

A Zone for Nonstatutory Review of Constitutional Claims

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Suppose a hotelier competes with the President of the United States, who has a side job in the hospitality business. The hotelier is upset because foreign governments are booking stays at the President's hotels. Might the hotelier successfully sue to enjoin this competition because the President's conduct violates the Foreign Emoluments Clause of the Constitution? To do so, the hotelier will need to run a gauntlet of threshold requirements, including demonstrating that they have a "cause of action."

Congress has not created a statutory cause of action that our hotelier could invoke. In such cases, a plaintiff commonly can seek equitable relief for a constitutional claim via a nonstatutory cause of action—as Ex parte Young famously demonstrates. Recent judicial clashes in high-profile litigation involving the Emoluments Clauses, Appropriations Clause, and Congress's subpoena power have, however, highlighted that the doctrine governing whether structural constitutional provisions grant legal rights that can support nonstatutory review has become surprisingly unclear.

This Article defends a simple resolution to this problem: Courts should use the same "zone-of-interests" test that they have developed to determine whether a plaintiff can invoke the Administrative Procedure Act's statutory cause of action to determine whether a plaintiff can invoke a nonstatutory cause of action for injunctive relief to enforce a constitutional provision. Adoption of this standard would cohere with the Supreme Court's past practice of generously allowing this form of review, respect the policy judgments underlying this practice, and clarify a difficult and under-examined corner of the law.

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The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.¹

[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution’ unless there is a reason not to do so.²

I. INTRODUCTION

Suppose a hotelier competes with the President of the United States, who has a side job in the hospitality business.³ The hotelier is upset because foreign governments are booking stays at the President’s hotels to curry his favor.⁴ Could the hotelier successfully sue to enjoin this competition because the President’s conduct violates the Foreign Emoluments Clause of the Constitution?⁵ To do so, the hotelier would need to run a gauntlet of threshold requirements, including demonstrating that they have suffered an “injury in fact” sufficient for constitutional standing.⁶ In addition, the hotelier would need to demonstrate that the violation infringed on a legal right belonging to the

¹ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

² *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 209 (D.D.C. 2019) (Sullivan, J.) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010)), *vacated as moot*, 949 F.3d 14 (D.C. Cir. 2020).

³ *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 184–85 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁴ *Id.* at 185.

⁵ U.S. CONST. art. I, § 9, cl. 8.

⁶ *See Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 189, 200 (reversing dismissal of Emoluments Clause claims for lack of Article III standing).

hotelier and that the hotelier has a remedial right to seek redress in the courts. In other words, our hotelier would need a “cause of action.”⁷

Often, a plaintiff can invoke an express statutory cause of action to press a constitutional claim. A plaintiff seeking to challenge conduct by state officials might invoke § 1983, which provides a cause of action to sue persons who, acting under color of state law, deprive a plaintiff “of any rights, privileges, or immunities secured by the Constitution and [federal] laws.”⁸ A plaintiff seeking to challenge federal agency action often can invoke the Administrative Procedure Act (APA), which grants a cause of action to any person who has suffered a “legal wrong” or has been “adversely affected or aggrieved by [final] agency action within the meaning of a relevant statute.”⁹ The Supreme Court has explained that this statutory language authorizes a plaintiff to use the APA’s cause of action so long as their claim would protect interests that are “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee” that the plaintiff claims has been violated.¹⁰ Neither § 1983 nor the APA, however, would apply to the hotelier’s claim—and neither would any other more specific cause of action enacted by Congress.¹¹

The hotelier might, however, be able to invoke a *nonstatutory* cause of action created (or recognized) by the courts. Nonstatutory review is rooted in a mix of common law and equitable authorities that courts have developed through the centuries.¹² Since the early days of the Republic, courts have

⁷ See *In re Trump*, 958 F.3d 274, 291 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (condemning majority for inventing “a wholly novel and nakedly political cause of action” to support Emoluments Clause litigation), *vacated as moot sub nom.* *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.). For glosses on the meaning of “cause of action,” see for example Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1816 (2016), which proposes that existence of a “cause of action” turns on “whether the defendant violated any duty owed to plaintiff as a primary right holder, and, if so, whether plaintiff had identified a remedial right of action from some source.” *Id.* (footnote omitted). See generally John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2015) (discussing evolution of the concept of the federal cause of action).

⁸ 42 U.S.C. § 1983.

⁹ 5 U.S.C. § 702.

¹⁰ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (adopting—or interpreted as adopting—the zone-of-interest test as a gloss on the scope of the APA’s cause of action, 5 U.S.C. § 702). But see Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 709 (2019) (explaining that *Association of Data Processing Service Organizations, Inc. v. Camp* has been misinterpreted as extending the APA’s right of action to persons who satisfy standing and its zone test).

¹¹ See Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1870 (2021) (“No statute expressly authorizes civil suits against federal officials who violate the Constitution—for any form of relief.”).

¹² See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

recognized that a plaintiff can bring an “officer suit” against a government official for injuring legally protected interests of the plaintiff.¹³ Where the requirements for equitable relief have been satisfied, courts have issued injunctions against officials to protect a plaintiff’s legal rights.¹⁴

To take advantage of this possibility, our hotelier would need to connect the President’s constitutional violation to an infringement of a legal right belonging to the hotelier. One can look for such legal rights in the common law (supplemented by equity), statutes, and the Constitution itself.¹⁵ The common law would not help because it does not recognize a legal right to be protected from the type of competitive injury at issue, and no statute creates a legal right to be free of the effects of Foreign Emoluments Clause violations.¹⁶ The remaining possibility is that the Foreign Emoluments Clause itself grants the hotelier a legal right enforceable in court via what we might call an “implied” constitutional cause of action.¹⁷

In some important contexts, the Supreme Court has become extremely hostile to implied causes of action, insisting that federal courts must not “rais[e] up” new causes of action as if they were common law courts.¹⁸ The Court’s criticisms of the *Bivens* doctrine, which provides a nonstatutory cause of action for plaintiffs to seek money damages for a handful of constitutional violations,¹⁹ make this hostility especially clear.²⁰ The Court has also tightened standards for

¹³James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–72 (2010).

¹⁴*See, e.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 842 (1824) (upholding injunctive relief to prevent state officials from interfering with Bank’s exercise of its franchise to conduct operations in Ohio).

¹⁵*Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring).

¹⁶*In re Trump*, 958 F.3d 274, 294–96 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting), *vacated sub nom.* *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

¹⁷*See* Preis, *supra* note 7, at 855 (explaining the process for “implying” a cause of action).

¹⁸*Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

¹⁹*See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 391–92 (1971) (recognizing an implied constitutional cause of action to sue federal officials for damages for Fourth Amendment violations).

²⁰*Hernandez v. Mesa*, 140 S. Ct. 735, 739, 743 (2020) (documenting that the Supreme Court has consistently rejected expansions of *Bivens* for forty years); *see also* *Egbert v. Boule*, 142 S. Ct. 1793, 1808 (2022) (“[M]ore recently, we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.” (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017))).

determining whether federal statutes provide implied causes of action for their enforcement.²¹

The good news for the hotelier is that the Supreme Court has adopted the opposite policy judgment for nonstatutory constitutional claims that seek only equitable relief.²² On this approach, a plaintiff (who satisfies other threshold requirements) generally can invoke nonstatutory review for injunctive relief for a constitutional claim so long as Congress has not affirmatively precluded this option.²³ This default rule presupposes that all (or at least many) constitutional provisions grant legal rights that plaintiffs have a remedial right to enforce in court. Rather than explain and limit this presupposition, however, the Supreme Court has instead largely ignored the issue, tacitly accepting that plaintiffs can seek injunctive relief to enforce various constitutional provisions without pausing to consider whether they come with judicially enforceable rights.²⁴ Along these lines, the Court has, with little or no discussion of the legal rights problem, accepted that individuals can sue to enforce “structural” constitutional provisions, such as those bearing on separation of powers and federalism.²⁵ Consistent with this generous if underexplained practice, we might expect courts readily to accept that our hotelier has a cause of action to seek enforcement of the Foreign Emoluments Clause.

But our story does not end quite so simply. First, in 2015’s *Armstrong v. Exceptional Child Center, Inc.*, the Supreme Court, contrary to its usual permissive approach, held that plaintiffs lacked a cause of action to seek injunctive relief for a purported violation of the Supremacy Clause.²⁶ Consistent with a broader move toward “equitable traditionalism,” the Court emphasized in *Armstrong* that judicial power to block illegal executive action via injunctive relief is rooted in historical practices of the courts of equity.²⁷ One purported

²¹ *Alexander*, 532 U.S. at 286–87 (explaining that a statutory cause of action requires congressional intent to “create not just a private right but also a private remedy”).

²² See Vladeck, *supra* note 11, at 1876 (explaining that, even as the Court has severely restricted judge-made claims for damages, it has regarded judge-made claims for injunctive relief as a “necessity to ‘promote the vindication of federal rights’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984))).

²³ John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) (explaining that the Court permits nonstatutory claims for injunctive relief to challenge ongoing violations of federal law so long as “Congress has not affirmatively barred the action”).

²⁴ Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 701–02 (2016) (“How the Court goes about inferring a private cause of action for equitable relief under the Constitution is far from settled. . . . [In some cases,] the Court simply operates with the presumption that equitable relief against the government is appropriate.”).

²⁵ See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

²⁶ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

²⁷ *Id.*; cf. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1271–73 (2020) (noting *Ex parte Young*’s “vulnerability to originalist applications of equitable traditionalism”).

element of this historical practice has been that equitable relief is available only to redress injuries to legally cognizable rights.²⁸ Second, in recent, high-profile litigation, plaintiffs sued Trump administration officials for violations of structural provisions of the Constitution that do not grant legal rights to individuals in an intuitively obvious way.²⁹ Our hotelier, for instance, turns out to be real rather than hypothetical—owners of hotel and restaurant interests (as well as states, members of Congress, and nonprofit organizations) sued President Trump for violating the Foreign and Domestic Emoluments Clauses.³⁰ States and environmental organizations sued Trump administration officials for violating the Appropriations Clause in connection with efforts to fund a border wall.³¹ The Judiciary Committee of the House of Representatives, for its part, sued a former White House Counsel to enforce a subpoena.³²

Judges in these cases have staked out sharply different approaches to answering two closely related questions. First, they have clashed over whether the plaintiffs have demonstrated injuries to “legal rights” of the type necessary to support a nonstatutory cause of action. Some judges, pursuing a path encouraged by the Supreme Court’s emphasis on equitable traditionalism, have insisted that the plaintiffs cannot demonstrate legal injury because the structural constitutional provisions at issue do not grant them any legal rights in the first place.³³ Other judges have held that plaintiffs need show only that they have suffered injuries-in-fact sufficient for constitutional standing, which they have done.³⁴

Second, judges have clashed over whether, assuming structural constitutional provisions can grant enforceable legal rights, an APA-style zone-of-interests test provides the right lens for determining which plaintiffs can enforce them via nonstatutory review. Some judges, following the APA’s model, think that a plaintiff can do so provided their claim seeks to protect interests “arguably . . . within the zone of interests” to be protected by the

²⁸ See *infra* notes 143–44 (discussing maxim that “equity follows the law”).

²⁹ See *infra* Part II (discussing judicial analysis and debate in recent cases over whether plaintiffs had causes of action to press structural constitutional claims).

³⁰ See *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 184 (2d Cir. 2019) (vacating dismissal of claims brought by hospitality industry members against President Trump for violations of the Emoluments Clauses), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.); see also *In re Trump*, 958 F.3d 274, 281 (4th Cir. 2020) (en banc) (reversing dismissal of complaint alleging violations of Emoluments Clauses), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.); *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020) (dismissing Foreign Emoluments Clause claim brought by Members of Congress).

³¹ *Sierra Club v. Trump*, 963 F.3d 874, 882, 888–89 (9th Cir. 2020), *vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.).

³² *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123–24 (D.C. Cir. 2020) (judgment vacated Oct. 15, 2020).

³³ E.g., *In re Trump*, 958 F.3d at 293 (Wilkinson, J., dissenting).

³⁴ E.g., *Sierra Club*, 963 F.3d at 888.

constitutional provision that they claim has been violated.³⁵ Others think a zone test should apply but that it should be stricter than the APA's "generous" test.³⁶ Still others doubt whether any zone test at all should apply to nonstatutory review of constitutional claims.³⁷

In answer to these newly salient questions, this Article submits: (a) structural constitutional provisions should be regarded as granting legal rights enforceable via a nonstatutory cause of action for injunctive relief; and (b) an APA-style zone test would indeed provide the best lens for determining which plaintiffs can invoke this cause of action.³⁸ As applied in the APA context, the zone test represents a foundational policy judgment by the Supreme Court that the formalistic requirement of a "cause of action" should preclude only especially inappropriate plaintiffs from seeking equitable-style relief to require federal agencies to comply with federal law (including the Constitution).³⁹ The pattern of the Court's case outcomes indicates that it has, in practice, applied essentially the same policy judgment to constitutional claims for equitable relief that happen to fall beyond the APA's reach and require nonstatutory review.⁴⁰ In short, the Court has, for good reasons, been behaving *as if* an APA-style zone test governs which plaintiffs can invoke nonstatutory review for equitable enforcement of constitutional claims. We have reached a point where it would clarify the law to recognize this point expressly.

Part II of this Article establishes the need for clarification by examining recent judicial clashes over the availability of nonstatutory review and the applicability of the zone test in litigation involving claims based on various structural constitutional provisions. Part III traces some of this confusion to the stunted doctrinal evolution of nonstatutory review of constitutional claims. Part IV traces other aspects of this confusion to the tangled evolution of the zone test and its fraught relationship to doctrines governing standing and causes of action. With this background in hand, Part V makes the case that courts should use a

³⁵ *E.g.*, *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 154–58 (2d Cir. 2019) (quoting *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970)), *republished as amended*, 953 F.3d 178 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

³⁶ *E.g.*, *Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 112 (2d Cir. 2020) (Menashi, J., dissenting denial of rehearing en banc).

³⁷ *E.g.*, *Sierra Club*, 963 F.3d at 893–94.

³⁸ *But see* Brannon P. Denning & Sarah F. Bothma, *Zone-of-Interests Standing in Constitutional Cases after Lexmark*, 21 LEWIS & CLARK L. REV. 97, 144 (2017) (concluding application of the zone test to constitutional claims is constitutionally dubious, impractical, and unnecessary); Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 24 (2006) (rejecting application of zone test to constitutional cases "because the Supreme Court has never provided a clear test for when a plaintiff has a relevant interest").

³⁹ *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

⁴⁰ *See infra* Part III.D (discussing this pattern).

zone test with APA-style breadth to determine which plaintiffs can invoke a nonstatutory cause of action for equitable relief for constitutional claims.⁴¹

II. JUDICIAL CLASHES OVER THE AVAILABILITY OF NONSTATUTORY REVIEW FOR INJUNCTIVE RELIEF FOR STRUCTURAL CONSTITUTIONAL CLAIMS

A. *Emoluments Clause Litigation in Three Circuits*

To prevent corruption, the Constitution includes both the Foreign Emoluments Clause and the Domestic Emoluments Clause. The former provides:

[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.⁴²

The latter adds:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.⁴³

Early in the Trump Administration, plaintiffs filed several suits against President Trump seeking equitable relief for violations of one or both clauses, but all were ultimately dismissed before courts could resolve the merits.⁴⁴

⁴¹ Professors Bradley and Young recently proposed a related approach that would use a zone test (of varying breadth) to clarify third-party standing doctrine. On this approach, a litigant should be regarded as invoking *their own* constitutional rights (rather than a third party's) so long as the "litigant's claim falls within the general set of interests protected by a particular constitutional principle." Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 35–42 (2021). This Article, by contrast, proposes to use a generous, APA-style zone to determine if a plaintiff has a cause of action.

⁴² U.S. CONST. art. I, § 9, cl. 8.

⁴³ *Id.* art. II, § 1, cl. 7.

⁴⁴ *In re Trump*, 958 F.3d 274, 280 (4th Cir. 2020) (en banc), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.); *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 185 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.); *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020) (dismissing Foreign Emoluments Clause claim).

*1. Judges in the Fourth Circuit Dispute the Availability of a
Nonstatutory Cause of Action and the Applicability of the Zone Test*

The District of Columbia and Maryland sued President Trump, seeking injunctive and declaratory relief for violations of both Emoluments Clauses based on payments made to the Trump International Hotel by foreign and state governments.⁴⁵ After concluding that both plaintiffs had Article III standing, the district court turned to the plaintiffs' assertion that they could "pursue an equitable action under the Emoluments Clauses."⁴⁶ The court declared that it saw "no problem in invoking its equitable jurisdiction" given that "[p]recedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution."⁴⁷ For support for this proposition, the district court cited Supreme Court precedents permitting plaintiffs to seek enforcement of the Tenth Amendment, the Appointments Clause, and separation-of-powers-principles.⁴⁸

The President contended that, even assuming that the Emoluments Clauses grant private rights to anyone, the zone test provides the correct lens for determining whether a given person has a cause of action to seek their enforcement.⁴⁹ In his view, the plaintiffs failed the zone test because the Emoluments Clauses were not intended to protect commercial competitors.⁵⁰ The district court disagreed, holding that the plaintiffs necessarily satisfied the zone test (assuming it applied) as the Emoluments Clauses "clearly were and are meant to protect all Americans."⁵¹

The President appealed based on absolute immunity and also petitioned the Fourth Circuit for a writ of mandamus.⁵² The panel granted the writ and reversed in the separate appeal, ordering dismissal with prejudice.⁵³ Regarding the cause-of-action problem, the panel expressed doubt whether the plaintiffs could invoke a nonstatutory cause of action because the Emoluments Clauses are structural

⁴⁵ *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 733–34 (D. Md. 2018), *rev'd sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *rev'd en banc*, 958 F.3d 274 (4th Cir. 2020), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

⁴⁶ *Id.* at 752–54.

⁴⁷ *Id.* at 755.

⁴⁸ *See id.*

⁴⁹ *Id.* at 754–55.

⁵⁰ *Id.* at 754.

⁵¹ *District of Columbia v. Trump*, 291 F. Supp. 3d at 755.

⁵² *In re Trump*, 928 F.3d 360, 364 (4th Cir. 2019), *rev'd en banc*, 958 F.3d 274 (4th Cir. 2020), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

⁵³ *Id.*

provisions that “do not expressly confer any rights or provide any remedies.”⁵⁴ The panel also noted that the plaintiffs might have to satisfy the zone test.⁵⁵

The Fourth Circuit, en banc, reversed the panel.⁵⁶ The thrust of the majority opinion was that the President had not established the “clear and indisputable” right to relief necessary for a writ of mandamus.⁵⁷

Judge Wilkinson, joined by five of his colleagues, responded with an outraged dissent in which he insisted that the plaintiffs had no legal rights that could support a nonstatutory cause of action for equitable relief.⁵⁸ He began his analysis by sounding the theme of equitable traditionalism, citing the Supreme Court’s observation that the federal courts’ equitable powers are based on those of the English Court of Chancery at the time of the founding of the Republic.⁵⁹ One traditional requirement for invoking equity is that a litigant demonstrate that “he has suffered an injury to some legally protected interest.”⁶⁰ Judge Wilkinson explained that a legally protected interest can be established by common law or be granted by positive law in the form of a statute or constitutional provision.⁶¹ The common law offered no help to the plaintiffs because “it was firmly established under English law [at the Founding] that the loss of business incident to lawful competition was not a legally cognizable injury.”⁶² Nor was statutory law any help given that Congress has not created a cause of action applicable to Emoluments Clause claims.⁶³

Absent help from the common law or statute, the plaintiffs needed to demonstrate that the Emoluments Clauses themselves granted legal rights to them.⁶⁴ An affirmative conclusion on this point would, according to Judge Wilkinson, constitute a “major departure from the long tradition of equity practice” in part because there was “nothing in the history of the drafting or ratification of the Clauses to remotely suggest that the Founders intended to create a new legal interest for parties to be protected from lawful competition—an interest wholly unknown to traditional equity practice.”⁶⁵ Nor did the texts of the Clauses help the plaintiffs as they do not “contain *any* rights-conferring language, let alone something resembling the sort of comprehensive regulatory

⁵⁴ *Id.* at 373–74.

⁵⁵ *Id.* at 374.

⁵⁶ *In re Trump*, 958 F.3d 274, 289 (4th Cir. 2020) (en banc), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

⁵⁷ *Id.* at 286.

⁵⁸ *Id.* at 291, 293 (Wilkinson, J., dissenting).

⁵⁹ *Id.* at 293 (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)).

⁶⁰ *Id.*

⁶¹ *Id.* at 293–94.

⁶² *In re Trump*, 958 F.3d at 294–95 (Wilkinson, J., dissenting).

⁶³ *Id.* at 296.

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

scheme that typically gives rise to competitive injury suits.”⁶⁶ The Emoluments Clauses, rather than granting legal rights to anyone, are merely “structural provisions of the Constitution designed to prevent official corruption . . . that are not and never have been judicially enforceable in their own right.”⁶⁷

This clash at the en banc court was the last judicial word on the availability of nonstatutory review for injunctive relief in this litigation as, a few days after the inauguration of President Biden, the Supreme Court vacated and remanded with instructions to dismiss the case as moot.⁶⁸

2. *The District Court for the District of Columbia Approves a Nonstatutory Cause of Action and Applies the Zone Test*

Over two hundred members of Congress sued President Trump in the District Court for the District of Columbia for violating the Foreign Emoluments Clause.⁶⁹ President Trump argued that the plaintiffs could not invoke a nonstatutory cause of action to seek equitable relief because: (a) the Foreign Emoluments Clause does not create any “personal or judicially enforceable rights” that equity could enforce; and (b) the members, considered as individuals, fell outside the zone of interests protected by the Clause, which protects the interests of Congress as a whole.⁷⁰

Judge Sullivan, after concluding that plaintiffs had constitutional standing, held that they could invoke a nonstatutory cause of action for equitable relief.⁷¹ He explained, “it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution’ unless there is a reason not to do so.”⁷² He rejected the argument that this baseline ought not apply in light of 2015’s *Armstrong v. Exceptional Child Center, Inc.*, in which the Supreme Court had held that the Supremacy Clause does not create a free-standing implied cause of action for general enforcement of federal law.⁷³

Turning to the applicability of the zone test, Judge Sullivan cited Supreme Court authority indicating that this test applies to constitutional claims,⁷⁴ but he

⁶⁶ *Id.*

⁶⁷ *Id.* at 297.

⁶⁸ *Trump v. District of Columbia*, 141 S. Ct. 1262, 1262 (2021) (mem.).

⁶⁹ *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2018), *subsequent determination*, 373 F. Supp. 3d 191 (D.D.C. 2019), *rev’d*, 949 F.3d 14 (D.C. Cir. 2020).

⁷⁰ *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 208 (D.D.C. 2019), *vacated as moot*, 949 F.3d 14 (D.C. Cir. 2020).

⁷¹ *Id.* at 209.

⁷² *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010)).

⁷³ *Id.* (discussing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015)).

⁷⁴ *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

also noted Supreme Court authority suggesting that the breadth of the zone might vary among statutory and constitutional claims.⁷⁵ Regardless of this tension, Judge Sullivan concluded that the members' claimed injury—that they had been deprived of their right to vote to consent to the President's acceptance of foreign emoluments—easily satisfied the zone test as applied to their Foreign Emoluments Clause claim.⁷⁶

The D.C. Circuit later reversed on the ground that the members lacked constitutional standing.⁷⁷

3. Second Circuit Judges Agree that the Zone Test Applies but Disagree About Its Breadth

Plaintiffs with interests in hospitality businesses, along with a government ethics watchdog, sued President Trump in the Southern District of New York, seeking, among other relief, an injunction to halt violations of the Emoluments Clauses.⁷⁸ The district court dismissed after concluding that the plaintiffs lacked standing to press their Emoluments Clause claims and that the claims of the hospitality plaintiffs failed to satisfy the zone test.⁷⁹

After acknowledging that the zone test had been fashioned as a means for determining whether a plaintiff could invoke the APA's statutory cause of action, the district court cited a dissenting opinion of Justice Scalia for the proposition that the zone test applies in a stricter form to constitutional claims.⁸⁰ The court then held that the hospitality plaintiffs' claims did not satisfy this stricter zone test because the Emoluments Clauses were designed to protect against corruption in governmental affairs rather than to protect restaurants and hotels from competition.⁸¹

After reversing on the issue of constitutional standing, a Second Circuit panel explained that the hospitality plaintiffs' claims satisfied the zone test in light of a consistent series of Supreme Court precedents demonstrating that any "plaintiff who sues to enforce a law that limits the activity of a competitor satisfies the zone of interests test even though the limiting law was not motivated

⁷⁵ *Id.* at 209–10 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)).

⁷⁶ *Blumenthal*, 373 F. Supp. 3d at 210.

⁷⁷ *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020).

⁷⁸ *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 179 (S.D.N.Y. 2017), *vacated*, 953 F.3d 178, 184 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁷⁹ *Id.* at 184–93.

⁸⁰ *Id.* at 187 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting)).

⁸¹ *Id.*

by an intention to protect entities such as plaintiffs from competition.”⁸² The panel acknowledged that most of these precedents involved statutory claims but added that it could “see no reason why the reasoning” would not also apply to constitutional claims.⁸³ Accordingly, the zone test was satisfied regardless of whether the ratifiers of the Emoluments Clauses intended to protect New York hotels from presidential competition.⁸⁴

The panel later amended its opinion to remove its zone analysis as dicta.⁸⁵ Two dissents from the Second Circuit’s denial of a petition for rehearing en banc nonetheless addressed the issue.⁸⁶ Most notably, Judge Menashi’s dissent contended that Supreme Court precedents established both that a zone test applied to the plaintiffs’ constitutional claims and that this zone should be stricter than the “generous” one applied to APA claims.⁸⁷ He then signaled that the hospitality plaintiffs lacked a cause of action given that the Emoluments Clauses were not intended to protect their competitive interests.⁸⁸

After the change in administrations, the Supreme Court vacated and remanded with instructions to dismiss.⁸⁹

B. Ninth Circuit Judges Dispute the Availability of Nonstatutory Review to Enforce the Appropriations Clause and the Applicability of the Zone Test

The Trump administration’s efforts to fund a border wall prompted several legal challenges, including *Sierra Club v. Trump*.⁹⁰ In this case, a split panel of the Ninth Circuit held, over a vociferous dissent, that the plaintiffs could invoke a nonstatutory cause of action for injunctive enforcement of various structural constitutional provisions, expressed doubt over the applicability of the zone test,

⁸² *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 142, 154–58 (2d Cir. 2019) (reversing on standing and canvassing Supreme Court authority), *republished as amended*, 953 F.3d 178 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁸³ *Id.* at 157.

⁸⁴ *Id.* at 158.

⁸⁵ *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 200 n.13 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁸⁶ *Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 103 (2d Cir. 2020) (Cabranes, J., dissenting denial of rehearing en banc); *id.* at 112–14 (Menashi, J., dissenting denial of rehearing en banc).

⁸⁷ *Id.* at 112–13 (Menashi, J., dissenting from denial of rehearing).

⁸⁸ *See id.* at 108, 113–14 (“The district court correctly followed the Supreme Court’s instruction that the zone-of-interests inquiry requires a court to consider whether the plaintiffs are within ‘the class for whose *especial* benefit’ the provision was adopted.” (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987))).

⁸⁹ *Trump v. Citizens for Resp. & Ethics in Wash.*, 141 S. Ct. 1262 (2021) (mem.).

⁹⁰ *Sierra Club v. Trump*, 963 F.3d 874, 879–80 (9th Cir. 2020), *vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.).

but concluded that the plaintiffs satisfied it in any event.⁹¹ The Supreme Court granted certiorari on whether the plaintiffs had a cause of action, but the Court vacated and remanded after the Biden administration abandoned the project.⁹²

To provide funding for a border wall, the Department of Defense shifted \$2.5 billion from various accounts pursuant to its authority under section 8005 of the Department of Defense Appropriations Act of 2019.⁹³ Sierra Club sued, contending that this shift violated separation of powers, the Appropriations Clause, the Presentment Clause, and the National Environmental Policy Act, and that it also constituted ultra vires action in excess of statutory authority.⁹⁴ The district court granted Sierra Club's request for injunctive relief barring the reprogramming.⁹⁵ Both the district court and the Ninth Circuit declined to stay the injunction pending appeal.⁹⁶ The cause-of-action problem embedded in the case grabbed the Supreme Court's attention, and it granted the defendants' application for a stay, expressly noting, "the Government has made a sufficient showing at this stage that the plaintiffs have *no cause of action* to obtain review of the Acting Secretary's compliance with Section 8005."⁹⁷

Declining to take a hint, a split Ninth Circuit panel concluded that the plaintiffs could invoke nonstatutory review both as an implied cause of action arising out of the Appropriations Clause⁹⁸ and based on traditional equitable authority to enjoin ultra vires action by executive authorities.⁹⁹ The panel majority conceded that implied constitutional causes of action are "most plainly available with respect to provisions conferring individual rights, such as the Establishment Clause or the Free Exercise Clause."¹⁰⁰ It added, however, that "certain structural provisions" also provide implied causes of action.¹⁰¹ To support this proposition, the court cited a string of cases in which the Supreme Court had permitted plaintiffs to invoke nonstatutory review to enforce the

⁹¹ See *id.* at 888–90 (concluding that plaintiffs can invoke nonstatutory causes of action to enforce various structural provisions of the Constitution); *id.* at 893–94 (expressing doubt whether a zone test should apply to constitutional claims but concluding that Sierra Club's Appropriations Clause claim satisfied this requirement).

⁹² *Trump v. Sierra Club*, 141 S. Ct. 618 (2020) (granting certiorari), *vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.).

⁹³ *Sierra Club*, 963 F.3d at 881.

⁹⁴ *Id.* at 882.

⁹⁵ *Sierra Club v. Trump*, No. 19-cv-00892, 2019 WL 2715422, at *3 (N.D. Cal. June 28, 2019), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.).

⁹⁶ *Id.* at *6 (denying stay); *Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (denying stay), *granting stay*, 140 S. Ct. 1 (2019) (mem.).

⁹⁷ *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (mem.) (emphasis added).

⁹⁸ *Sierra Club*, 963 F.3d at 888–90.

⁹⁹ *Id.* at 890–93.

¹⁰⁰ *Id.* at 888.

¹⁰¹ *Id.*

Recess Appointments Clause, federalism, the Presentment Clause, and bicameralism.¹⁰²

The defendants, as in the Emoluments Clause cases, contended that the Supreme Court's holding in *Armstrong*—that the Supremacy Clause does not create a cause of action—compelled dismissal of Sierra Club's Appropriations Clause claim.¹⁰³ Rejecting this analogy, the panel characterized the Appropriations Clause as a limit on the federal government and added that “it is entirely sensible to give a clause that restricts the power of the federal government as a whole a reading that safeguards individual liberty.”¹⁰⁴

Turning to the zone test, the court explained that, although earlier cases had “suggested that the test applied to constitutional causes of action,”¹⁰⁵ the Supreme Court's decision in 2014's *Lexmark International, Inc. v. Static Control Components* had clarified that it applies “only to statutory causes of action and causes of action under the APA.”¹⁰⁶ The court also asserted that “common sense” suggested that a zone test should not apply to nonstatutory claims directed against ultra vires action.¹⁰⁷ If, nonetheless, the zone test did apply, then it merely required the plaintiffs to show that their constitutional claim sought to protect interests “arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.”¹⁰⁸ In the court's view, the plaintiffs' claim of infringed liberty interests fell within the zone protected by the Appropriations Clause.¹⁰⁹

Dissenting, Judge Collins rejected the contention that “the Constitution *itself* grants a cause of action allowing *any plaintiff with an Article III injury* to sue to enjoin an alleged violation of the Appropriations Clause, the Presentment Clause, or the separation of powers.”¹¹⁰ He characterized the zone test as a generally applicable prudential limit that always “‘applies unless it is expressly negated’ by Congress.”¹¹¹ In his view, section 8005 provided the relevant zone as the plaintiffs' constitutional claims depended on showing that the administration had violated this statutory provision.¹¹² The interests that the

¹⁰² *Id.*

¹⁰³ *Id.* at 890 (discussing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015)).

¹⁰⁴ *Sierra Club*, 963 F.3d at 890. *But see id.* at 912 (Collins, J., dissenting) (embracing the analogy between the Supremacy and Appropriations Clauses for the purpose of concluding that neither creates an implied cause of action).

¹⁰⁵ *Id.* at 893 (majority opinion).

¹⁰⁶ *Id.* (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014)).

¹⁰⁷ *Id.* at 893–94.

¹⁰⁸ *Id.* at 894 (quoting *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977)).

¹⁰⁹ *Id.*

¹¹⁰ *Sierra Club*, 963 F.3d at 911 (Collins, J., dissenting).

¹¹¹ *Id.* at 913 (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

¹¹² *Id.*

plaintiffs sought to protect (e.g., environmental interests) plainly fell outside this zone.¹¹³

C. The D.C. Circuit Holds that the Congressional Committee Cannot Invoke a Nonstatutory Cause of Action for Judicial Enforcement of a Subpoena

The House Committee on the Judiciary issued a subpoena to former White House Counsel Donald McGahn in connection with investigation of Russian interference with the 2016 election.¹¹⁴ After McGahn refused to appear, the Committee sued to enforce the subpoena, seeking an injunction requiring him to testify.¹¹⁵ At the district court, Judge (now Justice) Jackson rejected the argument that the Committee lacked a cause of action, opining, “Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry.”¹¹⁶ On the case’s first trip to the D.C. Circuit, a split panel vacated on the ground that the Committee lacked constitutional standing,¹¹⁷ but the en banc court reversed on this issue and remanded.¹¹⁸

The original panel, presented with another bite of the apple, concluded the case should be dismissed because the Committee lacked a cause of action.¹¹⁹ The panel began its analysis by observing that “the Supreme Court has warned federal courts to hesitate before finding implied causes of action—whether in a congressional statute or in the Constitution.”¹²⁰ To support this proposition, it cited five Supreme Court precedents: two restricted the availability of *Bivens* actions for damages;¹²¹ a third declined to create a private cause of action to enforce international law;¹²² and the other two implicated the modern,

¹¹³ *Id.* at 907–09.

¹¹⁴ Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 153 (D.D.C. 2019), *aff’d in part en banc*, 968 F.3d 755, 763–68 (D.C. Cir. 2020), and *rev’d in part*, 973 F.3d 121 (D.C. Cir. 2020) (judgment vacated Oct. 15, 2020).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 193–94.

¹¹⁷ Comm. on Judiciary v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020) (Griffith, J.); *id.* at 535–36 (Henderson, J., concurring).

¹¹⁸ Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 763–68 (D.C. Cir. 2020).

¹¹⁹ Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020) (judgment vacated Oct. 15, 2020).

¹²⁰ *Id.*

¹²¹ *Id.* (first citing *Hernandez v. Mesa*, 140 S. Ct. 735, 741–43 (2020); and then citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

¹²² *Id.* (citing *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018)).

restrictive approach to implying *statutory* causes of action.¹²³ None addressed a situation in which a plaintiff was seeking injunctive relief to enforce a constitutional provision. Citing again to a *Bivens* case, the panel added that “usually Congress ‘should decide’ whether to authorize a lawsuit” involving a constitutional claim, and Congress had not authorized lawsuits to enforce House subpoenas.¹²⁴

Regarding the scope of federal court equitable powers, the panel observed that in 1999’s *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, the Supreme Court had held that these powers extend only so far as “was traditionally accorded by courts of equity.”¹²⁵ No judicial practice could qualify as a traditional power of the “courts of equity” unless it began before 1938, when the federal courts’ separate systems of law and equity were combined.¹²⁶ This stance was fatal to the Committee’s nonstatutory claim for injunctive relief as it could not “point to a single example in which a chamber of Congress brought suit for injunctive relief against the Executive Branch prior to the 1970s.”¹²⁷

Dissenting, Judge Rogers was satisfied that Supreme Court precedents established “that the powers of Congress enumerated in Article I of the Constitution imply not only a right to information but also a right to seek judicial enforcement of its subpoena.”¹²⁸

D. *Where Are We?*

Part II’s trek reveals common fault lines in judicial disputes over the availability of a nonstatutory cause of action to seek equitable relief to enforce structural constitutional provisions. First, judges inclined to allow this cause of action rely on a considerable amount of Supreme Court authority that has permitted plaintiffs to press such claims with little or no focus on whether they had a cause of action or legal injury.¹²⁹ Judges inclined to block plaintiffs from seeking equitable relief via a nonstatutory cause of action cite the Supreme Court’s hostility to “raising up” new implied causes of action,¹³⁰ and they also

¹²³ *Id.* (first citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); and then citing *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020)).

¹²⁴ *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

¹²⁵ *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d at 123–24 (quoting *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)).

¹²⁶ *Id.* at 124.

¹²⁷ *Id.*

¹²⁸ *Id.* at 127 (Rogers, J., dissenting).

¹²⁹ *See, e.g., Sierra Club v. Trump*, 963 F.3d 874, 888 (9th Cir. 2020), *vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

¹³⁰ *See, e.g., Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d at 123 (“[T]ime and again, the Supreme Court has warned federal courts to hesitate before finding implied causes of action.”).

rely on Supreme Court precedents indicating that judicial equitable powers are confined by tradition.¹³¹ As for the issue of whether a zone test should limit availability of this cause of action, judges choose from a range of signals sent by the Supreme Court indicating that the zone test does apply to constitutional claims,¹³² the zone test is limited to statutory causes of action,¹³³ and that the zone test applies more strictly to constitutional claims.¹³⁴

III. EVOLUTION OF THE NONSTATUTORY CAUSE OF ACTION FOR CONSTITUTIONAL CLAIMS

The confusion evidenced in Part II regarding whether structural constitutional provisions grant legal rights that can support a nonstatutory cause of action results from new pressure being placed on an under-examined premise of constitutional doctrine. In brief, the conceptual basis of nonstatutory review is that a plaintiff can sue an officer for conduct that, if taken by a private person, would violate the plaintiffs' rights at common law.¹³⁵ For most of the Republic's existence, courts did not recognize the Constitution as a source of legal rights that could be directly enforced via a nonstatutory cause of action—e.g., one could sue a federal officer for trespass but not for violating the Fourth Amendment.¹³⁶ This stance began to shift in the late nineteenth century, and, by the middle of the twentieth, we find the Supreme Court unequivocally characterizing injunctive enforcement of constitutional rights as an “established practice.”¹³⁷ Rather than develop an express framework for identifying precisely which constitutional provisions create legal rights that can support nonstatutory review for equitable relief, however, the Court instead has generally permitted plaintiffs to seek injunctive enforcement of constitutional

¹³¹ See *In re Trump*, 958 F.3d 274, 293 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting), *vacated as moot sub nom.* *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

¹³² See, e.g., *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 157–58 (2d Cir. 2019), *republished as amended*, 953 F.3d 178 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

¹³³ See, e.g., *Sierra Club*, 963 F.3d at 893 (characterizing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), as limiting the zone test to statutory causes of action).

¹³⁴ See, e.g., *Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 112–13 (2d Cir. 2020) (Menashi, J., dissenting denial of rehearing en banc) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)).

¹³⁵ See *infra* Part III.A (discussing the traditional model of the officer suit).

¹³⁶ See *Preis*, *supra* note 7, at 873–74 (explaining that in nineteenth century federal courts, “[a] constitutional right was involved in the suit, if at all, as a defense”).

¹³⁷ *Bell v. Hood*, 327 U.S. 678, 684 (1946).

provisions with little or no regard for the embedded cause-of-action problem.¹³⁸ This gap, along with the Supreme Court's shift to equitable traditionalism, has left space for the judicial disputes discussed in Part II regarding whether plaintiffs could seek nonstatutory, injunctive relief for violations of various structural constitutional provisions.

A. *The Traditional Model of a Nonstatutory Cause of Action*

During the early years of the Republic, a plaintiff seeking to use the courts to challenge official action would not sue the government itself, which was shielded by sovereign immunity, but would instead bring an "officer suit" directed at the person who carried out the government's work.¹³⁹ These actions were generally based on common law writs, notably trespass, developed by the courts of England.¹⁴⁰ A plaintiff might, for instance, use the common law writ of trespass to seek damages from an official who seized the plaintiff's property without authority.¹⁴¹

A plaintiff seeking specific relief might turn to equity where an official's action was causing (or threatened to cause) irreparable damage to the plaintiff's legally protected interests.¹⁴² In theory, in keeping with the maxim "equity follows the law," courts generally were not supposed to use this equitable authority to expand a plaintiff's rights beyond those recognized by common law.¹⁴³ In practice, application of this principle was not rigid, and courts would sometimes provide equitable remedies to plaintiffs who would not be able to satisfy technical requirements for obtaining relief via a common law writ.¹⁴⁴

The Supreme Court had an especially important opportunity to deploy equitable power in 1824's *Osborn v. Bank of the United States*, in which the

¹³⁸ See *infra* Part III.D (discussing the Court's acceptance that plaintiffs generally can invoke a nonstatutory cause of action to seek injunctive enforcement of constitutional provisions).

¹³⁹ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 3 (2012).

¹⁴⁰ *Id.* at 76.

¹⁴¹ See, e.g., *Preis*, *supra* note 7, at 873 (discussing example of *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806)).

¹⁴² See, e.g., *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 741–42 (1824).

¹⁴³ *Preis*, *supra* note 23, at 12. As *Preis* observes, "equity would issue injunctive relief for common-law violations, but in doing so, it would follow the common law as defined by courts of law." *Id.* But *Preis* also notes that this principle was, in practice, "not perfectly true." *Id.*

¹⁴⁴ See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 564 (1851) (granting injunctive relief against bridge that caused "a private and an irreparable injury" although no common law cause of action was applicable); Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 280–81 (2010) (explaining that equity provided its own set of enforceable substantive rights).

Bank and its officials sued Ohio officials for seizing about \$100,000 pursuant to a tax law that the state had enacted “for the avowed purpose of expelling the Bank from the State.”¹⁴⁵ In Chief Justice Marshall’s view, it was “morally certain” that the state, if allowed to keep the money, would succeed in forcing the Bank out of Ohio, which “would deprive the Bank of its chartered privileges, so far as they were to be exercised in that State.”¹⁴⁶ He conceded that the Bank would have been able to bring an action at law for trespass for interference with this privilege given that a “reasonable calculation” could be made of damages.¹⁴⁷ This legal remedy was nonetheless inadequate given the difficulties of determining damages and the necessity to prevent repetition, and the Court therefore affirmed a grant of injunctive relief to the Bank.¹⁴⁸

Issues of constitutional and statutory law would arise in these common law/equitable actions to resolve claims by defendant officials that they had legal authority to take their challenged actions. A plaintiff might sue an official for trespass in connection with some seizure; the official might defend on the ground that they had statutory authorization; and the plaintiff might reply that this statutory authorization was unconstitutional.¹⁴⁹ In such cases, constitutional enforcement was an indirect byproduct of the enforcement of common law rights.¹⁵⁰

B. Statutes as Sources of Legal Rights Enforceable via “Implied” Causes of Action

During the nineteenth century, in the absence of an express statutory cause of action, courts would allow a plaintiff to enforce a statute via a common law form of action provided they both protected against similar sorts of injuries.¹⁵¹ In later cases, the Supreme Court began to recognize that statutes could create new legal rights that protect against injuries for which the common law did not

¹⁴⁵ *Osborn*, 22 U.S. at 742, 839–40.

¹⁴⁶ *Id.* at 840.

¹⁴⁷ *Id.* at 841.

¹⁴⁸ *Id.* at 842, 870–71.

¹⁴⁹ Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987).

¹⁵⁰ Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510–11 (1989) (“Traditionally, governmental actors were liable at common law for injuries inflicted in the course of their employment. The constitutional nature of the harm seemed to have mattered only tangentially at first.” (footnote omitted)).

¹⁵¹ See *Bullard v. Bell*, 4 F. Cas. 624, 642 (C.C.D.N.H. 1817) (No. 2121) (Story, J.) (applying this approach to determine that plaintiff could bring an action for debt to enforce statutory liability of bank shareholders).

provide a cause of action.¹⁵² Having recognized such a legal right, a court could claim remedial authority to redress a violation consistent with the maxim, *ubi jus ibi remedium*—i.e., where there is a right, there is a remedy.¹⁵³ Courts turned to traditional remedial principles to determine whether such a remedy should take the form of damages or specific relief.¹⁵⁴

The Supreme Court provided a canonical example of this practice in 1930's *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, in which the Court both invoked *ubi jus* and linked it to congressional intent to justify recognizing an implied statutory cause of action.¹⁵⁵ The Railway Labor Act of 1926 set up a system for voluntary arbitration of labor disputes that, to ensure fairness, provided that the parties' "[r]epresentatives . . . shall be designated . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."¹⁵⁶ A union persuaded a district court to rely on this provision to enjoin the railroad company's efforts to coerce its employees into joining an alternative union.¹⁵⁷ After the company violated the injunction, the district court held it in contempt, and the court of appeals affirmed.¹⁵⁸ On appeal to the Supreme Court, the railroad company contended that the statutory provision at issue "confer[ed] merely an abstract right which was not intended to be enforced by legal proceedings."¹⁵⁹ The Supreme Court responded that "a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."¹⁶⁰ Given that the statutory prohibition on interference was both "appropriate to the aim of Congress" and could be enforced by the courts, it followed that Congress intended such enforcement.¹⁶¹

¹⁵² Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 846–49 (2004) (discussing and sharply criticizing this transition).

¹⁵³ See, e.g., *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916) (referencing *ubi jus* in a case inferring the availability of a remedy from the existence of a right). Professor Bellia explains that under a modern, "malleable conception of the cause of action, a rights-based mindset has emerged that asks not whether there is an available remedy, and thus a cause of action, but whether there is a right, and thus a cause of action for a remedy." Bellia, *supra* note 152, at 781. For a criticism of the invocation of *ubi jus*, see *id.* at 850 ("As an [sic] historical or normative matter, reciting the phrase *ubi jus, ibi remedium* does little work in justifying a broad implied-rights-of-action doctrine.").

¹⁵⁴ See *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

¹⁵⁵ *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 567–70 (1930).

¹⁵⁶ *Id.* at 557–58 (quoting Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. § 152)).

¹⁵⁷ *Id.* at 554–55.

¹⁵⁸ *Id.* at 556–57.

¹⁵⁹ *Id.* at 558.

¹⁶⁰ *Id.* at 568.

¹⁶¹ *Tex. & New Orleans R.R. Co.*, 281 U.S. at 569.

More generally, where courts detect that Congress has “created” a legal right, Congress, consistent with *ubi jus*, intends a judicial remedy as well.¹⁶²

C. Constitutional Provisions Become Sources of Directly Enforceable Legal Rights

So far, we have seen how common law, equity, and statutes might provide “legal interests” that, if violated, could support a nonstatutory cause of action. During the first century or so of the Republic’s existence, courts did not regard the Constitution itself as a source of such legal interests.¹⁶³ Instead, as noted above, constitutional issues arose in nonstatutory review as necessary to determine whether an official had legal authority to take some action that a plaintiff claimed violated their common law or statutory rights.¹⁶⁴ As constitutional rights expanded beyond common law analogues, this system came under increasing pressure,¹⁶⁵ and the Supreme Court began to recognize that some constitutional claims can stand on their own as a basis for nonstatutory review.¹⁶⁶

This subpart highlights two milestones in this long and complex transformation. The first, 1908’s *Ex parte Young*, has become synonymous with the idea that plaintiffs can seek nonstatutory review to enjoin officials from violating federal law.¹⁶⁷ It is therefore ironic that the Supreme Court strained

¹⁶² *Id.* at 569–70 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 163 (1803)). Later, the Court would condemn this purposive approach to detecting implied statutory causes of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001) (explaining that “private rights of action to enforce federal law must be created by Congress” and that the Court had abandoned an “*ancien regime*” that had adopted too lax an approach).

¹⁶³ Collins, *supra* note 150, at 1510–11 (discussing role of Constitution in officer suits as shield against claims based on common law).

¹⁶⁴ *See supra* notes 149–50 and accompanying text (noting this indirect method of enforcing constitutional provisions).

¹⁶⁵ *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1065 (2015) (noting that the “expansion of constitutional rights to embrace liberty interests that had no analogues at common law” put strain on the private rights model for challenging unlawful official action); Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1168 (2014) (“As these new federal constitutional rights expanded, they began to cover more and different interests than the common law did, making the common law seem increasingly inadequate to the job of fully enforcing the Constitution.”).

¹⁶⁶ For an explanation of how the Court abandoned the common-law model for justifying officer suits, *see* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954) (“By almost imperceptible steps [the Court] appears to have come to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable.”).

¹⁶⁷ *See generally Ex parte Young*, 209 U.S. 123 (1908). Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1111 (2010) (“The conventional wisdom similarly views *Young* as a generative source of authority for the proposition that

hard in *Young* to identify injuries to common law interests to justify concluding that the original plaintiffs had a cause of action.¹⁶⁸ The second case, *Bell v. Hood*, holds special interest because the Court decided it in 1946,¹⁶⁹ the same year that Congress enacted the APA.¹⁷⁰ In *Bell*, the Court expressly adverted to the Court's "established practice" of issuing injunctions "to protect rights safeguarded by the Constitution," but offered little guidance as to how to identify those rights.¹⁷¹

1. Ex Parte Young Exemplifies and Foreshadows Change

Ex parte Young began when shareholders of a railroad company challenged Minnesota's statutory and regulatory scheme for setting railroad rates so low as to violate due process.¹⁷² The suit sought injunctive relief against Young, the Minnesota Attorney General, to prevent him from enforcing the challenged rates.¹⁷³ The Supreme Court, after making its position that the Minnesota law was unconstitutional clear,¹⁷⁴ rejected Young's sovereign immunity objection by reaffirming that a state official enforcing an unconstitutional law is acting ultra vires and therefore cannot defend against an officer suit by invoking the Eleventh Amendment.¹⁷⁵

Disposal of the Eleventh Amendment objection still left the problem of identifying a legal right of the plaintiffs that could support a nonstatutory cause of action. Discussion of this issue followed several threads. The Court suggested that the Fourteenth Amendment itself could be a source of this legal right,¹⁷⁶ and it also indicated that the threat of "a multiplicity of suits or litigation" might constitute a legal injury that equity could enjoin.¹⁷⁷ Most notably for the present discussion, however, the Court felt compelled to offer a tortured explanation as to why the Minnesota rate scheme threatened the railroads' common law property rights. The Court observed that officer suits seeking injunctive relief

constitutional provisions such as the Fourteenth Amendment 'provide[] a cause of action' for injunctive relief against government officials . . ."). For a recent and controversial discussion of the applicability of the doctrine of *Ex parte Young*, see generally *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), holding, in a 5–4 opinion, that judges and judicial clerks are not proper defendants in an action brought under *Ex parte Young* to enjoin enforcement of purportedly unconstitutional law.

¹⁶⁸ *Ex parte Young*, 209 U.S. at 158.

¹⁶⁹ *Bell v. Hood*, 327 U.S. 678, 678 (1946).

¹⁷⁰ Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946).

¹⁷¹ *Bell*, 327 U.S. at 684.

¹⁷² *Ex parte Young*, 209 U.S. at 127, 129, 144.

¹⁷³ *Id.* at 129.

¹⁷⁴ *Id.* at 149.

¹⁷⁵ *See id.* at 159–60.

¹⁷⁶ *Id.* at 149–50, 154.

¹⁷⁷ *Id.* at 160.

were not necessarily limited to “direct trespass upon or injury to property.”¹⁷⁸ The Court then explained that it had, in an earlier case, characterized two precedents in a way that necessarily indicated that “threatened commencement of suits to enforce” an unconstitutional statute could count as a “wrong or trespass.”¹⁷⁹ As such, the threat of such suits was “equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer.”¹⁸⁰

Ex parte Young illustrates how a willing court can find an injury to common law interests to support nonstatutory review of what are, at bottom, constitutional claims.¹⁸¹ Viewed from a more modern angle, the Court’s strained efforts in *Young* may seem like more formalistic trouble than they were worth. Consistent with this critique, *Young* foreshadowed a gradual shift to a regime in which courts would recognize constitutional violations as direct bases for nonstatutory review seeking injunctive relief.¹⁸²

2. *Bell v. Hood Confirms Constitutional Provisions Can Support Nonstatutory Review but Doesn’t Explain Which Ones*

Bell v. Hood, issued in 1946, nearly forty years after *Young* and in the same year that Congress enacted the APA, provided an especially clear expression of the Court’s acceptance that constitutional rights can support nonstatutory review.¹⁸³ The plaintiff sued agents of the Federal Bureau of Investigation for damages for violations of their rights under the Fourth and Fifth

¹⁷⁸ *Ex parte Young*, 209 U.S. at 152–53 (emphasis added).

¹⁷⁹ *Id.* at 157–58 (citing the Court’s characterization in *Fitts v. McGhee*, 172 U.S. 516 (1899), of *Smyth v. Ames*, 169 U.S. 466 (1898), and *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362 (1894)).

¹⁸⁰ *Id.* at 157–58; cf. James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 750 (2020) (“The threatened government activity at issue in *Ex parte Young*, invocation of judicial power to seek enforcement of Minnesota state law in accordance with its terms, did not, in itself, invade a protected common law right.”).

¹⁸¹ See *Ex parte Young*, 209 U.S. at 157–58.

¹⁸² See Fallon, *supra* note 167, at 1112 (noting that, regardless of debates regarding the intended meaning of *Ex parte Young*, in later cases the Supreme Court “unquestionably recognized rights to sue for injunctions directly under the Constitution, without regard to whether such suits could have gone forward under traditional equity rules that generally authorized suits for injunctions only in cases involving tortious misconduct or threats to bring lawsuits”).

¹⁸³ *Bell v. Hood*, 327 U.S. 678, 678, 684–85 (1946); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152–53 (1951) (Frankfurter, J., concurring) (explaining that “standing” to challenge government action may be based on a legal interest created “by the Constitution or a statute”); *Coleman v. Miller*, 307 U.S. 433, 437–38 (1939) (concluding that Kansas state senators had standing to seek to block certification of a constitutional amendment that they contended violated Article V ratification procedure).

Amendments.¹⁸⁴ The defendants moved to dismiss, contending that: (a) the plaintiff merely asserted a claim of trespass under state law, and (b) the plaintiff could not recover damages in any event as neither the Constitution nor Congress had provided this remedy—i.e., Bell lacked either a statutory or nonstatutory cause of action to enforce the Constitution.¹⁸⁵ The district agreed and dismissed for lack of jurisdiction, and the circuit court affirmed.¹⁸⁶

In its reversal, the Supreme Court explained that a jurisdictional dismissal for lack of a cause of action would be appropriate only where a plaintiff's asserted cause of action was "wholly insubstantial and frivolous."¹⁸⁷ Bell's claim that he had a cause of action to enforce the Fourth and Fifth Amendments cleared this bar given that the Court had allowed constitutional claims in other cases.¹⁸⁸ To support this contention, the Court cited two cases from the turn of the previous century in which it had "sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution."¹⁸⁹ More broadly, the Court declared that it was "established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."¹⁹⁰ The precedents the Court cited as support for this "established practice" highlight its relative novelty given that most of them involved government actions that infringed on common law rights.¹⁹¹

After resolving the jurisdictional issue, the Court did not reach the merits of whether Bell had successfully stated a cause of action for violations of his Fourth and Fifth Amendment rights.¹⁹² The Court would return to the Fourth Amendment issue twenty-five years later in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁹³ in which the Court held that the

¹⁸⁴ *Bell*, 327 U.S. at 679.

¹⁸⁵ *Id.* at 680–81.

¹⁸⁶ *Id.* at 680.

¹⁸⁷ *Id.* at 682–83, 685.

¹⁸⁸ *Id.* at 683–84.

¹⁸⁹ *Id.* at 684 & n.3 (first citing *Wiley v. Sinkler*, 179 U.S. 58, 64–65 (1900); and then citing *Swafford v. Templeton*, 185 U.S. 487, 492–93 (1902)).

¹⁹⁰ *Bell*, 327 U.S. at 684.

¹⁹¹ *Id.* at 684 n.4; *see* *Hays v. Port of Seattle*, 251 U.S. 233, 234, 239 (1920) (rejecting bill seeking to restrain enforcement of state law vesting title to the waterway in the City of Seattle); *Phila. Co. v. Stimson*, 223 U.S. 605, 619 (1912) (holding that complainant could invoke equity to prevent "unwarrantable interference with property"); *Pennoyer v. McConaughy*, 140 U.S. 1, 18–19, 25 (1891) (upholding request for injunctive relief to block enforcement of state statute that would "work irreparable damage and mischief to [plaintiff's] property rights").

¹⁹² *Bell*, 327 U.S. at 684–85.

¹⁹³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

plaintiff did indeed have a cause of action to sue defendant officials for money damages for violating his Fourth Amendment rights.¹⁹⁴

D. The Legal Rights Problem Mostly Disappears from Constitutional Cases

One might have expected that, after *Bell*,¹⁹⁵ the Supreme Court would adopt an express framework for identifying which constitutional provisions grant legal rights that can support nonstatutory review, but the Court has not pursued this approach.¹⁹⁶ Instead, at least in cases seeking equitable relief, the Court has permitted plaintiffs who satisfy other threshold requirements (e.g., constitutional standing, political question doctrine) to seek nonstatutory review with little or no regard for whether they seek to enforce a constitutional provision that grants them a “legal interest.”¹⁹⁷ Functionally, this practice is consistent with the premise that all (or almost all) constitutional provisions can grant the type of legal rights needed for a nonstatutory cause of action.

The Court may have downplayed or ignored the legal interest inquiry in some cases because it regarded the plaintiffs’ remedial right to seek judicial enforcement as self-evident. The great desegregation cases of *Brown v. Board of Education*¹⁹⁸ and *Bolling v. Sharpe*¹⁹⁹ might serve as prime examples. In *Brown*, the Court explained that segregation necessarily violates equality, so it followed that the plaintiffs were “by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”²⁰⁰ In *Bolling*, which addressed segregation beyond the reach of the Fourteenth Amendment in the District of Columbia, the Court concluded segregation arbitrarily deprived students of their liberty rights under the Fifth Amendment.²⁰¹ In both *Brown* and *Bolling*, the Court, after identifying these underlying violations of the plaintiffs’ constitutional rights, assumed without discussion that they were judicially enforceable via a nonstatutory cause of action seeking injunctive relief.²⁰²

¹⁹⁴ *Id.* at 389–90.

¹⁹⁵ *Bell*, 327 U.S. 678.

¹⁹⁶ See Nelson, *supra* note 10, at 716 (“The Supreme Court never fully specified the criteria for determining whether a particular statutory or constitutional provision gave ‘legal rights’ to particular people.”).

¹⁹⁷ *Id.* at 760–61.

¹⁹⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).

¹⁹⁹ *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

²⁰⁰ *Brown*, 347 U.S. at 495.

²⁰¹ *Bolling*, 347 U.S. at 498–500.

²⁰² See Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 685–86 (2009) (noting that in neither *Brown* nor *Bolling* did the Supreme Court discuss whether the plaintiffs had a cause of action).

Much of the Court's discussion of the problem of determining which constitutional provisions can support a nonstatutory cause of action has appeared in cases assessing the availability not of injunctive relief but of money damages. In 1971's *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that the plaintiff could pursue a nonstatutory cause of action for damages against defendant officials whom the plaintiff claimed had violated his Fourth Amendment rights.²⁰³ Before the Court held that the plaintiff could seek damages, it determined the logically prior question of whether the plaintiff could invoke any nonstatutory cause of action at all—independent of the question of remedy.²⁰⁴ The Court's analysis of this question boiled down to the thesis that *Bivens* must have a nonstatutory cause of action to enforce the Fourth Amendment because state trespass law does not provide the same breadth of protection.²⁰⁵ In other words, *Bivens* assumed that, where the Constitution offers rights beyond the common law, plaintiffs must have access to a cause of action to enforce them.

The Court devoted more explicit attention to the cause-of-action problem in 1979's *Davis v. Passman*, which extended the *Bivens* remedy to cover a Fifth Amendment due process claim.²⁰⁶ Justice Brennan's opinion emphasized that inferring an implied *statutory* cause of action is a very different business than inferring an implied *constitutional* cause of action.²⁰⁷ Regarding the former, "it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner."²⁰⁸ As such, courts should infer an implied statutory cause of action only where there is sufficient evidence that Congress intended for one to exist.²⁰⁹ By contrast, the Constitution speaks with "majestic simplicity" to establish rights, and the judiciary serves as their "primary means" of enforcement.²¹⁰ To honor this role, "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."²¹¹ *Davis* did not, however,

²⁰³ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971).

²⁰⁴ *See id.* at 395 ("[Given limitations on state power,] the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action").

²⁰⁵ *See id.* at 392–95 (contrasting Fourth Amendment protections with state trespass law and concluding that the former must be enforceable via a nonstatutory cause of action).

²⁰⁶ *Davis v. Passman*, 442 U.S. 228, 228–30 (1979).

²⁰⁷ *Id.* at 241.

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 242.

provide general guidance regarding which constitutional provisions create enforceable legal rights.

A few years after *Davis*,²¹² the Court began consistently rejecting efforts to extend the *Bivens* remedy to cover additional constitutional claims. In keeping with this restrictive approach, the Court condemned the *Bivens* decision itself as a product of an “*ancien regime*” during which a freewheeling Court violated separation of powers by “[r]aising up” new causes of action as if federal courts had common law powers.²¹³ Pressed to its limit, this criticism suggests that the Court ought not recognize *any* nonstatutory cause of action for constitutional enforcement—regardless of whether a claim seeks money damages or equitable relief.²¹⁴ Rather than pursue this logic, the Court has instead leveled this criticism only at claims for money damages rather than claims seeking injunctive relief.²¹⁵ Indeed, even as later cases in the *Bivens* line reiterate that federal courts must not “raise up” new causes of action, they also presuppose the broad availability of a nonstatutory cause of action for injunctive relief. For instance, in 2001’s *Correctional Services Corp. v. Malesko*, the Court rejected extending *Bivens* to allow a claim for damages against a private prison firm.²¹⁶ After rejecting this extension, the Court observed that potential plaintiffs could still pursue injunctive relief, which unlike *Bivens* claims, “has long been recognized as the proper means for preventing entities from acting unconstitutionally.”²¹⁷ Similarly, in 2017’s *Ziglar v. Abbasi*, the Court justified rejecting an extension of *Bivens* in part by observing that damages were not the only practicable remedy given the possibility that the plaintiffs could seek injunctive relief.²¹⁸

It might be fair to argue that examples such as *Brown*, *Bolling*, *Bivens*, *Davis*, *Malesko*, and *Abbasi* establish only that injunctive relief for constitutional enforcement might be available where it is intuitively obvious that the challenged action, such as unlawful detention, violates a right that is personal to the plaintiff. The Supreme Court, however, has also permitted plaintiffs to seek injunctive enforcement of “structural” provisions of the Constitution that do not connect to personal rights in the same obvious way as, for example, the Fourth Amendment does. The Court’s most illuminating

²¹² *Davis*, 442 U.S. 228.

²¹³ *Hernandez v. Mesa*, 140 S. Ct. 735, 741–42 (2020) (first quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017); and then quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

²¹⁴ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 405 (1971) (Harlan, J., concurring) (contending that if a damages remedy for a constitutional tort requires congressional authorization, then so should equitable relief).

²¹⁵ See *Vladeck*, *supra* note 11, at 1871 (observing that the justices “have barely acknowledged” their inconsistent treatment of injunctive relief and damages).

²¹⁶ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001).

²¹⁷ *Id.* at 74.

²¹⁸ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017).

discussion of this practice appeared in 2011's *Bond v. United States*, in which a defendant invoked the Constitution as a defense to a criminal charge rather than as the basis for an affirmative cause of action.²¹⁹ More specifically, Bond challenged her conviction on a chemical weapons charge on the ground that the statute of conviction exceeded congressional authority and therefore violated the Tenth Amendment.²²⁰ The Court of Appeals concluded that Bond lacked standing to raise this defense based on 1939's *Tennessee Electric Power Co. v. Tennessee Valley Authority* (TVA), in which the Court had held that power companies lacked "standing" to press a Tenth Amendment claim seeking to enjoin the Tennessee Valley Authority from producing and selling electricity.²²¹

Reversing, the Supreme Court explained that, at the time of *TVA*, it had equated the existence of standing with the existence of a cause of action, but that later law had clarified that these issues should be regarded as distinct.²²² Bond had constitutional standing to raise the Tenth Amendment defense given that the statute that she challenged was the basis for an obvious injury—conviction of a felony and incarceration.²²³

More importantly for the present discussion, however, the Court also ruled that principles of prudential standing did not block Bond from raising the Tenth Amendment as a defense.²²⁴ The amicus defending the judgment below had contended that this defense ran afoul of the prudential rule against third-party standing because the Tenth Amendment protects state interests, and the state was not seeking to raise them.²²⁵ The Supreme Court rejected this argument on the ground that principles of federalism protect not just state sovereignty but also the liberty of individuals.²²⁶ Among other liberty-promoting virtues, federalism protects individuals from "arbitrary power" by "denying any one government complete jurisdiction over all the concerns of public life."²²⁷ As such, persons like Bond have "a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."²²⁸ To buttress this conclusion, the Court observed that other structural principles of the Constitution, including separation of powers and

²¹⁹ *Bond v. United States*, 564 U.S. 211, 214 (2011).

²²⁰ *Id.* at 215.

²²¹ *United States v. Bond*, 581 F.3d 128, 136–38 (3d Cir. 2009) (citing *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 143–44 (1939)), *rev'd*, 564 U.S. 211 (2011).

²²² *See Bond*, 564 U.S. at 218–19 (explaining that *TVA* had used the concepts of standing and cause of action interchangeably and that later decisions have used these terms "with more precision").

²²³ *Id.* at 217.

²²⁴ *Id.* at 220.

²²⁵ *Id.*

²²⁶ *Id.* at 220, 222.

²²⁷ *Id.* at 221–22.

²²⁸ *Bond*, 564 U.S. at 222.

federalism, also protect liberty and are amenable to judicial enforcement—a point that the Court documented with a string cite to its precedents permitting individuals to sue to enforce structural provisions.²²⁹ In short, structural provisions create “rights” that plaintiffs can sue to enforce in federal court.²³⁰

One of the precedents the Court cited, 2010’s *Free Enterprise Fund v. Public Company Accounting Oversight Board*, merits special attention because of the Court’s brutally dismissive rejection of the government’s argument that the plaintiffs lacked a nonstatutory cause of action to seek injunctive enforcement of separation of powers provisions.²³¹ The plaintiffs had challenged the constitutionality of a new agency, the Public Company Accounting Oversight Board, on the grounds that the system for appointing Board members violated the Appointments Clause and that statutory restrictions on their removal infringed on the President’s executive power.²³² The government responded that “petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.”²³³ Here is Chief Justice Roberts’s full response (minus parallel cites):

The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional provisions at issue here. *See, e.g., Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief “has long been recognized as the proper means for preventing entities from acting unconstitutionally”); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution”); see also *Ex parte Young*, 209 U.S. 123, 149, 165, 167 (1908). If the Government’s point is that an Appointments Clause or separation-of-powers claim should be treated differently than *every other constitutional claim*, it offers no reason and cites no authority why that might be so.²³⁴

Thus, at least as a “general matter,” as far as the Court was concerned in *Free Enterprise*, a nonstatutory cause of action for equitable relief is available to enforce any provision of the Constitution—regardless of whether that constitutional provision seems directed toward protecting obviously personal rights or is structural in nature.²³⁵

²²⁹ *Id.* at 223.

²³⁰ *See id.* at 220 (“Bond seeks to vindicate her own constitutional interests.”).

²³¹ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

²³² *Id.* at 484, 487–88.

²³³ Brief for United States at 22, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861).

²³⁴ *Free Enter. Fund*, 561 U.S. at 491 n.2 (emphasis added).

²³⁵ Given the Court’s treatment of the government’s cause-of-action argument in *Free Enterprise Fund*, it is not surprising that this argument does not appear in later notable Supreme Court cases in which plaintiffs brought “structural” constitutional claims seeking

E. *Armstrong and the Challenge of Equitable Traditionalism*

As we have seen, notwithstanding the Supreme Court's purported hostility to raising up new implied causes of action,²³⁶ the Court has generally permitted plaintiffs to invoke a nonstatutory cause of action for constitutional claims limited to equitable relief.²³⁷ In 2015's *Armstrong v. Exceptional Child Center, Inc.*, the Court carved an exception to this general practice for plaintiffs who base their claims on the Supremacy Clause.²³⁸ Along the way to this conclusion, the Court emphasized that judicial power to enjoin illegal executive action is rooted in historical equitable practices.²³⁹

In *Armstrong*, providers of Medicaid services sued Idaho officials, seeking injunctive relief to force an increase in Medicaid reimbursement rates.²⁴⁰ Section 30(A) of the Medicaid Act requires that a state's Medicaid plan "assure that payments are consistent with efficiency, economy, and quality of care" and are sufficient to enlist providers.²⁴¹ Affirming the District Court's judgment in favor of the providers, the Ninth Circuit noted they had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation."²⁴² In other words, the providers could pursue a nonstatutory cause of action on the theory that Idaho's violation of section 30(A) also violated the Supremacy Clause.

Reversing, Justice Scalia's opinion for the majority explained that the Supremacy Clause does not grant "any federal rights" and "certainly does not create a cause of action."²⁴³ Rather, it merely creates a rule of decision that all courts must give effect to federal law over conflicting state laws.²⁴⁴ To hold otherwise and uphold the providers' reading of the Clause would "give affected

equitable relief. *Id.*; see, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (holding that for-cause restriction on removal of Director violated separation of powers); cf. *Collins v. Yellen*, 141 S. Ct. 1761, 1790 n.1 (2021) (Thomas, J., concurring) (assuming the plaintiffs had the necessary "legal right" to obtain equitable relief for separation-of-powers claim given that *Free Enterprise Fund* indicated that plaintiffs "may have an implied . . . right of action" to seek equitable enforcement of Appointments Clause or separation-of-powers claims).

²³⁶ See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 741–42 (2020) (discussing the Supreme Court's extreme reluctance to recognize causes of action not expressly created by Congress).

²³⁷ See generally *infra* Part III.D (discussing the Supreme Court's broad acceptance of nonstatutory review for constitutional claims seeking equitable relief).

²³⁸ *Armstrong v. Exceptional Child Ctr. Inc.*, 575 U.S. 320, 326 (2015).

²³⁹ *Id.* at 327.

²⁴⁰ *Id.* at 323–24.

²⁴¹ 42 U.S.C. § 1396a(a)(30)(A).

²⁴² *Exceptional Child Ctr. Inc. v. Armstrong*, 567 F. App'x 496, 497 (9th Cir. 2014), *rev'd*, 575 U.S. 320 (2015).

²⁴³ *Armstrong*, 575 U.S. at 324–25 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)).

²⁴⁴ *Id.* at 324.

parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States.”²⁴⁵ Nothing in the ratification history of the Supremacy Clause suggested that it was meant to have this effect.²⁴⁶ Paradoxically, this reading of the Supremacy Clause would reduce federal power insofar as it would deprive Congress of the ability “to leave the enforcement of federal law to federal actors,” such as prosecutors and agencies.²⁴⁷ Moreover, although Justice Scalia did not see fit to mention this point, allowing private plaintiffs to use the Supremacy Clause as a bootstrap to seek judicial enforcement of the U.S. Code would negate the Court’s modern insistence that federal courts should recognize implied *statutory* causes of action only where they find that Congress intended to create one.²⁴⁸

Most importantly for the present discussion, Justice Scalia explained that the providers were mistaken to think that the Court’s practice of enjoining state laws that violate federal law necessarily implied that the Supremacy Clause has a cause of action embedded in it.²⁴⁹ Rather than arising from a part of the Supremacy Clause written in invisible ink, “[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action.”²⁵⁰ He added, “[w]hat our cases demonstrate is that, ‘in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.’”²⁵¹ In other words, as cases like *Osborn* and *Young* demonstrate, a plaintiff who has suffered the right kind of legal injury can invoke a nonstatutory cause of action against a public officer and, if the requisites of equity are satisfied, obtain injunctive relief.²⁵² The providers in *Armstrong* could not, however, make use of this nonstatutory cause of action because Congress can limit the federal courts’ power to issue equitable relief, and it had implicitly precluded private enforcement of section 30(A).²⁵³

One might read *Armstrong* in a narrow way that limits its implications for plaintiffs seeking to enforce structural constitutional provisions other than the Supremacy Clause. On this view, *Armstrong* would not disturb the Court’s signal in *Free Enterprise Fund* that “structural” provisions of the Constitution are amenable to equitable enforcement without regard for whether they grant

²⁴⁵ *Id.* at 325.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 325–26.

²⁴⁸ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001) (criticizing the Court’s earlier purposive approach to detecting implied statutory causes of action).

²⁴⁹ *Armstrong*, 575 U.S. at 326.

²⁵⁰ *Id.* at 326–27 (citing, inter alia, *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 838–39, 844 (1824), and *Ex parte Young*, 209 U.S. 123, 150–51 (1908)).

²⁵¹ *Id.* (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845)).

²⁵² See *id.* at 326–27 (citing, inter alia, *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 838–39 (1824), and *Ex parte Young*, 209 U.S. 123, 150–51 (1908)).

²⁵³ *Id.* at 327–28 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)).

individual rights in any but the most attenuated sense.²⁵⁴ On the other hand, *Armstrong*, by highlighting that the Supremacy Clause does not create legal rights that can support equitable enforcement,²⁵⁵ might suggest to willing judicial minds that other structural constitutional provisions might not, either. As Part II demonstrates, judges across several circuits have in recent litigation reached sharply different conclusions regarding which of these two approaches is correct. Some, often citing *Free Enterprise Fund*, readily accept that plaintiffs can invoke a nonstatutory cause of action to seek injunctive relief to enforce structural constitutional provisions.²⁵⁶ Others, relying heavily on *Armstrong*, along with some other Supreme Court opinions emphasizing “equitable traditionalism,” have insisted that plaintiffs cannot invoke a nonstatutory cause of action to enforce these structural provisions.²⁵⁷

IV. EVOLUTION OF THE ZONE-OF-INTERESTS TEST AND ITS RELATION TO CONSTITUTIONAL CLAIMS

Judges in the cases discussed in Part II also disagreed regarding whether some form of “zone of interests” test provides the correct lens for determining which plaintiffs can invoke a nonstatutory cause of action for injunctive relief for a constitutional claim.²⁵⁸ Confusion on this issue, too, is perfectly understandable given the tangled evolution of the zone test, ambiguity regarding its doctrinal source, and its fraught relationships with standing doctrine, cause-of-action doctrine, and the APA.

A. *Let’s Start with the APA Provision that the Zone Test Rewrote*

Since its introduction in 1970, the zone test has primarily functioned as a gloss on section 10(a) of the APA, now codified at 5 U.S.C. § 702, which governs who is eligible to use the APA’s cause of action.²⁵⁹ On its face, § 702 grants a right of judicial review to two categories of plaintiff. The first category

²⁵⁴ See *supra* text accompanying notes 231–35 (discussing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491–92 n.2 (2010)).

²⁵⁵ *Armstrong*, 575 U.S. at 324–25 (observing that Supremacy Clause is not a source of federal rights and does not create a cause of action).

²⁵⁶ See, e.g., *supra* text accompanying notes 45–51 (discussing *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 733–34 (D. Md. 2018)).

²⁵⁷ See, e.g., *supra* text accompanying notes 58–67 (discussing *In re Trump*, 958 F.3d 274, 291–97 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.)).

²⁵⁸ See *supra* Part II (identifying various approaches judges have taken to the zone problem in recent, high-profile litigation).

²⁵⁹ Administrative Procedure Act § 10(a), 5 U.S.C. § 702; see *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987) (explaining that the zone test “is most usefully understood as a gloss on the meaning of § 702”).

includes any “person suffering legal wrong because of agency action.”²⁶⁰ This prong carried forward judicial doctrines permitting plaintiffs to seek nonstatutory review of actions that have damaged interests that, according to the courts themselves, amount to legally protected rights.²⁶¹ In other words, this prong declared that a plaintiff can sue under the APA if they are the type of person whom a court would permit to seek nonstatutory review without the APA.

The second category extends a right to judicial review to persons “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”²⁶² As understood in 1946, this prong referred to persons entitled to sue pursuant to “special statutory review proceedings” enacted by Congress that authorized certain types of plaintiffs (e.g., “aggrieved” ones) to seek judicial review of specified agency actions.²⁶³ In other words, this second prong declared that a plaintiff can sue under the APA if they are a type of person to whom Congress has already granted the right to sue via another statute.²⁶⁴

In sum, the APA codified existing doctrines governing the rights of plaintiffs to seek judicial review of agency action.²⁶⁵ Before and after the APA’s adoption, a person had “standing” to seek such review if they were authorized to do so either by judicially developed doctrines governing nonstatutory review or by an express statutory cause of action.²⁶⁶ Courts would follow this model for about a quarter century until the Supreme Court rewrote § 702 in 1970’s *Association of Data Processing Service Organizations v. Camp*.²⁶⁷

²⁶⁰ 5 U.S.C. § 702.

²⁶¹ See, e.g., *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955) (explaining that the “legal wrong” prong restated existing law).

²⁶² 5 U.S.C. § 702.

²⁶³ See, e.g., Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1064, 1093 (1934) (codified as amended at 47 U.S.C. § 402(b)(6)) (authorizing “any other person [who is] aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing” certain applications to seek judicial review).

²⁶⁴ Nelson, *supra* note 10, at 727.

²⁶⁵ See, e.g., Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1150 (2009) (“The widely accepted view of the history is that this statement [in section 10(a) of the APA] was a declaration of existing law.”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 182 (1992) (observing that section 10(a) of the APA contemplated “standing for people whose common law or statutory interests were at stake, as well as for people expressly authorized to bring suit under statutes other than the APA”).

²⁶⁶ Sunstein, *supra* note 265, at 182 (noting continuity between APA and previous law on the issue of “standing,” which essentially depended on whether “the law had conferred a cause of action”).

²⁶⁷ Magill, *supra* note 265, at 1150 & nn.70–72 (collecting authority). But cf. Sunstein, *supra* note 266, at 184–85 (explaining how courts interpreted the “legal wrong” test with increasing breadth during the 1960s).

B. ADAPSO Revolutionizes Standing, Introduces the Zone Test, and Rewrites the APA

In 1970's *Association of Data Processing Service Organizations v. Camp* (ADAPSO), Justice Douglas's short majority opinion laid the groundwork for the modern law of standing, introduced the "zone of interest" test, and, along the way, rewrote § 702 of the APA.²⁶⁸ The Comptroller of the Currency issued a decision permitting banks to provide data processing services.²⁶⁹ Data processors sued under the APA to challenge this action, contending that it violated a statutory restriction on bank activities.²⁷⁰ The Eighth Circuit, following applicable Supreme Court precedent, treated the issue of whether the plaintiffs had standing as equivalent to whether they had a cause of action.²⁷¹ The court concluded that the plaintiffs lacked standing because: (a) no special statutory review provision authorized the challenge; and (b) the competitive harm the data processors had suffered did not infringe on any "legal right" they might possess.²⁷² In other words, the data processors were not eligible to invoke either prong of § 702.

Justice Douglas explained that the Eighth Circuit's characterization of "standing" as depending on a showing of infringement of a "legal interest" was incorrect.²⁷³ Standing to litigate should be regarded as a threshold inquiry that does not, unlike the issue of whether a plaintiff has a legal right to be free from some injury, go to the "merits" of a claim.²⁷⁴ On a constitutional level, standing is rooted in Article III's restriction of the judicial power to "cases and controversies."²⁷⁵ To satisfy this restriction, a plaintiff must demonstrate that they have suffered an "injury in fact."²⁷⁶ Beyond core Article III requirements,

²⁶⁸ See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–53, 157 (1970).

²⁶⁹ *Id.* at 151.

²⁷⁰ *Id.* at 151–53.

²⁷¹ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 406 F.2d 837, 840, 842–43 (8th Cir. 1969) (citing *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939)), *rev'd*, 397 U.S. 150 (1970).

²⁷² *Id.* at 843.

²⁷³ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153; see Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 319 (2004) (explaining that ADAPSO marked a "great transition between the old and new doctrines of standing" in which the Court abandoned the view that "a plaintiff's standing turned on whether the defendant's challenged actions invaded a 'legal right' belonging to the plaintiff").

²⁷⁴ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153, 158. For criticism of this effort to distinguish the existence of standing from the existence of a cause of action, see for example, Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974), and William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

²⁷⁵ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 151.

²⁷⁶ *Id.* at 152. *But cf.* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting) (noting that "it was not until 1970" that the Supreme Court "even

standing doctrine also implicates a judicial “rule of self-restraint” in the form of the zone-of-interests test.²⁷⁷ This rule requires that a claim seek to protect interests “arguably within the zone of interests to be protected or regulated by the statutory or constitutional provision” that the claim contends has been violated.²⁷⁸ This “zone of interests” may extend far beyond economic concerns.²⁷⁹ For instance, a person “may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.”²⁸⁰ Also, “‘aesthetic, conservational, and recreational,’ as well as economic values” might justify concluding that a person has standing to bring a claim under the APA to challenge federal agency action.²⁸¹

Justice White, who later played an important role in the zone test’s evolution, joined Justice Brennan’s dissent objecting that the zone test improperly conflated the merits issue of whether the plaintiff has a legally protected interest with the preliminary standing question of whether the plaintiff is entitled to commence an action.²⁸²

After radically altering standing doctrine, Justice Douglas explained why the data processors satisfied his new zone test in a way that radically altered § 702 of the APA. Section 702’s second prong, authorizing judicial review for persons “adversely affected or aggrieved by agency action within the meaning of a relevant statute,” carries within it the interpretive problem of determining the meaning of a “relevant statute.”²⁸³ As explained above, when the APA was enacted in 1946, Congress used this phrase to refer to special statutory review proceedings, which authorize select groups of people to seek judicial review of various agency actions.²⁸⁴ *ADAPSO* changed the meaning of “relevant statute”

introduced the ‘injury in fact’ (as opposed to injury in law) concept of standing” (quoting *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring)); Sunstein, *supra* note 265, at 185 (“What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes.”).

²⁷⁷ *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 154, 156 (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) (connecting issue of standing to contest a statutory violation to whether a claimant “arguably” falls “within the zone of interests protected by it”).

²⁷⁸ *Id.* at 153. This is the first appearance of the zone test in Supreme Court precedent. Siegel, *supra* note 273, at 320.

²⁷⁹ *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 154.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 153–54 (quoting *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 616 (1965)).

²⁸² *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 167–68 (Brennan, J., dissenting, joined by White, J.).

²⁸³ 5 U.S.C. § 702.

²⁸⁴ See *supra* notes 262–65 and accompanying text (explaining that § 702 provided that persons who could invoke special statutory review proceedings to obtain judicial review of agency action also had right to review under APA).

to refer to the legal provisions that a plaintiff alleges an agency has violated.²⁸⁵ In Justice Douglas's view, the data processors qualified to invoke § 702 under two "relevant" statutory provisions.²⁸⁶ First, a provision in the Bank Service Corporation Act of 1962 stated that "[n]o bank service corporation may engage in any activity other than performance of bank services for banks."²⁸⁷ Second, a provision in the National Bank Act stated that national banks have power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."²⁸⁸ Although the self-interested data processors had sued to protect their business interests from competition, their claim, if successful, would enforce the underlying policy of these statutory provisions that banks should stick to banking. Given this coincidence of interest, Justice Douglas concluded that the data processors had standing to sue as they were clearly "within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.'"²⁸⁹

C. *Post-ADAPSO Evolution of the Zone-of-Interests Test*

Thanks to ambiguity in *ADAPSO* regarding the source of its zone test, for most of the last fifty years it has led a double life. In some cases, the Court has characterized the zone test as a free-floating principle of prudential standing that

²⁸⁵ See *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153–56 (analyzing standing based on the premise that the "relevant statute" as used by § 702 refers to statutory or constitutional provisions that the plaintiff contends have been violated rather than as referring to statutory review provisions established by Congress); Magill, *supra* note 265, at 1162–63 (discussing judicial rewrite of § 702).

²⁸⁶ See *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 156–57.

²⁸⁷ Bank Service Corporation Act of 1962, Pub. L. No. 87-856, § 4, 76 Stat. 1132, 1132.

²⁸⁸ National Bank Act, ch. 106, § 8, 13 Stat. 99, 101 (1864).

²⁸⁹ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 157 (quoting 5 U.S.C. § 702). While *ADAPSO* made it much easier for a plaintiff to qualify to invoke § 702, it also should have reduced the legal significance of doing so. Before *ADAPSO*, a plaintiff who satisfied § 702 by demonstrating either that they had suffered a "legal wrong" or were "adversely affected or aggrieved . . . within the meaning of a relevant statute" would, by hypothesis, have demonstrated that they had a right (i.e., cause of action) to seek review pursuant to the APA. 5 U.S.C. § 702. Under Justice Douglas's framework, however, a plaintiff could qualify for "standing" under § 702, prove that the agency violated the law, and still not be eligible for a remedy unless they also proved that the agency's violation injured a legal right belonging to the plaintiff. See *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 158 (remanding for determination of whether the relevant statutes imparted to petitioners "a 'legal interest' that protects them against violations of those Acts"). As Professor Nelson has thoroughly explained, however, this aspect of *ADAPSO* soon fell by the wayside as courts accepted that the zone test determines eligibility to invoke the APA's cause of action. Nelson, *supra* note 10, at 708 (explaining that courts have, "[f]or more than a generation," interpreted *ADAPSO* as holding that "when an agency violates statutory or constitutional limitations on its authority, everyone who is suffering 'injury in fact' and whose interests are even 'arguably' within a relevant 'zone' can obtain relief under the APA").

applies generally, including to nonstatutory constitutional claims.²⁹⁰ In other cases, the Court has characterized the zone test as a gloss on § 702 that governs who can use the APA’s cause of action.²⁹¹ Later cases have explained that the zone test operates as a general principle that courts should apply to determine the reach of any statutory cause of action unless Congress specifies otherwise.²⁹² These cases also warn that the breadth of the zone varies across causes of action according to congressional intent—i.e., the APA’s very “generous” zone does not always apply.²⁹³ In 2014’s *Lexmark International, Inc. v. Static Control Components, Inc.*, the Supreme Court, in addition to confirming the zone test’s general applicability to statutory causes of action, rejected characterizing it as a free-floating requirement of “prudential standing.”²⁹⁴ Given this checkered evolution, the zone test’s applicability to constitutional claims under current doctrine has become both confusing and dubious.

1. *The Supreme Court Applied the Zone Test to a Constitutional Claim in 1977*

During the 1970s, the Supreme Court, building from *ADAPSO*’s dubious foundation, developed its familiar three-prong test for constitutional standing—i.e., a plaintiff must demonstrate a “concrete and particularized” injury in fact; a sufficiently close causal connection between this injury and the asserted violation of law; and a sufficient likelihood that a favorable judicial order will redress the injury.²⁹⁵ In addition, the Court identified three key “prudential” limitations on standing that it characterized as judicially created rather than embedded in Article III.²⁹⁶ These included a bar on generalized grievances, limits on third-party standing, and the zone test introduced by *ADAPSO*.²⁹⁷

Notwithstanding the zone test’s presence on this list, the Supreme Court has expressly applied it to just one constitutional claim over forty years ago. In 1977’s *Boston Stock Exchange v. State Tax Commission*, regional stock

²⁹⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (identifying zone test, limits on third-party standing, and bar on generalized grievances as prudential principles of standing); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (identifying same three principles of prudential standing).

²⁹¹ *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987).

²⁹² *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

²⁹³ *Id.*

²⁹⁴ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (explaining that the zone test does not speak to “prudential standing” but rather to the scope of a legislatively conferred cause of action).

²⁹⁵ See Fallon, *supra* note 165, at 1066 (recounting development of three-prong test).

²⁹⁶ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004).

²⁹⁷ *Id.* at 12; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982).

exchanges challenged a New York law that imposed a higher transfer tax on security transactions involving out-of-state sales.²⁹⁸ The Court disposed of the issue of standing in a footnote that applied *ADAPSO*'s two-part test requiring an injury-in-fact and satisfaction of the zone test.²⁹⁹ Regarding the latter, the Court observed that the plaintiffs claimed that the tax infringed on their right under the Commerce Clause to "engage in interstate commerce free of discriminatory taxes."³⁰⁰ After offering this observation, the Court declared, without offering any further analysis, that the plaintiffs were "arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question."³⁰¹ The cursory nature of the analysis may be attributable to the fact that it was authored by Justice White, who had joined Justice Brennan's dissent in *ADAPSO* objecting to the zone test as superfluous and confusing.³⁰²

2. *The Zone Test as a Gloss on § 702—from ADAPSO to Clarke*

The Supreme Court's applications of the zone test during its first decade of existence did not offer much express guidance regarding its meaning.³⁰³ On the same day that it issued *ADAPSO*, the Court also issued its decision in *Barlow v. Collins*, in which tenant farmers challenged a rule issued by the Secretary of Agriculture that permitted them to assign certain federal payments to their landlords for rent.³⁰⁴ The Court concluded that the statutory provision that the farmers claimed the Secretary had violated had been designed for their protection and that their claim "clearly" satisfied the zone test.³⁰⁵

Barlow provided a straightforward occasion for applying the zone test given that it involved a class of plaintiffs whom Congress intended to benefit. *ADAPSO* itself, by contrast, involved plaintiffs whom Congress did not specifically seek to benefit—i.e., business entities seeking to block competition from banks.³⁰⁶ Soon after *ADAPSO*, the Court confirmed, albeit with no explanation, that the zone test can reach to protect competitors in this way.³⁰⁷ In 1970's *Arnold Tours v. Camp*, the Court addressed the standing of providers of travel services to challenge the Comptroller's ruling that banks could provide

²⁹⁸ *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 319–20 (1977).

²⁹⁹ *Id.* at 320 n.3.

³⁰⁰ *Id.*

³⁰¹ *Id.* (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

³⁰² *Id.* at 319; *Ass'n of Data Processing Serv. Orgs., v. Camp*, 397 U.S. 159, 167–69 (1970) (Brennan, J., dissenting, joined by White, J.).

³⁰³ See Siegel, *supra* note 273, at 321–24 (summarizing the zone test's early development).

³⁰⁴ *Barlow v. Collins*, 397 U.S. 159, 160–63 (1970).

³⁰⁵ *Id.* at 164.

³⁰⁶ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 157.

³⁰⁷ *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 45–46 (1970) (per curiam).

travel services to their customers.³⁰⁸ In a per curiam opinion, the Court reasoned that, if data processors satisfied the zone of the pertinent banking statute, travel service providers must, too.³⁰⁹ A year later, in *Investment Co. Inst. v. Camp*, the Court held that *ADAPSO* “foreclosed” the contention that investment companies lacked standing to contest the Comptroller’s decision to permit banks to operate competing investments funds, but the Court gave no further explanation of the zone test’s meaning.³¹⁰ In later cases during the 1970s, the Court sometimes referenced the zone test but never invoked it to reject standing.³¹¹ The Supreme Court’s limited and confusing signals regarding the zone test left lower courts confused and observers wondering if the Court had abandoned it.³¹²

In another opinion authored by Justice White, the Court revived the zone test in 1987’s *Clarke v. Securities Industry Association*.³¹³ Yet again, members of a trade association were unhappy with a decision by the Comptroller to allow new competition.³¹⁴ More specifically, a trade association of securities brokers objected that a decision allowing banks to offer discount brokerage services ran afoul of statutory limits on bank branches.³¹⁵ The Comptroller responded that Congress intended these statutory limits to protect competitive equality between state and national banks rather than to protect securities dealers from competition, and that the trade association’s claim therefore fell outside the relevant zone of interest.³¹⁶

Justice White explained that the *ADAPSO* zone test was best understood as a gloss on § 702’s cause of action, which should be generously construed in light of the APA’s remedial purpose.³¹⁷ Accordingly, in an APA case, the zone test excludes a plaintiff only if the interests implicated by their claim are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”³¹⁸ Justice White also confirmed that the zone test does not demand any “indication of congressional purpose to benefit the would-be plaintiff.”³¹⁹ Applying this generous approach, the Court concluded that the securities brokers, like the data processors in *ADAPSO*, “allege[d] an injury that implicates the policies of the National Bank Act” and were “very reasonable candidates to seek review of the

³⁰⁸ *Id.* at 45–46.

³⁰⁹ *Id.* at 46.

³¹⁰ *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971).

³¹¹ Denning & Bothma, *supra* note 38, at 104 & nn.43–44 (collecting authority).

³¹² See Siegel, *supra* note 273, at 322–23 (discussing lower court confusion).

³¹³ *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–403 (1987).

³¹⁴ *Id.* at 392–93.

³¹⁵ *Id.*

³¹⁶ *Id.* at 393.

³¹⁷ *Id.* at 394–95.

³¹⁸ *Id.* at 399.

³¹⁹ *Clarke*, 479 U.S. at 399–400.

Comptroller's rulings."³²⁰ In other words, one might say that the brokers looked to be good private attorneys general.

In note 16 of his opinion, Justice White offered observations on the zone test that have provided grist for a great deal of later debate.³²¹ After acknowledging that *ADAPSO* had declared the zone test applicable to both statutory and constitutional claims, he expressed doubt "that it is possible to formulate a single inquiry that governs" all of them.³²² He conceded that the Court had applied the zone test to a Commerce Clause claim in *Boston Stock Exchange v. State Tax Comm'n*, and he added that the Court had reached an "undoubtedly correct" result regarding the plaintiffs' standing.³²³ The Court's application of the zone test to that particular constitutional claim, however, "should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply."³²⁴

Some courts and commentators, especially Justice Scalia, have read this passage as requiring a stricter zone for constitutional claims.³²⁵ This reading ignores that Justice White opposed creation of the zone test in *ADAPSO*,³²⁶ authored the Court's cursory application of it in *Boston Stock Exchange*,³²⁷ and expressly reaffirmed the correctness of this cursory application in *Clarke*.³²⁸ It also bears noting that the two precedents that Justice White cited to support the possibility that the zone test should be stricter in some non-APA contexts both addressed whether to recognize implied statutory causes of action against non-governmental defendants.³²⁹ Bearing these points in mind, it is implausible to think that the author of *Boston Stock Exchange* was burying in a footnote the thesis that a "generous" APA-style zone should never apply to constitutional claims.

Another notable aspect of *Clarke*'s note 16 is that it presupposed a shift toward treating the zone test as governing whether a plaintiff has a cause of action rather than mere standing.³³⁰ Recall that in *ADAPSO*, Justice Douglas had characterized standing as a preliminary issue governing a plaintiff's right to commence a suit, whereas the issue of whether a plaintiff has a "legal interest"

³²⁰ *Id.* at 403.

³²¹ *Id.* at 400 n.16.

³²² *Id.*

³²³ *Id.* (citing *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320–21 n.3 (1977)).

³²⁴ *Id.* (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970)).

³²⁵ *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting); cf. *Denning & Bothma*, *supra* note 38, at 123 ("Justice Scalia likely overread the *Clarke* footnote.").

³²⁶ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 159, 167–68 (1970) (Brennan, J., dissenting, joined by White, J.).

³²⁷ *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977).

³²⁸ *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

³²⁹ *Id.* (citing *Cort v. Ash*, 422 U.S. 66 (1975); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979)).

³³⁰ *Nelson*, *supra* note 10, at 781–83.

(and thus a cause of action) goes to the “merits.”³³¹ This distinction left the possibility that a plaintiff might satisfy the zone test, demonstrate that an agency had violated the law, but nonetheless fail to obtain any relief due to lack of a protected “legal interest.”³³² Soon after *ADAPSO*, some courts began to ignore this fine distinction and instead to treat a plaintiff’s satisfaction of the zone test as equivalent to demonstrating that the plaintiff has a right to relief so long as they can prove a legal violation.³³³ As Professor Nelson has explained, note 16 presupposed the correctness of this shift by comparing the APA’s zone test to the Court’s stricter approach to recognizing implied statutory causes of action, thus suggesting that the zone test, too, speaks to whether a plaintiff has a cause of action.³³⁴ This understanding has hardened into a settled judicial view that plaintiffs who satisfy the requirements of constitutional standing and the zone test have a cause of action that entitles them to relief under the APA if they can prove they have been harmed by a legal violation.³³⁵

3. Justice Scalia’s Push for a Stricter Zone for Constitutional Claims

The next discussion at the Supreme Court regarding application of the zone test to a constitutional claim arrived in Justice Scalia’s dissent in 1992’s *Wyoming v. Oklahoma*.³³⁶ Wyoming sued Oklahoma for violating the Commerce Clause by adopting a law that required coal-fired plants in the latter state to obtain ten percent of their coal from Oklahoma mines.³³⁷ The majority opinion was authored by none other than Justice White, who concluded that Wyoming had standing because the Oklahoma statute had reduced the sales of Wyoming coal, which cut Wyoming’s severance tax revenue.³³⁸ At no point did Justice White refer to the zone test.³³⁹

Justice Scalia’s dissent, joined by Chief Justice Rehnquist and Justice Thomas, did.³⁴⁰ He cited Justice White’s *Boston Stock Exchange* opinion for the proposition that the zone test is a generally applicable rule of prudential

³³¹ *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

³³² Nelson, *supra* note 10, at 763–64 (quoting *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 158).

³³³ *See id.* at 777–81 (canvassing authority).

³³⁴ *See id.* at 783 (“[T]he premise of the comparison was that *Data Processing* (like *Cort*) was about rights of action.”).

³³⁵ *Id.* at 801–02.

³³⁶ *Wyoming v. Oklahoma*, 502 U.S. 437, 469–73 (1992) (Scalia, J., dissenting).

³³⁷ *Id.* at 440–41 (majority opinion).

³³⁸ *Id.* at 448.

³³⁹ *Cf. id.* at 473 (Scalia, J., dissenting) (criticizing majority for “abandoning the zone-of-interests test”).

³⁴⁰ *Id.* at 469–73.

standing,³⁴¹ and then, with the help of selective quotation, characterized *Clarke*'s note 16 as requiring a stricter zone for constitutional claims.³⁴² Applying this stricter approach, he concluded that Wyoming's interest in collecting taxes fell outside the zone established by the dormant Commerce Clause.³⁴³ Justice Scalia added that the Court, by declining to deploy the zone test, had "abandon[ed] our chosen means of giving expression, in the field of constitutional litigation, to the principle that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.'"³⁴⁴ In other words, the Court had unwisely opened the floodgates to more claims invoking a nonstatutory cause of action to enforce the Constitution.

4. *A Generous Zone for APA Claims and a Variable Zone for Other Contexts*

Examination of the Court's significant applications of the zone test since *Clarke* reveals two themes. First, with one exception,³⁴⁵ the Court has in APA cases stuck with *Clarke*'s extremely generous characterization of the standard as a mechanism for excluding only especially inappropriate plaintiffs. Second, the Court has clarified that the zone test is not limited to the APA and instead should be regarded as a generally applicable tool for construing the scope of legislatively created causes of action.³⁴⁶ In non-APA contexts, however, the breadth of the zone may vary.

Both themes appear in 1997's *Bennett v. Spear*, in which Justice Scalia, writing for a unanimous Court, held that ranchers could bring an APA claim to enforce the Endangered Species Act (ESA) to try to take water away from endangered fish.³⁴⁷ The ranchers contended that the Fish and Wildlife Service had, in preparing plans to protect the fish, violated an ESA provision that

³⁴¹ *Id.* at 469 (citing *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320–21 n.3 (1977)).

³⁴² *Wyoming*, 502 U.S. at 469 (Scalia, J., dissenting) ("[W]e have indicated that [the zone test] is *more* strictly applied when a plaintiff is proceeding under a 'constitutional . . . provision' instead of the 'generous review provisions of the APA.'" (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987))).

³⁴³ *Id.* at 470–71.

³⁴⁴ *Id.* at 473 (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)).

³⁴⁵ *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 519 (1991) (holding that challenge brought by postal workers union to Postal Service's decision to suspend its statutory monopoly of delivery to foreign postal services did not satisfy the zone test).

³⁴⁶ See, e.g., *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (characterizing the zone test as evolving into a generally applicable prudential standing requirement).

³⁴⁷ See generally *id.*

requires agencies to “use the best scientific and commercial data available.”³⁴⁸ The ranchers’ claim satisfied the zone test as it served this provision’s purpose of avoiding “needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”³⁴⁹ Commenting on the scope of the zone test’s applicability, Justice Scalia added that, although the test was first applied to APA cases, later cases had applied it in other contexts and that it should be regarded as a generally applicable requirement of prudential standing.³⁵⁰ He also warned, however, “that the breadth of the zone of interests varies according to the provisions of law at issue,” and that the APA’s generous approach does not always apply.³⁵¹

Another example of the Court’s embrace of the generous *Clarke* approach in the APA context came in 2012’s *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, in which a landowner challenged the Secretary of Interior’s acquisition of land for an Indian tribe to develop a casino.³⁵² Patchak contended that the Secretary had exceeded his statutory authority under section 465 of the Indian Reorganization Act (IRA) to acquire property “for the purpose of providing land for Indians.”³⁵³ He also claimed the intended use of the land would cause him a mix of environmental, aesthetic, and economic harms.³⁵⁴ The government and tribe responded that Patchak’s claimed interests fell outside the zone protected by the IRA, which “focuses on land acquisition, whereas Patchak’s interests relate to the land’s use as a casino.”³⁵⁵ Rejecting this argument, the Supreme Court reiterated that the zone test “is not meant to be especially demanding,” nor does it require any “indication of congressional purpose to benefit the would-be plaintiff.”³⁵⁶ Land acquisition and land use concerns are intertwined. Neighbors such as Patchak “are reasonable—indeed, predictable—challengers of the Secretary’s decisions,” and “[t]heir interests, whether economic, environmental, or aesthetic, come within [section] 465’s regulatory ambit.”³⁵⁷

³⁴⁸ *Id.* at 176 (quoting 16 U.S.C. § 1536(a)(2)).

³⁴⁹ *Id.* at 176–77.

³⁵⁰ *Id.* at 163 (collecting authority).

³⁵¹ *Id.*

³⁵² *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 211–12 (2012).

³⁵³ *Id.*; see also 25 U.S.C. § 465 (2012).

³⁵⁴ *Patchak*, 567 U.S. at 224–25.

³⁵⁵ *Id.* at 225.

³⁵⁶ *Id.* at 225 (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987)).

³⁵⁷ *Id.* at 227–28.

5. *Lexmark Holds that the Zone Test Is Not a Prudential Standing Doctrine*

Our last stop in our tour of zone-test precedents, 2014's *Lexmark International, Inc. v. Static Control Components, Inc.*, marked a significant recharacterization of the test's nature and source.³⁵⁸ Rather than involving a constitutional claim or a statutory challenge to agency action, this case instead required the Court to determine the reach of a private cause of action that Congress created for enforcement of the Lanham Act, which authorizes suit by "'any person who believes that he or she is likely to be damaged' by a defendant's false advertising."³⁵⁹ The plaintiff, Static Control, argued that the Court should use the zone test to determine that it had prudential standing to bring its suit.³⁶⁰

Justice Scalia, writing for a unanimous Court, conceded that the Court had in the past characterized the zone test, as well as limits on third-party standing and a bar on generalized grievances, as three core principles of prudential standing.³⁶¹ This list was, however, outdated. First, the very notion that federal courts may refuse to hear cases based on their views of "prudence" is suspect given their "virtually unflagging" duty to hear and decide cases falling within their jurisdiction.³⁶² Second, the Court had already recharacterized the bar on generalized grievances as a matter of constitutional rather than mere prudential standing.³⁶³ With this groundwork laid, Justice Scalia explained that the zone test ought not be regarded as a doctrine of prudential standing, either.³⁶⁴ Instead, the zone test is a default rule for construing statutory causes of action to determine whether a plaintiff "falls within the class . . . whom Congress has authorized to sue."³⁶⁵ Courts can neither "recognize a cause of action that Congress has denied," nor "limit a cause of action that Congress has created merely because 'prudence' dictates."³⁶⁶

A moment's reflection reveals a deep irony in characterizing the zone test as a function of congressional intent given that it began life as Justice Douglas's rewrite of the APA.³⁶⁷ Again, in 1946, Congress expected that persons who had suffered "legal wrong" or were eligible to use a special statutory review

³⁵⁸ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014).

³⁵⁹ *Id.* at 129 (quoting 15 U.S.C. § 1125(a)(1)).

³⁶⁰ *Id.* at 127.

³⁶¹ *Id.* at 126.

³⁶² *Id.* (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

³⁶³ *Id.* at 127 n.3.

³⁶⁴ *Lexmark Int'l, Inc.*, 572 U.S. at 127–28.

³⁶⁵ *Id.* at 128.

³⁶⁶ *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

³⁶⁷ See *supra* text accompanying notes 273–81, 283–85 (discussing Justice Douglas's rewrite of § 702 of the APA in *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

proceeding could make use of the APA's cause of action.³⁶⁸ It did not intend to extend this cause of action to any person who could show that their claim arguably would protect interests served by some provision of federal law. Notwithstanding *Lexmark*, the extreme breadth of the APA's statutory cause of action reflects the Supreme Court's policy judgment, not the policy judgment of the 1946 Congress.

V. AN APA-STYLE ZONE FOR A NONSTATUTORY CAUSE OF ACTION FOR INJUNCTIVE RELIEF FOR CONSTITUTIONAL CLAIMS

Given the evolution of legal doctrine discussed in Parts III and IV, it is little wonder that judges in the cases discussed in Part II reached contradictory conclusions regarding whether plaintiffs could invoke a nonstatutory cause of action for injunctive relief to enforce structural constitutional provisions. As Part III discussed, although the Court has frequently indicated that injunctive relief is generally available to enforce constitutional rights,³⁶⁹ it has never provided a clear framework for identifying precisely which constitutional provisions grant legal rights and who has a cause of action to enforce them.³⁷⁰ The zone test (at some breadth) might seem a good candidate for filling this gap.³⁷¹ Part IV, however, showed that current precedent does not take us quite so far. When Justice Douglas created the zone test in *ADAPSO*, he characterized it as providing a prudential limit on standing, but he also emphasized that standing involves a threshold determination of whether a plaintiff has a right to commence a lawsuit that is distinct from the merits issue of whether a plaintiff has a cause of action.³⁷² In the statutory context, this tenuous distinction faded, and the zone test became a tool for determining whether a plaintiff can invoke a statutory cause of action.³⁷³ The same drift did not occur in the constitutional context for two reasons. First, the Supreme Court has expressly applied the zone test to a constitutional claim one time in 1977 in a short footnote.³⁷⁴ Second, and more definitively, the Court, after suggesting that the entire category of prudential limits on standing may be illegitimate, explained that the zone test is not a free-floating prudential standing doctrine but instead a tool for interpreting

³⁶⁸ See *supra* Part IV.A (discussing original understanding of section 10(a) of the APA (codified at 5 U.S.C. § 702)).

³⁶⁹ See Vladeck, *supra* note 11, at 1876–77 (explaining that federal courts have regarded the availability of injunctive relief as necessary to vindicate federal rights).

³⁷⁰ See Nelson, *supra* note 10, at 716 (“The Supreme Court never fully specified the criteria for determining whether a particular statutory or constitutional provision gave ‘legal rights’ to particular people.”).

³⁷¹ See generally *supra* Part II (discussing recent litigation vigorously disputing the role of the zone test in cause-of-action and prudential standing analysis).

³⁷² *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 150, 153, 158.

³⁷³ Nelson, *supra* note 10, at 707–08.

³⁷⁴ *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320 n.3 (1977).

statutory causes of action.³⁷⁵ This characterization left the zone test with no point of contact with *nonstatutory* causes of action.

Nonetheless, the impulse to use the zone test—especially in its more “generous” APA form—to determine which plaintiffs can invoke a nonstatutory cause of action for injunctive relief for constitutional claims is a good one, and doctrine should shift accordingly. Adoption of this zone test would respect the outcomes of the Court’s precedents recognizing when plaintiffs can invoke this form of nonstatutory cause of action—i.e., retroactive application of the zone test would leave the outcomes of the Court’s precedents undisturbed, and it would respect the Court’s underlying policy judgment that such review should generally be available. Going forward, adoption of an APA-style zone test would provide a clear, easily administrable framework for resolving cases such as those addressed in Part II. Application of the zone test to these cases would, of course, quickly lead to the conclusion that the plaintiffs could indeed invoke a nonstatutory cause of action to enforce the Emoluments Clauses, Appropriations Clause, and congressional subpoena power.

A. Preliminary Observations About Federal Court Authority to “Raise Up” Nonstatutory Causes of Action for Injunctive Relief

Before making the case that courts should expressly adopt an APA-style zone test for the purpose of determining the availability of a nonstatutory cause of action for injunctive relief for constitutional claims, it is worth pausing to consider their authority to do so in light of the Supreme Court’s approach to recognizing nonstatutory causes of action generally. In the last several decades, the Supreme Court has reiterated that federal courts, lacking common law power, have no business “raising up” new causes of action.³⁷⁶ Some of the judges in the cases discussed in Part II have seized on this hostility to help justify rejecting “new” causes of action for injunctive enforcement of structural constitutional provisions.³⁷⁷ The D.C. Circuit stressed this point in holding that the House Judiciary Committee lacked a cause of action to enforce its subpoena in court against a former White House Counsel.³⁷⁸

The underlying premise of this argument—that the Supreme Court has ceded control to Congress to determine the availability of causes of action to enforce statutory and constitutional provisions—is wrong. Instead, the Court has contracted and expanded the availability of judge-made nonstatutory review

³⁷⁵ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28, 127 n.3 (2014).

³⁷⁶ *Hernandez v. Mesa*, 140 S. Ct. 735, 741–42 (2020) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

³⁷⁷ See *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020) (judgment vacated Oct. 15, 2020).

³⁷⁸ *Id.*

according to its evolving policy judgments. In the middle of the twentieth century, the governing doctrine recognized that courts have general authority to recognize “implied” rights of action by determining that a statute or constitutional provision grants “legal rights,” including a remedial right to seek judicial relief.³⁷⁹ Case law instructed courts to find implied causes of action in statutes and to supply remedies as necessary to fulfill Congress’s purposes.³⁸⁰ The case law governing detection in constitutional provisions of legal rights that can support nonstatutory review was undeveloped as the practice was still quite new.³⁸¹

This general model for determining the availability of a nonstatutory cause of action came apart under the pressure of a series of Supreme Court policy judgments. In two contexts, the Court used the cause-of-action requirement to ratchet down the availability of judicial review. First, in part due to the increasing pervasiveness of federal law, the Court became more hesitant to recognize the existence of implied statutory causes of action that might be brought against state officials or private parties.³⁸² Accordingly, starting in the mid-1970s, the Court tightened its approach to recognizing implied statutory causes of action.³⁸³ Second, just a few years later, the Court became hostile to damages claims absent express congressional authorization, and it began consistently to reject requests to expand the availability of the *Bivens* cause of action.³⁸⁴ It is in these domains that the Court’s condemnations of its earlier practice of “raising up” new causes of action appear.

In two other contexts, the Court has, at least as a functional matter, radically expanded the availability of nonstatutory review. One of these contexts involves constitutional claims for injunctive relief.³⁸⁵ In the earlier part of the twentieth

³⁷⁹ See *supra* Part III.B–C (discussing judicial practice of recognizing causes of action to enforce legal rights that courts detect in statutes and constitutional provisions).

³⁸⁰ See *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (“[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”).

³⁸¹ See *supra* Part III.C (discussing evolution of law recognizing the Constitution as source of affirmative causes of action).

³⁸² See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (explaining that the Supreme Court had abandoned the “*ancien regime*” under which it implied causes of action to effectuate congressional purpose and that Congress, not the federal courts, must create new cause of action).

³⁸³ *Cort v. Ash*, 422 U.S. 66, 78 (1975); see also *Alexander*, 532 U.S. at 287 (explaining the Court had “sworn off the habit of venturing beyond Congress’s intent”).

³⁸⁴ *Hernandez v. Mesa*, 140 S. Ct. 735, 741–43 (2020) (“[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.”).

³⁸⁵ On the general availability of such relief, see, for example, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (rejecting government’s contention that injunctive relief was not available to enforce Appointments Clause and separation-of-powers claims against federal officials); *id.* (“[E]quitable relief ‘has long been recognized as the proper means for preventing entities from acting unconstitutionally.’” (quoting *Corr.*

century, the Court was just beginning to recognize that some constitutional provisions can provide the sort of “legal rights” that can, if infringed, support a nonstatutory cause of action.³⁸⁶ As the twentieth century marched on, the Court expanded the availability of judicial review for constitutional claims by, in effect, tacitly adopting a default rule that constitutional violations infringe on legal rights that can be enforced via a nonstatutory claim for injunctive relief.³⁸⁷ We thus flipped from a situation in which plaintiffs could not invoke an affirmative cause of action to enforce any constitutional provisions to one in which plaintiffs could seek equitable relief to enforce at least most of them.

The other context in which the Court expanded the availability of a cause of action to seek equitable-style relief involved claims against federal agencies brought pursuant to the APA.³⁸⁸ Recall that, in 1946, invoking the APA’s cause of action pursuant to § 702 required a plaintiff to demonstrate either a “legal wrong” or to invoke a special statutory review proceeding created by Congress for the purpose.³⁸⁹ The Court rewrote § 702 to permit plaintiffs to invoke the APA’s cause of action so long as they satisfy an extremely “generous” version of the zone test that Justice Douglas invented in *ADAPSO*.³⁹⁰ One might quibble that this move expanded the availability of *statutory* review because § 702 is, of course, a statutory provision. Section 702 as now applied, however, plainly reflects the Court’s policy judgment regarding the availability of judicial review to challenge federal agency action, not the judgment of Congress in 1946.

The Court, in short, has *never* left the business of controlling the availability of nonstatutory causes of action. More specifically, it has generally allowed plaintiffs to pursue nonstatutory review of constitutional claims for injunctive relief.³⁹¹

Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)); and *id.* (“[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

³⁸⁶ See *supra* Part III.C (discussing evolution of law recognizing the Constitution as source of affirmative causes of action).

³⁸⁷ See *supra* Part III.D (discussing Supreme Court’s general assumption of the existence of a cause of action for injunctive relief to remedy constitutional violations).

³⁸⁸ See Magill, *supra* note 265, at 1162–63 (explaining that in *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), the Supreme Court liberalized standing and the availability of relief under the APA by reading the zone test into 5 U.S.C. § 702). But see Nelson, *supra* note 10, at 706–10 (contending that this expansion of the availability of the right of action associated with the APA rests on a misreading of *ADAPSO* later adopted by lower courts).

³⁸⁹ See *supra* Part IV.A (discussing original understanding of section 10(a) of the APA).

³⁹⁰ See *supra* Part IV.B–C (discussing evolution of the zone test).

³⁹¹ See *supra* notes 195–202, 231–35 and accompanying text (discussing Supreme Court opinions permitting parties to obtain nonstatutory review of constitutional claims seeking injunctive relief).

B. An APA-Style Zone Test Could Fit Past Precedents and Guide Future Cases

There are, strictly speaking, an unlimited number of approaches one might take to determining which constitutional provisions create legal rights that can support a nonstatutory cause of action for injunctive relief. Along these lines, one might, as Professor Huq has, make the case that the Supreme Court's general approach of permitting individuals to press structural constitutional claims is flat-out wrong.³⁹² The goal of the current analysis is much more limited. It takes as given that the Supreme Court has reached correct outcomes in its precedents determining the availability of nonstatutory review. With this premise in hand, it seeks to identify a legal framework that respects these outcomes (as well as their underlying doctrinal and policy impulses) and offers a useful guide for resolving future disputes over the availability of nonstatutory review. More concretely, it seeks to resolve the cause-of-action puzzles raised by recent, high-profile litigation over nonstatutory review for claims based on the Emoluments Clauses, Appropriations Clause, and congressional subpoena power.³⁹³

Given these ground rules, some potential frameworks that might sound initially plausible are straightforward to exclude. For instance, in the statutory context, the Court has for several decades insisted that federal courts lack power to recognize implied statutory causes of action in the absence of legislative intent to create one.³⁹⁴ This approach to statutory causes of action obviously cannot transpose to constitutional claims without radical change to long-accepted doctrine because the framers and ratifiers of the Constitution did not regard it as a source of affirmative causes of action.³⁹⁵

Another possibility, pressed by Judge Wilkinson in his dissent in *In re Trump*, would be to require that a constitutional provision contain rights-granting language as a prerequisite to recognizing that it is enforceable through a nonstatutory cause of action.³⁹⁶ In Judge Wilkinson's view, the lack of such language in the Emoluments Clauses indicates that they are not enforceable in this way.³⁹⁷ This approach, however, plainly contradicts Supreme Court

³⁹² See generally Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013). But see generally Barnett, *supra* note 24 (concluding that regulated parties have both Article III standing and a cause of action to assert structural challenges).

³⁹³ See generally *supra* Part II (discussing judicial disputes over the availability of nonstatutory review in this litigation).

³⁹⁴ *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

³⁹⁵ See *supra* Part III.C (discussing jurisprudential shift toward regarding the Constitution as source of affirmative causes of action).

³⁹⁶ *In re Trump*, 958 F.3d 274, 296 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (noting that the Emoluments Clauses do not "contain any rights-conferring language"), *vacated as moot sub nom.* *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

³⁹⁷ *Id.*

precedents that have, with minimal or no discussion, accepted injunctive enforcement via a nonstatutory cause of action of structural provisions of the Constitution, such as claims based on the Commerce Clause, separation of powers, and federalism.³⁹⁸

On the other side of the spectrum, one might take the view that a plaintiff satisfies the requirements for a nonstatutory cause of action to seek injunctive relief for constitutional claims so long as they satisfy the requirements of constitutional standing.³⁹⁹ At bottom, the question of whether a plaintiff has a nonstatutory cause of action to enforce a particular constitutional provision largely boils down to whether courts accept that the plaintiff is the type of person who should be entitled to judicial relief if they prove a violation of that constitutional provision. Perhaps constitutional standing, as it has developed in the years since *ADAPSO*, sufficiently performs this task of limiting which plaintiffs can sue insofar as it bars generalized grievances, insists on particularized injuries, etc.⁴⁰⁰

Although this approach may have much to recommend it, its adoption would be inconsistent with the result of *Armstrong v. Exceptional Child Center, Inc.*, in which the respondents had standing but lacked a cause of action.⁴⁰¹ The respondent medical provider in *Armstrong* complained that the state of Idaho was violating federal law by paying too little for Medicaid services and thereby violating the Supremacy Clause, which binds Idaho to follow federal law.⁴⁰² Obviously, this purported violation was sufficient to satisfy the injury-causation-redressability requirements of constitutional standing. The Court nonetheless ruled that the medical provider lacked an implied cause of action under the Supremacy Clause because it does not grant any legal rights to anyone.⁴⁰³

Either of two forms of the zone test could accommodate both the Court's general practice of permitting nonstatutory causes of action for injunctive relief for constitutional claims and a carve-out for *Armstrong*-style situations.⁴⁰⁴ One of these possibilities is the "generous" APA-style zone test. As first formulated, this test merely requires a plaintiff to demonstrate that their claim would protect

³⁹⁸ See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (rejecting argument that petitioners had no implied right of action to challenge violations of the Appointments Clause and separation-of-powers principles).

³⁹⁹ See Denning & Bothma, *supra* note 38, at 135–37 (making case that post-*ADAPSO* constitutional standing and third-party standing doctrines are "more than adequate to safeguard separation of powers principles against imprudent exercises of judicial power").

⁴⁰⁰ See *id.* at 136 n.266 (discussing post-*ADAPSO* tightening of standing doctrine).

⁴⁰¹ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–26 (2015).

⁴⁰² *Id.* at 323–24.

⁴⁰³ *Id.* at 326–27.

⁴⁰⁴ Cf. Barnett, *supra* note 24, at 701–02 (noting that the framework for "inferring a private cause of action for equitable relief under the Constitution is far from settled" but assuming applicability of the zone test).

interests “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee” that the plaintiff claims has been violated.⁴⁰⁵ In later expositions, the Supreme Court has explained that the test does not demand any “indication of congressional purpose to benefit the would-be plaintiff.”⁴⁰⁶ Excluding intent to benefit the plaintiff from the zone test poses the risk of draining it of meaning insofar as one would expect that *any* successful claim to enforce a law would further interests served by that law. *Clarke*, however, gave the zone test a bit of bite by explaining that it excludes a claim where the interests it implicates are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”⁴⁰⁷ This formulation suggests a strong presumption that a plaintiff can serve as a private attorney general to enforce a law unless there is some very good reason to block the plaintiff from doing so.⁴⁰⁸ The “generous” APA-style zone test is, in short, a backstop to keep out exceptionally inappropriate plaintiffs.

Alternatively, one might, as Justice Scalia would have preferred, apply a stricter zone test to constitutional claims.⁴⁰⁹ Of course, this suggestion raises the question: How much stricter? The most obvious possibility, which we see reflected in some judicial opinions, is that a stricter zone test might insist that a plaintiff demonstrate that a constitutional provision was designed to specially benefit a class to which the plaintiff belongs.⁴¹⁰

Given the malleability of the concepts involved, both zone tests could stretch to accommodate the outcomes of Supreme Court precedents allowing nonstatutory review for injunctive relief of constitutional claims. Both tests, for instance, should yield the same results where constitutional provisions clearly implicate individual freedoms. As for structural provisions, the Court’s discussion in *Bond v. United States* demonstrates how easy it is to characterize structural provisions as benefiting everyone—as it turns out, we all enjoy more

⁴⁰⁵ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

⁴⁰⁶ *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987)).

⁴⁰⁷ *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

⁴⁰⁸ *Cf. id.* at 403 (observing that competitors can be “very reasonable candidates” to serve as plaintiffs to challenge agency disregard of law and that Congress has “sound reason” to rely on them for this function).

⁴⁰⁹ *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (discussed *supra* at Part IV.C.3).

⁴¹⁰ *See, e.g., Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 113–14 (2d Cir. 2020) (Menashi, J., dissenting from denial of rehearing en banc) (contending that the Supreme Court has instructed that the zone test for constitutional claims considers “whether the plaintiffs are within ‘the class for whose *especial* benefit’ the provision was adopted” (selectively quoting *Clarke*, 479 U.S. at 400 n.16)), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

freedom thanks to federalism and separation of powers.⁴¹¹ Insofar as structural constitutional provisions benefit everyone, any plaintiff seeking to enforce one should generally satisfy either a generous or strict version of the zone test.⁴¹²

Paradoxically, *Armstrong v. Exceptional Child Center, Inc.*, even though it rejected a cause of action for nonstatutory review,⁴¹³ suggests a reason to prefer the more generous APA-style zone test over a stricter one. With the right will, either zone test can accommodate *Armstrong*'s refusal to permit the plaintiff to seek equitable enforcement of the Supremacy Clause. One can square *Armstrong*'s outcome with a strict zone test by the simple expedient of following the Supreme Court's lead and rejecting the notion that the Supremacy Clause grants rights to anyone.⁴¹⁴ On this view, no plaintiff could satisfy the strict zone's requirement of demonstrating that they belong to a class whom the Supremacy Clause was designed to benefit. One can square *Armstrong*'s outcome with a generous zone test that excludes only exceptionally inappropriate plaintiffs by recognizing that permitting plaintiffs to enforce the Supremacy Clause would cause intolerable damage to other legal and constitutional values. More specifically, the Court in *Armstrong* was concerned that permitting this cause of action would enable excessive private enforcement of federal law and deprive Congress of its power to control this method of enforcement.⁴¹⁵

The latter account is better because it is more direct and leaves less room for dubious manipulation. On its face, *Armstrong*'s insistence that the Supremacy Clause does not grant any legal rights to anyone is perfectly plausible.⁴¹⁶ Note, however, how simple it would have been for the Court, had it wished to do so, to follow the generous approach of *Bond* and instead characterize the Supremacy Clause as granting legal rights to everyone.⁴¹⁷ It could, for instance, have explained that the supremacy of federal law protects core federalism values, federalism protects liberty as explained in *Bond*,⁴¹⁸ and the Supremacy Clause therefore must protect everyone's liberty, too. In short, a Supreme Court that chooses to characterize federalism as creating individual rights enforceable in court can find ways to characterize just about any other constitutional text or principle as creating such rights. This point suggests that

⁴¹¹ *Bond v. United States*, 564 U.S. 211, 222–23 (2011) (discussed *supra* text accompanying notes 219–30).

⁴¹² See Barnett, *supra* note 24, at 703 (explaining that regulated parties' challenges based on structural constitutional provisions should satisfy either generous or strict versions of the zone test).

⁴¹³ *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324–26 (2015).

⁴¹⁴ *Id.* at 324–25.

⁴¹⁵ *Id.* at 325–26.

⁴¹⁶ *Id.* at 324–25.

⁴¹⁷ See *Bond v. United States*, 564 U.S. 211, 222 (2011) (explaining that federalism protects individuals from “arbitrary power”).

⁴¹⁸ *Id.* at 221–22.

the driving force behind the outcome in *Armstrong* was not textual or historical analysis of whether the Supremacy Clause grants rights. Rather, the driving force was that the Court determined that the Supremacy Clause should not be interpreted as granting a cause of action because doing so would lead to bad consequences.

Ping-pong in the Emoluments Clause litigation brought by hospitality plaintiffs in the Second Circuit nicely illustrates the directness of a generous zone test as compared to the manipulability of a stricter one that insists that plaintiffs must specially benefit from the constitutional provisions they seek to enforce. The district court concluded that the plaintiffs fell outside a stricter zone because the Emoluments Clauses were intended to protect against corruption rather than to protect entities like the plaintiffs from competition.⁴¹⁹ A Second Circuit panel, relying on an APA-style zone, observed that the Supreme Court has consistently held that competitors satisfy the zone test even where they sue to enforce a law that “was not motivated by an intention to protect entities such as plaintiffs from competition.”⁴²⁰ It therefore did not matter that the Emoluments Clauses were not written in the late eighteenth century to protect twenty-first century hotels and restaurants from presidential competition.⁴²¹ Dissenting from a denial of rehearing en banc, Judge Menashi insisted that the zone test for constitutional claims must check “whether the plaintiffs are within ‘the class for whose *especial* benefit’ the provision was adopted.”⁴²² He also signaled that the district court had correctly applied this stricter zone test to exclude the hospitality plaintiffs as they obviously were not part of a special class of Emoluments Clause beneficiaries.⁴²³

No doubt it is true that one could scour the records of the ratifying conventions and find no reference to the Emoluments Clauses protecting hotels and restaurants. These constitutional provisions do, however, protect against corruption, and hotel and restaurant owners presumably have as much right as anyone else to be free of such misgovernance—as some judges have recognized in applying the zone test, and others have not.⁴²⁴ Such disagreement highlights

⁴¹⁹ *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017), *vacated*, 953 F.3d 178, 184 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁴²⁰ *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 154 (2d Cir. 2019) (canvassing Supreme Court authority), *republished as amended*, 953 F.3d 178 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁴²¹ *Id.* at 158.

⁴²² *Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 113–14 (2d Cir. 2020) (Menashi, J., dissenting from denial of rehearing en banc) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400, n.16 (1987)), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁴²³ *Id.*

⁴²⁴ *See* *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 755–56 (D. Md. 2018) (holding that plaintiffs making Emoluments Clause claims satisfied the zone test as these constitutional provisions “clearly were and are meant to protect all Americans”), *rev’d sub*

that determining whether a plaintiff belongs to a class that a structural constitutional provision was intended to benefit poses a problem that often lacks a clear answer and leaves space for judicial preferences and ideology to affect outcomes. One reason to prefer the APA's generous zone test is that, properly understood as a very weak backstop, it avoids this problem.

Circling back to the litigation discussed in Part II, the proposed approach provides simple and direct answers to whether the plaintiffs, assuming they satisfied other threshold requirements such as constitutional standing, qualified to invoke a nonstatutory cause of action for injunctive relief to enforce the Emoluments Clauses, the Appropriations Clause, and the congressional subpoena power.⁴²⁵ Their claims, if valid and successful, would, by hypothesis, serve purposes underlying these structural provisions. Unlike the case in *Armstrong*, there is no obvious countervailing constitutional value suggesting that it would be wise to block their claims.⁴²⁶ Therefore, applying a generous APA-style zone test, these plaintiffs each should have been able to invoke a nonstatutory cause of action for injunctive relief.

VI. CONCLUSION

Over the course of the twentieth century, the Supreme Court began treating the Constitution as a source of legal rights that, if infringed, can support a nonstatutory cause of action for equitable relief.⁴²⁷ The Court has never provided a clear framework for determining precisely which constitutional provisions create such rights or which plaintiffs can invoke them.⁴²⁸ Until recently, this vagueness has not presented much of a practical problem. The Court has, with little or no discussion, allowed plaintiffs to invoke this nonstatutory cause of action, including plaintiffs who have based their claims

nom. In re Trump, 928 F.3d 360 (4th Cir. 2019), *rev'd en banc*, 958 F.3d 274 (4th Cir. 2020), *vacated as moot sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.); *cf. Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 187–88 (S.D.N.Y. 2017) (holding that Emoluments Clauses protect against corruption but rejecting relevance of this purpose to hospitality plaintiffs' claim), *vacated*, 953 F.3d 178, 184 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (mem.).

⁴²⁵ See *supra* Part II (discussing recent disputes over the availability of a nonstatutory cause of action for injunctive enforcement of structural constitutional provisions).

⁴²⁶ See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325–26 (2015) (discussing negative consequences of permitting plaintiffs to proceed with cause of action to enforce Supremacy Clause); see also *supra* text accompanying notes 245–48 (discussing this aspect of *Armstrong*).

⁴²⁷ See *supra* Part III.C (discussing recognition of the Constitution as a directly enforceable source of rights).

⁴²⁸ See Nelson, *supra* note 10, at 716 (“The Supreme Court never fully specified the criteria for determining whether a particular statutory or constitutional provision gave ‘legal rights’ to particular people.”).

on “structural” constitutional provisions, such as those bearing on separation of powers and federalism.⁴²⁹

This understanding has come under pressure in recent years. One source of pressure is 2015’s *Armstrong v. Exceptional Child Ctr., Inc.*, in which the Court emphasized that judicial power to block illegal executive action via injunctive relief is rooted in historical practices of the courts of equity.⁴³⁰ One purported element of this historical practice has been that equitable relief is available only to redress injuries to legally cognizable rights.⁴³¹ Further pressure has come from recent, high-profile litigation in which plaintiffs sued Trump administration officials for violations of structural provisions of the Constitution.⁴³² Judges in these cases have clashed over whether plaintiffs must, as a prerequisite to invoking nonstatutory review to obtain injunctive relief, demonstrate that they have suffered injuries to their “legal rights” as well as over whether plaintiffs must satisfy some form of zone test.⁴³³ Confusion on these points is completely understandable given the complex history of nonstatutory review and the tangled evolution of the zone test.

This Article makes the case that courts should use an APA-style zone test to determine whether a plaintiff qualifies to invoke a nonstatutory cause of action for injunctive relief for constitutional claims. The Supreme Court, notwithstanding concerns over “raising up” causes of action, plainly has authority to adopt this approach, which would cohere both with the Court’s generally permissive practice of allowing such claims as well as with the policy judgments underlying this practice. At the same time, this approach would respect limits on nonstatutory review indicated by *Armstrong*. In addition, adopting a generous, APA-style zone test would avoid indeterminate and manipulable inquiries into constitutional purpose that a stricter zone test would encourage.

All of which leads to the conclusion: yes, our hotelier did have a cause of action under the Foreign Emoluments Clause for their suit against President Trump.

⁴²⁹ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

⁴³⁰ *Armstrong*, 575 U.S. at 327.

⁴³¹ *See, e.g., In re Trump*, 958 F.3d 274, 293 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (“In other words, to fall within the equitable jurisdiction of the federal courts, a litigant must demonstrate *both* that he has suffered an injury to some legally protected interest *and* that he cannot obtain adequate redress for that injury at law.”), *vacated as moot sub nom.* *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (mem.).

⁴³² *See generally supra* Part II (discussing this litigation).

⁴³³ *See generally supra* notes 129–34 and accompanying text (summarizing these clashes and citing to representative authority).