supremacy Clause. The case would then come squarely within the principle of *Marbury v. Madison* that a constitutionally invalid law is no law at all. 5 U.S. (1 Cranch) 137 (1803). When a party would have a constitutionally valid defense in an enforcement action, powerful considerations of policy and fairness support allowing that party to assert that defense preemptively, in a suit for an injunction. If so, upholding the plaintiff's cause of action in *Shaw* makes policy sense, even in the absence of a statutory right. Perhaps one could say that a substantive right exists for the *Shaw* cause of action to protect because the plaintiffs would have had a right not to have the state regulatory statute enforced against them in a coercive proceeding.

actions against state officials.<sup>246</sup> Insistence that separation-of-powers concerns preclude federal judicial lawmaking also ignores, and would leave unjustified, the role the Court has assumed in shaping official immunity law.

To get the doctrine back on a better path, the Supreme Court should begin by acknowledging the fundamental correctness of the *Bivens* approach, despite admitted grounds for possible disagreement concerning its proper application: judge-crafted remedies for constitutional violations are not only historically pedigreed, but sometimes constitutionally necessary to promote rule-of-law values. Having clarified this point, the Court should reaffirm that there may sometimes be good reason for courts to stay their hands.

Consistent with these premises, early post-*Bivens* cases framed the right question by asking whether schemes of statutory remedies constituted “special factors counseling [judicial] hesitation” in authorizing suits for damages to remedy constitutional violations.<sup>247</sup> Under that standard, *Carlson v. Green*, in which the Court upheld a *Bivens* remedy despite the availability of redress under the FTCA, would have struck me as a difficult case but for the legislative history surrounding the statutory amendment that made the intentional tort involved in *Carlson* actionable under the FTCA for the first time. A Senate Report said expressly that “after the date of enactment of this measure, innocent individuals who are subjected to raids [such as that in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government.”<sup>248</sup> Absent that legislative history, it would have been plausible to interpret Congress’s decision to provide a remedy other than a direct suit to enforce the Constitution as a deliberate, constitutionally permissible choice that should cause judicial hesitation.

But *Carlson* lies in the past. The more pressing current question involves the significance of the FTCA for future *Bivens* cases. With respect to that question, congressional action since *Carlson* signals acceptance of *Bivens* actions and, accordingly, counsels no special judicial hesitation in upholding them. In 1988, Congress amended the FTCA by passing the Westfall Act, which substitutes the government as a defendant in all state law tort actions against federal officials for conduct within the scope of their employment.<sup>249</sup> By its express terms, the Westfall Act “does not extend” to civil actions against government officials “brought for a violation of the Constitution of the United States.”<sup>250</sup> As read in the context of its enactment, the Westfall Act should preclude any inference that the FTCA, which was initially enacted decades before the advent of *Bivens* actions, reflects a considered congressional

---

246. See, e.g., Woolhandler, *The Common Law Origins*, *supra* note 38, at 120–48.

247. *Carlson v. Green*, 446 U.S. 14, 33 (1980).

248. S. REP. NO. 93–588, at 3 (1973), as reprinted in 1974 U.S.C.C.A.N. 2789, 2791 (emphasis added) (quoting *Carlson*, 446 U.S. at 20).

249. See 28 U.S.C. § 2679(b)(1) (2012).

250. *Id.* (b)(2)(A) (2012).



preference for an exclusive statutory alternative. To the contrary, on a better reading, the Westfall Act contemplates the continued availability of *Bivens* suits absent “special factors counseling hesitation” that do not include the mere existence of the FTCA.<sup>251</sup>

Among the considerations supporting this conclusion is that the Westfall Act raises the stakes, including the constitutional stakes, of denying *Bivens* remedies. It does so by expressly immunizing federal officials from state law tort actions against them arising from their official conduct, even when an FTCA exception—such as the one involving suits “brought for a violation of the Constitution”—applies and there could, accordingly, be no remedy against the government.<sup>252</sup> With the Westfall Act creating a substantially broadened category of victims of constitutional lawbreaking for whom it is *Bivens* actions or nothing,<sup>253</sup> the historically well-grounded principle that damages remedies should normally be available to victims of constitutional misconduct ought to control.<sup>254</sup>

ii. Official Immunity

Although the Supreme Court should adjust its qualified immunity doctrine, it should make less drastic changes than its sharpest critics have demanded. As Part III argued, the *Harlow* formula—under which immunity attaches unless officials violated clearly established law—is basically sound. In defending the *Harlow* framework, however, the Court need not and should not cling to *Harlow*’s reasoning. In *Harlow* and ever since, the Court’s shaping of immunity standards has relied on the assumption that fear of personal liability would have undesirable chilling effects on officials threatened with suit.<sup>255</sup> Recent empirical

---

251. See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–38 (2009); Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 570–82 (2013). I take no stand here on other considerations that might rise to the level of “special factors counseling hesitation.”

252. See 28 U.S.C. § 2679(b)(1); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

253. There is no consensus in the literature about the efficacy of *Bivens* actions in furnishing individual redress, especially in light of immunity doctrines. Compare Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343–44 (1989) (finding virtually no judgments for plaintiffs and very few settlements in a sample of more than 12,000 cases filed 1971–1989), with Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (concluding based on data from five judicial districts that “success rates for Bivens cases range from 16% to more than 40%”). For a brief survey of relevant legislation, see HART & WECHSLER, *supra* note 103, at 896–904.

254. See Fallon & Meltzer, *supra* note 5, at 1789 (“Within a historically defensible yet normatively appealing account of our constitutional tradition, the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle . . .” (citation omitted)).

255. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (“[The] qualified immunity defense . . . reflect[s] . . . ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’” (quoting *Butz v.*

work significantly undercuts that premise. In the leading study to date, Professor Schwartz found that local governments almost always pay judgments against law enforcement officials for action within the outer bounds of their duties.<sup>256</sup> That finding resonates with common sense: few people with good judgment would accept government employment without guarantees against personal liability for good faith errors.

Although Schwartz's work might call for a reframing of qualified immunity doctrine if that doctrine had to rely entirely on the argument based on chilling effects on official initiative, *Harlow* remains supportable on other grounds. As Part III argued, imposing damages liability for violations of every newly recognized right could easily deter courts from recognizing new rights or even applying longstanding ones in new circumstances. In addition, some officials cannot count on indemnification. Based on these considerations, the Court should continue to apply the qualified immunity standard as formulated in *Harlow v. Fitzgerald*. But it should disavow subsequent expansions under which law cannot count as "clearly established" if *any* reasonable official could disagree. That draconian formulation—which the Court has never sought to explain—undervalues the compensatory, deterrence, and redress functions that damages remedies perform.

There is a worry, of course, that the *Harlow* immunity standard, which calls for the dismissal of cases not involving violations of clearly established rights, may itself impede the recognition of new rights. If a case is easily resolvable on the ground that a defendant did not violate a "clearly established" right, courts may feel little incentive to address the often-harder question of whether the defendant's alleged conduct violated the Constitution at all. As the Equilibration Thesis highlights, however, the Supreme Court has other tools with which to respond to that concern, even if not to eliminate it entirely.

The Court's recent efforts to do so begin with its 2001 decision in *Saucier v. Katz*.<sup>257</sup> *Saucier* held that lower courts, when encountering qualified immunity defenses, should rule first on whether a defendant's alleged conduct violated the Constitution before going on, if necessary, to decide whether qualified immunity applies.<sup>258</sup> Eight years later, the Court backed off. Overruling *Saucier*,

---

Economou, 438 U.S. 478, 506 (1978)); Schwartz, *How Qualified Immunity Fails*, *supra* note 117, at 13–15.

256. See Schwartz, *Police Indemnification*, *supra* note 207, at 912–17. John Jeffries' informal surveys led him to a similar conclusion about predominant indemnification practices. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 & n.16 (1998) (reporting on the basis of "personal experience" and anecdotal evidence that "[t]he state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on governmental defense and indemnification"); Meltzer, *supra* note 226, at 1019 (reporting that indemnification is "generally thought to be widespread"). *But cf.* SCHUCK, *supra* note 205, at 85 (describing indemnification as "neither certain nor universal").

257. 533 U.S. 194 (2001).

258. *Id.* at 201.

*Pearson v. Callahan*<sup>259</sup> held that lower court judges “should be permitted to exercise their sound discretion” in determining whether to rule first on whether a defendant’s conduct violated any constitutional right at all or whether an asserted right was “clearly established” at the time of an alleged violation.<sup>260</sup> More recently, *Camreta v. Greene*<sup>261</sup> admonished that “[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones” by ruling on the merits when a case could be easily dismissed on qualified immunity grounds.<sup>262</sup>

If *Saucier* made excessive demands on overworked lower courts to decide hard constitutional issues when they could easily resolve cases by finding that the defendants had not violated “clearly established” rights, *Camreta* tips too far the other way. Lower courts should be encouraged to decide merits issues first and thereby help to establish constitutional rights clearly for the future.<sup>263</sup> Although the Supreme Court has not put it this way, *Pearson*, as subsequently glossed by *Camreta*, rightly requires lower courts to balance competing private and public interests, which include judicial economy, in deciding whether to rule first on merits or qualified immunity issues.

Another prominent criticism of the Supreme Court’s qualified immunity doctrine applies primarily to § 1983 actions. Although a well-designed system of remedies for constitutional violations would limit damages relief to cases involving breaches of clearly established law, the application of official immunity in suits under § 1983 poses statutory interpretation issues not present in *Bivens* actions. The Court blundered in *Harlow* when it ignored those issues and assumed without explanation that it could reshape official immunity law as an exercise in federal common lawmaking. Once again, however, the practically important question today is not whether *Harlow* was properly and adequately justified by Justice Powell’s Court opinion in 1982, but whether its result ought to stand.

In a recent article, Professor William Baude has argued that the Supreme Court’s development of qualified immunity doctrine for § 1983 cases is

---

259. 555 U.S. 223 (2009).

260. *Id.* at 236. Empirical studies have reached radically different conclusions about *Pearson*’s effects, if any, in encouraging lower courts to rule on merits claims, and thus potentially to recognize new constitutional rights, before turning to immunity questions. See HART & WECHSLER, *supra* note 103, at 1052–53, 1052 n.16.

261. 563 U.S. 692 (2011).

262. *Id.* at 707.

263. A further complicating factor involves whether lower courts are capable of “clearly establishing” the law at all. In *Camreta*, the Court determined that a circuit ruling that a defendant had violated a constitutional right would not be “mere dictum” in subsequent cases within the circuit, *id.* at 704 (quoting *Bunting v. Mellen*, 541 U.S. 1019, 1023 (Scalia, J., dissenting from denial of certiorari)), but also asserted that “district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity,” *id.* at 709 n.7.

indefensible under any plausible theory of statutory interpretation.<sup>264</sup> If that criticism is valid, it applies equally to a number of other doctrines that have developed under § 1983. Read literally, § 1983 creates a categorical right to both injunctive and damages relief against state officials who violate the Constitution, but the Supreme Court has long read the statute as either encompassing or authorizing the judicial development of a myriad of exceptions, including these:

- The Court held in *Preiser v. Rodriguez*<sup>265</sup> that a state prisoner cannot use § 1983 as a vehicle through which to seek release from incarceration but must rely instead on the habeas corpus statutes.
- Although § 1983 constitutes an exception to the Anti-Injunction Act's prohibition against federal injunctions of state court proceedings,<sup>266</sup> the Court has insisted, under the doctrine associated with *Younger v. Harris*,<sup>267</sup> that federal courts should "abstain" from ruling on § 1983 suits to enjoin pending state criminal proceedings.
- Post-*Younger* cases have expanded the abstention mandate in § 1983 cases to encompass some state civil and administrative proceedings brought by state officials to enforce state law.<sup>268</sup>
- The *Pullman* abstention doctrine dictates that federal courts should abstain from resolving sensitive constitutional issues in suits for injunctions against state and local officials until the plaintiffs have sought state court rulings on difficult state law issues that might moot or alter federal constitutional claims.<sup>269</sup>
- Although the Supreme Court has mostly justified its abstention doctrines by invoking principles of equity, the Court has determined that federal courts can "stay" damages actions, apparently including suits under § 1983, when abstention policies would otherwise apply.<sup>270</sup>
- The Supreme Court has held that § 1983 includes an implied exception for suits to enjoin state tax collection.<sup>271</sup>
- A series of cases has ruled that doctrines of claim and issue preclusion bar the bringing of § 1983 actions in cases to which they apply, including damages actions, even when the modern

---

264. See generally Baude, *supra* note 12.

265. 411 U.S. 475 (1973).

266. See *Mitchum v. Foster*, 407 U.S. 225 (1972).

267. 401 U.S. 37, 54 (1971).

268. See *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

269. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941) ("The complaint of the Pullman porters . . . touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.").

270. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996).

271. See *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 589 (1995).

barriers have developed subsequent to the enactment of § 1983.<sup>272</sup>

- The Court has held that some officials sued in § 1983 actions have absolute, rather than qualified, immunity, even though § 1983 makes no more reference to absolute than to qualified immunity.<sup>273</sup>

I cannot sensibly pause here to probe which of these doctrines might and might not be justifiable under “ordinary” principles of statutory interpretation. Suffice it to say that the Supreme Court, in a diverse swath of § 1983 cases, has assumed an entitlement to take substantial interpretive liberties.<sup>274</sup>

What now ought to be done? Professor Baude concludes that the Court should acknowledge that ordinary interpretive principles govern, confess past errors, and either correct those errors or pronounce that although it will not overrule erroneous precedents, neither will it extend them.<sup>275</sup> In my view, by contrast, the interpretive context of the Court’s immunity decisions under § 1983—which includes not only the history surrounding the statute’s enactment in 1871, but also the capacious approach to statutory “interpretation” that the Court has employed in developing a multitude of doctrines—requires a recognition that § 1983 does not pose “ordinary” questions of statutory interpretation today, even if it once did.

At this point in § 1983’s interpretive history, I believe the Supreme Court should recognize that it is for all practical purposes a “common law statute,” which authorizes the courts to develop doctrine on a common law-like basis.<sup>276</sup> A precedent comes from the Sherman Antitrust Act, which the Court has explicitly placed in the “common law statute” category.<sup>277</sup> The Court has not

272. See *Allen v. McCurry*, 449 U.S. 90, 97–98 (1980); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796–97 (1986).

273. See *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (finding no congressional intent to abolish judicial immunity); *Tenney v. Brandhove*, 341 U.S. 367, 372–73 (1951) (legislative immunity relying on “presuppositions” to support an immunity for which the statute does not expressly provide).

274. See Richard H. Fallon, Jr., *Why Abstention is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847 (2013).

275. See Baude, *supra* note 12, at 80–82.

276. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, CALIF. L. REV. ONLINE (Nov. 2018), <http://www.californialawreview.org/qualified-immunity-and-statutory-interpretation-a-response-to-william-baude> [<https://perma.cc/62WN-E6MA>]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989) (characterizing § 1983 as “delegat[ing] power to make common law”).

277. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”). The analogy is not perfect. Among other things, the Sherman Act brought existing state common law causes of action within the ambit of federal law. See *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983). But the analogy should not need to be precise in view of the length and diversity of the Court’s pattern of developing nontextual exceptions to § 1983.

spoken so candidly regarding § 1983. Sometimes it pretends to be bound by relatively specific congressional intent concerning the reach of official immunity.<sup>278</sup> But the pretenses are unconvincing. They invite attributions of hypocrisy and deceit. Unless the Court is prepared to reject a relatively broad swathe of doctrines, it should take the rationalizing step of affirming that § 1983, when read against the backdrop of history, endows the judicial branch with common law-like powers to develop and adjust official immunity doctrines.

Even if hesitant to take that step, the Court, with policy considerations in mind, should follow the same approach to official immunity in § 1983 actions that it has applied in cases presenting issues of claim and issue preclusion. In both *Allen v. McCurry*<sup>279</sup> and *University of Tennessee v. Elliott*,<sup>280</sup> the Court held that suits under § 1983 were foreclosed under preclusion principles that had not yet emerged at the time of § 1983's enactment.<sup>281</sup> In the latter case it reasoned, not implausibly, that "[w]e . . . see no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaption of traditional principles of preclusion" over the course of subsequent legal history.<sup>282</sup> The same rationale would apply with equal force in a challenge to the Court's application of modern qualified immunity standards in § 1983 cases.

## 2. *Entity Liability.*

Despite the strong policy arguments supporting governmental liability for officials' torts that Part III marshalled, the Supreme Court rightly accepts the sovereign immunity of the United States as a fixed point in its analysis of constitutional tort cases.<sup>283</sup> Federal sovereign immunity has existed from the beginning of U.S. history. The Supreme Court has affirmed it on multiple occasions.<sup>284</sup>

As a matter of first impression, arguments that the Constitution protects state sovereign immunity in suits asserting violations of the Constitution and laws of the United States are much weaker. The Constitution not only presupposes, but affirmatively asserts, the supremacy of federal law.<sup>285</sup> The Eleventh Amendment, which was enacted to overrule a Supreme Court decision that characterized Article III as having divested the states of sovereign immunity in diversity cases,<sup>286</sup> makes no reference to immunity in suits to enforce the

---

278. See, e.g., *Tower v. Glover*, 467 U.S. 914, 920 (1984) (holding that, while "[o]n its face § 1983 admits no immunities," the Court must look to what immunities were available to officials at the time the statute was passed in 1871 to determine if an official is immune).

279. 449 U.S. 90 (1980).

280. 478 U.S. 788 (1986).

281. See *Elliott*, 478 U.S. at 797; *Allen*, 449 U.S. at 113 (Blackmun, J., dissenting).

282. *Elliott*, 478 U.S. at 797.

283. The acceptance traces to early cases. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383, 392, 411–12 (1821); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793).

284. See HART & WECHSLER, *supra* note 103, at 877–80.

285. See U.S. CONST. art. VI.

286. *Chisholm*, 2 U.S. (2 Dall.) at 419.

Constitution and laws of the United States. Nonetheless, to the question whether the Constitution either creates or mandates causes of action against the states when they violate the Constitution, *Hans v. Louisiana*<sup>287</sup> answered in the negative. On this point, *Hans* has stood substantially unchallenged for well over one hundred years, with even the dissenting Justices in the pivotal 1996 case of *Seminole Tribe of Florida v. Florida*<sup>288</sup> accepting *Hans* as authoritative on this issue.<sup>289</sup>

Assessment of the Supreme Court's sovereign immunity decisions in light of principles bearing on the necessary availability of constitutional remedies largely ratifies this judgment. By naming a state official rather than the state itself as the defendant, plaintiffs can typically secure injunctive relief against ongoing constitutional violations.<sup>290</sup> And even if the Constitution sometimes requires damages remedies for constitutional violations, relief against the government officials who personally violate the Constitution, rather than the government employer, should normally suffice today, as it has throughout American history. A few cases in which the Court has held that the states must provide financial recompense for constitutional violations can continue to constitute a narrow, exceptional category.<sup>291</sup> Beyond *stare decisis*, pragmatic support for the conclusion that officer liability is constitutionality adequate derives from the widespread practice of government bodies, driven by pragmatic necessity, of indemnifying their employees for tort judgments based on the employees' official conduct.

Cities and counties do not enjoy sovereign immunity.<sup>292</sup> In *Monell v. Department of Social Services*,<sup>293</sup> the Supreme Court held that cities and counties are suable "persons" under § 1983 but that they are not liable for their employees' torts on a respondeat superior basis. Subsequent decisions have articulated exceedingly stringent standards for establishing municipalities' causal responsibility for their employees' constitutional violations.<sup>294</sup> As Justice Breyer wrote in a dissenting opinion in *Board of County Commissioners v. Brown*,<sup>295</sup> *Monell's* rejection of respondeat superior liability put the Court on a path requiring "ever finer distinctions" that almost always preclude ultimate

---

287. 134 U.S. 1 (1890).

288. 517 U.S. 44 (1996).

289. See *id.* at 78 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting).

290. The leading case is *Ex parte Young*, 209 U.S. 123 (1908). On the relatively stable juxtaposition of *Ex parte Young* with *Hans v. Louisiana*, see Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).

291. See *supra* note 236 and accompanying text.

292. *N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 194–95 (2006); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977); *Lincoln Cty. v. Luning*, 133 U.S. 529, 530–31 (1890).

293. 436 U.S. 658 (1978).

294. See HART & WECHSLER, *supra* note 103, at 999–1003 (summarizing relevant decisions).

295. 520 U.S. 397 (1997).

recoveries of damages.<sup>296</sup> In addition, subsequent research by scholars has cast doubt on the soundness of *Monell*'s initial, history-based ruling.<sup>297</sup> Finally, as Part III shows, strong arguments of fairness and policy support establishment of a regime in which cities and counties assume responsibility for their officials' constitutional violations. Given this conjunction of factors, the Court should reconsider *Monell*. In lieu of traditional respondeat superior liability, and consistent with the idea that § 1983 is a common law statute, the Court should hold that municipalities are suable for their officials' constitutional violations on the same terms as the officials themselves would be.

### 3. *Heightened Pleading Requirements under the Federal Rules of Civil Procedure.*

The Supreme Court has no license to craft special pleading rules for suits seeking damages remedies for constitutional violations by government officials.<sup>298</sup> It must abide by applicable statutes and the Federal Rules of Civil Procedure. In *Ashcroft v. Iqbal*, the Court sought to effect an end-run around this stricture by interpreting Rule 8 as imposing demands that no defensible norms of statutory interpretation could justify. But one need not rely on narrowly textualist premises to conclude that *Iqbal* overreached. Among relevant indicators of *Iqbal*'s break from the liberal pleading philosophy of the Federal Rules of Civil Procedure was Form 11, which was attached to the Rules at that time. Entitled a "Complaint for Negligence," Form 11 stated simply, "On date at place, the defendant negligently drove a motor vehicle against the plaintiff."<sup>299</sup> According to Rule 84 as it then read, pleading on the model of Form 11 was sufficient.<sup>300</sup> Even if the Supreme Court does not overrule *Iqbal*, it should limit the case's holdings as narrowly as possible.

## CONCLUSION

Constitutional tort law subsists in turbulence and partial disequilibrium. The Supreme Court has recently exhibited hostility to suits seeking redress from state and federal officials for alleged constitutional violations. But the Court has

---

296. See *id.* at 430 (Breyer, J., dissenting); see also HART & WECHSLER, *supra* note 103, at 1001–03.

297. See, e.g., Susan Bandes, *Introduction: The Emperor's New Clothes: Section 1983 Municipal Liability in Civil Rights Litigation—Eighth Annual DePaul Law Review Symposium*, 48 DEPAUL L. REV. 619 (1999). For example, Jack M. Beerman, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 647–51 (1999), criticizes the *Monell* Court's interpretation of the legislative history of § 1983 and the common law of vicarious liability in 1871. That debate seems mostly to have been about liability for private wrongdoing, not wrongdoing by municipal officials. See also Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1201–03 (2003).

298. See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

299. FED. R. CIV. P. app. Form 11 (repealed 2015).

300. FED. R. CIV. P. 84 (repealed 2015).



not developed an affirmative vision of what a well-designed scheme of constitutional remedies would look like. Most of the Court's critics have not done much better. A traditional model of official accountability—rooted in a private tort-law vision, under which government officials should be subject to the same legal norms as everyone else—has continued to exert an outsized influence on efforts to imagine the contours of a better remedial regime than the Court has developed. But that model is ill-fitted to the distinctive issues that surround the exercise of public power in the modern day.

In this Article, I have sought to open vistas for better, more imaginative thinking by rejecting the common law of tort as a paradigm of official accountability and liability for constitutional violations. In its place, I have advanced a broadly framed perspective on current practice, on constitutional history, on relevant normative principles, and on issues of judicial role. Constitutional remedies serve multiple purposes. Some remedies are constitutionally necessary, others not. Courts have an irreducible role to play, but so does Congress.

Congress, I have argued, could, and should, implement major reforms. These include expansions of entity liability, authorization of more suits for nominal damages, and more extensive reimbursement of attorneys' fees—accompanied by continuing preclusions of some kinds of suits alleging constitutional violations and possibly by liability caps. In contrast with Congress, the Supreme Court is restricted in some respects by limitations on the judicial role. But the Court also has obligations and prerogatives that recent Justices have misunderstood. Our tradition requires courts to play an active part in crafting remedies that implement the Constitution on terms that reflect its rule-of-law ideals. In recognition of that role, I have recommended a series of specific doctrinal revisions that the Court ought to make.

The design of a scheme of constitutional remedies necessarily involves trade-offs and accommodations along multiple dimensions. But curbing suits for damages against the government and its officials is not by itself a worthy aim. With an enhanced understanding of the historical and normative landscape, and of the choices available within it, both Congress and the Court ought to do better.

