

Short Circuit 236

📅 Thu, 9/8 5:27PM ⌚ 47:33

SUMMARY KEYWORDS

remedy, case, common law, constitution, state, court, bivens, michigan, government, majority, question, tort, claims, plaintiff, action, legislature, dissent, rights, enforce, courts

SPEAKERS

Anthony Sanders, Anya Bidwell, Ben Field

Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. My name is Anthony Sanders, I am the director of the Center for Judicial Engagement at the Institute for Justice. We are recording this on September 7, 2022. We're going to have an exciting podcast with a federal and a state case where we're going to talk a lot about remedies. You may have a right. But do you have a remedy? John Marshall once told us that you indeed do. And we're going to see how that's not always true, but sometimes it is. Joining me today are to Institute for Justice power attorneys Anya Bidwell and Ben Field. Welcome back to both of you.

Anya Bidwell 01:13

Hey, hey.

Ben Field 01:14

Thank you.

Anthony Sanders 01:15

Well, first of all, Anya is going to -- while she's here, she might as well -- talk about when you can meet her in person, if you happen to live in New York City. So Anya when's that going to happen?

Anya Bidwell 01:28

That's going to happen on October 26. It's a Wednesday, doors open at 6:30pm. We got this very fancy venue called Mezzanine. And we're going to be all very fancily dressed.

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Anthony Sanders 01:47

In the financial district, I believe. So all the Wall Street traders can come by and see you after they're done.

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Anya Bidwell 01:55

Yes. And we have three amazing guests. Maaren Shah. She's a partner at Quinn Emanuel. She also teaches at Stanford. We also have a professors Bruce Green, and Alex Reinert. They all clerked for the Second Circuit. They also clerked for the United States Supreme Court, at least some of them. They argued amazing cases before the Second Circuit. So it's going to be really interesting. It's going to be Second Circuit heavy. And we're going to get some nice rumors in as well as discuss some cases.

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Anthony Sanders 02:32

Great. Well, you can sign up online, make sure you RSVP. We have a link in the show notes if you want to come meet some folks from the Institute for Justice. But today, you can listen to folks from the Institute for Justice talk about remedies. So Anya take it away in the 10th circuit.

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Anya Bidwell 02:52

Yes, thanks, Anthony. This is a very interesting case. And I wanted to discuss it because it's, you know, post *Egbert* versus *Boule*, the United States Supreme Court case from the beginning of June of this year, when the Supreme Court basically said that we will allow a remedy directly under the Constitution, in very, very few cases. So, listeners understand we're talking about the Bivens remedy, right. So it's a damages remedy for when an individual federal official violates your constitutional rights. For a while there, we thought that this is a very broad remedy, where as long as federal official violates your constitutional rights, you can immediately open the courthouse door. But the United States Supreme Court has told us on several occasions that this is actually a very, very narrow remedy. And the last time it said so was this case *Egbert* versus *Boule*, where it was a Fourth Amendment and First Amendment claim against a CBP officer. And the Supreme Court essentially said that plaintiff is out of luck. And the plaintiff in that CBP case in *Egbert* might not be as sympathetic. But in this case, the 10th circuit case, the facts actually quite chilling. And the 10th circuit with both Democrat and Republican appointees said that we really don't care about how chilling the facts are. There is no remedy because of this *Egbert* case, right? So the facts are basically this is a prisoner in federal prison. This guard went into his cell, which took him outside the view of security cameras, and once inside the cell, the federal guard assaulted this prisoner by quote slamming him on the floor, jumping on his back, and applying painful pressure with his knee. And then other officers falsely accused this prisoner of actually assaulting the prison guard himself. And so the prisoner brought pretty typical, you know, excessive force claims. And in the olden days, chances are that, you know, a district court and a federal Court of Appeals would have looked favorably upon those claims and allowed them. At the very least allowed them to proceed against the federal defendants. We are not talking here about you know, remedy being ordered immediately. All we're talking about here is the ability to prove your case in court, to open the courthouse door in the

beginning. And in this case, however, the panel is basically saying we're not going to do that. We don't care how sympathetic the claims are. We just not going to do that post Egbert versus Boule. The court says, and I quote, "the Supreme Court's message could not be clearer. Lower courts expand Bivens claims at their own peril. We heed the Supreme Court's warning and decline plaintiffs invitation to curry the Supreme Court's disfavor." And it's a very short opinion, there is no dissent. You have W Bush appointee, you have Reagan appointee, and you have Bill Clinton, no, Carter appointee. And the three of them just are not willing to go there at all. They say that post Egbert, this prisoner has no remedies whatsoever. They also say that post Egbert, you essentially have two ways how you can deny a remedy. The first way is whether a court is competent to authorize a damages action, not just against an individual defendants. But so the first way is really whether Congress is more competent to authorize the remedy, or a court is more competent to authorize a remedy. And, you know, the Supreme Court says the court is essentially almost never competent to authorize a remedy. And the second way is, you know, whether there is an alternative remedy. And that's kind of a thing that I want Ben to talk more about when he talks about the Michigan case. Because here, the way they look at alternative remedies is not whether the plaintiff himself has alternative remedies, but whether, you know, there is a deterrence for the future. So it's not necessarily about what happened in one particular case, it's whether there is, quote, "means through which allegedly unconstitutional actions can be brought to the attention of the government body and prevent it from recurring." And in this case, the court says, Listen, there is a Bureau of Prisons administrative remedy program. It's a regulatory scheme. And, you know, maybe it won't provide a remedy to this particular prisoner in this particular time. But there is a chance, you know, at least we know, it's going to be brought to the attention of the Bureau of Prisons, and maybe in the future, you know, it's not going to happen. And that is essentially enough to deny a remedy to this prisoner in this particular case. And that's kind of a really good example of how courts are looking at a federal remedy against federal officials post Egbert versus Boule. So they really are looking at it as there is a general prohibition on remedy against federal officials. And they because, as they say, Congress is essentially always better suited to provide a cause of action. So apparently, it's up to Congress to tell us when we can sue and when we can't sue. So there's a general prohibition and there could be very few situations where somehow court is better positioned than Congress. And really, you know, I am yet to find a case where the court will say, no, you know what, we are better positioned to provide a remedy. So, Anthony, earlier you talked about whether is right, there is a remedy. When it comes to federal courts against federal officials, this is a really good example where there is essentially no longer any remedy period, and this case is a great demonstration of that.

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Anthony Sanders 09:32

What one question about that here, and I mean, I agree with everything you just explained Anya, but is this was also a suit against the United States itself. And I'm guessing it was under the Federal Tort Claims Act, but it seems like that wasn't appealed or something happened at the district court stage. Do we know what happened to that part of the case?

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Anya Bidwell 09:56

We don't know what happened to that part of the case but you have a pro se litigant essentially. So there have been a whole bunch of procedural issues down below to the point where the defendant actually, the individual defendant, because on appeal, the only question is

the individual defendants and their liability. The individual defendants on appeal argued that you don't even have to address the Bivens thing here, because the pro se complaint was so bad that the court had the option to throw out the case altogether, and not even reached the question of Bivens post Egbert. But they specifically say we exercise our own discretion to address the merits of the issue here, and then they go on to provide a very banal opinion on Egbert.

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Anthony Sanders 10:47

Well, I say raise that because I would think a much more sympathetic way for the court to address this situation, rather than you can file a complaint that everyone knows probably won't get read, is that your suit against the actual government, not the official, you might get some money for?

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Anya Bidwell 11:06

Yeah there's a case called Carlson vs. Green, where the United States specifically said that the FTCA and Bivens are not alternative remedies. They're complementary remedies. And they are not mutually exclusive. The Supreme Court likes to pretend that Carlson versus Green doesn't exist. But I think everybody kind of understands that there's still that case. And it's pretty explicit about FTCA remedies versus Bivens remedies, and how they're not mutually exclusive. So courts, if they can kind of avoid discussing that, they generally just avoid discussing that and find something other than the FTCA to use as an alternative remedy.

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Anthony Sanders 11:52

But I should I should point out to that, that the FTCA, if there's a violation of the Constitution, you don't use the FTCA. You use FTCA for what we would call common law causes of action like battery or, or what have you. So in that way, you know, there are many cases where it isn't -- well, we'll talk about with Ben's case where it isn't a perfect substitute.

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Anya Bidwell 12:17

That's right. That's right. It's, you know, sometimes you of course, have like Fourth Amendment claims, where there's a big overlap between common law torts and constitutional torts. But sometimes you don't have that.

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Anthony Sanders 12:27

Well, Ben, speaking of constitutions and common law torts, tell us what you think about this this 10th Circuit case. But let's weave into what happened in Michigan where there was a very different result.

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Ben Field 12:44



Ben Field 12:44

Yeah. So there's, essentially I think there are three different types of constitutional claims you might be bringing. You might be bringing federal constitutional claims against federal officials. And as that 10th Circuit case illustrates, that's virtually impossible now. You might be bringing federal constitutional claims against state officials. And fortunately, there's a statute that we've talked about a lot on Short Circuit called Section 1983, that lets you do that. It is still daunting, you have qualified immunity and all the other things we talk about. But at least you have a cause of action to get into court. And then there is what if you want to bring a suit against a state official or a state agency under the state constitution? There are a handful of states that have a sort of 1983 analog, but it's pretty rare. And so the question is, is there some equivalent to Bivens at the state level. And it's state supreme courts that get to make that decision, which brings us to this case in Michigan, called Bauserman versus the Unemployment Insurance Agency. And as you were alluding to Anthony, this is a case that doesn't really have a private tort analog. It's not a battery or a false arrest or any of the things that we often think about Fourth Amendment style cases being. It's a due process claim. And the actual facts are pretty galling. So there are two named plaintiffs, who are trying to represent a class of people who collected unemployment insurance in the state of Michigan, and then they were subjected to this very, you know, we often I think, use the word Kafkaesque, but it fits so often when you're dealing with state bureaucracies. So they collected their benefits, everything was going fine. And then this automated state system determined that they were defrauding the state and didn't even necessarily tell them that they did. So for instance, if you stopped collecting your benefits, and then didn't log into the Unemployment Insurance website anymore, you would never see the notice that the state had had said that you are committing fraud. And so both the plaintiffs eventually, when they actually did get notice, they tried to challenge it, but ran into this wall. The automated system just trumped it, and you had the state garnishing their wages, garnishing their tax refunds, and taking 1000s of dollars from them. And then when the state actually did look at the evidence said, Oh, actually, there wasn't any fraud here whatsoever. But you know, at that point, the state gives you back the money, but you've gone through now two years of having to fight the state and worried that your next paycheck might just disappear. And so they want to go into court and say, We should be compensated for this violation of our due process rights. And so the question before the court was, there's no specific statute in Michigan that says you can sue for a due process violation, and so is there one directly under the Michigan Constitution or that's created by courts as a matter of common law to enforce the Michigan Constitution? And unlike Anya's case, this is one where the court did the right thing and said absolutely, yes, there is. And I think that it went through, it went through many of the arguments that the the anti Bivens types of cases have addressed, and I think really demolished them in a very persuasive way. So the first thing that the majority said was that the recognition in redress of constitutional violations are quintessentially judicial functions required of us by the separation of powers. And I think that's a very important principle that this isn't courts going out of their way to engage in lawmaking. Those constitutional rights are in the Michigan Constitution. In fact, the Declaration of Rights is the very first part of the Michigan Constitution, as it is in most states. And so all the courts are doing is saying there are rights that are in the Constitution, we're going to make sure that there's a remedy for the violation of them. And then it goes on to explain history. And you know John Marshall was not picking a maxim out of thin air when he said that when there's a right there's a remedy. The exact same thing is said in Federalist 15, by Alexander Hamilton. The court goes through history showing that English common law, it was very common for courts to provide common law remedies when officials violated the basic rights of citizens.



Anva Ridwell 17:10



Amya Brown 17:10

Common common law remedies.



Ben Field 17:13

Exactly. And and I think another weird thing about this whole area is that they're in most of these cases, there's no statute that lets you get an injunction. But everybody agrees that obviously, if the government is violating your rights, you can get an injunction. So there's this bizarre situation where everybody agrees that courts are allowed to invent a cause of action in order to stop the government from violating your rights in the future. But if the government has successfully already violated your rights, like an obvious case, and official has beaten you up in violation of the Constitution, courts are often saying, Well, you know, if the government got away with it, then no remedy for you. And the Michigan Supreme Court says no, you know, damages are the most traditional remedy. And so we're there's no reason to distinguish between injunctive relief or money damages. And another important thing they say is often the critics have given say, Oh, well, courts are engaging in policymaking. And I think the Michigan Supreme Court said quite powerfully, no, it's the opposite. What they said is, quote, this court should not be in the business of determining the quote unquote, propriety of recognizing a constitutional damages claim. And so unlike the kind of analysis in that 10th Circuit case, where the court is hemming and hawing about, oh, is it really our role to enforce this? The Michigan Supreme Court says no, it's the opposite. Courts should as a default be enforcing constitutional rights. We didn't create the rights. They're in the Constitution. We're just providing a remedy for them. And if we start deciding, oh, is it appropriate for us to do this in this situation or not? That is policymaking. That is what it's inappropriate. It's not policymaking to just look at the Constitution, say there's a right, and then to enforce it. And so at the end of the day, what the Court held was in Michigan now, there's just a strong default that unless the specific constitutional provision has specifically delegated the enforcement of the right to some other body like the legislature, and unless the legislature has actually created a remedy, that would be sufficient and at least equal to the common law remedies that would be available, then the Michigan Supreme Court and the Michigan courts generally are going to enforce the Michigan Constitution and allow people to seek damages remedies, if that's the most appropriate remedy in their specific case. And, frankly, I'm not aware of any other court that has been this strident in saying constitutions mean something. Our state constitution is the supreme law of the is, you know, next to the federal constitution, the supreme law in our state, and if a constitutional right is violated, we're going to enforce that. One potential caveat is this was a four to three decision and there was a concurrence written by one of the justices in the majority. And I think she has some very good language of her opinion. For instance, she says that an untenable situation would arise if the state could violate an individual's fundamental, inalienable rights without the individual having a legal pathway to an adequate remedy. Our fundamental and inalienable rights would hardly be fundamental at all, without such a remedy. I agree with that 100%. That bolsters the majority position, but she caveats in two ways that might be important in future cases. First, she says that I'm only going along with the majority, insofar as we're talking about rights that are in the Declaration of Rights. So you so in her view, you can't sue for rights that are outside of the state equivalent of the Bill of Rights. You know, most claims are going to be under that. So I don't think that's a huge caveat. But that's one thing to keep in mind. And she also at least predicts that this is going to be, quote, relatively rare, because in her view, there often will be an alternative remedy. And I think that's an empirical question to be determined. You know, I think that she might be a bit sanguine about that. But if the Michigan legislature is

providing strong remedies for people, you know, more power to them, and that that's great. But to the extent they're not, it's good that the majority of the court is firmly on the side that the court will provide a remedy, just like courts have done at common law for centuries.

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Anya Bidwell 21:20

And this question of alternative remedies is fascinating, right? The majority kind of is pretty clear in the way they're defining alternative remedy. And they're basically saying no, so there is this right that was violated. And an alternative remedy would be something that would specifically address that right, and provide a sort of recompense for that injury. Justice Welch in her concurrence, she's basically saying, it doesn't necessarily mean that the plaintiff will be whole. But she doesn't dispute this fundamental idea that no alternative remedy means dealing with this particular right, and that particular injury.

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Ben Field 22:02

Absolutely.

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Anya Bidwell 22:03

Yeah. And the way we see it in federal Bivens cases is that alternative remedy can be anything, right. It's just kind of the way this 10th Circuit case is looking at it where, you know, if there is some sort of a regulatory regime that would inform the Bureau of Prisons, that there is a problem that they have in their hands, you know

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Anthony Sanders 22:26

Lets you send a postcard.

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Anya Bidwell 22:28

Yes, there was another case, you know, Ahmed versus Weyker from the Eighth Circuit where they said, the Hatch Act, you know, victims of trafficking, right, that could potentially be some sort of an alternative remedy in a situation involving a woman who was jailed for two years, for no reason, because an agent lied and caused her to be incarcerated. So the way that the federal courts are interpreting alternative remedy is extremely broad. And the way the court is doing it here in the Michigan case is very targeted, very narrow, very much focusing on this particular injury and whether this particular person would be compensated for that particular injury.

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Ben Field 23:13

Yeah, this specific language in the majority opinion is that the legislature's alternative must be at least as protective of a particular constitutional right as a judicially recognized cause of

action, and must include any remedy necessary to address the harm caused. And so obviously, you know, in that 10 Circuit case, being assaulted in your prison cell, you know, filing a grievance so that some other person isn't assaulted isn't providing you any remedy whatsoever.

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Anya Bidwell 23:41

Right. It's such a it's not an excuse, the way that the federal courts are looking at it as an excuse to deny a remedy. Here, it's like, no, it's actual, where there's a right, there is a remedy. If there is an alternative remedy that is just as good, fine. But if there isn't, then that's not good enough.

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Anthony Sanders 23:57

So this case is extremely fascinating, and one of the most fascinating state constitutional law cases of of the last couple years. But I apologize, I may cause a little bit of a rankle among the panel with with couple of observations that that I had. So I agree with with both you that the end result is the way that it should be in with the majority opinion. That you should have a remedy for the violation of what happened to these these people in this case under the state constitution. But I think this is an unusual case where even though I agree with what the majority said, I did find the dissent in the case really well done and fascinating.

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Anya Bidwell 24:49

A la Justice Scalia, right. He brought out his best Justice Scalia.

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Anthony Sanders 24:52

Sure. Yeah, you could say that. So this is Justice Viviano's dissent -- very long, poignant dissent. I thought that he actually got a little deeper into the you might almost call the metaphysics of how this stuff works than than the majority. Although I think the majority got to got to the right result. And the reason I say that is we went into -- the well I say we it was really John Ross and Anya -- went into the last season of Bound by Oath, our sister podcast into a lot of this stuff. And we had a couple episodes about like, where do remedies come from? What does it really mean to have a remedy under the Constitution versus a remedy at common law, and we keep throwing around common law and for non lawyers out there, that really means like, someone causes like, a real wrong to you -- takes your stuff beats you up, whatever it is. And then you have a cause of action against them to be compensated for that. So we went into all of the the ins and outs of of how that works. And one thing to take away from that on on what happened with Bivens at the federal level, is the federal courts used to just have regular causes of action at federal common law, because federal common law was a thing. It just kind of mirrored state law. So say, you had that you had to get into federal court, you had to have some kind of reason to be in federal court, under the Constitution. Like diversity, right. You're in different states or some federal statute or something.

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Any Bidwell 26:49

Federal question jurisdiction shows up after the Ku Klux Klan Act, Section 1983. Right at that time.

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Anthony Sanders 26:54

Right, but there's still federal common law at that time. So then they get rid of federal common law of this thing called Erie that would be a whole, it's own season Bound by Oath, and we will get into in the 1930s. And then then you're left with there's a gap there for like doing the thing that you should just normally do, which is sue the federal official for for a wrong. And so they come up with Bivens and say that, well, it's a it's a violation of the federal constitution. You know, it's not just a tort. It's like a violation of the Constitution. It happens to be a government official. And so you should have a way to to, and Congress has never bothered to pass a law saying you could do that, like they did with 1983. And so you can get into into court with that. Well, what what Justice Viviano kind of gets into is that with the the old, the kind of the common law where judges create remedies for, you know, a battery or a theft or something like that. It doesn't really map onto constitutional wrongs. So someone in the government violates your due process rights. Because, of course, the common law in England, they didn't have a written constitution. He kind of makes fun of the British Constitution at one time where he says it's an you know, it's an unwritten kind of hazy constitution. By the way, we're going to have an episode on the British Constitution in the coming months. A little little preview for you guys. But so what so how does that work? Now the thing is, I think American jurisprudence has never really come to grips with this really deep question, which is, how does the common law causes of action map on to the written constitutional order that we have? And how do they relate to each other. Because he says, Look, under a written the written constitution and Michigan, the legislature has this lawmaking power. And under the old system of Parliament, like judges made up cause of action, but Parliament could come along and change it. And here we have, the legislature basically just hasn't done anything other than maybe sovereign immunity. And then you have these rights in the Constitution. So judges making up, I say, making up I'm trying not to be pejorative, coming up with remedies for violation of those rights. That's not the same thing as coming up for a remedy with a violation of the common law, because that was just part of the common law. Now, I think those two things are much more similar than he's giving credit to. But I kind of see his where he's coming from there. And I think the majority glosses over that a little bit. Maybe they just think like that, you know, that's angels dancing on a pin.

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Ben Field 29:48

I agree with you this area is somewhat under theorized because until really the 1950s or 60s, as you would learn from Bound by Oath, constitutional tort litigation wasn't, didn't really exist. And so this is a relatively recent area of law. And state high courts in particular, are only now really delving into it. But I think that the majority's basic point about a right having a remedy is responsive. And it turns what Justice Viviano is getting at on its head. Because so at common law, you know, in the 18th century, where you have, you know, judges and justices in England, having to decide, well, what are the kinds of things that we're going to provide a remedy for, there isn't a lot of legislation as a backdrop for them to make decisions on. But we move into the United States with written constitutions. And now there is a body of law, of written law that gives rights to people. And so the question for the court is not, is this kind of thing of right that you have? Or is it not a right? Instead, you have the right, the question is just whether or not

there's a remedy for it. And traditionally, at common law, you know, if you had a right, for instance, a right against being bodily assaulted or right against being defrauded, then you know, you would go into court. You could pick which court you went to whether it was a legal court or an equity court. But the type of court you had has a certain, you know, menu of remedies available. And if you could show that your rights were violated, then you would get the appropriate remedy for it. And so I think that all that the Michigan Supreme Court is doing is saying, look, there is a body of positive law out there that gives people rights. And so the question is just do we have to wait for the legislature to create a cause of action in order to remedy that? And I think the majority is very poignant in saying, no, if you have to wait for the legislature then the constitutional rights are essentially meaningless. You've essentially eviscerated the Constitution and gone back to the 18th century where Parliament is, you know, supreme, because if Parliament, or the legislature can't be bound by the Constitution, the Constitution doesn't have any meaning.

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Anya Bidwell 32:09

And the Bill of Rights, right is specifically an anti majoritarian document, right? That's kind of the key to understand too. The Bill of Rights is meant to protect against the rule of the majority -- that the majority can't take away some of the rights that you have that have pre existed the government, right. And it is rather absurd to say that a majoritarian institution like Congress, or like legislature, is the one that would allow you to go into court to enforce your anti majoritarian, right? That just completely clashes. And the other thing that I think is interesting is discussion between the majority and the dissent of what what is the role of the judiciary within the separation of powers? And how do you see that role in this particular situation? The majority is basically saying it is our duty within the separation of powers to provide a remedy, right. And the dissent the saying no, the separation of powers is telling us to stay away and wait for legislature to provide the cause of action. And the majority, I think, is much more in tune with the foundations of this country in terms of the separation of powers principle. Right, that famous case by Justice Story, the Apollon, where he talks about how it is supremely the function of the judiciary to see whether the wrong was committed and then order an appropriate remedy. It's not the function of the legislature, especially when it comes to providing you a permission slip to enforce anti majoritarian rights.

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Anthony Sanders 33:44

Yeah, and the majority points to the Michigan Constitution's grant of power to the Michigan Supreme Court and says that it has the judicial power of the state. And part of that judicial power traditionally, is these creation of remedies, as you say.

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Ben Field 34:04

And I think it's also telling that Justice Viviano, and the kinds of jurists that he's channeling, really lack the courage of their convictions. Because if they were serious and believed that you really do need a permission slip from the legislature to enforce your constitutional rights, they would say the same thing about injunctive relief, and the majority points that out.

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Anthony Sanders 34:24

The funny thing about that is, so I have actually had to litigate this question. So maybe it was more fresh from my mind than Justice Viviano. But usually you do actually have a statute to enforce injunctions and and definitely declarations, declaratory judgments, and that's the UDJA, the Universal Declaratory Judgment Act, which most states have adopted, which gives you a cause of action to have a declaratory judgment about various things. But included in that is the constitutionality of an ordinance or a statute. And so when he didn't say that I thought, I don't know, maybe he already written a very long dissent. And he was a little exhausted, and his clerks, you know, had to go to dinner. And so they didn't put in the stuff about that. But that actually is true most in most of the time -- that you do have a statutory cause of action. Where you wouldn't -- so for example, I believe in Texas, Texas Supreme Court said yes, there's there's kind of a waiver of sovereign immunity to go to court on questions of declarations and injunctions because of the UDJA. But there isn't for monetary damages. So I thought that was something interesting he left on the table.

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Anya Bidwell 35:41

Nobody disputes though that you don't need that statue. It's nice to have. Right. It's kind of like with section 1983.

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Anthony Sanders 35:48

I think some people do dispute that. I think some people do. But it's it is very accepted, though. Maybe it's the majority view.

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Anya Bidwell 35:55

It's very accepted. Right.

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Ben Field 35:57

And so in fact, Justice Scalia wrote an opinion near the end of his life, in a case called *Armstrong*, where in a very, very short paragraph with just like one citation, he says, obviously, there's a an equitable right to enjoin unconstitutional government action. Doesn't go any further, doesn't explain it. You know, obviously, it wasn't about *Bivens* so he doesn't have to explain how it's different from *Bivens*. But the federal statute books lack any cause of action creating language for an injunction. And that's true in most states too. Even those with the Uniform Declaratory Judgment Act, they don't have necessarily a separate statute that creates a right to get an injunction, you know,

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Anthony Sanders 36:40

I think the language is declaratory judgment or other relief. Which is always rolled, because everyone always asked for both, if you ask for an injunction. But yeah, that, you know, those statutes are less than 100 years old. Because the declaratory judgment I think, was a an

invention in the 1930s. And, and before that, there was, you know, various mechanisms that courts of equity, the old chancellor in England would provide that kind of relief.

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Anya Bidwell 37:11

But I want to bring us back to this and to finish on that note, so listeners kind of think about that. Back to this distinction between local and state officials and federal officials. So in this Michigan case, for example, if you are a Michigan official, or if you are a local official within Michigan, you can be sued. Or in this case, it's actually an agency too, right, the state of Michigan itself, you can be sued for violations of the Michigan Constitution or even the United States Constitution, right? You can be sued under Section 1983 in federal courts for violations of Federal Constitution. You can be sued directly under Michigan Constitution. There are many different options to hold state and local officials to account. And as Ben mentioned earlier, you could run into qualified immunity issues. And that could be a big problem. However, it's a much better situation if you're a plaintiff than if you're a plaintiff against a federal defendant. Because this implied right of action under Michigan Constitution are going to do you no good. You can't sue a federal official in state court because of the Westfall Act. And now as you can see, with this 10th Circuit decision, the federal courts are interpreting Bivens as essentially bad law and no longer providing any cause of action for violations of the Constitution under Bivens. So if somebody hurts you, and they happen to be a federal official, or they happen to be on a federal task force, you're pretty much out of luck. And those guys have absolute immunity. So that's kind of the big picture Eastern European pessimism for you.

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Anthony Sanders 38:56

We always love the Eastern European pessimism, Anya. I actually have have an additional question. And in this, this is maybe a way to bring back our report, 50 Shades of governmental immunity or 50 Shades of immunity, that we released earlier this year, and that Alex Reinert, who's going to be on Short Circuit Live next month was a part of and we did a special Short Circuit on I think back in February. We'll put a link to that episode up in the show notes. So what we talked about in that episode was there are some harms that are both constitutional and common law, you might say. So, like a Fourth Amendment seizure, right, an officer grabs you maybe breaks your arm, something like that. Doesn't have probable cause to do so. That's a seizure. But it's also just an assault, an old fashioned battery that you could sue for. This case, Ben, you said this case is you know, isn't really something you could sue for, I think, partly that's true, but partly like, you know, the people who are seizing these tax returns or, you know, saying you've been stealing unemployment benefits. It seems like you could bring some kind of maybe, I don't know, negligence claim or like they committed extortion or some kind of. I mean, theft is a crime, but some kind of cause of action you'd have for, you know, taking your stuff, essentially. And then eventually they got it back. But these people were probably out, I don't know, they couldn't make rent a few months, or they're out some kind of damages, maybe pain and suffering for what happens to them. So is there a way that what happened to these people in this case, could be could be seen to be a common law cause of action? And I think it's interesting, maybe just to think about, can that be seen as then, therefore, more parallel to an old fashioned common law action? And maybe there's more justification for the creation of this cause of action? But also, could they have just sued like, forget the state constitution, could they have just had that as a lawsuit? But if they did that, are

there like state immunities in their way where they wouldn't get the relief? I don't know. I'm suspecting maybe there is. And that's why this lawsuit was structured that way. But I wonder if there, you know, if that's part of the story, too.

B

Ben Field 41:36

So I think that this raises a couple interesting points. So first, I don't know the details of Michigan. But most states have a statute that waives sovereign immunity. And it has built into it a lot of rules and exceptions, which often would block those kinds of suits.

A

Anthony Sanders 41:55

It's like we waive it but not really.

B

Ben Field 41:58

Right. But I think that your question gets to a sort of deeper and more fundamental point, which is, so it's conceivable. So you could say this was negligence, or this was the tort of conversion, which is when you take somebody's property illicitly. But that's, you know, typically when you think of conversion, it's, you know, I entrusted my money to my cousin, and then he ran away with it. That's conversion, you know, it's it's very straightforward. Here. It's not really, if if the government had been right, that these plaintiffs were committing fraud, it would have been fine for them to do it, to take the money. And if they gave them due process, and these plaintiffs just never showed up to prove that they weren't committing fraud, then the government probably wouldn't be committing a wrong either. It really is the lack of process that's the harm that was suffered. And you can try to shoehorn that in to private torts. But if we agree that at the end of the day, you should have a remedy when your due process rights are violated, it seems unusual to me that we would demand it. And you might be able to shoehorn this particular case in, but that's not going to be true for lots of ones. So the classic example, are free speech rights, other people don't have any obligation to respect your speech. They're allowed to say, you're an idiot, I'm not listening to you. And I'm not going to be your friend, if you keep talking about, you know, politics that I don't like. But the government doesn't have that ability, the government is restricted in what it can do to you. And so there's just never going to be a private tort for very fundamental rights, like free exercise of religion, or free speech. And it just doesn't make sense to try to force all of these issues into, you know, common law, private torts that happen between individual people. Because that relationship is very different from the relationship between a person and the government. And the majority opinion gets into that.

A

Anya Bidwell 43:48

And that brings us full circle to that episode, Anthony, with Alex Reinert, where he discusses this and also how it is a very particular harm when it's government that's doing it to you than private individuals who are doing that to you. And that's why a constitutional violation is so different from common law violation. Even if you have a big overlap between the two causes of action. There's something special and particularly pernicious about the government doing it.

A

Anthony Sanders 44:17

I think that's very well said by both of you and I agree that free speech is the best example. You know, if say, you have a sign advertising your store, and the government forces you to take it down, and therefore you can't sell your stuff. I mean, that's a classic economic damages kind of situation, but there's no tort that you'd be able to bring for that other than it violated the Constitution that they discriminated against your speech. And, and there's there has to be at the end of the day, in my mind, again, going back to the majority and why I think they came to the right result, the end of the day there has to be something about it being the fundamental law of your jurisdiction that the government itself can't act in this way. And yet you wouldn't have a cause of action because the majoritarian legislature hasn't bothered to give it to you. But you could if, you know, it was just an old fashioned common law right that was never put into any kind of fundamental law between private parties. It seems like that's just backward. And there has to be a way for the judiciary to write that wrong.

B

Ben Field 45:27

And under the dissent's view it seems to me it would be perfectly acceptable for the legislature to pass a law that says you may not criticize your legislator, and you have no cause of action to enforce your constitutional rights to challenge this law. And that just can't be right. If that's right, constitutions are meaningless.

A

Anthony Sanders 45:45

Very well said. Well, we'll leave it there. And thank you both for this tour through remedies and rights and everything in between. We'll keep our eyes on how these issues unfold in the coming months and years.

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Anya Bidwell 46:03

Keep an eye on Nevada.

A

Anthony Sanders 46:05

That's right. Nevada is pending.

A

Anya Bidwell 46:08

Yes, there is a pending case and Ben argued it as an amicus about implied rights of action under Nevada Constitution. Ben, before we go, can you just like spend one second talking about it? And so our listeners keep an eye on it. Nevada is next after to Michigan,



B**Ben Field 46:22**

Yes. So Nevada is considering this very question. It's in the specific context of due process rights, just like Michigan and the rights against Nevada's Fourth Amendment analogue, but it's answering just the broader question of when can you sue directly under the Nevada Constitution? And Anya was there with me in Carson City earlier this year. I got to present argument asking them to essentially take the tack that Michigan has taken. And, you know, obviously the moment that the Michigan case came out, we submitted it as supplemental authority, and we hope that Nevada will be the next state to join this chorus of actually enforcing its constitution.

A**Anthony Sanders 47:02**

And on that bombshell news and cliffhanger, we're going to end it there. Thank you, Anya. Thank you, Ben. Appreciate you coming on. We'll keep our eyes on Nevada. And in the meantime, we're going to ask everyone to get engaged.