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## Constitutional Remedies as Constitutional Law

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# CONSTITUTIONAL REMEDIES AS CONSTITUTIONAL LAW

MARTIN H. REDISH

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# CONSTITUTIONAL REMEDIES AS CONSTITUTIONAL LAW

MARTIN H. REDISH\*

**Abstract:** Virtually all constitutional scholars agree, and the Supreme Court has uniformly held, that our entire system of constitutional democracy is premised in important part on the dictate of judicial review, i.e., the power of the judiciary to exercise the final say as to the meaning of the countermajoritarian Constitution's provisions. Absent judicial review, the fundamental speed bumps to tyranny that the Framers so carefully inserted into our political structure would be rendered all but useless at best and a fraud on the electorate at worst. Yet puzzlingly, most of the very same scholars and judges assume that the very political branches that the Constitution is designed to restrain will fully control the remedies to be issued. Thus, all the political branches need to do to avoid constitutional control is deny the courts any power to enforce their decisions. Such a logically inconsistent dichotomy indirectly destroys the essence of the judicial review process that is so central to American constitutional democracy. Yet neither constitutional scholars nor the Supreme Court have recognized either the serious logical flaw or the potentially grave practical dangers in vesting in the very branches sought to be controlled by the Constitution the final power to determine the scope—indeed, the existence—of remedies to enforce constitutional dictates. This Article explains the inherent theoretical and practical link between constitutional review and constitutional remedies, demonstrating that full control of constitutional remedies belongs in the judiciary, not the political branches. It then explains how judicial inference of constitutional remedies in the face of textual silence on the issue can be justified by principled theories of textual interpretation, highlights the inadequacy of scholarly work in this area, and answers potential counterarguments. Finally, it applies this theory of constitutional remedies to the Supreme Court's implied remedies jurisprudence.

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## INTRODUCTION

Consider the following scenario: a future federal government enacts a law directing federal agents to seek out and physically attack members of a particular ethnic minority group to which that government is hostile. In order to prevent the federal courts from ordering a halt to this obviously unconstitutional practice, Congress modifies the All Writs Act<sup>1</sup> to exempt the practices that this new statute directs. The All Writs Act authorizes the federal judiciary to issue various forms of mandatory relief, including issuance of injunctions. Adopted in 1789, the Act has long been assumed to provide the federal judiciary with its power to issue equitable remedies, including injunctions that would halt such grievous violations of constitutional liberties.<sup>2</sup> Without authorization granted by the All Writs Act, presumably, the federal courts would be powerless to enjoin such practices.<sup>3</sup> Although, theoretically, in such a case the state courts would be available, the long-standing prohibition on state court power to control federal officers directly would, at the very least, create a cloud over state courts' abilities to enjoin the practices.<sup>4</sup> More importantly, if it is assumed—as it long has been—that, purely as a matter of substantive constitutional law, constitutional remedies lie totally within the power of the political branches of the federal government to control, presumably that power would allow those branches to limit state court ability to enforce the Constitution as well. For in such a situation, the issue is not one of congressional power to control judicial *jurisdiction*, but rather what the Constitution does and does not require. Thus, if, as a matter of substantive constitutional law, it is constitutional for Congress to exercise total control over constitutional remedies, state courts would be required to uphold the congressional modification of the All Writs Act, even if state courts were permitted to adjudicate such constitutional challenges. Thus, even if, in such a situation, a court—state or federal—were found to possess

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<sup>1</sup> 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

<sup>2</sup> See Samuel I. Ferenc, Note, *Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act*, 118 COLUM. L. REV. 127, 136–40 (2018) (describing the adoption of the All Writs Act and explaining how courts have used it to derive authority to issue forms of equitable relief).

<sup>3</sup> See U.S. CONST. art. III (making no mention of the judiciary’s power to issue remedies).

<sup>4</sup> See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 407–08, 411–12 (1871) (denying state courts authority to issue writs of habeas corpus to federal officers); see also *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603–04 (1821) (holding that a state court lacked the authority to issue a writ of mandamus to a federal officer); *Kennedy v. Bruce*, 298 F.2d 860, 862–63 (5th Cir. 1962) (holding that state courts may not enjoin federal officers). For a detailed discussion of the issue of state courts’ authority to issue writs to federal officers, see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157–61 (1982).

power to declare these actions unconstitutional, the constitutionally valid selective repeal of the All Writs Act would deny them the power to order the practices halted.

This situation would sound absurd, if it were not so frightening. Yet, if one accepts the traditionally accepted view that constitutional remedies are sub-constitutional and therefore ultimately lie in the hands of Congress, then the dystopic scenario described above becomes conceivable.<sup>5</sup> Nevertheless, the Supreme Court has consistently recognized the extremely deferential role that the judiciary must play in fashioning remedies for constitutional violations.<sup>6</sup> And the very existence of the All Writs Act inescapably implies that absent that statutory authorization, the courts would lack power to issue equitable writs, even to protect constitutional rights.

Surprisingly, the work of even the most respected scholars has been, at best, unhelpful and, at worst, downright harmful in understanding the relevant constitutional typography on the issue of constitutional remedies. Many have concluded that constitutional remedies present a sub-constitutional issue, and are therefore fully within the power of Congress to regulate as it sees fit.<sup>7</sup> And although several respected scholars have been far more sympathetic to the need for some sort of constitutional status for the remedies for constitutional violations, their analyses are only of slightly more value, because they advocate no more than a *presumption* in favor of judicial control of constitutional remedies.<sup>8</sup> More importantly, these scholars fail to place the role of constitutional remedies within the broader framework of American political theory, or even to attempt to justify the constitutional status of remedies as a matter of constitutional interpretation.<sup>9</sup> What has long been needed, but to this point never supplied, is a detailed, coherent defense of the unbending constitutional status of constitutional remedies, grounded in core precepts of American constitutional democratic thought and justified as a matter of textual interpretation.

In this Article, I argue that well-accepted, foundational principles of American constitutionalism, grounded in belief in the essentially countermajoritarian nature of the Constitution's directives as controls on the majoritarian branches of government, inescapably lead to the conclusion that constitutional remedies

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<sup>5</sup> See *infra* Part III (discussing popular scholarly theory regarding constitutional remedies as sub-constitutional).

<sup>6</sup> See *infra* Part V (discussing the Supreme Court's hesitance to build upon the doctrine of implied constitutional damage remedies based on its deferential attitude toward Congress).

<sup>7</sup> See *infra* Part III (identifying popular scholarly theories that posit that constitutional remedies are a legislative power).

<sup>8</sup> See *infra* Part III (laying out these more sympathetic but still deferential theories of constitutional remedies).

<sup>9</sup> See *infra* Part III (critiquing the existing scholarship surrounding constitutional remedies).

possess full status as constitutional law.<sup>10</sup> In other words, remedies for violations of the Constitution must be recognized as just as much a part of the Constitution as the substantive directives are, and therefore that such remedies are fully in the control of the countermajoritarian judiciary, much as textual interpretation has been since the decision in *Marbury v. Madison*.<sup>11</sup>

The United States Constitution reflects a delicate balance between majoritarian rule and countermajoritarian limitations. Our system amounts to a paradox: a foundational commitment to the precept that the best way to assure democracy's continued existence is to limit it. The Framers sought to temper the worst impulses of democracy by making ours a democratic republic in which the people elect representatives rather than participate in democracy directly. The Founders recognized, however, that elected representatives could still threaten minority rights or even seek to impose tyranny. For the most part, the Framers sought to avoid tyranny by dividing political power, both horizontally (separation of powers) and vertically (federalism). The Founders generally sought to protect individual rights against majoritarian invasion through enactment of the Bill of Rights—with the first eight amendments guaranteeing various individual rights.<sup>12</sup> Subsequent generations expanded countermajoritarian protection of individual rights to the states through enactment of the post-Civil War amendments. Although the post-Civil War amendments expressly provide for congressional enforcement, even those measures require enforcement by the courts.<sup>13</sup> In any event, even if Congress never enacted enforcing legislation, no one could reasonably doubt that the directives of those provisions are self-executing, to be enforced by the judiciary. But more importantly, none of the Bill of Rights' provisions mentions anything about enforcement mechanisms. On their face, none of these textually guaranteed protections provides for a judicial enforcement mechanism.<sup>14</sup> Absent such remedial measures, of course, the mandatory countermajoritarian guarantees of individual rights are worth even less than the paper on which they are written. This is because their very existence will naturally lull the members of the electorate into a false sense of security that they in fact possess such rights. In reality, however, the rights are worth no more than their enforcement, and the existence of enforcement mechanisms belongs solely in the hands of the very majoritarian branch-

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<sup>10</sup> See *infra* notes 11–321 and accompanying text.

<sup>11</sup> 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury v. Madison* espouses the powers of the judiciary and explicitly states that it is the role of the judiciary “to say what the law is,” expound upon it, and interpret it. *Id.*

<sup>12</sup> U.S. CONST. amends. I–VIII.

<sup>13</sup> *Id.* amends. XIII–XV.

<sup>14</sup> See *id.* amends. I–VIII (mentioning no enforcement mechanisms). One exception, contained in the body of the Constitution, is the provision for habeas corpus. *Id.* art. I, § 9, cl. 2.

es they are designed to restrain. The result amounts to the imposition of a fraud on the public. The simple fact, as a matter of both logic and practicality, is that the remedies required to vindicate these rights are just as essential as the substance of the rights themselves, and if control of remedies is ultimately vested in the very majoritarian branches that these rights presumably restrain, the rights do not exist. As a result, unknown to most, the entire structure of our constitutional system of minority rights possesses a potentially fatal Achilles' heel that, in a time of stress, could bring the system down.

One might consider such dire warnings to be no more than hyperbole. After all, our system has existed for well over two hundred years without this structural anomaly causing any serious problem. But constitutional law must be shaped with the most extreme circumstances in mind. Indeed, who would have thought that we would ever suffer the threats to American democracy that have ominously surfaced in recent years? When viewed from that perspective, our current system is woefully unprepared for the worst. This Article seeks to remedy that glaring systemic weakness.

To protect minority rights from hostile majorities, the Framers of the Constitution intentionally established a judiciary insulated from majoritarian political pressures with salary and tenure guarantees in Article III.<sup>15</sup> The independence that these features ensured, as well as the power of judicial review vested in the federal courts, make it the only branch suited to review the constitutionality of the political branches' actions and, by extension, to create remedies to redress violations of individuals' constitutional rights. Recognizing the judiciary as the only institution capable of fashioning constitutional remedies acknowledges its proper role in our paradoxically countermajoritarian, yet democratic, system.

This Article proceeds in five parts. Part I sets out a countermajoritarian constitutional theory and applies it to the issue of constitutional remedies. It explains how only a countermajoritarian institution (the judiciary) can both interpret and enforce the Constitution.<sup>16</sup> Part II shapes a theory of constitutional interpretation that justifies and rationalizes the courts' interpretive implication of constitutional remedies from constitutional text, despite such remedies' lack of explicit expression in that text.<sup>17</sup> Part III critiques existing scholarly

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<sup>15</sup> *Id.* art. III, § 1 (providing that judges shall hold their office during good behavior and be compensated); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[N]othing can contribute so much to [the judiciary’s] firmness and independence as permanency in office . . . .”); *id.* at 468 (“This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from . . . serious oppressions of the minor party in the community.”).

<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Part II. I should note that both the Thirteenth and Fourteenth Amendments explicitly authorize Congress to enforce the provisions' substantive directives through legislative action. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5. Nevertheless, this surely does not mean that, absent the

theories concerning the legal status of constitutional remedies, showing the failure of even the most respected scholars to come to terms with the fundamental theoretical and practical flaws inherent in the vesting of control of constitutional remedies in the hands of the political branches.<sup>18</sup>

Part IV addresses likely counterarguments to the theory of constitutional remedies as constitutional law, specifically Professor Henry Monaghan's characterization of constitutional remedies as constitutional common law, and the view that constitutional remedies cannot be constitutional law because Congress maintains the power to control federal jurisdiction. Monaghan's constitutional common law posits that although the judiciary can use the same power to protect constitutional rights as it does to create rights and remedies that protect federal interests and implement federal legislative schemes, Congress has the authority to revise or reverse the courts' choice of constitutional remedies as constitutional common law. An additional counterargument suggests that just as the Constitution affords Congress the power to limit federal court jurisdiction, it assures that Congress can similarly control the judiciary's ability to fashion remedies for constitutional violations. Both fail to recognize the judiciary's unique role as ultimate interpreter of the Constitution.<sup>19</sup> This Article concludes in Part V with an examination of the implications for and lessons drawn from the *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* doctrine and implied constitutional damage remedies, highlighting the weakness of the *Bivens* doctrine itself and explaining why it constitutes a woefully inadequate means of vindicating and enforcing constitutional rights.<sup>20</sup>

## I. THE CONSTITUTIONAL THEORY OF CONSTITUTIONAL REMEDIES

### A. Countermajoritarian Constitutionalism

Unlike its British counterpart, which took an unwritten form and whose content was determined largely by a process of consensus understandings, the American Constitution took the form of written, mandatory positive law, subject to alteration only through a complex supermajoritarian process of amendment.<sup>21</sup> Much of the document imposed restrictions on the exercise of political power by the federal government as a whole as well as on the separate branch-

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enactment of such legislation, the amendments lack any constitutional floor to be enforced by the judiciary.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> U.S. CONST. art. V (requiring that amendment to the Constitution, as written, can only be accomplished through proposal by two-thirds of both the House and Senate or two-thirds of the state legislatures, and subsequent ratification by three-fourths of state legislatures); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971).



es of that government. The subsequently enacted Bill of Rights—the first ten amendments—in varying ways placed further limits on the political branches, primarily on their ability to violate individual rights.<sup>22</sup> As the Supreme Court made clear in Chief Justice John Marshall’s famed 1803 opinion in *Marbury v. Madison*,<sup>23</sup> it would make no sense to permit the political branches to ignore those written, binding limitations on their power.

If one starts with the premise that the majoritarian branches are not permitted to ignore the binding, written limits imposed by the Constitution, the inevitable next step is to conclude that they cannot serve as the final arbiter of those limitations. To do so would violate Lord Coke’s famous dictate in *Dr. Bonham’s Case* that no man can be a judge in his own case.<sup>24</sup> Indeed, what purpose would the Constitution serve if the very majoritarian branches it is designed to check are permitted to write, interpret, or eliminate those restrictions? The answer is obvious: the Constitution would be a dead letter. Without the counter-majoritarian judiciary in control of remedies for constitutional violations, however, there is nothing, apart from Congress’s and the President’s magnanimity, stopping these admittedly radical scenarios from coming to pass. The Framers were not so naïve or trusting.<sup>25</sup> Obsessively fearful of and experienced with tyranny, they understood this democratic paradox—that the only way to preserve democracy and majoritarian rule that does not trample down minority rights was to make our system of government’s undemocratic branch the ultimate guardian of democracy and the Constitution. This, in short, is the precept of judicial review, which has become so fundamental to our constitutional system since *Marbury*.

Accordingly, “American judges came to be regarded as essential to the maintenance of the rule of law and the protection of individual rights.”<sup>26</sup> The salary and tenure protections secured to the federal judiciary by the Constitution are a reflection of this regard and serve to ensure federal judges remain independent of the political pressures to which the majoritarian branches must

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<sup>22</sup> U.S. CONST. amends. I, II, III, IV, V, VI, VII, VIII, IX, X.

<sup>23</sup> 5 U.S. (1 Cranch) 137, 176 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”).

<sup>24</sup> (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118 a.

<sup>25</sup> See MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX 16 (2017) (“*The Federalist* paints a picture of a Founding Era obsession with the dangers of tyranny; Hamilton and Madison saw it lurking behind every corner and under every bed. Each measure the Founders took in the course of building the new federal government was aimed at safeguarding the young nation and future generations of Americans from oppression in any form . . . .” (footnote omitted)).

<sup>26</sup> Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 22 (2018).

respond.<sup>27</sup> Because of these protections, the federal judiciary would be able, according to Alexander Hamilton, to “guard the Constitution and the rights of individuals.”<sup>28</sup> He adds that “the general liberty of the people can never be endangered from” the courts,<sup>29</sup> as long as they remain truly distinct from the majoritarian branches, and “that the courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority.”<sup>30</sup> This then ensures that individuals subject to abusive government power or assaults on their individual constitutional rights “need not resort to revolution to vindicate th[ose] rights . . . .”<sup>31</sup> Instead, they could rely on the countermajoritarian judiciary to keep the majoritarian branches in check.

The dictate of judicial review flows logically from the fears and concerns expressed throughout *The Federalist Papers* over the inevitable dangers of tyranny. Throughout those documents, Hamilton and Madison express a fear—indeed, arguably an obsession—with the avoidance of this danger.<sup>32</sup> History taught them that tyranny was most likely to originate in the majoritarian branches. These concerns led the Framers of the Articles of Confederation to choose not to create an executive and to severely limit Congress’s legislative power.<sup>33</sup>

One can rightly presume that the Framers adopted the Constitution under the premise that its terms and provisions were binding and had meaning, and that the people could rely on it for a predictable form of government that would protect the rights and limits on the governmental power that it enumerates. Absent structural guarantees that the rights enshrined in the Constitution would be protected and enforced, the Constitution would be worse than meaningless. Indeed, it would create a framework of government under which the

<sup>27</sup> See U.S. CONST. art. III, § 1 (providing that judges “shall hold their Offices during good behaviour,” during which they should receive continuous, undisturbed compensation).

<sup>28</sup> THE FEDERALIST NO. 78, *supra* note 15, at 468 (Alexander Hamilton).

<sup>29</sup> *Id.* at 464.

<sup>30</sup> *Id.* at 466.

<sup>31</sup> Barnett & Bernick, *supra* note 26, at 23 (discussing the guardian role of the courts).

<sup>32</sup> See, e.g., THE FEDERALIST NO. 48, *supra* note 15, at 306–07 (James Madison) (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex . . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.”).

<sup>33</sup> See Barnett & Bernick, *supra* note 26, at 22 (noting that the principal threats to liberty were likely to come from the majoritarian branches like state legislatures); see also Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 479 n.44 (2006) (“With one exception, that of New York, [state constitutions] included almost every conceivable provision for reducing the executive to a position of complete subordination.” (quoting CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 28 (1969))).

rights it is designed to protect are unprotectable. It would jeopardize the explicit constitutional rights of the most vulnerable. And it would cynically mislead the American populace into falsely believing that the people live in a constitutional democracy—the rights of minorities would last only as long as the majority acquiesced in them.

What I have said to this point should hardly be controversial. Indeed, it simply reflects the philosophy expressed by Hamilton in *Federalist No. 78* and the reasoning of Chief Justice Marshall in *Marbury*.<sup>34</sup> It represents the core notion of American constitutionalism. But it inexorably leads to the conclusion that the judiciary must be fully in control of the scope and nature of our rights' enforcement mechanisms. It is logically and practically inconceivable that the Framers, who so carefully shaped a delicately structured system of separation of powers within the countermajoritarian, written, and binding Constitution, would have contemplated such a fatally large loophole that could so easily bring down the entire system that they spent so much time creating. It would all have been for naught, if the effectiveness of the document's countermajoritarian limits would depend entirely on the good will, in instituting remedies for violations of constitutional rights, of the very branches it sought to control.

Were the political branches of government to possess ultimate control of the remedies for enforcing the Constitution's countermajoritarian directives, the entire concept of judicial review would be rendered all but meaningless, which in turn would render the very idea of a countermajoritarian, written, and binding constitution all but meaningless. The courts would at best be rendered nothing more than advisory bodies, with no power other than to expound on the law in the abstract, subservient to the willingness of the political branches to enact means to make their decisions meaningful. At worst, the courts would be rendered completely irrelevant, as it has long been established that no Article III federal court possesses power to issue an advisory opinion.<sup>35</sup> Thus, absent legislative authorization to the courts to implement remedies as a means of enforcing constitutional directives, the courts could be virtually eliminated

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<sup>34</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–79 (1803) (explaining the rationale for and establishing the power of judicial review); THE FEDERALIST NO. 78, *supra* note 15, at 463–69 (Alexander Hamilton) (describing the structure and function of the judiciary as a constraint on unconstitutional legislative action).

<sup>35</sup> In 1793, Thomas Jefferson, then-Secretary of State in the Washington administration, wrote to the Supreme Court requesting answers to a set of discrete legal questions arising out of the United States' intention to remain neutral in the wars of the French Revolution. On behalf of a unanimous Court, Chief Justice John Jay declined Jefferson's request, emphasizing that the legal questions did not arise in judicial proceedings, and further noting that the Constitution permitted the President to require advisory opinions only from officers in the Executive branch. See 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., 1891).

from the process of judicial review, while, paradoxically, leaving judicial review in existence (albeit in name only).

This approach to constitutional remedies, that they must be solely the province of the judiciary to maintain the power of judicial review and for the Constitution to retain its countermajoritarian directive, is entirely consistent with and an inherent part of the well-established framework of countermajoritarian constitutional theory.<sup>36</sup> In other words, as I have written and contend, it is “essential that the final say as to the [Constitution]’s meaning and the authority to enforce its provisions be vested in the [prophylactically] insulated judiciary.”<sup>37</sup>

It is, then, both puzzling and ironic that both courts and scholars widely and simultaneously accept two totally inconsistent principles of constitutional law and theory, when the two cannot logically coexist—a point no one, until now, seems to have noticed. On the one hand, none but the most fringe constitutional scholars challenge the sanctity and security of the precept of judicial review. *Marbury* is the very first case read in virtually any course in constitutional law. And lest there be any doubt, the modern-day Supreme Court has reasserted the precept’s continued existence whenever it perceives a threat to it. For example, the Court could not have been more clear in its 1958 decision, *Cooper v. Aaron*, when state government officials had the audacity to assert power to interpret the Constitution at least equal, if not superior, to that of the federal judiciary: “[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the [c]ountry as a permanent and indispensable feature of our constitutional system.”<sup>38</sup> Yet both the Court<sup>39</sup> and respected scholars<sup>40</sup> have for some reason failed to understand that

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<sup>36</sup> It is beyond the scope of this Article to argue the merits of constitutional theories rejecting the power of ultimate judicial review. It should suffice for present purposes to describe all such theories as “fringe.” Prominent alternatives include departmentalism and popular constitutionalism. Departmentalism contends that judicial supremacy is unconstitutional and that each of the three branches is equally endowed with the authority to interpret the Constitution. REDISH, *supra* note 25, at 37 (describing alternatives to judicial review). Popular constitutionalism accepts that the Constitution permits judicial supremacy but also makes a normative argument that interpretive authority should rest in “the People” rather than the undemocratic judiciary because the text of the Constitution does not explicitly provide for judicial review. *Id.*

<sup>37</sup> *Id.* at 17. Article III, Section 1 of the Constitution insulates the judiciary from majoritarian political pressures with salary and tenure protections. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

<sup>38</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>39</sup> See *infra* Part V (discussing the Supreme Court’s deferential constitutional remedy jurisprudence).

to recognize judicial review while simultaneously rejecting ultimate judicial control over the fashioning of remedies for constitutional violations amounts to swimming half way across a river, rendering the entire system an illogical failure. To the extent the system survives, it is only because it is effectively built on a house of cards: the political branches could bring it down any time they have a mind to, restrained only by the very same sort of vague consensus and tradition that the Framers conspicuously sought to avoid as the last line of protection against tyranny when they chose to reject the British system in favor of written, mandatory positive law as a means of controlling majoritarian government.

None of this should be taken to suggest that the insulated judiciary always acts as a perfect check on the majoritarian branches, or even an effective one. On more than one occasion, the Supreme Court has permitted or even endorsed majoritarian oppression of minorities.<sup>41</sup> But as Churchill said of democracy, judicial control is the worst system—except for all the others.<sup>42</sup> Of the three branches, the insulated judiciary is far and away most likely to follow the Constitution's mandates because, unlike the executive, it possesses “neither FORCE nor WILL, but merely judgment,”<sup>43</sup> and possesses no military power to enforce those judgments. Furthermore, the judiciary differs from the legislature in that “it is not directly subject to the political pressures imposed by the . . . prejudices of the electorate.”<sup>44</sup>

For these reasons, we must deem remedies for constitutional violations to have constitutional status, and the federal judiciary must have the final authority to craft the appropriate remedial scheme with no deference to Congress or the Executive. To be sure, if Congress enacts remedies for violation of the Constitution pursuant to its authorized legislative power, the courts may choose to find those remedies sufficient, mooting the need for judicial fashion-

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<sup>40</sup> See John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2513 (1998) (arguing that Congress controls constitutional remedies); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (arguing that constitutional remedies are a matter of constitutional common law and thus ultimately controlled by Congress); see also *infra* Parts III, IV (critiquing existing scholarship that does not recognize that constitutional remedies logically must be under judicial control, and examining popular counterarguments to this theory).

<sup>41</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the constitutionality of the internment of Japanese prisoners in camps during World War II); *Plessy v. Ferguson*, 163 U.S. 537, 557–58 (1896) (upholding state racial segregation laws).

<sup>42</sup> HC Deb (11 Nov. 1947) (444) col. 207 (“Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time . . .”).

<sup>43</sup> THE FEDERALIST NO. 78, *supra* note 15, at 464 (Alexander Hamilton); see U.S. CONST. art. III (stating the powers of the judiciary).

<sup>44</sup> REDISH, *supra* note 25, at 19; see U.S. CONST. art. III, § 1 (stating the salary and tenure protections of the judiciary that insulate it from political pressures).

ing of further relief. But if the courts do so, it is not because of some built-in deference, but simply because the courts, deciding independently, find the legislative remedy adequate to protect and implement constitutional rights. Judicial control of constitutional remedies is consistent with judicial review of the meaning of the Constitution's rights-bearing provisions. In fact, it is an essential feature of judicial review. Although it is true that the Constitution has little to say explicitly about remedies, the document also does not fully explain the meaning of the rights to be protected. Those rights, without judicial explication of their meaning and scope, would not be worth the paper on which they are written. But the interpretation cannot end there. Were the judiciary limited to expounding on the meaning of the rights-bearing provisions without the power to enforce those meanings through appropriate remedial schemes, those provisions would be as toothless as if their meaning and scope were never developed in the first place. Judicial review to interpret the meaning of the Constitution must therefore include the power to fashion the remedies for constitutional violations. One simply cannot logically accept the former without accepting the latter.

### *B. Challenging the Intersection of Constitutional Directives and Constitutional Remedies*

One might respond to the compelling nature of the argument in favor of merging the power of constitutional interpretation and constitutional enforcement in two ways. First, one could argue that the fears of tyranny I express are grossly overstated. Our nation has survived as a constitutional democracy since its beginning with the understanding that the courts lack ultimate control of judicial remedies. Second, to the extent that the fears I raise are in fact legitimate, vesting ultimate control of constitutional remedies in the judiciary will be meaningless, because those involved in bringing about tyranny will no doubt refuse to enforce those decisions, much as President Jackson did in 1832 when he refused to obey Chief Justice Marshall's order in *Worcester v. Georgia*<sup>45</sup> and as President Lincoln did in 1861 when he ignored Chief Justice Roger Taney's writ of habeas corpus in *Ex parte Merryman*.<sup>46</sup>

Although, at some level, there is truth in both of these assertions, we ultimately must reject them as grounds for vesting ultimate control of constitutional remedies in the hands of the political branches. In the end, every meas-

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<sup>45</sup> 31 U.S. 515, 594–95 (1832) (holding unconstitutional a Georgia statute prohibiting non-Native Americans from being present on Native American lands without a license from the State of Georgia). In the aftermath of the decision, President Andrew Jackson reportedly said: “Well: John Marshall has made his decision: now let him enforce it!” Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J.S. HIST. 519, 519 (1973) (emphasis omitted).

<sup>46</sup> See 17 F. Cas. 144, 152–53 (C.C.D. Md. 1861) (holding that the president lacked authority to unilaterally suspend the privilege of the writ of habeas corpus).

ure that the Framers took to avoid the onset of tyranny can amount to no more than speed bumps. If the forces of tyranny are strong enough, nothing can stop them from ripping up the entire Constitution. But the fact that constitutional protections are merely speed bumps does not mean they are irrelevant. Although speed bumps cannot stop a car from going over and beyond them, they can force that car to slow down. Unless tyranny is imposed by outside enemies following a successful invasion, moves towards tyranny will demand some significant level of support within the populace. To the extent that those seeking to impose tyranny at the outset unambiguously violate controlling constitutional law, their legitimacy in the eyes of the populace is likely to be reduced. If majoritarian forces, as part of their move towards tyranny, are deemed to possess constitutionally valid authority to revoke all judicial remedies for violations of constitutional rights, it is likely to be that much easier for them to achieve their goal of gaining public support.

The fact that, at present, the fears I express may seem unrealistic does not mean that they are more theoretical than real, because once those issues do in fact become real, it is usually too late for constitutional theory to catch up.<sup>47</sup> It is, then, far better to debate these issues of constitutional theory at a time when they are in fact theoretical, rather than when they become all too real.

## II. CONSTITUTIONAL REMEDIES AND CONSTITUTIONAL TEXT

There may be another reason why scholars and courts have largely assumed ultimate remedial authority in the political branches. With very rare exception,<sup>48</sup> the text of the original document, as well as that of the Bill of Rights, make no reference to remedial authority. And although the post-Civil War amendments expressly mention legislative power of enforcement, they similarly say nothing about judicial enforcement.<sup>49</sup> Thus, to deem constitution-

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<sup>47</sup> David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 60–61 (2006) (arguing that the Suspension Clause of the Constitution can be used to modify underlying constitutional rights); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 602–07 (2009) (discussing the Suspension Clause and its application to modern problems posed by the war on terrorism); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 902 (2012) (exploring the historical record surrounding the Suspension Clause and arguing that only under a valid suspension could citizens be detained without criminal charges); cf. Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361 (2010) (arguing that the Fifth Amendment's Due Process Clause must be construed to supersede the Suspension Clause).

<sup>48</sup> See, e.g., U.S. CONST. art. I, § 9, cl. 2 (habeas corpus guarantee).

<sup>49</sup> *Id.* amends. XIII, XIV, XV (expressly giving Congress the power to enforce each respective amendment by appropriate legislation).

al remedies as having the status of constitutional law, one would have to infer the remedial power in the judiciary without any express textual basis.

For those who have no difficulty somehow gleaning from the written document a set of unwritten constitutional rights and directives,<sup>50</sup> inference from constitutional silence concerning judicial control of remedies should hardly seem shocking. I do not, however, include myself in that group. To the contrary, I believe in a form of constitutional textualism, which recognizes that although at some level constitutional text is often ambiguous, the total absence of linguistic grounding for constitutional dictates generally precludes judicial inference of constitutional authority.<sup>51</sup> How, then, am I able to give constitutional remedies constitutional status, when the text makes virtually no reference to such a remedial power?

The answer to that question is, in the end, not as difficult as it might seem. Although I consider myself a textualist,<sup>52</sup> a commitment to textualism does not necessarily imply a commitment to textual literalism. Rather than focusing on the textual trees, I believe the textual forest is far more important. In other words, the key for an interpreting court is to glean from the text some underlying purpose (which may or may not result from an originalist inquiry), and then to interpret the text in a manner that assists that provision in achieving that goal. I label this approach “facilitative textualism.” Thus, my interpretive approach justifies neither the Supreme Court’s holding in *Lochner v. New York*<sup>53</sup> nor its decision in *Roe v. Wade*,<sup>54</sup> regardless of my personal views on the social, political, or moral merits of either, because I can find no grounding for either in text, and because no one has fashioned a convincing argument providing real textual support in either instance.

In contrast to such naked, judge-made, nontextual additions to the Constitution, in certain instances facilitative textualism allows an expansion beyond the specific words in text in order to make the express textual directive meaningful. In the words of Justice Antonin Scalia and his coauthor, Professor Bry-

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<sup>50</sup> See, e.g., Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 848–49 (1978) (examining and reviewing noninterpretive judicial review, which the author refers to as “unwritten law”).

<sup>51</sup> See generally Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1493 (2012) (illustrating the author’s view of textualism).

<sup>52</sup> The author has already proposed a detailed textualist theory of constitutional interpretation. See *id.* (departing from nontextualism and demanding that interpretation be confined to the linguistic reaches of the actual constitutional text).

<sup>53</sup> 198 U.S. 45, 64 (1905) (recognizing a constitutional right to contract in the Fourteenth Amendment’s Due Process Clause, despite no textual basis for such a right).

<sup>54</sup> 410 U.S. 113, 166–67 (1973) (finding a woman’s right to abortion under the Due Process Clause, despite no textual basis for such a right); see also *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing a general constitutional right to privacy).



an Garner, “to say that one *begins* with the [text] is to suggest that one does not *end* there,”<sup>55</sup> for “[t]extualism, in its purest form, begins and ends with what the text says and fairly implies.”<sup>56</sup> Thus, the form of textualism that they advocate does not prohibit taking into consideration the more general purposes the text is designed to serve.<sup>57</sup>

According to Justice Scalia and Professor Garner, this form of textualism is not a new development; indeed, it has its roots in early American jurisprudence and has been applied throughout the country’s history. For example, in the Supreme Court’s 1819 holding in *McCulloch v. Maryland*, Chief Justice Marshall rejected a hyperliteral interpretation of the Necessary and Proper Clause.<sup>58</sup> Even earlier, in 1816, in the Court’s decision of *Martin v. Hunter’s Lessee*, Justice Joseph Story advocated for “reasonableness, not strictness, of interpretation”<sup>59</sup> and argued that “[t]he words [of the Constitution] are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.”<sup>60</sup> Much later, in the Court’s 1946 holding in *Utah Junk Co. v. Porter*, Justice Frankfurter noted that “[l]iteralness may strangle meaning.”<sup>61</sup> Rejecting a “narrow, crabbed reading of a text”<sup>62</sup> that is the essence of strict constructionism, textualists like Justice Scalia and Professor Garner acknowledge that the full text, given its fair, reasonable meaning, has implications that can alter the “hyperliteral meaning of each word in the text.”<sup>63</sup>

Disposing of strict constructionism as “a doctrine [not] to be taken seriously,”<sup>64</sup> textualists such as Justice Scalia simultaneously reject the notion that departing from the literal approach to textualism gives judges free license to ignore the text entirely, while paying it lip-service, and stray unrestrained by anything other than their own moral compasses into the realm of lawmaking. “[W]hile the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that

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<sup>55</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 17 (admitting that they do not consider themselves “pure” textualists).

<sup>58</sup> 17 U.S. (4 Wheat.) 316, 413, 421 (1819) (rejecting that “necessary” meant “absolute physical necessity” and stating, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional”).

<sup>59</sup> SCALIA & GARNER, *supra* note 55, at 355.

<sup>60</sup> *Id.* at 355–56 (alteration in original) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (opinion of Story, J.)).

<sup>61</sup> *Id.* at 355 (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946) (Frankfurter, J., majority opinion)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 356.

<sup>64</sup> *Id.*

range is permissible.”<sup>65</sup> The approach of this Article is entirely consistent with this idea, for finding the judiciary’s power to fashion constitutional remedies in the Constitution does not require departing from the document’s text. Such a power lies within that “limited range of meaning.”<sup>66</sup> Not only is this interpretation entirely compatible with the principled textualist approach just outlined, it is also reinforced by “rules of interpretation called the canons of construction,”<sup>67</sup> tools often associated with and favored by textualists. Several, in particular, are relevant here.

Thus, my version of facilitative textualism is wholly consistent with the interpretive approach just described. Indeed, the Supreme Court has employed it on a variety of occasions.<sup>68</sup> One of the fundamental canons is the presumption against ineffectiveness, which states that “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”<sup>69</sup> The canon is based on “the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness.”<sup>70</sup> It demonstrates that consideration of a legal text’s purpose is not inconsistent with textualism.

The presumption against ineffectiveness applies not only to the rights-bearing provisions of the Constitution, but also to the entire countermajoritarian document, for common sense interpretive principles dictate that no provision of the Constitution can be construed to be meaningless. Application of this canon is quite straightforward. Two of the purposes of the Constitution are to restrain the majoritarian branches and to protect the individual rights enshrined in the Constitution.<sup>71</sup> The countermajoritarian judiciary acts as the restraint on the majoritarian Congress and Executive. It would be an understatement to say that without it, and without recognizing both this duty and power, a primary purpose of the Constitution would go unfulfilled. This purpose would be ac-

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<sup>65</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 24 (1997).

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 25 (referring to canons of construction, which are often used and associated with textualism).

<sup>68</sup> *See, e.g., infra* notes 83–89 and accompanying text (illustrating how the Court used facilitative textualism to find rights to freedom of thought, association, and expressive anonymity through the First Amendment’s protection of free speech).

<sup>69</sup> SCALIA & GARNER, *supra* note 55, at 63.

<sup>70</sup> *Id.*

<sup>71</sup> This can be intuited from the fact that the countermajoritarian judiciary has the power of judicial review to ensure that the acts of its majoritarian counterparts comply with the Constitution and the fact that the Constitution explicitly provides for guarantees of specific individual rights. *See* U.S. CONST. amends. I, II, III, IV, V, VI, VII, VIII (providing for the protection of individual rights); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–79 (1803) (establishing the Court’s power of judicial review).

tively undermined and impossible to achieve, because the majoritarian branches would be left unchecked with little between them and possible tyranny, other than the parchment on which the Constitution is written. Similarly, without remedies, the Constitution's rights-bearing provisions would be wholly ineffective. Instead of serving their intended function of restraining the majoritarian branches, the provisions of the Constitution would function as nothing more than hortatory pleas. With no way to enforce or vindicate those rights, they would become worse than meaningless. Indeed, an interpretation that deprived the textual directive of mandatory countermajoritarian judicial enforcement would turn the Constitution into an instrument of deception, defrauding the populace into believing they possess rights that, as a practical matter, they do not have.<sup>72</sup>

In shaping a theory of implied enforcement powers, it is important to distinguish this "facilitative" form of nontextualism from the far less legitimate form of "supplemental" nontextualism. The former is merely a common-sense and principled means of analyzing the text of the Constitution in an effort to make sure the explicit text has meaningful impact. Absent these nontextual additions, the explicit textual directives are rendered all but meaningless as a matter of mandatory positive law. These ancillary directives are necessary as a matter of logic and practicality, in order to provide full force to the explicit provisions of the Constitution. The supplemental implied directives, by contrast, are not required to implement the Constitution's explicit mandates. Instead, the interpreter makes her own determination, often according to her personal ideology, that the directive is essential. Their connection to the text is tenuous at best. Recognition of the interpretive distinction between facilitative and supplemental nontextualism is necessary to rebut the charge that the former is illegitimate because the directives are not textually explicit and to mitigate the concerns that this approach would unleash judges to illegitimately stray from the text by fashioning supplemental implied constitutional directives with no foundation in the text.<sup>73</sup>

None of this is true of supplemental nontextual directives. These directives "are not found to be essential to the successful implementation of an explicit provision, but instead represent nothing more than directives that the interpreter happens to conclude are foundational to a democratic society."<sup>74</sup> These are inherently problematic because allowing "unrepresentative, unaccountable judges" to "check the political branches when and only when the choices of

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

<sup>73</sup> The aforementioned article refers to these as "internal" and "external" implicit directives. Redish & Arnould, *supra* note 51, at 1519 (encouraging the acceptance and use of "internal" implicit directives while warning of the use of "external" implicit directives).

<sup>74</sup> *Id.*

those branches differ from the narrow political preferences of” the judicial interpreter completely undermines “our system of popular sovereignty.”<sup>75</sup>

Consider, for example, the Court’s discovery of an unenumerated right to privacy in *Griswold v. Connecticut* in 1965.<sup>76</sup> Justice William Douglas, writing for the Court, reasoned that the “specific guarantees in the Bill of Rights,” particularly in the First, Third, Fourth, and Fifth Amendments, “have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>77</sup> In doing so, Justice Douglas took principles or guarantees expressly provided in the Bill of Rights—such as the prohibition against the quartering of soldiers in individuals’ homes during peacetime or the proscription against unreasonable searches and seizures—and fashioned something entirely new and distinct.<sup>78</sup> The right to privacy can be said to have been fashioned out of whole cloth because, although ostensibly starting with textual provisions, it becomes completely unmoored from the text and is not a necessary directive to effectuate or enforce the text. Justice Douglas’s analysis, although purportedly, on some strained level, grounded in the text, is not textualism at all. Thus, I categorically reject forms of supplemental nontextualism developed not to bring to life a specific provision, but rather to simply advance the interpreter’s own policy preferences. For reasons just explained, they are far different from the legitimate use of facilitative nontextualism I advocate for here.

One should be equally wary, however, of the other extreme, that “leaves the political branches effectively unchecked, [so that] the essential values of counter[.]majoritarian constitutionalism, so central to our political structure, [are] seriously undermined.”<sup>79</sup> Although proponents of this view repudiate the contention that the judiciary should completely defer to the political branches when constitutional challenges to their actions arise, any model that vests any institution other than the judiciary with ultimate interpretive authority “effectively bring[s] about this result.”<sup>80</sup>

Instead, a framework that remains fundamentally consistent with a faithful interpretation of the broad provisions of the Constitution’s text can rest firmly in the middle ground between the two extremes of an unrestrained judicial power either to restrict or empower the political branches on the one hand and, on the other hand, leave those majoritarian branches so unchecked as to

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<sup>75</sup> *Id.* at 1486.

<sup>76</sup> 381 U.S. 479, 484–86 (1965) (finding a right to privacy “emanat[ing]” from several explicit constitutional guarantees).

<sup>77</sup> *Id.* at 484.

<sup>78</sup> *Compare id.* at 484–86 (finding a general right to privacy), with U.S. CONST. amends. III, IV (prohibiting, respectively and explicitly, the quartering of soldiers during peacetime and unreasonable searches and seizures).

<sup>79</sup> Redish & Amould, *supra* note 51, at 1486.

<sup>80</sup> *Id.*

eviscerate the countermajoritarian nature of the Constitution. This approach gives rise to the possibility of ancillary constitutional directives, that never contradict the Constitution's explicit text but that are indispensable to give meaning and effect to what the text does explicitly provide. "[C]onfined to the outer linguistic reaches of applicable constitutional text,"<sup>81</sup> the ancillary directives "are concepts that, while not explicit on the face of the text, are both logically and practically necessary to assure viability of the textually explicit directive."<sup>82</sup>

One need not delve too deeply into the Supreme Court's interpretation of provisions of the Bill of Rights to find the Court's principled application of these directives. Take, for example, the First Amendment right of free speech.<sup>83</sup> The Supreme Court has rightly inferred from the text of the First Amendment such facilitative freedoms as the freedom of thought and the freedom of association,<sup>84</sup> as well as a right to expressive anonymity,<sup>85</sup> despite the fact that there is no express provision of these rights in the text of the amendment. Similarly, the Court has inferred a First Amendment right of anonymity, despite the text's failure to provide such a guarantee, because, absent such a right, the textually guaranteed right of free expression would often be chilled. The Court has wisely reasoned that without inference of these additional facilitative mechanisms, the right expressly provided—the right of free expression—cannot be implemented effectively. In 1958, in *NAACP v. Alabama ex rel. Patterson*,<sup>86</sup> a case involving a state attorney general's demand for the dis-

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<sup>81</sup> *Id.* at 1493.

<sup>82</sup> *Id.* at 1519.

<sup>83</sup> U.S. CONST. amend. I (referring to the freedoms of religion, speech, press, petition, and assembly).

<sup>84</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .").

<sup>85</sup> See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (Stevens, J., majority opinion) (holding unconstitutional an Ohio statute prohibiting the distribution of anonymous campaign literature because "anonymous pamphleteering is . . . a shield from the tyranny of the majority . . . thus exemplif[y]ing the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." (citations omitted)); *Talley v. California*, 362 U.S. 60, 64 (1960) (Black, J., majority opinion) (striking down a Los Angeles ordinance that required the inclusion of authors' personal information on any publicly distributed handbills, and noting "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression").

<sup>86</sup> 357 U.S. at 460. In *Griswold v. Connecticut*, Justice William Douglas uses this case as an example to justify the right to privacy, stating that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." 381 U.S. 479, 483 (1965). But as this Article has explained, this application is unsound because the so-called right to privacy does not facilitate the effectuation of the rights listed in the First Amendment—or any of the other rights listed in the Bill of Rights relied upon by Justice Douglas—whereas the freedom of association facilitates individuals'

closure of the NAACP's members, the Court found that "compelled disclosure of [the group's membership] [would] affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."<sup>87</sup> Because the freedom of association "will [frequently] function as a precursor to or facilitator of direct expression," it "can be seen as ancillary to and facilitative of the right of expression."<sup>88</sup> It is purely a matter of common sense that "the freedom of speech cannot survive, much less flourish, absent corresponding constitutional recognition of these supporting freedoms."<sup>89</sup>

What is true for these ancillary, facilitative First Amendment freedoms is equally applicable to implied enforcement powers. Indeed, the case for viewing implied enforcement powers as a legitimate form of facilitative textualism is far stronger than the case for recognizing ancillary facilitative First Amendment freedoms. Absent the ancillary First Amendment freedoms that the Court has recognized, the right of free expression would still possess independent force, albeit at a level significantly weaker than it possesses when those additional freedoms are added. In contrast, absent recognition of an implied power of countermajoritarian judicial enforcement, the foundational countermajoritarian nature of the entire document would be lost. As Chief Justice Marshall recognized in *Marbury v. Madison*, the only means by which courts may interpret the provisions of the Constitution is through a process of adjudication—a process that necessarily assumes a judicial exercise of remedial power. Absent such a remedial power, courts cannot perform their function.<sup>90</sup> Thus, once one concludes—as our nation long has—that judicial review is itself an essential element of American constitutionalism, vesting in the courts a corresponding remedial power must similarly be recognized as an essential element of our constitutional framework.

One might respond that as long as the political branches remain willing to vest in the judiciary such remedial power, the system of American constitutionalism can continue to function properly. But as long as the judiciary's retention of its enforcement power remains entirely in the discretion of the political branches that the Constitution seeks to control, the system has a dangerously weak foundation.

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ability to practice the freedom of speech explicitly provided in the First Amendment. See *NAACP*, 357 U.S. at 460 (making this observation); *supra* notes 72–80 and accompanying text (highlighting the important distinction between facilitative nontextualism and supplemental nontextualism).

<sup>87</sup> *NAACP*, 357 U.S. at 462–63.

<sup>88</sup> MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 162 (2013).

<sup>89</sup> Redish & Arnould, *supra* note 51, at 1519.

<sup>90</sup> See 5 U.S. (1 Cranch) 137, 176–78 (1803) (exposing the judiciary's power of judicial review through adjudication).

Implied facilitative constitutionally guaranteed remedial authority is in no way logically confined to constitutional rights. This facilitative enforcement power logically applies as well to other provisions of the Constitution relating to the powers of the federal government. The executive branch provides a good example. Article II vests the executive power in the President<sup>91</sup> and requires that he or she “take Care that the Laws be faithfully executed.”<sup>92</sup> There is absolutely no reference in the text of Article II or any other part of the Constitution to executive privilege. It can only be justified as a means of protecting and facilitating the exercise of executive power. Although this power is neither absolute nor unqualified, the Supreme Court has recognized its constitutional foundations: “The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>93</sup>

Consequently, the combination of the Constitution’s mandatory language and countermajoritarian nature, along with the understanding that a strictly literal reading of the Constitution is unworkable and that ancillary directives are needed to effectuate the Constitution’s rights-bearing provisions, demonstrates that a principled textualist approach to interpreting the Constitution demands constitutional status for constitutional remedies.

### III. THE INADEQUACY OF EXISTING SCHOLARLY THEORY

Issues surrounding the status of constitutional remedies have not escaped the attention of at least a few leading constitutional law scholars, though it would not have been unreasonable to expect the subject to have received considerably more attention. Some of the scholars that have examined the issue have moved in the direction of the firm stance I take here. All of them, however, have consistently failed to: recognize the constitutional status of constitutional remedies; recognize why only the judiciary, by way of its final interpretative authority, can appropriately fashion these remedies; or integrate all of these elements into a comprehensive constitutional theory in line with the foundational principles of American constitutionalism.<sup>94</sup>

Professor Henry Hart briefly addressed the issue in his famous dialogue, recognizing broad congressional power to craft and select remedies. In his words, “[i]t must be plain that Congress necessarily has wide choice in the selection of remedies, and that [the status of these remedies] can rarely be of

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<sup>91</sup> See U.S. CONST. art. II, § 1, cl. 1.

<sup>92</sup> *Id.* art. II, § 3.

<sup>93</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974) (footnote omitted) (explaining the rationale for a presumptive privilege for presidential communications).

<sup>94</sup> See *infra* notes 95–141 and accompanying text (critiquing the existing scholarship surrounding constitutional remedies).

constitutional dimension.”<sup>95</sup> He added, “that preventive relief is the exception rather than the rule . . . makes it hard to hold that anybody has a constitutional right to an injunction or declaratory judgment.”<sup>96</sup> In so declaring, he made a serious mistake of overstatement. Hart fatally fails to distinguish between constitutional and statutory remedies.<sup>97</sup> Denial of remedies for constitutional violations are *always* and *necessarily* determinations of constitutional dimension. When constitutional rights have been violated, only a constitutional remedy can provide adequate redress, and basic notions of separation of powers and American constitutionalism inescapably dictate that those remedies are to be fashioned by the judiciary as an inherent element of the process of judicial review.<sup>98</sup> One cannot evaluate the proper respective roles for Congress and the judiciary without first recognizing this critical distinction. Moreover, this distinction allows for a clear dividing line: Congress controls statutory remedies because it legislates statutes, whereas the judiciary controls constitutional remedies because only it has final say as to the meaning of the Constitution.<sup>99</sup>

Professor John Harrison has also advocated strong congressional authority over constitutional remedies.<sup>100</sup> In his inquiry into the extent to which Congress can control constitutional remedies, Harrison argues that only Congress, under its substantive powers, can create affirmative judicial remedies.<sup>101</sup> Because remedies depend solely upon congressional authorization, Congress may withdraw what it also has the power to confer.<sup>102</sup> The implication of his argument is an exceedingly narrow view of judicial authority to protect constitutional rights—one lacking the power to provide affirmative remedies for constitutional violations. His theory also makes the same mistake as Hart’s: the source of the right implicates the source of the remedy. The two must be one and the same, lest the entire process of judicial review be rendered no more than the equivalent of the French Maginot Line immediately prior to World

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<sup>95</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953).

<sup>96</sup> *Id.* at 1366.

<sup>97</sup> See *Constitutional*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining as “[o]f, relating to, or involving a constitution”); *id.* at *Statutory* (defining as “[o]f, relating to, or involving legislation, or legislatively created”).

<sup>98</sup> See *supra* Part I.A (arguing that fundamental principles of the Constitution demand judicial control of constitutional remedies).

<sup>99</sup> U.S. CONST. art. I, § 1 (vesting all legislative powers in Congress); *id.* art. III, § 1 (vesting all judicial power in the courts).

<sup>100</sup> Harrison, *supra* note 40, at 2513 (arguing that Congress controls constitutional remedies).

<sup>101</sup> *Id.* at 2514–15 (arguing that Congress has both substantive and structural powers). Substantive powers refer to Congress’s ability to create causes of action to be heard in federal courts, whereas structural powers refer to Congress’s ability to determine what kind of decrees the federal courts can issue. *Id.*

<sup>102</sup> See *id.* at 2518–19 (explaining this concept through an example using the Due Process Clause).



War II—on the surface appearing to provide strong protection yet in reality, easily circumvented by the very forces against whom protection is needed. Congress, as an inherent element of its legislative power, can create federal remedies for statutorily created rights.<sup>103</sup> In sharp contrast, as I have explained, the rights protected by the Constitution must be given final meaning by the courts that are empowered to interpret it. Thus, unless one rejects the foundational premise of judicial review—and none but fringe constitutional scholars have even seriously raised this possibility—protecting those rights is the role of the judiciary, and therefore, the means to protect constitutional rights are equally left to judicial determination. This is a fundamental reality of our entire democratic and countermajoritarian constitutional framework.<sup>104</sup>

Others have pushed back on Hart's and Harrison's arguments for congressional primacy, but they have failed to push back strongly enough. For example, Professor Daniel Meltzer<sup>105</sup> responded directly to Harrison's "radical" theory that "the Constitution is merely a shield and not a sword."<sup>106</sup> Meltzer questions Harrison's conclusion—that the scope of the judiciary's power to supply constitutional remedies is a narrow one—as "a doubtful leap" from Harrison's "originalist" premises.<sup>107</sup> "The nineteenth century practice on which Harrison relies" for his conclusion, Meltzer argues, provides "weak support for [Harrison's] [argument] that that framework is the *exclusive* one called for by the Constitution."<sup>108</sup> Meltzer points out that Harrison fails to cite any legislative, judicial, or other contemporary authority in the early years of the United States for his proposition.<sup>109</sup> He then points to the "distinctive American ideas of a written higher law, enforceable by courts, and of individual rights protected by the Constitution" for a broad understanding of *Marbury v. Madison*'s notion that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."<sup>110</sup>

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<sup>103</sup> See U.S. CONST. art. I, § 1 (vesting all legislative powers in Congress).

<sup>104</sup> See *supra* Part I.A.

<sup>105</sup> See *infra* Part IV.A (discussing Meltzer's support for the theory of constitutional common law, that I argue is incoherent and cedes far too much power to Congress and unconstitutionally permits the legislature to reverse or modify the judiciary's interpretation of the Constitution).

<sup>106</sup> Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2551 (1998) (footnote omitted).

<sup>107</sup> *Id.* These premises are: "(1) in the nineteenth century, officer suits based on claims of private right were the predominant, indeed perhaps the virtually exclusive, form of relief against unconstitutional action; (2) in court, the Constitution's principal effect was to nullify statutes or other claims of official defense; and (3) most constitutional litigation involved the validity of statutes rather than of nonlegislative governmental actions." *Id.* (footnotes omitted).

<sup>108</sup> *Id.* at 2553; see *supra* note 107 and accompanying text (listing the practices upon which Harrison based his conclusion).

<sup>109</sup> Meltzer, *supra* note 106, at 2553–54.

<sup>110</sup> *Id.* at 2554 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

Meltzer's analysis up to this point is no doubt both fair and accurate. Not only does Harrison ignore the inherently constitutional nature of the rights and remedies, he also fails to ground his approach fully in the Constitution. Nevertheless, Meltzer missed an opportunity to strike even more forcefully at Harrison's framework. The Constitution cannot be reduced merely to a shield, meant solely to soften the blow of majoritarian attacks on individual constitutional liberties.<sup>111</sup> Rather, it must provide for the countermajoritarian judiciary to wield power in response so that the rights protected are actually vindicated and the people can exercise them. Any order a court issues to protect constitutional rights will necessarily require the political branches to do or refrain from doing something. The Constitution as a sword, in effect, allows individuals to take full advantage of the constitutional rights afforded to them rather than hide behind a shield while Congress or the Executive searches for other ways to violate those rights.

Meltzer continued to develop this theory of constitutional remedies in an article coauthored with Professor Richard Fallon.<sup>112</sup> They recognize certain important remedial implications in the Constitution and argue that there should be "a strong though not unyielding presumption" in favor of "individually effective redress for violations of constitutional rights"<sup>113</sup> and that "constitutional remedies [must be] adequate to keep government generally within the bounds of law."<sup>114</sup> Meltzer and Fallon acknowledge the general lack of explicit reference to remedies in the Constitution but explain that "[t]o the [F]ramers, special provision for constitutional remedies probably appeared unnecessary, because the Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional guarantees would be implemented."<sup>115</sup> They base their theory on two basic principles served by constitutional remedies: "[t]he first is to redress individual violations" (i.e., for every right there is a remedy); and "[t]he second function is . . . to reinforce structural values, including those underlying the separation of powers and the rule of law."<sup>116</sup> Both Meltzer and Fallon recognize that the Constitution was designed to serve as a

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<sup>111</sup> See *id.* at 2551 (summarizing the implication of Harrison's theory: that the federal courts acting on their own lack the authority to institute constitutional remedies without the congressional issuance of such power).

<sup>112</sup> See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (developing a general theory of constitutional remedies that keeps government within the bounds of the Constitution, but in some cases denies relief).

<sup>113</sup> Meltzer, *supra* note 106, at 2559 (summarizing his work with Fallon).

<sup>114</sup> Fallon & Meltzer, *supra* note 112, at 1778–79.

<sup>115</sup> *Id.* (addressing the criticism that the Constitution does not explicitly address the subject of remedies).

<sup>116</sup> *Id.* at 1787.

necessary check on the political branches and that it is the judiciary's role "to represent the people's continuing interest in the protection of long-term values, of which popular majorities, no less than their elected representatives, might sometimes lose sight."<sup>117</sup> Nevertheless, they view this as merely "aspiration[al]" and "not an unqualified command" flowing directly and logically from the text of the Constitution.<sup>118</sup> This is their fatal mistake, for reasons explained throughout this Article.

Meltzer and Fallon, along with Professor Walter Dellinger, acknowledge that Congress can and should play a legitimate role in crafting these remedies. For example, Dellinger argues that Congress can "substitut[e] an alternative remedial scheme [for the one created by the Court], provided it affords comparable vindication of the constitutional provision involved,"<sup>119</sup> and that in many cases the judiciary should actually defer<sup>120</sup> to Congress regarding constitutional remedies.<sup>121</sup> Even though scholars like Dellinger claim that "[t]he source of the Court's power to create remedies will be found, if at all, in the spare language of [A]rticle III,"<sup>122</sup> they still assume "that Congress has the power initially to detail the remedial mechanisms available in the federal courts, [and that] Congress should be free to revise with an adequate alternative any remedy which is not determined by the Court to be indispensable but which is merely selected by the Court as one appropriate method of carrying into effect a substantive constitutional right."<sup>123</sup>

Despite acknowledging Congress's critical role in crafting remedial schemes, Dellinger seemingly leaves open the possibility that some remedies may lie solely within the province of the judiciary—in the "spare language of [A]rticle III."<sup>124</sup> But this notion remains grossly underdeveloped. Dellinger is correct in stating that remedies are part of the judicial power and manifested through judicial review. But left unsaid is that the judiciary's remedial power is fundamental to its countermajoritarian duty to enforce the Constitution and

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<sup>117</sup> *Id.* at 1788.

<sup>118</sup> *Id.* at 1789.

<sup>119</sup> Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548 (1972).

<sup>120</sup> *Id.* at 1549 (arguing that, with respect to constitutional remedies, the court should usually defer in advance to Congress). Dellinger comments in a footnote that "[t]he ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review." *Id.* at 1548 n.89.

<sup>121</sup> *Id.* at 1549 ("Certainly, given the wider range of remedial techniques available to the legislature, the Court should often defer to the ability of Congress to effectuate a more precise compromise of competing interests.").

<sup>122</sup> *Id.* at 1541 (referring to the fact that this power could be found in the granting of the judicial power).

<sup>123</sup> *Id.* at 1549.

<sup>124</sup> *Id.* at 1541.

restrain majoritarian excesses. Also left unanswered is where exactly one is to find the line dividing those remedies that must be left solely to the judiciary and those that need not be. “If the Court is restricted in its development of constitutional remedies to only those remedies which are so indispensable that their absence would render the guarantee involved a ‘mere form of words,’ then the Court’s implementation of the Constitution will be less than that reasonably implicit in the document.”<sup>125</sup> Seemingly—for just a few pages later he says “where the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy.”<sup>126</sup> This also fails to account for Congress’s inability to interpret the Constitution and the fact that the judiciary owes Congress no deference regarding what is or is not adequate. And the Constitution is the clear, principled dividing line. Rights that fall under the Constitution can be redressed solely by the judiciary’s remedial power.

Fallon has elaborated further on constitutional remedies in the context of congressional power to limit the jurisdiction of federal courts.<sup>127</sup> He emphasizes that “jurisdiction to decide constitutional cases would prove meaningless without judicial power to award remedies,” adding that judicial “pronounce[ments] on constitutional issues” for which the courts “could not order [] remed[ies] would run afoul of “Article III’s prohibition against advisory opinions.”<sup>128</sup> But although “the constitutional necessity of any particular remedy should be regarded as a function not only of the availability or unavailability of other remedies, but also of the particular constitutional provision under which a party seeks relief,” the principle “that the Constitution requires some form of individually effective relief in all cases . . . is not absolute and will sometimes yield to interests in efficient government administration.”<sup>129</sup> Nevertheless, Fallon states that “congressional attempts to preclude all possible remedies for the systematic or ongoing violation of constitutional rights . . . should be deemed intolerable.”<sup>130</sup> But this sets the constitutional bar far too low; the mere fact that Congress has provided *some* remedy does not necessarily mean that the courts, exercising their independent final authority to interpret consti-

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<sup>125</sup> *Id.* at 1550 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971)).

<sup>126</sup> *Id.* at 1552–53.

<sup>127</sup> Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1104–15 (2010) (arguing that the stripping of state and federal jurisdiction would preclude the award of constitutionally necessary remedies, thus violating the Constitution).

<sup>128</sup> *Id.* at 1100 & n.264.

<sup>129</sup> *Id.* at 1107–08.

<sup>130</sup> *Id.* at 1107.

tutional directives, must accept the congressional determination of what is adequate. In any event, Fallon does not go far enough, missing the inherent intersection between countermajoritarian substantive constitutional commands and constitutional remedies that are justified as a form of facilitative or ancillary textualism.<sup>131</sup>

Despite the serious flaws to which I have pointed, there is much to approve of in the scholarship of Dellinger, Fallon, and Meltzer, to the extent that they argue that the judiciary possesses the power to fashion constitutional remedies and that this authority derives from the Constitution itself.<sup>132</sup> All of them overlook or fail to recognize that this power, however, can and must rest ultimately with the judiciary—in *all constitutional cases*.<sup>133</sup> It is a matter not only of textual and structural constitutional interpretation, but also a logical outgrowth of the theory of the inherently paradoxical nature of American constitutionalism. And although these scholars have acknowledged the countermajoritarian role of the federal courts, they have not fully reconciled this role with giving final congressional authority to interpret the Constitution on its own—a political branch interpreting the restraints on its own action. In fact, these two ideas are irreconcilable, as majoritarian control of constitutional remedies and interpretation eviscerates the countermajoritarian nature of the Constitution.

Professor Susan Bandes has sought to develop a more complete theory in her discussion of *Bivens*<sup>134</sup> remedies.<sup>135</sup> She recognizes “that the judicial branch can enforce the Constitution without congressional action,” as “enforcement of the Constitution is not dependent on the assent of the political branches or of

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<sup>131</sup> See *supra* Part I.A (detailing how the countermajoritarian nature of the Constitution and role of the courts demands that constitutional remedies be constitutional law); *supra* Part II (providing an overview of facilitative textualism and arguing that it supports judicial control over constitutional remedies).

<sup>132</sup> See Dellinger, *supra* note 119, at 1541 (arguing that, according to the language of Article III, some remedies may solely be in the province of the judiciary); Fallon, *supra* note 127, at 1100 & n.264 (articulating that to not allow federal courts to control remedies for conditional violations would run afoul of Article III); Fallon & Meltzer, *supra* note 112, at 1788 (recognizing that the Constitution designs the judiciary to serve as the protector of the people’s individual rights from the majoritarian branches).

<sup>133</sup> See Dellinger, *supra* note 119, at 1548–49 (arguing that Congress can substitute a remedial scheme for the one created by the courts, and that in most cases the courts should defer); Fallon, *supra* note 127, at 1107–08 (contending that the Constitution does not always require an individual effective remedy in every case); Fallon & Meltzer, *supra* note 112, at 1789 (viewing the countermajoritarian view of the judiciary as an “aspiration[al]” not “unqualified command”).

<sup>134</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (finding an implied damages remedy for violations of the Fourth Amendment by federal agents).

<sup>135</sup> See *infra* Part V (discussing the origin, expansion, and subsequent limitation of the *Bivens* doctrine of implied constitutional remedies).

the states.”<sup>136</sup> Bandes further claims that “[t]he insight at the heart of *Bivens* is that the judiciary has a duty to enforce the Constitution” and that “[i]f the remedy [for violations of the Constitution] is not forthcoming from the political branches, the Court must provide it.”<sup>137</sup> Her argument relies on the “separation of powers principle demand[ing] judicial enforcement,” declaratory and injunctive relief, as well as damages remedies.<sup>138</sup> Although Bandes is undoubtedly skeptical of a role for Congress in this area,<sup>139</sup> it appears as though she may allow for some congressional participation so long as the remedy it provides is adequate.<sup>140</sup> Mere skepticism is insufficient, however, and it is this point that ultimately distinguishes her theory from the one proposed in this Article: the majoritarian branches cannot in any case be deemed to possess the ultimate say in “determin[ing] the proper means for effectuating constitutional guarantees.”<sup>141</sup> The countermajoritarian nature of judicial review permits no deference to Congress in constitutional interpretation. It is the role of the judiciary alone to interpret the Constitution, and fashioning remedies for constitutional violations is an essential feature of that role. The judiciary must be able to create constitutional remedies because such remedies are necessary facilitative directives, required to effectuate the textually explicit directives.

The aforementioned theories of constitutional remedies either concede far too much power to Congress, fail to give remedies for constitutional violations the required constitutional status, or fail to place the theory of judicial control of remedies within a broader theory of American constitutionalism. I seek to fill these gaps by offering a theory fully consistent with and faithful to both the text of the Constitution and the paradox of American constitutionalism.

#### IV. ANTICIPATING AND RESPONDING TO COUNTERARGUMENTS

To this point, I have demonstrated that both constitutional theory and text, properly construed, point ineluctably toward a framework in which constitutional remedies are deemed to possess constitutional status. Furthermore, only the countermajoritarian judiciary, whose independence from political pressure

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<sup>136</sup> Susan Bandes, *Reinventing Bivens: The Self-executing Constitution*, 68 S. CAL. L. REV. 289, 291–92 (1995).

<sup>137</sup> *Id.* at 293.

<sup>138</sup> *Id.* at 294 (arguing that the ultimate responsibility to enforce the Constitution lays with the courts by being able provide any adequate remedies against constitutional violations).

<sup>139</sup> *See id.* at 307 (arguing that if Congress were given authority over the existence, nature, and extent of constitutional remedies “[t]he structural limits on the powers of government would exist only in the unlikely event that those with governmental power did not seek to aggrandize it”).

<sup>140</sup> *See id.* at 324 (“In a sense, I am arguing that deference to Congress in this area is inappropriate. However, I do not mean to argue that the Court must determine the proper means for effectuating constitutional guarantees.”).

<sup>141</sup> *Id.*

is assured by Article III's prophylactic salary and tenure guarantees, may possess the ultimate power to fashion these remedies if our constitutional system is to function properly. This remedial power is appropriately viewed as an inherent element of the power of judicial review.

Nevertheless, courts, Congress, and scholars have largely rejected this constitutional theory throughout much of our nation's history.<sup>142</sup> This is not because the theory has been ignored, but rather because it has been rejected on other grounds. This Part examines two of the most likely counterarguments. The first, set forth in Section A,<sup>143</sup> is Professor Henry Monaghan's theory of constitutional common law that posits that the power to develop remedies stands somewhere between legislative and judicial power. The second, set forth in Section B,<sup>144</sup> is the well-settled power of Congress to control federal court jurisdiction which has often been assumed to subsume the power to control the remedies afforded by the federal courts. Careful analysis will demonstrate, however, that both are seriously flawed as a matter of constitutional theory.

#### A. *The Incoherence of Constitutional Common Law*

In his review of the Supreme Court's 1974 term, Monaghan articulated his theory of constitutional common law.<sup>145</sup> Monaghan contended:

[A] surprising amount of what passes as authoritative constitutional "interpretation" is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.<sup>146</sup>

If the reader was not puzzled by this statement at the outset, a more careful reading should quickly demonstrate just how dubious Monaghan's theory actually is. In one breath, Monaghan points to "substantive, procedural, and remedial rules" inspired and authorized by the Constitution. These rules would necessarily be developed by the judiciary in the course of its interpretation of the Constitution. In the next breath, Monaghan claims that these judicial holdings can be amended, modified, or even overruled by Congress. This turns our system of separation of powers on its head. Congress has no authority to amend,

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<sup>142</sup> See *supra* Part III (outlining and critiquing popular scholarship regarding constitutional remedies that reject the theory developed in this Article); *infra* Part V.B (discussing the origin and subsequent limitation of the *Bivens* remedy).

<sup>143</sup> See *infra* Part IV.A.

<sup>144</sup> See *infra* Part IV.B.

<sup>145</sup> See generally Monaghan, *supra* note 40 (expressing his theory of constitutional common law).

<sup>146</sup> *Id.* at 2–3.

modify, or reverse the Supreme Court's interpretation of the Constitution.<sup>147</sup> On the other hand, if a particular substantive, procedural, or remedial rule is truly part of the common law, how can it be properly characterized as constitutional interpretation? Constitutional law, by its very countermajoritarian nature, preempts congressional revision. In contrast, common law, again by its very nature, is inherently subject to congressional modification. Either the courts are construing the Constitution, or they are not. As a matter of the theory of American constitutionalism, then, Monaghan is swimming halfway across a river. In short, his entire theory is, as a matter of political theory, incoherent.

Uncovering more of the theory shines additional light on its inherent incoherence. The constitutional common law, Monaghan emphasized, was "rooted in the Constitution" and essentially a species of Judge Henry Friendly's "specialized" federal common law.<sup>148</sup> Monaghan set out his theory of the Supreme Court's constitutional common law power through an examination of Supreme Court developments in the field of criminal procedure, particularly the exclusionary rule—a doctrine created by the Court prohibiting the use of evidence obtained through violations of the Fourth, Fifth, and Sixth Amendments.<sup>149</sup> The Supreme Court's common-lawmaking power, however, extends beyond that, according to Monaghan.<sup>150</sup>

He points to the fact that the Supreme Court has used its power to create rights and remedies protecting federal interests and implementing federal legislative schemes. Accordingly, the Court should be free to employ the same kind of power to protect constitutional rights, as the Court's history of protecting individual rights make it a "singularly appropriate institution" to carry out this role.<sup>151</sup> Although Monaghan argues that this power is "rooted in the Constitution," he envisions "a coordinate role for Congress"—a form of Court-Congress "dialogue"—"in the continuing process of defining the content and

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<sup>147</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (holding that Congress's enactment of the Religious Freedom Restoration Act of 1998 was inappropriate "because it contradicts vital principles necessary to maintain separation of powers").

<sup>148</sup> Monaghan, *supra* note 40, at 3, 10–11 (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)) (lauding *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), for enabling the development of a limited, but "predictable and useful," federal common law). The federal common law that Monaghan refers to is the decisional law created by federal courts when adjudicating federal questions. *Common Law*, BLACK'S LAW DICTIONARY, *supra* note 97.

<sup>149</sup> Monaghan, *supra* note 40, at 3–10 (exemplifying the theory of constitutional common law through the development of the exclusionary rule); see *Exclusionary Rule*, BLACK'S LAW DICTIONARY, *supra* note 97.

<sup>150</sup> See Monaghan, *supra* note 40, at 17 (explaining the Court's constitutional common lawmaking power in the context of its dormant commerce clause jurisprudence).

<sup>151</sup> *Id.* at 13–19 (arguing that the authority to create federal common law in different situations derives from the structure of the Constitution and that protection of individual liberties has become and should remain the central function of judicial review).



consequences of individual [constitutional] liberties.”<sup>152</sup> Congress’s power to revise or reverse the Supreme Court’s constitutional common law is, he argues, key to overcoming objections and concerns that constitutional common law violates separation of powers.<sup>153</sup>

Despite the critical role Monaghan sees Congress playing in protecting individual constitutional rights and liberties, particularly “where the Court’s rule is perceived to have gone too far,” he appears to acknowledge that there may be judicially crafted rules or remedies that may be beyond the reach of Congress to amend or reverse.<sup>154</sup> For it is constitutional interpretation, and no longer common law, when the Court views a particular remedy as an indispensable component of the underlying constitutional guarantee.<sup>155</sup> And, he continues, “[t]he Court undoubtedly has both the power and the duty to fashion ‘interpretive’ implementing rules to fill out the meaning of generally framed constitutional provisions.”<sup>156</sup> Some of these rules may be “true constitutional interpretations within the meaning of *Marbury v. Madison*.”<sup>157</sup> But true constitutional interpretations, of course, cannot be characterized as common law.<sup>158</sup> Only the judiciary has the final authority to interpret the Constitution and determine the remedies that are indispensable to its meaning, and Congress has no power to overturn the judiciary’s interpretation of any constitutional provision.

One of the major problems with Monaghan’s theory is that he leaves completely unanswered the question of where the dividing line is to be drawn. The deeper one goes, the murkier the water becomes. How does it fit within our constitutional structure for Congress to overrule judicial judgments when the Court is “interpreting the Constitution ‘itself.’”<sup>159</sup> Monaghan’s answer is unclear.<sup>160</sup> Ultimately, he appears content to settle on a “quasi-constitutional,” twilight-zone-like law of remedies that the Court can fashion to vindicate con-

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<sup>152</sup> See *id.* at 3, 27–29.

<sup>153</sup> *Id.* at 34. Monaghan views this as only “limited judicial lawmaking to vindicate existing constitutional rights.” *Id.* at 35.

<sup>154</sup> *Id.* at 24, 29 (recognizing that when dealing with matters of constitutional common law, Congress provides a safety-valve, but one that is not available when dealing with constitutional interpretation and constitutional rights).

<sup>155</sup> *Id.* at 24 (differentiating the boundary between constitutional common law, in which Congress has a role to play, and constitutional interpretation, in which separation of powers mandates that Congress has no role).

<sup>156</sup> *Id.* at 22.

<sup>157</sup> *Id.* at 32–33.

<sup>158</sup> See *id.* at 24 (arguing that if an action is not constitutional interpretation then it is common law).

<sup>159</sup> *Id.* at 15.

<sup>160</sup> See *id.* at 15–17 (providing potential answers to the posed question but subsequently critiquing them). In the context of the Commerce Clause, Monaghan contends that the Supreme Court is not actually engaged in constitutional interpretation but in “fashioning federal common law on the authority of the commerce clause.” *Id.* at 17.

stitutional liberties, subject—except apparently in the clearest instances of constitutional interpretation—to the power of Congress to revise or reverse the judiciary’s remedial scheme with one of its own.<sup>161</sup> This resolution, however, is far from satisfactory. Indeed, the notion of “quasi-constitutional” law seems like nothing more than an attempt to have one’s cake and eat it, too. Congress has no constitutional interpretive authority; so, in order for it to have any role at all, this area of the law must be something less than fully constitutional. That in itself is incoherent because the text from which these rules and laws are drawn is the Constitution—and only the judiciary can formulate those interpretations.

Leading scholars have weighed in on Monaghan’s behalf.<sup>162</sup> Professor Daniel Meltzer has argued “that the Constitution ‘authorizes’ such lawmaking every bit as much as do federal statutes[,]” finding this authority to be unexceptional.<sup>163</sup> Moreover, he is not as troubled by the difficulty of drawing a “distinction between . . . common law and pure constitutional interpretation.”<sup>164</sup> Meltzer, like the fiercest critics of Monaghan’s theory (described below), acknowledges that there are instances in which congressional reversal or modification of a judicial decision of constitutional interpretation would violate the Constitution.<sup>165</sup> This is too generous. Every congressional attempt to reverse or modify the judiciary’s interpretation of the Constitution is unconstitutional.

Monaghan’s theory has been forcefully attacked by critics such as Professors Thomas Schrock and Robert Welsh.<sup>166</sup> They raise three primary objections to the theory of constitutional common law: “*Marbury*-style judicial review . . . separation of powers . . . [and] federalism.”<sup>167</sup> *Marbury*, they argue, “legitimizes only constitutional review” and authorizes no “sub[-]constitutional powers over other branches.”<sup>168</sup> They also contend that constitutional common law poses separation of powers problems with respect to both Congress and the

<sup>161</sup> See *id.* at 9, 24 (advocating for a theory of quasi-constitutional law of constitutional remedies that functionally resembles the common law but for situations when the remedies are indispensable to underlying constitutional rights).

<sup>162</sup> See Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 27 (1994) (voicing his support for the importance and validity of Professor Monaghan’s constitutional common law); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172–76 (1986) (explaining his support for Monaghan’s constitutional common law).

<sup>163</sup> Meltzer, *State Court Forfeitures*, *supra* note 162, at 1173–74.

<sup>164</sup> *Id.* at 1174 (internal quotation marks omitted).

<sup>165</sup> *Id.*; see *infra* notes 166–179 and accompanying text (critiquing Monaghan’s theory).

<sup>166</sup> See generally Thomas S. Schrock and Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (arguing that Monaghan’s theory of constitutional common law is illegitimate).

<sup>167</sup> *Id.* at 1127–29 (objecting to the view that the Court can have sub-constitutional power on three grounds).

<sup>168</sup> *Id.* at 1127 (articulating the *Marbury v. Madison*-style judicial review objection).

executive branch.<sup>169</sup> The Court's regulation of subjects as diverse as "criminal law, welfare service, public employment systems, and the like" would improperly invade Congress's sphere of power.<sup>170</sup> That Monaghan's theory permits Congress to overrule the judiciary in these fields does not solve the constitutional problem, for Congress's ability to defend "itself against judicial invasion of its sphere does not justify that invasion in the first place."<sup>171</sup> They also highlight Monaghan's tendency "to assimilate the constitutional common law to judicial review when he needs the benefit of the latter's established legitimacy" to reconcile his theory's separation of powers problem vis-à-vis the executive branch.<sup>172</sup> Finally, Schrock and Welsh object to constitutional common law on federalism grounds, which even Monaghan recognizes might "allow[] Supreme Court intrusion upon areas of state competence in a manner inconsistent with *Erie*'s fundamental presuppositions with respect to the limits of federal judicial power to displace state law."<sup>173</sup>

Schrock and Welsh also argue that Monaghan's concept of constitutional common law has no basis of authority in the Constitution, as "he can ultimately do no better than to infer authority from utility."<sup>174</sup> Neither general federal common law, nor analogies to some commerce cases, nor the Court's supervisory power suffice to overcome their objections and provide authority for the Court's constitutional common-lawmaking power that Monaghan claims.<sup>175</sup>

Schrock and Welsh are correct that, if one views the Court's actions in this realm as common lawmaking, Monaghan's theory does concede a power to the judiciary that is not found in the Constitution.<sup>176</sup> But my disagreement

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<sup>169</sup> *Id.* at 1127–28 (making the separation-of-powers objection).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1128.

<sup>172</sup> *Id.* (quoting Monaghan, *supra* note 40, at 35) (addressing the encroachment on the executive that would result from judicial power to pass judgment on area of executive law).

<sup>173</sup> *Id.* at 1130 (quoting Monaghan, *supra* note 40, at 35) (addressing the federalism objection). Schrock and Welsh argue that the scope of Monaghan's constitutional common law is so great that it could easily claim aspects of criminal procedure once thought to be the autonomy of states. *Id.*

<sup>174</sup> *Id.* at 1131; see Monaghan, *supra* note 40, at 23 ("I suggest that such legislative rules can be adequately rationalized as constitutional common law. For example, the utility of providing the police with guidance . . . should be self-evident.")

<sup>175</sup> See Schrock & Welsh, *supra* note 166, at 1131–45 (arguing that there is no constitutional source of authority for the constitutional common law). They summarize their findings on the lack of authority for constitutional common law as follows: "While general supervisory powers may allow the Court in limited circumstances to impose rules upon the federal executive department, authority is lacking for similar impositions upon the states. Thus, the constitutional common law runs seriously afoul of federalism and, less seriously, of separation of powers." *Id.* at 1145.

<sup>176</sup> See *id.* at 1131 (noting that there is no constitutional source for this authority). Schrock and Welsh also note that *Bivens* is properly understood as "a constitutional (not common law) decision . . . prevent[ing] the fourth amendment from being rendered a 'mere form of words.'" *Id.* at 1135–36 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring)). Part V of this Article discusses *Bivens* in more detail. See *infra* Part

with Monaghan's theory derives from a different perspective: in establishing remedial schemes that are necessary to give meaning and effect to various constitutional provisions protecting individual rights, the judiciary is not engaged in common-lawmaking, but rather, in its appropriate and constitutionally granted role of constitutional interpretation through facilitative or ancillary constitutional directives.

Proper analysis of Monaghan's theory of constitutional common law, the objections posed by Schrock and Welsh, and the theory developed in this Article demand a sound understanding of the respective roles of both Congress and the federal judiciary, which, under this approach, keep each in its constitutionally dictated lane. Monaghan's constitutional common law theory assumes that both Congress and the judiciary can exercise powers found nowhere in the Constitution: Congress cannot legislate as to the meaning of the Constitution, and the judiciary may not interfere with Congress's constitutionally vested legislative authority. He asserts that the Constitution authorizes the judiciary to fashion a constitutional common law in the same way that certain federal statutes authorize it to fashion a federal common law.<sup>177</sup> The latter, however, arises directly from congressionally created authority and can therefore justifiably be reversed by Congress. But, the Constitution itself, which is super-congressional and beyond Congress's power to alter, forms the basis of the judiciary's interpretive authority. Here, Monaghan gives Congress a power it simply lacks—the power to reverse judicial interpretations of the Constitution by arbitrarily labeling it constitutional common law.<sup>178</sup> If the judiciary invalidates legislation that conflicts with the Constitution, Congress has no authority to reverse that constitutional interpretation. Monaghan's constitutional common law theory is accordingly oxymoronic—"combin[ing] in one phrase authority that is simultaneously beyond yet within congressional power to overrule."<sup>179</sup>

The theory of constitutional remedies as constitutional law, on the other hand, preserves the proper balance between Congress and the judiciary in my system of separation of powers. It limits the judiciary to its role of serving as the ultimate countermajoritarian interpreter of the Constitution—"the bulwark[] of a limited Constitution against legislative encroachments"<sup>180</sup>—including of the

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V (discussing the origin, expansion, and subsequent limitation of the *Bivens* doctrine of implied constitutional remedies).

<sup>177</sup> Monaghan, *supra* note 40, at 12–13 (analogizing the constitutional common law to federal common law).

<sup>178</sup> *See id.* at 27–29, 34–35 (explaining that there is a coordinate role for Congress to play in the process of defining and enforcing constitutional rights, and that Congress, therefore, has the right to revise and reverse the Supreme Court's constitutional common law).

<sup>179</sup> Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 603.

<sup>180</sup> THE FEDERALIST NO. 78, *supra* note 15, at 468 (Alexander Hamilton).

remedies inherent in and needed to give effect to constitutional provisions protecting individual rights. It also ensures that Congress does not become the constitutional judge of its own powers, which would “enable the representatives of the people to substitute their WILL to that of their constituents.”<sup>181</sup> Providing statutory remedies is, indeed, within the proper province of Congress; constitutional remedies, however, are for the courts, which alone have the power to enforce the countermajoritarian Constitution against the majoritarian political branches.

There appears to be a general consensus, presumably beginning with the Court’s decision in *Marbury*, that when the judiciary announces decisions and rules interpreting the Constitution, Congress is powerless to undo it. Nothing short of a constitutional amendment can accomplish that end. The critical distinction lies in where the judiciary’s power to fashion remedies for constitutional violations is found. If it is part of the judiciary’s supposed constitutional common-lawmaking power, then, by subjecting them to congressional reversal, they are not really constitutional remedies at all. Nevertheless, if they are deemed essential to the effective enforcement of enumerated constitutional rights—without which the rights-protecting provisions of the Constitution would be a “mere form of words”<sup>182</sup>—then they must be constitutional in that they are derived directly from the constitutional provisions themselves. Because only the judiciary is empowered to interpret and give meaning to the Constitution, only the judiciary has the ultimate power to fashion constitutional remedies.

Monaghan’s theory of constitutional common law, then, is both unworkable as a practical matter and theoretically irreconcilable with the central precepts of American constitutionalism. Remedies are either constitutional or statutory. There is no murky middle ground where Congress and the judiciary engage in a “dialogue” to determine a form of “quasi-constitutional” remedies. Monaghan provides no clear, principled dividing line between too much and too little interference by one branch in the proper sphere of the other. By contrast, under the theory of constitutional remedies as constitutional law, the dividing line could not be clearer. If the reviewing court deems the remedy necessary to enforce the Constitution, the judiciary—and only the judiciary—can construe the document to give rise to implied remedies as a form of facilitative textualism.

Note the vitally important differences between implied *constitutional* remedies on the one hand and implied *statutory* remedies on the other hand. As a matter of democratic theory, the unrepresentative, unaccountable judiciary

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<sup>181</sup> *Id.* at 466.

<sup>182</sup> Dellinger, *supra* note 119, at 1549.

has no authority to construe a statute to include a provision that Congress chose not to include. Congress carefully chooses which remedies it wishes to include in a statute, and the courts' conclusion that additional remedies are called for is irrelevant. In contrast, as I have explained, for the very reason that the federal courts are not representative, foundational principles of American constitutionalism dictate that determination of the most effective means of enforcing the countermajoritarian Constitution must lie solely in the hands of the judiciary.

### *B. Constitutional Remedies and Congressional Power to Control Federal Jurisdiction*

One argument regarding Congress's constitutional power over the federal courts takes the form of "the greater includes the lesser"—that is, if Congress has broad power over the federal courts in some capacity, it must also possess any lesser power over those same federal courts.<sup>183</sup> For example, because Article III of the Constitution grants Congress discretion over the creation of lower federal courts,<sup>184</sup> Congress must also have the power to limit the federal courts' jurisdiction. Because the Constitution gives Congress the authority to control federal jurisdiction, the argument goes, it also confers on Congress authority to control the courts' remedial power. The Supreme Court said as much in its 1938 decision, *Lauf v. E.G. Shinner & Co.*, a New Deal-era case in which the Court explicitly linked congressional power to control federal courts' jurisdiction with a power to control remedies.<sup>185</sup> But this interpretation was mistaken. *Lauf* had nothing to do with jurisdiction, nor did it have anything to do with the Constitution. The Court's analysis in that case fundamentally misconstrued the issue, which was statutory rather than constitutional. Therefore, reliance on *Lauf* to justify denying the judiciary full control of constitutional remedies does not follow. This is discussed more fully, below, in Subsection One.<sup>186</sup>

Furthermore, Congress's control of federal jurisdiction is far from plenary. To the contrary, it is constrained by the separation of powers and due-process principles inherent in the text and structure of the Constitution. The Supreme Court has expounded on these limitations in several key cases de-

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<sup>183</sup> See Hart, *supra* note 95, at 1366 (posing the possibility that Congress's power to regulate federal court jurisdiction in effect gives it the power to control federal court remedies).

<sup>184</sup> See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

<sup>185</sup> 303 U.S. 323, 327 (1938) (remarking that the authority of the Court to issue the remedy was dependent on the jurisdiction provided in the statute).

<sup>186</sup> See *infra* Part IV.B.1.

scribed below in Subsection Two, and these principles are critical to grounding the power over constitutional remedies in the judiciary alone.<sup>187</sup>

### 1. *Lauf*'s Fundamental Flaw

In *Lauf*, the Supreme Court chose a peculiar case to hold that the judiciary's power over remedies can be limited by Congress's control of federal jurisdiction, as the case concerned merely the enforcement of a congressional statute.<sup>188</sup> Thus, in no way did the case implicate the judiciary's authority to interpret the Constitution. Accordingly, that federal courts must enforce constitutionally valid statutes enacted by Congress has no bearing on their power as the ultimate interpreters of the Constitution.

Prominent scholars such as Professor Henry Hart have suggested that there is a link between Congress's power to control federal jurisdiction and its authority to create or deny remedies for constitutional violations. In his famed "Dialogue," he poses this question: "The power of Congress to regulate jurisdiction gives it a pretty complete power over remedies, doesn't it? To deny a remedy all Congress needs to do is to deny jurisdiction to any court to give the remedy."<sup>189</sup> Although Hart's respondent refrained from answering this question completely in the affirmative, she did acknowledge that "[i]t must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension."<sup>190</sup>

*Lauf* is the leading case espousing the view that Congress's power to control federal jurisdiction necessarily implies a power to control remedies.<sup>191</sup> In this labor dispute, Shinner, the owner of several meat markets in Wisconsin, sought a preliminary injunction to restrain Lauf and the labor union he led from picketing the business, forcing Shinner to fire employees who did not belong to this particular labor union, and running advertisements accusing Shinner of maintaining business practices that were unfair to labor.<sup>192</sup> The district court granted the preliminary injunction and the U.S. Court of Appeals for the Seventh Circuit affirmed.<sup>193</sup>

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<sup>187</sup> See *infra* Part IV.B.2.

<sup>188</sup> 303 U.S. at 329–30 (discussing issues regarding the prerequisites to exercise jurisdiction to enforce the Norris-LaGuardia Act).

<sup>189</sup> Hart, *supra* note 95, at 1366.

<sup>190</sup> *Id.*

<sup>191</sup> 303 U.S. at 327.

<sup>192</sup> *Id.* at 325.

<sup>193</sup> *Id.*

The case involved the meaning of “labor dispute” under both Wisconsin and federal law and specifically implicated the Norris-LaGuardia Act.<sup>194</sup> The relevant statutory provision stated: “no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute” unless the district court made certain findings set out in the statute.<sup>195</sup>

Because the district court issued the injunction without making the required findings, the Supreme Court held that the district court exceeded its jurisdiction.<sup>196</sup> It maintained that “the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States.”<sup>197</sup> As there was “no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States,” issuing the injunction without making the statutorily required findings went beyond the district court’s jurisdiction as set out by Congress.<sup>198</sup> What follows, therefore, according to the Court in *Lauf*, is that the federal judiciary’s remedial power is subsumed within Congress’s power to control its jurisdiction.

The *Lauf* Court misconceived the fundamental nature of the issue in the case and consequently articulated a conclusion far beyond the proper grounds for upholding the statute. *Lauf* concerned purely a statutory matter—a directive embodied in the Norris-LaGuardia Act—not a constitutional one. The case involved purely an issue of substantive law—i.e., whether or not the statute authorized an injunction under the circumstances of the case—not an issue of the courts’ jurisdiction. Despite the use of the term “jurisdiction” in the relevant portion of the statute, then, the case demanded nothing more than that the courts enforce the statutory substantive law as set out by Congress. The statute authorized the courts to issue injunctive relief only in specific circumstances after making the statutorily required factual findings.<sup>199</sup> In a democratic system, the courts have no authority to supersede a constitutionally valid statutory directive, and it is well within Congress’s power to instruct the judiciary in these matters. “Jurisdiction,” however, “is a word of many, too many, mean-

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<sup>194</sup> *Id.* at 327–29 (analyzing the definition of “labor dispute” in both the Wisconsin Labor Code and the Norris-LaGuardia Act). Under the Norris-LaGuardia Act, a labor dispute “includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in . . . changing, or seeking to arrange terms or conditions of employment.” 29 U.S.C. § 113(c).

<sup>195</sup> *Lauf*, 303 U.S. at 329 (quoting Pub. L. No. 72-65, § 7, 47 Stat. 70, 71 (1932)).

<sup>196</sup> *Id.* at 330.

<sup>197</sup> *Id.* at 327.

<sup>198</sup> *Id.* at 330.

<sup>199</sup> *See id.* at 329 (describing the conditions that must be met for a court to issue an injunction under the Norris-LaGuardia Act); *see also* 29 U.S.C. § 107 (explicitly setting out the procedure a court must follow and the findings that a court must make to issue an injunction).



ings,”<sup>200</sup> and the use of the term here harkens back to the days when the Court did not use the term as precisely as it endeavors to do today. For example, jurisdiction must not be confused with authority or power. To be sure, both may stem directly from the Constitution, but jurisdiction pertains to whether the case is properly before a court, whereas authority or power refer to the actions a court may permissibly take.<sup>201</sup> Therefore, the inquiry into a court’s remedial power is distinct from that into its jurisdiction. Control over one does not necessarily imply control over the other. The fundamental mistake, then, is to view *Lauf* as a jurisdictional and constitutional case rather than a statutory one.

## 2. Statutory Enforcement vs. Constitutional Interpretation: Separation of Powers and Limits on Congress’s Power to Control Federal Jurisdiction

The distinction between statutory and constitutional issues cannot be understated. It does not follow that Congress’s authority to set out rules of decision for the courts’ enforcement of its statutes (with the caveat that it cannot force the courts to enforce unconstitutional statutes) necessarily entails a congressional power to instruct the Court on how to interpret and enforce the Constitution. The former lies at the heart of Congress’s legislative power vested in it by the Constitution; the latter is fixed at the core of the Court’s judicial power.<sup>202</sup>

Consider the 1871 Supreme Court case of *United States v. Klein*.<sup>203</sup> A congressional statute allowed for persons whose property had been seized during the Civil War to recover that property so long as they could prove that they gave no assistance to the Confederacy during hostilities, and the Supreme Court ruled that a presidential pardon could constitute the required proof.<sup>204</sup> While Klein’s claim to recover the proceeds of his seized property was working its way through the federal courts and pending at the Supreme Court, Congress changed the law and instructed federal courts to treat a presidential pardon as proof of disloyalty—in direct contradiction of Supreme Court prece-

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<sup>200</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

<sup>201</sup> Compare *Jurisdiction*, BLACK’S LAW DICTIONARY, *supra* note 97, with *Authority*, BLACK’S LAW DICTIONARY, *supra* note 97.

<sup>202</sup> U.S. CONST. art. I, § 1 (granting legislative powers to Congress); *id.* art. III, § 1 (granting judicial power to the courts).

<sup>203</sup> 80 U.S. (13 Wall.) 128, 147 (1871). This case was ostensibly about Congress’s Article III, Section 2 power over the Supreme Court’s appellate jurisdiction, but it also implicated Congress’s authority to control the jurisdiction of lower federal courts, as Congress supplied a new rule of decision for lower federal courts to apply as well. *See id.* at 141–42 (noting that Congress repealed a law related to presidential pardons that instructed lower federal courts to use proof of presidential pardons to presume disloyalty, in direct contradiction with Supreme Court precedent).

<sup>204</sup> *Id.* at 130–31 (describing the statute).

dent—and dismiss Klein’s case for lack of jurisdiction. This, the Supreme Court held to be unconstitutional.<sup>205</sup>

Although *Klein* arose from a congressional statute, it turned on the Court’s interpretation of the Constitution and the pardon power in particular. It is well established that federal courts must apply the law as it stands at the time of the final judicial decision, even if Congress changes the applicable law while a case is pending, and even if the government is a party.<sup>206</sup> Here, however, Congress’s new directive to the courts “was unconstitutional because it denied to the presidential pardon—which the President was constitutionally authorized to issue—the effect the Court had ruled it had.”<sup>207</sup> In short, the Supreme Court, not Congress, has the final authority to interpret the Constitution, and Congress cannot overturn the Supreme Court’s interpretation of a constitutional provision by merely passing ordinary legislation.

When the issue involves sub-constitutional law and the enforcement of constitutionally valid congressional statutes, the judiciary has no authority to substitute its will for that of Congress. Furthermore, Congress is free to prescribe rules of decision, even in pending cases, that the Court must follow. *Lauf* is much more akin to an 1855 case the Court distinguished in *Klein*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*<sup>208</sup> That case concerned a bridge that the law at the time of the suit deemed a nuisance.<sup>209</sup> While the case was pending, Congress passed a statute legalizing the bridge as a post-road, an act that the Court upheld as within the constitutional powers of Congress.<sup>210</sup> In both *Lauf* and *Wheeling Bridge*, the Court was called merely to enforce the law as it stood at the time of its decision. Neither case involved the Court’s authority to interpret the Constitution or its jurisdiction to decide particular cases. Consequently, one cannot rely on cases like *Lauf* to draw any conclusions about the judiciary’s power over constitutional remedies. The more appropriate place to look is cases such as *Klein*, where performance of the Court’s critical constitutional function was at stake.<sup>211</sup> The key constitutional dictate growing out of

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<sup>205</sup> *Id.* at 141–46 (holding that such action only intends to withhold appellate jurisdiction as a means to an end of controlling the meaning of a presidential pardon).

<sup>206</sup> MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 48 (2d ed. 1990).

<sup>207</sup> *Id.*

<sup>208</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

<sup>209</sup> *Id.* at 421–27 (stating the facts of the case and the original nuisance injunction).

<sup>210</sup> See Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 446–47 (2006) (differentiating between the holdings in *Pennsylvania v. Wheeling & Belmont Bridge Co.* and *United States v. Klein*).

<sup>211</sup> Compare *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 327–30 (1938) (withholding jurisdiction because the court did not make the required statutory findings), and *Wheeling Bridge*, 59 U.S. (18 How.) at 435 (concluding that because congressional act legalized the bridge, the bridge was no long-

*Klein* is that “Congress may not control or direct the [Supreme] Court’s interpretation of the Constitution.”<sup>212</sup> Separation of powers and constitutional supremacy could not permit otherwise.<sup>213</sup>

There is no question that Congress can exercise significant power over both the Supreme Court’s and lower federal courts’ jurisdiction. Congress’s power over federal jurisdiction, importantly, flows directly from the text of the Constitution itself.<sup>214</sup> But there are limits to this power. As *Klein* shows, Congress cannot employ its power over federal jurisdiction to dictate how the judiciary interprets the Constitution. These limits are dictated by the principle of separation of powers, but they extend beyond the prohibition against congressional directives to the judiciary on its authority to serve as the final interpreter of the Constitution.

Although the general assumption is that Congress cannot limit the Constitution’s grant of cases to the Supreme Court’s original jurisdiction, the Constitution clearly gives Congress authority over the Supreme Court’s appellate jurisdiction. The textual support for this congressional power can be found in Article III’s Exceptions Clause, which states: “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*”<sup>215</sup>

It is beyond the scope of this Article to reexamine the extent of Congress’s power to limit the Supreme Court’s appellate jurisdiction—other than to demonstrate its irrelevance to the power over constitutional remedies. Both the Court and scholars have opined extensively on that since at least the Reconstruction Era.<sup>216</sup> Some have interpreted the Exceptions Clause power

er a nuisance), *with* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141–46 (1871) (holding that although the congressional act appeared only to withhold jurisdiction, it was in fact a means to an end of interpreting the presidential pardon clause of the Constitution and thus unconstitutional).

<sup>212</sup> Redish & Pudelski, *supra* note 210, at 447.

<sup>213</sup> *Id.* at 447–49 (explaining how *Klein* supports the larger countermajoritarian constitutional structure).

<sup>214</sup> *See* U.S. CONST. art. III, § 1 (articulating explicitly that Congress can create lower federal courts); *id.* art. III, § 2, cl. 2 (authorizing Congress to regulate the Supreme Court’s appellate jurisdiction).

<sup>215</sup> *Id.* art. III, § 2, cl. 2 (emphasis added).

<sup>216</sup> *See, e.g., Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 94–106 (1868) (examining the Supreme Court’s appellate jurisdiction in habeas corpus cases); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–15 (1868) (examining the jurisdiction of the Supreme Court to review lower courts’ determinations under federal statutory law). If one reads *Ex parte McCordle* “for all it might be worth,” it appears that the Supreme Court gives Congress broad, if not plenary, power to control the Court’s appellate jurisdiction. Hart, *supra* note 95, at 1364. The Court also cited Chief Justice Marshall for the contention that the Supreme Court can only exercise the appellate jurisdiction that Congress has given it. *McCordle*, 74 U.S. (7 Wall.) at 513 (citing *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810)). In *Ex parte Yerger*, the Court took a much narrower view of Congress’s power over the

broadly, while others view its scope as much more limited, referring only to the Supreme Court's review of questions of fact rather than questions of law.<sup>217</sup> For present purposes, the key point is that whether or not Congress has sought to make such an exception, it lacks constitutional authority to dictate to the Court how to interpret the Constitution.

Congress's discretionary authority to create lower federal courts is similarly widely assumed.<sup>218</sup> Again, the text of the Constitution is instructive, as Article III vests the judicial power "in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish.*"<sup>219</sup> Because the Constitution does not require Congress to create lower federal courts, Congress can abolish them once they have been established. It could even stop short of abolishing them altogether by permitting the courts to exist while limiting their jurisdiction—"the 'greater' power to abolish the lower courts logically includes the 'lesser' power to limit the kinds or amount of cases they can hear."<sup>220</sup> This is a controversial power, as the Constitution does not explicitly grant Congress this authority, as it does regarding the Supreme Court's appellate jurisdiction, but it at least arguably makes logical sense. Nevertheless, separation of powers, as we saw in *Klein*, demands that Congress cannot use this power to usurp the judiciary's authority to interpret the Constitution nor to co-opt it into rubber-stamping its unconstitutional actions.<sup>221</sup>

*Klein* and other cases<sup>222</sup> show that, despite the broad language in the Constitution conferring authority on Congress to control the jurisdiction of the Supreme Court (through the Exceptions Clause) and the lower federal courts (the

Court's appellate jurisdiction, reading the language of *McCardle* to be far from conclusive of what that case indicated to be a plenary congressional power. 75 U.S. (8 Wall.) at 103–06 (discussing *McCardle*).

<sup>217</sup> RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285–96 (1969) (arguing for a narrower view of the Exceptions Clause); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 57 (1962) (interpreting the Exceptions Clause narrowly to regulate the treatment of fact issues).

<sup>218</sup> See, e.g., REDISH, *supra* note 206, at 30–41 (discussing jurists, such as Justice Joseph Story, and scholars who question whether Congress has any discretion to refuse to establish lower federal courts).

<sup>219</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>220</sup> REDISH, *supra* note 206, at 29. For the leading Supreme Court case articulating this view of Congress's power to control the jurisdiction of lower federal courts, see *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

<sup>221</sup> See 80 U.S. (13 Wall.) 128, 141–46 (1871) (holding that congressional attempt to withhold jurisdiction was unconstitutional because it only served as a means to an end of controlling the interpretation of a presidential pardon).

<sup>222</sup> For another example of the limitations on Congress's power to control federal jurisdiction, see *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324–29 (2016). Although the Supreme Court held that Congress did not exceed its authority in this case because it merely changed the substantive law while litigation was pending, it did make clear that Congress cannot use its power to dictate how the Court should rule in specific cases. See *id.*

“greater” power to establish these courts logically entails the “lesser” power to control the types and amount of cases they can adjudicate), this power is not unlimited. A common theme recurring throughout these examinations is that the Constitution’s checks and balances are not designed to allow one branch of government to eviscerate the authority of another branch to carry out its constitutionally assigned functions and exercise its constitutionally vested powers. In this context, the problem is particularly severe when one of the majoritarian branches intrudes upon the independent, countermajoritarian judiciary and attempts to co-opt it into validating the majoritarian branch’s potentially unconstitutional actions, or denies the judiciary the authority altogether to halt those unconstitutional actions. Congress cannot, in one breath, seek the “legitimacy provided by judicial validation of its actions,” and in the next, forbid it from exercising its independent judgment to determine the constitutionality of those actions.<sup>223</sup>

Thus, power to control federal jurisdiction has nothing to do with constitutional remedies. Remedies for violations of constitutional provisions are not jurisdictional; they are a matter of constitutional interpretation. And there is only one ultimate interpreter of the Constitution: the judiciary. If, as this Article argues, constitutional remedies are inherently linked to their associated constitutional provisions, the determination of the constitutional remedies required to vindicate constitutional rights is a matter of constitutional interpretation left solely to the courts. Congress’s control of federal jurisdiction is irrelevant.

#### V. IMPLICATIONS OF CONSTITUTIONAL REMEDIES AS CONSTITUTIONAL LAW: CONSTRUING AND MISCONSTRUING *BIVENS*

The theory of constitutional remedies as constitutional law, developed here, has profound practical implications for how the judiciary has dealt with remedies. It impacts the future of particular remedies the judiciary has already found within its authority to fashion and addresses the flawed argument that the judiciary’s treatment of implied constitutional remedies should proceed parallel to its handling of implied statutory remedies. This dilemma has been front and center of the Supreme Court’s development of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* remedies. Judicial legitimacy and separation of powers, however, demand that constitutional remedies be analyzed discretely from statutory remedies because of the constitutionally prescribed limits on the powers of Congress and the courts. Put simply, implied statutory remedies are beyond the courts’ power, but implied constitutional remedies fall squarely within the courts’ constitutional authority.

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<sup>223</sup> REDISH, *supra* note 206, at 51.

The Constitution vests enumerated legislative powers in Congress.<sup>224</sup> The legislative power, quite naturally, includes drafting statutes that, upon presidential approval, become law. In drafting statutes, Congress decides on the behavior to be promoted or prohibited and whether any remedies will be available to those whose rights under the statute are violated. The judiciary plays no role in this process because it can claim no legislative power under the Constitution.

Interpreting the Constitution, on the other hand, is a different matter entirely. The Constitution vests the federal courts, at the top of which is the Supreme Court, with the judicial power.<sup>225</sup> The Supreme Court has the ultimate authority to interpret the Constitution and declare its meaning, and because constitutional remedies are part of the meaning of the relevant constitutional provisions, the whole power to fashion constitutional remedies lies with the judiciary, not Congress.<sup>226</sup>

The Supreme Court's foray into the subject of implied statutory remedies began in 1964 in its decision in *J.I. Case Co. v. Borak*.<sup>227</sup> The Court developed this doctrine further in key cases over the next fifteen years, setting out factors it would consider and limiting principles on this self-declared authority to infer remedies for statutory violations when none could be found in the text of the statute. A certain degree of deference to Congress, as well as the scheme set out in a given statute, would serve as two principal guideposts for determining whether courts could infer a statutory remedy.<sup>228</sup>

In the midst of this development, the Court also articulated its power to infer implied damages remedies for violations of the Constitution in the 1971 case of *Bivens*.<sup>229</sup> *Bivens* occurred in the context of the Fourth Amendment's prohibition on unreasonable searches and seizures,<sup>230</sup> and soon after, the Court

<sup>224</sup> U.S. CONST. art. I, § 1 ("All legislative Powers herein granted . . ."); *see id.* art. I, § 8 (enumerating specific legislative powers).

<sup>225</sup> *Id.* art. III ("The judicial Power of the United States, shall be vested . . .").

<sup>226</sup> *See supra* Part II (illustrating the concept of facilitative textualism and arguing that it supports the constitutionality of constitutional remedies); *supra* Part IV.B (explaining why Congress's power to create and limit the jurisdiction of lower federal courts does not arrogate to itself ultimate authority to interpret the Constitution).

<sup>227</sup> 377 U.S. 426, 432 (1964) (implying a statutory damage remedy based on the purpose of the statute).

<sup>228</sup> *See Cort v. Ash*, 422 U.S. 66 (1975) (declining to imply a statutory remedy but laying out factors it would consider in such cases); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (refusing to imply a statutory remedy after the application of the *Cort* factors). These cases and their impact on the Court's approach to implied statutory remedies will be discussed in greater detail in Part V.A. *See infra* Part V.A (examining the doctrine of implied statutory remedies).

<sup>229</sup> 403 U.S. 388, 392, 397 (1971) (holding that an implied cause of action exists for an individual whose Fourth Amendment right to freedom from unreasonable search and seizure has been violated).

<sup>230</sup> *Id.* at 390–93.

extended these implied remedies for certain violations of the Fifth<sup>231</sup> and Eighth<sup>232</sup> Amendments. Nonetheless, apart from these examples, the Court declined to extend *Bivens* remedies, consistently narrowing its own authority to imply constitutional remedies.<sup>233</sup> *Bivens* and its progeny, in fact, suggested such a trajectory, because these cases emphasized deference to Congress. The Court has consistently built on this deference principle; since *Bivens* itself, the Court has held the doctrine of implied constitutional remedies in extreme disfavor, with each case seemingly putting another nail in the coffin of the *Bivens* doctrine.<sup>234</sup>

Many seem to have assumed that if the judiciary is required to defer to Congress in the realm of statutory remedies, it must also defer to Congress before creating constitutional remedies. After all, the Court in *Bivens* relied in part on *Borak* to declare this authority in the first place.<sup>235</sup> This argument, however, fails to recognize the difference between constitutional remedies and statutory remedies, as well as the very different functions and powers vested by the Constitution in Congress and the Supreme Court. In short, the judiciary's experiment with implied statutory remedies is as great an interference with Congress's vested authority and an affront to the principles of separation of powers as Congress's involvement in constitutional remedies and interpretation is to the judiciary's authority to interpret the Constitution. Any comparison between the two is inapposite: the foundations of the respective remedies are fundamentally different, and the respective roles of Congress and the courts in our democratic system are equally divergent.<sup>236</sup>

### A. Implied Statutory Remedies

As previously noted, the growth of implied statutory remedies began with the Supreme Court's 1964 decision: *Borak*.<sup>237</sup> The case involved a civil action filed by a shareholder of J.I. Case Co. for a deprivation of his and other stockholders' preemptive rights resulting from a merger allegedly affected through a

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<sup>231</sup> *Davis v. Passman*, 442 U.S. 228, 245–49 (1979).

<sup>232</sup> *Carlson v. Green*, 446 U.S. 14, 18–25 (1980).

<sup>233</sup> See *infra* Part V.B.2 (discussing the expansion and development of the doctrine of implied constitutional remedies).

<sup>234</sup> See *infra* Part V.B.3 (illustrating the Court's continued limitation of the doctrine).

<sup>235</sup> *Bivens*, 403 U.S. at 397 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

<sup>236</sup> Professor Susan Bandes has completed extensive work on the greater constitutional implications of *Bivens* and constitutional remedies. See generally Bandes, *supra* note 136 (analyzing the judicial power to create remedies and explaining that the courts, not Congress, are and should be ultimately responsible for providing remedies for violations of the Constitution and interpreting and enforcing the Constitution).

<sup>237</sup> 377 U.S. at 433 (finding that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose” of the statute).

false and misleading proxy statement.<sup>238</sup> After the U.S. Court of Appeals for the Seventh Circuit reversed the trial court's ruling that the relevant statute empowered the trial court to issue only declaratory relief, the Supreme Court considered whether the statute "authorizes a federal cause of action for rescission or damages."<sup>239</sup>

Even though the statute contained no explicit reference to a private right of action, the Court inferred a statutory damage remedy based on the purpose of the statute.<sup>240</sup> The Court uncovered the statute's "broad remedial purposes" through its text and legislative history,<sup>241</sup> concluding that "[i]t is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded . . . [and] 'federal courts may use any available remedy to make good the wrong done.'"<sup>242</sup>

Not long after discovering this power to infer statutory damage remedies, the Court began to cut back and reinforce the notion implicit in *Borak* that Congress could limit this power. The Supreme Court declined to find an implied statutory damage remedy in the 1975 case of *Cort v. Ash*,<sup>243</sup> but notably, it set out the factors for doing so that it would consider in future cases. The principal issue in *Cort* was "whether a private cause of action for damages against corporate directors is to be implied in favor of a corporate stockholder under . . . a criminal statute prohibiting corporations from making 'contributions or expenditures'" in relation to particular federal elections.<sup>244</sup>

<sup>238</sup> *Id.* at 427. The civil action arose from section 14(a) of the Securities Exchange Act of 1934, which makes it unlawful to utilize interstate commerce to violate Securities Exchange Commission (SEC) proxy rules and regulations. 15 U.S.C. § 78n(a).

<sup>239</sup> *J.I. Case Co.*, 377 U.S. at 427–28.

<sup>240</sup> *Id.* at 432 (noting that "among [the statute's] chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result.").

<sup>241</sup> *Id.* at 431 (stating that "[t]he purpose of section 14(a) [was] to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation"). The Court relied on three things primarily: (1) H.R. REP. NO. 73-1383, at 13–14 (1934), which demonstrated the "congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange'" and that the act "was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders'" ; (2) S. REP. NO. 73-792, at 12 (1934), which stated that "[t]oo often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought"; and (3) the text of section 14(a), "which makes it 'unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.'" *Id.* at 431–32 (first and second alterations in original).

<sup>242</sup> *Borak*, 377 U.S. at 433 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>243</sup> 422 U.S. 66, 69, 85 (1975).

<sup>244</sup> *Id.* at 68.



The Court listed four factors that it would consider in determining whether a private remedy can be inferred from a statute that explicitly fails to provide for one (all of which counseled against an implied statutory remedy in the case at hand): (1) whether the plaintiff is “one of the class for whose *especial* benefit the statute was enacted”; (2) whether there is “any indication of a legislative intent, explicit or implicit, either to create such a remedy or to deny one”; (3) whether an implied remedy is “consistent with the underlying purposes of the legislative scheme”; and (4) whether inferring a federal remedy would be inappropriate on the basis that such a cause of action is “one traditionally relegated to state law.”<sup>245</sup>

Although the Supreme Court did not go so far as to curtail completely its power to infer statutory damage remedies (even with regard to criminal statutes), it did, through the explication of these factors, demonstrate a greater recognition that statutory remedies should be expressly supplied by Congress. Subsequently, the Court has adhered to these factors and has been reluctant to infer statutory remedies.<sup>246</sup> In 2008, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Court refused to extend a private right, as “[c]oncerns with the judicial creation of a private cause of action caution against its expansion.”<sup>247</sup> It further recognized that implied statutory causes of action and remedies like those found in *Borak* are purely “judicial construct[s],” requiring clear congressional intent.<sup>248</sup>

## B. *Bivens* and Implied Constitutional Remedies

### 1. The Origins of the *Bivens* Doctrine

The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures,” but the text of the Amendment provides no remedy for violations of this prohibition.<sup>249</sup> In 1914, the Supreme Court ruled in *Weeks v. United States* that the Fourth Amendment bars from federal trials the use of evidence obtained by federal law enforcement officers in violation

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<sup>245</sup> *Id.* at 78.

<sup>246</sup> See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166–67 (2008) (limiting the extent of the private right of action the Court had previously implied in section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 8j, and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2020)); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (finding all four of the *Cort v. Ash* factors satisfied by Title IX of the Education Amendments of 1972).

<sup>247</sup> 552 U.S. at 165.

<sup>248</sup> *Id.* at 164.

<sup>249</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

of this prohibition.<sup>250</sup> Without this exclusionary rule, the Court later explained, the Fourth Amendment would be nothing more than a mere “form of words.”<sup>251</sup> Prior to 1971, however, the Supreme Court had not ruled definitively on the “question whether [the prohibition against unreasonable searches and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”<sup>252</sup>

The Court answered this question affirmatively in 1971 with *Bivens*,<sup>253</sup> where the exclusionary rule was irrelevant because the plaintiff, mistakenly subjected to an unreasonable search, was never prosecuted and no trial from which to exclude any illegally obtained evidence ever occurred.<sup>254</sup> Rejecting the notion that Mr. Bivens could only obtain money damages through a state tort law action,<sup>255</sup> Justice William Brennan, writing for the Court, emphasized that “the Fourth Amendment operates as a limitation upon the exercise of federal power.”<sup>256</sup> The Fourth Amendment must independently restrain federal power,<sup>257</sup> and “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>258</sup> Furthermore, “federal courts may use any available remedy to make good the wrong done.”<sup>259</sup>

The *Bivens* Court’s logic implies that violations of constitutional rights require the right to a federal cause of action and a remedy, notwithstanding congressional silence, lest explicit constitutional rights become merely advisory. Nevertheless, Justice Brennan did not completely foreclose a role for Congress. He found it proper to infer a federal damage remedy in this case because it “involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress.”<sup>260</sup> In addition, he noted that there had been “no

<sup>250</sup> 232 U.S. 383, 398–99 (1914).

<sup>251</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The Court later extended the Fourth Amendment exclusionary rule to apply to state criminal trials. *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961).

<sup>252</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). The Court had reserved this question twenty-five years earlier in *Bell v. Hood*, 327 U.S. 678, 683–84 (1946).

<sup>253</sup> 403 U.S. at 389.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 390–91.

<sup>256</sup> *Id.* at 392.

<sup>257</sup> *Id.* at 392–93.

<sup>258</sup> *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>259</sup> *Id.* at 396.

<sup>260</sup> *Id.* These special factors included “question[s] of ‘federal fiscal policy’” or whether “to impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress.” *Id.* at 396–97 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1954)) (citing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)).

explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents,"<sup>261</sup> but instead could only avail themselves of some other remedy "equally effective in the view of Congress."<sup>262</sup>

Justice John Marshall Harlan's concurrence sought to distinguish between congressional and judicial roles in vindicating constitutional rather than statutory rights:

[I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.<sup>263</sup>

He added that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."<sup>264</sup>

Despite this strong articulation of clearly distinct roles for Congress and the judiciary in protecting constitutional rights, Justice Harlan puzzlingly—and illogically—approved of judicial deference to Congress, saying that "it must be remembered that legislatures are [the] ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."<sup>265</sup> The Court, through its "special factors counseling hesitation" language and other acknowledgements of Congress's role in contributing to constitutional remedies, failed to set out a complete framework for the fashioning of constitutional remedies. Moreover, by leaving open the possibility of some deference to Congress, it did not rest its decision on the judiciary's final authority to interpret the Constitution and to restrain the majoritarian branches, leaving unsettled the questions of how and under what circumstances this approach could extend to other constitutional provisions.

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<sup>261</sup> *Id.* at 397.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 407 (Harlan, J., concurring). Justice Harlan also relied on *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), noting that "in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Id.* at 402.

<sup>264</sup> *Id.* at 407.

<sup>265</sup> *Id.* (quoting *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

## 2. Extending *Bivens*

The subsequent story of *Bivens* remedies has been marked by limitation and restraint. In the nearly fifty years since the Supreme Court articulated its authority to issue implied damage remedies for constitutional violations, it has rarely seen fit to extend the protection of the *Bivens* doctrine to other constitutional provisions.

Those rare exceptions began in 1979 with the Court's holding in *Davis v. Passman*, which involved an allegation by a former congressional employee of wrongful termination on the basis of sex.<sup>266</sup> She brought suit under the equal protection component of the Fifth Amendment Due Process Clause, seeking damages in the form of backpay.<sup>267</sup> The Court considered whether, under *Bivens*, “a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated,”<sup>268</sup> despite the fact that Title VII's prohibition against sex-based employment discrimination specifically excluded from its protections congressional staff members.<sup>269</sup>

The Court extended a *Bivens* damage remedy to Davis's Fifth Amendment claim,<sup>270</sup> emphasizing that “the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.”<sup>271</sup> Congress, the Court made clear, creates statutory rights and these are enforced through means appropriately designed by Congress, whereas the judiciary is charged with interpreting and enforcing constitutional rights.<sup>272</sup>

The Court ostensibly made a strong claim for the judiciary's power, at the expense of Congress, to fashion remedies for constitutional violations. And even though the Court noted the presence of “special concerns counseling hesitation,”<sup>273</sup> it chose to extend a *Bivens* damage remedy—although not without

<sup>266</sup> 442 U.S. 228, 230–31 (1979).

<sup>267</sup> *Id.* at 231.

<sup>268</sup> *Id.* at 230.

<sup>269</sup> *Id.* at 247.

<sup>270</sup> *Id.* at 230.

<sup>271</sup> *Id.* at 241.

<sup>272</sup> *Id.* at 252 (Powell, J., dissenting) (explaining that “the judiciary is clearly discernable as the primary means through which [constitutional] rights may be enforced” (alteration in original)). For this proposition, the Court quoted James Madison, who when presenting the Bill of Rights to Congress, declared, “[i]f [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.” *Id.* at 241–42 (majority opinion) (second alteration in original) (quoting 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834)).

<sup>273</sup> *Id.* at 246 (majority opinion) (hypothesizing factors that may counsel hesitation). The special concern was suing a “Congressman for putatively unconstitutional actions taken in the course of his

highlighting that there was “no *explicit* congressional declaration that” litigants like Davis “may not recover money damages,”<sup>274</sup> leaving the door open to judicial deference to Congress if the legislature explicitly prohibited the issuance of money damages for constitutional violations. What, though, would the Court do if Congress took this step? Further, what if Congress denied any remedial relief altogether? Would this not make the Fifth Amendment a mere “form of words”?<sup>275</sup>

The Court again considered the issues surrounding the extension of *Bivens* remedies a year later in *Carlson v. Green*,<sup>276</sup> a suit brought by the mother of a deceased federal prisoner alleging that he died from personal injuries suffered during incarceration because the prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment.<sup>277</sup> The majority directed attention to two situations in which an action for a *Bivens* damages remedy could be defeated: (1) when the defendants show “special factors counselling hesitation in the absence of affirmative action by Congress,” and (2) “when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”<sup>278</sup>

Neither situation applied to Green’s case. First, there were no special factors counseling hesitation because the prison officials did “not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.”<sup>279</sup> And second, “nothing in the Federal Tort Claims Act (FTCA) or its legislative history . . . show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.”<sup>280</sup> Once again, although extending *Bivens* remedies to another constitutional provision, the Court neither set out a comprehensive framework for constitutional remedies nor made clear that vio-

official conduct.” *Id.* But the Court dispensed with this concern as “coextensive with the protections afforded by the Speech or Debate Clause,” though not protected by that Clause, and “the principle that ‘legislators ought . . . generally to be bound by [the law] as are ordinary persons.’” *Id.* (alteration in original) (citing *Gravel v. United States*, 408 U.S. 606, 615 (1972)).

<sup>274</sup> *Id.* at 246–47 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)).

<sup>275</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (holding that without a constitutionally mandated remedy, i.e., the exclusionary rule, the Fourth Amendment would practically be worth nothing).

<sup>276</sup> *Carlson v. Green*, 446 U.S. 14, 18–25 (1980).

<sup>277</sup> *Id.* at 16 (reporting the facts of the case).

<sup>278</sup> *Id.* at 18–19 (first citing *Bivens*, 403 U.S. at 396–97; and then citing *Davis*, 442 U.S. at 245–47). The Court also considered the question whether the allegations supported a suit under the Federal Tort Claims Act. *Id.* at 19–24.

<sup>279</sup> *Id.* at 19.

<sup>280</sup> *Id.* at 19–20 (explaining that Congress exercised “the practice of explicitly stating when it means to make FTCA an exclusive remedy”).

lations of constitutional rights require constitutional remedies to prevent those rights from becoming a mere “form of words.” The Court’s deference to Congress had become part and parcel of its *Bivens* doctrine, leaving a gaping hole in the judiciary’s final authority to interpret and enforce the Constitution.<sup>281</sup>

### 3. Limiting *Bivens*

The Supreme Court’s reluctance to extend *Bivens* damage remedies to other constitutional provisions was short-lived. Apart from the two exceptions just described, the Court has refused on each subsequent opportunity to infer damage remedies to enforce other constitutional protections.<sup>282</sup>

Although the seeds of *Bivens*’s demise can be found within the Court’s *Bivens* decision itself, the true “turning point”<sup>283</sup> occurred in the 1983 case of *Bush v. Lucas*, which involved a request for “a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors.”<sup>284</sup> Lucas, a NASA facility director, demoted Bush, a NASA aerospace engineer, allegedly as punishment for publicly criticizing the management of the space center where they both worked.<sup>285</sup> The Court first assumed that Bush’s “First Amendment rights were violated by the adverse personnel action” and that the “civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered.”<sup>286</sup> Despite explicitly stating that the remedy<sup>287</sup> that Congress provided was inadequate, the Court declined to extend *Bivens*, reasoning that Congress had established an “elaborate, comprehensive [remedial] scheme” to protect these rights.<sup>288</sup> Furthermore, it explained that Congress was “in a far better position than a court”<sup>289</sup> to make the “policy judgment”<sup>290</sup> of “balancing governmental efficiency and the rights of employees.”<sup>291</sup>

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<sup>281</sup> See Bandes, *supra* note 136, at 337–38 (explaining how the Court in *Carlson v. Green* codified the judiciary’s deference to Congress in *Bivens* actions).

<sup>282</sup> See *infra* notes 283–307 and accompanying text (discussing the Court’s limitation of the *Bivens* doctrine in subsequent cases).

<sup>283</sup> Bandes, *supra* note 136, at 338.

<sup>284</sup> 462 U.S. 367, 368 (1983).

<sup>285</sup> *Id.* at 369–71 (reporting the facts of the case).

<sup>286</sup> *Id.* at 372 (footnote omitted).

<sup>287</sup> *Id.* at 373 (stating that Congress had provided a less than complete remedy). Congress had made available to federal employees like Bush a number of civil service remedies, including through the Federal Employee Appeals Authority and the Civil Service Commission’s Appeals Review Board. *Id.* at 369–71 (walking through the different administrative remedial proceedings available to and attempted by Bush).

<sup>288</sup> *Id.* at 385–86.

<sup>289</sup> *Id.* at 389.

<sup>290</sup> *Id.* at 388.

<sup>291</sup> *Id.* at 389.

The Court's deference to Congress was on full display throughout its analysis, emphasizing that "[w]hen Congress provides an alternative remedy, it may . . . indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised."<sup>292</sup> It also combined the two factors set out in *Carlson v. Green*,<sup>293</sup> making "the existence of a statute . . . a factor counseling hesitation."<sup>294</sup> This move "obviated the need to find that the statute was equally effective—evidently its mere existence was reason for deference."<sup>295</sup>

The Supreme Court took yet another step toward near total deference to Congress in the context of *Bivens* action five years later in its 1988 decision, *Schweiker v. Chilicky*.<sup>296</sup> This case involved a Fifth Amendment Due Process Clause challenge to the denial of Social Security Disability Insurance (SSDI) benefits, allegedly through the use of impermissible quotas.<sup>297</sup> Congress had previously created an elaborate administrative remedial scheme for those who had been removed from the disability rolls, but the scheme only helped to restore SSDI benefits that were improperly withheld.<sup>298</sup>

Congress, in the context of *Bivens* actions, would now determine which remedies are adequate. Justice Sandra Day O'Connor's majority opinion contended that "[w]hen the design of a Government program suggests that Congress has provided *what it considers adequate remedial mechanisms* for constitutional violations that may occur in the course of its administration, [the Court] ha[s] not created additional *Bivens* remedies."<sup>299</sup> The Court again stressed that "Congress is in a better position to decide whether or not the public interest would be served by creating"<sup>300</sup> a new *Bivens* damages remedy. Following this case, the state of affairs seemed to be that Congress, not the

<sup>292</sup> *Id.* at 378.

<sup>293</sup> *Id.* at 377–78 (summarizing the *Carlson* holding and emphasizing the two factors); see Bandes, *supra* note 136, at 297 ("[T]he *Bivens* Court was willing to defer either where a congressional remedy, which was meant to be exclusive *and* was found equally effective, existed, or, even where no such remedy existed where there were factors counseling judicial hesitation.").

<sup>294</sup> Bandes, *supra* note 136, at 297.

<sup>295</sup> *Id.*

<sup>296</sup> See generally 487 U.S. 412 (1988) (refusing to apply a *Bivens* remedy to a violation of the Fifth Amendment).

<sup>297</sup> *Id.* at 414–20.

<sup>298</sup> *Id.* at 437 (Brennan, J., dissenting). It "did not even purport to redress the constitutional injuries claimed." Bandes, *supra* note 136, at 297. Justice O'Connor stated, "Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision." *Schweiker*, 487 U.S. at 429 (majority opinion) (citation omitted).

<sup>299</sup> *Schweiker*, 487 U.S. at 423 (emphasis added).

<sup>300</sup> *Id.* at 427 (quoting *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

judiciary, has the final say on whether the remedial mechanisms it provides adequately vindicate constitutional rights.

The doctrinal development of the *Bivens* doctrine concludes with the Court's holding in the 2017 case of *Ziglar v. Abbasi*,<sup>301</sup> a suit involving the United States' post-9/11 detention policies brought against high-level Department of Justice officials for alleged Fourth and Fifth Amendment violations.<sup>302</sup> The Court first acknowledged that "[t]he decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself."<sup>303</sup> Yet, it drew the wrong conclusion from this difference. It referenced "separation-of-powers principles," noting that creating a judicial remedy for constitutional violations was "a significant step" under these principles.<sup>304</sup> Then, when considering the question of "who [between Congress and the Court] should decide' whether to provide for a damages remedy," the Court answered, "most often [it] will be Congress."<sup>305</sup>

As these cases demonstrate,<sup>306</sup> the Supreme Court's *Bivens* doctrine, from its inception, has marched inexorably toward greater judicial deference to Congress in the field of remedies for constitutional violations, leaving the protection of individual rights increasingly subject to congressional determination of the adequacy of the remedies provided.<sup>307</sup> Left unanswered is the question of whether the Court would change course if Congress determined that *no* remedy was required to enforce certain constitutional provisions.

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<sup>301</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

<sup>302</sup> *Id.* at 1853–54. Subjects of these 9/11 detention policies were subjected to twenty-four hours of light, little to no opportunity to be outside of their cells, no access to communication outside, no access to basic hygiene products, and faced constant strip searches any time they were moved. *Id.*

<sup>303</sup> *Id.* at 1856.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 1857 (quoting *Bush*, 462 U.S. at 380).

<sup>306</sup> *See id.* at 1856–57 (answering that most often Congress should decide whether to provide damage remedies for constitutional violations); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (holding that when Congress has provided what it thinks to be an adequate remedy for constitutional violations, the courts should not imply their own damages); *Bush*, 462 U.S. at 377–78 (noting that Congress can provide an alternative remedy in a myriad of ways and making the existence of a remedial statute, regardless of its sufficiency, a factor counseling against the courts' application of a *Bivens* remedy). The Supreme Court denied a *Bivens* remedy in another context in early 2020. *See Hernandez v. Mesa*, 140 S. Ct. 735, 746–49 (2020) (denying the action for alleged violations of Fourth and Fifth Amendment rights when a U.S. Border Patrol Agent shot and killed a Mexican national on Mexican soil partially on the ground that "Congress has repeatedly declined to authorize the award of damages [against federal officials] for injury inflicted outside [U.S.] borders").

<sup>307</sup> *See* Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. 129, 136–36 (2020) (discussing that today the Court has made the remedy recognized in *Bivens* virtually non-existent to the rights it attempts to serve).



### C. Implied Statutory Remedies vs. Implied Constitutional Remedies

The prior discussion has demonstrated that the Supreme Court's treatment of implied statutory remedies and implied constitutional remedies have largely settled into a state of rather generous judicial deference to Congress.<sup>308</sup> That was not always the case, however. Prior to the Court's decision in *Bush*, "[a] significant feature of the implied-remedies cases [was] the Court's disparate treatment of constitutional and statutory rights."<sup>309</sup> Leading up to this point, the Court seemingly recognized that Congress and the judiciary had fundamentally different roles to play with respect to constitutional remedies, which were ostensibly special and unique in the sense that Congress had no role in drafting or interpreting the document from which such remedies came—the United States Constitution.<sup>310</sup>

The "turning point"<sup>311</sup> came when *Bush* "mark[ed] the beginning of a convergence in the Court's doctrine regarding constitutional and statutory remedies."<sup>312</sup> In that case, "[t]he Court declined to recognize a *Bivens* remedy where Congress had erected an 'elaborate, comprehensive scheme' of administrative remedies," a rationale strikingly similar to the Court's reliance "on the existence of 'elaborate' congressional legislation to infer the absence of congressional intent to create an implied damages remedy" in the context of statutory remedies.<sup>313</sup> It went even further in the cases of *Schweiker* and *Ziglar*, stating that Congress is far better positioned than the judiciary to determine whether and what kind of remedies are required to enforce constitutional rights.<sup>314</sup> In post-*Bush Bivens* cases, the Court no longer stresses the distinction between constitutional remedies and statutory remedies or why its own role in creating the former might drastically differ from the latter.

There are at least two fundamental flaws with this approach, stemming from the principles of judicial legitimacy and separation of powers. When they

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<sup>308</sup> See *supra* Part V.A (discussing the Court's deferential treatment of implied statutory remedies); *supra* Part V.B.3 (explaining the Court's limitation of *Bivens* remedies).

<sup>309</sup> Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 48–49 (1985). *Contra Bush*, 462 U.S. at 377–78 (developing a deferential attitude toward Congress in the area of implied constitutional remedies).

<sup>310</sup> See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (emphasizing that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (distinguishing between congressional and judicial roles in vindicating constitutional rights).

<sup>311</sup> *Bandes, supra* note 136, at 338.

<sup>312</sup> Merrill, *supra* note 309, at 49 n.209.

<sup>313</sup> *Id.* (quoting *Bush*, 462 U.S. at 385) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13–15 (1981)).

<sup>314</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Schweiker v. Chilicky*, 487 U.S. 413, 423 (1988).

assume the power of judicial review, the courts' legitimacy flows from the execution of their constitutionally mandated functions. The first function is "adjudicative . . . [resolving] the claims of [adverse] individuals and, in the constitutional context, . . . protect[ing] individual liberties."<sup>315</sup> The second is the "structural role: [the courts'] duty to ensure that the political branches do not exceed their constitutionally granted powers."<sup>316</sup> The judicial branch has the final say as to the meaning of the Constitution. Therefore, it is appropriate and entirely commensurate with judicial review to develop remedies that are essential to the meaning of the Constitution, necessary to protect constitutional rights, and effective in enforcing constitutional restraints. This role takes on even greater significance and further enhances the judiciary's legitimacy in cases where one of the majoritarian branches has encroached upon individual constitutional liberties. For statutory rights and remedies, on the other hand, the Constitution gives to the democratically elected Congress final decision-making authority. The judiciary's legitimate role here is limited to interpreting the statutes that Congress passes, leaving to that body the prerogative to decide how they are to be enforced.

The Court's approach to implied statutory and implied constitutional remedies also runs into multiple separation-of-powers problems. Judicially implied statutory remedies amount to an improper encroachment by the judiciary on the legislature's authority. Not only does Congress know how to provide a private cause of action and remedial scheme when it desires, but even if a judicially implied statutory remedy helps effectuate the purpose of the statute, that remedy "was not subjected to the formal requirements of the legislative process."<sup>317</sup> By inferring a remedy into a statute lacking one, the Court changes the statute and the law, violating Article I's bicameralism and presentment requirements.<sup>318</sup> Appealing though it may be, it is beyond the judiciary's authority to set out its own view of public policy or its theory of how a particular statute can best be implemented. That is left to Congress.

The Court permits Congress to violate separation of powers and improperly encroach on the judiciary's function when it allows the legislature to determine what, if any, remedies should be available for violations of the Constitution. Constitutional remedies are a matter of judicial interpretation—

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<sup>315</sup> Bandes, *supra* note 136, at 303.

<sup>316</sup> *Id.* "To uphold the rights of individuals before the Court, the Court must prevent encroachment on those rights by the political branches." *Id.* at 311.

<sup>317</sup> MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 39 (1991) (footnote omitted).

<sup>318</sup> *See* U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it . . .").

choosing and shaping them are an essential element of the judiciary's role, not Congress's. Furthermore, "exclusive enforcement authority [cannot] reside with the very political branches (and particularly the mistrusted legislative branch) whose power . . . the Bill of Rights . . . restrain[s]."<sup>319</sup> Viewing statutory remedies and constitutional remedies as one and the same strikes at the very foundation of the governmental structure established by the Constitution, transforms violations of separation of powers principles into judicial doctrine, creates an opportunity for both Congress and the judiciary to lose legitimacy, and leaves our constitutional rights unsecured.

### CONCLUSION

What difference does all this make? Does it ultimately amount to nothing more than a purely academic exercise? After all, all a court can do is issue a piece of paper. How, then, could the judiciary actually control constitutional remedies under the proposed framework? It has, as Alexander Hamilton said, "neither FORCE nor WILL . . ."<sup>320</sup> As a practical matter, this may be true, and the theory expounded here does nothing to alter that reality.

Under the current system, however, it is perfectly legitimate for Congress or the Executive to treat issuance of that order as a mere piece of paper. By paying deference to the political branches in the creation, enforcement, or even existence of constitutional remedies—by ceding interpretive control over the very document and provisions adopted to restrain unchecked majoritarian power—the judiciary has itself effectively turned the Constitution into a mere piece of paper and the rights enshrined in our founding charter into a mere form of words.

It is undoubtedly true that, even if one accepts this theory of constitutional remedies in our counter-majoritarian system, the Constitution is little more than a piece of parchment unless the institutions charged with enforcing it carry out their mandated functions. But under this theory, the stakes for flouting the Constitution or a court's judgment are much higher. Majoritarian-branch actions would be unlawful—and the people who, with the courts, can keep those branches in check will be better able to do so.

In any event, this criticism, grounded in judicial impotence, proves far too much. The very same criticism applies just as clearly to the very process of judicial review: courts have no independent means to enforce their decisions, yet virtually all concede that the loss of judicial review would be devastating to our constitutional democracy. At some level, the system collapses absent consensus adherence to it. But the popular force of an argument that failure to enforce the

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<sup>319</sup> Bandes, *supra* note 136, at 313.

<sup>320</sup> THE FEDERALIST NO. 78, *supra* note 15, at 464 (Alexander Hamilton).

courts' exercise of judicial review will do much to deter abandonment of that consensus. I argue here that the very same is true of the need to permit the judiciary to exercise the ultimate power of fashioning constitutional remedies.

If one accepts the power of judicial review, if one acknowledges that enshrined in the Constitution are individual rights that are meant to be protected, exercised, and enforced, and if one recognizes the principles of separation of powers and the countermajoritarian judiciary's checking role against its majoritarian counterparts, one must conclude that the political branches—given to majoritarian impulses and most threatening to constitutional rights—must not be permitted to judge the manner and extent to which they are restrained. And, they certainly must not be allowed to do so with the judiciary's imprimatur.

This theory of constitutional remedies as constitutional law ineluctably grows out of the Constitution's text and the nature of our democratic system going back to the Founding Era. It recognizes the role and duty of the federal judiciary designed by the Framers, one in which they are "faithful guardians of the Constitution."<sup>321</sup> It is as relevant now as it was then—as are the rights protected by our Constitution.

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<sup>321</sup> *Id.* at 469.

