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Articles

The Procedural Annihilation of Structural Rights

STEVEN G. GEY*

For several years, the Supreme Court has been systematically erecting obstacles to the litigation of constitutional claims in federal court. Although this trend toward limiting federal court authority affects all types of constitutional claims, including those involving traditional individual constitutional rights, the most serious effect is on what can be called "structural rights." The term "structural rights" describes constitutional provisions that are designed to protect the basic nature of democratic government. These provisions constrain the power of the elected branches of government, preserve citizen autonomy, and otherwise ensure that political winners in the democratic process do not use their power in ways that undermine the democratic structure of government in the long term. The negative effects on structural rights of the Court's recent limitations on judicial authority are important because the usual justification the Court gives for these limitations involves the need for judicial restraint and deference to the elected branches of government. This is essentially a claim that the exercise of judicial authority in these circumstances is antidemocratic. The central thesis of this Article is that judicial restraint in the face of structural rights claims has exactly the opposite characteristic because in a case raising structural rights claims the current government is disempowered from doing certain things precisely to preserve the democratic structure of government. Thus, the Article concludes somewhat paradoxically that courts must be given the authority to enforce structural rights against the violations of those rights by the elected branches not in spite of democracy, but rather because of it.

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INTRODUCTION

In *Hein v. Freedom from Religion Foundation, Inc.*,[1] the Supreme Court limited the ability of taxpayers to challenge government programs financing religious enterprises in violation of the Establishment Clause. On the surface this decision is neither surprising nor unusual. In recent years the Supreme Court has become much more reluctant to entertain challenges to Establishment Clause violations, even when the plaintiff's claims involve classic violations such as government financing of religious enterprises[2] or public school religious exercises.[3] Indeed, since the end of

1. 551 U.S. 587, 597 (2007) (plurality opinion).

2. *See id.*; Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479–80 (1982) (refusing to recognize a taxpayer's standing to challenge the transfer of government property to a religious organization).

3. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004) (rejecting on standing grounds a father's Establishment Clause claim against the use of the phrase "under God" in routine

the Warren Court, the entire concept of taxpayer standing has been reduced to little more than a constitutional curio, which has little practical effect in the real world.[4]

If viewed narrowly as a case dealing with an anachronistic artifact of the Warren Court's liberal Establishment Clause jurisprudence, *Hein* has little significance beyond its holding. In fact, however, *Hein* is part of a much larger pattern of procedural retrenchment by the Supreme Court in cases involving certain kinds of constitutional violations. This pattern of procedural retrenchment has made it much more difficult—and often impossible—to hold the government accountable for violating its constitutional obligations. The pattern began developing during the Burger Court era and has continued through the Rehnquist and now the Roberts Courts.[5] The Court's procedural retrenchment has taken many forms, including restrictions on constitutional standing,[6] the expansion of state immunities under the Eleventh Amendment,[7] the narrowing of judicial authority to issue and maintain injunctions,[8] and the refusal to infer remedial authority to enforce statutes and constitutional provisions.[9]

The theme uniting these disparate phenomena can be summarized by the recently popularized term "judicial minimalism."[10] That is, the notion that the Court should refrain whenever possible from rendering substantive decisions that legally restrict the actions of the political branches of government.[11] There are various justifications for this approach, most of which have to do with the perception that courts

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recitations of the Pledge of Allegiance in his daughter's public school classroom).

4. *See infra* notes 108–17 and accompanying text.

5. The Burger Court produced *Valley Forge*, 454 U.S. 464, and the Rehnquist Court generated *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), decisions that encapsulate the narrow standing doctrine that eventually resulted in the Roberts Court's decision in *Hein*.

6. *See Lujan*, 504 U.S. at 560–61 (describing the narrow constitutional requirements for standing).

7. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57–73 (1996) (reaffirming traditional rules regarding the Eleventh Amendment immunity of states, and holding that Congress cannot override that immunity in a statute enacted under the Commerce Clause).

8. *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992) (lowering the requirement for institutions such as jails to avoid judicial oversight by allowing courts to modify existing structural injunctions upon a simple showing that enforcing the injunction has become "substantially more onerous" or "unworkable because of unforeseen obstacles").

9. *See infra* notes 177–216 and accompanying text.

10. One of the principal proponents of judicial minimalism has been Cass Sunstein. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (describing the theory of "decisional minimalism"). Professor Sunstein's version of judicial minimalism generally asserts that courts should take an incremental approach to adjudicating cases, render decisions that defer to and show extreme respect for the elected branches of government, and display a heightened sensitivity to social and political traditions.

11. *See supra* note 10.

should be only secondary policy actors in the American constitutional system, deferring whenever possible to the decisions of the political branches rather than providing legal or constitutional resolutions of contentious issues.[12]

The premise of this Article is that the Court's recent procedural retrenchment has substantive implications that the Court's own proponents of judicial minimalism do not acknowledge. Specifically, the recent expansion of jurisdictional and remedial limitations on the courts' authority to enforce the Constitution has the effect of eradicating entire categories of what can be termed "structural rights." Structural rights include constitutional provisions that structure the government's interaction with its citizens and limit the power of government in order to prevent governmental overreaching and ensure over the long term the preservation of popular consent to the exercise of political power. These structural rights inhere in the very nature of citizenship in a democracy, and are therefore possessed by every citizen in the country.

The notion that structural rights are a universal aspect of citizenship leads to the conclusion that the government can violate a citizen's rights even when the citizen is not individually targeted by the government action in question. Violations of structural rights can therefore occur in various different contexts, including the executive branch's systematic financing of religious enterprises in *Hein*,[13] government programs collecting information on political dissidents,[14] comprehensive programs of warrantless searches at issue in recent anti-terrorism litigation,[15] voting rights violations,[16] and violations of relatively mundane constitutional provisions intended to ensure governmental independence and the

12. This argument appears in various guises. *See supra* note 10 (judicial minimalism); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977) (arguing that society should avoid at all costs "government by judiciary"); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005) (popular constitutionalism); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000) (claiming that the Constitution should be "taken away from the courts," in favor of populist determinations of constitutional meaning). Although the details of the arguments and the ideological preferences of the authors vary, the authors share the sense that granting to the courts exclusive authority over certain constitutional matters is inherently undemocratic and contrary to the long-term interests of the nation. This increasingly common perception is directly challenged in this Article.

13. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 597 (2007) (plurality opinion) (limiting taxpayer standing to challenge Establishment Clause violations by the executive branch).

14. *See* Laird v. Tatum, 408 U.S. 1, 3 (1972) (denying standing to plaintiffs challenging the United States Army's surveillance and collection of information on domestic political protesters).

15. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 278–96 (2001) (codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C) (authorizing the government to engage in various types of searches without going through the ordinary channels necessary to obtain judicial warrants).

16. *See* Bush v. Vera, 517 U.S. 952, 957–58 (1996) (holding that individuals who live within a state, but outside an illegally gerrymandered district within that state, lack standing to challenge the gerrymander).

dissemination of public information about the government's activities.[17] When the government violates structural rights in these ways, it changes the nature of the government and alters the basic structure of authority that defines a constitutional democracy. Likewise, when the Court limits judicial power to consider an individual citizen's challenge to the government's violations of structural rights, the Court effectively eradicates the structural limitations on the government's power and thus fundamentally, but surreptitiously, restructures the constitutional landscape.

This Article will address the effect the Court's recent procedural retrenchment has had on the enforcement of structural rights. The first Part will address the theory of structural rights generally and discuss their role in defining the nature of the American constitutional democracy. The second Part will catalog the various ways in which the Court has limited constitutional remedies during the last twenty years, with a special focus on the extent to which these limitations have affected structural rights. The third Part will discuss and respond to the Court's justifications for limiting constitutional remedies in the context of claims regarding structural rights. In the end, the Court's basic justification for limiting redress of structural rights violations is that these rights all amount to political questions.[18] Based on this assumption, the Court eschews any judicial oversight and permits dominant political majorities to define the limits of their own power in ways that are directly contrary to the spirit of the American Constitution. The Article concludes by questioning both the Court's justifications and the consequences of renouncing the judicial role in enforcing structural rights.

I. INDIVIDUAL RIGHTS, STRUCTURAL RIGHTS, AND CONSTITUTIONAL REMEDIES

Constitutional rights protect citizens from their government in various ways. The most obvious way is by protecting against unwarranted government action directed at one or more specific individuals.[19] These individual rights are no doubt important because they protect a zone of individual autonomy for citizens. A zone of individual autonomy is

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17. *See* United States v. Richardson, 418 U.S. 166, 178 (1974) (denying standing to plaintiffs seeking to challenge under the Statement and Account Clause Congress's refusal to publish information about the CIA's top-secret "black budget").

18. *See id.* at 179 ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

19. As used in this Article, the term "individual" includes both individuals and gatherings or groups of individuals in the private sector. Thus, the term encompasses political parties, clubs, social groups, and so forth. One of the key distinctions between the terms "individual rights" and "structural rights" is that when the government violates individual rights it targets only a subset of society, whereas when the government violates structural rights it undermines the rights shared by all citizens.

necessary to cultivate the resilient and independent persona of citizenship that is required for a proper democracy to flourish. A society in which individuals are constantly worried about arbitrary (or worse, perniciously targeted) government action against themselves and their property will never benefit from the ongoing, open, and direct critiques of the public order that are the lifeblood of a true democracy. A government that can, without fear of consequences, target individuals for what they say or do—or for that matter can, without fear of consequences, harm individuals for no reason at all—is not a government that accurately can be described as operating under the control of its citizens.

While the benefits that individual rights provide to both government and citizens are obvious, democratic governance can also be undermined by government action that does not immediately single out and harm specific individuals. Thus, another category of rights comes into play when it is necessary to protect against unconstitutional government conduct in order to preserve the very structure of democratic government. This is the category of rights that I will refer to as "structural rights." In some ways the category of structural rights is even more important to the preservation of constitutional democracy than the more familiar category of individual rights. Individual rights protect against isolated acts of government misconduct; structural rights protect against systematic and continuing government misconduct. Individual rights involve an abuse of power; structural rights involve an illegal aggrandizement of power. If we countenance government misconduct within the category of individual rights, then isolated injustice occurs, but this sort of violation usually does very little permanent damage to the social or political structure. If we countenance government misconduct within the category of structural rights, however, then the entire structure of government is threatened in a way that could potentially exterminate all rights—individual as well as structural.

A. The Interrelationship of Individual and Structural Rights

At the highest level of abstraction, individual rights and structural rights are closely related. After all, *all* rights are intended to restrict the government to certain areas of collective action and thereby preserve other areas in which individuals may act without government regulation, supervision, or intervention in their activities or affairs. Although individual and structural rights are related, however, they are manifested in different ways.

Many individual and structural rights relate explicitly to political matters and democratic governance. Examples include First Amendment rights relating to political speech, voting rights, and equal protection rights to participate in government activities. It is easy to see how these

matters could take the form of individual rights claims. The First Amendment right to political speech, for example, could be violated when the government specifically targets a particular political dissenter.[20] Voting rights violations could take the form of government actions denying individual voters the right to exercise the franchise.[21] Equal protection could be violated by government actions prohibiting particular individuals from participating in the routine activities of government.[22]

On the other hand, it is also easy to see how each of these matters could take the form of structural rights violations. Structural rights violations of the First Amendment could occur, for example, when the government imposes loyalty oaths for voting or government employment.[23] Structural voting rights violations could occur whenever the government gerrymanders entire voting districts.[24] Structural equal protection violations could occur when an entire group of people is prohibited altogether from participating in the political process.[25]

To further complicate matters, structural rights violations often will involve a simultaneous violation of individual rights. A First Amendment case involving the imposition of loyalty oaths will involve a structural rights violation since the oaths are intended to reconfigure the political system in a way that favors the current government. As soon as someone refuses to take the loyalty oath, however, an individual rights violation will also occur. Likewise, a gerrymandering case will involve structural rights violations because the current government is attempting to distort the political system in order to reinforce and perpetuate its power, but the same action will also violate the individual rights of all voters who have been manipulated either into or out of the district. The key fact here is simply that individuated harm of the sort usually found in private civil litigation is not the only kind of harm that should be recognized

20. *See, e.g.*, Debs v. United States, 249 U.S. 211, 216–17 (1919) (affirming the ten-year prison sentence of a presidential candidate for making an antiwar speech).

21. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding unconstitutional a state law establishing as a prerequisite to voting that individuals must reside within the state for a year and within the county for three months).

22. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 100 (1986) (prohibiting prosecutors from using peremptory challenges to bar individuals from serving on juries because of their race).

23. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967) (holding unconstitutional New York statutes requiring state employees to sign loyalty oaths certifying that they do not support or teach the violent overthrow of the government).

24. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 143 (1986) (holding that political gerrymandering that systematically dilutes the voting strength of classes of voters is potentially a violation of the Equal Protection Clause).

25. *See* Terry v. Adams, 345 U.S. 461, 484 (1953); Smith v. Allwright, 321 U.S. 649, 664–66 (1944); Nixon v. Herndon, 273 U.S. 536, 541 (1927). Collectively known as the "White Primary Cases," these three cases held that state laws prohibiting racial minorities from voting in political parties' all-white primaries violate the Equal Protection Clause.

under the Constitution. In the case of a structural rights violation, everyone in society has had their rights violated—even though they may not be able to show precise and individualized damage as a result of the violation.

In addition to rights that are directly related to political participation and the political process, for several decades the courts have recognized a multitude of rights that relate to more personal matters of a nonpolitical nature. Again, many of these can be characterized both as individual and structural rights. The Texas state statute denying access to abortion that was challenged in *Roe v. Wade*,[26] for example, was a matter of individual rights in the sense that it prevented Norma McCorvey from obtaining an abortion, but the case was also a matter of structural rights in the sense that it was used by the Court to articulate a constitutional structure in which the state and federal governments were not allowed to strip from all women the right to make their own reproductive choices. In other words, *Roe v. Wade* represents a structural rights decision in the sense that it redefined the constitutional universe in a way that redrew the lines between government regulation and unfettered private decision-making regarding matters of reproduction and childbirth.

Another decision that illustrates the relationship between individual and structural rights arose out of the privacy doctrine that generated *Roe v. Wade*.[27] When the Court recognized a constitutional privacy right to sexual freedom in *Lawrence v. Texas*,[28] the Court not only dismissed criminal charges against the two petitioners in the case, it also articulated a broad series of structural restrictions on the extent to which the government could intrude upon individual decisions pertaining to sex and sexuality.[29]

Cases such as *Roe v. Wade* and *Lawrence v. Texas* illustrate the breadth of the concept of structural rights. Recall that at the beginning of this Part the concept of structural rights was defined as rights that come into play when it is necessary to protect against unconstitutional government conduct in order to preserve the very structure of

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26. 410 U.S. 113, 164–65 (1973) (striking down Texas abortion statute as a violation of the federal constitutional right of privacy).

27. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing a "zone of privacy created by several fundamental constitutional guarantees").

28. 539 U.S. 558, 578 (2003) (striking down Texas sodomy statute as a violation of the federal constitutional right of privacy).

29. *Id.* at 567. The Court asserted a Millian liberty principle as the overriding theme of its decision. After noting that Texas was attempting to regulate "a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals," the Court went on to conclude, "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.*

democratic government. At first glance, this definition would only encompass narrow political rights such as those protected in the Court's First Amendment political speech cases. This narrow interpretation would also exclude from the concept of structural rights any constitutional criminal procedure protections, privacy rights, or separation of powers provisions.

This narrow interpretation of the concept of structural rights, however, focuses on a far too narrow conception of what democratic theory requires. Under any conception of democratic theory, the *sine qua non* is the notion that the citizen is independent from—indeed, superior to—that citizen's government. The essential condition of democratic government is that it depends on the consent of the governed, and that consent in turn depends on the ability of those who make up the governed to develop their own perspectives on the world free of coercion and governmental duress, so that they may critique the government's performance and, if that performance is unsatisfactory, reject the government in favor of another. Thus, structural rights would encompass not only the right to read and speak about explicitly political matters, but also (as Alexander Meiklejohn eventually concluded in his landmark early First Amendment books and articles[30]) would protect expression concerning any other subject that contributes to the development of the human psyche. As Meiklejohn concluded in the First Amendment context, a person's political views stem from more than just that person's musings on subjects that are explicitly political.[31] Rather, a person's politics stem from that person's full persona. Political views are a product of the person taken as a whole, and include not just the political views of the person, but also the person's participation in religious, personal, sexual, and cultural activities, as well as even those casual matters that seem far removed from the affairs of state, ideology, and public policy. Structural rights are the mechanism that democratic constitutions employ to prevent the government from systematically straying into these aspects of the citizens' autonomy. This is not because of any need to respect the inherent or natural rights of individuals, as is commonly argued in defense of individual rights.[32] Rather, structural rights exist as much to protect the government (at least a particular type of government) and its

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30. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (2d ed. 2002) (arguing that public policy speech receives priority under the First Amendment); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57 (broadening the concept of public-policy speech to include expression that contributes to the development of political beliefs and values).

31. *See supra* note 30.

32. There are, of course, multiple different versions of individual rights theory along all points of the political continuum. *Compare* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (articulating a theory of human rights that leads to a market-oriented, minimalist state), *with* JOHN RAWLS, A THEORY OF JUSTICE (1971) (describing a social-democratic theory of natural and individual rights).

citizens *en masse* as to preserve the rights of the government's citizens individually. In short, structural rights exist in order to preserve the citizen's political independence which in turn preserves the government's democratic legitimacy.

B. The Concept of Structural Rights as Applied to Particular Constitutional Provisions

The approach advanced here views the concept of structural rights as primarily about protecting a government's democratic legitimacy by preventing that government from intruding into its citizens' personal and political autonomy. This approach significantly broadens the range of issues covered by the concept. Some constitutional protections, such as those embodied in the First Amendment, are easy to construe as structural rights. Thus, the concept of structural rights undoubtedly encompasses almost every aspect of the First Amendment, including both political and nonpolitical speech. If the individual rights conception of the First Amendment protects the right of speakers to have their say, the structural rights conception of the First Amendment protects the right of listeners to hear all available points of view on every subject. Any government effort to suppress the dissemination of this information is by definition an infringement of the citizen's right to inform him- or herself as to whether the government is doing its job. It is impossible to conceive of a vibrant democracy operating without open discussion of every imaginable topic—even if the government does not like the direction of the discussion, and even if the government's efforts effectively suppress the discussion without producing a single identifiable speaker as an individual rights "victim" of official censorship. The structural rights perspective does a much better job of explaining the expansive scope and speech-protectiveness of modern First Amendment jurisprudence than the individual rights justifications that the Court continues to rely on in its opinions.[33]

The conception of structural rights also explains the existence and function of the Establishment Clause of the First Amendment far better than an individual rights analysis. Under a structural rights conception, the Establishment Clause mandates that the government must take an agnostic approach to issues relating to religion or religious faith. This mandate exists not because of any particular constitutional attitude toward religion as a subject, but rather for two reasons relating to the democratic political structure of the country. The first reason is a formal

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33. For a classic statement of the individual rights conception of the First Amendment, see Justice Harlan's majority opinion in *Cohen v. California*, 403 U.S. 15, 25 (1971), much of which revolves around the central proposition that "the Constitution leaves matters of taste and style so largely to the individual."

recognition of the dangers religion poses to democratic political order. These dangers are both historical[34] and conceptual.[35] The second reason the Establishment Clause mandate exists is to provide a means of protecting an important aspect of the process by which a person develops deep-seated values that combine to form a comprehensive worldview, which in turn ultimately will inform that person's political attitudes and actions. By preventing religious organizations from using the government to imbue the public sphere (and in particular the public schools) with their theological views, the government has thereby freed citizens to develop their own personal perspective on the world without having to contend with an official morality with which they may deeply disagree. Viewed from this perspective, the Establishment Clause is not a sore-thumb provision within the First Amendment, but rather exemplifies the thrust of all of the First Amendment's provisions: citizens should be allowed to develop their sensibilities and attitudes toward life and politics free of government coercion or duress. In practice, therefore, any action by the government to embrace, advance, or endorse a particular religion or religion in general violates the constitutional mandate against the politicization of religion in a way that undermines the central structural protection of a private realm relating to the development of individual beliefs, values, and perspectives.

Other provisions of the Bill of Rights function as structural rights in somewhat different ways than the First Amendment. The criminal procedure provisions of the Bill of Rights—contained in the Fourth, Fifth, and Sixth Amendments—provide the crucial structural function of limiting the government's ability to use physical force as a means of exerting its dominance over society. The structural rights aspects of the Constitution's criminal procedure provisions serve both expressive and corporeal functions. The expressive function is simply to communicate to the government, the government's police officers, and individual citizens that there are strict limits to the government's ability to employ the truncheon in a democratic society. If this message is communicated

34. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) ("Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all.").

35. The conceptual problems have to do with two complementary phenomena. The first is the inability of any pluralistic collective body to develop the ability to comprehend, understand, or come to terms with the divine in either its general or specific aspects. The second is the tyrannical potential of having any subset of a pluralistic collective body impose on the entire body the subset's peculiar notions of the divine and its various mandates. This, at least, was James Madison's view. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 8 (1785), *as reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, app. at 64–72 (1947) (Rutledge, J., dissenting) ("What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people.").

clearly enough and enforced with sufficient rigor, government officials (including police officers) should eventually internalize this message and begin to constrain their own behavior. There is a clear relationship between the expressive function of the criminal procedure provisions and the objectives of the structural rights conception of the Constitution. If a democratic government is beholden to its citizens, then government officials must always remain modest about their own power and the source of that power. Conversely, citizens are entitled to be somewhat haughty about their own relationships with the government. It is important for government officials—and especially police officials—to be reminded occasionally that they are subordinate to the citizens. As Justice Brennan once noted, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[36]

The corporeal function of the criminal procedure provisions is simply to limit the physical power of the state over its citizens. By limiting the ability of the state to put people in jail without adequate proof of guilt, or to use the police to illegally arrest or harass individual citizens, the Constitution greatly constrains the state's ability to enforce its will on recalcitrant citizens. This function is related to the structural objectives of democratic constitutionalism in two ways. First, it prevents the government from using its public safety authority for political means. One of the most time-honored methods of extending one faction's political control is to arrest and imprison that faction's political opponents.[37] Second, it reinforces the communicative function of constitutional criminal procedure provisions by providing a concrete mechanism for enforcing the limits imposed on government when the government exceeds the bounds of its constitutional authority.

When reduced to essentials, the gist of all these provisions is that although the police are employed to maintain security and enforce the law, they still work for the citizens, and should expect to be held accountable whenever they overstep their authority. As with the First Amendment, many of these same functions can also be accomplished through the individual rights aspects of the criminal procedure provisions. On the other hand, the requirement of governmental

36. Houston v. Hill, 482 U.S. 451, 462–63 (1987).

37. Perhaps the most notorious example of this phenomenon in the United States is the use by President Adams's Federalist Administration of the Alien and Sedition Acts to imprison the Administration's Jeffersonian opponents. *See generally* N.Y. Times v. Sullivan, 376 U.S. 254, 273–76 (1964). Although its constitutionality was never tested in court, the Act is now widely viewed as having been unconstitutional. *See id.* at 276. The Act expired soon after Jefferson became President in 1801, and President Jefferson pardoned those who had been convicted under the Acts and remitted their fines. *See id.*

accountability that is at the heart of the structural rights interpretation has broader ramifications than simply allowing for individual citizen lawsuits against police officers who have harmed them. The accountability required under the structural rights concept also dictates that broad-scale government infringements into individual privacy should be subject to redress without regard to whether individual victims of those infringements can be found. Also, in the ongoing debate about the relative balance between security and liberty, the structural approach mandates that the balance should never be struck in favor of security if such a balance would significantly inhibit the ability of citizens to check the government and challenge its direction. Thus, recent activities such as the widespread surreptitious surveillance of political groups and individuals,[38] or the comprehensive wiretapping of private telephone calls without any suspicion of criminal behavior,[39] are inherently suspect.

Other aspects of the Bill of Rights and the Fourteenth Amendment also serve the structural function of maintaining the proper relationship between the government and its citizens. Many of these are fairly obvious. For example, the implicit right of privacy that the Court derived from various constitutional amendments[40] and the Due Process Clause[41] operates in much the same way as the nonpolitical speech protections of the First Amendment in maintaining a buffer between individual citizens and the potential for government coercion. By the same token, the Equal Protection Clause also imposes on the government strictures that limit the government's ability to permanently ostracize entire sectors of society.[42] The concept of democracy that underlies the theory of

38. For one account of past FBI political surveillance, see Athan G. Theoharis, *FBI Surveillance: Past and Present*, 69 CORNELL L. REV. 883 (1984). In more recent times, the Attorney General has issued guidelines indicating that the government has the right to conduct surveillance and investigation of political groups without any indication that the groups have engaged in criminal activity. *See* THE ATTORNEY GENERAL'S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION 3 (2003), *available at* http://www.fas.org/irp/agency/doj/fbi/nsiguidelines.pdf.

39. For two cases that have been filed recently to challenge this type of illegal government behavior, see *Jewel v. National Security Agency*, No. 08-cv-4373-VRW (N.D. Cal. filed Sept. 18, 2008), and *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). The central allegation in each of these cases is that the National Security Agency collaborated with AT&T to intercept the telephone and e-mail messages of millions of Americans without judicial warrants or oversight, and with no prior indication of criminal behavior by the authors of the messages. *See* Complaint at 2, 7–15, *Jewel*, No. 08-cv-4373-VRW, *available at* http://www.eff.org/files/filenode/jewel/jewel.complaint.pdf; Amended Complaint at 2–3, 7–13, *Hepting*, 439 F. Supp. 2d 974 (No. C-06-0672-JCS), *available at* http://www.eff.org/files/filenode/att/att_complaint_amended.pdf.

40. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (declaring that the "penumbras, formed by emanations" of various constitutional amendments create "zones of privacy" that are largely immune from government regulation).

41. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (locating in the Due Process Clause the constitutional protection of "a person's most basic decisions about family and parenthood").

42. See *supra* note 25, discussing the "White Primary Cases," in which the Court prohibited southern states from ostracizing African American citizens by denying them permission to vote in

structural rights is predicated on the notion that democracy is not a snapshot of reality at any given point in time, but rather a process that is intended to endure (if the project is successful) over centuries. The long-term focus of the democratic political structure dictates that the political or racial majority today may not necessarily be the political or racial majority fifty years from now. The political structure must take that fact into account by protecting political minorities today so that they have the opportunity to increase their numbers, muster support, and work to take power in the indefinite future. The Equal Protection Clause is a crucial structural component of the Constitution's recognition of this structural reality.

Although subdividing rights into individual and structural categories may be somewhat unusual, the general concept should not be controversial. What may be slightly more controversial is that the concept of structural rights includes constitutional provisions that are not usually categorized as rights at all. These would include any provision dealing with the explicit allocation of powers within the government, any provision governing the qualifications of those holding political office in any branch of government, and any provision specifically detailing the functions and responsibilities of the various branches and departments of the federal government. The consequence of treating these aspects of the Constitution as structural rights would be to provide individual citizens with a direct interest in remedying violations of those provisions.

The controversial nature of providing individual redress for structural rights claims, such as separation of powers violations, will be addressed at length in Part II, *infra*. For now, however, it is worth noting that treating as structural rights non-individualized constitutional claims such as those involving the separation of powers is not at all radical once we accept the premises that (1) the Constitution is primarily a document that is designed to preserve over the long term a basic form of democratic government; (2) democratic government requires that elected officials be held in check and that the government run by those officials must always be beholden to the citizenry; and (3) in the absence of some external mechanism for enforcing constitutional restrictions on the power of public officials, those officials are naturally inclined to amass power and undermine the influence of those in society that the officials consider political or cultural opponents. Once these (presumably uncontroversial) premises are accepted, and the acceptance of these abstract premises is accompanied by a concrete commitment to enforce these basic precepts of democratic government, then it is impossible to avoid ascribing the status of structural rights to provisions that are usually treated as little more than unenforceable housekeeping

politically crucial party primaries.

measures. After all, if the bona fides of a democratic government depend on the nature of that government, and if the rightful proprietors of a democratic government are the citizens of that government, then refusing to grant those citizens an individual interest in enforcing the limitations imposed by the government's founding document robs those citizens of the very control that the founding document was drafted to guarantee.

The basic concept of democratic governance is the theme that unites the structural functions of the Bill of Rights and the purely structural provisions scattered throughout the main body of the Constitution. Most of the structural rights in the latter category never get litigated, or get litigated only to the point at which (because of the various procedural limitations discussed in Part II, *infra*) the Court dismisses the complaint on procedural grounds.[43] Many plaintiffs attempt to litigate structural rights within the first category, only to be thwarted by the same procedural limitations, limitations whose application plaintiffs often invite by attempting to shoehorn their lawsuits into the individual rights paradigm.[44] The minor premise of this Article is that the structural rights within the Constitution should be enforceable as such by citizens, without regard to whether the particular provision is phrased in terms of individual rights, and also without regard to whether the person raising the claim in court has an individualized injury analogous to the injuries that arise in civil litigation. The major premise of this Article is that virtually everything the Court has done in the last two decades with regard to limiting access to judicial relief in constitutional law litigation has had a disproportionate effect on claims of a structural rights variety. Thus, it could be said that one of the Court's major objectives during the last decade is to forestall the most crucial type of constitutional litigation: litigation intended to keep the government within its proper parameters to preserve the basic framework of democratic governance. The details of this claim will be addressed after a brief consideration of the relationship between the concept of structural rights and other structural interpretations of the Constitution.

C. THE RELATIONSHIP BETWEEN STRUCTURAL RIGHTS AND OTHER STRUCTURAL INTERPRETATIONS OF THE CONSTITUTION

Structural theories have played a prominent role in constitutional interpretation for many years.[45] Structural interpretations of the

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43. The classic examples of this phenomenon are the *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 209 (1974), decisions discussed *infra* note 251.

44. The cases discussed *infra* notes 74–122 provide various examples of attempts to mix individual rights, structural rights, and other constitutional claims.

45. In many ways John Marshall's opinions provide the earliest examples of a structural approach

Constitution serve as a counterpoint to other modes of constitutional interpretation, including those that focus on textual exegesis, original intent, original meaning, theories of an evolving or "living" Constitution, and theories of judicial fidelity to abstract conceptions of rights. Although proponents of a structural interpretation vary widely in the meanings they ascribe to particular constitutional provisions, they are united by the objective of seeking an interpretive method that treats the Constitution as a uniform document. Under such a method, all constitutional provisions should be viewed as oriented toward the same goals, and must therefore be interpreted in conjunction with one another rather than in isolation. In this sense, the theory of structural rights is consistent with other structural interpretations of the Constitution, because the theory of structural rights views all constitutional provisions as oriented toward the goal of preserving the basic conditions of constitutional democracy over the long term. Beyond this basic agreement about the need for an internally consistent interpretation of the entire document, structural theories of constitutional interpretation can differ a great deal with regard to the precise conclusions they draw about the meaning of particular constitutional terms and indeed the basic objectives of constitutional jurisprudence generally. A brief consideration of two prominent structural theories of the Constitution will illustrate this point and highlight the differences between these theories and the theory of structural rights posited here.

The most prominent example of a structural interpretation of the Constitution can be found in the work of Charles Black, who described his view of the approach in his slim 1969 masterpiece *Structure and Relationship in Constitutional Law*.[46] Black's version of the structural interpretation is quite similar to the interpretation that produces the concept of structural rights. Black's approach to the Constitution emphasizes "the method of inference from the structures and relationships created by the constitution."[47] An obvious implication of the structural approach is that textualism *simpliciter* is insufficient to answer many, if not most, important constitutional law questions. One of Black's main targets is the tendency of commentators and courts to rely so heavily on textualism and precedent in deriving constitutional

to constitutional interpretation, by eschewing narrow linguistic or historical approaches to determining constitutional meaning in favor of a broad approach emphasizing the interrelationship of all constitutional provisions, as exemplified by Marshall's insistence in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), that the nature of the Constitution requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . [W]e must never forget[] that it is *a constitution* we are expounding."

46. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

47. *Id.* at 7.

meaning.[48] Black's response to this commonplace textualism can be read in two ways. The most obvious understanding of Black's approach suggests that constitutional meaning must be derived from a careful comparison of terms within the text of the Constitution—thus reading Black not as an opponent of textualism, but rather a proponent of a sort of super-textualism. Under the more radical interpretation of Black, however, his approach requires those interpreting the Constitution to go outside the text to identify the central purpose that the text is designed to serve. Under this interpretation of Black, structuralism becomes a way of integrating into the document extratextual sources such as constitutional and political theory—sources that are not extraneous to the search for constitutional meaning, but rather provide the only logical explanation for why the various provisions included in the Constitution are there in the first place.

To fully appreciate the link between the concept of structural rights and the work of Professor Black, one must first dispense with a common misconception about the nature of the main arguments in *Structure and Relationship*. As Professor Michael Dorf has pointed out, Black is often misconstrued as an interpretive holist, who was concerned primarily with the relationship between the various textual provisions of the Constitution.[49] As Dorf notes, while this element was certainly present in *Structure and Relationship*, it is by no means the main focus of the book.[50] In much of the book, Black moved outside the constitutional text to find relevant aspects of constitutional law in other sources.[51] In Dorf's characterization, "[Black] infers his constitutional rule of law from what he takes to be the most productive way of organizing relations among constitutionally created and recognized actors, not constitutional clauses."[52] Under this interpretation, Black's structural approach to constitutional law is less about the text itself than it is about Black directing "attention toward various structures and relationships created under the Constitution to ensure that the Republic continues to function."[53]

It is in this respect that the concept of structural rights melds into Black's concept of constitutional structure and relationship. The concept of structural rights makes certain assumptions about the nature of the Constitution and various constitutional provisions. The broad

48. *Id.* at 13.

49. *See* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 834–35 (2004).

50. *Id.*

51. *Id.* at 835–37.

52. *Id.* at 837.

53. Craig Green, Erie *and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 685 (2008).

assumption is that the Constitution was intended to create a democratic form of government that is intended to last for generations. Therefore, as described in the previous Part, the Constitution imposes on the government certain characteristics and limitations intended to preserve the pivotal democratic mandate that government policy and personnel must remain both fluid and impermanent. Thus, certain methods of exercising power are prohibited because they tend to centralize authority in a way that will inhibit the circulation of elites that is necessary to preserve over the long term a true democracy.[54] Likewise, "losers' principles"—that is, principles extrapolated from the recognition that a proper constitutional democracy must include structural protections of political losers—are necessary to protect the ability of political losers at one point in time to continue their efforts to muster support in the hope of becoming political winners at some future point. The key to interpreting the Constitution, therefore, is to keep the Court's focus on the ultimate point of the entire endeavor, which is to preserve the structural conditions of democracy. The Constitution is intended to regulate and limit the exercise of governmental power in ways that deny to the citizenry the ability to accurately assess the government's actions, militate against the government, or seek to dismiss the current regime from power. Any interpretation of the document that has the effect of increasing the current regime's authority over the citizenry in these respects is, under the structural interpretation, *ipso facto* invalid.

Although it does so in the work of Charles Black, the structural interpretation of the Constitution does not always produce a theory that is consistent with the concept of structural rights—or, for that matter, with a robust conception of individual rights. The structuralist views of Akhil Amar are a case in point.[55] Like Black, much of Amar's work regarding constitutional interpretation is oriented around an emphasis on the interrelated structural functions of each constitutional provision.[56] But unlike Black, Amar's work is really more of an exercise in textualism and historicism than in pure structuralism.[57] Amar focuses heavily on the historical context of the drafting and ratification of particular constitutional provisions in order to discern their meaning.[58] Thus,

54. Examples of this would include government efforts to suppress political debate, ban political parties, or rig elections by other means.

55. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

56. Professor Amar coined the term "intratextualism" to describe his approach. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). Under this approach, "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase." *Id.*

57. Professor Amar forthrightly acknowledges this, arguing that "although some might seek to divorce textual from structural arguments, there are sound reasons to keep them wed." Akhil Reed Amar, *Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000).

58. *See id.*

although Amar accepts Justice Hugo Black's argument that the Bill of Rights is incorporated into the Fourteenth Amendment and therefore applicable to the states, he also argues that some of the Bill of Rights are not enforceable by individual citizens against a government: "the right question is not whether a clause is fundamental, but whether it is truly a private right of the citizen rather than a right of the states or the public generally."[59]

Phrasing the question in this way—that is, setting citizens' rights against the rights of states and "the public generally"—has the inevitable effect of extracting from the Constitution basic provisions that under a Charles Black–style structural interpretation could never be jettisoned without doing serious damage to the most basic purposes of the document. Thus, it is not at all surprising for one who focuses exclusively on the text and its original historical milieu to arrive at the conclusion that the Establishment Clause of the First Amendment does not provide a private right against governmental religious coercion, but rather provides the states the "right" to engage in such coercion.[60] It would not be possible, on the other hand, for someone who focuses on the structural rights conception of the Constitution to arrive at the same conclusion. To a structural rights theorist, the Establishment Clause must be interpreted in light of its role in protecting the democratic process, which by its nature must remain secular.[61] Therefore, the Establishment Clause should include an individual right of action against any government—federal, state, or local—that seeks through law or the exercise of governmental power to impose on the entire culture one faction's religious values.

None of this is intended to suggest that either the structural rights interpretation or Charles Black's version of the structural interpretation are inconsistent or incompatible with the practice of using the text and history of the Constitution as aides in the determination of constitutional meaning. As with Charles Black's own version of the structural

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59. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1265 (1992).

60. *See* AMAR, *supra* note 55, at 40–42 (arguing that the Establishment Clause was intended only to prevent the federal government from interfering with state religious establishments, and should therefore not be interpreted to provide a private constitutional right against state violations of religious freedom).

61. *See* Kathleen M. Sullivan, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 195, 199 (1992).

> Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all. From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like "discrimination." But from the perspective of the settlement worked by the Establishment Clause, it looks like proper treatment.

Id.

interpretation, the structuralist interpretation proposed here to arrive at a theory of structural rights is consistent with an attempt to interpret the constitutional text coherently. Both Black's view and the structural rights theory are consistent with a sophisticated version of what Professor Amar has called "intratextualism."[62] As Amar notes, requiring an interpreter to view the document as a consistent and intertwined whole not only has "a certain undeniable aesthetic attraction,"[63] it also prevents "interpretive cheating,"[64] and invites interpreters to recognize the cross-illumination of noncontiguous constitutional provisions.[65]

All this is true, but intratextualism should be kept in its proper interpretive place. An interpretive approach that emphasizes too strongly the role of intratextualism will inevitably fall victim to the same fatal flaw as other versions of textualism, in that the interpreter will dwell so closely on the text that language, grammar, and syntax will tend to override the more fruitful and appropriate focus on constitutional policy and theory. The point of proper structural interpretation is not to ignore the text; the point is simply to recognize what kind of text we are interpreting. The Constitution is not a literary artifact; rather, it is (in Charles Black's phrase) a "working charter of government."[66] Proper interpretations of the Constitution, therefore, must take into account not only what kind of government that document was intended to create, but also what interpretations of the document would make the government work and therefore achieve the document's purposes. This is, of course, hardly a new idea. It seems to have occurred, for example, to Chief Justice Marshall when he pointed out in *McCulloch v. Maryland* that "we must never forget, that it is *a constitution* we are expounding."[67] The mode of interpretation proposed here does not require the interpreter to ignore the text of the Constitution; it simply requires the interpreter to avoid reading the constitutional text in a way that would undermine the very purposes that the document was written to achieve.

In concluding this discussion of structural theories of constitutional interpretation and the concept of structural rights, note that the concept of structural rights is merely a subset of the broader and more comprehensive structural theories. Although the existence of structural rights is important to the implementation of any serious theory of structural interpretation, the theory of structural rights is not intended to address constitutional provisions that serve no democracy-preserving structural function or are intended to protect other interests. For

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62. *See* Amar, *supra* note 56.
63. *Id.* at 799.
64. *Id.* at 798.
65. *Id.*
66. *See* Green, *supra* note 53, at 685.
67. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

example, it is worth emphasizing once more that structural rights are very different from (although potentially coexistent with) the category of individual rights, which serve different functions from structural rights and are justified on different grounds.

Assuming that structural rights exist and serve an important function distinct from individual rights, the question addressed in this Article is whether the Supreme Court is fundamentally misconstruing the Constitution when it systematically denies relief for violations of structural rights. The issue is confusing only because the categories of structural and individual rights are not hermetically sealed. A constitutional provision may, as a matter of constitutional theory, provide both structural protection and individual protections.[68] The fact that the Court provides relief for violations of the individual-rights aspects of a particular constitutional provision does not demonstrate that the Court is also enforcing the structural protections of the provision. Likewise, the protections offered to the victim of an individual rights violation may not adequately protect the structural interests of the rest of society.

The remainder of this Article will address the issues relating to the enforcement of structural rights. The key point is that there are rights throughout the Constitution that provide crucial components of the framework that dictates the way that the government should interact with its citizens, and violations of those provisions will not always produce direct evidence of individual harm to a particular citizen. The next Part will discuss the ways in which the modern Court has imposed various procedural obstacles to the litigation of structural claims where there is no direct evidence of individual harm. The third Part will then discuss the possible justifications for the Court's refusal to enforce structural rights.

II. THE SUPREME COURT'S PROCEDURAL THERMIDOR

Substance and procedure have always been closely intertwined in American constitutional jurisprudence. Justices and commentators who are generally happy with the Court's approach to substantive issues will logically tend also to support granting courts broad jurisdiction and remedial authority to enforce its substantive rulings. Conversely, those who are unhappy with the Court's substantive perspective will logically tend (for obvious reasons) to look for procedural mechanisms that would prevent potentially significant cases from ever reaching the courts. Thus, early in the twentieth century, liberals on the Court who were unhappy with a conservative Court's approach toward economic due process and the Commerce Clause came up with the idea that the concept of standing

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68. *See supra* notes 26–29 and accompanying text.

could be used to limit the Court's access to cases challenging economic regulations.[69] Turn the calendar forward several decades and it was also liberals who sought to expand the concept of standing and limit other restrictions on the federal courts' remedial authority during the period when liberals controlled the substantive agenda of the Court.[70]

It is no surprise, therefore, that as the Justices who have formed the majority since the advent of the Burger Court have become increasingly conservative on substantive matters, those same Justices have sought to restrict the federal courts' jurisdiction and remedial authority in a range of different cases involving claims based on the substantive decisions of the previous majority.[71] The most obvious explanation of the Court's procedural shift to the right is that this phenomenon is merely a Thermidorian reaction to the Jacobin excesses of the Warren Court era.[72] The critical aspect of the Court's reaction, however, is its somewhat duplicitous nature. The modern Court's response to the expansion of

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69. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1455 (1988) (account of the historical development of the concept that standing is a constitutional limitation on access to courts independent of the substantive merits of the lawsuit).

> It is... no accident that many of the early taxpayer standing cases involved attacks on federal legislation addressed to an activist conservative Court. The first few were rejected on their merits. But soon the primary stance of the liberal judicial resistance was the development of doctrines of procedural limitation. In this formative period, Justice Brandeis reported to his confidant Felix Frankfurter his famous remark to Justice Holmes: "I tell him, 'the most important thing we do is not doing.'" *Frothingham* was a product of the liberal judicial resistance to substantive due process....

Id. (footnotes omitted).

70. See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968), in which the Court at the end of the Warren Court era greatly expanded the concept of taxpayer standing to challenge Establishment Clause violations by the government, and came very close to embracing the concept of citizens' standing.

71. Examples of this phenomenon can be found in the Court's Establishment Clause standing cases cited in the introduction to this Article. In *Elk Grove Unified School Disrict v. Newdow*, 542 U.S. 1 (2004), for example, the Court used standing doctrine to deny a father the right to challenge allegedly unconstitutional religious activity in his daughter's school. This allowed the current Court to avoid having to apply existing precedents regarding in-school religious activity, whose separationist holdings have not been significantly diluted since the Warren Court era. *See* Engel v. Vitale, 370 U.S. 421 (1962) (holding unconstitutional state-authorized prayers in public schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional state-authorized Bible reading in public schools).

Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587 (2007), is another example. In that case the law regarding government financing of religion had changed since the days of the Warren Court era, but significant obstacles remain to the direct assistance and facilitation of religious activity by the executive branch, which is what was alleged in that case. *Id.* at 592 (plurality opinion). Thus, eliminating standing was an easy way to moot the substantive claims and circumvent a potentially difficult decision. See the discussion of *Hein infra* notes 101–23 and accompanying text.

72. This is, of course, a reference to the right-wing reaction in 1794 to the perceived excesses of Robespierre and the Jacobins in the French Revolution. The reaction began in the revolutionary calendar's month of Thermidor, hence the term "Thermidorian reaction." *See* WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 282–85 (2d ed. 2002) (describing the beginning of the reaction).

substantive rights during the Warren Court era seldom takes the form of outright attacks on the previous Court's substantive pronouncements; rather, the modern Court often responds in a more subtle way by seeking to modify the very structure of the judicial system, in a way that will prevent (or seriously impede) succeeding majorities from hearing future cases that raise certain types of substantive issues. Substance has become a slave to procedure, in a manner that will tie the hands of future majorities for decades to come.

There is a thick catalogue of different ways in which the modern Court has restricted the federal courts' jurisdiction and remedial authority. The courts' authority has been limited at every stage of litigation, beginning with restrictions on the initial decision to identify litigants, then extending through the middle stages of litigation, during which the courts have lost some of their authority to identify and interpret substantive rights, and finally culminating with contractions in the courts' ability to frame remedies and enforce them against defendants who are deemed to have acted illegally. There are multiple examples of limitations at each stage of litigation, and exploring the intricacies of each example would require an entire law review article unto itself. What follows, therefore, is merely a thumbnail sketch of several major categories of procedural limitations developed by the Supreme Court during the last three decades. These examples are primarily intended to illustrate the scope of the Court's attack on federal judicial authority. After briefly outlining these examples, I will turn to the question of what the Court's procedural retreat portends for the enforcement of structural rights.

A. Undermining Structural Rights at the Beginning of Lawsuits: Eliminating the Right to Sue

By far the most comprehensive and systematic attack on the remedial authority of courts during the last few decades has occurred in the area of the standing doctrine. The Court has not only limited the scope of the constitutional right to present claims in federal court, it has also limited Congress's authority to provide statutory grants of standing.[73] *Hein* is only the latest example of a trend that is rapidly foreclosing the possibility of structural rights litigation in the federal courts.

The effect of standing limits on structural rights litigation can be seen in the Court's most important modern standing decision, *Lujan v. Defenders of Wildlife*.[74] By now the details of this case are intimately

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73. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992) (using constitutional standing limitations to restrict Congress's ability to explicitly grant individuals the authority to enforce their legal rights).

74. *Id.*

familiar to students of federal courts and constitutional law. In *Lujan* the Court imposed several requirements on those seeking standing to bring an action in federal court.[75] The Court required all persons seeking standing to demonstrate that their injury is concrete, imminent, nonconjectural, traceable to the defendant, and redressable by the courts.[76] Although in the abstract many of these requirements are unobjectionable guideposts as to who may litigate particular claims, when combined and applied as the Court applied them in *Lujan*, these requirements serve as almost an absolute bar to the litigation of structural rights claims.

Lujan involved the straightforward question whether the Endangered Species Act applied to United States government actions outside the country.[77] Although the case does not involve constitutional rights, it does involve statute-based structural limitations on the government's activity, and therefore provides a template for how the Court's standing restrictions will apply to the litigation of structural rights based in the Constitution. The two individuals representing the plaintiffs in *Lujan* were environmental activists who were seeking to have the Court interpret the Endangered Species Act to apply abroad as well as domestically.[78] Both plaintiffs had traveled abroad on trips that involved the observation of endangered species and were therefore engaged in precisely the sort of activity that would be directly affected by the resolution of the statutory interpretation issue at the heart of the case.[79]

Despite the obvious interest of the plaintiffs in the resolution of the case, the Court denied standing to both plaintiffs, based on an expansive interpretation of the standing requirements articulated in the decision. Thus, although the Court ruled that their injury was concrete,[80] the Court found that their claim was not imminent because they could not provide a precise date for their next trip abroad.[81] The Court also found that the plaintiffs' interests in the ecosystem and the animals themselves were too conjectural to support standing.[82] Finally, the Court held the injury was not redressable or traceable because the plaintiffs could not demonstrate that foreign governments receiving American money would suspend the offending projects or modify them to do less harm to the environment if

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75. *Id.* at 560–61.

76. *Id.*

77. *Id.* at 557–58.

78. *Id.* at 563–64.

79. *Id.*

80. *Id.* at 562–63 ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.").

81. *Id.* at 564 (concluding that the plaintiffs' expectation of future visits to foreign countries did not "produce 'imminent' injury").

82. *Id.* at 565–67.

the Endangered Species Act applied to future American-financed projects.[83]

In short, the plaintiffs in *Lujan* lost on every single aspect of the Court's standing standard except one. Given how the Court interpreted the various standing requirements, it is doubtful that the plaintiffs could ever have arranged the facts of their claims in a way that could satisfy what the Court viewed as part of the Article III limitation on federal court jurisdiction. Even if the plaintiffs could have demonstrated—for example, through the purchase of plane tickets—that they would be going abroad on a particular date, they would never have been able to demonstrate that they would actually see examples of the endangered species on those trips (because, after all, the animals are endangered and therefore few and far between). The plaintiffs also would have been unable to show that recipients of American money abroad would not simply substitute money from other countries that was unencumbered by Endangered Species Act requirements.

If others were waiting in the wings to raise the same claims as the plaintiffs in *Lujan*, then at least the dismissal of the individual activists and the groups with which they were associated would not be fatal to the substantive claim. But it is difficult to identify other plaintiffs who could substitute for the *Lujan* groups and activists. Governmental agencies will not sue, of course, because they are the very entities that are allegedly violating the law. Other environmental groups could not sue because (as in *Lujan*) their standing would be based on the underlying injuries of their members,[84] all of which would be subject to the same defenses the government raised against the two women in *Lujan*. And in any event, like the *Lujan* plaintiffs, environmental groups would also be unable to satisfy the requirements of traceability and redressability. So *Lujan* provides us with a precise and important legal issue that procedural obstacles will prevent anyone from ever litigating in federal court.

Although *Lujan* is a statutory case, it is merely the distillation of tendencies that have been evident in the Supreme Court's constitutional jurisprudence for many years. In several cases in the 1970s and 80s, the Court applied many of the same factors it used in *Lujan* to dismiss claims by plaintiffs raising allegations of systematic constitutional violations. The allegations in these cases include the claim that in one county racial discrimination permeated the criminal justice system,[85] the claim that

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83. *Id.* at 571 ("Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, [if American funds are] eliminated.").

84. *See* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.").

85. *See* O'Shea v. Littleton, 414 U.S. 488, 495-75 (1974) (denying standing to plaintiffs challenging a county's pattern of racially discriminatory behavior in bond setting, sentencing, and

racial minorities were being singled out by the Los Angeles Police Department for the use of a potentially lethal chokehold restraint method,[86] and the claim that the Philadelphia Police Department was engaged in systematic violations of civil rights.[87] In all three cases the problem was that the plaintiffs were seeking injunctions against the violations.[88] This turned out to be a problem because the Court decided to subdivide the constitutional standing requirements depending on the remedies sought in the lawsuit.[89] Since injunctions are forward-looking, the Court demanded that each of the plaintiffs show some definitive threat of future injury, a requirement that none of the plaintiffs in these cases could satisfy.[90] Thus, in the first case, the plaintiffs were dismissed for lack of standing because they could not show that they would be arrested and subjected to discrimination in the future;[91] in the second case the plaintiff (who had been subjected to the chokehold by the police) was not permitted to seek an injunction preventing the use of the chokehold in a racially discriminatory manner because he could not demonstrate that he would be stopped by the police and subjected to the chokehold in the future;[92] and in the third case the Court refused to permit multiple plaintiffs who each had been subjected to racially discriminatory treatment from joining together in a case challenging race discrimination by the entire police department.[93] In each of these cases, the Court interpreted its constitutional standing limitations so strongly that they were transformed into remedial limitations. These

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assessing jury fees).

86. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 98, 111 (1983) (denying standing to respondent seeking an injunction against the unconstitutional use of a chokehold by the Los Angeles Police Department); *id.* at 116 & n.3 (Marshal, J., dissenting) (discussing respondent's Equal Protection claim).

87. *See* Rizzo v. Goode, 423 U.S. 362, 366–67, 371–73 (1976) (denying standing to plaintiffs seeking to bring a class action against the Philadelphia Police Department to challenge a pervasive pattern of police misconduct directed toward minority citizens of Philadelphia).

88. *See Lyons*, 461 U.S. at 98; *Rizzo*, 423 U.S. at 366–67; *O'Shea*, 414 U.S. at 492, 500.

89. *See supra* notes 86–88.

90. *See Lyons*, 461 U.S. at 105; *Rizzo*, 423 U.S. at 372; *O'Shea*, 414 U.S. at 496–97.

91. *O'Shea*, 414 U.S. at 496–97 ("[H]ere the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners.... [I]t seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.").

92. *Lyons*, 461 U.S. at 105 ("That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.").

93. *See Rizzo*, 423 U.S. at 372 ("[T]he individual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future ... but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures.").

standing/remedial limitations effectively precluded an injunction from being sought in any of these cases, which in turn prevented any effective redress of the substantive violations alleged.

The problem does not stop with the Court's rigid reading of the standing requirement. During the past thirty years the Court has created a panoply of different procedural restrictions, which work together to preclude effective relief in structural rights cases. In the case involving the chokehold, for example, the Court blithely noted that although the plaintiff is not permitted to seek an injunction, he could continue to seek relief in the form of damages.[94] The problem with this solution is that five years earlier the Court had decided *Carey v. Piphus*, in which it held that plaintiffs could not seek inferred damages in civil rights and constitutional tort actions, but rather may collect only compensatory damages based on concrete injuries.[95] The problem with this approach is evident in the chokehold case. The plaintiff in that case was stopped by the police for a broken taillight while driving home from work late at night.[96] For reasons that are still unclear, he was taken from his car, choked by a police officer until he passed out, and awoke several minutes later having urinated and defecated in his pants.[97] The police then gave him a ticket for the taillight, and told him to leave.[98] Under the *Carey* rule, the plaintiff had little prospect for serious damages. He was not killed, so there was no wrongful death action; he was not seriously injured, so there were no serious medical costs; and there is no evidence that he was psychologically traumatized.[99] Basically, his damages amounted to the cleaning bill for his pants. To add insult to injury, and to further reduce the possibility that a damages action could truly serve the function of an injunctive action, another ruling by the Supreme Court has eliminated the possibility of an award of attorney's fees in any case in which the plaintiff receives only nominal damages.[100] Whatever one can

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94. *Lyons*, 461 U.S. at 109 ("[H]e still has a claim for damages against the City that appears to meet all Art. III requirements.").

95. 435 U.S. 247, 248, 262–64 (1978) (holding in the context of multiple procedural due process violations by a public school that students were entitled to recover only nominal damages in the absence of proof of actual injury).

96. *Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

97. *Id.* at 114–15.

98. *Id.* at 115.

99. *See id.* at 114–15.

100. *See* Farrar v. Hobby, 506 U.S. 103, 105 (1992) (holding that although a civil rights plaintiff who receives only nominal damages is a "prevailing party" under the relevant statutes, the attorney representing such a plaintiff is not entitled to attorney's fees). The logic of this decision seems to be an extension of *Carey*'s notion that damages awards in civil rights laws exist exclusively to compensate for tort-style harms (as opposed to advancing the purposes of vindication or punishment). *See id.* at 115. Unfortunately, the Court never really clarifies the precise connection between the compensatory rationale for damages awards and the denial of attorney's fees beyond noting that the attorney's fee statutes were never intended to produce windfalls for attorneys. *Id*

say about the extent to which a damages action would adequately compensate the plaintiff for his experience, it is very clear that this would hardly be an adequate substitute for an injunction either in terms of its ability to communicate to the police department that it had acted wrongly or in terms of deterrence against future actions of the same sort. And therefore—as in the statutory context of *Lujan*—because of a dense thicket of procedural restrictions, violations of structural constitutional rights essentially go unremedied.

All of these same tendencies can be seen in the Court's recent opinion in *Hein v. Freedom from Religion Foundation, Inc.*[101] *Hein* involved what in many ways is the quintessential structural right: the Establishment Clause of the First Amendment.[102] The Establishment Clause exists largely to keep the government from becoming infused with religion to the detriment of the religious liberty of the entire culture.[103] The defining paradox of the Establishment Clause is that it exists to protect the government from religion in order to protect religion from the government.[104] One of the most crucial aspects of the Establishment Clause is its prohibition of government funding of religious activity.[105] At one point in the Court's history, the Court viewed this function of the Establishment Clause as so crucial that it required special, more lenient standing rules to permit citizens to challenge government funding of religious enterprises.[106] This perception produced the decision in *Flast v. Cohen*,[107] which exempted those challenging a funding program that

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101. 551 U.S. 587 (2007).

102. *Id.* at 592 (plurality opinion).

103. *See supra* notes 34–35 and accompanying text. For an additional perspective on this matter from the author of the First Amendment, see Madison, *supra* note 35.

> Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

Id.

104. *See* Lee v. Weisman, 505 U.S. 577, 589–90 (1992) ("It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.").

105. One can see how strongly the Court viewed this aspect of the Establishment Clause in its early cases by the absolutist phrasing of the Establishment Clause no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

106. Flast v. Cohen, 392 U.S. 83, 103–04 (1968) (allowing taxpayer standing in cases involving Establishment Clause challenges).

107. *Id.*

violated the Establishment Clause from the usual rule that taxpayers do not have standing to challenge the misuse of their tax dollars.[108]

Hein did not overrule *Flast*. Instead, the plurality in *Hein* ruled that taxpayers have no standing to challenge executive branch expenditures supporting religion.[109] In other words, the *Hein* plurality held that the taxpayer standing rule from *Flast* henceforth will be limited to cases challenging congressional statutes that explicitly appropriate federal funds to religious groups in violation of the Establishment Clause.[110] Thus, if an agency within the executive branch distributes funds to religious groups from a general congressional appropriation, then no citizen could sue to stop that distribution of funds using the *Flast* taxpayer standing rationale. The plurality's rationale for this conclusion is simple formalism; the facts of *Flast* involved a specific congressional appropriation of funds to religious groups, therefore the holding of the case is effectively limited to those facts.[111]

The problem is that this formalistic rationale for the holding in *Hein* defies the logic of the *Flast* holding. As six of the nine Justices voting in *Hein* pointed out (the four dissenters plus the two concurring Justices Scalia and Thomas), the holding of *Hein* is essentially irrational. Both the *Hein* dissent and the concurrences of Justices Scalia and Thomas argued that it is illogical to treat *Flast* as applying only in the case of specific congressional appropriations of funds because a general appropriation of funds engages Congress's Article III authority in exactly the same way as a specific allocation of funds, and therefore logically implicates the taxpayer standing authority to precisely the same extent.[112] The logic of *Flast* is that taxpayer standing is justified in lawsuits challenging Establishment Clause violations because taxpayers have a direct connection to the claim insofar as their tax money is being used in violation of the First Amendment.[113] This is true regardless of whether

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108. *Id.* at 106; *see* Massachusetts v. Mellon, 262 U.S. 447, 488–89 (1923) (holding that in general taxpayers have no standing to challenge the constitutionality of federal statutes).

109. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007) (plurality opinion) ("*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.").

110. *Id.* at 610–11.

111. *Id.* at 603–05.

112. *See id.* at 618 (Scalia, J., concurring) ("Either [*Flast*] should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a matter alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated."); *id.* at 637 (Souter, J., dissenting) ("[T]he controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent . . . .").

113. *See* Flast, 392 U.S. at 106 (recognizing as a valid injury for standing purposes the claim that "tax money is being extracted and spent in violation of specific constitutional protections against [the] abuse[] of legislative power").

the funds are being allocated for impermissible purposes by executive branch officials or Congress.

The effect of *Hein* on Establishment Clause litigation could be devastating. Although *Hein* itself involved executive branch allocations of funds in violation of the Establishment Clause, the real question is what effect *Hein* will have on future litigation of Establishment Clause challenges to state and local programs funding religion. Justice Alito's opinion in *Hein* very strictly limits the taxpayer standing authority granted by *Flast* to cases in which Congress itself has violated First Amendment limitations on the Article III authority to appropriate funds.[114] The precise holding of *Hein* is that *Flast* taxpayer standing authority does not extend even to branches of the federal government other than Congress.[115] If *Flast* no longer even covers constitutional violations by the executive branch of the federal government, then almost by definition taxpayer standing no longer exists to challenge state and local funding programs that violate the Establishment Clause. The routine assumption to this point is that *Flast* covers state and local, as well as federal programs.[116] If *Hein* indeed casts doubt upon this routine assumption, then the implications of *Hein* are much more serious than one may initially surmise from reading the relatively sketchy *Hein* plurality opinion. The Bush Administration aside, historically there have been very few cases in which the executive branch has decided on its own to allocate funds for religious purposes without congressional assent. On the other hand, because many of the disputes involving government funding of religious institutions involve education, which is largely a localized affair in this country, challenges to state and local attempts to fund religious institutions are far more routine.[117] If *Hein* means that taxpayer standing may no longer be employed to challenge state and local financial violations of the Establishment Clause, then the case will

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114. *Hein*, 551 U.S. at 609 (plurality opinion) ("*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.").

115. *Id.*

116. *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 380–81 (1985) (taxpayer standing challenge to local program providing state assistance to private religious schools); Marsh v. Chambers, 463 U.S. 783, 785 (1983) (taxpayer standing challenge to Nebraska practice of using state funds to pay legislative chaplains); Soc'y of Separationists, Inc. v. Herman, 959 F.2d 1283, 1297 n.11 (5th Cir. 1992) (Goldberg, J., dissenting); Wilder v. Bernstein, 645 F. Supp. 1292, 1310 n.12 (S.D.N.Y. 1986).

117. Major cases of this sort have reached the Supreme Court. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002) (taxpayer standing challenge to Cleveland educational voucher system); Mitchell v. Helms, 530 U.S. 793, 801 (2000) (taxpayer standing challenge to Louisiana program providing educational materials to religious schools); *Grand Rapids Sch. Dist.*, 473 U.S. at 380 (taxpayer standing challenge to local program providing state assistance to private religious schools); Mueller v. Allen, 463 U.S. 388, 392 (1983) (taxpayer standing challenge to Minnesota program providing tax deductions for the expenses of sending children to religious schools).

seriously inhibit the enforcement of the Establishment Clause in the future.

Beyond the actual holding of *Hein*, the larger problem with the decision is the general spirit of each of the opinions in the plurality. Although Justice Alito's plurality opinion diverges from Justice Scalia's concurring opinion with regard to the continued viability of a narrow version of *Flast*, the overall tone of the two opinions is actually quite similar. Both Justice Alito and Justice Scalia are very skeptical of anything that resembles ideological litigation: that is, litigation on behalf of someone who has not suffered a common-law-tort-style, highly individualized injury.[118] Much of Justice Scalia's concurring opinion is given over to a discussion of the inadequacy of what he calls "psychic injuries" (which he contrasts with "wallet injuries")[119] as the basis for standing under Article III. This general theme—that standing should be narrowed to cover only tort-style, individualized injuries—signals the possibility of subsequent attacks by the Court's new conservative majority on attempts to enforce the Establishment Clause in contexts other than the funding of religion. In particular, it may presage an effort to limit standing that is based on simple exposure to instances of governmental endorsement of religion, in the absence of some additional coercive measure such as a requirement to participate in a prayer.[120] If this effort to further limit Establishment Clause standing comes to pass, it would effectively eliminate most litigation against government endorsement of religion and religious symbols outside the public schools. In the public school context standing presumably will still be freely available, since the coercion inherent in mandatory attendance rules leads Justice Kennedy to abandon his conservative colleagues and recognize that government endorsement causes harm to identifiable individual students.[121]

118. *See Hein*, 551 U.S. at 609–10 (plurality opinion) (noting the limitations of *Flast* and expressing doubts about the viability of standing in the absence of individualized injury).

119. *Id.* at 619 (Scalia, J., concurring).

120. We will soon have an indication from the Supreme Court regarding whether it intends to limit standing in Establishment Clause cases beyond those involving taxpayer standing. The Court has granted certiorari in *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (granting certiorari). *Salazar* involves an Establishment Clause challenge to the placement of a Latin cross in the Mojave National Preserve, which is located in Southeastern California and operated by the National Park Service. *See* Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 129 S. Ct. 1313 (Feb. 23, 2009) (No. 08-472). The plaintiff in the case is a former employee of the National Park Service, whose standing is based on the claim that he is being subjected to unwanted exposure to illegal religious speech by the government. *Id.* at 770. Whether the Court permits standing in this case will reveal much about whether the Court intends *Hein* to be an idiosyncratic and narrow decision, or rather see it as merely the first salvo in a broader attack on Establishment Clause standing generally.

121. *See* Lee v. Weisman, 505 U.S. 577, 587–90 (1992). Justice Kennedy's majority opinion in *Lee* held that a nondenominational prayer at a high school graduation ceremony violated the First Amendment rights of a student attending the ceremony. *Id.*

The more general point is that efforts to impose upon plaintiffs seeking to redress constitutional violations a requirement that they show direct injuries that are the equivalent of an assault or a conversion of property is deeply misguided and inconsistent with the constitutional structure. A tort-style injury requirement will render it impossible to adequately enforce constitutional rights generally, and will have the effect of virtually exterminating structural constitutional rights. The Establishment Clause dispute litigated in *Hein* provides a perfect example of this phenomenon. The Establishment Clause is a quintessential example of a structural right; it is designed to structure government in a way that prevents powerful religious groups or institutions from taking over the government and using it to advance their own sectarian ends.[122] The Establishment Clause is also designed to preserve the essential democratic characteristic of a temporal government, in the sense that it forces the government to focus on worldly matters and adopt policies that are recognized by all to be both temporary and imperfect.[123] The Establishment Clause creates a democratic government that concerns itself with earthly affairs, which leaves the salvation of souls to other institutions. Unfortunately, violations of these sorts of structural protections of democratic government often do not result in the direct coercion of any individual or church, and therefore often do not result in the sorts of tort-style injuries that would be required if the Court follows the standing theory of *Hein* to its logical conclusion.

The ultimate conclusion to be drawn from this discussion is that if the Court proceeds down the path it seems to have chosen, then multiple constitutional provisions will be rendered virtually unenforceable. The Court's implicit response is that these provisions are unenforceable because the government's violation of these provisions will never injure

122. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982) ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute [in question] can be seen as having a 'primary' and 'principal' effect of advancing religion.").

123. *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 84 (2002).

> [T]his new [constitutional] order rested, in important part, on its limited horizon. The order would belong to "the ages," and its powers would be restricted to the temporal welfare of its citizens. Though each of them might (indeed likely would) have religious commitments, the state itself would have no religious confession to make. By thus circumscribing the government's jurisdiction, this new world order would avoid both conflict among religious factions for political authority and the inevitable despotism of the religious faction that won out. Seen in political terms, "religion" represents that which the new order disclaims: jurisdiction over ultimate truths, a comprehensive claim to undivided loyalty, and a command to worship.

Id.

anyone to a sufficient degree to justify engaging the machinery of the judiciary. But with regard to structural rights, the reality is not that their violation injures no one, but rather that their violation injures everyone. Ironically, under the Court's recent standing doctrine, the more widespread the injury, the less likely that injury will ever be redressed by the courts.

B. UNDERMINING STRUCTURAL RIGHTS IN THE MIDDLE OF LAWSUITS: ELIMINATING THE ABILITY TO CHALLENGE VIOLATIONS OF STRUCTURAL RIGHTS EFFECTIVELY

Imposing limits on standing at the outset of litigation is hardly the only way in which the modern Court has made it more difficult to enforce structural rights. As the headings in this Part indicate, the Court has limited structural rights litigation at every stage of the litigation process. Not all of the Court's litigation-limiting efforts have been entirely successful. While the current Court's Thermidorian Reaction in the standing area has almost completely vanquished the Jacobin tendencies of the Warren Court era, other efforts by the Court to dilute or eradicate existing mechanisms for remedying constitutional violations are still very much in flux. One example of such a dispute is the ongoing argument within the Court over the continued viability and applicability of facial challenges to unconstitutional statutes.

Facial challenges to unconstitutional statutes are fixtures of constitutional litigation, albeit controversial ones.[124] They are especially important in First Amendment litigation, where a facial challenge is brought as a facial overbreadth claim—that is, the claim that a statute regulating speech is unconstitutional because the challenged statute regulates a substantial amount of constitutionally-protected speech.[125] It is not difficult to understand why plaintiffs challenging a structural rights violation value the ability to raise a facial challenge to unconstitutional statutes. The main value of a facial challenge is in the type of remedy that a successful lawsuit produces. A lawsuit that successfully raises a facial challenge to an unconstitutional statute will produce an injunction against the entire statute.[126] Thus, the statute may not be employed against anyone until it is rewritten and narrowed by the legislature. A successful facial challenge protects the entire world from the

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124. Sabri v. United States, 541 U.S. 600, 609–10 (2004) (noting that facial challenges should be "discouraged," but then noting a series of constitutional areas in which facial challenges are routinely permitted).

125. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973) (discussing the standards that apply to substantial overbreadth claims in First Amendment cases).

126. *See* United States v. Frandsen, 212 F.3d 1231, 1235 (11th Cir. 2000) ("A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself.... The remedy if the facial challenge is successful is the striking down of the regulation ....").

government's unconstitutional conduct. This scattershot aspect to the facial challenge is not just an unfortunate byproduct; rather, it is the entire point of the doctrine that permits such challenges to take place. Indeed, within First Amendment jurisprudence the courts have traditionally considered it so important to protect everyone against the "chilling effect" produced by an unconstitutional statute that they have generated special standing rules for overbreadth challenges to statutes. These rules allow a litigant to raise a facial overbreadth challenge to an unconstitutional statute even if that litigant was engaged in constitutionally unprotected expression and therefore was not personally affected by the challenged statute's overbreadth.[127]

In contrast to a successful facial challenge, a successful as-applied challenge to an unconstitutional statute will produce an injunction that protects only the particular conduct that is litigated in that particular lawsuit.[128] The statute remains on the books and can therefore be used to regulate others. Every other small variation in facts will require a different lawsuit to challenge the application of the statute in that circumstance. If the major advantage of a facial challenge is that plaintiffs will obtain a very broad (and therefore very effective) injunction at the end of a successful lawsuit, the major detriment of an as-applied challenge is the cost and pragmatic obstacles of mounting effective challenges to flawed statutes. If a facial challenge is unavailable, then only repeated litigation can effectively address the problems—even if the constitutional problems are recurrent, endemic, and inherent in the statutory language. Given factors such as the limitations on damages and attorney's fees discussed in the previous section,[129] the sort of repeated litigation required in these cases will often be impracticable.

This issue is especially troublesome when statutes are worded so broadly or vaguely that they permit (or even encourage) unconstitutional implementation and enforcement. One example of this phenomenon is *Bowen v. Kendrick*, an early challenge to government financing of social services by religious organizations.[130] *Bowen* involved an Establishment Clause challenge to the Adolescent Family Life Act, which provided federal funding to organizations engaged in counseling related to adolescent sexual activity and pregnancy.[131] Two factors raised concerns about this statute's compatibility with the Establishment Clause's broad

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127. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) ("[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court . . . .").

128. *See* United States v. Faasse, 265 F.3d 475, 487 n.10 (6th Cir. 2001) ("The appropriate remedy for [an] as-applied challenge would be to invalidate the statute as to [the claimant].").

129. *See supra* notes 95–100 and accompanying text.

130. 487 U.S. 589 (1988).

131. *Id.* at 593.

prohibition on government funding of religious activity. First, the statute specifically encouraged government funding of religious groups in an area fraught with religious concerns.[132] Second, the plaintiffs had extensive evidence of religious groups advancing their sectarian views in programs funded under the Act.[133] Nevertheless, the Court rejected the plaintiffs' facial challenge to the statute.[134] The Court left open the prospect that plaintiffs could raise a string of as-applied claims against particular grants when those grants were made to pervasively sectarian organizations, or were used impermissibly for religious activities.[135]

The impracticalities of the as-applied approach are evident in *Bowen*. *Bowen* is also a good illustration of how the shift from facial to as-applied challenges tilts the playing field sharply against those seeking to enforce structural rights. This happens in two ways, both of which are evident in *Bowen*. First, by rejecting the facial claim in favor of an as-applied challenge, the majority in *Bowen* was able to ignore much of the extensive factual record that the plaintiffs had assembled in the district court, which in turn allowed the Court to neuter part of the relevant constitutional standard.[136] This is ironic, given the fact that one of the usual explanations for disfavoring facial challenges to unconstitutional statutes is that such challenges raised the risk of "'premature interpretatio[n] of statutes' on the basis of factually barebones records."[137] Treating these issues as as-applied claims skews the playing field in favor of the government in a second way by fundamentally altering the nature of the plaintiffs' claim. As the *Bowen* dissenters noted, "this lawsuit has been litigated primarily as a broad challenge to the statutory scheme as a whole, not just to the awarding of grants to a few individual applicants."[138] In short, the Court in *Bowen* created a series of practical and financial obstacles inhibiting challenges to comprehensive constitutional violations, excluded from consideration the plaintiffs' widespread factual evidence related to those comprehensive constitutional violations, and provided itself with a mechanism for converting the plaintiffs' broad and generalized claim against an entire

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132. *Id.* at 606–09.

133. *See id.* at 625–26, 642 n.12 (Blackmun, J., dissenting).

134. *Id.* at 618 (majority opinion) (holding that the Adolescent Family Life Act, on its face, does not violate the Establishment Clause).

135. *Id.* at 620–22.

136. *Id.* at 627 (Blackmun, J., dissenting) ("By designating appellees' broad attack on the statute as a 'facial' challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* 'effects' prong particularly sterile and meaningless.").

137. Sabri v. United States, 541 U.S. 600, 609 (2004) (alteration in original) (quoting United States v. Raines, 362 U.S. 17, 22 (1959)) (rejecting facial challenge to a federal bribery statute).

138. *Bowen*, 487 U.S. at 628 (Blackmun, J., dissenting).

statutory framework into a series of narrow and relatively insignificant claims against individual grant recipients.

The dispute within the *Bowen* Court over facial versus as-applied challenges was merely the first salvo of what has become an all-out battle within the Court over how to litigate constitutional-law issues. Most of the recent examples of this dispute within the Court are centered around the so-called "*Salerno* rule."[139] The fight in favor of the *Salerno* rule, and therefore against most facial challenges, has been led by Justice Scalia. Justice Scalia has for many years contended that the *Salerno* rule should not govern all constitutional disputes outside the First Amendment free speech area[140] (where he apparently concedes that the overbreadth doctrine does have a legitimate pedigree and serves a valid role[141]). The *Salerno* rule states that a statute may be challenged on its face only if "no set of circumstances exist under which the Act would be valid."[142] Thus, in a case governed by the *Salerno* rule, the government could avoid having a statute held facially unconstitutional by coming up with a single constitutional application of that statute. As a practical matter, in a world governed by the *Salerno* rule, facial challenges would be reduced to situations in which the government has been either stupid or irrational.[143] If *Salerno* applied without exception to all constitutional challenges, an overwhelming majority of cases would be shifted to the realm of the narrow and piecemeal as-applied challenge.

The precise status of the *Salerno* rule is uncertain, although it seems that a majority of the present members of the Supreme Court reject the notion that the rule should be applied to all cases. It also seems clear, however, that all of the current members of the Court would apply the rule to many types of disputes. The dispute, therefore, centers on whether there are exceptions to the *Salerno* rule, and what those exceptions are. The clearest statement of how the Court's current majority would apply the *Salerno* rule appears in *Sabri v. United States*, a decision involving a Spending Clause challenge to the application of a federal bribery statute in a local bribery case.[144] In *Sabri* a majority of the

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139. *See* United States v. Salerno, 481 U.S. 739, 745–46 (1987) (rejecting facial challenge to the Bail Reform Act's authorization of pretrial detention on grounds of future dangerousness).

140. *See* City of Chicago v. Morales, 527 U.S. 41, 73–83 (1999) (Scalia, J., dissenting) (describing at length his argument that federal courts have no Article III authority to declare statutes unconstitutional on their face).

141. *See id.* at 79 n.2 ("[T]he overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statutes will chill free expression.").

142. *Salerno*, 481 U.S. at 745.

143. For an example of the latter, see Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569, 571, 577 (1987), which held facially unconstitutional a Los Angeles ordinance making it illegal to "engage in First Amendment activities within the Central Terminal Area of Los Angeles International Airport."

144. 541 U.S. 600, 602–04 (2004).

Court rejected on *Salerno* grounds the defendant's attempt to raise a facial challenge to the federal statute.[145] At the same time, the majority provided a list of different constitutional law categories in which facial challenges routinely should be permitted.[146] Those categories include free speech, right to travel, abortion rights, and legislation under Section 5 of the Fourteenth Amendment.[147] Justice Kennedy submitted a cryptic concurring opinion, joined by Justice Scalia, which suggested that a similar exception should be made for Commerce Clause challenges to federal statutes.[148]

Even though a majority of the Supreme Court agrees that *Salerno* should govern at least some constitutional disputes, the list of exceptions to the *Salerno* rule is fairly limited and falls far short of the full range of constitutional provisions that could be construed as structural rights. Even under the most liberal application of the *Salerno* rule within the current Supreme Court, therefore, the rule imposes significant burdens on litigants attempting to enforce structural rights.

The nature of those burdens is clearly evident from a recent dispute involving the abortion rights of minors in *Ayotte v. Planned Parenthood of Northern New England*.[149] The case involved a constitutional challenge to New Hampshire's parental notification abortion statute.[150] The statute did not contain a provision allowing a physician to perform an abortion in a medical emergency without complying with the statute's notification requirements, which the plaintiffs argued was a violation of federal constitutional privacy rights.[151] Because a series of decisions by the Supreme Court since *Roe v. Wade* have effectively mandated a medical emergency exception to abortion regulations in order to protect the health of women seeking the procedure,[152] the obvious approach in *Ayotte* would be the one taken by the lower courts, both of which struck down the New Hampshire statute on its face.[153] The unanimous Supreme Court, however, decided to take a different approach.[154] In the Supreme

145. *Id.* at 604–05.

146. *Id.* at 609–10.

147. *Id.*

148. *Id.* at 610 (Kennedy, J., concurring in part).

149. 546 U.S. 320, 323 (2006).

150. *Id.* at 323–25.

151. *Id.* at 324–25.

152. *See* Stenberg v. Carhart, 530 U.S. 914, 929–30 (2000) (discussing the need for exceptions to government regulation of abortion where necessary to protect the health of the pregnant woman); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion) (same); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (same).

153. *See* Planned Parenthood of N. New Eng. v. Heed, 296 F. Supp. 2d 59, 65 (D.N.H. 2003), *aff'd*, 390 F.3d 53, 58 (2004).

154. The Court would be far more divided when the majority issued a similar ruling one Term later in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). In *Gonzales* the Court rejected a facial challenge to the federal Partial-Birth Abortion Ban Act of 2003, even though the Act banned a procedure that in some

Court, the state conceded (and in its opinion the Court reiterated) that, as a factual matter, some women need immediate abortions to avoid serious damage to their health, and as a legal matter, the Constitution requires states to provide women who need them access to such immediate abortions.[155] Nevertheless, despite the fact that the state essentially conceded that the statute as written was unconstitutional on its face, the Supreme Court rejected the lower courts' approach of facial invalidation, remanded the case to the lower courts, and essentially recommended that the lower courts rewrite the statute by injunction[156]—while simultaneously and inconsistently maintaining that "we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements.'"[157] The Court suggested that "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," and therefore a narrow injunction "prohibiting unconstitutional applications" may be sufficient to take care of any constitutional concerns.[158]

If viewed in the abstract, the Court is clearly right: an injunction prohibiting a statute from being applied unconstitutionally would by definition satisfy any theoretical constitutional concerns. But the world of privacy law as applied to abortion rights is not lived in the abstract; this world exists in a complicated morass of personal, psychological, sociological, and medical facts. If the Court had granted the plaintiffs' facial challenge, the state legislature would have been forced to draft a new statute with specific guidelines as to what constituted a medical emergency. An injunction prohibiting the state from applying its statute in medical emergencies, on the other hand, will leave the state free to define "medical emergency" on a case-by-case basis. This unfortunate fact leaves patients and doctors adrift, without any clear indication of when the New Hampshire law applies and when it does not. The Supreme Court's solution to this dilemma is to permit patients and

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instances may be medically necessary to protect the health of pregnant women. *Id.* at 1619–20. The Supreme Court held that the lower courts should not have considered a facial challenge to the statute, but rather should have forced doctors and patients to bring as-applied challenges in particular cases. *Id.* at 1638–39. "[An as-applied challenge] is the proper manner to protect the health of the woman if it can be shown that in discreet and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Id.*

155. *Ayotte*, 546 U.S. at 328.

156. *Id.* at 330–32. The Supreme Court opinion left alive for the lower courts the option of striking down the statute altogether if the lower courts found that the state legislature had expressed the specific intent that it preferred the courts to strike down the statute rather than modify the statute in any way. *Id.* at 331. Before the lower courts could make this determination, the legislature repealed the statute and the lawsuit was dismissed as moot. *See* Planned Parenthood of N. New Eng. v. Ayotte, 571 F. Supp. 2d 265, 270–71 (D.N.H. 2008).

157. *Ayotte*, 546 U.S. at 329 (alteration in original) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

158. *Id.* at 331–32.

doctors to bring as-applied challenges in individual situations. Unfortunately, this solution does nothing for doctors who are confronting what they believe may be a true medical emergency. In such a scenario, the doctor has only two options. Under the first option, the doctor could go to court to obtain an injunction against the application of the statute in the particular situation at hand—an option that is thoroughly impractical if the doctor is in the midst of an urgent medical crisis requiring immediate attention. Under the second option, the doctor could go ahead and perform the procedure without going to court, thereby subjecting him- or herself to second guessing by state authorities at a later time, followed by the possibility of criminal, civil, or administrative sanctions. This is precisely the sort of ad hoc state oversight of medical care that the Court has always forbidden in the abortion context.[159] What was lost on the Court in *Ayotte* is that the only way to avoid such unwarranted oversight of sensitive medical procedures is to eschew the ad hoc legal construction of a questionable statute via a series of as-applied challenges to the statute's constitutionality.

The debate within the Supreme Court over the use of facial challenges to unconstitutional statutes has focused on two things: first, the supposed impracticalities of using facial challenges to resolve constitutional disputes, and second, judicial-restraint concerns, in both their separation of powers and federalism manifestations.[160] The academic literature has generally been critical of attempts by some members of the Court to limit facial challenges, but the academic critiques generate other conceptual concerns that may inhibit the use of facial challenges to enforce structural rights. Professor Richard Fallon, for example, has argued that all challenges to statutes are in one sense as-applied challenges (since the lawsuit originates with the argument that the statute cannot be applied to the plaintiff), and that most statutes have a series of constitutional subrules that are separable from the unconstitutional subrules.[161] Nevertheless, Fallon argues that the application of certain legal doctrines "yield[s] the conclusion that a statute is invalid, not merely as applied to the facts, but more generally or even in whole."[162] In other words, "when a court upholds a constitutional challenge, the nature of the test that it applies will

159. *See* Colautti v. Franklin, 439 U.S. 379, 396 (1979) (holding unconstitutional a Pennsylvania abortion regulation imposing a high standard of care on doctors who performed abortions on fetuses that "may be viable" on the ground that the statute "could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment").

160. *See Ayotte*, 546 U.S. at 328–31 (discussing both the practical and theoretical concerns with facial challenges).

161. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1334–41 (2000).

162. *Id.* at 1337.

determine whether the statute is found unconstitutional solely as applied, in part, or in whole."[163] Professor Fallon then describes four categories of constitutional rules, and concludes that one category of rules is most likely to justify facial constitutional challenges. This category includes rules that demand that a statute fully specify the behavior it covers at the outset and limits the separability of subrules within statutes that are otherwise found unconstitutional.[164]

The overall thrust of Professor Fallon's critique of the debate over facial versus as-applied constitutional challenges is that there is no general set of rules regarding facial challenges that should apply across the board. Rather, Professor Fallon would have us look to the underlying doctrinal rules governing individual substantive claims to determine whether a facial challenge should be permitted in any particular instance.[165] The problem with this approach is that it may lend itself to haphazard and piecemeal litigation over constitutional provisions that are designed to serve a much more comprehensive function in regulating the government's behavior. This assertion is only conditional because Professor Fallon leaves himself a fairly large escape hatch from his endorsement of the proposition that as-applied challenges should remain the norm in constitutional adjudication.[166] The escape hatch is provided by his acknowledgment that the courts should continue to routinely recognize facial challenges to unconstitutional statutes within a certain category of cases. Professor Fallon describes this category as follows:

> [W]here constitutional values are unusually vulnerable, the Supreme Court can authorize the robust protection afforded by tests that invite rulings of facial invalidity and preclude the case-by-case curing of statutory defects. This approach most commends itself when a constitutional provision both affords protection to speech or conduct that is especially prone to "chill" and reflects a value that legislatures may be unusually disposed to undervalue in the absence of a significant judicially established disincentive.[167]

Although Professor Fallon seems to intend this definition to be fairly narrow, if applied honestly it would seem to encompass the entirety of what I call structural rights. These rights are intended to define the borders between government coercion and individual autonomy in order to preserve the ability of individuals to join together to oust any government that is not responsive to their needs. Thus, government intrusions into these areas of individual autonomy or government attempts to undermine these structural protections will almost inevitably "chill" individual conduct. More importantly, since governmental efforts

163. *Id.* at 1339.
164. *Id.* at 1344-46.
165. *Id.* at 1350 n.147.
166. *Id.* at 1352.
167. *Id.* (citations omitted).

to undermine the structural protection of the democratic political structure will be intended to benefit those currently controlling the political branches of government, such efforts will almost by definition involve the sorts of constitutional limitations that legislatures are prone to undervalue in the absence of strong judicial sanctions. Thus, at least with regard to its application to structural rights, Professor Fallon's exception may swallow his rule.

In the ongoing debate over the inadvisability or impermissibility of facial challenges to unconstitutional statutes, there are many different variations on the same themes discussed by Professor Fallon. Like Professor Fallon, many of these discussions reject the Court's assertion that it permits facial challenges only when all applications of a given statute are unconstitutional. Professor Michael Dorf argues, for example, that the Supreme Court really does not have a specific doctrine regarding facial and as-applied challenges, but rather employs in some circumstances a presumption of severability to salvage part of an otherwise unconstitutional statute.[168] The real question, therefore, is not whether a statute may be challenged on its face, but rather whether some portions of a challenged statute may be severed from others and thereby survive a constitutional challenge.[169] Professor Dorf then notes several substantive constitutional limitations on the applicability of the presumption of severability that he considers to be the true basis of the *Salerno* rule.[170] These substantive limitations include Equal Protection Clause challenges to underinclusive statutes,[171] the use of the overbreadth doctrine in First Amendment and some fundamental rights cases,[172] and the application of the Establishment Clause to prohibit government action motivated by impermissible religious purposes.[173]

I would suggest adding to the list of substantive constitutional limits on the *Salerno* rule the concept of structural rights. Like the other categories of limitations on *Salerno* mentioned by Professor Dorf, the substantive nature of structural rights make them particularly incompatible with as-applied challenges. As in cases involving equal protection underinclusiveness claims, it is difficult to fashion an adequate severability remedy in a structural rights challenge. In this respect, a structural rights challenge is most closely analogous to an unconstitutional purpose challenge under the Establishment Clause. In

168. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 249–50 (1994).

169. *Id.* at 249 ("The answer depends on whether the court treats the unconstitutional applications of the statute as severable from the constitutional ones.").

170. *Id.* at 251–81.

171. *Id.* at 251–61

172. *Id.* at 261–79.

173. *Id.* at 279–81.

an Establishment Clause case, once the plaintiff has demonstrated that a statute is in fact motivated by an impermissible purpose, then the entire statute is tainted and must be held unconstitutional.[174] No severability is possible. Likewise, once it is established in a structural rights case that the government is doing something that it is not empowered to do, then any attempt to sever part of the statute would be absurd, since the government is also disempowered from engaging in the same actions against others not presently in court. In this way, therefore, structural rights are also analogous to Professor Dorf's third substantive limitation on the severability presumption—the overbreadth doctrine.[175] The overbreadth doctrine exists in large part to prevent the government from engaging in actions that chill the rights of those who are not in court, and indeed was recognized as serving this function even in *Salerno* itself.[176] By the same token, the very purpose of structural rights is to preserve the political independence of everyone in society—including those who belong to groups that are currently out of power or highly unpopular, or who do not choose to engage in direct action against the government, or who do not choose for the moment to exercise their rights as citizens to take part in political activity. Thus, it is logical in structural rights litigation, as it is in litigation raising First Amendment overbreadth challenges, to freely permit facial challenges to statutes that violate these rights.

The discussions of Professors Fallon and Dorf are important because they reject the Court's chosen focus of the debate over *Salerno* as a substantively neutral rule advancing the equally neutral cause of judicial restraint, and instead view the debate as involving a substantively loaded procedural mechanism that is regularly employed to dilute or deny access to certain types of rights. Once it is recognized that the fight over *Salerno* is really a fight about substance rather than procedure, then the question turns to whether structural rights actually serve the important functions described in Part I, *supra*. If the assumption of this Article is correct and structural rights do indeed serve an indispensable function within a constitutional democracy, then the debate over the application of the *Salerno* rule should turn exclusively on the question whether in the absence of facial challenges structural rights could be enforced effectively or at all. An honest answer to this question would

174. *See* Edwards v. Aguillard, 482 U.S. 578, 590–94 (1987) (holding unconstitutional on its face a Louisiana creationism statute because the statute lacked a secular purpose); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (setting forth the requirement that a statute must have a secular purpose to comply with the Establishment Clause).

175. *See* Dorf, *supra* note 168, at 261–79.

176. *See* City of Chicago v. Morales, 527 U.S. 41, 79 n.2 (1999) (Scalia, J., dissenting) ("As *Salerno* noted, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression." (citation omitted)).

have to acknowledge that many if not most structural rights would not be enforceable in the absence of the free availability of facial challenges to statutes that infringe those rights. Thus, the procedural decision to enforce *Salerno* silently encompasses the underlying decision not to enforce most substantive rights. Once again, therefore, as in the standing area, the debate within the current Court over procedural limitations on constitutional litigation has substantive implications that the Court is not willing to acknowledge.

C. Undermining Structural Rights at the End of Lawsuits: Eliminating Remedies

We have seen in the first two sections how the Supreme Court is using its authority to fashion procedural rules that undercut the enforcement of structural rights. The Court does this at the beginning of the lawsuit by imposing restrictive standing rules that make it difficult for anyone not suffering a tort-style injury to bring a matter to the courts' attention, and it does this once the lawsuit begins by imposing severe restrictions on how unconstitutional statutes can be attacked. This section looks to the culmination of a lawsuit, and once again the trend described in the previous sections holds true: in recent years the Supreme Court has developed a body of remedial jurisprudence that threatens to eliminate any chance of redressing structural rights violations by governmental actors—even if those violations are proved in court or admitted by the government. If this observation is accurate, then once again the Court is using procedural mechanisms to render various structural rights meaningless.

Several caveats must be offered at the outset of this discussion. First of all, the body of law addressed here is somewhat esoteric, and the relevant precedents stretch back several decades. Moreover, the Court has not entirely settled on its present stance on the continued validity of these precedents. Finally, there are significant connections between the remedial theories of these cases—especially cases dealing with statutory remedies and those dealing with constitutional remedies—that most Justices on the Court (with usual exception of Justice Scalia) have not yet recognized. With all those caveats in mind, it nevertheless seems clear that the Court is poised on the brink of fundamentally revamping its view of whether violations of constitutional rights—especially structural rights—may be remedied in court in the absence of congressional authorization of the remedy.

Phrased narrowly, the issue addressed in this section is: Do the federal courts have inherent remedial authority to redress violations of structural constitutional rights by granting relief in the form of injunctions, declaratory judgments, or damages to victims of illegal conduct by the government? The debate over this issue has been going

on for many years, and for the moment the faction of the Court that would grant legal relief seems to maintain its narrow majority.[177] This conclusion is cast into doubt somewhat by a series of recent decisions in cases involving the courts' inherent authority to fashion relief for violations of federal statutes that do not include specific grants of remedial authority. In several of these cases the Court has refused to infer a remedy, using arguments that could easily be applied to cases in which the Court is being asked to infer remedies for constitutional violations. Although Justice Scalia has drawn the links between the statutory and constitutional cases, the very different considerations that apply to the inference of statutory and constitutional remedies make unclear the extent to which Justice Scalia has convinced other Justices to abandon the concept of inferred constitutional remedies.

In the constitutional area, the debate over the Court's authority to infer remedies to redress constitutional violations has for the moment been settled by the Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[178] *Bivens* authorized federal courts operating under nothing more than the general statutory grant of federal question jurisdiction[179] to award civil damages to the victims of Fourth Amendment violations by federal agents.[180] The question was whether the absence of a specific statutory grant of remedial authority rendered such an award impermissible. The essence of the conservative position on inferred constitutional remedies was stated in *Bivens* by Justice Black, who vociferously disagreed with the majority that federal courts have the inherent authority to remedy constitutional violations: "The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States."[181] The conservative position is, in other words, essentially about preserving the separation of powers. Just as the courts have no inherent authority to create their own jurisdiction, the argument goes, they also have no authority to give themselves the power to remedy particular substantive offenses.

The rejoinder to this position obviously must rest on the concept of inherent judicial authority, but judicial discussions of constitutional remedies often provide little in the way of precise rationales for granting courts the ability to infer remedies without specific statutory authorization. Justice Brennan's majority opinion in *Bivens*, for example, offers little more than remedial homilies: "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the

177. *See infra* notes 178–216 and accompanying text.
178. 403 U.S. 388 (1971).
179. *See* 28 U.S.C. § 1331 (2006).
180. *Bivens*, 403 U.S. at 389.
181. *Id.* at 429 (Black, J., dissenting).

violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."[182] Justice Brennan answers this question "yes," but he does not offer much in the way of an explanation of why he arrived at that answer.

Justice Brennan's answer to the question of rights and remedies is the correct one—indeed, if structural rights are to be effectively enforced, it is the only possible answer—but the explanation for that answer is much more involved than Justice Brennan admits. The basic framework of an explanation can be found in Justice Harlan's concurring opinion in *Bivens*. Justice Harlan, who notes that he was initially skeptical of the plaintiffs' claims, eventually concludes that the plaintiffs were correct in asking the federal court to award damages for the Fourth Amendment violations of federal agents.[183] He rests his conclusion on two bases. First, Justice Harlan argues that the award of damages is analogous to the traditional assumption that federal courts have inherent authority under the general grant of subject matter jurisdiction to issue equitable relief in cases falling within their jurisdiction.[184] Second, Justice Harlan argues that the award of damages for constitutional violations is consistent with various precedents involving damages awards issued by federal courts in cases involving statutory violations, in which the statutes did not provide for specific remedial authority but damages awards were deemed necessary to effectuate the congressional policy.[185] Justice Harlan uses these two different areas of federal court procedure both to emphasize that there is nothing new about federal courts utilizing different types of traditional legal and equitable remedies to effectuate their judgments, and to rebut the *Bivens* dissenters' claims that there is something inherently legislative in nature about the authorization of judicial remedies. Claims of this sort—that the authorization of judicial remedies is an inherently legislative function—are particularly pertinent to the enforcement of structural rights. Since one of the most important functions of structural rights is to limit the excesses of both the legislative and executive branches, it would be somewhat ironic if one of those branches could thwart the enforcement of structural rights simply by refusing to grant the courts remedial authority to enforce those rights.

The claim that the authorization of judicial remedies is exclusively a legislative function is an explicit claim about the separation of powers. More particularly, as Justice Harlan's *Bivens* concurrence makes clear, this amounts to the claim that the creation of judicial remedies for constitutional violations is a political question, which for both pragmatic

182. *Id.* at 397 (majority opinion).

183. *Id.* at 398 (Harlan, J., concurring).

184. *Id.* at 404–06.

185. *Id.* at 402–03.

and theoretical reasons the courts should not endeavor to address.[186] If phrased in this way, the flaw in the argument against the judicial creation of remedies for constitutional violations becomes clear. In discussing this argument, Justice Harlan refers to one of the classic descriptions of a political question and concludes that the argument "cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment."[187] He then refers to a series of decisions in which courts have enforced statutory rights in the absence of specific statutory authorization of remedies.[188] In these cases—the most important of which is *J. I. Case Co. v. Borak*[189]—the Court inferred a damages remedy in order to effectuate the purposes of the statute: "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[190]

The Court's decision in *Borak* is very short, and there is almost no theoretical discussion of the courts' power vis-à-vis Congress to define remedies for the enforcement of particular statutes. The reason for the Court's offhanded treatment of this issue may be that there simply does not seem to be much of an argument for the courts to refrain from using their inherent remedial authority when confronted with a violation of a substantive statutory right. After all, if Congress went to the trouble to pass a statute containing substantive provisions, then it is reasonable to assume that Congress was not engaging in an empty gesture. Enforcing Congress's own policy could hardly be construed as hostile to Congress. Moreover, if Congress did intend to engage in purely symbolic action when it passed a statute, then it would be very easy to put in that statute a clause indicating that Congress intended to create no private right of action to enforce the statute. Also, if the courts misconstrued a statute as substantive rather than symbolic, it would be very easy for Congress to correct the courts' mistake. Finally, as a theoretical matter, it is very strange to argue that the vigorous judicial enforcement of a statute in any way infringes upon Congress's legislative authority. After all, the stated

186. *Id.* at 400–02.

187. *Id.* at 402; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (identifying six elements that are typically found in political question cases). For discussion of the Court's use of *Baker* in another area in which the Court is restricting the litigation of structural rights, see *infra* note 248. For a discussion of the Court's attempt to define all efforts to litigate structural rights violations as political questions, see *infra* notes 246–50 and accompanying text.

188. *See Bivens*, 403 U.S. at 402–09 (Harlan, J., concurring).

189. 377 U.S. 426, 433 (1964) (inferring that the federal courts have authority to order rescission and damages remedies to victims of violations of section 14(a) of the Securities Exchange Act of 1934).

190. *Id.*

purpose of inferring remedies in *Borak*-style cases is "to make effective the congressional purpose."[191]

Despite the seemingly clear logic in allowing courts to devise remedies to enforce the policies that Congress wrote into law, during the past few years the Supreme Court has been systematically chipping away at *Borak* and casting doubt on the proposition that the courts may infer from the existence of a statutory policy that Congress actually wants that policy enforced.[192] Justice Scalia has used what the Court has said in these statutory rights cases to cast doubt upon *Bivens* and the authority it confers upon the courts to infer remedies in constitutional rights cases—including cases dealing with structural rights.[193]

Two recent decisions exemplify the current Supreme Court's efforts to eradicate the judicial authority to infer remedies to enforce statutory rights. In the first of these cases, *Alexander v. Sandoval*, the Supreme Court refused to infer a remedy to allow private individuals to enforce disparate-impact regulations under Title VI of the Civil Rights Act of 1964.[194] In the second of these cases, *Gonzaga University v. Doe*, the Court held that there is no private right of action to enforce a statute that Congress named the Family Educational Rights and Privacy Act of 1974.[195] There is a certain irony in the Court holding that a statute whose title includes the phrase "Family Educational Rights" in fact creates no rights whatsoever. This irony would be allowed to pass without comment here but for the fact that the methodology producing the irony is at the heart of how the Court is revamping the area of inferred remedies for statutory and constitutional violations. At the most obvious level what the Court is doing in these cases is moving from a *Borak*-style search for methods to effectuate policies passed by Congress, to a rigid, formalistic system that is built upon the presumption that individuals may not enforce their rights unless Congress explicitly grants them permission to do so. The Court actually goes even further in *Gonzaga*, in which the Court takes its new analysis requiring Congress to explicitly articulate individual rights and applies that analysis to limit relief in cases in which the plaintiff is attempting to enforce a statute by using 42 U.S.C. § 1983—one of the broadest and most comprehensive remedial statutes Congress has ever written.[196]

As with the Court's recent efforts to narrow the concept of standing and its concurrent attempts to restrict the ability of plaintiffs to raise

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191. *Id.*

192. *See infra* notes 194–216 and accompanying text.

193. *See infra* note 208 and accompanying text.

194. 532 U.S. 275, 293 (2001).

195. 536 U.S. 273, 290 (2002).

196. For the discussion of the Court's application of its analysis to cases involving § 1983, see *id.* at 284–86.

facial challenges to unconstitutional statutes, the primary rationale for the Court's refusal to infer remedies for the enforcement of statutory rights is separation of powers, defined for present purposes as a general inclination toward judicial passivity in deference to the political branches. The Court even treats this approach as being inherent in the very structure of the federal courts. Justice Scalia, speaking on behalf of the majority in *Sandoval*, concludes that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[197] Thus, the Court creates a system in which Congress has to enact statutes in particular forms. If Congress intends to create policies that benefit individuals and have those policies enforced, Congress not only has to explicitly articulate an individual right in the text of the statute, but also has to separately articulate an equally explicit grant of remedial authority in order to permit the courts to enforce that right.[198] Congress's failure to follow the Court's instructions about how to write statutes will result in Congress having engaged in essentially an empty gesture. One of the many ironies in these cases is the fact that the Court, acting in the name of judicial deference to Congress, effectively dictates detailed instructions to Congress regarding how it must do its work.

It should be emphasized that these cases represent a radical departure from the way the Court had previously treated the issue of enforcing ambiguous statutes. It should also be noted that these recent cases have the effect of overruling *Borak*. Although the Court explicitly refuses to follow *Borak*, it attempts to enlist support for this decision by claiming that *Borak* effectively had been abandoned much earlier. Specifically, Justice Scalia contends in *Sandoval* that the Court had abandoned the *Borak* understanding of private causes of action twenty-six years earlier in *Cort v. Ash*.[199] In fact, this is demonstrably untrue. Although in *Cort* a unanimous Court refused to infer a private cause of action for damages from the existence of a federal criminal statute prohibiting certain corporate election contributions, the Court also reaffirmed *Borak* at several places in its opinion.[200] Indeed, in *Cort* the Court summed up its understanding of the rules pertaining to private causes of action in a way that directly contradicts the standard adopted in

197. *Sandoval*, 532 U.S. at 287 (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

198. *Id.* at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.").

199. *Id.* at 293; *see* Cort v. Ash, 422 U.S. 66, 78 (1975).

200. *See, e.g.*, *Cort*, 422 U.S. at 79 & n.11 (citing J. I. Case Co. v. Borak, 377 U.S. 433 (1964), in support of the proposition that "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages"); *id.* at 84 (quoting central principle of *Borak*, 377 U.S. at 433, that it is the duty of courts to infer remedies that would effectuate congressional intent).

Justice Scalia's opinion in *Sandoval* nearly three decades later. According to *Cort*, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[201] Justice Scalia's assertion that *Cort* abandoned *Borak* is also inconsistent with the portion of the *Cort* opinion that identifies several factors for courts to use in deciding whether to infer private rights of action to enforce statutes.[202] This list includes some factors that would be embraced by Justice Scalia, such as whether the statute that the party seeks to enforce creates a federal right in favor of the plaintiff, and whether there is any implicit or explicit indication of legislative intent to create a private remedy.[203] But the *Cort* list also includes one factor that is based on the central holding of *Borak*: "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"[204]

In the end, the most important thing is not the fact that within the last few years the Court has abandoned *Borak* and revamped the rules governing implied remedies to enforce federal statutes in a way that virtually eradicates all implied remedies. The most important fact is that *Borak* and the "effectuate-the-law" standard that it embodies are also the basis for the *Bivens* concept that courts can infer remedies to enforce constitutional provisions, including those that can be categorized as structural rights. This raises the question whether, if the Court is willing to abandon the *Borak* standard for inferring remedies to enforce statutory rights, it is also willing to abandon the *Borak*-based standard for inferring remedies to enforce constitutional rights. On one hand, some of the logic of *Gonzaga* and *Sandoval* does not apply in the context of constitutional remedies. If the Court in *Gonzaga* and *Sandoval* is simply reducing statutory remedies to an exercise of literalistic statutory interpretation, then *Bivens* should survive the new cases intact. On the other hand, the larger theme of *Gonzaga* and *Sandoval* concerns the more comprehensive issues relating to the separation of powers. If separation of powers is the central theme of *Gonzaga* and *Sandoval*, then these cases have a direct bearing on the continued viability of *Bivens* and the very concept of using implied remedies to redress constitutional violations.

The corrosive effect that these statutory remedies cases have on the continued viability of *Bivens* has not gone unnoticed within the Court. In *Correctional Services Corp. v. Malesko*, the Court refused to apply *Bivens* to a case in which a prisoner sued a private corporation operating a

201. *Id.* at 82.
202. *Id.* at 78.
203. *Id.*
204. *Id.*

halfway house under contract with the federal government.[205] In explaining its decision not to apply *Bivens* to this case, the majority spoke mainly in terms of pragmatics. Specifically, the majority argued that *Bivens* was concerned primarily with deterring individual federal officials rather than agencies or institutions, and was therefore inappropriate for the particular claim raised in the case.[206] Chief Justice Rehnquist's majority opinion referred to *Sandoval* only in passing, in a single footnote.[207] It was left to Justice Scalia, in a concurring opinion joined by Justice Thomas, to highlight the full implications of *Sandoval* and the other statutory remedies cases for *Bivens* and inferred constitutional remedies generally. According to Justice Scalia:

> *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be "implied" by the mere existence of a statutory or constitutional prohibition. As the Court points out, we have abandoned that power to invent "implications" in the statutory field. There is even greater reason to abandon it in the constitutional field, since an "implication" imagined in the Constitution can presumably not even be repudiated by Congress.[208]

Thus, Justice Scalia uses a case in which the Court renounces its authority to fashion remedies for statutes created by Congress as support for the proposition that the Court cannot use its inherent authority to enforce constitutional provisions that are intended to tie Congress's hands. Then, to make matters worse, Justice Scalia explains that the Court should not use its inherent authority to enforce constitutional provisions that are designed to limit Congress's power because such authority cannot be repudiated by Congress.

Such is the casuistry that has led the Court to the brink of denying the judicial branch the authority to enforce the Constitution. This topsy-turvy view of judicial authority services the goal of separation of powers only if one omits the courts from the concept of "powers." In truth, the federal courts have unique powers that allow them to serve an important—and from the perspective of structural rights, essential—function in the constitutional framework defined by the separation of powers.

The argument presented here in favor of recognizing the inherent judicial authority to remedy violations of structural rights echoes to some extent the endless debate over whether Article III imbues the federal courts with inherent jurisdiction, or rather allows Congress to exercise the power to strip jurisdiction from the federal courts in some or all

205. 534 U.S. 61, 63 (2001).
206. *Id.* at 70–71.
207. *Id.* at 67 n.3.
208. *Id.* at 75 (Scalia, J., concurring) (citations omitted).

circumstances.[209] The concept of structural rights has implications for the Article III debate because structural rights theory requires Article III to be interpreted in a way that provides the federal courts with a mechanism to perform their constitutional role in enforcing structural rights.

When reduced to its essence, the structural rights argument is that: (1) in the spirit of Blackstone and Chief Justice Marshall, "where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded"[210]—thus, structural rights are presumed to carry with them inherent legal remedies; (2) it is in the nature of legal remedies to eschew self-help and require an enforcing agent; and (3) the federal courts are the only plausible entities that are equipped to enforce the inherent remedies that attend structural rights. This argument complements the position of those who assert that the concept of separation of powers as embodied in Article III limits Congress's authority to strip jurisdiction or to eliminate altogether the federal courts.[211] The argument here is different than the usual Article III argument, however, because the structural rights argument asserts that the limitations on Congress's ability to restrict the remedial authority of courts are a logical inference of the rights themselves, rather than an ingredient of Article III's jurisdictional provisions.[212] Thus, the structural rights argument comes closest to Professor Hart's concept that courts possess certain "essential functions," which Congress may not take away through jurisdictional or remedial restrictions.[213] The structural rights argument actually goes some distance beyond Professor Hart, who

209. *Compare* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908, 920 (1984) (arguing that Congress has plenary authority to allocate jurisdiction to the lower federal courts and appellate jurisdiction to the Supreme Court), Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031, 1041 (1982) (same), *and* Herbert Wexler, *The Court and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (same), *with* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25–27 (1981) (arguing that Article III imposes limitations on Congress's ability to strip jurisdiction from lower courts or to eliminate lower courts altogether), Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532–33 (1974) (same), *and* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–65 (1953) (arguing that Congress does not have the constitutional authority to strip jurisdiction from federal courts, especially with regard to the courts' "essential functions").

210. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765)).

211. *See* Eisenberg, *supra* note 209; Sager, *supra* note 209.

212. For a similar argument, see Lawrence Sager's discussion of the proposition that Congress's authority under the Exceptions Clause of Article III is limited by other constitutional provisions that ordinarily constrain Congress's behavior. *See* Sager, *supra* note 209, at 37–42.

213. Hart, *supra* note 209, at 1365 ("The measure [of a congressional jurisdiction-stripping measure's constitutionality] is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court . . . .").

focused only on the Supreme Court rather than lower federal courts[214] and who was willing to concede that Congress could channel jurisdiction to the Supreme Court so long as it did not altogether eliminate all avenues into the Court.[215] In contrast to Professor Hart's deference to Congress on these matters, adequate enforcement of structural rights would require that the constitutional protection of jurisdiction in the lower federal courts be just as robust as the protection of the Supreme Court's jurisdiction, and would also prohibit Congress from limiting more effective remedies in favor of others that may be less effective. Nevertheless, the rationale for structural rights theory is exactly the same as Professor Hart's rationale for restricting Congress's power to limit the jurisdiction of federal courts: because the contrary position is based in the proposition "that the power to regulate jurisdiction is actually a power to regulate rights."[216]

III. The Insufficient Justifications for the Elimination of Structural Rights

The previous Part provides several examples of mechanisms created or greatly enhanced by the current Court to deny litigants the ability to effectively enforce federal statutory and constitutional law. These efforts to limit the courts' authority to enforce the law strike especially hard at efforts to enforce structural rights. Indeed, the imposition of procedural limitations on constitutional litigation will have the effect of diluting or exterminating structural rights in many cases. It is not difficult to see why this is so. Unlike personal rights, structural rights benefit all citizens to an equal degree. Unfortunately, the benefit is highly abstract: the preservation of a form of government that allows each citizen to participate (or not) in government to the extent that citizen feels comfortable. Thus, the party complaining in court about violations of structural rights will often lack the sort of very specific and particularized injuries more common in private tort litigation and now basically required in all cases under the Court's strict standing doctrine.[217] Likewise, violations of structural rights will often be systemic rather than particularized, and therefore will often require broad facial attacks on an entire statutory framework or administrative scheme. Thus, the Court's recent limitations on facial attacks will hit structural rights litigation

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214. *See id.* at 1363–64 ("Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.").

215. *See id.* 1372–73 ("It's hard . . . to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court) if Congress chooses to provide some alternative procedure.").

216. *See id.* at 1371.

217. *See supra* notes 73–122 and accompanying text.

especially hard.[218] Finally, as the Court advances toward the possible elimination of *Bivens*, it could potentially construct a legal landscape in which courts would be stripped of all powers to enforce constitutional provisions intended to keep the elected branches of government within their constitutional boundaries.[219] These effects are significant, and arguably alter the very nature of the American constitutional landscape. If the concept of structural rights set forth in Part I, *supra*, is correct, then eliminating the courts' ability to enforce structural rights will centralize power and to a large extent undercut the democratic nature of this country's constitutional government.

Given the sinister implications of these moves toward restricting structural rights litigation, what justifications could be offered for the Court's recent actions? Courts and academic commentators have provided several explanations for imposing the various procedural limitations on constitutional litigation discussed in the previous Part, but these explanations are almost always offered in a vacuum, without regard to the specific substantive implications that those procedural limitations may carry. It is therefore worth exploring these explanations in a broader light. In this broader light, the question is not whether, as a matter of institutional design, courts should systematically restrain themselves from acting in particular cases, but rather whether the structural rights provisions of the Constitution can serve their function if courts refuse to perform their role of enforcing structural rights and thereby keeping the democratic system functioning effectively. Or, to put the matter another way, if the courts do not fulfill this structural function, then who or what will?

Rather than ask questions about the systemic implications of their restrictive approach to constitutional procedure on the constitutional design, representatives of the current Court's majority tend to recite vague constitutional platitudes to justify the limitations they are imposing on constitutional litigation.[220] These platitudes usually involve some variation on the theme of separation of powers or judicial restraint.[221] In contrast, the dissenters tend to focus more narrowly on the pragmatic implications of imposing procedural limitations on constitutional litigation.[222] This gives the dissents in these cases a grounded quality that the majority opinions lack, but focusing on pragmatics makes it difficult for the dissents to respond adequately to what the majority claims are basic constitutional principles.

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218. *See supra* notes 125–76and accompanying text.

219. *See supra* notes 178–216 and accompanying text.

220. *See infra* notes 229–33, 236–38 and accompanying text.

221. *See infra* notes 234–35 and accompanying text.

222. *See infra* notes 223–28 and accompanying text.

Some of the clearest examples of the different approaches embraced by the majority and dissenters can be found in recent standing decisions. To the majority in these cases, the standing limitations are all about the grand principle of the separation of powers, which is to say (depending on how one looks at the matter) judicial restraint or judicial powerlessness.[223] To the majority, allowing courts to adjudicate what have come to be known as "generalized grievances" would violate the central theoretical division between the political branches and the courts.[224] This theoretical division is that courts are allowed only to adjudicate individual grievances, whereas the political branches are allocated authority to protect the public interest writ large. As the Court's majority phrased this point in *Lujan*, "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[225]

We will return in a moment to the obvious question of what happens when Congress or the Chief Executive violates the public interest as embodied in the Constitution and laws. For the moment, however, it is noteworthy that the Court's majority has staked out a definitive theoretical position on these issues. The majority's arguments for limiting the courts' remedial power to adjudicate issues of constitutional law are integral to a comprehensive political and constitutional theory—that is, a theory of how a democratic government should be structured. The majority's position produces what to a layperson must sound like a very strange rule of law. As the majority phrased that rule in *Lujan*: "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable."[226] The Court's majority believes, at best, in a formalist democracy, in which those who are formally elected to control the political branches are essentially authorized to act unfettered by laws or constitutional provisions that impede the implementation of their immediate policy objectives—even if those objectives are inherently undemocratic. The majority's implicit response to those who object to the fox being allowed to guard the chicken coop in this fashion is that if the objectors do not like the results, then they should convince their fellow citizens to elect a better quality fox.

223. *See infra* notes 243–57 and accompanying text.

224. *See* United States v. Richardson, 418 U.S. 166, 174 (1974) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" (quoting Flast v. Cohen, 392 U.S. 83, 114 (1968) (Stewart, J., concurring))).

225. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).

226. *Id.* at 575.

There are, of course, alternative conceptions of democracy, such as the one proposed in this Article, but one could not easily find such a conception in the dissenters' opinions in the Court's recent standing cases. Instead, what we find in the dissenters' opinions are a series of fairly narrow, pragmatic objections that rarely extend the dissenters' more liberal notions of standing beyond the facts of the case at hand. In *Hein*, for example, the dissenters argued that the standing issue reduces ultimately to the pragmatic matter of whether the plaintiff's complaint is too abstract to be justiciable by the courts.[227] Unfortunately, the dissent then gives away much of the game by conceding that "once one strays from these obvious cases [i.e., economic or physical harms], the enquiry can turn subtle."[228] Instead of fighting standing battles by analogizing to economic or physical harms—an analogy that will never work in favor of those litigating constitutional violations or other public harms—it would be more profitable for the dissenters in these cases to simply reject the analogy to individual injuries altogether, and assert forthrightly that there is a category of harm to the commonwealth in which the normal standing rules simply should not apply. The dissenters should urge the full Court to recognize that the government is capable of harming the very fabric of democratic governance by ignoring constitutional limitations on its actions. Since these constitutional limitations exist in order to protect the essence of democracy—i.e., the citizens' power over their government—then it stands to reason that every citizen has a vested interest in asking the courts to correct these harms when they occur.

Discussions similar to those in the Court's standing decisions can also be found in the Court's recent discussions of the permissibility of facial challenges to unconstitutional statutes and, to a lesser extent, in the cases discussing limitations on the judicial power to infer remedies for constitutional violations. In the cases involving facial challenges, in fact, the Court's justifications for the *Salerno* rule (or a rule that falls short of *Salerno* but nevertheless strictly limits facial challenges to unconstitutional statutes) could be lifted almost verbatim from its standing decisions. Two themes figure prominently in these cases: one theme relates to the separation of powers and the other relates to the individualized nature of rights enforcement. Both themes have their

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227. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 641–43 (Souter, J., dissenting). This conception of standing harkens back to *Flast v. Cohen*, in which a then-liberal majority asserted that the "'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" 392 U.S. 83, 99 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

228. *Hein*, 551 U.S. at 642 (Souter, J., dissenting).

roots in attitudes expressed in cases that predate the present dispute over *Salerno*.

The most comprehensive expression of these attitudes in pre-*Salerno* cases appears in Justice Black's majority opinion in *Younger v. Harris*, which held that in most circumstances federal courts have no authority to enjoin ongoing state criminal proceedings involving federal constitutional challenges to state statutes.[229] According to Justice Black, "Procedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal courts in our constitutional plan."[230] The power of judicial review, Justice Black continued, "does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them."[231] Justice Black gives several reasons to support judicial restraint in the face of unconstitutional legislation, all of which relate to the need for judicial deference to legislative prerogatives.

> The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided.[232]

Justice Black also couples the judicial restraint theme with the theme that rights (at least judicially enforceable rights) are all individual in nature.

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution.[233]

Thus, Justice Black renders the federal courts' magisterial authority to enforce constitutional limitations on political actors via the power of judicial review as subservient to the haphazard and piecemeal judicial processes more befitting a low-level state civil court.

The more recent cases involving facial versus as-applied challenges have far less comprehensive discussions of the reasons why a majority of the Court wants to limit facial challenges. Indeed, in cases like *Bowen v.*

229. 401 U.S. 37, 41 (1971) (dismissing a lawsuit raising First Amendment claims against a California statute that two years earlier the Court had suggested was unconstitutional); *see id.* at 60 (Douglas, J., dissenting) (noting that the Court itself had deemed the statute at issue in *Younger* unconstitutional only two years earlier).

230. *Id.* at 52 (majority opinion).

231. *Id.*

232. *Id.* at 53 (citation omitted).

233. *Id.* at 52.

Kendrick[234] this issue is not addressed at all in the majority opinion that rejects the facial challenge, leaving it to the dissent to point out several practical problems with relegating the plaintiffs to as-applied challenges.[235] *United States v. Salerno*[236] lent its name to the so-called "*Salerno* rule," which is the focal point of the current dispute over the viability of facial challenges to unconstitutional statutes, but that opinion is equally bereft of any systematic discussion of why facial challenges should be limited. In *Ayotte*, one of the most recent examples in which the Court refuses to facially invalidate an unconstitutional law, the Court includes a very general discussion of "[t]hree interrelated principles [that] inform our approach to remedies."[237] All three principles are simply paeans to the grail of judicial deference to legislative action.[238] The Court's brief discussion of these principles, however, tells us little about why such deference is either necessary or advisable in the particular circumstances presented in *Ayotte* or any other case.

A similar pattern appears in the cases discussing restrictions on inferred remedies for constitutional violations. The pattern starts in decisions such as *Sandoval* and *Gonzaga*—cases in which the Court limited judicial authority to infer remedies from the substantive provisions of statutes. In these cases the Court limited judicial authority ostensibly in the interest of judicial restraint and deference to the political branches.[239] But as noted above, the actual effect of these decisions is to refuse to enforce valid statutes unless the statutes contain specific remedial provisions as demanded by the Court. The Court's logic that this amounts to deference to the political branches makes sense only in the context of a severe and literalistic textualism. The Court evidently believes that Congress passes statutes that it never intends to have enforced, and communicates the message that it does not want a statute enforced by neglecting to include a remedial provision. Somehow in these cases the contrary assumption—that Congress always wants its statutes enforced unless it says otherwise—is viewed as insufficiently deferential to the political branches. Since this theme of judicial restraint

234. 487 U.S. 589 (1988).

235. *See id.* at 627 (Blackmun, J., dissenting) (arguing that the majority misused the distinction between facial and as-applied challenges in order to "divide and conquer appellees' challenge.... By characterizing appellee's objections to the real-world operation of the [statute] as an 'as-applied' challenge, the Court risks misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the [statute].").

236. 481 U.S. 739 (1987).

237. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006).

238. The Court's three principles are more akin to three mandates to courts crafting judicial remedies: First, avoid nullifying more of a statute than is necessary; second, do not rewrite statutes in order to salvage them in the face of legal attacks; and third, respect legislative intent, "the touchstone for any decision about remedy." *Id.* at 329–30.

239. *See supra* notes 194–201.

and deference to Congress is used to deny enforcement of valid congressional statutes, it makes little sense even in the statutory context. Nevertheless, members of the majority such as Justice Scalia have already taken this theme and applied it directly to cases such as *Bivens*, in which the Court infers remedies to enforce constitutional provisions that are specifically designed to limit Congress's power.[240] Justice Scalia even suggests at one point that one reason why courts should not be allowed to infer remedies to enforce constitutional rights is because it would deny Congress the authority to repudiate those remedies.[241] Conversely, it is the premise of this Article that repudiating remedies is the equivalent of repudiating the substantive rights to which those remedies attach. If this is true, then Justice Scalia must explain why in the context of structural rights, if Congress has no authority to repudiate the rights themselves, it somehow has acquired the authority to eradicate the remedies that give those rights substance.

In sum, the Court's explanation for its behavior is remarkably similar in all the recent cases in which it seeks to deny access to judicial remedies for violations of structural rights. To the extent that the Court discusses its rationale for limiting judicial authority to enforce rights, including structural rights, that rationale almost always boils down to some variation on the theme of judicial restraint and an enforced respect for the elected branches of government.[242] The current majority of the Court considers judicial restraint an unequivocal social and political good, but in fact, at least in the context of structural rights, judicial restraint has the effect of distorting the constitutional system by eradicating structural constraints on the action of the political branches. Thus, in this context the term "judicial restraint" is something of a misnomer. In this context, judicial restraint has exactly the same type of effect as the absence of judicial restraint. By refusing to prohibit actions that violate structural constraints on the government, the Court effectively certifies those actions as legitimate. Whether the courts act or refuse to act, meaning is ascribed to the Constitution and political power is deployed in particular ways.

Although judicial restraint is usually posited as a laudable exercise of judicial humility, in fact it is often just the opposite. In a situation in which a structural constraint is asserted against some government action, the courts have only two options. Under option one, the courts may use their power to enforce the structural constraint, which will have the effect of enforcing the constitutional provision and thereby preventing the government from acting illegally. Under option two, the courts may

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240. *See supra* notes 206–16.

241. *See infra* note 246.

242. *See supra* notes 194–238 and accompanying text.

assert some version of the theory of judicial restraint, which will have the effect of refusing to enforce the constitutional provision and thereby allowing the government to act illegally. Paradoxically, in this scenario judicial restraint is actually the less humble position for the courts to take. When the courts defer to the unconstitutional exercise of power by the political branches, they do not modestly yield to the greater expertise or judgment of other branches of government; rather, the courts become the handmaidens and facilitators of rogue political actors.

The Court's approach of dispensing with many constitutional issues involving structural rights by referring to the principle of judicial restraint has the effect of turning these issues into political questions. The Court has on at least one occasion admitted this forthrightly. In *United States v. Richardson*, the Court rejected on standing grounds a challenge to Congress's refusal to publish the CIA's secret black budget.[243] The plaintiff's claim was that this refusal violated the Constitution's Statement and Account Clause,[244] which requires that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."[245] The Court noted that the plaintiff shared his injury with every other citizen.[246] In explaining why this fact is relevant to its decision to dismiss the complaint on standing grounds, the Court explicitly referred to the political question doctrine:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[247]

There are several problems with the Court's explanation, starting with the fact that the claim in *Richardson* fits none of the six classic features of political question claims set forth in *Baker v. Carr*[248]—a case to which the court in *Richardson* specifically refers.[249]

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243. 418 U.S. 166, 179–80 (1974).

244. *Id.* at 167.

245. U.S. CONST. art. I, § 9, cl. 2.

246. *Richardson*, 418 U.S. at 178.

247. *Id.* at 179.

248. 369 U.S. 186, 217 (1962) (identifying six elements that are typically found in political question cases). The six major factors do not apply to the issues in cases such as *Richardson* because there is no textual constitutional commitment of the relevant issues to another branch of government; there are

The bigger problems, however, are with the Court's reference to the democratic process as a solution to the plaintiff's complaint about Congress's constitutional violation. The most basic problem is one of logic. The plaintiff in *Richardson* essentially brought an informational claim. In other words, he claimed that the Constitution guaranteed citizens certain information in order to allow them to exercise their democratic franchise knowledgeably. The Court rejected his claim, and referred those who seek this information to the democratic process, inviting them to convince "a sufficient number of their fellow electors" to throw the scoundrels out if Congress did not produce the requested information.[250] Unfortunately, without the information that the plaintiff sought in the lawsuit, there would be no way to convince his fellow electors that bad deeds were afoot and there were scoundrels to be thrown out.

The larger problem is with the Court's snapshot view of democracy. The Court's view of democracy is that of an electoral snapshot—a one-time, winner-take-all contest in which the winners are essentially unconstrained in the exercise of their power once they get into office. If people do not like the way elected officials exercise power, the argument goes, then they can eject those officials from office at the next election. The possibility that politicians may exercise their power after their first election in ways that perpetuate that power indefinitely does not seem to have occurred to the Court. Nor does it seem to have occurred to the Court that political factions on both sides of the aisle may have a joint interest in advancing the unfettered exercise of governmental power, since both Democrats and Republicans will have little desire to diminish the power that comes with the crown that they both seek to wear.

The unconstrained, vulgar democracy contemplated by the Court may have many virtues, but it has many more flaws. Most of those flaws have to do with the political consequences noted in the previous paragraph that attend the short-term thinking that the Court displayed in *Richardson*. The structural rights in the Constitution described in Part I, *supra*, are designed to mitigate these flaws by treating every political faction that happens to gain power as beholden to the larger purposes of the constitutional project. Under this system, the winner does not, in fact, take all, because both the means and purposes of exercising power are constrained by the need to preserve the democratic process itself. No matter how large an electoral victory a particular faction has mustered,

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manageable judicial standards for resolving the issues; the policies involved are not clearly intended for nonjudicial discretion; the resolution of the issues do not express disrespect for coordinate branches of government; there is no unusual need to adhere to an existing political decision; and there is no potential for embarrassment due to multiple decisions by multiple departments.

249. *See Richardson*, 418 U.S. at 171, 173, 178, 180.

250. *Id.* at 179.

that faction will be viewed as governing undemocratically whenever it exercises power in a way that contravenes the rules that structure the democratic process set forth in the Constitution. Contrary to the Court's conception in *Richardson*, elections are only one part of the democratic process. True democracy requires structural elements in addition to elections to preserve the basic sense that citizens control the government, which is the very essence of democracy in any of its forms.

Whenever the Court systematically seeks to limit access to judicial relief, or limits the tools by which courts can provide that relief, the Court thereby removes from the democratic process the very structural elements that are necessary to render the system truly democratic. In the various decisions discussed above—involving standing, limitations on facial challenges to constitutional statutes, and limitations on judicial remedies—this is precisely what the current majority on the Supreme Court has done. In the standing area, the Court has reduced all constitutional claims to the functional equivalents of everyday civil tort suits, thereby making it impossible to enforce any structural rights claims and thereby nullifying several structural rights provisions.[251] With regard to recent limitations that the Court has placed on facial challenges, the Court has effectively reduced challenges brought against broad constitutional violations to the level of small-scale, fact-specific claims, which must be brought in a piecemeal fashion that is often inefficient and ineffectual. Finally, with regard to limitations on the courts' ability to infer remedies to enforce constitutional provisions, the trajectory of the Supreme Court's recent decisions seems to be predicated on the assumption that certain constitutional provisions should exist only in the abstract, and have no practical significance in the real world.

When all is said and done, the Court's reliance on judicial restraint and deference to the legislature to justify its decisions limiting judicial power rests on a claim about democracy. The claim is that society prefers to be ruled by elected officials rather than, to borrow Raoul Berger's famous book title, government by judiciary.[252] At first glance it may seem that there is something to this claim; at first it may seem like judicial deference represents a perfectly proper nod of respect to the democratic process. In fact, if the form of democracy created by the Constitution is properly understood, the Court's approach should be seen as thoroughly

251. Indeed, this is exactly what the Court has already done with the Statement and Account Clause and the Incompatibility Clause. *See Richardson*, 418 U.S. at 179–80 (Statement and Account Clause); Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 209 (1974) (rejecting the standing of military reservists to challenge violations of the Incompatibility Clause by members of Congress who simultaneously serve as members of the military).

252. *See* BERGER, *supra* note 12 (arguing that the Warren Court exceeded its authority and extended the Court's reach into too many areas of policy by interpreting the Fourteenth Amendment too broadly).

anti-democratic. By precluding effective enforcement of the Constitution's structural rights provisions, the Court allows short-term political victors to convert their electoral victory into the long-term capture of power. This can occur in various ways, such as (just to cite a few examples that have actually been litigated in the Supreme Court) the surveillance of political dissenters,[253] the unconstitutional arrest of political dissenters,[254] the misuse of police power,[255] the operation of a judicial system tainted by discrimination and prejudice,[256] or the conduct of basic governmental operations in unconstitutional secrecy.[257] If no one is allowed to go to court to challenge these violations, or if courts are not allowed the remedial authority to redress them, then those controlling the elected branches of government are effectively ceded the authority to use the apparatus of government to perpetuate their own power, in ways that fundamentally undermine the democratic premises of the Constitution.

In light of the abuses that are possible under the Court's preferred system, which would grant unfettered, unstructured primacy to the elected branches of government, the Court's overtures to democracy ultimately ring hollow. Despite the Court's repeated paeans to judicial restraint and democratic governance, allowing democratically elected governments to systematically undermine democratic safeguards does nothing to foster democracy.

CONCLUSION

The proposition that all rights must have remedies is almost as old as the Constitution itself. The current Supreme Court is whittling away at that proposition by diluting judicial power to enforce rights at all stages of litigation. While this is problematic in the area of personal rights, it is especially problematic—indeed, probably fatal—to the entire concept of structural rights. It is the premise of this Article that any government that calls itself democratic must be framed around a series of structural

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253. *See* Laird v. Tatum, 408 U.S. 1, 15 (1972) (denying standing to plaintiffs challenging the United States Army's surveillance and collection of information on domestic political protesters).

254. *See* Younger v. Harris, 401 U.S. 37, 41–42 (1971) (refusing to block the prosecution of a left-wing political activist under the unconstitutional California Criminal Syndicalism Act); *see also supra* note 229 and accompanying text.

255. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (denying standing to plaintiff seeking an injunction against the unconstitutional use of a chokehold by Los Angeles Police Department); Rizzo v. Goode, 423 U.S. 362, 364–66 (1976) (denying standing to plaintiffs seeking to bring a class action against the Philadelphia Police Department to challenge a pervasive pattern of police misconduct directed toward minority citizens of Philadelphia).

256. *See* O'Shea v. Littleton, 414 U.S. 488, 493–96 (1974) (denying standing to plaintiffs challenging a county's pattern of racially-discriminatory behavior in bond setting, sentencing, and the assessing of jury fees).

257. *See* United States v. Richardson, 418 U.S. 166, 179–80 (1974) (denying standing to plaintiffs seeking to challenge congressional violations of the Statement and Account Clause).

rights, that is, rights possessed by all citizens that limit the extent to which the current government can suppress opposition, accumulate the means by which to control or manipulate the citizenry, and thereby allow one or a few factions to maintain power perpetually. The current trend toward limiting the courts' power to enforce structural rights undercuts the democratic bona fides of any government operating under such a truncated constitutional regime. The only response to this claim offered by advocates of the current trend toward limiting judicial power to enforce structural rights is that the courts should defer to the political agencies of government whenever possible. As noted above, this argument misconstrues the concept of democracy and effectively places the foxes in charge of the henhouse. Without the constraints on those in power offered by an independent judiciary armed with the broad authority to adjudicate and remedy violations, the structural rights that are a necessary ingredient of any democratic constitutionalism become empty, meaningless shells. "Rights" of this sort are more in keeping with the structure of the old Soviet Constitution than the current American one.

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