

DISARMING THE PRIVATE ATTORNEY GENERAL[†]

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In Disarming the Private Attorney General, Professor Karlan describes how the Supreme Court has created a significant regulation-remedy gap by critically undercutting one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general. Professor Karlan identifies a series of techniques the Court has used to strip private individuals of their ability to enforce civil rights laws. On the one hand, the Court has expanded the scope of sovereign immunity under a new “Eleventeenth” Amendment jurisprudence and the scope of compelled arbitration under the Federal Arbitration Act. On the other hand, the Court has contracted the availability of implied rights of action and attorney’s fees. The overall effect of the Court’s decisions is to severely restrict enforcement of basic antidiscrimination requirements.

This year marks the bicentennial of *Marbury v. Madison*.¹ The Supreme Court’s opinion remains a quintessential assertion of judicial power under the cloak of judicial modesty. William Marbury had asked the Court for a writ of mandamus ordering James Madison, the Secretary of State, to deliver his commission of office as a justice of the peace. Although the Court found that Marbury had a legal right to the commission, it held that it lacked the power to provide the relief he sought. But the technique the Court used to *disclaim* its power over Madison was to *proclaim* its power over Congress. It declared the Judiciary Act of 1789 unconstitutional. The Act, the Court held, violated Article III, because it

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*In writing this Article, I have felt a tremendous debt to the members of the constitutional law study group. Every other week for the past several years, we have read a pair of recent Supreme Court opinions, and one of the many rewards has been the unexpected connections we have made among seemingly unrelated decisions. Some of those connections inform my argument here. Especially as the last of the other original members head off to judicial clerkships, I think of how Chaucer portrayed the clerk in the *Canterbury Tales*—“gladly wolde he lerne and gladly teche”—and I feel glad to have learned and taught with such extraordinary students.*

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

granted the Supreme Court original jurisdiction (rather than appellate jurisdiction) over mandamus proceedings. And so the Supreme Court refused to exercise the authority Congress had conferred. *Marbury* is thus a paradoxical example of Justice Brandeis's classic observation that sometimes "[t]he most important thing we do is not doing."²

The two great Alexanders of constitutional law—Hamilton and Bickel—saw courts as essentially reactive institutions. The judiciary, Hamilton wrote in the Federalist Paper that gave Bickel's book its title, is "the least dangerous branch" because it "can take no active resolution whatever . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."³ Bickel applied this general proposition even to the fundamental constitutional principle of equality expressed in *Brown v. Board of Education*,⁴ suggesting that the Supreme Court might properly decline to grant an immediate remedy because realistic enforcement would require enlisting Congress and the President.⁵ The Alexandrian view depends on a model of adjudication in which the courts announce a rule and then rely on the political branches to obey or enforce it.⁶ But *Marbury* shows that the converse can also be true. There is an important class of cases in which the legislature and the executive must depend on the judiciary for the efficacy of *their* judgments. In these cases, it is judicial refusals to act that pose a danger "to the political rights of the Constitution."⁷

Marbury itself recognized this threat, when Chief Justice Marshall observed that the government of the United States could no longer be "termed a government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right."⁸ As the Court stated last term, in *Bush v. Gore*, although there are "vital limits on judicial authority," when "contending parties invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."⁹ What makes that declaration so ironic is the context. As in *Marbury*, an aspirant for federal office sought the Court's assistance. But unlike William Marbury, George W. Bush managed to procure a sweeping remedial order from the Supreme Court without ever identifying any vested legal right that the rem-

2. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 71 (1962).

3. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This passage appears as the epigraph to Bickel's book. BICKEL, *supra* note 2.

4. 347 U.S. 483 (1954).

5. See BICKEL, *supra* note 2, at 247–54, 267–72.

6. Even when it comes to straightforward constitutional adjudication, however, as Gerald Gunther explained in a classic article, there can be substantial costs to a court's refusal to address properly presented claims. See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

7. THE FEDERALIST NO. 78, *supra* note 3, at 465.

8. 5 U.S. (1 Cranch) 137, 163 (1803).

9. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam).

edy he requested would actually vindicate.¹⁰ Moreover, the same Court that provided George W. Bush with an unprecedented remedy in the service of an expansive, if evanescent, equal protection claim has shown itself strikingly resistant to judicial remedies for civil-rights plaintiffs raising more traditional equality-based claims.

There are two ways a court might retrench on civil rights protections. First, a court might explicitly redefine an underlying right in narrower terms. For example, in *City of Mobile v. Bolden*,¹¹ the Supreme Court redefined the preexisting jurisprudence of racial vote dilution, embodied in such decisions as *White v. Regester*,¹² to forbid only those electoral structures that were adopted or maintained for racially discriminatory purposes, rather than prohibiting also those that had a disparate impact on minority voters.¹³ Similarly, in *Patterson v. McLean Credit Union*,¹⁴ the Supreme Court offered a cramped interpretation of 42 U.S.C. § 1981's protection against racial discrimination in the right "to make and enforce contracts."¹⁵ It held that § 1981 "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment,"¹⁶ and thus that racial harassment of employees was not actionable under § 1981.

The other approach, which is more insidious, is for the court to leave the formal right in place, but to constrict the remedial machinery. At best, this will dilute the value of the right, since some violations will go unremedied. At worst, it may signal potential wrongdoers that they can infringe the right with impunity.

Remedial abridgment is a pervasive tool of the contemporary Supreme Court. In criminal procedure, for example, Carol Steiker has shown that while the Burger and Rehnquist Courts have left in place most of the Warren Court's restrictions on police activity, they have developed new "inclusionary" rules that allow the introduction of unconstitutionally

10. I explore this point at substantial length in Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001), and Pamela S. Karlan, *Equal Protection: Bush v. Gore and the Making of a Precedent*, in THE UNFINISHED ELECTION OF 2000, at 159, 185–95 (Jack N. Rakove ed., 2001).

11. 446 U.S. 55 (1980).

12. 412 U.S. 755 (1973).

13. For discussions of this retrenchment, see, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 708–10, 729–45 (2d ed. 2001); James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 4, 28 (1982).

14. 491 U.S. 164 (1989).

15. 42 U.S.C. § 1981 provided, at the time, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2000)). Congress subsequently amended § 1981 to overturn the Court's decision in *Patterson*, declaring that "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (2000).

16. 491 U.S. at 176.

obtained evidence, thereby dampening the effect of “conduct” rules directed at law enforcement personnel.¹⁷ Similarly, in structural reform litigation, Daryl Levinson has pointed to ways in which the Court’s retrenchment on the scope of appropriate remedies has backwashed into the definition of the underlying rights.¹⁸

In this article, I discuss how several of the Supreme Court’s civil rights decisions from last Term reflect this strategy. For the most part, the Court has left the political branches’ power to regulate relatively unconstrained. That is, the Court assumes that Congress and the Executive can prohibit various forms of primary conduct. At the same time, however, the Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general.

The idea behind the “private attorney general” can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. While one can imagine a regime in which Congress simply delegates the government’s own right to enforce its laws to private bounty hunters—that is essentially what *qui tam* lawsuits envision¹⁹—the current reliance on private attorneys general is more modest. It consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney’s fees for a prevailing plaintiff.

Virtually all modern civil rights statutes rely heavily on private attorneys general. As the Court explained in *Newman v. Piggie Park Enterprises*²⁰—one of the earliest cases construing the Civil Rights Act of 1964, which forbids various kinds of discrimination in public accommodations, federally funded programs, and employment—Congress recognized that it could not achieve compliance solely through lawsuits initiated by the Attorney General: “A [public accommodations] suit is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”²¹ Thus, *Piggie Park* recognized the piggybacking function of the Act: Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large. Later, the

17. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?: Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

18. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

19. And what Judge Jerome Frank, who apparently coined the phrase “private attorney general” in his 1943 opinion in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), imagined. For discussions of *qui tam* lawsuits, see, e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

20. 390 U.S. 400 (1968) (per curiam).

21. *Id.* at 401–02.

Court explained that this public function exists even when a civil rights plaintiff asks for compensatory damages rather than injunctive relief. “Unlike most private tort litigants,” the civil rights plaintiff “seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits.”²² Thus, when “his day in court is denied him,” the congressional policy which a civil rights plaintiff “seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.”²³

This article explores four decisions from October Term 2000 in which the Supreme Court sharply abridged the ability of private attorneys general to get their day in court. In two cases, the Court denied private plaintiffs the ability to bring lawsuits altogether. In *Board of Trustees of the University of Alabama v. Garrett*,²⁴ the Court underscored its narrow reading of congressional enforcement power under section 5 of the Fourteenth Amendment, holding that Congress cannot authorize private damages lawsuits against state governments that discriminate against the disabled. And in *Alexander v. Sandoval*,²⁵ the Court held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964, which forbids racial discrimination in federally funded programs or activities. In each of these cases, the Court left open (perhaps only for the time being) the possibility of other forms of congressional or administrative enforcement, but the elimination of private attorneys general altogether will surely decrease overall enforcement of the underlying rights.

In two other cases, the Court left open the formal availability of private lawsuits, but created substantial practical barriers to private vindication of public policy. In *Circuit City Stores, Inc. v. Adams*,²⁶ the Court construed the Federal Arbitration Act (FAA) in a way that permits employers to compel workers to arbitrate claims under federal fair-employment laws. And in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,²⁷ the Court rejected the preexisting “catalyst theory” for granting attorney’s fees. Under that theory, courts had awarded plaintiffs attorney’s fees when their lawsuits led the defendant to change the challenged practice voluntarily. The Supreme Court, however, held that fees can be awarded only if there is a judicially sanctioned change in the parties’ legal relationship.²⁸ These decisions will cut

22. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

23. *Id.* at 575 (internal quotation marks omitted).

24. 531 U.S. 356 (2001).

25. 532 U.S. 275 (2001).

26. 532 U.S. 105 (2001).

27. 532 U.S. 598 (2001).

28. *Id.* at 604.

down both on the amount of civil rights enforcement and on the development of the law through the creation of binding precedent.

I. *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT*
AND THE “ELEVENTEENTH” AMENDMENT

When Judge Jerome Frank originally coined the phrase “private attorney general,” he was thinking about litigation by private plaintiffs “to prevent [a government] official from acting in violation of his statutory powers.”²⁹ There is thus something deeply ironic about the fact that the Supreme Court has most sharply limited the use of private attorneys general in precisely those cases which involve claims of unlawful state action.

When Congress wants to regulate activities such as employment, public accommodations, government programs, or market transactions, it has two broad sources of authority on which to draw: its enumerated powers under Article I and its enforcement clause powers under the Reconstruction Amendments.³⁰ In general, modern Congresses have relied more often on their Article I powers—particularly the commerce and spending clause powers of Article I, section 8—even when they are pursuing the values of nondiscrimination more expressly reflected in the substantive commands of the Thirteenth and Fourteenth Amendments. In part, this reliance is a product of the peculiar limitations of the Reconstruction Amendments: the Fourteenth Amendment reaches only state actors,³¹ and in many cases Congress wants to regulate both public and private conduct; the Thirteenth Amendment, while it reaches private conduct as well as state action, covers only a narrow subset of the behavior Congress might want to reach.³² By contrast, the Commerce Clause gives Congress tremendous latitude, permitting regulation of virtually any area of economic endeavor.³³

29. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

30. The Thirteenth, Fourteenth, and Fifteenth Amendments each contain a section providing Congress with “power to enforce” the Amendments’ substantive limitations “by appropriate legislation.” See U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

31. See *United States v. Morrison*, 529 U.S. 598, 619–26 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

32. The Supreme Court has held that Congress can rely on the Thirteenth Amendment, which by its own terms forbids “slavery” and “involuntary servitude,” to reach discrimination that can be seen as a “badge” or “incident” of slavery. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–44 (1968). But the Court has generally read what constitutes a badge or incident of slavery quite narrowly. Cf. *Gen. Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 390–91 (1982) (holding that § 1981, which rests on congressional power to enforce the Thirteenth Amendment, does not reach practices that have a disparate racial impact unless the plaintiffs also show a racially discriminatory purpose); *City of Memphis v. Greene*, 451 U.S. 100, 126–28 (1981) (refusing to find that a decision to close off streets in a white area that lay between a black residential area and a municipal park implicated a badge or incident of slavery).

33. I read the Court’s recent decisions reviving limitations on congressional power under the Commerce Clause, see *Morrison*, 529 U.S. at 607–19 and *United States v. Lopez*, 514 U.S. 549 (1995), as leaving the regulation of unambiguously economic activity essentially untouched.

But although Congress can regulate a wider range of behavior under the Commerce Clause than under the Reconstruction Amendments, its enforcement authority is shallower in an important sense. In *Seminole Tribe v. Florida*,³⁴ the Supreme Court held that Article I does not empower Congress to abrogate the sovereign immunity embodied in the Eleventh Amendment: “Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”³⁵ And in *Alden v. Maine*,³⁶ the Court held that Congress could not use its Article I powers to force states to defend against private damages lawsuits in their own courts either. Cases like *Seminole Tribe* and *Alden* thus drive a wedge between Congress’ essentially plenary power to regulate state economic activity and its ability to enforce its regulations by making damages remedies available and attractive to private attorneys general.³⁷

As *Seminole Tribe* itself recognized, when Congress acts to enforce the Reconstruction Amendments, it does not face this regulation-remedy gap. In *Fitzpatrick v. Bitzer*,³⁸ the Court unanimously held that Congress can use its power under section 5 of the Fourteenth Amendment to “provide for private suits against States or state officials which are constitutionally impermissible in other contexts”³⁹ because the very nature of the Fourteenth Amendment’s prohibitions is to limit state sovereignty.⁴⁰

The juxtaposition of *Seminole Tribe* and *Alden* on the one hand with *Fitzpatrick* on the other, inevitably places pressure on the question of which source of congressional authority undergirds a statute. Congress can create quite similar rights and duties under both the Commerce Clause and the Fourteenth Amendment, but Congress has two quite different enforcement regimes. In a move reminiscent of the fabled dissertation in David Lodge’s *Small World* on T. S. Eliot’s influence on Shakespeare, a court that used to see the Fourteenth Amendment as a limitation on the Eleventh has come to see the Eleventh as a constraint on the Fourteenth.

Last Term’s decision in *Board of Trustees v. Garrett*⁴¹ offers a particularly striking example of “Eleventeenth” amendment jurisprudence. *Garrett* concerned Title I of the Americans with Disabilities Act (ADA).⁴²

34. 517 U.S. 44 (1996).

35. *Id.* at 72.

36. 527 U.S. 706 (1999).

37. Private litigants can, to the extent they have standing, seek relief against some ongoing state practices that violate Article I-based laws by using *Ex parte Young*, 209 U.S. 143 (1908), which permits suits for injunctive relief against state officials, ostensibly in their personal capacity. For a discussion of *Ex parte Young*, see Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1318 (2001).

38. 427 U.S. 445 (1976).

39. *Id.* at 456.

40. *See id.* at 454–56.

41. 531 U.S. 356 (2001).

42. Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (2000).

The ADA prohibits certain employers, including state governments, from discriminating against otherwise qualified individuals with disabilities, and requires these employers to offer “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual” unless they can show “that the accommodation would impose an undue hardship on the operation of the [employer’s] business.”⁴³ Among the enforcement devices Congress provided for some violations was a private cause of action for damages.⁴⁴ The plaintiffs in *Garrett* were employed by instrumentalities of the state of Alabama. They had sought accommodations for medical conditions and alleged that the state both failed to accommodate their disabilities and, in essence, retaliated against them for asserting their rights.⁴⁵

Congress certainly enjoyed the ability, under the Commerce Clause, to regulate Alabama’s employment practices.⁴⁶ Thus, the question in *Garrett* was not whether Congress could impose a nondiscrimination requirement on state employers, or even whether Congress could confer a right to nondiscriminatory treatment on state employees. As the Chief Justice was to explain, regardless of whether private damages remedies are available, “Title I of the ADA still prescribes standards applicable to the States”—standards that could be enforced by the United States in actions for money damages, since the Eleventh Amendment poses no bar to suits brought by the United States,⁴⁷ and by private attorneys general seeking only injunctive relief under the *Ex parte Young* fiction.⁴⁸

43. *Id.* § 12112(b)(5)(A).

44. Section 107(a) of the ADA provides that the remedies set forth in various provisions of the Civil Rights Act of 1964 “shall be the . . . remedies . . . this subchapter provides . . . to any person alleging discrimination on the basis of disability.” *Id.* § 12117(a). Section 102 of the Civil Rights Act of 1991 provides, in pertinent part, that

in an action brought by a complaining party . . . as provided in section 107(a) of the Americans with Disabilities Act . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover [certain kinds of] compensatory and punitive damages . . . in addition to any [equitable] relief authorized . . .

42 U.S.C. § 1981(a)(2).

45. *See Garrett*, 531 U.S. at 362.

46. *See id.* at 374 n.9; *see also, e.g., Alden v. Maine*, 527 U.S. 706, 759 (1999) (reaffirming that Maine is bound by the substantive requirements of the Fair Labor Standards Act (FLSA) even if it is not amenable to private damages suits); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (upholding the Commerce Clause basis for applying the Age Discrimination in Employment Act to state employers).

47. The United States is even entitled to pursue victim-specific relief (that is, damages that will be paid to the private victim). *Cf. EEOC v. Waffle House*, 534 U.S. 279, 297–98 (2002) (permitting the EEOC to seek relief under the ADA on behalf of an individual who is himself barred by an arbitration agreement from seeking a judicial remedy); *Alden*, 527 U.S. at 759 (noting that the United States may prosecute a lawsuit under the Fair Labor Standards Act on behalf of state employees even if the Eleventh Amendment bars the employees themselves from bringing such a lawsuit).

48. *Garrett*, 531 U.S. at 374 n.9 (citing *Ex parte Young*, 209 U.S. 123 (1908)). Under *Ex parte Young*, plaintiffs can sue state officials in their “individual” capacity seeking injunctions forbidding them from violating federal law. (Oddly enough, it is only because the officials are engaged in “state action” that their acts violate the Constitution in the first place.) Because states can act only through their officials, *Ex parte Young* in effect can prevent the state from engaging in future constitutional violations. As several commentators have suggested, the presence of the *Ex parte Young* fiction is necessary to the

But the Commerce Clause would not authorize the remedial scheme Congress had enacted, which contemplated damages lawsuits by individuals who had suffered discrimination. So the Court confronted the question whether the Equal Protection Clause of the Fourteenth Amendment also provided a source of congressional power to enact the ADA.⁴⁹

The Court held that it did not.⁵⁰ It reviewed prior decisions regarding the Fourteenth Amendment claims of disabled individuals, noting that such claims “incur[red] only the minimum ‘rational-basis’ review applicable to general social and economic legislation,” rather than the heightened forms of scrutiny triggered by discrimination against suspect classes.⁵¹ As virtually everyone knows, with a few notable exceptions,⁵² the standard of review is the whole ballgame. Keeping down the costs of government programs or services is a legitimate government purpose, even if it is not a sufficiently important or compelling one to justify use of a suspect characteristic, such as race or sex.⁵³ Thus, the *Garrett* Court explained, it might be “entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities,” rather than accommodating disabled individuals.⁵⁴ In short, the Court distinguished between permissible discrimination against the disabled and irrationally invidious discrimination; only the latter violates the Equal Protection Clause.⁵⁵ And the Court saw little evidence in the legislative record of a pattern of pervasive, unconstitutional discrimination.⁵⁶

There are two discrete aspects to Congress’ enforcement power under section 5: the preventative and the corrective. Under the preventative prong, Congress can enact legislation that reaches beyond conduct proscribed by the Fourteenth Amendment itself if the statute “exhibit[s] congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵⁷ Under the corrective prong, Congress can create remedies for denials of constitutional rights themselves. Section 2 of the Voting Rights Act of 1965, which prohibits electoral practices that have a disparate impact without requiring proof of a

Court’s current robust reading of the Eleventh Amendment, because *Ex parte Young* enables courts to regulate states indirectly, while the Eleventh Amendment preserves a formal sovereign immunity. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102 (1996).

49. *Garrett*, 531 U.S. at 364.

50. *Id.* at 374.

51. See *id.* at 366 (citing *Cleberne v. Cleberne Living Ctr.*, 473 U.S. 432, 446 (1985)).

52. One of which, of course, involved discrimination against the disabled. See *Cleberne*, 473 U.S. at 447–50.

53. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

54. *Garrett*, 531 U.S. at 372.

55. See *id.* at 366–72.

56. *Id.*

57. *Id.* at 365 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

racially discriminatory purpose (the touchstone of a constitutional violation), is an example of preventative or prophylactic legislation.⁵⁸ By contrast, § 1983⁵⁹ is a corrective, or purely remedial, statute. Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred.”⁶⁰ It authorizes suits for damages and injunctive relief against persons acting under color of state law who deprive individuals of rights secured by the Constitution and federal laws.

Garrett conflates these two aspects, perhaps because Congress and the litigants did as well. The Court’s analysis focuses almost exclusively on the question whether the ADA’s provisions are appropriate preventative legislation: was there a sufficient risk of unconstitutional discrimination against the disabled to justify a statute that sweeps more broadly to bar constitutionally permissible discrimination as well? In an earlier decision, the Court had held that “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”⁶¹ If there is little risk of unconstitutional conduct, then section 5 provides an insufficient basis for overinclusive legislation. I disagree with the majority’s conclusion, largely for the reasons given in Justice Breyer’s dissent: the Court should defer more to congressional fact finding in section 5 cases, and Congress had an adequate basis here for concluding that the ADA was appropriate legislation.⁶² Still, the general principle—that the scope of prophylactic measures should depend on the degree of risk of unconstitutional conduct—seems fairly straightforward.

But that does not answer the question of what remedial tools Congress can properly deploy in the face of actual constitutional violations. Suppose there were only scattered examples of unconstitutional conduct—by hypothesis, not enough to justify a ban on constitutionally innocuous activities. Can Congress nonetheless enforce the core constitutional commands of the Fourteenth Amendment through private attorneys general? That is, can Congress abrogate a state’s Eleventh Amendment immunity

58. For an extensive discussion of the relationship between the Voting Rights Act and the enforcement clauses, see Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998).

59. Section 1983 provides, in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. § 1983 (1994).

60. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

61. *City of Boerne*, 521 U.S. at 532; see *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (upholding a provision of the Voting Rights Act of 1965 that prohibits voting practices with a racially disparate impact, even though the Fourteenth and Fifteenth Amendments prohibit only purposeful racial discrimination, on the grounds that the regulated jurisdictions had a history of invidious behavior).

62. *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting).

and provide a damages remedy for a state's actual violations of the Equal Protection Clause regardless of the volume of constitutional violations? The Court's decision in *Garrett*, like its prior Eleventh Amendment decisions,⁶³ suggests the Court's reluctance to contemplate purely remedial abrogation. The Court seems to treat the Eleventh Amendment and the scope of section 1 of the Fourteenth Amendment as placing separate limitations on Congress's section 5 powers. It shifts imperceptibly from circumscribing the scope of Congress's preventative or prophylactic powers, to restricting the reach of Congress's ability to specify remedies for core violations. In other words, the Court's recent decisions turn *Fitzpatrick* on its head. There, the Court saw the later-enacted Fourteenth Amendment as a limitation on the sovereign immunity recognized by the Eleventh Amendment.⁶⁴ Now, the Court sees the Eleventh Amendment as a curb on the Fourteenth.

Perhaps this turnaround can be laid at Congress's feet because the challenged statutes have not distinguished between actions Congress can regulate only under the Commerce Clause and those it can regulate under both the Commerce Clause and the Fourteenth Amendment.⁶⁵ But there are other statutes that do make such a distinction. For example, the Civil Rights Act of 1991 provides for compensatory and punitive damages in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 when plaintiffs prove that the defendant "engaged in unlawful intentional discrimination," while providing equitable relief alone for plaintiffs who show only a disparate impact.⁶⁶ The protected classes under Title VII are all entitled to some form of heightened scrutiny under the Equal Protection Clause. Thus, intentional discrimination against them is presumptively unconstitutional. Abrogation of sovereign immunity here, then, would seem essentially remedial rather than preventative. Certainly, if the Act were amended to provide for damages when defendants engaged in "unconstitutional intentional discrimination," it is difficult to justify an Eleventh Amendment constraint on congressional enforcement power.⁶⁷

One perhaps helpful way of posing this question is to ask whether Congress would have the power to amend § 1983 to authorize suits against

63. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

64. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

65. Of course, that confusion might be laid at the Court's feet when it comes to statutes enacted prior to *Seminole Tribe*, particularly those enacted after *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)—which *Seminole Tribe* overruled—had suggested Congress could use its Article I powers to abrogate states' sovereign immunity.

66. 42 U.S.C. § 1981a(a)(1) (2000).

67. Cf. *infra* text accompanying notes 86–88 (describing the Court's apparent approval of Congress's decision to abrogate state sovereign immunity in cases brought under Title VI alleging intentional racial discrimination).

states themselves for deprivations of constitutional rights.⁶⁸ In *Will v. Michigan Department of State Police*,⁶⁹ the Court held as a matter of statutory construction that § 1983 does not reach states (or state officials acting in their official, as opposed to their personal, capacity).⁷⁰ But nothing in *Will* suggested that Congress would have lacked the power to include states within § 1983's purely corrective ambit.

There is one additional aspect of the Court's Eleventh Amendment cases that sheds light on its view of private attorneys general. The Court has repeatedly softened the bite of its Eleventh Amendment holdings by noting that damages remedies are not foreclosed altogether: the federal government retains the right to seek damages on behalf of injured individuals.⁷¹ But the Court sees this latter class of lawsuits as different in an important respect:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the [Constitutional] Convention, the States have consented to suits of the first kind but not of the second.⁷²

The key assumption underlying the Court's position seems to be the equation of importance with centralized enforcement. Only the federal government's willingness to use its own resources and send its own lawyer to prosecute a case truly shows that "the federal interest in compensating [citizens] . . . for alleged past violations of federal law is [actually] compelling . . ."⁷³ Otherwise, Congress is engaged in cheap talk—a sort of unfunded mandate.

That defies the central idea behind the private attorney general—that Congress might decide that decentralized enforcement better vindicates civil rights policies "that Congress considered of the highest priority."⁷⁴ For example, in explaining why § 5 of the Voting Rights Act of 1965 should be construed to permit private lawsuits, as well as the lawsuits by

68. Section 1983 also authorizes lawsuits for deprivations of rights secured by "the laws"—essentially federal statutes—and these sorts of lawsuits would presumably run afoul of *Seminole Tribe* and *Alden*, because Congress could not abrogate states' immunity for denial of rights secured by laws whose basis was Congress's Article I power.

69. 491 U.S. 58 (1989).

70. *Id.* at 69–71. In an earlier case, *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court had held that Congress had not clearly indicated an intention that § 1983 abrogate states' Eleventh Amendment immunity.

71. *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting that even though the Eleventh Amendment bars ADA damages lawsuits by private individuals, the prohibitions it imposes "can be enforced by the United States in actions for money damages"); *Alden v. Maine*, 527 U.S. 706, 759 (1999) (under the FLSA, 29 U.S.C. § 216(c) (2000), the Secretary of Labor can seek damages on behalf of a worker whose rights were violated).

72. *Alden*, 527 U.S. at 759–60.

73. *Id.* at 759.

74. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam).

the Attorney General expressly authorized by the Act,⁷⁵ the Court noted that

[t]he Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. . . . The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Act].⁷⁶

Put simply, the major effect of permitting only federally initiated lawsuits is to decrease the total amount of enforcement of valid congressional regulation. Presumably, that will increase the number of uncorrected violations, leaving the right less completely protected. Just as “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen,”⁷⁷ so too, to the extent that the ability to enforce a right is debased, it is that much less a right. The Eleventh Amendment may erect only a formalistic barrier to enforcing federal rights—and, with the availability of § 1983 damages actions and *Ex parte Young* suits for injunctive relief, only a porous barrier at that—but if the Amendment has any bite, that bite cuts deep into the heart of the private attorney general.

II. *ALEXANDER V. SANDOVAL* AND DISIMPLIED RIGHTS OF ACTION

The Eleventeenth Amendment cases represent a forthright judicial rejection of congressional authority to deputize private attorneys general: the Supreme Court held that the Constitution does not permit Congress to require the courts to hear certain kinds of claims. By contrast, the Supreme Court’s other recent attacks on private attorneys general purport to involve statutory interpretation. Here too, however, the Court’s decisions turn *Federalist No. 78* on its head. *Alexander v. Sandoval*⁷⁸ provides a particularly good illustration of how dangerously unhelpful the courts can be when the executive “depend[s] on the aid of the [judicial] arm . . . for the efficacy of its judgments.”⁷⁹

Sandoval concerned the existence of a private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil

75. I discuss the question of implied rights of action in more detail in the next section of this Article. See *infra* Part II.

76. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556–57 (1969).

77. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

78. 532 U.S. 275 (2001).

79. THE FEDERALIST NO. 78, *supra* note 3, at 465 (stating that the judiciary relies on the executive arm, including for the efficacy of its judgments).

Rights Act of 1964.⁸⁰ Section 601 provides that no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal funds.⁸¹ Section 601 itself, however, reaches only purposeful discrimination.⁸² A different provision, § 602, authorizes federal agencies to “effectuate” § 601 by promulgating administrative rules and regulations.⁸³ At least forty federal agencies—including most notably the Departments of Justice, Transportation, and Education—have adopted regulations pursuant to § 602 that prohibit not only practices that have a discriminatory purpose, but also practices that have a discriminatory effect.⁸⁴ Thus, regulations promulgated under § 602 often prohibit conduct that would not violate § 601 itself (or, for that matter, the Equal Protection Clause).

Title VI does not explicitly provide a cause of action to individuals who are denied the rights it protects. Nonetheless, in an earlier case, *Cannon v. University of Chicago*, the Court noted approvingly that lower-court opinions had construed Title VI to create a private remedy for violations of § 601.⁸⁵ Congress later ratified the Court’s observation in *Cannon* and expressly abrogated states’ sovereign immunity against suits to enforce Title VI.⁸⁶ Moreover, even before *Cannon*, in the Civil Rights Attorney’s Fees Awards Act of 1976, Congress had expressly provided that “[i]n any action or proceeding to enforce a provision of . . . title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”⁸⁷ This provision explicitly contemplates enforcement by parties other than the federal government.⁸⁸

Finding private rights of action under § 602, however, is one step further removed, and raises questions analogous to those posed in the Eleventh Amendment cases. First, are the regulations valid preven-

80. See 42 U.S.C. §§ 2000d to 2000d-6 (2000).

81. *Id.* § 2000d.

82. See *Alexander*, 532 U.S. at 280–81 (summarizing the tangled line of cases in which a majority of the Justices agreed that § 601 reaches only purposeful discrimination). Section 601 goes beyond the constitutional command of the Equal Protection Clause to the extent that it reaches private actors who are recipients of federal funds.

83. 42 U.S.C. § 2000d-1.

84. See, e.g., 28 C.F.R. § 42.104(b)(2) (1999) (Department of Justice regulation); 34 C.F.R. § 100.3(b)(2) (2000) (Department of Education regulation); 49 C.F.R. § 21.5(b)(2) (2000) (Department of Transportation regulation).

85. 441 U.S. 677, 696 (1979).

86. See 42 U.S.C. § 2000d-7. That abrogation, as long as it is limited to § 601 suits, causes no constitutional difficulties: § 601 itself forbids only those state actions that would violate the Equal Protection Clause. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.); *id.* at 325, 328, 352 (White, Brennan, Marshall, & Blackmun, JJ., concurring in part and dissenting). Thus, the entitlement to private damages claims falls squarely within *Fitzpatrick*.

87. Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988(b)).

88. See also Julia Lamber, *Private Causes of Action Under Federal Agency Nondiscrimination Statutes*, 10 CONN. L. REV. 859, 873–81 (1978) (describing the somewhat inconclusive legislative history of Title VI and § 1988).

tative measures insofar as they exceed the prohibitions of § 601 itself? Second, would finding a private right of action for damages for a § 602 violation be an appropriate way of enforcing § 601?

Although Justice Scalia was clearly itching to answer the first question in the negative, thereby dismantling the entire disparate impact regulatory apparatus,⁸⁹ he apparently could not muster a majority for that proposition, and so he assumed the validity of disparate impact regulations for purposes of deciding the secondary question whether an individual injured by the violation of such a regulation could bring suit.⁹⁰

Sandoval concerned a challenge to Alabama's newly adopted policy of administering the written portion of its driver's license examination only in English.⁹¹ The plaintiff brought a class action suit seeking declaratory and injunctive relief.⁹² The named defendants were the Alabama Department of Public Safety and its director, in his official capacity.⁹³ The plaintiff argued, among other things, that the English-only policy violated her rights under § 602.⁹⁴

Over the past forty years, the Supreme Court has taken strikingly different positions on the question whether to find an implied right of action when Congress has not expressly created one. At the time Title VI was enacted, the Court was quite favorably inclined toward finding private rights, seeing it as "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" embodied in a statute.⁹⁵ But as Justice Scalia breezily observed, "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"—are gone.⁹⁶ Recently, the Court has been quite reluctant to find private rights of action absent clear indications of a congressional intent to authorize them. This trend culminated, perhaps, in *Correctional Services Corp. v. Malesko*,⁹⁷ where the Supreme Court refused to find an implied right of action even with respect to constitutional violations, essentially limiting the principle it had recognized thirty years

89. See *Alexander v. Sandoval*, 532 U.S. 275, 281–82, 286 n.7 (2001).

90. *Id.* at 282.

91. *Id.* at 275. Apparently, forty-eight other states and the District of Columbia administered the written portion of the driver's license examination "in a multitude of foreign languages," which makes more sense than one might originally think, given that there is apparently "no evidence that non-English speakers [have] posed a greater safety risk or had more accidents than other motorists." *Sandoval v. Hagen*, 7 F. Supp. 2d 1234, 1242 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander*, 532 U.S. 275.

92. *Sandoval*, 7 F. Supp. 2d at 1245.

93. *Id.*

94. *Id.*

95. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

96. *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

97. 534 U.S. 61 (2001).

earlier in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,⁹⁸ to a few narrowly defined circumstances.⁹⁹

When the *Alexander v. Sandoval* Court analyzed the text and structure of Title VI, it concluded that § 602 was “focuse[d] neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.”¹⁰⁰ Thus, the Court explained, § 602 should not be seen as a right-creating provision in the first place.¹⁰¹

The Court found reinforcement for this view in the explicit enforcement provisions of § 602. Section 602 authorized agencies to enforce their regulations by terminating funding to programs that violate their regulations.¹⁰² But it cocooned this enforcement authority in a web of elaborate procedural requirements.¹⁰³ A general canon of statutory construction counsels that the express provision of one method of enforcement bespeaks a congressional intent to preclude others.¹⁰⁴ Moreover, the contrast between the difficulty of pursuing administrative sanctions and the streamlined judicial process afforded by a private right of action suggested to the Court that Congress did not intend private lawsuits to enforce § 602 regulations.¹⁰⁵

Once again, the Court’s decision essentially disarms private attorneys general. Three aspects of the Court’s opinion are especially noteworthy. First, the Court focused its attention on whether § 602 creates individual rights, rather than whether it contemplates allowing private parties to enforce the obligations that regulations impose on the recipients of federal funds.¹⁰⁶ By posing the question this way, the Court ignores a central feature of the private attorney general: her authority to sue is, at least in part, derivative of the broader public interest in vindicating an important governmental policy. That is, we might find an implied right of action because of the “social benefits”¹⁰⁷ these lawsuits produce and locate the ability to bring that lawsuit in individuals who are adversely affected by the challenged policy because we think they have the right incentives to litigate the question vigorously. As Judge Frank explained when he originally coined the term “private attorney general,” in situations where the federal government “can constitutionally author-

98. 403 U.S. 388 (1971). In *Bivens*, the Court found an implied right of action under the Fourth Amendment, permitting an individual whose rights had been violated during an unconstitutional search by federal officers to bring a damages action. *Bivens* found an implied right that parallels in significant respects the express cause of action provided by 42 U.S.C. § 1983 for individuals whose constitutional rights are violated by state officers.

99. *Malesko*, 534 U.S. at 519–21.

100. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2000).

101. *Id.*

102. See 42 U.S.C. § 2000d-1 (2000).

103. See *Alexander*, 532 U.S. at 289–90 (summarizing the various restrictions on administrative enforcement).

104. See *id.* at 290.

105. See *id.* at 289–91.

106. See *id.* at 279.

107. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

ize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers,”¹⁰⁸ Congress can confer that same ability “to vindicate the interest of the public or the government . . . even if the *sole* purpose is to vindicate the public interest.”¹⁰⁹ In that sense, as Judge Frank immediately went on to point out, private attorneys general resemble the bounty hunters of traditional *qui tam* actions.¹¹⁰ Thus, even if § 602 is not read to create the sort of legal entitlements that generally accord an individual the right to bring suit, that does not necessarily answer the question whether Congress contemplated private enforcement of § 602 prohibitions on discriminatory state behavior, particularly when a plaintiff is seeking only injunctive relief.

Second, a striking feature of the current Court is its refusal to think critically about how to interpret statutes that were enacted under what *Alexander v. Sandoval* dismissively calls the “*ancien regime*”¹¹¹—when earlier Supreme Courts held a dramatically different view of congressional powers and the importance of vindicating civil rights claims. Today, if Congress does not provide for an express private right of action against state agencies, it surely is on notice that the current Court’s Eleventh Amendment jurisprudence and hostility to implied rights of action make it unlikely the courts will supply a private judicial remedy. It thus seems reasonable for courts faced with congressional silence to infer congressional aversion. But an earlier Supreme Court explicitly recognized that during the Second Reconstruction, Congress had assumed private lawsuits would provide a central pillar of the overall enforcement machinery.¹¹² Thus, a genuine attempt to implement congressional intent requires asking what the enacting Congress assumed its words meant. In the case of Title VI, an earlier Supreme Court—ironically also in a case captioned *Alexander*—declared that Congress had “delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constitut[e] sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that [have] produced those impacts.”¹¹³ The legislation of the Second Reconstruction is honeycombed with reliance on private enforcement of antidiscrimination mandates, including in cases where the primacy en-

108. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

109. *Id.* (emphasis added).

110. *Id.* at 704–05.

111. *Alexander*, 532 U.S. at 287.

112. *See, e.g.*, *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 718 (1974); *Allen v. State Bd. of Elections*, 393 U.S. 544, 556–57 (1969); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968).

113. *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985).

forcement device is administrative.¹¹⁴ And § 602 should be read against this backdrop.

Read that way, § 602's inclusion of a novel administration remedy—cutting off funds to noncompliant programs—hardly suggests a congressional intention to preclude private lawsuits. Of course, the cumbersome procedural apparatus surrounding the cutoff provision suggests that Congress intended funds cutoffs only in egregious cases. A funds cutoff, after all, is a blunderbuss weapon: while it operates directly against the program receiving federal funds, its effects ultimately will be felt by the people whom federal funding was intended to benefit.

But there are two quite different sets of inferences one might draw from this reluctance. *Alexander v. Sandoval* seems to see a congressional reluctance to permit any enforcement, absent the kind of egregious, systemic violation that might prompt wholesale termination of federal assistance.¹¹⁵ But it seems equally plausible to think that Congress intended the funds cutoff as a supplement to the default remedy for isolated violations—fine-grained injunctive relief targeting only the precise practice that offends the regulations. That is, the funds cutoff was made cumbersome, not because Congress wanted to keep down the overall level of § 602 enforcement, but because Congress assumed that most enforcement could be handled by more precise remedies.

Third, across a variety of doctrines, from its anticommandeering cases to its Eleventh Amendment decisions, the current Court expresses a strong commitment to a particular version of political accountability. In this view, the fact that enforcement of congressional directives is costly is a *good* thing. It keeps Congress from imposing too many duties on the states.¹¹⁶ Put another way, the current Court likes the idea of a regulation-remedy gap. The idea of the private attorney general, however, stands in sharp contrast to this vision. Reliance on private attorneys general elevates full enforcement of broad policy goals over formal political accountability for discrete enforcement decisions. It assumes, of course, that the courts are sympathetic to Congress's underlying policy goals. Perhaps, then, it is not surprising that a Supreme Court that seems suspicious of the substantive goals Congress is pursuing is reluctant to see those goals pursued vigorously.

114. See Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1599 n.133 (2002) (describing the similarity between § 602 cases and the administrative remedy in certain cases under the Voting Rights Act).

115. See *Alexander v. Sandoval*, 532 U.S. 275 (2000).

116. See *supra* text accompanying notes 71–73 (describing the distinction the Court draws between government-initiated and private lawsuits as a test of how important Congress really thinks an interest is).

III. *CIRCUIT CITY STORES, INC. V. ADAMS* AND SHORT-CIRCUITING THE PROCESS OF PUBLIC ADJUDICATION

While *Marbury* may have insisted that “[t]he province of the court is, solely, to decide on the rights of individuals,”¹¹⁷ the private attorney general rests on a very different vision of litigation. In this vision, courts not only resolve the particular dispute before them, but also “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes.”¹¹⁸ The private attorney general can assist this project in two ways. First, if her lawsuit persuades a defendant to change its behavior or results in equitable relief, she vindicates the public interest by bringing that defendant into compliance with constitutional or statutory commands. And similarly situated individuals will often benefit directly from the private attorney general’s success, even if the lawsuit is not formally a class action. Second, if a private attorney general obtains a judgment in her favor, that judgment will often be accompanied by a judicial decision that articulates a rationale for her victory that extends beyond her particular case. The creation of binding precedents is a beneficial byproduct of litigation, which may explain why private attorneys general are often subsidized.¹¹⁹ A private attorney general whose activities produce precedent is thus in some important ways more effective than a private attorney general whose activities produce only local change.

Many commentators over the years have relied on this insight to criticize various alternatives to adjudication for their failure to produce public precedent.¹²⁰ In *Gilmer v. Interstate/Johnson Lane Corp.*, however, the Supreme Court rejected the argument that civil rights claims cannot be the

117. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

118. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

119. See John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 970 (1988). For a classic law-and-economics treatment of precedent as an externality of litigation, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). For a classic public-values treatment of precedent creation as a central aspect of adjudication, see Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979). For a discussion of the ways in which judicial decisions can form an “interpretive network externality” that clarifies otherwise ambiguous legal rules, see Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 761, 778–79 (1995).

120. See, e.g., Fiss, *supra* note 110, at 1085; Martin H. Malin, *Privatizing Justice—but by How Much?: Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001); see also John V. O’Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a “Better Way”?*, 136 U. PA. L. REV. 1723, 1745–46 (1988) (“In the context of considering private litigants as private attorneys general charged with enforcing public law and its underlying policies, the debilitating effect of compromise decisions becomes clearer. A statute is a legislative policy choice, but without subsequent judicial development through the public resolution of disputes, that policy will remain stagnant, or perhaps wither entirely. The ambiguous statutory language that frequently results from legislative compromise remains with the understanding that the courts will supply an interpretation. Even if initial principles are established through adjudication, permitting the arbitration of an entire category of claims restricts further evolution in that area of the law by reducing the number and variety of claims presented to the courts.”). For a specific discussion of this point with respect to employment discrimination claims, see Geraldine Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 398–99 (1999).

subject of compulsory arbitration.¹²¹ Robert Gilmer was required by his employer to register with several stock exchanges as a securities representative.¹²² A rule of one of those stock exchanges required arbitration of any dispute between a registered representative and employers such as Gilmer's.¹²³ When Gilmer later tried to bring suit against his employer under the Age Discrimination in Employment Act (ADEA),¹²⁴ his employer moved to compel arbitration instead.¹²⁵

Gilmer argued that compelled arbitration would be inconsistent with the ADEA's purposes, since, as the Court itself had noted earlier, "the ADEA is designed not only to address individual grievances, but also to further important social policies."¹²⁶ But the Court quickly dismissed this concern:

We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. . . . "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."¹²⁷

The Court was relatively unconcerned with the possibility that arbitration would "stifl[e] . . . the development of the law," because even if Gilmer's dispute failed to produce useful precedent, "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements."¹²⁸ For one thing, even if private individuals were prevented from seeking judicial decisions, the Court noted that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."¹²⁹ The underlying assumption, then, of the Court's approach was that diverting individual claims out of the adjudicatory process would not substantially impair vindication of important substantive interests. That is,

121. 500 U.S. 20 (1991).

122. *Id.* at 23.

123. *Id.*

124. 29 U.S.C. §§ 621–634 (2000).

125. For a variety of reasons summarized in David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 43–50, arbitration is often a more employer-friendly forum for discrimination claims.

126. *Gilmer*, 500 U.S. at 27; see *EEOC v. Wyoming*, 460 U.S. 226, 231–32 (1983) (describing how the ADEA reflected congressional concern with both "the individual and the social costs" of age discrimination).

127. *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

128. *Gilmer*, 500 U.S. at 32.

129. *Id.*

even if Gilmer himself were unable to bring suit, there would still be plenty of other private attorneys general, plus public enforcement.

Gilmer rested on a “liberal federal policy,” embodied in the FAA,¹³⁰ favoring arbitration agreements.¹³¹ But it recognized an express statutory exception to that policy: § 1 of the FAA provides that “nothing” contained in the Act “shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹³² How to interpret § 1 was the issue presented by last Term’s decision in *Circuit City Stores, Inc. v. Adams*.¹³³

St. Clair Adams was hired by Circuit City, a nationwide consumer electronics retailer, to work in its store in Santa Rosa, California.¹³⁴ As part of his employment application, Adams signed a form agreeing to arbitrate all disputes, including claims under federal civil rights statutes.¹³⁵ Two years later, Adams filed suit in state court, alleging that Circuit City and three of its supervisors had subjected him to on-the-job harassment and retaliation because of his sexual orientation in violation of California law.¹³⁶ Circuit City then filed suit in federal court, seeking to enjoin the state-court action and to compel arbitration pursuant to the FAA.¹³⁷

Circuit City was undeniably a business engaged in interstate commerce—indeed, that was the basis of its claim that the FAA compelled arbitration.¹³⁸ But the Supreme Court held, by a 5–4 vote, that Adams was not a worker “engaged in foreign or interstate commerce” within the meaning of § 1.¹³⁹ Only those employees who could be described as “transportation workers” were exempt from compulsory arbitration clauses.¹⁴⁰ The term “workers engaged in foreign or interstate commerce,” the Court explained, constituted a “residual phrase,” in a list beginning

130. 9 U.S.C. §§ 1–16 (2000).

131. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

132. 9 U.S.C. § 1; see *Gilmer*, 500 U.S. at 25 n.2. Although the dispute subject to arbitration in *Gilmer* was an employment-related claim, the arbitration clause at issue was in *Gilmer*’s securities registration application and not in his employment agreement with Interstate. Thus, the Court declined to address the applicability of § 1 to *Gilmer*’s case. *Id.*

133. 532 U.S. 105 (2001).

134. *Id.* at 110.

135. Had Adams not signed the form, Circuit City would not have considered him for employment. To the extent that an entire class of employers has policies like Circuit City’s, *Gilmer*’s assumption that arbitration agreements will not foreclose judicial elaboration of a statute’s general command seems misplaced.

136. See Brief for Respondent at 1, *Circuit City Stores, Inc.*, 532 U.S. 105, available at LEXIS, Genfed Library, Briefs File. Adams raised no federal-law claims.

137. *Circuit City Stores, Inc.*, 532 U.S. at 110.

138. The FAA’s coverage provision, § 2, provides in pertinent part that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Thus, had the contract between Adams and Circuit City not involved the kind of commerce that Congress could regulate under its Commerce Clause powers, the FAA would not apply in any event.

139. *Circuit City Stores, Inc.*, 532 U.S. at 119.

140. *Id.* at 109.

with seamen and railroad workers.¹⁴¹ Since these workers are themselves engaged in foreign or interstate commerce, in the most literal sense of the phrase, there would have been no need to list them specifically if the phrase included all such workers. Thus,

[t]he wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”¹⁴²

Because Adams was not a transportation worker, he could be compelled to arbitrate his claims.¹⁴³

The Court’s decision in *Circuit City Stores, Inc. v. Adams*, like its decision in *Alexander v. Sandoval*, was a product of a deep resistance to interpreting statutes in their historical context. The Court recognized that the FAA had been enacted at a time when congressional Commerce Clause power was narrower than it now is.¹⁴⁴ Section 2 of the FAA provided for enforcement of all arbitration agreements “involving commerce” within Congress’s Commerce Clause power.¹⁴⁵ At the time, that category might plausibly have been interpreted to include only contracts that directly concerned the foreign or interstate movement of goods and services (rather than also including those concerned with either manufacturing or intrastate commerce). So when § 1 excluded “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,”¹⁴⁶ that might be read in tandem with § 2 to suggest that Congress was also excluding from the FAA all of the employment contracts it would otherwise have Commerce Clause authority to regulate. But while § 2’s enforcement of arbitration agreements now extends more broadly—to reach all agreements that involve “commerce” in its contemporary, expansive, sense—the Court held that § 1’s exemption should not shift in a parallel fashion.¹⁴⁷

In earlier decisions, the Supreme Court recognized that plaintiffs in federal employment discrimination lawsuits “act as ‘private attorney[s] general,’ vindicating” “‘the large objectives’ of the relevant Act[s].”¹⁴⁸ The upshot of *Circuit City Stores, Inc. v. Adams* will surely be to decrease the amount of private enforcement, particularly given employers’ increasing imposition of arbitration requirements.¹⁴⁹

141. *Id.* at 114.

142. *Id.* at 114–15 (citation omitted).

143. *See id.* at 119.

144. *See id.* at 115–16.

145. *Id.* at 111; *see also* 9 U.S.C. § 2 (2000).

146. 9 U.S.C. § 1; *see also Circuit City Stores, Inc.*, 532 U.S. at 112.

147. *Circuit City Stores, Inc.*, 532 U.S. at 114–18.

148. *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)).

149. *See Moohr*, *supra* note 102, at 398–99 (collecting recent statistical and anecdotal evidence of an increasing insistence on compulsory arbitration by employers).

As with the Eleventh Amendment cases, the Court leaves open the avenue of centralized federal enforcement. In this Term's decision in *EEOC v. Waffle House*, the Court held that an arbitration agreement between an employer and an employee cannot bar the EEOC from pursuing even victim-specific judicial relief, such as back pay, reinstatement, and damages under the ADA.¹⁵⁰ The EEOC, the Court explained, must have wide latitude to "choose cases that best vindicate the public interest" and cannot be constrained by an employer's ability to force an individual employee into arbitration.¹⁵¹ But because the EEOC files very few lawsuits, even in those cases where its investigation convinces it that an employee's claim of discrimination has merit,¹⁵² centralized federal enforcement seems unlikely to provide the same overall vindication of "[t]he broad, overriding societal interest shared by employer, employee, and consumer . . . [in] efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."¹⁵³ Like the Court's decisions in the Eleventh Amendment cases and *Alexander v. Sandoval*, the Court's decision in *Circuit City Stores, Inc. v. Adams* preserves the formal conduct rules, but undermines the practical enforcement mechanism.

IV. *BUCKHANNON BOARD & CARE HOME, INC. v. WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES* AND THROTTLING THE CATALYST THEORY

Attorney's fees are the fuel that drives the private attorney general engine. Every significant contemporary civil rights statute contains some provision for attorney's fees,¹⁵⁴ and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction Era civil rights statutes as well.¹⁵⁵ The rationale for fee awards rests on several interlocking considerations. First, most civil rights

150. 534 U.S. 279, 288 (2002). Since the EEOC and other federal agencies have quite similar enforcement powers under other federal employment statutes, arbitration agreements presumably do not constrain federally initiated judicial proceedings under those statutes either.

151. *Id.* at 296 n.11.

152. *See id.* at 290 n.7 (reporting that although in fiscal year 2000, the EEOC found reasonable cause to believe there was discrimination in 8,248 of the 79,896 charges it received from employees, "it only filed 291 lawsuits and intervened in 111 others"). Overall, "the EEOC files less than two percent of all antidiscrimination claims in federal court. Indeed, even among the cases where it finds reasonable cause, the EEOC files suit in less than five percent of those cases." *Id.*

153. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

154. In its original form, the Civil Rights Act of 1964, the cornerstone of the Second Reconstruction and the model for later antidiscrimination statutes such as the ADA, provided for fee awards to prevailing parties in cases brought under Title II (governing public accommodations) and Title VII (governing employment) but not under Title VI (governing federally funded programs). The Civil Rights Attorney's Fees Awards Act of 1976, however, provides for attorney's fees in Title VI cases as well. *See* 42 U.S.C. § 1988(b) (2000).

155. 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .").

plaintiffs are unable to afford counsel¹⁵⁶ and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono. Second, the absence of statutory fees might skew attorneys' selection of cases: they might concentrate on cases involving the possibility of large damages awards and the attendant contingent fee, and forego cases which involve only equitable relief or where the right, while important, is not easily translated into a large damages award for the named plaintiffs.¹⁵⁷ But this latter group of cases—especially those involving structural injunctive relief—often do the most to vindicate important societal interests. They are the ones where plaintiffs function most clearly as private attorneys general.

There is something sadly fitting about the very first decision issued by the Rehnquist Court: it held that citizens who vindicate their Title VI rights in the administrative forum to which *Alexander v. Sandoval* consigns them cannot recover attorney's fees.¹⁵⁸ In the ensuing fifteen years, the Rehnquist Court issued a series of similarly parsimonious fees decisions.¹⁵⁹ Last Term's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*¹⁶⁰ marked yet a further retrenchment.

The question presented in *Buckhannon Home* was whether a plaintiff whose lawsuit prompts a defendant to change its conduct "voluntarily"—that is, without an actual court order—is a "prevailing party" and therefore statutorily entitled to recover a reasonable attorney's fee for the time spent on the litigation.¹⁶¹ After it was threatened with closure of its assisted-living care facilities for failure to meet a state regulation, Buckhannon Home brought a federal lawsuit claiming that the regulation violated the Fair Housing Amendments Act of 1988¹⁶² and the ADA,¹⁶³ and sought

156. See S. REP. NO. 94-1011, at 1-3 (1976); H.R. REP. NO. 94-1558, at 1 (1976).

157. The Supreme Court's decision in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), does not permit the award of damages to vindicate the general value of the constitutional right in question. So, for example, absent proof of an actual injury, plaintiffs who show violations of such constitutional entitlements as the right to procedural due process are entitled only to nominal damages. See *Carey v. Phipps*, 435 U.S. 247 (1978).

158. See *N.C. Dep't of Transp. v. Crest St. Cmty. Council Inc.*, 479 U.S. 6, 11 (1986) (holding that time spent in an administrative proceeding to enforce Title VI regulations would not entitle successful claimants to an attorney's fee award).

159. See, e.g., *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (suggesting that in many cases, a plaintiff who recovers only nominal damages should be entitled to no fees award at all because, although she has vindicated her "'absolute' [i.e., abstract] right," she has failed to prove some central element of her claim for compensatory damages); *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) (rejecting the possibility of a contingency multiplier); *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83 (1991) (holding that plaintiffs are not entitled to recover the costs of experts' services as part of their statutory attorney's fee in the absence of express authorization).

160. 532 U.S. 598 (2001).

161. See *id.* at 600.

162. 42 U.S.C. §§ 3601-3631 (2000).

163. 42 U.S.C. §§ 12101-12213.

declaratory and injunctive relief.¹⁶⁴ Less than a month after the district court denied the defendants' motion for summary judgment, the West Virginia Legislature repealed the regulation Buckhannon Home had challenged. The defendants then moved to dismiss the case as moot, and Buckhannon Home, which claimed that its suit had triggered the statutory repeal, moved for attorney's fees as a "prevailing party" under the fees provisions of the FHAA and the ADA, which follow the standard model provided by the 1964 Civil Rights Act and § 1988.¹⁶⁵

By a 5–4 vote, the Supreme Court held a plaintiff cannot be a "prevailing party" within the meaning of the fees statutes unless it achieves "a court-ordered 'change [in] the legal relationship between [it] and the defendant.'"¹⁶⁶ To be entitled to an award of attorney's fees, plaintiffs must either receive an adjudicated judgment on the merits or persuade the defendant to enter into a consent judgment that provides for some sort of fee award.¹⁶⁷ Otherwise, their achievement "lacks the necessary judicial *imprimatur* . . ." ¹⁶⁸ Chief Justice Rehnquist's opinion for the Court downplayed the negative effects of the decision on plaintiffs' ability to vindicate their rights. First, he suggested that the danger of defendants unilaterally denying plaintiffs their right to fees was limited to a small class of cases.¹⁶⁹ That threat "only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case."¹⁷⁰ Of course, as the Chief Justice himself acknowledged in a footnote, there is a broad class of claims for which damages are not even theoretically available: those to which the Eleventh Amendment applies.¹⁷¹ Moreover, to the extent that suits seeking only equitable relief lie at the core of the vision of the private attorney general as champion of the public interest, the Court's theory countenances cutting off the cases that particularly motivated Congress to provide attorney's fees. More systematically, the Court's decision reintroduces the skewing effect on case selection: civil rights attorneys who want to safeguard the possibility of recovering fees will choose lawsuits in which damages are

164. *Buckhannon Home*, 532 U.S. at 600–06. Buckhannon Home originally also sought damages, but dropped this claim early on when the defendants raised claims of sovereign immunity. *See id.* at 624 (Ginsburg, J., dissenting).

165. *Id.* at 601–03.

166. *Id.* at 604 (emphasis added) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

167. In *Evans v. Jeff D.*, 475 U.S. 717, 742–43 (1986), the Supreme Court held that defendants can offer consent judgments that are expressly conditioned on a plaintiff's waiver of his statutory right to attorney's fees. In light of *Jeff D.*, very few defendants are likely to agree to consent judgments that either do not waive fees entirely or do not fully resolve the fees question. *See Marek v. Chesney*, 473 U.S. 1, 7 (1985) (noting that "[m]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff" (quoting *Chesney v. Marek*, 720 F.2d 474, 477 (7th Cir. 1983))).

168. *Buckhannon Home*, 532 U.S. at 605.

169. *Id.* at 608–09.

170. *Id.*

171. *See id.* at 609 n.10.

available over lawsuits that involve only injunctive relief, even if the latter lawsuits are more socially valuable.

Second, the Chief Justice suggested that the catalyst theory might actually have perverse consequences for plaintiffs. In a no-catalyst theory world where fees can be avoided by unilateral abandonment, a defendant whose conduct is detrimental to the plaintiff but not actually illegal might change course, thereby giving a plaintiff more relief than he could win through full-scale adjudication.¹⁷²

Buried in this argument is a less beneficent vision of civil rights plaintiffs. The Court sees the catalyst theory as giving fees to a “plaintiff who, by *simply* filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the ‘sought-after destination’ without obtaining any judicial relief.”¹⁷³ In short, the Court feared a windfall for undeserving plaintiffs—those who persuade defendants to abandon “conduct that may not be illegal”—if the lower federal courts could award fees without first being required to find actual violations.¹⁷⁴ Justice Scalia’s concurrence is more blunt: the plaintiff who induces a defendant to abandon conduct that no court has found to be illegal¹⁷⁵ may be getting rewarded for “a phony claim.”¹⁷⁶ As between giving a fee to someone with a phony claim and denying a fee to a plaintiff with a solid case whose opponent manipulates the system to evade the fee statute, Justice Scalia came down squarely against the civil rights plaintiff:

[I]t seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney’s fees to some plaintiffs who are no less “deserving” of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exact[ing] the payment of attorney’s fees to the extortionist.¹⁷⁷

Justice Scalia’s choice of words is deeply revealing. For him, attorney’s fees are an extraordinary boon, and not the centerpiece of an enforcement regime that sees the private attorney general as an essential tool. And civil rights plaintiffs are potential extortionists, rather than potential victims of conduct that the Constitution or Congress has proscribed.

V. CONCLUSION

The overriding theme that links together the Supreme Court’s decisions on a range of issues—from the scope of Eleventh Amendment immunity to the scope of congressional power under section 5 of the Four-

172. *See id.* at 608.

173. *Id.* at 606 (emphasis added).

174. *Id.* at 608.

175. Justice Scalia remarked that if he were writing on a clean slate, he would probably decline to award fees even to a plaintiff who obtains a consent judgment. *See id.* at 618 (Scalia, J., concurring).

176. *Id.*

177. *Id.*

teenth Amendment, and from when to find implied rights of action to when to award attorney's fees—can be stated quite simply: The current Court is creating an ever-greater regulation-remedy gap. It has left Congress free to regulate a wide range of subjects, but it is engaged in a form of court stripping that reduces the possibilities for judicial enforcement of statutory commands. Thus, I would argue that a “virulent variety of free-wheeling interventionism lies at the core of [the Court's] devices of restraint.”¹⁷⁸

The Congress and Supreme Court of an earlier era constructed the institution of the private attorney general because they recognized that, without private attorneys general, it would be impossible to realize some of our most fundamental constitutional and political values. The current Court seems bent on dismantling this centerpiece of the Second Reconstruction. For all its invocations of *Marbury's* declaration that it “is emphatically the province and the duty of the judicial department to say what the law is,”¹⁷⁹ the current Court seems to have forgotten *Marbury's* equally important acknowledgment—that “the government of the United States has been emphatically termed a government of laws, and not of men,” but “will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”¹⁸⁰ When the law furnishes no remedy because the Supreme Court has cast out the remedies that the political branches have tried to provide, then the courts threaten to become the most dangerous branch “to the political rights of the Constitution,”¹⁸¹ and not the least.

178. Gunther, *supra* note 6, at 25. The quoted text summarizes Gunther's assessment of Alexander M. Bickel's article, *The Passive Virtues*.

179. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

180. *Marbury*, 5 U.S. at 163.

181. THE FEDERALIST NO. 78, *supra* note 3, at 465.

