Constitutional Rights and Remedies: A Treatise-Style Summary

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1 Introduction

The central paradox of American constitutional remedies lies in the tension between *Marbury v. Madison*'s maxim—that where there is a right, there must be a remedy—and the entrenched doctrine of sovereign immunity. The United States cannot be sued without its consent, a rule nowhere explicit in the Constitution yet foundational to federal courts law. The early dicta of Chief Justice Marshall, congressional enactments like the Tucker Act and Federal Tort Claims Act, and statutory regimes like the Administrative Procedure Act collectively construct a remedial architecture that is cautious, fragmented, and often restrictive.

The chapter under review charts this terrain. It examines the inheritance of sovereign immunity from English common law, the emergence of statutory waivers, the development and curtailment of officer suits, the rise and near-demise of *Bivens* remedies, and the layered jurisdictional and remedial constraints imposed by Congress and the Court. What emerges is less a story of expansive judicial protection of rights than one of carefully hedged concessions to accountability.

2 The Inherited Principle of Sovereign Immunity

2.1 English Roots

The English maxim "the King can do no wrong" did not reflect a belief in royal perfection but a procedural barrier: the Crown could not be sued without consent. Redress came through the petition of right, contingent on the monarch's fiat. This principle migrated across the Atlantic, shaping early American understandings of sovereignty. Article III's reference to controversies "to which the United States shall be a Party" was construed

not as an abrogation of immunity but as jurisdictional recognition that suits involving the sovereign required special consent.

2.2 Early Judicial Recognition

In *Cohens v. Virginia* (1821), Marshall casually asserted that the United States could not be sued without its consent, citing "universally received opinion" rather than constitutional text. In *United States v. Clarke* (1834), he reaffirmed this view, emphasizing that jurisdiction depended on congressional authorization. Neither decision grappled with first principles; both treated immunity as received wisdom.

Later, in *United States v. Lee* (1882), the Court allowed a suit nominally against federal officers to proceed, permitting the Lee heirs to challenge the confiscation of Arlington estate. The decision illustrates the "officer suit" workaround—framing unconstitutional acts as ultra vires conduct outside sovereign authority. This remedial innovation reflected the Court's Reconstruction-era ambivalence: simultaneously reinforcing immunity while carving limited paths around it.

2.3 State Analogy and Hans v. Louisiana

The federal doctrine found reinforcement in state immunity jurisprudence. *Hans v. Louisiana* (1890) construed the Eleventh Amendment broadly, grounding state immunity not in text but in constitutional structure. The analogy was clear: just as states did not surrender immunity without express language, neither did the federal government. Sovereign immunity thus became a structural presumption for both levels of government.

3 Statutory Waivers: The Court of Claims, the Tucker Act, and the FTCA

3.1 The Court of Claims

Persistent petitions to Congress for redress—especially Civil War-era claims—demonstrated the inefficiency and favoritism of private bills. The Court of Claims, created in 1855 and strengthened in 1863, institutionalized adjudication of monetary claims against the government, though initially in advisory form. Lincoln himself urged that government had a duty to render justice against itself as well as between citizens.

3.2 The Tucker Act

The Tucker Act of 1887 represented the first general waiver. It conferred jurisdiction on the Court of Claims and, for smaller cases, district courts, over monetary claims founded upon contracts, statutes, regulations, or the Constitution. Importantly, it codified judicial remedies for Takings Clause violations, transforming constitutional protections into enforceable claims for compensation.

But the waiver was narrow. In *United States v. Sherwood* (1941), the Court stressed that waivers define jurisdiction strictly; claims entangled with private disputes fell outside. In *United States v. Testan* (1976), the Court clarified that the Tucker Act is purely jurisdictional—it requires a separate money-mandating source of law. By contrast, *United States v. Mitchell (Mitchell II)* (1983) recognized jurisdiction where statutes imposed fiduciary obligations enforceable in damages. The Act thus symbolizes both progress and constraint: a recognition that the sovereign must sometimes answer in damages, yet only within boundaries Congress delineates.

3.3 The Federal Tort Claims Act (1946)

The FTCA addressed tortious injuries caused by federal employees. Prompted in part by the 1945 B-25 bomber crash into the Empire State Building, it made the United States liable "in the same manner and to the same extent as a private individual" under state tort law. It substituted the United States for employee defendants and created an administrative exhaustion requirement.

Yet exceptions abound: the discretionary function exception (*Dalehite v. United States*), combatant activities, foreign torts, and many intentional torts. Later amendments carved out a narrow law-enforcement proviso. Supreme Court decisions further limited scope: *Indian Towing Co. v. United States* imposed liability for operational negligence, while *United States v. Varig Airlines* upheld immunity for regulatory judgments.

Most significantly, *FDIC v. Meyer* (1994) held that constitutional torts are not cognizable under the FTCA. Constitutional claims must find other vehicles, for the FTCA imports only state-law standards. The Act thus offers compensation for negligence but not a remedy for violations of constitutional rights.

4 The Administrative Procedure Act (1946)

The APA remains the broadest statutory framework for judicial review of agency action, but it too contains built-in limits.

4.1 Waiver of Sovereign Immunity (§702)

Section 702 lifts immunity for suits seeking non-monetary relief against agencies. But presidential action lies outside: in *Franklin v. Massachusetts* (1992) and *Dalton v. Specter* (1994), the Court held that the President is not an "agency" and therefore beyond APA review.

4.2 Prerequisites to Review (§704)

Only "final agency action" lacking another adequate remedy is reviewable. *Bennett v. Spear* (1997) established the test: consummation of decision-making and legal consequences. Where Congress has provided an alternative scheme—as in *Elgin v. Department of Treasury* (2012)—APA review is unavailable.

4.3 Grounds of Review (§706)

Courts must "set aside" agency action that is arbitrary, capricious, unlawful, unsupported by evidence, or contrary to constitutional rights. *INS v. Chadha* (1983) illustrates this breadth: agency action pursuant to an unconstitutional legislative veto was voided.

But the remedy of vacatur itself is contested. In *Trump v. CASA, Inc.* (2024), Justice Barrett suggested that "set aside" may mean case-specific disregard rather than universal nullification, casting doubt on decades of practice.

4.4 Statutory and Discretionary Bars (§701; Channeling)

Section 701(a)(1) excludes cases where statutes preclude review, as in *Block v. Community Nutrition Institute* (1984). Section 701(a)(2) excludes matters committed to agency discretion, exemplified by *Heckler v. Chaney* (1985) and *Lincoln v. Vigil* (1993). Jurisdiction-stripping statutes such as the Mine Safety Act at issue in *Thunder Basin* (1994) further channel claims into designated forums. The recent *Axon v. FTC* (2023) decision narrowed this doctrine by permitting structural constitutional claims to bypass administrative channels.

5 Officer Suits and Injunctions

Before the APA, equitable relief often turned on officer suits: framing ultra vires actions as personal wrongs of federal officials. *Osborn v. Bank of the United States* and *United States v. Lee* supported such remedies, but *Larson v. Domestic & Foreign Commerce Corp.* (1949) curtailed them, holding that acts within delegated authority—even unlawful ones—were effectively sovereign and immune.

In modern times, officer suits remain relevant chiefly where APA review is precluded. *Trump v. CASA* illustrates the stakes: the Court restricted nationwide injunctions, holding that statutory authority did not extend to systemic nullification of executive orders. The implication is a remedial retreat toward party-specific relief, weakening systemic checks on executive power.

6 Bivens and Constitutional Torts

6.1 Birth of the Doctrine

Bivens v. Six Unknown Named Agents (1971) recognized an implied damages remedy against federal officers for Fourth Amendment violations. The Court invoked *Marbury*'s principle: rights without remedies are hollow.

6.2 Retrenchment

Subsequent cases limited *Bivens*. In *Chappell v. Wallace* (1983) and *Bush v. Lucas* (1983), the Court declined extensions where special factors—military discipline or comprehensive statutory schemes—counseled hesitation.

In *Egbert v. Boule* (2022), the Court effectively froze the doctrine, holding that recognition of new *Bivens* contexts is a "disfavored judicial activity." The Court emphasized congressional primacy in creating remedies and treated even partial alternative processes as reasons for judicial abstention. Today, *Bivens* survives only in its original triad: Fourth Amendment searches (*Bivens*), Fifth Amendment gender discrimination (*Davis v. Passman*), and Eighth Amendment deliberate indifference (*Carlson v. Green*). Outside these narrow categories, no damages remedy lies.

7 Jurisdictional and Remedial Limitations

7.1 Historical Limits

Congress's power to shape jurisdiction was affirmed early. *Stuart v. Laird* (1803) upheld jurisdictional restructuring. *Ex parte McCardle* (1869) validated Congress's withdrawal of appellate habeas jurisdiction, while *United States v. Klein* (1872) struck down jurisdictional manipulation that effectively dictated outcomes. *Patchak v. Zinke* (2018) reflects ongoing debate over the line between jurisdiction-stripping and outcome-control.

7.2 Statutory Constraints

Several statutes restrict federal remedies. The Anti-Injunction Act bars suits to restrain tax collection, requiring a pay-then-sue model. The Declaratory Judgment Act excludes tax cases. The Norris–LaGuardia Act curtails labor injunctions. AEDPA (1996) sharply narrowed habeas review, enforcing deference to state adjudications. These targeted limits confine federal judicial intervention in politically sensitive domains.

8 Conclusion

The history of remedies against the federal government reveals a persistent theme: constraint rather than expansion. From Marshall's dicta through statutory waivers, from officer suits to *Bivens*, from the APA to modern jurisdiction-stripping, the judicial power to supply remedies has been hedged at every turn.

Marbury's promise—that for every right there must be a remedy—remains aspirational rather than descriptive. Rights against the sovereign are conditional, contingent, and politically bounded. For law students, the lesson is clear: constitutional law is not merely about declaring rights but about understanding the procedural and jurisdictional architecture that determines whether those rights can be enforced. The doctrinal edifice of sovereign immunity, statutory waiver, and remedial restriction is as central to constitutional law as the substantive rights themselves.