

The Constitution as a Source of Remedial Law

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ABSTRACT. In *Equity's Constitutional Source*, Owen W. Gallogly argues that Article III is the source of a constitutional default rule for equitable remedies – specifically, that Article III's vesting of the “judicial Power” “in Equity” empowers federal courts to afford the remedies traditionally afforded by the English Court of Chancery at the time of the Founding, and to develop such remedies in an incremental fashion. This Response questions the current plausibility of locating such a default rule in Article III, since remedies having their source in Article III would be available in federal but not state courts and would apply to state-law claims as well as federal claims. Treating Article III as a source of remedial law would thus conflict with more recent decisions that have become canonical, including *Erie Railroad v. Tompkins*. Nonetheless, the evidence that Gallogly has amassed in support of the proposed default rule retains substantial current-day relevance. The challenge is to translate the Founders' understanding to our current, very different legal universe. This Response defends a constitutional default rule on remedies, and a concomitant judicial power to develop such remedies, that is (a) binding on state as well as federal courts, and (b) applicable to remedies at law as well as remedies in equity, but (c) applicable only to claims based on federal law. As applied to equitable remedies, Gallogly's constitutional default rule is largely consistent with the status quo. If extended to legal remedies, however, recognition of a constitutional default rule, and a concomitant judicial law-making power, would require a significant, and much needed, rethinking of the Court's current approach.

INTRODUCTION

It is often remarked that the Constitution expressly addresses remedies in only two provisions: the Takings Clause and the Suspension Clause.¹ In *Equity's*

1. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 755 (7th ed. 2015) (“The [constitutional] text refers explicitly to remedies in only two instances. First, the remedy of habeas corpus is safeguarded against ‘suspension’ by Congress. Second, the Just Compensation Clause of the Fifth Amendment ‘dictates the remedy for interference with property rights amounting to a taking’— compensation for the impairment of value.” (quoting *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 316 n.9 (1987))).

Constitutional Source, Owen W. Gallogly points out that this conventional wisdom overlooks another constitutional provision expressly addressing remedial issues: Article III's extension of the federal judicial power to cases "in Equity."² Gallogly argues that the federal courts' power to award equitable remedies has its source, and finds its limits, in the Constitution itself. Gallogly also criticizes the Supreme Court's flurry of recent equity decisions for focusing instead on the federal statutes that confer equity jurisdiction. In defining the scope and limits of the federal courts' authority to award equitable remedies, on the other hand, Gallogly mainly agrees with the Court's historical approach, arguing that Article III "incorporates the system of remedies that was being administered by the Founding-Era English Chancellor."³ But Gallogly goes on to argue that the Court's recent cases misunderstand the nature of the Chancellor's powers at the Founding and, as a result, mistakenly take a static approach to determining the scope and limits of the federal equity powers. According to Gallogly, the Chancellor "was not categorically limited to granting only those exact remedies that his forebears had issued."⁴ Rather, he could "develop, elaborate, and modestly update the law of equity by accretion of precedent."⁵ "[A]vulsive changes to equity jurisprudence," however, "required legislative approval from Parliament."⁶

This Response does not take issue with Gallogly's understanding of the scope of the Chancellor's powers at the Founding. Gallogly makes a persuasive case that the Chancellor possessed the authority to develop equitable remedies in (at least) an incremental fashion, and that the Founders understood that the federal courts would possess an equivalent power. Instead, this Response focuses on the current plausibility of locating the source of the federal courts' equity powers in Article III. The main difficulty with doing so lies in the fact that Article III is jurisdictional, whereas the availability of equitable remedies is, as Gallogly recognizes, a matter of substance.⁷ Locating the source of the equitable remedial power in Article III thus means, problematically, that (1) the remedies would be available in federal but not necessarily state courts; and (2) the remedies would be available in federal court, as a matter of federal law, even in cases arising under state law. In our post-*Erie* world, the Founders' remedial expectations are best understood as applying only to federal claims and grounded not in Article III but

2. Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213 (2023).

3. *Id.* at 1221.

4. *Id.* at 1222.

5. *Id.*

6. *Id.*

7. Although equity addresses matters of primary right and matters of procedure, in addition to remedial questions, Gallogly focuses on equity as a source of remedies. *See id.* at 1224 n.33 ("Of the components of equity jurisprudence – rights, procedure, remedies, and jurisdiction – this Article focuses exclusively on remedies.").

in the provisions of federal law on which the substantive claim is based, in combination with Article VI of the Constitution, which declares these provisions to have the force of supreme law.⁸ Remedies for nonfederal claims, on the other hand, are best understood to be grounded in whatever law governs the substantive claims in question. Whatever the source of the claim (and with minor exceptions) the available remedies should be the same in federal and state court. And, because the Founders' expectations in this regard extended to legal as well as equitable remedies, the proposed constitutional default rule should apply to legal as well as equitable remedies.

Part I of this Response specifies exactly how Gallogly claims that Article III operates as the source of federal courts' equitable authority and assesses the extent to which Gallogly's thesis that this authority finds its source in the Constitution would alter the Court's current approach to equitable remedies. Part II discusses the doctrinal anomalies that would result from locating the source of the federal courts' remedial authority in Article III. Part II concludes that, after *Erie*, it is implausible to contend that one set of remedies is available in federal court but not in state court, or vice versa. In cases arising under state or foreign law, *Erie* requires the federal courts to award whatever remedies are provided for by the law that governs the merits of the claim (with the possible exception of remedies so unconventional that they cannot be regarded as "judicial" in nature). In cases arising under federal law, the Supremacy Clause requires the state courts to award whatever remedies federal law establishes. Part III agrees with Gallogly that the Founders expected the federal courts to have the power to afford traditional forms of equitable relief, and to develop them incrementally, but argues that this expectation extended equally to legal remedies. In light of Part II's conclusion that a constitutional default rule regarding remedies is plausible today only with respect to federal claims, Part III argues that the Founders' expectations in this regard are best translated as a judicial power to develop both legal and equitable remedies in incremental fashion to give efficacy to the federal rights involved—a power that today is best understood to have its source in the Supremacy Clause.

I. THE DIVERSE WAYS IN WHICH A CONSTITUTION MIGHT ADDRESS REMEDIES

A constitution might address remedies in a number of ways. First, it might *require* certain remedies. In other words, it might impose a remedial *floor*. This is what the Suspension Clause does with respect to the remedy of habeas corpus, guaranteeing its availability unless Congress suspends the writ in the event of an

8. U.S. CONST. art. VI, § 2.

invasion or rebellion.⁹ It is also what the Constitution's Takings Clause does with respect to takings of property, requiring "just compensation" if property is taken by the government for public use.¹⁰ In addition, the Supreme Court has interpreted the Due Process Clause to require compensation for deprivations of liberty or property in the absence of a predeprivation hearing.¹¹ For legislative acts that contravene the Constitution, the Supremacy Clause has been understood to imply the sanction of nullity as a remedy. Some scholars contend that this defensive remedy is the only one the Constitution requires,¹² while others describe that as a "radical" view.¹³ The Court itself has found the remedy of anticipatory injunctive relief to be constitutionally required under certain circumstances.¹⁴

The Constitution might also provide that certain remedies are beyond the power of courts to award, even if authorized by the legislature. In other words, the Constitution might place a *ceiling* on remedies. For example, the Court has held that the Due Process Clause places a limit on the scope of punitive damages that a court may award.¹⁵ As interpreted by the Court, Article III's case-or-controversy requirement places outer limits on the circumstances in which federal courts may award injunctive relief¹⁶ or damages,¹⁷ even if such relief is authorized by the legislature. Justice Gorsuch, joined by Justice Thomas, has expressed

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9. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the popular Safety may require it."); see *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause guarantees the right to habeas corpus except in times of formal suspension).
 10. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").
 11. *Id.* ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); see *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) (holding that the Due Process Clause requires compensation for intentional deprivations of property without a prior hearing); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (same for deprivations of liberty).
 12. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2513-14 (1998).
 13. FALLON ET AL., *supra* note 1, at 756 n.2; see Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549-65 (1998) (disagreeing with Harrison).
 14. See *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226-28 (1908). Because granting equitable remedies is to a significant extent left to the discretion of the court, it will frequently be difficult to claim that a particular equitable remedy is constitutionally required in a particular case. Still, *Crain* holds that the availability of injunctive relief is at least sometimes required by the Constitution.
 15. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).
 16. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).
 17. *E.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210-11 (2021).

the view that Article III likely precludes the issuance of nationwide injunctions,¹⁸ and some scholars agree.¹⁹ Others dispute that claim.²⁰

Gallogly neither endorses nor rejects the claim that Article III imposes a constitutional ceiling or floor on the availability of equitable remedies.²¹ His thesis, instead, is that Article III establishes a “default rule” with respect to the availability of such remedies. As a result of Article III, the federal courts “possess[] . . . the authority inherent in ‘[t]he judicial Power’ in ‘Equity’ unless Congress expressly limits or expands upon that baseline.”²² Thus, unlike Article III’s case-or-controversy requirement and its enumeration of certain categories of cases to which the judicial power extends, Article III’s operation as a source of equity power is not a limit on Congress’ ability to authorize remedies. As with these other aspects of Article III, however, Congress does have the power to reduce the courts’ authority to award equitable relief, a power that Gallogly attributes to Congress’s power to control the jurisdiction of federal courts.²³

Strictly speaking, the rule Gallogly proposes operates as a default rule only with respect to the Supreme Court’s original jurisdiction. With respect to inferior federal courts, the default rule is that equitable remedies are not available. Under the Madisonian Compromise, the default rule established by Article III is that inferior federal courts do not exist.²⁴ For this reason, the federal courts’ “default” authority to afford equitable relief is dependent on congressional action creating the courts and according them jurisdiction. The Court once suggested that Congress was required to create inferior federal courts and endow them with jurisdiction over the categories of cases set forth in Article III, Section 2 for which the Supreme Court lacks original jurisdiction,²⁵ but that view has not prevailed.²⁶ Accordingly, Gallogly’s claim is that the federal courts “become

18. See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay).

19. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the Nationwide Injunction*, 131 HARV. L. REV. 417, 420-21, 471-72 (2017).

20. See, e.g., Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 81-90 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080-90 (2018).

21. Cf. Gallogly, *supra* note 2, at 1280 & n.337 (discussing but not taking a position on whether there is a constitutional floor).

22. *Id.* at 1221.

23. *Id.* at 1221 n.28 (citing *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943)); *id.* at 1277-78.

24. See FALLON ET AL., *supra* note 1, at 7-9.

25. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 330-31 (1816).

26. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

possessed of” equitable authority “only when [such courts are] created and given jurisdiction by Congress.”²⁷

Given the need for congressional action, it seems misleading to say that Article III itself is the “source” of the lower federal courts’ equity power. It would seem more accurate to say that, as with those courts’ jurisdiction, Article III is the source of Congress’s power to confer equity authority on the lower federal courts. Semantics aside, one could still maintain – as Gallogly does – that Article III contemplates that the lower federal courts, once created, will have the full equitable authority possessed by the Founding-Era Chancellor unless explicitly limited by Congress. Because the rule is subject to congressional modification, it is perhaps better understood as a rule of constitutional common law.²⁸ Or, it might be understood as a rule of statutory interpretation, requiring that a statute creating a federal court or specifying its jurisdiction be construed to authorize equitable remedies under the standard Gallogly identifies unless Congress restricts that authority.

Given Congress’s conceded power to expand or contract the availability of the courts’ equitable authority, it is worth asking whether there is much of a difference in practice between saying that the scope and limits of the federal courts’ equitable authority are presumptively determined by Article III and saying that they are determined by the statutes that confer equitable jurisdiction on the federal courts. One possible difference, if one takes a historical approach to determining the scope of the authority conferred by the statutes (as the Supreme Court has done), relates to the temporal baseline for assessing the relevant equitable tradition. If Article III is the source, one would presumably look at the equitable authority of the Chancellor at the time of the Constitution’s adoption (as Gallogly does). On the other hand, if the source of the authority is a statute enacted by Congress, one might focus instead on the scope of the judiciary’s equitable authority as it stood at the time of the statute’s enactment.

For some of the relevant statutes, however, the time periods are roughly the same. For example, the lower federal courts were given equitable authority over some categories of cases – specifically, diversity and alienage cases and suits by the United States – by the Judiciary Act of 1789.²⁹ One of the Court’s most

27. Gallogly, *supra* note 2, at 1221, 1224.

28. See Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 1-3 (1975) (explaining the theory of constitutional common law).

29. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Gallogly argues that this statute did not confer authority to grant equitable remedies, relying on modern cases that establish that “jurisdictional grants generally do not authorize the federal courts to develop substantive law.” Gallogly, *supra* note 2, at 1270. For this reason, he argues that the cases granting equitable remedies under these statutes support his claim that the authority to grant equitable relief was understood to be based on Article III. But, if a statute granting jurisdiction “in equity” does

notable recent equity decisions, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, was a diversity case under the successor to this section of the Judiciary Act.³⁰ The Court held that the scope of the lower court’s equitable authority turned on this Act, and it concluded that the Act “conferred . . . an authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”³¹ The Judiciary Act was enacted, of course, at roughly the same time as the separation of the two countries.

In other cases, the Court has understood the lower courts’ equity powers as having been conferred by later-enacted statutes. For example, in determining the scope of permissible equitable relief under the Employment Retirement Income Security Act (enacted in 1974), the Court looked to whether the requested relief was among “those categories of relief that were typically available in equity” . . . ‘in the days of the divided bench,’”³² that is, “prior to the merger of law and equity.”³³ The merger of law and equity began with New York’s adoption of the Field Code in 1848 and was completed (for federal courts) with the adoption of the Federal Rules of Civil Procedure in 1938.³⁴ The Court’s focus on a later time period in interpreting statutes conferring equitable authority suggests that treating Article III as the source of the authority could make an analytical difference.³⁵

But this possible analytical difference is largely erased by Gallogly’s claim that Article III confers a dynamic equity power on the federal courts—that is, the power to “develop, elaborate, and modestly update the law of equity by accretion

not authorize equitable remedies, it would seem *a fortiori* that a constitutional provision authorizing Congress to give lower federal courts jurisdiction “in Equity” does not do so.

30. 527 U.S. 308 (1999).

31. *Id.* at 318 (quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)); *accord id.* at 335 (Ginsburg, J., dissenting).

32. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361-62 (2006) (first quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis removed); and then quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 524 U.S. 204, 212 (2002)).

33. *See Cigna Corp. v. Amara*, 563 U.S. 421, 439 (2011) (noting that the Employment Retirement Income Security Act, § 502(a)(3) refers to “those categories of relief” that, traditionally speaking (i.e., prior to the merger of law and equity) “were typically available in equity” (quoting *Sereboff*, 547 U.S. at 361)).

34. *See FALLON ET AL.*, *supra* note 1, at 560.

35. *See also Liu v. SEC*, 140 S. Ct. 1936, 1942-63 (2020) (relying on decisions from the mid-to-late-nineteenth century to determine the scope of equity authority conferred by Securities Exchange Act of 1934). *But see id.* at 1950-53 (Thomas, J., dissenting) (rejecting reliance on twentieth-century precedents in favor of focusing on the scope of equity at the time of the Founding).

of precedent.”³⁶ If Article III empowers the judiciary to update the law of equity incrementally, and Congress has the power to make more avulsive changes to equity power, then post-Founding developments are quite relevant. Gallogly’s main criticism of the Court relates to its excessive focus on the scope of equity at the Founding, distinguishing the Court’s “static” approach from his own more dynamic approach.³⁷ The decisions just discussed suggest that the Court has not focused exclusively on Founding-Era sources in interpreting more recent statutes. Even in interpreting the scope of equitable authority conferred by Founding-Era statutes, the Court has not excluded reliance on post-Founding developments. It is true that the Court phrased the standard for interpreting the Judiciary Act of 1789 in *Grupo Mexicano* in a way that appears to contemplate a more static historical approach, but the Court relied in part on precedents from the nineteenth and twentieth centuries.³⁸ With respect to later-enacted statutes, *Grupo Mexicano*’s author has acknowledged the need for some flexibility “[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past.”³⁹ At the same time, Gallogly’s approach authorizes the judiciary to make only incremental changes, and he declines to endorse what he characterizes as the more freewheeling approach to developing equitable remedies taken by Justice Ginsburg’s dissent.⁴⁰ It is thus not readily apparent how locating the source of the federal courts’ equity powers in the Constitution as opposed to statutes would produce different outcomes than the Court has been reaching.

Gallogly claims that “[p]erhaps no federal equity doctrine stands to benefit more [from his thesis] than the *Ex parte Young* injunction.”⁴¹ But the Court already applies a default rule that equitable relief and equitable “causes of action” are available in suits challenging state and federal official action.⁴² Scholars have

36. Gallogly, *supra* note 2, at 1222. Gallogly uses the term “dynamic” to describe Justice Ginsburg’s approach to equity in dissenting opinions, which he does not embrace. *Id.* at 1222 & n.30. He might thus reject my characterization of his approach as “dynamic.” What I mean is that his approach is more dynamic than the “static” approach that he attributes to the Supreme Court, which he also rejects. His approach is dynamic in this sense insofar as it accepts, and criticizes the Court for failing to recognize, a judicial power to develop the law incrementally.

37. *See id.* at 1313.

38. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1010 n.61 (2015).

39. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (Scalia, J.).

40. *See* Gallogly, *supra* note 2, at 1312-13, 1313 n.490.

41. *Id.* at 1315.

42. *See* *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015). I use scare quotes because, although that is the term used in *Armstrong*, equity did not have “causes of action.” Samuel L. Bray and Paul B. Miller prefer the term “grievance.” *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1772 (2022).

worried that the Court would extend its static historical approach to equity to these suits, cutting back on the remedies available in such actions.⁴³ In its recent decision in *Whole Woman's Health v. Jackson*, the Court did assert that “[t]he equitable powers of federal courts are limited by historical practice.”⁴⁴ But the Court did not harken back to the powers of the Founding-Era English Courts of Chancery. It focused instead on whether the requested relief was consistent with the 1908 decision in *Ex parte Young*.⁴⁵ Whether *Ex parte Young* altered the then-prevailing rule can be debated,⁴⁶ but Gallogly does not regard the change as avulsive.⁴⁷ Thus, here too, Gallogly’s thesis is largely consistent with the status quo. The Court’s treatment of *Ex parte Young* in *Whole Woman's Health* as the outer limit of available relief in cases challenging official action is questionable and worrisome,⁴⁸ but Gallogly’s standard would not necessarily have produced a different result in the case, as Gallogly himself recognizes.⁴⁹

Scholars have forcefully criticized the Court’s historical turn in defining the current availability of equitable remedies.⁵⁰ Gallogly sides with the Supreme Court on this front. Scholars have also criticized the Court for misunderstanding what Congress was seeking to accomplish in enacting specific statutes authorizing (and, in the Court’s understanding, limiting) equitable remedies.⁵¹ Gallogly’s theory neither adds to nor detracts from such criticisms, as he recognizes that Congress has the power to make even avulsive changes to equitable remedies. He does note that Congress must “speak clearly to limit the federal courts’ equity powers,” but he does not claim that this clear statement rule, or even a

43. See, e.g., James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 748-52 (2020).

44. 142 S. Ct. 522, 535 (2021) (citing *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)).

45. 209 U.S. 123 (1908).

46. Compare Pfander & Formo, *supra* note 43, at 750 (“The remedy in *Ex parte Young* does not . . . rest on the traditional use of equity to prevent injuries cognizable at law.”), with John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008) (arguing that *Ex parte Young* merely applied an established and limited corollary to the antisuit injunction).

47. Gallogly, *supra* note 2, at 1316 (noting that *Ex parte Young*’s holding “is precisely the type of updating to the federal system of equitable remedies that Article III’s incorporation of precedent-based equity affirmatively contemplates”).

48. See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1348-54 (2023).

49. Gallogly, *supra* note 2, at 1316 (concluding that “the equitable remedies at issue in *Whole Woman’s Health v. Jackson* are probably beyond the federal courts’ inherent power”).

50. See, e.g., David C. Vladeck, *The Erosion of Equity and the Attack on the FTC’s Redress Authority*, 82 MONT. L. REV. 159 (2021).

51. See, e.g., John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

weaker interpretive presumption, comes from Article III.⁵² Nor does locating the federal courts' equitable authority in Article III as distinguished from federal statutes add to or detract from the criticisms by scholars who dispute the Court's history. Indeed, this is, at bottom, Gallogly's complaint against the Supreme Court. He notes that the Court has read the relevant statutes as adopting a historical standard that "actually sound[s] quite similar" to his,⁵³ but he criticizes the Court for overlooking that the Chancellor's powers were "not frozen in time."⁵⁴ His argument is compelling, but it would be equally compelling whether the historical standard came from Article III or the statute passed by Congress granting jurisdiction in equity to the court. Indeed, as discussed, the criticism would arguably be stronger if the source were statutes.

In sum, insofar as the federal courts' equitable authority is concerned, locating the source of the authority in the Constitution would be largely compatible with the status quo. Gallogly's thesis, as it relates to equitable remedies in cases arising under federal law, does not depart dramatically from the Court's current approach, although it does provide a strong basis for rejecting calls to narrow this approach, as some Justices have urged in dissenting opinions.⁵⁵

II. PROBLEMS WITH ARTICLE III AS A SOURCE OF REMEDIAL LAW

Locating the source of the power to afford equitable remedies in Article III creates a number of doctrinal problems in light of more recent Supreme Court decisions that are now widely accepted and, indeed, regarded as canonical. First, Article III only addresses the judicial power of federal courts.⁵⁶ Thus, if one locates the federal courts' power to afford equitable relief in Article III, the relief would be available in federal but not state courts. This means, for example, that the scope of equitable relief in a federal claim would differ depending on whether the suit was brought in federal or state court. To the extent Gallogly's thesis produces this result, it is inconsistent with decisions interpreting the Supremacy Clause. Second, Article III addresses the jurisdiction of the federal courts not only in cases arising under federal law but also in cases arising under state (and foreign) law. Thus, if Article III empowers and limits the federal courts' power to accord equitable relief, it does so for state-law claims pending in federal court

52. Gallogly, *supra* note 2, at 1278 & n.323 (citing a twentieth-century and a nineteenth-century decision); *see also id.* at 1311 (describing this as "the Supreme Court's rule").

53. *Id.* at 1311-12.

54. *Id.* at 1312.

55. *See, e.g., Liu v. SEC*, 140 S. Ct. 1936, 1950 (Thomas, J., dissenting).

56. *See U.S. CONST.* art. III, § 1 (referring to the "judicial Power of the United States").

because of diversity or alienage jurisdiction, potentially resulting in broader or narrower relief in federal court than in state court. To the extent Gallogly's thesis produces this result, it has likely been superseded by the Court's holding in *Erie*.

A. Article III Applies to Federal but Not State Courts

One obvious consequence of treating Article III as a source of remedial law is that the availability of a remedy would depend on whether the suit was brought in federal or state court. The main purpose of Article III, Section 2—in which the reference to “Equity” appears—is to allocate jurisdiction between the state and federal courts. But, as Gallogly recognizes, the scope and limits on available equitable remedies are properly regarded as a matter of substance, not jurisdiction.⁵⁷ The Court agrees.⁵⁸ It is true that equity is often spoken of as a matter of jurisdiction, but the term “‘equitable jurisdiction’ . . . is misleading to many readers now” because it does not really refer to a court’s “power . . . to pronounce a judgment.”⁵⁹ “Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked.”⁶⁰ Given Article III’s jurisdictional nature, it would seem more sensible to understand the clause as authorizing federal courts to adjudicate the enumerated types of suits raising equitable claims or seeking remedies that would sound in equity, in addition to suits raising claims at law or in admiralty. Whether any given remedy is appropriate, however, would depend on the law under which the claim arises—be it federal, state, or foreign law.

With respect to cases arising under federal law, locating the source of the federal authority to award equitable relief in Article III is problematic insofar as it would provide for different remedies depending on whether the suit is brought in federal or state court. If a federal statute expressly provides for a particular remedy, current case law requires states to provide the remedy in their own courts,⁶¹ subject to a limited power to deny their courts’ jurisdiction.⁶² The source of that requirement is not Article III but the Supremacy Clause, which

57. *E.g.*, Gallogly, *supra* note 2, at 1309 (referring to remedial law as “substantive”).

58. *See, e.g.*, *Petrella v. Metro-Goldwyn-Meyer, Inc.*, 572 U.S. 663, 679 (2014) (describing the equitable defense of laches as a “substantive” or “remedial” principle, not a matter of procedure affected by the Federal Rules’ merger of law and equity).

59. *Bray & Miller, supra* note 42, at 1775.

60. *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926).

61. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 367-75, 380-81 (1990); *Haywood v. Drown*, 556 U.S. 729, 737-42 (2009); *Testa v. Katt*, 330 U.S. 386 (1945).

62. *See generally* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 929-35 (2017).

applies in state as well as federal courts.⁶³ All Justices except Justice Thomas recognize that state courts must entertain federal claims in their courts as long as they have jurisdiction to entertain analogous state-law claims.⁶⁴ In any event, if the state courts do have jurisdiction, there is no doubt that they are required to afford the remedies contemplated by federal law.⁶⁵

If the federal courts are authorized by Article III to award forms of equitable relief in cases involving federal statutes that do not themselves authorize those forms of relief, the available remedies in any given case would differ depending on whether the case was brought in federal or state court. If the Constitution does contemplate the existence of certain default remedies for cases arising under federal law, however, one would think that the remedies would be available in state court as well as federal court. After all, under the Madisonian Compromise, there was no requirement for Congress to establish inferior federal courts at all. And for virtually the entire first century of the country's existence, Congress did not endow the inferior federal courts with general jurisdiction over cases arising under federal law.⁶⁶ A constitutional source of remedies for violation of federal law based on Article III, therefore, would have no operation in the state courts. To make them effective, Congress would have to create lower federal courts. But to say that Congress is required to create lower federal courts to provide a forum in which the constitutionally required remedies can be sought is to deny that Congress has discretion not to create lower federal courts.

Gallogly might respond that his thesis does not deny that state courts are required by the Supremacy Clause to afford whatever remedies are contemplated by the federal statute in question. But, if so, then the remedial regime advances by Gallogly would be quite complex: state *and* federal courts would be required to give effect to the statutorily required level of federal remedies, but the federal courts would have the authority to recognize and enforce additional equitable remedies by virtue of Article III. The Court would have to articulate one set of remedial rules to which both state and federal courts are bound and another set of remedial rules that apply only in federal court. When added to the remedial floor the Court has found to be applicable in state court⁶⁷ and the remedial

63. See *Testa*, 330 U.S. at 389-94 (relying on the Supremacy Clause); *Haywood*, 556 U.S. at 742 (same).

64. See *Haywood*, 556 U.S. at 767-76 (Thomas, J., dissenting).

65. See, e.g., *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (holding that state courts are required to provide a jury trial in a suit under the Federal Employers' Liability Act because a jury trial is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act").

66. The first enduring grant of jurisdiction over cases "arising under" federal law came with the enactment of the Judiciary Act of 1875. See FALLON ET AL., *supra* note 1, at 782.

67. See *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226-28 (1908).

ceiling the Court appears to regard as application only in federal court,⁶⁸ Gallogly's default remedial rule applicable only in federal courts would produce a quite elaborate remedial regime (to put it mildly).

Recognizing default remedies under Article III would also mean that the outcome of a federal claim would differ depending on whether federal jurisdiction exists. Under current interpretations of the general federal-question statute, some cases that "arise under" federal law for purposes of Article III do not arise under federal law for purposes of the general federal-question statutes (28 U.S.C. §§ 1331, 1441). For example, under the well-pleaded-complaint rule, federal jurisdiction generally cannot be based on a federal counterclaim.⁶⁹ If such a counterclaim had to be litigated in state court, whatever equitable authority Article III confers on the federal courts would not be applicable. The available scope of equitable relief would be different than if the claim were brought in federal court. There is not a hint in the cases on these and other doctrines surrounding the federal-question statute, such as the abstruse doctrines determining the availability of federal jurisdiction over declaratory-judgment actions,⁷⁰ that the absence of jurisdiction could determine the scope of available remedies. The "accident" of federal-question jurisdiction should not determine the available remedies any more than the accident of diversity, as discussed in the next Section.⁷¹

B. Article III Applies to State-Law Claims

A second problem with Gallogly's claim that the source of the federal courts' authority to grant equitable remedies is Article III is that federal law would determine the remedies available in federal court for claims based on state law. The text of Article III, Section 2 actually suggests that the clause's reference to "Equity" has no bearing on cases arising under state or foreign law. The term "Equity" appears in the portion of the clause that extends the judicial power to cases "arising under" the Constitution and federal statutes and treaties. It does not appear in the portions that extend the judicial power to diversity and alienage cases, as the latter clauses are separated from the "arising under" clause by a semicolon. But Gallogly resists this conclusion. He acknowledges that the reference to "Equity" in Article III reaches only cases arising under federal law. But rather than limiting the scope of his claim, he modifies its textual source. His fallback

68. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210-11 (2021).

69. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-32 (2002).

70. See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

71. Cf. *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945) (noting that the "accident" of diversity should not determine the outcome in diversity cases); *infra* text accompanying notes 80-82.

is that the constitutional source of federal equitable power is the part of Article III that vests the “judicial power” in the federal courts: “one could reach substantially identical conclusions based solely on an interpretation of ‘[t]he judicial Power.’”⁷² But, if this were the case, the claimed constitutional source of the federal courts’ equitable authority is not, in the end, a text that expressly refers to “Equity.” Gallogly’s shift to Article III’s vesting of the “judicial power” in federal courts attenuates the textual support for the claim that Article III incorporates the equitable powers of the English Chancery Court.

To support his argument that Article III is the source of the federal courts’ power to afford equitable remedies even in diversity and equitable cases, Gallogly relies upon numerous diversity cases from the eighteenth and nineteenth centuries based on Section 11 of the Judiciary Act of 1789. It is true that, during this period, the Supreme Court clearly articulated and strenuously enforced the principle that the federal courts’ power to award equitable remedies, even in nonfederal cases, was governed by a uniform federal standard derived from the authority of the English Court of Chancery.⁷³ Not coincidentally, this was also the period in which the federal courts used their independent judgment in applying the general common law.⁷⁴ But, in what can only be described as an avulsive change in U.S. law, the approach represented by these cases was altered by the Court’s decision in *Erie Railroad Co. v. Tompkins*.⁷⁵ Before *Erie*, remedies were sometimes thought of as a matter of procedure.⁷⁶ With respect to equitable remedies in particular, the Court wrote in 1915 that

it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles,

72. Gallogly, *supra* note 2, at 1225.

73. See Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249 (2010).

74. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Interestingly, however, during this period the federal courts employed state procedural rules in cases at law. The relevant statutes required the use of the procedures in place in the states in which the court sat *at the time of the statutes’ enactment*. See Collins, *supra* note 73, at 259.

75. 304 U.S. 64 (1938).

76. See, e.g., 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 86 (1935) (“The affording of a remedial right . . . is a matter solely to be determined by the sovereign from whom the remedy is demanded; in other words, the allowance of a remedy, the methods of carrying on the suit, the judgment, and the execution, are matters entirely for the law of the forum . . .”).

rules, and usages of equity having uniform operation in [federal] courts wherever sitting.⁷⁷

Indeed, under *Swift*, the federal courts used their own judgment regarding the content of the “general law” even on questions of substance.⁷⁸ But, of course, *Erie* rejected that approach.

Even though *Erie* was a case at law, the Court cited equity precedents among those it was disapproving.⁷⁹ In *Guaranty Trust Co. v. York*, which involved a claim in equity, the Court articulated its “outcome-determinative” test for distinguishing issues of substance – as to which the law of the states governed in diversity cases – from issues of procedure, as to which federal rules applied.⁸⁰ The “accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away” should not affect the outcome.⁸¹

In essence, the intent of [*Erie*] was to insure that in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.⁸²

Clearly, if certain remedies are available in federal court but not state court, or vice versa, the accident of diversity would change the outcome. The Court has described the availability of equitable remedies and defenses as a substantive matter.⁸³ Gallogly recognizes that the availability of equitable remedies is a matter of substance.⁸⁴ It follows that federal courts must follow state law if state law withholds a remedy that federal courts would be empowered to grant with

77. *Guffey v. Smith*, 237 U.S. 101, 114 (1915); see also *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868) (“The equity jurisdiction conferred on the Federal courts . . . is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.”).

78. See FALLON ET AL., *supra* note 1, at 580-83.

79. See *Erie*, 304 U.S. at 72 (citing *Mason v. United States*, 260 U.S. 545, 559 (1923)).

80. 326 U.S. 99 (1945).

81. *Id.* at 109.

82. *Id.*

83. See, e.g., *Petrella v. Metro-Goldwyn-Meyer, Inc.*, 572 U.S. 663, 679 (2014).

84. See, e.g., Gallogly, *supra* note 2, at 1269-70 (noting that locating the source of authority to grant equitable relief in Section 11 of the Judiciary Act of 1789 “creates a serious doctrinal conflict, as the Supreme Court has also made clear that jurisdictional grants generally do not authorize the federal courts to develop substantive law”).

respect to federal claims.⁸⁵ Federal courts should similarly be required to provide a remedy that state law establishes with respect to state-law claims even if it is a remedy that the federal courts would not be authorized to grant under federal statutes, with the possible exception of a state-created remedy that is so innovative as not to be thought of as “judicial” in nature. Otherwise, the accident of diversity would produce a different outcome just because one party selected the federal court.

The Court in *Guaranty Trust* listed as among the equitable remedies that a federal court could not grant even if authorized by state law those that are outside “the traditional scope of equity as historically evolved in the English Court of Chancery,”⁸⁶ thus seeming to treat the historical scope of equity as an outer limit on the types of remedies a federal court can award. But the equitable remedies that are unavailable even if authorized by state law should consist of only those remedies that would be beyond Congress’s power to authorize for federal claims, and Gallogly is surely correct in asserting that Congress can enact even “avulsive” changes to the federal courts’ equitable authority even if the courts themselves cannot. To the extent the applicable state law authorizes an equitable remedy that the federal courts may not award because it is not “judicial” in character, the case should be dismissed by the federal court for lack of jurisdiction rather than on the merits, leaving it open to the plaintiff to pursue the claim in state court. A remedial limit having its source in Article III should be regarded as a basis for denying jurisdiction rather than denying a remedy on the merits. Litigants should not be subject to claim preclusion on state-law claims just because the federal courts lack the authority to grant the authorized remedy.⁸⁷

Though it is a post-*Erie* decision, *Grupo Mexicano* is not in conflict with the view that federal courts should apply state law regarding the availability of equitable remedies in diversity cases. The *Erie* issue was raised in the case, but it was raised too late and for that reason the Court declined to consider it.⁸⁸ Professor Burbank has persuasively argued that the remedy sought in *Grupo Mexicano* should have been denied solely on the ground that New York law did not

85. See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1312 (2000) (noting that the *Mareva* injunction should have been denied in *Grupo Mexicano* on the ground that New York law did not permit it). *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), is not to the contrary. The Court there found the availability of a class action to be a procedural matter, not a matter of the availability of a remedy. *Id.* at 414-16.

86. 326 U.S. at 105.

87. Compare *Cates v. Allen*, 149 U.S. 451, 460-61 (1893) (holding that the appropriate disposition of such a case, if removed from the state courts, is to remand), with *Venner v. Great N. Ry. Co.*, 209 U.S. 24, 33-35 (1908) (upholding jurisdiction but dismissing for “want of equity”).

88. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund*, 527 U.S. 308, 318 n.3 (1999).

authorize it.⁸⁹ If Professor Burbank is wrong and federal courts' power to award *Mareva* injunctions in diversity cases is not governed by state law, that would only be because the standard for awarding preliminary injunctions under Rule 65 is a matter of procedure governed by federal standards.⁹⁰ But the federal courts' authority to award permanent injunctions in cases arising under state law should undoubtedly be governed by state law.

In sum, while the Founders may have understood Article III to be the basis of a federal law of equitable remedies applicable in federal but not state court and applicable to both state and federal claims, such an understanding does not survive the Court's more recent decisions. With respect to federal claims, the notion that state courts are free to disregard remedies that have been recognized by the federal courts but not enacted by Congress appears to contradict decisions interpreting the Supremacy Clause to require state courts to accord the relief required by federal law as long as their courts have jurisdiction.⁹¹ With respect to state-law claims, *Erie* would preclude federal courts from granting equitable remedies that the state has declined to authorize. Likewise, *Erie* would appear to require federal courts to grant whatever equitable relief the state has authorized, even if such relief is not of the sort that is typically available for federal claims, subject to a possible limit for remedies so unusual as to not count as "judicial."

III. DEFAULT CONSTITUTIONAL REMEDIES

Gallogly persuasively shows that the Founders and the federal judiciary in our early history expected the courts to afford (at least) the types of remedies that had traditionally been available in England. More importantly, Gallogly persuasively shows that courts were understood to have the power to develop these

89. See Burbank, *supra* note 85, at 1312.

90. Cf. Collins, *supra* note 73, at 337 n.398 ("The early-nineteenth-century federal equity cases are not completely without force, as they continue to animate modern interpretations of the Court's equity powers by defining the limits of the federal courts' remedial powers under FED R. CIV. P. 64.").

91. As discussed above, there is some controversy about the federal courts' authority to award nationwide injunctions in suits against federal officials or agencies. See *supra* notes 18-20 and accompanying text. If federal courts have such a power, it might be argued that state courts lack the power. If so, that would be because of separate constitutional limits on the geographic scope of state courts' authority. A "nationwide" injunction, however, is merely an injunction purporting to bind nonparties, and state courts award such remedies all the time. In any event, the issue is unlikely to arise in cases against federal officials or agencies because such defendants, if sued in state court, have the right to remove to federal court. See 28 U.S.C. § 1442. Whether state courts would have the power to grant such injunctions if lower federal courts were not created, or if federal defendants were not empowered to remove the case to federal court, is an interesting question. Cf. *Vázquez & Vladeck*, *supra* note 62, at 941-44 (discussing *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872)).

remedies in (at least) an incremental fashion. In this respect, Gallogly's argument is not so much for a default rule on remedies as for a judicial lawmaking power with respect to remedies.⁹² Part II suggested that subsequent Supreme Court decisions, particularly *Erie*, undercut the argument that a constitutional default rule with respect to equitable remedies finds its source in Article III. But that does not mean that the Founders' expectations in this regard lack continuing relevance. The challenge is to translate these expectations to a legal universe in which law is understood to operate differently.

The more recent decisions discussed in Part II mean that any constitutional default rule regarding remedies can apply only to claims based on federal law. They also mean that the constitutional default rule must find its source in a constitutional provision that addresses substance rather than jurisdiction. As so re-framed, Gallogly's constitutional default rule, with its accompanying recognition of a judicial law-making power with respect to remedies, also advances a separate constitutional value – giving efficacy to federal legal norms. This Part argues further that the constitutional default rule should extend as well to remedies at law. To the extent the Founders' expectations were reflected in the text of Article III, it is significant that the relevant text refers to cases “in Law and Equity.”⁹³ More importantly, the expectations of the Founders and the early judiciary that the courts would be empowered to afford traditionally-available remedies appears to have applied equally to suits at law.⁹⁴ Part I suggested that the default rule proposed by Gallogly would not require dramatic changes in the Supreme Court's current approach to equitable remedies. Extending the proposed default rule to legal remedies would produce a welcome course correction in the Court's jurisprudence of remedies.

While the Court's historical approach to equitable remedies has been criticized as too narrow, its approach to legal remedies has been even less generous and even less consistent with historical tradition. Far from recognizing that the Constitution establishes a default rule that the legal remedies recognized in the

92. The proposed default rule is thus, unlike the constitutional floor discussed *supra* text accompanying notes 9-14, one that can be weakened by the legislature, and, unlike the constitutional ceiling discussed *supra* accompanying notes 15-17, one that can be strengthened by the legislature and (to a limited extent) by the judiciary itself.

93. Additionally, Article III's text provides stronger support for a default rule applicable to cases based on federal law than for a broader default rule applicable as well to diversity cases. See *supra* text accompanying note 72.

94. Gallogly does not appear to disagree. See Gallogly, *supra* note 2, at 1229-30 (“The Founders modeled the federal courts on the English judiciary . . . Eighteenth-century English jurists defined judicial power in terms of the three great heads of jurisdiction: law, equity, and admiralty. . . . Given this context, it probably went without saying among informed members of the Founding Generation that federal ‘courts’ exercising ‘judicial Power’ would do so in law, equity, and admiralty as the case required.”).

Courts of Westminster at the time of the Founding remain available,⁹⁵ the Court today insists that damage remedies exist only if Congress affirmatively creates them. With respect to federal statutes, the Court has replaced its once-receptive approach to implying damage remedies⁹⁶—an approach resembling the approach it currently takes to equitable remedies—with an almost irrebuttable presumption against judicially implied damage remedies. As the Court put it in *Alexander v. Sandoval*, a “[s]tatutory intent [to create a private remedy] is determinative.”⁹⁷ “Without it, a cause of action does not exist and courts may not create one, no matter how desirable it might be as a policy matter, or how compatible with the statute.”⁹⁸ With respect to remedies for constitutional violations, the Court has not yet overruled its holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* recognizing an implied right of action against federal officials directly under the Constitution,⁹⁹ but it has disapproved of its holding and all but limited it to its facts.¹⁰⁰ In the context of legal remedies, in contrast to equitable remedies, the Court has assumed that *Erie* virtually wiped out all that came before.

The pre-*Erie* tradition described by Gallogly regarding the federal courts’ equitable powers, which the Court largely continues to follow in cases arising under federal law, finds a parallel in the approach the Court followed during this period in recognizing damage remedies for violations of federal law by state and federal officials. Just as the courts relied on traditional principles of equity in recognizing the availability of a remedy (and a right of action) in cases like *Ex parte Young*, it relied on traditional common-law forms of action in recognizing a right of action for damages in innumerable cases.¹⁰¹ These traditional common-law remedies included such English forms of action as the right of action on the statute recognized in *Ashby v. White*.¹⁰² After *Erie*, the Court has continued

95. The Court looks to the practice at Westminster only to find limits to the federal judicial power. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 460 (1939).

96. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964).

97. 532 U.S. 275, 286 (2001).

98. *Id.* at 286-87.

99. 403 U.S. 388 (1971).

100. The Court limited *Bivens* again, most recently, in *Egbert v. Boule*, 142 S. Ct. 1793 (2022).

101. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 87-88 (1997).

102. (1703) 92 Eng. Rep. 126, 136; 2 Ld. Raym. 938, 954 (Holt, C.J., dissenting) (“Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.”); see Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts* in *Bell v. Hood*, 117 U. PA. L. REV. 1, 25 (1968) (“The Chief Justice’s dissenting opinion was accepted by the House of Lords, which reversed the King’s Bench and entered judgment for the plaintiff.”); Carlos

to regard the traditional availability of equitable relief in cases arising under federal law to be a matter of federal law. With respect to legal remedies under statutes, the Court initially applied an approach that paralleled the common-law action on the statute, supplementing substantive legal obligations with traditional common-law remedies unless incompatible with the statutory scheme.¹⁰³ As the Court wrote in *Texas & Pacific Railway v. Rigsby*,

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (f), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'¹⁰⁴

But, as noted, the Court has more recently repudiated the approach.¹⁰⁵

With respect to legal remedies for violations of the Constitution, the Court after *Erie* initially downgraded the traditional remedies available at common law to the status of state law.¹⁰⁶ In *Bivens*, it eventually recognized what might be considered a constitutional default rule recognizing a federal damage remedy for violation of the Constitution by federal officials, but it has since criticized that holding as improper judicial lawmaking.¹⁰⁷

The Court's parallel traditions with respect to legal and equitable remedies supports a constitutional default rule that extends to both types of remedies. It may be that the English courts at common law had less authority to develop remedies and recognize new forms of action than the Courts of Chancery. Gallogly notes that, "in the mid-thirteenth century, the courts began refusing to accept novel writs. If no previously recognized forms of action accurately captured the plaintiff's case, they were simply out of luck; no remedy was available at

M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 537-540 (2013).

103. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964).

104. 241 U.S. 33, 39 (1916).

105. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

106. See Vázquez & Vladeck, *supra* note 102, at 541-42, 542 n.165 (noting that, after *Erie*, "the pre-existing common law remedies were assumed to be state law remedies" and citing federal-court decisions).

107. See *id.* at 524-25.

common law.”¹⁰⁸ But even a static approach would afford victims of violations of federal law more legal remedies than does the Court’s current approach.¹⁰⁹ In any event, the reason for the reticence Gallogly refers to with respect to the recognition of legal remedies appears inapplicable to cases based on statutes or written constitutions (the latter of which of course did not exist in England). In the words of Maitland, English law during this period inverted the notion that, “in order of logic Right comes before Remedy.”¹¹⁰ “The argument from Right to Remedy [was] reversed” during this period and it was understood that the absence of a remedy (via the existing forms of action) negated the existence of the right.¹¹¹ This reasoning, while plausible for claimed rights under unwritten law, is wholly inapposite to rights established by legislation. For such rights, deference to the lawmaker favors judicial recognition of a legal remedy. Hence the common-law action on the statute, described above. Much less does the logic apply to rights created by a higher law. Moreover, even in common-law cases, the courts were far from powerless to develop the law. As the Solicitor General’s brief in *Bivens* (opposing the recognition of a constitutional right of action) argued, reliance on traditional common-law remedies was appropriate in defining remedies for constitutional violations because “growth and improvement ha[ve] always been the great tradition of the common law.”¹¹²

Far from deferring to Congress, the Court’s current approach to the recognition of damage remedies under federal statutes imposes on Congress the obligation to be clear if it wishes to create such remedies. Nevertheless, though ahistorical, the Court’s retrenchment with respect to legal remedies for statutory violations might itself be justifiable as judicial lawmaking. The Court having announced the new approach, it can be assumed that Congress has relied on it in enacting statutes since then. And, if Congress created the right, it can be relied on to specify the proper remedy. But strong structural arguments cut against reliance on Congress to create remedies for violation of the Constitution by

108. Gallogly, *supra* note 2, at 1238–39 (footnote omitted).

109. For elaboration, see Vázquez & Vladeck, *supra* note 102.

110. See F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 5 (1936).

111. *Id.*

112. Brief for the Respondents at 40, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900.

federal officials.¹¹³ It is here that the proposed constitutional default rule, with its accompanying judicial power to develop remedies, has its greatest purchase.¹¹⁴

Even if limited to cases arising under the Constitution, however, relying on Article III as the source of a default constitutional rule regarding remedies is problematic. As discussed, Article III applies only to the federal courts. If the Constitution contemplates a default remedial rule for constitutional claims, state courts with jurisdiction must be required to award them, as the text of the Supremacy Clause expressly provides.¹¹⁵ Post-*Erie*, a constitutional default rule must find its source in a constitutional provision other than Article III. I would nominate the Supremacy Clause. That clause played a key role in the nineteenth-century cases recognizing the availability of both equitable and legal remedies for violations of federal law by state and federal officials, eliminating the defense of official authority, as *Ex parte Young* itself explained.¹¹⁶ As Alexander Hamilton wrote in Federalist 15,

It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.¹¹⁷

By declaring the Constitution to be “law,” and instructing judges to give them effect, the Constitution can be understood to assign to the judiciary the authority (and responsibility) to develop a federal default rule of remedies for violation of federal law, ensuring that the Constitution is law in the Hamiltonian sense, and not just admonition.¹¹⁸

113. See Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923, 1933-35 (2021).

114. The proposed default rule also retains importance with respect to the third category of supreme federal law—treaties. See Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

115. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

116. See *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

117. THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

118. The Supremacy Clause’s reference to “the Judges in every State” should be understood to include federal judges. In any event, the obligation imposed by the clause applies *a fortiori* to federal judges.

The Court in *Armstrong v. Exceptional Child Center* rejected the claim that the Supremacy Clause creates a cause of action for equitable relief for violation of federal statutes (while recognizing that such relief is presumptively available as a matter of equitable tradition).¹¹⁹ But the Court's analysis establishes only that the Supremacy Clause does not make available an equitable remedy for violations of federal statutes that is beyond Congress's power to modify.¹²⁰ *Armstrong's* reasoning is fully consistent with the idea that the Supremacy Clause is the source of a *default* remedy for violation of federal statutes. Much less does *Armstrong* reject a Supremacy Clause-based default rule for violations of the federal *Constitution*. Indeed, its reasoning does not contradict the claim that the Supremacy Clause is the source of a federal judicial power to articulate remedies for violation of the Constitution *not* subject to congressional narrowing. The clause is the most plausible basis for the defensive remedy of the nullity of unconstitutional laws that the Court has recognized and even the most stringent theorists accept,¹²¹ as well as the remedy of an injunction the Court recognized as constitutionally required in *Crain*.¹²² The pre-*Erie* history recounted by Gallogly of federal-court power to develop equitable remedies, along with the parallel history of federal-court recognition and development of legal remedies for violations of federal law, support the conclusion that the Constitution assigns to the federal courts the power to articulate remedies necessary to ensure that the Constitution, especially insofar as it limits the powers of Congress and federal and state officials, is truly law and not merely admonition. Indeed, the structural considerations referred to above would support an interpretation of the Supremacy Clause as, additionally, the source of a judicial power to articulate and enforce a constitutional floor of remedies for violation of the Constitution.

A full defense of such a default rule (and floor) is beyond the scope of this Response. Questions regarding a default rule's interplay with notions of sovereign immunity would have to be worked out, as would the legislature's power to expand or contract the available remedies.¹²³ Because the purpose of the Supremacy Clause-based power of the courts to articulate and enforce remedies would be to give efficacy to the federal norms, the courts would have broader discretion than Gallogly contemplates to tailor the remedies as needed to correspond to the substantive rights established by federal law. To be sure, such a

119. See 575 U.S. 320, 324-27 (2015).

120. See *id.* at 325 (citing Hamilton and Story for the proposition that the Supremacy Clause cannot be understood "to give affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States").

121. See *supra* note 12 and accompanying text.

122. See *supra* note 14 and accompanying text.

123. For an earlier discussion of these issues, see Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

default rule is out of step with the Court's current approach to judicial authority regarding the availability of remedies. But Gallogly's case for recognizing such a constitutionally based default rule for equitable remedies supplies important support for a post-*Erie* default rule based on the Constitution that is broader than Gallogly's in some respects (because it applied to legal as well as equitable remedies and applies in state as well as federal courts) but narrower in other respects (because it applies only to federal claims – perhaps only those based on the Constitution and treaties).

CONCLUSION

Gallogly makes a persuasive case that the Founders contemplated that the federal courts would have the authority to afford equitable relief possessed at that time by the English Court of Chancery, including the power to develop those remedies in, at least, an incremental fashion as appropriate to adapt to developments in law and society. This was a part of their more general expectation that the courts would give effect to, and update as necessary, the broader system of remedies available at the time in England, both in equity and at law. For the Framers, “the Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional guarantees would be implemented.”¹²⁴ These mechanisms included “the recognized forms of action at common law and in equity.”¹²⁵

Gallogly provides some support for the conclusion that the early Court located this authority, at least with respect to its equitable powers, in Article III. But the Founders did not fully anticipate the large number of complex questions that have arisen in the years since then in the field of federal courts. Today, it is more plausible to limit any inherent judicial power to afford remedies to cases arising under federal law, in particular to constitutional claims, and to recognize the duty of state courts having jurisdiction to afford those remedies as well. For those reasons, it is more plausible, in our post-*Erie* world, to locate the constitutional source of this power in a provision of the Constitution that addresses substance rather than jurisdiction. As discussed, the Supremacy Clause is the most appropriate textual home for a constitutional law of remedies.

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

125. FALLON ET AL., *supra* note 1, at 756.