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ARTICLES

REINVENTING *BIVENS*: THE SELF-EXECUTING CONSTITUTION

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I. INTRODUCTION

This Article originated with my thinking I had missed something basic, and going back to try to find it. For years, I had taught my students the conventional wisdom that section 1983¹ exists because congressional authorization is required for the enforcement of constitutional rights. Yet this was never an entirely satisfying explanation. We studied early twentieth century cases in which courts enforced constitutional rights with no mention of a statutory cause of action.² It was apparent that the availability of injunctive relief did not depend

1. 42 U.S.C. § 1983 (1988) provides:

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.

2. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Ex Parte Young*, 209 U.S. 123 (1908).

on statutory authorization. The case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,³ which held that statutory authority is not necessarily a prerequisite to constitutional enforcement in damage suits, further heightened my curiosity.

Bivens raises the issue squarely: Why can't the judiciary enforce the Constitution on its own? Precisely what purpose is served by section 1983? In popular, if inexact, parlance, why shouldn't the Constitution be self-executing?⁴ The *Bivens* case provides a paradigm for the notion of a self-executing Constitution. *Bivens* contained two crucial insights in the realm of constitutional enforcement. It recognized that the judicial branch can enforce the Constitution without congressional action.⁵ It also recognized that the Constitution should be enforceable on its own terms, not because of its congruence with state law or common law protections. That is, a federal cause of action should be available for federal constitutional violations.

Yet *Bivens* itself encapsulates the tension between the principle of the self-executing Constitution and the principle of deference to Congress and state law. As I will illustrate, the *Bivens* case contained the seeds of its own demise. Moreover, its requirement of deference to Congress has come to virtually subsume the general rule in favor of a judicial cause of action.

3. 403 U.S. 388 (1971).

4. The term "self-executing" commonly describes a constitutional provision (or treaty) which does not require legislation to give it effect. The term "judicially executing" seems more accurate. The term "self-executing" evokes James Boyd White's image: "If the Senate keeps no journal . . . the omnipotent author of this Constitution will not step down from the sky and force it to do so." JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 244 (1984).

Certain provisions have been long assumed to be self-executing, such as the Thirteenth Amendment, *see, e.g., Jordan v. Lewis Grocer Co.*, 467 F. Supp. 113 (N.D. Miss. 1979), and the Fifteenth Amendment, *see, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966). These Amendments, along with the Fourteenth, rendered anomalous a particularly ugly application of the principle of the self-executing Constitution—the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, which Justice Story held provided a self-executing remedy of peaceable recaption for the slaveholder, independent of congressional action. *See Prigg v. Pennsylvania*, 41 U.S. 539, 625 (1842); *see also* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 167-68 (1975) (discussing *Prigg*). Yet curiously, given the basic nature of the inquiry and the high stakes involved, there has been little attempt to articulate the reasoning behind the determination that certain provisions are self-executing. Efforts to craft standards have taken place largely in the contexts of interpreting state constitutions and treaties. *See, e.g.,* 16 AM. JUR. 2D § 140 (1979); 16 C.J.S. § 46 (1984); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. OF INTERNATIONAL LAW 760 (1988) (discussing the difference between self-executing and non-self-executing treaties); *infra* note 105 (discussing the black letter law of self-executing state and federal constitutions).

5. This assumes that there is jurisdiction, which is provided by 28 U.S.C. § 1331 (1988).

I propose to reinvent *Bivens* in a form more faithful to its original promise. Part of the task is to correct the wrong turns taken by the *Bivens* progeny (and indeed, by *Bivens* itself) so that the damage action against federal officials is preserved. But I undertake a much broader task as well. Here I use *Bivens* in an aspirational sense: It stands for the principle that enforcement of the Constitution is not dependent on the assent of the political branches or of the states. The Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals. Therefore, the Constitution must be enforceable by individuals even when the political branches do not choose it to be. It is meant, particularly since the passage of the Civil War Amendments, to permit federal protection of individuals when state protection is inadequate. Therefore, it must be enforceable by individuals irrespective of state law.

Examining the scope of the aspirational *Bivens* action raises significant issues about the judicial role in enforcing the Constitution. It requires thinking about the meaning of cause of action, the difference between cause of action and remedy, and the sources of each. It raises separation of powers issues regarding the sources of judicial legitimacy, and federalism issues about the role of state law in defining the scope of constitutional protections. Finally, it raises fundamental questions about the role of the Constitution as positive law.

The next two sections of this Article make the case for the aspirational *Bivens*. Part II argues that the Constitution must be enforceable by the judicial branch without the need for congressional authorization, as well as where such authorization exists but is inadequate. Part III argues that the Constitution must be enforceable on its own terms, whether or not it is congruent with state law or common law protections.

Part IV examines the wider ramifications of the aspirational *Bivens*. Specifically, this part argues for an expanded *Bivens* doctrine which applies to federal officials and the federal government itself, for damage remedies against state officials and state government directly under the Fourteenth Amendment, and for remedies against municipal officials and government directly under the Fourteenth Amendment where section 1983 does not provide adequate relief.

II. THE CONSTITUTION IS JUDICIALLY ENFORCEABLE

Should the Constitution be enforceable without congressional authorization? If Congress neglects to provide a remedy for victims of illegal searches by federal agents, or it decides not to permit suit by military officers whom the government used without their knowledge for drug experimentation, or it inadequately compensates people unconstitutionally stricken from the welfare rolls, should the courts have the authority to remedy the constitutional wrongs, though the only statutory basis for doing so is the general federal question statute?

The question is intriguing in part because of its inconsistent treatment depending on both the historical time and the type of relief at issue. The federal question statute, without more, has always been considered sufficient authority for traditional equitable relief against government officials. In the early twentieth century, when section 1983 was essentially dormant, courts also awarded damages in various constitutional cases without statutory authorization. Yet the current understanding is that section 1983 or similar specific statutory authorization is needed to provide a cause of action and a source of remedies for constitutional violations under color of state law. Section 1983 does serve that purpose (although not against federal officials), but why is it needed?

In contradiction to this approach stands the *Bivens* case, in which the Court inferred from the Constitution itself, with only the federal question statute for congressional authorization, a cause of action and damage relief against federal officials who violate the Fourth Amendment. The insight at the heart of *Bivens* is that the judiciary has a duty to enforce the Constitution. To discharge this duty, the Court must ensure that each individual before it receives an adequate remedy⁶ for the violation of constitutional rights. If the remedy is not forthcoming from the political branches, the Court must provide it.

Thus stated, the principle sounds elemental. Yet, the fact that the Court did not decide *Bivens* until the early 1970s reflects the controversial nature of the case. *Bivens* itself stands for something less than adequate remediation for every constitutional violation suffered by a federal plaintiff; and even its compromised guarantee of remediation has been rapidly eroded. Less than twenty-five years later, in the

6. As I will explain in detail below, a condition precedent to adequate remediation is the existence of a cause of action. See *infra* text accompanying notes 49-55.

wake of cases like *United States v. Stanley*⁷ and *Schweiker v. Chilicky*,⁸ there is little left of the *Bivens* principle.

In this part, I will argue that the ultimate responsibility to enforce the Constitution must lie with the courts. Where Congress has failed to provide adequate remedies, or any remedies at all, against unconstitutional actions by the political branches, the courts must step in and ensure that such remedies exist. In short, the argument is that the separation of powers principle demands judicial enforcement.

The *Bivens* cases, on their most specific level, are about the judicial power to infer a cause of action and a damage remedy from the Constitution. However, I do not intend to confine my argument to the need for damages. The aspirational reading of *Bivens* for which I argue supports a broader principle: the judicial power to award an adequate remedy for constitutional wrongs. Indeed, in many cases damages are not the most appropriate or effective remedy; declaratory or injunctive relief is preferable.⁹ In part the focus on damages is a result of the fact that the judicial power to grant injunctive relief is well accepted, whereas the power to award damages is controversial. Ideally, once parties establish the cause of action, it will be a court's province to craft the proper remedy.

As I will detail shortly, the separation of powers challenge to *Bivens* remedies proceeds on two major fronts: first, judicial creation of remedies is an illegitimate exercise of power which more appropriately belongs to the legislative branch; and second, apart from questions of power, the courts are simply less competent or otherwise less suited to the remedial function. I will address each argument in turn, with the goal of demonstrating that the separation of powers principles upon which the *Bivens* critics seek to rely instead support the need for the *Bivens* remedy. Before doing so, I review the story thus far.

7. 483 U.S. 669 (1987).

8. 487 U.S. 412 (1988).

9. See PETER H. SCHUCK, *SUING GOVERNMENT* (1983); Susan Bandes, Monell, Parratt, Daniels and Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 125 (1986); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42 (1980).

A. WEBSTER BIVENS, JAMES STANLEY, AND THE DEMISE OF THE
BIVENS SUIT

Although the story of Webster Bivens is familiar,¹⁰ I take the liberty of retelling it, and the story of James Stanley too, with a summary of what transpired between the two decisions. In addition to refreshing the reader's memory, the retelling will allow me to set forth the specifics of the controversy over the *Bivens* principle, illustrate the demise of that principle, and try to make the principle concrete. The principle, after all, is the right of *every individual* to a remedy, and therefore the consequences of lack of remediation to individuals are a crucial part of the discussion.

Webster Bivens was at home with his wife and children when agents of the Federal Bureau of Narcotics entered his apartment without a warrant, manacled him in front of his family, and threatened to arrest the entire family. They searched his apartment thoroughly, took him to the federal courthouse, interrogated him, booked him, and subjected him to a visual strip search. All charges against him were eventually dropped. Because he was not tried, exclusion of the evidence was not a possible remedy. Nor could Bivens meet the criteria for injunctive relief.¹¹ Thus, for Webster Bivens "it [was] damages or nothing."¹²

Bivens sued the agents in Federal District Court, asking for damages to compensate for the humiliation, embarrassment, and mental suffering he underwent as a result of the agents' unlawful conduct.¹³ The government's unsuccessful argument was that the rights asserted were creations of state law and should be redressed by an action in tort. Part III will discuss this argument in detail. To fully understand the separation of powers controversy, it is necessary to look to Justice Harlan's concurrence and to the dissents.

The germane issue, as Justice Harlan recognized, was whether the federal courts have the power to create a federal cause of action for

10. At least to federal courts mavins.

11. There was no allegation that the conduct was likely to recur.

12. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

13. The unlawful conduct included the warrantless arrest and search, the use of unreasonable force, and the lack of probable cause for the arrest. *Id.* at 389.

damages, and if so, what are the limits of that power. Chief Justice Burger dissented in *Bivens*:

We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.¹⁴

This excerpt summarizes the familiar double barreled attack on judicially crafted remedies: They are the product of illegitimate judicial legislation, and the courts are not competent to craft them. As I hope to show shortly, Chief Justice Burger's simplistic position masks a complex web of issues which must be untangled before they can be addressed.

Although the *Bivens* majority had little to say about the dissents' separation of powers arguments, Justice Harlan addressed them in detail. He reasoned that the power to award damages obviously exists, since the Court awards damages in statutory cases, and that if the Court can effectuate statutory rights, it can certainly effectuate constitutional rights which "are aimed predominantly at restraining the Government as an instrument of the popular will."¹⁵ He further reasoned that explicit congressional authorization cannot be an absolute prerequisite to federal court power to fashion relief, because it has never been required for equitable relief.¹⁶

Defining the limits of the power to infer damages was more problematic. The *Bivens* case itself, in which no other remedy was possible for the petitioner, asked not merely whether awarding him damages was necessary and appropriate, but whether Congress, by its action or inaction in the Fourth Amendment area, had intended to preclude judicial action.¹⁷ Thus, even when the principle of judicial remediation was first announced, the seeds of deference to the judgment of the political branches were present.

14. *Id.* at 411-12 (Burger, C.J., dissenting).

15. *Id.* at 404 (Harlan, J., concurring).

16. *Id.* at 405.

17. The Court asked whether there were special factors counseling judicial hesitation in the absence of affirmative action by Congress, or whether there was an explicit congressional declaration that persons injured by federal violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. *Id.* at 396-97.

By the time of *Carlson v. Green*,¹⁸ Chief Justice Rehnquist had entered the fray, bringing a more sophisticated version of the dissent position that *Bivens* remedies exceeded the judicial power.¹⁹ I will consider Chief Justice Rehnquist's arguments in detail shortly. In *Bush v. Lucas*,²⁰ the dissent became the majority, and the notion of deference became a serious impediment to *Bivens*' remediation principle. Recall that the *Bivens* Court was willing to defer either where a congressional remedy, which was meant to be exclusive *and* was found equally effective, existed, or, even where no such remedy existed where there were factors counseling judicial hesitation. The *Bush* decision conflated the two exceptions, so that the existence of a statute was itself a factor counseling hesitation. The advantage for the former *Bivens* dissenters was that this obviated the need to find that the statute was equally effective—evidently its mere existence was reason for deference.

In *Bush*, the Court deferred to a congressional scheme that, while concededly not equally effective,²¹ did offer substantial relief. In *Schweiker v. Chilicky*,²² the Court deferred to a congressional scheme that, although complex, did not even purport to redress the constitutional injuries claimed.²³ It stated:

Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent it affects the case before us, and we see no legal basis that would allow us to revise its decision.²⁴

But it was the *Stanley* case, a year earlier, that had completed the circle by leaving the victim of shocking governmental wrongdoing completely without a remedy. In 1958 James B. Stanley, a master sergeant in the Army, "volunteered to participate in a program ostensibly designed to test the effectiveness of protective clothing and

18. 446 U.S. 14 (1980).

19. *Id.* at 37-42 (Rehnquist, J., dissenting).

20. 462 U.S. 367 (1983).

21. *Id.* at 372.

22. 487 U.S. 412 (1988).

23. Plaintiffs had been improperly denied social security disability payments and alleged violations of their due process rights. *Id.* at 414. Congress had devised an elaborate remedial scheme for those ousted from the disability rolls. The scheme addressed only the restoration of wrongly withheld entitlements and made no provision for compensating the alleged constitutional violations. *Id.* at 437 (Brennan, J., dissenting).

24. *Id.* at 429 (citation omitted).

equipment as defenses against chemical warfare."²⁵ In fact, without his knowledge or consent, he was secretly administered several doses of LSD by civilian officials, which he alleged caused hallucinations, incoherence, memory loss, impaired military performance, sleeplessness, violent episodes, and, ultimately, the dissolution of his marriage. He was not notified of the actual nature of the experimentation until 1975 when the Army solicited his cooperation in a study of the long-term effects of LSD on the "volunteers."²⁶

In *Stanley*, the Court denied relief in large part *because* there was no congressional remedy. Stanley had already been denied compensation under the Federal Tort Claims Act ("FTCA").²⁷ The Court found the unique disciplinary structure of the military establishment to be a factor counseling hesitation, relying in part on its own recent decision to exempt from the FTCA even claims against civilian federal officials.²⁸ In stark contrast to the *Bivens* case, the Court relied on the fact that Stanley had no FTCA remedy as justification for denying him a judicial remedy, finding that his exclusion from the FTCA evidenced a congressional intent worthy of deference. Justice Scalia said:

[I]t is irrelevant to a "special factors" analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an "adequate" federal remedy for his injuries. The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.²⁹

In sum, now that the dissenters' position is ascendant, they have saddled the *Bivens* remedy with a standard that is reflexively deferential to Congress,³⁰ grounding it on the purported dictates of the separation of powers principle. I hope to show that the principle in fact dictates an opposite result: a judiciary which, whenever necessary, fashions adequate remedies for constitutional wrongs.

25. *United States v. Stanley*, 483 U.S. 669, 671 (1987).

26. *Id.* at 671-72.

27. *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981) (dismissing original FTCA claims), *cert. granted sub nom. United States v. Stanley*, 479 U.S. 1005 (1986), and *rev'd in part, vacated in part*, 483 U.S. 669 (1987), and *cert. denied sub nom. Board of Regents of Univ. of Md. v. Stanley*, 483 U.S. 1020 (1987).

28. 483 U.S. at 678-84 (citing *United States v. Johnson*, 481 U.S. 681 (1987)).

29. *Id.* at 683 (alterations in original).

30. George Brown is probably not overstating the case when he claims that now in *Bivens* cases all courts do is discern the legislative intent. George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 276-78 (1989).

B. THE JUDICIAL POWER TO CREATE REMEDIES

The more nuanced arguments of Chief Justice Rehnquist and Justice Scalia about the limits of the judicial power have augmented Chief Justice Burger's naive and simplistic objection to *Bivens* actions (the legislature makes the law; the courts interpret it). These arguments, however, reflect a confusion which can also be found in the opinions of *Bivens*'s defenders, such as Justice Brennan in *Davis v. Passman*.³¹ What exactly does *Bivens* do, and by what authority?

1. *Unpacking the Charge of Illegitimacy*

Taken to the extreme, it might be argued that, unless the Constitution specifically provides for a remedy, only Congress has the power to create it.³² The converse argument is that the federal courts have the power to fashion an adequate remedy for every constitutional wrong.³³ The split-the-difference approach to which the Court adheres is that the federal courts have remedial powers not expressly authorized by the Constitution or statute, but that these are largely subservient to the will of Congress.³⁴ This approach seems incompatible with a lack of judicial power, but it is also on a collision course with itself.

The ambiguity of the illegitimacy charge is inevitable given the confusion, beginning with *Bell v. Hood*³⁵ and perpetuated since, about what principle is at stake. Is it a question of jurisdictional or prudential power? If the latter, is it a power to create a cause of action or to craft a remedy? Or is it merely a question of construing the federal question statute?

One thing is certain: The objections to *Bivens* are not jurisdictional in nature. Chief Justice Rehnquist in his *Carlson* dissent briefly flirts with the argument that the federal courts lack Article III power

31. 442 U.S. 228 (1979). Justice Brennan makes a valiant effort to sort out the issues. *See id.* at 237-39 (explaining the meaning of differences between jurisdiction, standing, and cause of action). However, his rather lengthy discussion of the meaning of cause of action tends to obfuscate more than illuminate. *See id.* at 239 n.18.

32. As to damages, this was the respondents' argument in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 390-91 (1971), and that of the dissenters, *id.* at 411-12 (Burger, C.J., dissenting), *id.* at 427-28 (Black, J., dissenting), and *id.* at 430 (Blackmun, J., dissenting).

33. *See* *Bush v. Lucas*, 462 U.S. 367, 373 (1983) (referring to the two "extreme" positions).

34. *Id.*

35. 327 U.S. 678 (1946); *see infra* text accompanying notes 48-49.

to craft remedies.³⁶ However, given the existence of 28 U.S.C. § 1331, conferring general federal question jurisdiction,³⁷ the jurisdictional predicate for *Bivens* actions does exist.³⁸

Chief Justice Rehnquist concedes that the jurisdictional issue is distinct from that of the relief to be granted. However, he argues that section 1331 is not sufficient authority for the *Bivens* action; that neither its text nor its history support its use as a jurisdictional predicate for a damage award.³⁹ As with the parallel argument based on the language and text of the Bill of Rights,⁴⁰ the argument's inferences from the statute's lack of specificity are unwarranted. The legislative history of the statute is notoriously scant. If anything, it reflects Congress' desire to authorize expansive federal question jurisdiction.⁴¹ As to the language, it generally confers original jurisdiction over federal

36. 446 U.S. 14, 36 (1980) (Rehnquist, J., dissenting). He reads *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1866), and *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), for all they are worth; the principle that the federal courts possess only that jurisdiction granted by Congress. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953).

37. 28 U.S.C. § 1331 (1988). Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

38. Of course Congress could rescind § 1331, and then it would be necessary to discuss whether the judicial power to infer remedies exists without congressional authorization. This subject has spawned a number of superb articles. See e.g., MARTIN REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7-52 (2d ed. 1990); Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *Neo-Federalist View*]; Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Hart, *supra* note 36; Leonard G. Ratner, *Congressional Power*, 109 U. PA. L. REV. 157 (1960); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Mark V. Tushnet, *The Law, Politics and Theory of Federal Courts: A Comment*, 85 NW. U. L. REV. 454 (1991).

In any case, Congress has no power to deprive the state courts of the power to hear constitutional claims. Therefore, even if the federal courts lack the power to infer remedies, it seems likely that state courts could ensure that constitutional wrongs are remedied. Moreover, in the absence of federal remedies, they would be obligated to do so under the Supremacy Clause and the Due Process Clause.

39. *Carlson*, 446 U.S. at 39-40.

40. See *infra* part II.B.3.a.

41. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 5.2, at 223 (1989). Professor Chemerinsky says that if the skimpy legislative history indicates anything, it is that Congress desired to authorize expansive jurisdiction equal to that allowed by the Constitution.

question suits on the district courts, leading to a fair inference that these courts are empowered to grant their usual arsenal of relief.⁴²

Perhaps the most damning argument against inferring a bar on damages from section 1331's general language is that the general federal question jurisdiction has been routinely used as the source for a range of commonly used remedies, without additional specific legislation.⁴³ Indeed, Chief Justice Rehnquist's textual argument is fatally undercut by the traditional use, of which he implicitly approves, of section 1331 as the jurisdictional predicate for equitable relief, though it does not explicitly authorize such relief.⁴⁴ Chief Justice Rehnquist seeks to ground the distinction between legitimate equitable relief and illegitimate damage relief on the historical pedigree of the former. This distinction is simply not of jurisdictional magnitude.⁴⁵

Moreover, the presumption in favor of equitable relief perverts the usual treatment of damages as a common remedy at law and injunctions as extraordinary remedies available only when no adequate remedy at law exists.⁴⁶ At this point any historical reasons that might have explained the difference in treatment are anachronistic. The pre-*Erie* federal equitable system no longer exists. In any event, in constitutional cases it has always been the Constitution, rather than the court's equity power, which provided the source of federal equitable power.⁴⁷ The remedy would not have been available in the absence of the cognizable right.

Thus Chief Justice Rehnquist's assumption that damages should be treated differently from equitable relief is more than just a weakly

42. Federal courts routinely fashion damage remedies outside the constitutional context. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (implying judicial power to create federal common law in admiralty cases); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) (holding that the Labor Management Relations Act, which grants jurisdiction but does not specify a damage remedy, authorizes federal courts to fashion a body of federal law).

43. See Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 43 (1968).

44. *Carlson v. Green*, 446 U.S. 14, 42-43 (1980).

45. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542-43 (1972) ("It may well be true that the considerations governing a decision to create a damage remedy will differ from those respecting the granting of injunctive relief; this goes to the appropriateness of the remedy created, however, and not to the Court's remedial power."); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1136 (1989).

46. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); Nichol, *supra* note 45, at 1135.

47. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1138-39 (1969).

defended inconsistency or outcome determinative jurisprudence. It reflects the confusion at the heart of the *Bivens* cases: a failure to distinguish jurisdiction, cause of action, and remedy.

As Chief Justice Rehnquist himself acknowledges, the question of jurisdiction is distinct from that of the appropriate relief to be granted. The jurisdictional issue was effectively resolved in *Bell v. Hood*, which held that a nonfrivolous allegation that the Fourth or Fifth Amendment was violated arose under the Constitution of the United States.⁴⁸ However, another distinction is hopelessly muddled in the *Bivens* cases, beginning with *Bell v. Hood* itself: the distinction between a cause of action and a remedy.⁴⁹ Although in the early cases Justices Harlan⁵⁰ and Brennan⁵¹ struggled to dispel the confusion, they never succeeded, and the toll on *Bivens* jurisprudence is palpable.

Assuming jurisdiction over a constitutional claim,⁵² the Court must resolve three additional issues: (1) Has there been a violation of a substantive constitutional provision?⁵³ (2) Is there a legal entitlement to relief (a cause of action) for the particular plaintiff? (3) If the first two issues are answered affirmatively, then what remedies are appropriate?

The second and third questions are the central, and separate, issues of the *Bivens* cases, yet they are consistently conflated. Given a constitutional violation over which the Court has jurisdiction, is a statutory cause of action required, or may the court infer one directly from the Constitution? The Court cannot address the question of the ability to award a particular remedy until it determines that the harm to be remedied is legally cognizable and declares the government

48. 327 U.S. 678 (1946). The Court held that a complaint alleging violation of Fourth or Fifth Amendment rights arose under the Constitution of the United States and therefore was within the district court's federal question jurisdiction. Consequently, dismissal must be on the merits and not for want of jurisdiction. *Id.* at 682.

49. *Bell v. Hood* correctly separated the jurisdictional issue from the cause of action issue, but then transformed the cause of action issue into "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments." *Id.* at 684.

50. See *Bivens*, 403 U.S. at 398 (Harlan, J., concurring).

51. See *Davis v. Passman*, 442 U.S. 228, 235-43 (1979).

52. Jurisdiction will exist if there is a federal question, and under current interpretation of Article III, if the plaintiff has standing to sue (without which the "case" requirement cannot be met). See *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

53. I do not intend to suggest that the Court need consider these issues in any particular order. Compare *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1868) (threshold issue of jurisdiction must be considered first) with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (considering merits of the plaintiff's claim before reaching the jurisdictional issue).

action unconstitutional.⁵⁴ Yet the Court consistently frames the issue solely as whether a court may infer a *damage remedy* from the Constitution without legislative authorization.⁵⁵

This formulation confuses the issues, but it also diminishes and masks the most important principle at issue: the notion of the judicially executed Constitution. The issue is not merely a choice of remedial outcomes, but whether the governmental wrongdoers should be able to set their own terms of accountability.

2. *The Separation of Powers as a Source of Legitimacy: The Adjudicative Function*

The judicial duty to remedy constitutional violations stems from two overlapping sources: (1) the courts' adjudicative function, and (2) their structural checking function. The judiciary has a dual role in the scheme of separated powers. Its traditional function is to adjudicate the claims of individuals and, in the constitutional context, to protect individual liberties. Congruent with, or sometimes in tension with, this function is its structural role: its duty to ensure that the political branches do not exceed their constitutionally granted powers.⁵⁶ The *Bivens* dissenters espouse a narrow conception of the separation of powers doctrine, which not only downplays or ignores the structural component, but views the traditional adjudicative component in a simplistic and unduly narrow light.

The traditional role of the courts in the constitutional context is to determine the rights of individual litigants and to protect individual

54. Hill, *supra* note 47, at 1139. I recognize that *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which requires a showing of Article III standing to request injunctive relief, lends support to the conflation of the question of remedy with the question of the court's authority to hear the case. However, as I and others have argued, the case is wrongly decided. See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 266 n.247, 293 n.449 (1990); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 24-30 (1984).

55. Of course, if a statute does exist providing a cause of action, it may provide that only certain remedies are available. Compare 42 U.S.C. § 1983 (1988) (providing for "an action at law, suit in equity, or other proper proceeding for redress") with the Federal Tort Claims Act, 28 U.S.C. § 1346 (providing for damages for those injured by federal employees). If a statute sought to limit available remedies for constitutional violations, questions of the Court's ultimate responsibility to enforce the Constitution might be raised. See, e.g., 18 U.S.C. § 3501 (1988) (purporting to limit *Miranda* protections).

56. See *Marbury*, 5 U.S. (1 Cranch) at 137; Bandes, *supra* note 54, at 262 n.221; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1787-88 (1991).

freedoms. *Bivens* and its immediate progeny took this duty very seriously. *Bivens* cites the familiar language of *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."⁵⁷ Although remedies were available that would redress the harm to most victims of Fourth Amendment violations, Webster Bivens was the unusual plaintiff for whom neither the exclusionary rule nor an injunction would provide relief. *Bivens* stands for the proposition that the existence of remedies for others is beside the point: The particular plaintiff before the court is entitled to adequate relief.⁵⁸

In the context of *Bivens* remedies, the notion that the judiciary is invading congressional turf has little force. *Bivens* represents the ideal of a remedy for the particular individual before the court, and in that sense is quintessentially judicial.⁵⁹ In the narrowest sense of the judicial role, the court must interpret the Constitution to determine whether a plaintiff is entitled to be made whole once it is found that the plaintiff suffered a wrong.

There are two possible objections to the argument that *Bivens* remedies fulfill the courts' narrowest adjudicative role. One is that in upholding a remedy for Webster Bivens or Shirley Davis the Court is setting a precedent that will permit damages for other victims of Fourth or Fifth Amendment violations, and that such a potentially broad remedy looks like judicial legislation.⁶⁰ I will address in more detail the notion of separation of powers which lends itself to such a sharp delineation of functions.⁶¹ For now, it should suffice to point

57. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

58. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). The court of appeals in *Bivens* rejected the imposition of damages because injunctive relief, state tort actions, and the exclusionary rule are generally available to victims of Fourth Amendment violations, despite the fact that these remedies would not help Bivens himself. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971); Dellinger, *supra* note 45, at 1536-37, 1551.

59. See Dellinger, *supra* note 45, at 1541-42; Nichol, *supra* note 45, at 1136-38.

60. The objection might also be that the *Bivens* and *Davis* Courts created a new cause of action, but the longstanding availability of equitable relief for these same constitutional violations leads to the conclusion that the cause of action, as opposed to the damages remedy, was well accepted.

61. See *infra* part II.B.3.b.

out that the courts' particularization function⁶² inevitably involves precedent setting and norm creation.⁶³ The difference between decisions that bind discrete parties and those that bind large groups is a matter of degree, not of kind.⁶⁴

The second argument attacks the very premise of the adjudicative function. It questions whether every wrong does require a remedy. The answer is easy to assert; difficult to prove correct.

It has often been observed that the ringing Latin maxim *ubi jus ibi remedium*—for the violation of every right, there must be a remedy—is not, and perhaps cannot be, strictly observed in practice.⁶⁵ Hurdles to complete remediation are plentiful. Some are at least purportedly mandated by the Constitution⁶⁶ or statute,⁶⁷ whereas others are frankly judicially created, such as prudential standing⁶⁸ and certain abstention doctrines.⁶⁹ Yet history teaches that many remedies that

62. See Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 370 (1982) (discussing how the judiciary particularizes rules to specific fact situations).

63. See Bandes, *supra* note 54, at 265-70, 287 n.405; Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29, 43 (1979).

64. Moreover, as a normative matter the courts' resources may be better spent adjudicating issues that affect large numbers of people, particularly when doing so articulates and enforces constitutional norms. Even assuming, as the *Bivens* dissenters would argue, that decisions affecting large groups should be left for Congress, sometimes Congress shirks this responsibility, as it certainly has in relation to federal defendants. In such cases, the courts' duty is to ensure that protection of rights does not fall victim to the popular will. For a discussion of checks and balances see Part II.B.3.

65. See generally Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992) (discussing barriers to crafting and enforcing remedies for constitutional violations).

66. For example, restrictive standing doctrines which the Court has held flow from Article III. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975). For an argument that Article III does not require these results, see Bandes, *supra* note 54, at 265-70. Likewise, the Court's highly restrictive interpretation of the Eleventh Amendment as barring federal question as well as diversity suits has been widely criticized. See, e.g., Amar, *Neo-Federalist View*, *supra* note 38, at 238-54; William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 118, 131 (1990); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

67. For example, immunities from suit under section 1983 purport to be statutorily created but bear a marked resemblance to judicial common law. See, e.g., Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

68. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (applying restrictive standing rules in the Fourth Amendment area); *Rakas v. Illinois*, 439 U.S. 128 (1978) (same); *McGowan v. Maryland*, 366 U.S. 420 (1961) (holding that a litigant may not assert claims of a third party).

69. See *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941).

the judiciary was once reluctant to impose, because they were perceived to exceed the judicial power or to be simply unenforceable, are now taken for granted.⁷⁰ The process is ongoing: In recent cases like *Missouri v. Jenkins*,⁷¹ and *Spallone v. United States*,⁷² the Court has upheld aggressive and creative remedies necessary to achieve desegregation in the face of recalcitrant officials. Thus, a wrong that at one time appears unremediable may later be adequately remedied.⁷³

Rights have gone unremedied in the past, and some go unremedied today. The question, however, is not whether every right does have a remedy, but whether every right should have one. At this point commentators tend to say things like "the principle is so obviously correct that assent to it is instinctive."⁷⁴ This seems true: By definition, a right must be enforceable. What would be the measure of a right whose transgression carried no penalty? It would look more like a hope, or a request, than a guarantee.

70. For example, the Court's shift from *Colegrove v. Green*, 328 U.S. 549 (1946), to *Baker v. Carr*, 369 U.S. 186 (1962), marks its rejection of Justice Frankfurter's view that the federal courts were without power to reapportion voting districts. In more general terms, it bespeaks a shift in the Court's view of the expansiveness of its injunctive power and its power over state government. Another example of a shift in the Court's view is the recent overruling of *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860), in which the Court held that federal courts have no authority under the Constitution to compel an asylum state to extradite a fugitive. In *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the Court explained that this holding "rests upon a foundation with which time and the currents of constitutional change have dealt . . . [un]favorably. . . . The fundamental premise of the holding in *Dennison*—'that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.'" *Id.* at 227-28 (quoting *FERC v. Mississippi*, 456 U.S. 742, 761 (1982)). The history of desegregation tells a more subtle story. As Paul Gewirtz describes, the Court's reluctance in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), to order immediate desegregation was not based on questions of its authority, but on concern that resistance from the states and citizenry would make such a decree unenforceable. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609-12 (1983).

71. 495 U.S. 33 (1990).

72. 493 U.S. 265 (1990).

73. This underscores the importance of Professor Sager's insight that although some rights might be presently unenforceable, or at least underenforced, for the sake of their future enforcement the underlying right must not be denigrated. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226-27 (1978).

74. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987). Professor Zeigler, commendably, does put forth a proof of the proposition. *Id.* at 677-81; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485-86 (1987) ("The proposition that every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions; [and] was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality . . .").

Although a discussion of rights theory is beyond the scope of this Article, I will posit that the purpose of rights is to affect the distribution of power between individual and state; specifically, to protect individuals from the abuse of state power.⁷⁵ Rights without remedies would be wholly ineffectual for this purpose.⁷⁶ The government's duty to respect such rights would be purely a moral one, and therefore illusory.⁷⁷ Even the symbolic value of rights would be short-lived once it became obvious that rights could be violated with impunity. The structural limits on the powers of government would exist only in the unlikely event that those with governmental power did not seek to aggrandize it.⁷⁸ Individual victims of governmental wrongdoing would not be compensated.⁷⁹

Many commentators have discussed the difficulty of finding effective remedies for certain violations,⁸⁰ or the legitimacy of certain remedies.⁸¹ But the fact that some rights defy easy remediation, or that compliance may be difficult to assure, or that particular remedies may be inappropriate in particular contexts, does not detract from the basic presumption in favor of attempting to remedy constitutional violations.

At bottom, the question is not whether every right does have a remedy, but whether every right should have one. The descriptive

75. See, e.g., Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1023-24 nn.23-24 (1987).

76. It is difficult enough for individuals to enforce rights against the government when remedies do exist. See, e.g., Gewirtz, *supra* note 70.

77. See IREDELL JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW* 243 (1980) (discussing that an essential attribute of a right is its obligatoriness); Zeigler, *supra* note 74, at 678 (A right implies a correlative duty, and unless a duty is enforceable, it is not a duty but merely voluntary behavior.).

78. As the maxim goes, "Power tends to corrupt and absolute power corrupts absolutely." J. DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (Himmelfarb ed., 1948).

79. To the extent individuals are completely denied compensation for a constitutional claim in both state and federal court, the guarantee of due process might be implicated. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (holding that the Due Process Clause requires a state to afford meaningful post-payment relief for taxes paid pursuant to a tax scheme ultimately found unconstitutional); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 337-39 (1993); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 32 (1994).

80. See, e.g., Barry Friedman, *Right and Remedy, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System*, 43 VAND. L. REV. 593 (1990) (book review); Gewirtz, *supra* note 70.

81. See, e.g., Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

proposition does not prove the normative one. The normative proposition with which one begins is crucial, as an examination of arguments by Justice Scalia, Richard Fallon, and Daniel Meltzer will illustrate.

Justice Scalia's dissent in *Webster v. Doe*⁸² begins with the normative proposition that rights do not *require* remedies, and seeks to prove it with the descriptive proposition that many rights do not *have* remedies. Justice Scalia dismisses, rather disdainfully, the idea that all constitutional violations must be remediable in the courts. He seeks to prove that this cannot be true; first, by noting that some powers are explicitly granted to the political branches.⁸³ This is beside the point, because to the extent a power is textually committed to the political branches, their exercise of that power is by definition within their constitutionally defined powers.⁸⁴

However, he goes on to argue that even some claims not textually committed have been found to be political questions and therefore beyond judicial review.⁸⁵ This claim will be considered with the following: that the doctrine of sovereign immunity "is a monument to the principle that some constitutional claims can go unheard."⁸⁶ Both examples use misguided, severely restrictive interpretations of the scope of the judicial power to argue for more of the same. The suggestion that an act of one of the political branches should be insulated from judicial review, although the act exceeds that branch's constitutional discretion, is supportable only if one gives little weight to the values of judicial supremacy and rights enforcement, and great weight to doctrines like executive privilege.⁸⁷ Likewise, the doctrine that

82. 486 U.S. 592, 611-14 (1988) (Scalia, J., dissenting).

83. *Id.* at 613.

84. See, e.g., *Marbury v. Madison*:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); see also *Powell v. McCormack*, 395 U.S. 486, 518-49 (1969) (Art. I § 5 of the U.S. Constitution is a textually demonstrable commitment to Congress to judge the qualifications of its members. However, this commitment extends only to those qualifications expressly set forth in the Constitution.). I do not mean to suggest here that power committed to the political branches is automatically exercised in a constitutional manner. The lesson of *Powell v. McCormack* is that few if any exercises of governmental powers are properly immune from judicial review. *Id.*

85. *Webster*, 486 U.S. at 613-14 (1988) (Scalia, J., dissenting).

86. *Id.*

87. See Bandes, *supra* note 54, at 235 n.44; Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597 (1976).

states should be shielded from suit for their constitutional violations rests on inflating the values of state autonomy and *stare decisis*⁸⁸ and shortchanging judicial supremacy values.⁸⁹

In short, Justice Scalia proves only that the Court has the power to fulfill its own prophecy. If it wishes to leave rights without federal judicial remedies, it will succeed.⁹⁰ It can then invoke *stare decisis* to do it again with an even greater aura of legitimacy. But if Justice Scalia had not so stubbornly insisted on his initial premise, that not all constitutional rights require remedies, he might have examined the Court's jurisprudence more critically to determine where it has erred in leaving so many rights unprotected.

Richard Fallon and Daniel Meltzer make a sophisticated and initially more palatable argument, which nevertheless would also result in the dilution of rights enforcement. They argue that "the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command."⁹¹ They posit that any realistic theory of constitutional remedies must account for the inevitable gaps in remediation. In their view, although the courts should seek to minimize such gaps, they will never entirely eliminate them. This state of affairs is tolerable so long

88. See, e.g., *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring) (arguing that regardless of whether *Hans v. Louisiana*, 134 U.S. 1 (1890), interpreting the Eleventh Amendment to bar suits by citizens against their own states, is correct, it should be adhered to based on its longevity). But see Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990) (arguing that the doctrinal underpinnings of *Hans* have disappeared, so the case should be overruled).

89. See *infra* part IV.C.2.a; see also Bandes, *supra* note 54, at 243-45; David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 63-66 (1984). *Will v. Michigan State Police*, 491 U.S. 58 (1989), took this approach to its illogical extreme. *Will* applied the "usual constitutional balance" as embodied in the Eleventh Amendment, to a situation—suits against states in state courts—in which the Eleventh Amendment is inapplicable. It reasoned that it would be anomalous to permit such suits under section 1983 while barring suits against states in federal courts, since the purpose of section 1983 is to permit greater access to federal courts. *Will*, 491 U.S. at 66. In short, it used its recognition that its restrictive Eleventh Amendment jurisprudence thwarts a central purpose of section 1983, not as an occasion to rethink that jurisprudence, but as an occasion for even further restriction. For an excellent discussion of the role political choices played in the *Will* decision, see Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 IND. L.J. 1 (1990).

90. Although due process problems may arise, see *supra* note 79.

91. Fallon & Meltzer, *supra* note 56, at 1789; Meltzer, *supra* note 79, at 33 n.146.

as the Court discharges its structural function of providing a check on the political branches.⁹²

The crux of my response is that it is dangerous to let the Court off the hook at all. Because the remedial phase of a lawsuit requires cooperation from various parties—some hostile, some indifferent, some thwarted by outside forces—the court-ordered remedy may be delayed, diluted, or denied.⁹³ To the extent the Court finds this unacceptable, it has had to venture into new realms to enforce constitutional guarantees.⁹⁴ I fear that a theory which accommodates remedial lapses will give such lapses an undeserved imprimatur. The symbolic damage to the promise of the Bill of Rights is obvious, but something more concrete is also at stake. The danger is that a “flexible” theory will go beyond a mere recognition of the problem and will become part of the problem: an affirmation of its inevitability.

Although Fallon and Meltzer are rightly protective of the structural function, there is some irony in placing the structural function more highly in the hierarchy of values than the Court’s more traditional, narrow Article III function of ensuring a remedy to the individual litigants before it.

Moreover, Fallon and Meltzer’s theory seems overly able to accommodate even shocking results like that in *Stanley* as “inevitable gaps in remediation.” Yet the *Stanley* case reminds us that when we speak of “inevitable gaps in remediation,” we are talking about people who have suffered injuries, sometimes grievous injuries caused by outrageous official conduct, and that these people will be forced to bear all the costs of those injuries. Like *Bivens* himself, Stanley’s only possible relief was a *Bivens* remedy. Yet, as discussed above, the *Stanley* Court relied on the fact that Stanley had no statutory remedy (recall that Stanley had no statutory remedy because the Court had previously interpreted the FTCA to preclude such a remedy in his circumstances) as justification for denying him a *Bivens* remedy, and therefore, any remedy at all for his grievous wrong.⁹⁵ The Court is too

92. Fallon & Meltzer, *supra* note 56, at 1787-91. Please see the article itself for a more eloquent and complex statement of the argument.

93. See Friedman, *supra* note 65; Gewirtz, *supra* note 70, at 609-12; Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531 (1988).

94. *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Spallone v. United States*, 493 U.S. 265 (1990); see also *United States v. Fordice*, 112 S. Ct. 2727 (1992); *Baker v. Carr*, 369 U.S. 186 (1962); *Cooper v. Aaron*, 358 U.S. 1 (1958).

95. The Court found two special factors counseling hesitation: “[T]he unique disciplinary structure of the Military Establishment and Congress’ activity in the field . . .” *United States v.*

comfortable with the idea that rights may go unremedied and relies on injustices it has perpetrated in the past as authority for additional injustices.

3. *The Separation of Powers as a Source of Legitimacy: The Structural Checking Function*

As Chief Justice Marshall understood, once the power of the judiciary to protect individual rights through judicial review is established, the Court's power to check the excesses of the political branches is implicated as well.⁹⁶ Conceptually, though not chronologically, *Bivens* is a short step from *Marbury*.⁹⁷ To uphold the rights of individuals before the Court, the Court must prevent encroachment on those rights by the political branches. More than a century and a half after *Marbury*, *Bivens* ratified judicial enforcement of the limits on governmental excess. The use of the Constitution as a sword;⁹⁸ the willingness to enforce limits, which is the animating principle behind *Bivens*, rests on the notion of positive checks on government espoused in *Marbury*. It is inconsistent with a version of the separation of powers doctrine which views the tripartite functions as sharply separated, and the judiciary as passive in the face of incursions by the political branches.

The *Bivens* dissenters' key undefended premise is that legislative action is needed to create a damage remedy for constitutional violations and that judicial action usurps the legislative role and is therefore illegitimate. I have addressed above the several possible

Stanley, 483 U.S. 669, 683 (1987). The latter referred to the FTCA, which the Court's decisions in *Feres* and *Johnson* rendered unavailable to Stanley. See *United States v. Johnson*, 481 U.S. 681 (1987) (holding that a serviceman injured incident to service has no FTCA claim even if the alleged negligence is caused by civilian federal employees); *Feres v. United States*, 340 U.S. 135 (1950) (holding that the government is not liable under the FTCA for injuries to servicemen that arise in the course of their duties).

96. Most commentators agree that *Marbury* itself does not definitively establish judicial supremacy. See David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279 (1992); Thomas R. Haggard, *Marbury v. Madison: A Concurring/Dissenting Opinion*, X J.L. & POL. 543 (1994); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. It was Cooper v. Aaron, 358 U.S. 1, 17-19 (1958), that declared *Marbury* to have established judicial supremacy. But whatever Justice Marshall understood to be the scope of the judicial power, he knew the decision had the potential to place him in a dangerous power struggle with the executive. See Van Alstyne, *supra*, at 7.

97. Akhil Reed Amar, *Marbury, Section 13 and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 447-48 (1989).

98. See generally Dellinger, *supra* note 45 (discussing legislative replacement of the exclusionary rule).

meanings of the accusation of illegitimacy.⁹⁹ The question is not about jurisdiction, but rather about the power or the competence to create the cause of action or grant the remedy.

The argument sometimes takes the familiar textualist form that because remedies are not spelled out in the Constitution, the Court has no power to fashion them.¹⁰⁰ It sometimes takes the form of a bald statement that fashioning remedies is the domain of Congress, a domain which the Court may not enter.¹⁰¹ It sometimes takes the form of an argument about the competence of the Court to fashion remedies. I will address each of these arguments.

a. *Lack of textual support in the Constitution:* Damage awards under *Bivens* are frequently attacked for "lack of a textual constitutional foundation."¹⁰² The argument is that despite the jurisdiction granted by Congress, the courts have no power to infer a cause of action or a remedy from the Constitution in the absence of explicit textual authority in the Constitution, clear evidence of Framers' intent, or explicit statutory authority. The concern is that to do so would constitute illegitimate judicial legislation; that unmoored to text, it would allow courts to impose their own value judgments to hamper the political branches.

The guarantees of the Bill of Rights and the Civil War Amendments are virtually silent about the consequences of transgression. The Fifth Amendment makes mention of just compensation for unlawful takings.¹⁰³ The writ of Habeas Corpus is protected from suspension.¹⁰⁴ As to the remainder of the guarantees, no specific remedies are mentioned.¹⁰⁵ Nor, with the exception of the Civil War

99. See *supra* part II.B.1.

100. See, e.g., *Carlson v. Green*, 446 U.S. 14, 37 (1980) (Rehnquist, J., dissenting).

101. *Id.* at 36; *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting).

102. See, e.g., *Carlson v. Green*, 446 U.S. 14, 35 (Rehnquist, J., dissenting).

103. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

104. U.S. CONST. art. I, § 9, cl. 2. However, it is unlikely that this clause creates an inalienable right to Habeas Corpus; rather, it "is probably meant to keep Congress from suspending the writ and preventing state courts from releasing individuals who were wrongfully imprisoned." CHEMERINSKY, *supra* note 41, § 15.1, at 679; see W. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 135-36 (1980); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994) (discussing the meaning of the Suspension Clause).

105. According to the treatises, the lack of a specified remedy is not generally considered a hurdle to judicial enforcement of state constitutional provisions. The current presumption is that all constitutional provisions are self-executing. The mere fact that legislation may supplement

Amendments, does the Constitution specify which branch or branches ought to formulate them.¹⁰⁶ It does not mention judicial review. It does not mention the equitable relief which is routinely granted. Nor does it mention which branch should enforce its guarantees. It gives no more specific remedial power to the political branches than to the Court.

One can only speculate on the reason for the omission. It is difficult to discern the Framers' intent and arguable how useful it is, but perhaps the Framers assumed the courts would use all the usual common law remedies, of which damages is the most usual, to enforce the Bill of Rights.¹⁰⁷ It seems unlikely that the Framers meant the Bill of Rights to be merely precatory. It also seems unlikely that the Framers intended exclusive enforcement authority to reside with the very political branches (and particularly the mistrusted legislative branch) whose power they meant the Bill of Rights to restrain.¹⁰⁸

In any case, the particular version of separation of powers doctrine which insists that every nuance of the judicial power be spelled out in text or in clear evidence of the Framers' intent is excessively formalist. It tends to make no such demand for the legislative or executive power. Its refusal to make structural inferences, for example,

and add to, or prescribe a penalty for the violation of, a self-executing provision of a constitution does not render such a provision ineffective in the absence of such legislation. 16 AM. JUR. 2D § 142.

106. See U.S. CONST. amend XIII, § 2; *id.* amend XIV, § 5; *id.* amend XV, § 2 (providing Congress with the power to enforce by appropriate legislation). As I will discuss *infra* at Part IV.C.2.a, the grant of enforcement power to Congress does not preclude judicial enforcement.

107. Fallon & Meltzer, *supra* note 56, at 1779 (discussing that the Framers assumed availability of common law remedies, and thus did not specify them); see also *Moor v. Alameda*, 411 U.S. 693, 703 (1973) (assuming that a statute not specifying remedies permits use of all necessary and appropriate remedies); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969) (holding that the rule of damages is a federal rule responsive to the need whenever a federal right is impaired).

Alternatively, because the remedy was at the time only against the federal government, the Framers may have seen the Bill of Rights as limiting an already limited federal government, which they were assuming had no powers not explicitly granted. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1227-38 (1990); see also *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 564 (1992) (White, J., concurring) ("[I]t would be reasonable to assume that the United States obeys the law and pays its debts and that . . . a valid judgment against the Government for a certain sum of money would be worth that very amount. . . . There is nothing new about expecting governments to satisfy their obligations."). See generally Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) (The Federalists feared that an incomplete or inaccurate written declaration of rights would undermine the status of unwritten rights retained by the people.).

108. ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-88* (1966); Akhil Reed Ainar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1202 (1992); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935).

does not impede its willingness to infer the separation of powers doctrine itself from a Constitution that specifies no such doctrine.¹⁰⁹

Thus, although it bills itself as value neutral, or even an antidote to ungrounded value preferences, the demand for specific textual authority is a value choice. It chooses to give the power to enforce the Constitution to the political branches at the expense of the judicial role, despite the fact that the Constitution contains no express language granting Congress the power to create remedies for enforcement of the Bill of Rights.¹¹⁰ By requiring a clear statement of judicial but not legislative power, it thus protects the political status quo from the possibility of judicial reform. It ratifies the choices of the powerful, and relegates the powerless to explicit legislative remedies they are unlikely to secure. It aggrandizes the political power by default.¹¹¹

It is a choice of interpretive values. It reflects a literal-minded textualism¹¹² which has been largely discredited.¹¹³ Taken literally, the textualist argument would bar not only all remedies for constitutional violations (with the exception of just compensation under the takings clause),¹¹⁴ but judicial review, which is itself not spelled out in the Constitution.¹¹⁵ Thus, its logical consequence would be a Bill of Rights enforceable only by the political branches. Though the argument for this result can be made, it is so far from the mainstream that it does little to buttress the anti-*Bivens* position.

The insistence on explicit text is also a choice of substantive values: It is skewed against less tangible, broadly framed, animating values, or at least limits them to their narrowest, least evolved states.

109. See Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318-19 (1992). Nor was the omission a mere oversight—it was a deliberate exclusion. James Madison's proposed clause explicitly providing for the separation of powers was rejected. *Id.* at 319 n.4.

110. Compare the Civil War Amendments and Amendments XIX, XXIII, XXIV, and XXVI, which specifically authorize Congress to enforce their provisions through appropriate legislation. See Dellinger, *supra* note 45, at 1546.

111. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 102 (1989); Rand E. Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 252-53 (1978).

112. Moreover, it operates at a very specific level of generality. See Michael H. v. Gerald D., 491 U.S. 110 (1989); Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL. L. REV. 2453, 2463 (1993); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

113. Chemerinsky, *supra* note 111, at 93; Richard A. Posner, *What Am I, a Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23.

114. *Carlson v. Green*, 446 U.S. 14, 43 n.9 (1980) (Rehnquist, J., dissenting).

115. ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 19-21 (1987).

Even a constitution that specified remedies would be ultimately indeterminate. If it contained spacious language like that of Section 5 of the Fourteenth Amendment,¹¹⁶ it would fail to resolve questions about the propriety of particular remedies. Even more specific language, for example authorizing injunctive relief, would leave open questions about affirmative or structural, as opposed to negative, injunctions.¹¹⁷ The Constitution would be an unwieldy and graceless document if it attempted to reach this level of specificity, as it clearly does not.¹¹⁸

b. *The myth of sharply separated functions:* The legitimacy objection to the *Bivens* cause of action rests on a formalist approach to the separation of powers. The dissent approach assumes a strict, easily applied delineation among the government's tripartite functions under which the straying or self-aggrandizing branch can be simply identified. In high school civics language: The legislature makes the law; the executive enforces the law; and the Court applies the law.¹¹⁹ Or in Burt Neuborne's more precise terms: The legislature enunciates generally applicable rules, the executive implements them, and the judiciary particularizes them to specific fact situations.¹²⁰

116. Granting Congress the "power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

117. This is exactly what has happened with section 1983. The legitimacy argument against *Bivens* remedies has a strong element of the disingenuous, as a comparison with attitudes toward structural injunctions illustrates. The controversy about *Bivens* damage remedies is dwarfed by the chorus of objections to structural injunctions. See, e.g., Roger A. Hanson, *Contending Perspectives on Federal Court Efforts to Reform State Institutions*, 59 U. COLO. L. REV. 289, 325-45 (1988); William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1388-1409 (1991) (describing objections). To the extent the objections are grounded on legitimacy concerns, they are ironic, because structural injunctions are issued almost exclusively under the statutory authority of section 1983, which provides both a legislative cause of action and a legislatively created remedy. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). It is always possible to respond that the courts are misinterpreting the intent of the 1871 Congress when they issue structural injunctions. But it seems unavoidable that the courts develop a common law to address the interstitial questions which virtually any statute will leave open. And if Congress cannot be expected to enunciate every broadly applicable rule when it passes a statute, it is predictable that the spare language of the Constitution will not address every rule of constitutional applicability.

118. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); WHITE, *supra* note 4, at 244 ("[I]t is impossible to foresee the future and one therefore cannot with any degree of confidence set down specific and complete directions ahead of time.").

119. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523-24 (1991) (describing the formalist approach to separation of powers).

120. Neuborne, *supra* note 62, at 370 (arguing that this approach is overly simplistic).

The notion that the powers of government can be so neatly compartmentalized has been called archaic,¹²¹ simplistic,¹²² and indefensibly extreme.¹²³ Although its echoes can be heard in recent formalist decisions,¹²⁴ it seriously misdescribes a complex government in which the branches must delegate and share power in order to function.¹²⁵ Indeed, it misdescribes the Constitution itself, which contemplates the sharing of numerous functions by two or more branches.¹²⁶ Most important, it sidesteps the crucial separation of powers issue: the *reason* for separated powers. Functions are separated to avoid amassing undue governmental power, to protect against governmental tyranny.¹²⁷ The limitation on judicial effectuation of constitutional remedies, where Congress has also failed to effectuate them, must be evaluated in light of this purpose.

At bottom, debates about whether judicial remedies should be described as "making the law" or "applying the law" are unhelpful. The proper focus is whether *Bivens* remedies further the judicial role within the scheme of separated powers. As I argued above, *Bivens* remedies are at the core of the judicial function. Even under a rigidly separationist view of the Constitution, when considered in light of the core judicial role of giving meaning to constitutional values as a bulwark against governmental overreaching, judicial remedies are not merely legitimate, but crucial.

The "pure" doctrine of separation of powers seeks to prevent undue governmental power by dividing that power so that it will not become concentrated. No branch may encroach on the functions of the others. In this view, the mere existence of three separate entities will check the exercise of arbitrary power by each of the three.¹²⁸ It is thus a passive doctrine which would look askance at any active attempt by one branch to check the others. It externalizes responsibility for wrongful consequences—when self-policing inevitably fails, no

121. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977).

122. *Neuborne*, *supra* note 62, at 370.

123. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-2, at 19 (2d ed. 1988).

124. *See Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Brown*, *supra* note 119, at 1525.

125. *See Brown*, *supra* note 119, at 1524; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 492-93 (1987).

126. *See TRIBE*, *supra* note 123, § 2-2.

127. *See supra* part II.B.3.

128. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 13-17 (1967).

branch has responsibility to prevent their occurrence. A passive judiciary merely ratifies the status quo; instead of acting as a bulwark against undue political power, it becomes an actor in concert with the political branches against the individual.

The theory of checks and balances, which is sometimes treated interchangeably with separation of powers, is instead an important counterweight to it. It provides the positive component which allows each branch to exercise control over the others.¹²⁹ The power of judicial review cannot derive solely from the separation of powers doctrine because in its extreme version that doctrine is incompatible with the idea of one branch interfering with another. Judicial review is premised on the theory that the judiciary has the power to prevent aggrandizement of power, not merely by refraining from legislative or executive functions, but by affirmatively checking the excesses of the political branches.¹³⁰

The pure separation of powers theory supports the view of the Court's role as negative and passive. It is consistent with its declaratory function, but nothing more. In our constitutional scheme, judicial review has always meant more than that; since before *Marbury v. Madison* it has embraced the power to strike down acts of the political branches that violate the Constitution.¹³¹ As Charles Black elegantly demonstrated, the very structure of the Constitution supports the need for this judicial role if the notion of separated power is to be enforceable at all.¹³²

The Court's duty to enforce the Constitution by checking the excesses of the political branches has evolved considerably since Justice Marshall's early assertion of the judicial power. The great shift in power after the Civil War, which granted the federal courts significantly greater responsibility to enforce the Constitution; the emergence of the welfare state in the 1930s and the Court's increasing role in realizing its goals;¹³³ the Court's watershed use of affirmative injunctive relief to enforce its holding in *Brown v. Board of Education*

129. *Id.* at 157-58.

130. *Id.* at 17-19, 157-58.

131. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

132. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

133. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

in 1955;¹³⁴ and the incorporation of most of the Bill of Rights through the Fourteenth Amendment in the 1960s¹³⁵ all reflect and help to explain the Court's gradual evolution into the primary guardian of the Constitution.¹³⁶

In the late twentieth century, the meaningful discharge of the Court's checking function requires judicial oversight. Collective government action of the sort needed to achieve the post-New Deal social goals is impossible under a theory of passive separation—a theory that restrains rather than facilitates strong governmental action in service of constitutional goals. Persistence, creativity, and eternal vigilance are often required if cherished rights are to be more than empty promises. In its oversight of state institutions, the Court has often been cognizant of the need to protect individual rights from the popular will and has been willing to do so through increasingly aggressive means.

A solely passive judiciary cannot discharge its responsibility to keep electoral government within bounds. This lesson is equally true when the federal government is the transgressor.¹³⁷ In an important way, the case for affirmative judicial activity is stronger in that instance, because the political branches have a conflict of interest. In the 120 years since it passed section 1983, giving the courts a statutory cause of action and authorization to remedy constitutional wrongs under color of state law, Congress has not seen fit to provide an analogous statute for suit against the federal government or federal officials. Chief Justice Rehnquist is correct that when Congress has wished to authorize such suit, it "has known how to do so."¹³⁸ But this observation hardly counsels for deference to its decision not to. There

134. 349 U.S. 294 (1955) (*Brown II*) (charging the lower federal courts with responsibility for enforcing the holding of *Brown I*, 347 U.S. 483 (1954)); see also Hanson, *supra* note 117, at 289.

135. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961).

136. This is not to suggest that the progress is always in the right direction. See Chemerinsky, *supra* note 111.

137. As Charles Black pointed out, much of the controversy about judicial review has been generated by the Court's oversight of state government, though invalidation of state acts is more firmly grounded in the constitutional text than review of coequal branches. BLACK, *supra* note 132, at 73-76. He concludes that the originalist objection to judicial review is therefore somewhat of a red herring. *Id.* at 76.

138. *Carlson v. Green*, 446 U.S. 14, 40 (1980) (Rehnquist, J., dissenting); see also *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 428-29 (Black, J., dissenting) (stating Congress did not intend to allow suits against federal officers because it provided for them in the case of state officials while remaining silent in the federal context).

is no viable argument that identical constitutional rights deserve less protection when violated by federal officials.¹³⁹

When Congress exempts itself and the executive from compliance with constitutional rights, deference to its decision is inappropriate. It is, in fact, the strongest illustration of the need for checks and balances. A passive judiciary under such circumstances, though consistent with the pure notion of separation of powers, would permit exactly what the Framers feared: a concentration of power which would serve to trammel individual rights.¹⁴⁰ Congress has license to insulate itself and the executive from compliance with the Constitution unless the Court supplies the cause of action and the remedies that Congress has withheld.¹⁴¹

The *Bivens* progeny provide a case in point. In *Bivens*, the Court viewed the failure of the legislature to provide an adequate remedy as the occasion for a judicial remedy. Similarly, in *Carlson v. Green* and *Davis v. Passman*, the Court was willing to review the legislative

139. The floodgates argument advanced by some of the *Bivens* dissenters is unduly alarmist, even taken on its own terms. See, e.g., *FDIC v. Meyer*, 114 S. Ct. 996 (1994) (*Bivens* suits against the government would create potentially enormous financial liability); *Carlson*, 446 U.S. at 35-36 (Rehnquist, J., dissenting) (*Bivens* actions would divert federal courts from more pressing needs). It was section 1983 that eventually unleashed the flood of litigation. The number of federal suits would be paltry by comparison. In any case, I would argue that floodgates are not a proper reason to refuse enforcement of the Constitution. See Susau Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2327-30 (1990).

140. See THE FEDERALIST NO. 78 (James Madison) (Wright ed. 1961) (writing about judges as "Guardians of the Constitution"); VILE, *supra* note 128, at 14; Brown, *supra* note 119; Sharp, *supra* note 108, at 434.

141. I have elsewhere addressed the "majoritarian difficulty" with permitting the unelected judiciary to protect rights when the political branches do not choose to do so. See Bandes, *supra* note 54, at 303-04 (addressing the issue in the standing context). The most important role of the independent judiciary is to check the tendency of the political branches to underprotect unpopular or minority rights that the Constitution guarantees. See BLACK, *supra* note 132; THE FEDERALIST NO. 78, *supra* note 140. In a recent article, Lawrence Sager correctly shifts the burden to those who would make defending the Constitution subservient to the acts of the electoral branches, when he notes "It is popular sovereignty that must be at hazard, not the Constitution." Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 897 (1990). Erwin Chemerinsky has often and forcefully made the same point. See CHEMERINSKY, *supra* note 115; Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984); Chemerinsky, *supra* note 111, at 61-96; see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (arguing that the majoritarian difficulty is based on faulty assumptions about governmental roles—when in fact the Court is engaged in an ongoing dialogue with the other branches about the meaning of the Constitution); Stephen M. Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 775 (1987) (arguing that difficulty lies in the implausible conception of democracy that all political institutions must be justified in terms of majoritarianism).

remedies in order to ensure that they adequately protected the plaintiffs' constitutional rights. Beginning in *Bush v. Lucas*, the Court began to accept the legislative provision of an inadequate remedy as the occasion for judicial inaction.

By *Stanley* and *Chilicky*, deliberate legislative withholding of remedies had become the occasion for judicial ratification of this exclusion. This is a textbook example of the evils of passive separation. The legislature ratifies by default the excesses of the executive branch. In *Stanley*, the legislature refused to provide a remedy for military excesses, which included intentionally conducting dangerous drug experimentation on unknowing military personnel. In *Chilicky*, the legislature provided no remedy for the serious and widely shared constitutional deprivations caused by the executive's mass denial of social security disability benefits to eligible recipients. In each case the judiciary ratified legislative inaction by its own refusal to act. It thus became a partner in the transgressions of the political branches, instead of a bulwark between them and the individuals who sought the Court's protection.

c. *Judicial competence to create remedies*: The competence argument against *Bivens* suffers, as the legitimacy argument does, from the failure to distinguish the tasks involved. The courts' competence to craft remedies, to assess damages in particular, or to imply a cause of action¹⁴² raise distinct issues. Unlike the legitimacy argument, which is grounded in normative concerns about the role of the courts, the competence argument usually reduces to a tedious comparison of the resources of courts and legislatures.¹⁴³ For several reasons, this debate seems beside the point.

One reason to opt out of the debate is that it is unresolvable. The legislature has broad fact-finding capabilities; the courts have subpoena power and access to expert witnesses. The courts can individualize a remedy, while the legislature can see its wider ramifications. The laundry-list approach cannot yield a definitive victor. More important, the competence debate should be avoided because it is

142. Courts create causes of action all the time. Although the trend has been away from it in statutory cases (see, e.g., *Cort v. Ash*, 422 U.S. 66 (1975)), it is a traditional common law judicial activity to create private law causes of action, for example in contract or tort. One issue raised by creating a new cause of action, which is arguably not raised by implying a particular remedy, is the courts' competence to determine the allocation of judicial priorities.

143. See Bandes, *supra* note 54, at 303; Brown, *supra* note 30, at 278-80; Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 92-95 (1965).

diversionary. It reduces the argument to who can do it best, but it misstates what needs to be done, glosses over the reality that only the judiciary is willing to do it, and seeks to transform into a managerial, value-neutral issue the question of the effectuation of the Bill of Rights.

When *Bivens'* critics describe the courts' powers, they tend to downplay all but the most traditional. Federal courts faced with formulating and enforcing remedies in complex litigation have had to develop tools to enable them to gather information from wide ranging sources and to discover the ramifications of varied broad-based remedial options.¹⁴⁴ The competence debate is skewed in part because the courts' powers are portrayed in pre-*Brown* private law terms, as if they consisted solely of awarding individual damages and issuing negative injunctions.¹⁴⁵ Likewise, the courts' substantive mission is portrayed in tort terms, as a venture in risk spreading, which again minimizes its core constitutional character.¹⁴⁶ Once *Bivens* is reduced to nothing more than a remedy for private, tortious conduct, it is no wonder that the state forum seems procedurally adequate and that the value of affirming constitutional rights is often made subservient to political expediency, efficiency, and other subsidiary goals.

Those who question the courts' competence in this area tend to buttress their arguments by portraying the judicial role as a quasi-Article I function of filling in the gaps in legislation.¹⁴⁷ If this were an accurate description of the process of creating *Bivens* remedies, if it consisted of little more than interpreting the Federal Tort Claims

144. See Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Fiss, *supra* note 63; Sturm, *supra* note 117, at 1406-08.

145. Sturm, *supra* note 117, at 1408. Ironically, as to *Bivens* suits, the narrow, traditional judicial role is all the courts are called on to perform. The competence debate seems beside the point when the issue is whether courts are capable of determining the measure of damages, a function they have long discharged as a matter of course.

146. See generally *Carlson v. Green*, 446 U.S. 14, 33-34 (1980) (Rehnquist, J., dissenting) (arguing that congressional provisions for intentional torts against federal officers eliminated the need for constitutional remedies); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989) (explaining that courts, by casting section 1983 issues in tort terms, marginalize section 1983's goals and place much state conduct outside the ambit of its protections).

147. See, e.g., *Carlson v. Green*, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) (arguing that the task of creating damages is legislative); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting) ("Today's holding seeks to fill in one of the gaps of the [exclusionary rule] doctrine, at the price of impinging on legislative and policy functions that the Constitution vests in Congress.").

Act¹⁴⁸ or Title VII, then concededly Congress would be the logical branch to do it. When conceived of as the prototypical Article III function of interpreting the Constitution, however, the creation of *Bivens* remedies seems a logical job for the judiciary.

Ultimately, the competence of Congress to remedy constitutional wrongs is irrelevant if it is unwilling to do so or does so inadequately.¹⁴⁹ The political branches cannot always be counted on to aid poorly organized, unpopular, or powerless groups such as prisoners or the mentally ill. The competence of the Court to decide whether Congress has adequately protected the disenfranchised lies at the heart of judicial review. Its power to do so is essential to the notion of checks and balances which inheres in the American notion of separation of powers.

C. THE LIMITS OF JUDICIAL ENFORCEMENT: WHEN SHOULD THE *BIVENS* POWER BE EXERCISED?

I must now consider the boundaries of my position. Given the Court's paramount role in effectuating the Constitution, is deference to Congress ever appropriate in the realm of creating causes of action and remedies? One might argue that, taken to its logical extreme, the argument places in question the purpose of statutory authorization for constitutional suits.

There are powerful arguments in favor of statutory authorization. Though I reject the legitimacy challenge to the Court's role in enforcing the Constitution, there is a separate argument that judicial enforcement will less likely command public acceptance than will legislative enactments.¹⁵⁰ Congress has the ability to hold extensive hearings, to commission studies, and generally to ensure that those

148. *Compare Carlson*, 446 U.S. at 32-34 (Rehnquist, J., dissenting) (reviewing the plaintiff's remedies under the FTCA and finding them less effective than the damage remedy that could be inferred from the Eighth Amendment) *with United States v. Stanley*, 483 U.S. 669, 705 (1987) (using recent restrictive interpretation of the FTCA, which denied plaintiff a statutory remedy, as a reason to refuse to grant him a remedy based on the Due Process Clause as well).

149. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26 (1975) (listing obstacles in the way of legislative action, including inertia, lack of time, and the futility of all-encompassing statutory codes). To this list I would add the lack of incentive to back unpopular legislation, particularly on behalf of poorly organized or powerless groups.

150. Cox, *supra* note 143, at 94. Professor Cox uses the example that *Brown v. Board of Education* "became more firmly law" after its incorporation into the Civil Rights Acts of 1964. *Id.* Even so, it took persistent judicial action to enforce *Brown*. See generally Gewirtz, *supra* note 70 (reviewing judicial struggles to fashion desegregation remedies).

affected are heard.¹⁵¹ Although courts have increasingly found ways to hear and weigh the interests of nonparties affected by the proceedings,¹⁵² some would argue that Congress has superior abilities in this regard or that it conveys a more reassuring appearance of democratic participation in the process. If this is so, it seems intuitively correct that congressional action will make popular support more likely. However, the ability to be heard is distinct from the ability to effectuate change, and the latter is harder to come by for the powerless or poorly organized.

Another variant of this theme is an alternative, less palatable explanation for the increased public acceptance of legislative action. It may be that those legislative enactments which the public would find least acceptable are unlikely to be supported by elected officials in the first place. There are times when only the politically insulated federal judiciary is willing to protect, for example, the rights of minorities, prisoners, and criminal suspects,¹⁵³ and, not surprisingly, such decisions meet with little public acceptance.¹⁵⁴

In the same vein, statutory authorization makes it more likely that the political branches will themselves perform their roles in effectuating constitutional rights.¹⁵⁵ In the fair housing area, in which Congress has aggressively enforced the equal protection guarantee, it has put in place a system of incentives, favorable standing rules, and

151. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27:44, at 240-41 (2d ed. 1984).

152. See, e.g., Brown, *supra* note 119; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *supra* note 63; Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).

153. Chayes, *supra* note 152, at 1308-09.

154. Concededly, the current federal judiciary has itself shown very little willingness to protect the rights of criminal suspects or prisoners, see generally Bandes, *supra* note 112, or other powerless groups, see generally Chemerinsky, *supra* note 111. Indeed, the recent pattern has been that Congress steps in to correct parsimonious judicial interpretations of the Civil Rights statutes. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991) (amending 42 U.S.C. § 1981). Perhaps, as Robin West suggests, this means it is time to address our arguments to Congress, rather than to the courts. Robin L. West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990). However, Congress has fairly consistently turned a deaf ear toward arguments that it revise section 1983. See, e.g., Quern v. Jordan, 440 U.S. 332, 365-66 (1979) (Brennan, J., concurring) (exhorting Congress to amend section 1983 to make clear that states are “persons”). Also, as noted *infra* note 266, Congress has shown little willingness to include itself in the reach of federal civil rights statutes. Whether or not the Court chooses to protect rights in the ways I suggest, the important point is that it has both the power and the competence to do so.

155. Friedman, *supra* note 65, at 769-73 (suggesting that statutory authorization would lead to greater cooperation among the branches).

other means by which its legislation can be effectuated. It can more easily convene hearings, amend the statute, and, of course, appropriate the needed funds for enforcement.¹⁵⁶ Obviously, this is all to the good. Judicially imposed remedies may be more difficult to enforce, and, given a persistent court, may lead to unpleasant confrontations with recalcitrant political branches.

In short, congressional remedies for constitutional wrongs are preferable in some important ways. But they are not necessary. When they do not exist or are inadequate, the Court must create effective judicial remedies. The language of deference to Congress in this area is permeated with a confusion between the Article I function of creating legislative programs and the Article III function of interpreting the Constitution. Congress is better at the former, the Court at the latter.¹⁵⁷ The usual defense of congressional primacy, that the legislature is better able to enact broad social policy and define broad national objectives,¹⁵⁸ is seriously undercut when the Constitution is at issue. Constitutional enforcement is an a priori national objective, and one which trumps legislative preference. If the Constitution were left to the vagaries of political preference, its enforcement would be a precarious thing indeed.

In a sense, I am arguing that deference to Congress in this area is inappropriate. However, I do not mean to argue that the Court must determine the proper means for effectuating constitutional guarantees. In public law litigation, there will often be numerous ways of achieving constitutional objectives.¹⁵⁹ The Court ought not second guess the legislature on which is preferable, but it must *review* the

156. Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

157. Brown, *supra* note 30, at 285-87.

158. Comment, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine*, 36 MD. L. REV. 123, 143 (1976).

159. See Sturm, *supra* note 117, at 1359-78 (providing examples of various forms of public remedial decisionmaking). There will, of course, be interpretive issues regarding how thoroughly the constitutional objective must be achieved and at what cost. See Shane, *supra* note 93, at 554-58 (discussing rights maximization). This is first an issue of constitutional interpretation. That is, certain interests will be legitimately weighed against the harm asserted by plaintiffs in determining whether their rights have been violated as a substantive matter. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976). Second, the remedial criteria themselves incorporate judicial discretion, especially those for declaratory and injunctive relief and certainly those for extraordinary remedies like complex structural injunctions. This discretion correctly takes into account such competing interests as the interests of other affected parties. Thus, the concept of rights maximization can exist and still take cognizance, at both substantive and remedial stages, of competing interests.

statutory means to determine their effectiveness. The Court's abdication of this function in the recent *Bivens* cases¹⁶⁰ is a rejection of the broadest promise of *Bivens*: that the Constitution has meaning independent of the willingness of the political branches to enforce it. Ironically, what the Court has done in the name of separation of powers is to turn away from judicial review and to allow the political branches to abuse their power unchecked.

III. VINDICATING CONSTITUTIONAL RIGHTS ON THEIR OWN TERMS

The *Bivens* paradigm contributes the insight that the Bill of Rights should be self-executing, that its guarantees have force irrespective of whether Congress provides a vehicle for their enforcement. In Part II, I described how *Bivens* held out this promise but ultimately retreated from its implications, and I argued that the principles of separation of powers support the existence of the *Bivens* action. This part will examine the other great insight of the *Bivens* paradigm: that constitutional guarantees are worthy of protection on their own terms and not because of an incidental congruence with common law or state law protections. Thus *Bivens* soundly rejected the argument that federalism demands deference to state law. In this context, too, realization of the promise of *Bivens* is hindered by the retreat from the full implications of its insight.

In Justice Harlan's famous phrase in his *Bivens* concurrence: "[I]njuries inflicted by officials acting under color of law . . . are substantially different in kind [from those inflicted by private parties]."¹⁶¹ *Bivens* rejected the argument that a suit by a citizen against a federal agent unconstitutionally exercising his authority is no different from a state law suit between two private parties.¹⁶² It recognized that federal rights are worthy of protection on their own terms. Implicit in this recognition is an understanding of the Bill of Rights as positive law, not merely as a set of negative limitations on governmental

160. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (holding that the absence of statutory relief does not imply a need for damage relief); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (holding it is irrelevant to a special factors analysis whether current laws afford plaintiffs an adequate remedy).

The Court has abdicated this function in a broad spectrum of other constitutional cases as well. See *Chemerinsky*, *supra* note 111.

161. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 409 (Harlan, J., concurring).

162. *Id.* at 391.

power.¹⁶³ Simultaneously, *Bivens*' reach is severely limited by its anachronistic loyalty to the very private law model, and its difficulty with the very notion of affirmative constitutional protections, which it took a tentative step toward transcending.

A. HISTORICAL ROOTS OF THE PROBLEM

It is an intriguing question why the principle of damage actions against unconstitutional federal acts brought directly under the Constitution was not officially recognized for so long—until a century after the Civil Rights Acts provided damage relief against unconstitutional state acts. The question has given rise to some equally intriguing scholarship, including prescient pre-*Bivens* articles by Professors Al Katz¹⁶⁴ and Alfred Hill,¹⁶⁵ and more recent pieces by Professors Louise Weinberg¹⁶⁶ and Michael Collins.¹⁶⁷ Though each article yields fresh insights, the conclusions rest on substantial common ground.

Although these scholars identify several factors contributing to the timing of *Bivens*,¹⁶⁸ their common theme is that *Bivens* was inconceivable until the Court began to view the Constitution as an independent source of rights irrespective of whether those rights coincided with common law protections. Traditionally, harm caused by government officials was cognizable only to the extent it fit within the common law forms; the Constitution itself was relevant only in defense.¹⁶⁹ Consistent with this mindset, the governmental defendant was treated like an individual wrongdoer; his harm like privately caused harm.¹⁷⁰

163. Hill, *supra* note 47, at 1111-12.

164. Katz, *supra* note 43.

165. Hill, *supra* note 47.

166. Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737.

167. Michael G. Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493 (1989).

168. See, e.g., *id.* at 1494-96 (like Professor Hill, citing *Erie* as the event that ushered in *Bivens*); Hill, *supra* note 47, at 1138 (arguing that the recognition of a right to a remedy for redress of constitutional violations was hindered by differences in common law pleading traditions for legal and equitable suits); Weinberg, *supra* note 166, at 763 (finding *Monroe v. Pape* an "irresistible rationalizing pressure" that eventually precipitated *Bivens*—despite developments in federal sovereign immunity).

169. Collins, *supra* note 167, at 1510. *But see infra* note 202 and accompanying text (certain rights had no common law analogues).

170. Collins, *supra* note 167, at 1510.

The common law orientation provides a plausible explanation for the flourishing of equitable relief based solely on the Constitution and federal question statute: the widespread, erroneous belief that the federal equity system contained independent sources of right, whereas no such sources were available at law.¹⁷¹ When this attitude began to change is ambiguous. *Ex parte Young*¹⁷² is widely viewed as a watershed case. Henry Hart speaks of the imperceptible steps that led to the crucial advance of *Ex parte Young*: treating the equitable remedy as conferred directly by federal law.¹⁷³ Some commentators identify *Erie* as an important factor in the shift, positing that it forced the courts to confront the actual sources of remedial law and led them to realize the possibility of a federal cause of action as the source of both legal and equitable remedies.¹⁷⁴

Perhaps the *Bivens* mystery cannot be solved definitively, but for present purposes the answer is clear enough: The Court could not decide *Bivens* until it was ready to conceive of federal rights, harms, and remedies apart from their common law analogues. This entailed a threefold recognition: (1) the federal source of the right, (2) the governmental nature of the harm, and (3) the affirmative nature of the remedy. The *Bivens* decision thus represents a crucial advance toward the notion of the Bill of Rights as positive law. Ironically, it also contains the seed of its own demise: its inability to truly break free of the anachronistic hold of the common law.

B. RESILIENCE OF THE COMMON LAW

As to the source of the right at stake, the nature of the harm caused, and the source and nature of the remedies available, *Bivens* exemplifies both path-breaking insight and, ultimately, a failure of nerve. Likewise, the watershed cases leading to *Bivens*, like *Ex parte Young*¹⁷⁵ and *Erie*,¹⁷⁶ contributed to *Bivens*' ambivalent relationship with the common law. In the next three sections I will examine the

171. *Bivens*, 403 U.S. at 400-401 (Harlan, J., concurring); Hill, *supra* note 47, at 1138. *But see* Collins, *supra* note 167, at 1494-96 (demonstrating that actions for damages directly under the Constitution and federal question statute were prevalent as well).

172. 209 U.S. 123 (1908).

173. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954).

174. Collins, *supra* note 167, at 1532; Weinberg, *supra* note 166, at 761.

175. 209 U.S. 123 (1908).

176. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

ways in which common law principles hindered (and continue to hinder) the full realization of the *Bivens* remedy.

1. *The Source of the Right*

Long after general federal question jurisdiction was conferred in 1875, opening up the federal courts to claims arising under the Constitution,¹⁷⁷ the constitutional source of rights against the government remained obscured. Rights were often cast in common law terms. For example, victims of unreasonable searches or seizures would typically bring suit in state court on a state law cause of action like trespass; defendants¹⁷⁸ would claim they had acted within the scope of their authority; and plaintiffs would reply that the defendants' actions were in fact *ultra vires* because these actions violated the Fourth Amendment.¹⁷⁹ Thus, the only effect of the Fourth Amendment would be to overcome the defense and leave the defendant open to a tort claim.

This was the scenario the *Bivens* Court rejected, recognizing that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen."¹⁸⁰ But this language doesn't do justice to the crucial insight of *Bivens*, which is that the Constitution is a source of rights—of positive law—*independent* of state law. This means not only that rights exist that have no state law analogues, but also that these rights may themselves be the predicate for *affirmative* suits and not merely raised in defense.¹⁸¹ Although this insight is equally applicable to the entire Bill of Rights,¹⁸² courts have been resistant to recognizing its implications.¹⁸³

177. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1982)).

178. The defendants might remove the case to federal court. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 390-91 (1971).

179. Amar, *supra* note 74, at 1506-07.

180. *Bivens*, 403 U.S. at 392.

181. *Dellinger*, *supra* note 45.

182. This insight is equally applicable to the entire Bill of Rights to the extent the rights therein are cognizable in individual actions.

183. *Bivens* has been extended to Fifth Amendment equal protection claims, *Davis v. Passman*, 442 U.S. 228 (1979), and to Eighth Amendment claims, *Carlson v. Green*, 446 U.S. 14 (1980), but not to First Amendment claims, *Bush v. Lucas*, 462 U.S. 367 (1983), or Fifth Amendment due process claims, *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). An especially stark example of the Court's unwillingness to see the constitutional source of rights is in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), in which the Court completely fails to acknowledge the plaintiffs' constitutional claim.

The accusation that *Bivens* constitutes illegitimate common law both exemplifies and exacerbates the confusion about the source of the cause of action. Although Henry Monaghan's classic explication of constitutional common law sought to defend *Bivens* as a flexible, subconstitutional exercise by the Court in filling in "an incomplete statutory framework,"¹⁸⁴ it instead damned *Bivens* with faint praise. Monaghan recognized that the Court meant to derive the right to damages from the Fourth Amendment itself but could not accept that it had done so. The subconstitutional label he gave *Bivens* has done much to undermine its legitimacy.

Monaghan believed that the lower court's test in *Bivens* was correct: The court has the power to imply a constitutional remedy only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'"¹⁸⁵ That is, the damage remedy was constitutional only if indispensable to effectuation of the right.¹⁸⁶ This test of constitutionality rests on two assumptions: first, that the remedy must be indispensable to upholding the Fourth Amendment guarantee as a general matter, not merely in the case before it; and, second, that the remedy must be the *only* one appropriate to effectuation of the right.¹⁸⁷ Professors Schrock and Welsh refute the first assumption, pointing out that absent a damage remedy, the Fourth Amendment would be a mere form of words for *Bivens* himself, and that *Bivens*' injury is a sufficient predicate for the implied remedy.¹⁸⁸ This is, as I have argued above, the promise of *Bivens*: that each victim be accorded his constitutional remedy, regardless of whether remedies exist for others. Ironically, in light of Monaghan's demotion of *Bivens* to judicial legislation, this case-by-case approach falls within the least controversial, most narrowly defined conception of the judicial role.¹⁸⁹

184. Monaghan, *supra* note 149, at 23.

185. *Bivens*, 403 U.S. at 399 (Harlan, J., concurring) (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 723 (2d Cir. 1969)).

186. Monaghan, *supra* note 149, at 24; *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 51-52 (1985) (accord).

187. *See* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-36 (1978); *infra* text accompanying notes 219-25.

188. Schrock & Welsh, *supra* note 187, at 1136.

189. I do not mean to imply that a remedy which sweeps more broadly would be illegitimate, however. All constitutional adjudication affects parties not before the Court. Sometimes a broadly conceived remedy, like the *Miranda* warnings, may be needed to replace a case-by-case review process which was unsuccessful in protecting rights. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966). Yet Monaghan has the converse problem with the *Miranda* decision, which he criticizes for requiring that state courts adopt an across-the-board rule, rather than proceed to judge fairness on a case-by-case basis. Monaghan, *supra* note 149, at 21. Under his apparent

Once *Bivens* is classified as constitutional common law, the charge that it violates the Rules of Decision Act¹⁹⁰ must be addressed.¹⁹¹ If, however, *Bivens* is recognized as constitutional interpretation, the Rules of Decision Act ceases to be an issue, since it exempts situations where the "Constitution . . . otherwise . . . provide[s]." ¹⁹² At bottom, then, the debate is about what counts as legitimate constitutional interpretation and what counts as judicial legislation, the latter being at worst illegitimate, at best subconstitutional.

The debate has a familiar ring. It assumes a distinction between those things the Constitution clearly intends to protect and the means by which that intent is effectuated. Thus Monaghan's argument gives credence, perhaps unintentionally, to the textualist notion that what is not spelled out in the Constitution is not within the realm of legitimate interpretation. He portrays the Court's role in *Bivens* as a quasi-common law function of filling in statutory gaps, rather than exercising its own interpretive powers. But the Constitution does not have the prolixity of a legal code;¹⁹³ it is a spacious and evolving document. The Court's determination that the document can be read to give rise to a cause of action for the violation of constitutional rights is well within the Court's Article III power to effectuate constitutional guarantees.¹⁹⁴

The anachronistic tendency to ignore the constitutional source of rights is widespread. I have elsewhere discussed its ramifications with

construction of the "indispensable" criterion, it seems impossible to (1) show that a certain remedy is required across the board to effectuate constitutional rights, and (2) avoid bright line rules and stick to case-by-case determinations.

190. The Rules of Decision Act currently provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1988).

191. See, e.g., Merrill, *supra* note 186, at 55; Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. REV. 761, 766 (1989).

192. 28 U.S.C. § 1652 (1988); see Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 Nw. U. L. REV. 860, 865 (1989). Weinberg makes the insightful point that the Rules of Decision Act itself may be a relic of pre-*Erie*, prepositivist assumptions about the sources of law—that post-*Erie*, all law is understood to have an identifiable sovereign source, and if that source is federal, the law is supreme and trumps the Rules of Decision Act. *Id.* at 866.

193. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); WHITE, *supra* note 4, at 244.

194. See Schrock & Welsh, *supra* note 187, at 1164.

regard to standing and a host of other jurisdictional doctrines¹⁹⁵ and to conceptions of governmental duties.¹⁹⁶ The tendency is likewise prevalent in the context of defining substantive rights, particularly those due process rights that flow from the spare language of the Fifth and Fourteenth Amendments.

The scope of the liberty and property interests protected by the Due Process Clause has been sharply curtailed by keying it to the scope of state law protections. A line of cases beginning with *Paul v. Davis*¹⁹⁷ defers to state law to determine what interests are worthy of inclusion under the rubrics of liberty and property.¹⁹⁸ *Carey v. Phiphus*¹⁹⁹ takes a similar approach to assessing the measure of damages for a violation of due process rights, holding that loss of the right itself, apart from any *actual* injury of the sort recognized at common law, was not compensable.²⁰⁰

However, it soon became clear that the result in *Carey* was not attributable merely to vagueness in the due process language—in *Memphis Community School District v. Stachura*²⁰¹ the Court extended *Carey*'s reasoning to damages for First Amendment violations. The problem runs deeper: It is the Court's unwillingness in these cases to recognize the Constitution as a legitimate source of protection, even when it fails to coincide with state law or common law protections.²⁰²

195. See Bandes, *supra* note 54, at 279-81.

196. See Bandes, *supra* note 139, at 2308-13.

197. 424 U.S. 693 (1976) (holding there is no state protected interest in one's reputation); see also *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding there is no state protected interest in a hearing before depriving public school children of personal security); *Meachum v. Fano*, 427 U.S. 215 (1976) (no state protected interest in prisoner being kept in minimum security facility); *Bishop v. Wood*, 426 U.S. 341 (1976) (no state protected interest in continued employment).

198. For criticism of this approach, see Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978).

199. 435 U.S. 247 (1978).

200. For criticism of this approach, see Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Phiphus*, 93 HARV. L. REV. 966 (1980).

201. 477 U.S. 299 (1986).

202. The difficulty seems especially acute in the sorts of cases which "look like" common law torts; many of which are due process cases. See generally Bandes, *supra* note 9 (discussing *Monell, Parratt, Daniels, and Davidson*). It is less of a problem for cases based on the portions of the Bill of Rights for which there is no common law analogue. For example, the protection of freedom of speech and religion in the First Amendment would not be judicially enforceable if a common law analogue were required. Likewise, many of the trial related rights—the rights to confrontation, to a speedy and public trial, and against self-incrimination—are without common law analogues.

The flaw underlying the approach in cases like *Paul* and *Carey* is that it permits state law to trump constitutional protections. As the Court has explicitly recognized elsewhere, the Supremacy Clause prevents the use of state law to deny federal rights.²⁰³ In suits against state officials, if state law is allowed to define the scope of federal protections, the state may dictate the limits of its own power. This notion poorly comports with the idea of the Constitution as a bulwark against governmental overreaching.²⁰⁴ In suits against federal officials, like *Bivens* itself, it is even less comprehensible why enforcement of a federal right against federal officers should depend on the content of state law.

2. *The Nature of the Harm*

The traditional unwillingness to recognize the independent vitality of the Constitution apart from common law obscures not only the source of rights, but also the identity of those who violate them. Sovereign immunity doctrines provide additional barriers to recognizing the governmental character of wrongdoers. Here again the *Bivens* case took an important step away from common law limitations, but ultimately was hindered by its antecedents—in particular *Ex parte Young* and *Larson v. United States*.

Young made important strides for government accountability. It is often cited as an early example of an action brought directly under the Fourteenth Amendment without congressional authorization.²⁰⁵ In addition, it provided a crucial means of avoiding the bar of sovereign immunity—it permitted suits against the government for the violation of constitutional rights under the fiction that the governmental defendant was acting as an individual rather than on behalf of the state.²⁰⁶

However, there was always ambiguity about how fictional the *Young* principle was. Was the state truly unaffected by relief against

203. *Howlett v. Rose*, 496 U.S. 356 (1990).

204. David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1550 (1992).

205. See, e.g., Amar, *supra* note 74, at 1508 n.321; Collins, *supra* note 167, at 1512. It could have been brought as a section 1983 case but was brought during the dormant period discussed *supra* Part III.A.

206. *Ex parte Young*, 209 U.S. 123 (1908). Although the case was decided in the Eleventh Amendment context as a means of permitting suit against state defendants, its principle has been extended to permit suits against federal defendants as well. See, e.g., *Philadelphia v. Stimson*, 223 U.S. 605, 620 (1912).

the individual official; or was the principle simply a workable means of enforcing the Constitution against the government itself?²⁰⁷ Although the latter formulation has a firmer grasp on reality, the former—casting government as an individual—has been taken too literally, giving it power beyond the particular utilitarian goal it was meant to serve.²⁰⁸

The Court in *Young* insisted that plaintiffs sue the government by falsely pretending to sue the officer.²⁰⁹ It characterized the harms as the sorts perpetrated by private individuals, not by complex governmental entities.²¹⁰ *Edelman v. Jordan*,²¹¹ which perpetuated the fiction by denying relief that was too closely traceable to the state's own coffers to pretend it came from the individual official's pocket, eventually followed *Young*.²¹²

Perhaps even more damaging (and illustrative of the confusion) was the intervening case of *Larson v. Domestic and Foreign Commerce Corp.*,²¹³ which held that unless the challenged actions of the governmental official were not merely unconstitutional but also outside the official's statutory authority, they were the acts of the sovereign and could not be enjoined. *Larson* tried to take the fiction literally, by barring relief unless the official was "truly" acting alone. In doing so, it lost the original reason for the fiction, which was to

207. See the colloquy between Justice Powell and Justice Stevens in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Justice Powell described the rule of *Ex parte Young* as a means to the end of judicial supremacy—a mere fiction. *Id.* at 105-06. When Justice Stevens suggested that the rule is based on the assumption (true for violations of state as well as federal law) that an unconstitutional act is not the act of the government, *id.* at 150, Justice Powell accused him of being "out of touch with reality." *Id.* at 107; see also Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1152-54 (1989) (discussing colloquy).

208. As David Shapiro pointed out, once we truly recognize the utilitarian nature of the fiction we can decide that the supremacy of federal law would be even more effectively upheld by permitting monetary as well as injunctive relief against the state. Shapiro, *supra* note 89, at 83-84. This, of course, has not happened.

209. Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435 (1962) ("You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign.")

210. Amar, *supra* note 74, at 1507-08.

211. 415 U.S. 651 (1974).

212. I need not belabor the point that much of the monetary relief awarded "ancillary to prospective relief" and thus allowable under *Young* also came from state coffers. See *Edelman*, 415 U.S. at 667 (noting that the difference between prospective and retrospective relief "will not in many instances be that between day and night"); see also *Papasan v. Allain*, 478 U.S. 265 (1986) (deeming relief for violation of a trust retroactive while deeming the same relief for violation of the Fourteenth Amendment prospective); REDISH, *supra* note 38, at 198-99 (commenting that *Papasan* "took *Edelman's* prospective-retroactive dichotomy to new heights of metaphysical absurdity").

213. 337 U.S. 682 (1949).

reach the sovereign. The absurd result was that under *Larson* any decree that would operate against government interests was unobtainable, eliminating the sole reason to sue the governmental actor. Ironically, not only did *Larson* inappropriately attempt to use private law agency principles to determine matters of official accountability, it also misused those principles to protect conduct for which courts would have held private employers liable.²¹⁴

In short, *Larson* appropriated *Young*'s private harm metaphor but divorced it from its original purpose of safeguarding federal supremacy. A more recent case, *Pennhurst State School & Hospital v. Halderman*,²¹⁵ provides a mirror image of *Larson*. *Pennhurst* kept the purpose of *Young* in mind but jettisoned the fiction itself. It declared that the Court cannot enjoin the unconstitutional act unless the governmental actor is violating federal law. *Young* is inapplicable to violations of state law because these do not threaten the principle of federal supremacy.²¹⁶

Why was the *Pennhurst* Court so willing to unmask *Young* as a mere utilitarian fiction? The nature of the *Pennhurst* litigation made it impossible to pretend any longer that private parties caused the harm. The defendant was precisely the sort of complex, bureaucratic entity that could not be made to fit a private law mode. More to the point, the nature of the remedies against Pennhurst State Hospital looked nothing like the simple negative injunctions the *Young* Court had envisaged.

3. *The Nature of the Remedy*

The *Young* fiction depicts a rogue official, acting alone, whose unlawful use of the state's good name can be easily thwarted by enjoining the official to desist. If instead the court enjoined the official to *do* something, such as to reform the state's rate regulating procedures, it would be difficult to sustain the pretense that the official could comply with the injunction as a private individual. The difficulty in sustaining the *Young* fiction is the probable explanation for the otherwise unexplained footnote in *Larson*, which states that a suit

214. See Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1487-91 (1962); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 38-67 (1972-1973).

215. 465 U.S. 89 (1984).

216. *Id.* at 109 n.17.

against unconstitutional actions of an official "may fail, as one against the sovereign . . . if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign."²¹⁷

As the nature of the injunction changed from the negative private law version at issue in *Young* to the complex, intrusive creature of public law at issue in *Pennhurst*, the Court came to realize that the prospective/retrospective distinction no longer worked. Although the relief sought in *Pennhurst* was injunctive and therefore within the literal mandate of *Young*, it was no longer possible to suspend disbelief and accept the *Young* fiction. The *Pennhurst* plaintiffs sought a total restructuring of the hospital's physical facilities and of its means of treatment, and appointment of a long-term special master to oversee the changes. It is difficult to force such quintessentially public relief into the private law mold that *Young* demands.²¹⁸

The persistent effort to demote *Bivens* to subconstitutional status is likewise traceable to the private law mindset. Monaghan relegated *Bivens* to subconstitutional status²¹⁹ in large part because the Court did not find damages to be the only possible remedy to effectuate the right.²²⁰ Yet Justice Brennan in his majority opinion had a clear-sighted rejoinder to this objection: He stated that the question is simply whether the plaintiff has a judicial cause of action. If so, the Court may redress his injury through any mechanism normally available in

217. *Larson*, 337 U.S. at 691 n.11. The opinion ascribes the quotation to *North Carolina v. Temple*, 134 U.S. 22 (1890), but the quoted language is nowhere contained in that case. The language lends itself to interpretations ranging from that in *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1955) (prohibiting requiring the sovereign to dispose of its property), to that in *Ickes v. Fox*, 300 U.S. 82 (1937) (holding that even where officers are not acting pursuant to valid statutory authority, the purposes of sovereign immunity may control if the relief sought would work an intolerable burden on governmental functions). In his classic article, Louis Jaffe reports that the language has been interpreted as everything from an unobjectionable suggestion that affirmative suits *may* fail under certain circumstances to a sweeping mandatory prohibition against mandamus actions. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 34-36 (1963).

218. See *supra* note 212.

219. Monaghan also relegated *Bivens* to subconstitutional status because the damages remedy did not seem indispensable to effectuation of the Fourth Amendment in general, but only to *Bivens* himself. See *supra* text accompanying notes 184-94.

220. Of course, for *Bivens* himself, it was the only possible remedy. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

the federal courts.²²¹ The courts have traditionally had discretion to craft an effective remedy, and there is nothing inherent in this notion of flexibility that renders it illegitimate.

The notion that the remedy will flow ineluctably from the right is accurate, if at all, mainly in traditional, private rights cases.²²² In public law cases, in which the Court elucidates and enforces constitutional norms, the Court's responsibilities are to a wider range of people, both parties and non-parties, and to safeguarding constitutional values.²²³ Its remedial function is complex, often encompassing declaratory, compensatory, and deterrent aims; notice and fairness problems; and difficult issues of enforcement, negotiation, and cooperation. Given such an array of interests to balance, goals to be achieved, and tools with which to achieve them, it is highly unrealistic to think there is a single way to approach a complex public law case. For *Bivens*, it was damages or nothing: that was the easy case. For others, whose substantive constitutional claims are no less cognizable, there is a choice among remedies. So long as the Court chooses among these remedies to effectuate the constitutional rights at stake,²²⁴ it is not legislating but performing its adjudicative function.²²⁵

IV. REINVENTING *BIVENS*

I have argued that the *Bivens* decision is based on two crucial insights: that the Constitution is enforceable without the need for congressional authorization, and that the Constitution is enforceable

221. *Id.* at 397. Justice Brennan conditions the availability of a federal cause of action on the absence of an explicit declaration by Congress that the Court is precluded from a judicial remedy and remitted to an equally effective statutory remedy. *Id.*

222. See Bandes, *supra* note 54, at 276 n.335 (commenting on the private rights/public law distinction argued by Chayes & Fiss); Chayes, *supra* note 152, at 1293-94 (noting that the right and the remedy are interdependent in the traditional rights model); Fiss, *supra* note 63, at 48-50 (noting that the remedial phase is episodic, designed to correct or prevent a discrete event in the traditional model); Sturm, *supra* note 117, at 1382-83 (critics use a private rights model to invalidate structural remedies).

223. See *supra* note 222.

224. The difficult issue is to what extent the remedy must ensure maximum vindication of the right. See *supra* note 159.

225. Likewise, the fact that Congress or the states may replace the judicial remedy with an equally effective statutory remedy does not render the judicial remedy unconstitutional. The Court performs its role by making the ultimate determination of effectiveness. If it finds the statutory remedy inadequate, either across the board or just for the individual before the Court, its duty is to supplement it. In *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court made clear its preference for effective state remedies to enforce the Fourth Amendment. Unless and until such remedies are forthcoming from the states or Congress, the exclusionary rule is constitutionally mandated to enforce the Fourth Amendment.

regardless of its congruence with state or common law. It would be an understatement to say the promise of *Bivens* has not been realized. Beginning in the *Bivens* case itself, the Court began compromising the very principles it set forth. The decision in *Carlson v. Green* confirmed that the availability of the *Bivens* cause of action would be predicated, at least in part, on the intent of Congress. The applications of the *Bivens* holding later became increasingly grudging, but *Bivens* had charted its own demise.

Thus any attempt to reinvent *Bivens* must begin, literally, with the *Bivens* decision itself. I argue in Section A that *Bivens*' deference to Congress, which *Carlson* codified, must be discarded.

However, my intent is not merely to argue for expanded availability of damage actions against individual federal officials. I have tried to establish the larger proposition that, in the absence of effective congressional remedies, the courts are not only empowered but obligated to craft a broad range of remedies on their own. This proposition is not particularly controversial when applied to simple injunctive relief, but is controversial when applied to damages, even against individual officials.

Then there is the truly rugged terrain. There are questions of judicial power to award extraordinary relief such as complex injunctive remedies or attorneys' fees without statutory authorization. There are questions of whether enterprise liability ought to be available, and, if so, whether it ought to augment individual liability or serve as an alternative method of remediation. The latter questions lead to the most difficult issue of all—sovereign immunity. That is, of what use is a cause of action or a remedy if governmental immunity can defeat it?

All I can attempt here is to raise some of the issues and their implications and to offer some opinionated views on how they should be resolved. To do justice to the complexity of the topics in this part would take at least an additional article, and I do not even try to do so herein.

Sections B, C, and D make sweeping proposals for realizing the promise of *Bivens*, which nevertheless are the natural outgrowth of the *Bivens* principles themselves. Section B argues that parties should be able to sue the federal government itself, and not merely its individual officials, for violations of the Constitution, and that federal sovereign immunity in such cases should be abolished. Section C argues

that parties should be able to sue the state directly under the Fourteenth Amendment, without need for Section 5 authorization to override the Eleventh Amendment. Section D argues that parties should be able to sue municipalities and municipal officials directly under the Fourteenth Amendment, despite the existence of section 1983.

A. SAFEGUARDING THE RIGHT OF EVERY INDIVIDUAL—
DISCARDING THE TWO-PART TEST

From the start, the two-part test compromised the *Bivens* principle. *Carlson v. Green* sets out two grounds for not inferring a *Bivens* action: first, the existence of special factors counseling hesitation in the absence of affirmative action by Congress, and second, a showing that Congress has provided an alternative remedy, which it explicitly declared to be a substitute for recovery directly under the Constitution and which Congress viewed as equally effective.²²⁶ In short, by failing to authorize a remedy, or by authorizing one that *it* found satisfactory, Congress could determine the availability and scope of relief for constitutional harms.

Initially, the Court appeared to retain for itself the final say on whether the remedies available to the plaintiff were adequate by leaving ambiguous the issue of who should ultimately judge effectiveness.²²⁷ *Bush v. Lucas*²²⁸ marked the turning point, because in that case the Court jettisoned the effectiveness question and began to deny *Bivens* relief based on factors counseling hesitation, even when alternate remedies were concededly less effective.²²⁹ To exacerbate matters, its approach to identifying the factors has become increasingly less refined, and in its most recent cases it has denied *Bivens* relief essentially because "this is a military case"²³⁰ or "Congress has

226. 446 U.S. 14, 18-19 (1980). The components of the test had been discussed earlier, in *Bivens* itself, 403 U.S. at 396-97, and *Davis v. Passman*, 442 U.S. 228, 245-47 (1979), but Justice Brennan's opinion in *Carlson* set it forth explicitly.

227. In *Davis*, 442 U.S. at 228, the Court's deference to Congress was rather unconvincing, given its questionable finding that Congress had not intended to exempt itself from the reach of Title VII. *Id.* at 254 (Powell, J., dissenting). More important, the Court undertook its own examination of the relief available to plaintiffs and concluded that a *Bivens* action under the Due Process Clause was required. *Id.* at 239-44. Likewise in *Carlson*, 446 U.S. at 14, although the Court premised its holding on a congressional intent to permit a *Bivens* action, *id.* at 21, it also made its own determination that a *Bivens* action would be more effective than the Federal Tort Claims Act remedy available to the plaintiff and was thus needed to sufficiently protect his constitutional rights. *Id.* at 21-23.

228. 462 U.S. 367 (1983).

229. *Id.* at 378-80.

230. *United States v. Stanley*, 483 U.S. 669, 683 (1987).

acted.”²³¹ *Schweiker v. Chilicky* is the nadir (one hopes) of this unfortunate progression. Whereas *Bivens* seemed to promise that the existence of a broad-based remedy would not be used to deny relief to an individual who fell through its cracks,²³² *Chilicky* used the existence of a statutory remedy which *did not address constitutional harm at all* to deny relief to hundreds of thousands of plaintiffs claiming constitutional harm.²³³

Although the demise of *Bivens* eventually prompted some dissent, the dissenters objected in each case to the majority's assessment of the particular factor counseling hesitation, and never questioned the appropriateness of the *Bivens* criteria themselves.²³⁴ Yet the deference to Congress endorsed by the *Bivens* cases is their central puzzle, as well as their fatal flaw. Just as Chief Justice Rehnquist's extreme position to the contrary is incorrect—the courts do have the power to remedy wrongs without congressional authorization—so is the middle ground of deference to Congress compromised.²³⁵ Although Congress is free to legislate constitutional remedies, the courts may take primary responsibility, and *must* take ultimate responsibility, for ensuring that effective remedies exist.

The deference to Congress inherent in the two-part test is defensible only in the very limited sense that Congress should have flexibility in choosing among adequate remedies.²³⁶ To the extent the test purports to give Congress final say about whether courts ought to remedy constitutional wrongs, it is incompatible with our commitment to judicial review.²³⁷

B. SUING THE FEDERAL GOVERNMENT

Bivens holds that, assuming the existence of the federal question statute, the federal courts have the power to interpret the Constitution to provide both a cause of action and an appropriate remedy²³⁸

231. *Schweiker v. Chilicky*, 487 U.S. 412, 425-29 (1988); *see also* *FDIC v. Meyer*, 114 S. Ct. 996 (1994) (holding that the factor counseling hesitation is that federal fiscal policy should be left to Congress).

232. This is admittedly speculative, since in *Bivens* Congress had provided no remedy at all for Fourth Amendment violations.

233. 487 U.S. at 430 (Brennan, J., dissenting).

234. *Chilicky*, 487 U.S. at 436-39 (Brennan, J., dissenting); *Stanley*, 483 U.S. at 705-08.

235. *See* Nichol, *supra* note 45, at 1124-25.

236. Dellinger, *supra* note 45, at 1548; Hart, *supra* note 36, at 1366.

237. Nichol, *supra* note 45, at 1150.

238. *Bivens* deals solely with the availability of the damage remedy. The availability of the equitable remedy is already assumed.

against federal officials who violate its guarantees. Yet no cause of action is available against the federal government itself. This section examines the source of the distinction between individual suits and entity suits in the federal context. Three issues are raised: (1) whether, as a prudential matter, *Bivens* suits ought to be available against the federal government itself; (2) whether federal sovereign immunity ought to operate as a bar to such suits; and (3) assuming these issues are resolved in favor of the cause of action against the entity, how to determine the parameters of the cause of action.

1. *The Need for Governmental Accountability*

First, I address the issue of *why* it is crucial to permit constitutional suits against the federal government itself. Beginning with a pragmatic argument from existing doctrine, the current *Bivens* action has proved ineffective.²³⁹ In large part this is due to the problems with *Bivens* itself,²⁴⁰ but in addition there are numerous procedural hurdles for *Bivens* plaintiffs, the most daunting of which is the qualified immunity of individual government officials.²⁴¹ There is also the familiar psychological hurdle—that juries are often reluctant to penalize individual officials for doing their jobs, when it is really the governmental employer who is at fault.²⁴²

Nor is this reluctance necessarily unreasonable. That is, if the government itself is at fault, it ought to be held accountable. Sometimes the individual is also responsible, but sometimes, for example when there is no settled law²⁴³ or when the violation is the result of a series of decisions, only the entity may be liable. It is tactically difficult, unfair, and sometimes legally impermissible to hold individual

239. See Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343 (1989).

240. See *supra* part IV.A.

241. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 174 (1993). Other hurdles include the judicially constructed requirement that a *Bivens* claim must be pleaded with great specificity and the unavailability of attorneys' fees in *Bivens* suits. See Rosen, *supra* note 239, at 364-68.

242. Rosen, *supra* note 239, at 371.

243. For example, Rosen points out that the *Pembaur* case, 475 U.S. 469 (1986), could not have been decided against federal officials, since there was no settled law on the Fourth Amendment issue at the time. Rosen, *supra* note 239, at 363.

officials liable in such situations.²⁴⁴ Many of the objections to individual liability are met by a scheme of enterprise liability, including, as Peter Schuck points out: “[The] propensity [of individual liability] to chill vigorous decisionmaking; to leave deserving victims uncompensated and losses concentrated; to weaken deterrence; to obscure the morality of law; and to generate high system costs”²⁴⁵

On a pragmatic level, a governmental wrong requires a remedy directed at the government. In the context of municipalities, the Court in *Owen v. City of Independence*²⁴⁶ noted that the threat of governmental liability:

[S]hould create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements

244. See Whitman, *supra* note 9, at 59-60. This unfairness to individual officials is one of many factors ignored in Justice Thomas’ embarrassing and disingenuous argument in *FDIC v. Meyer*, 114 S. Ct. 996 (1994). Justice Thomas held that:

[T]he purpose of *Bivens* is to deter the officer If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer’s regime, the deterrent effects of the *Bivens* remedy would be lost.

Id. at 1005 (citations omitted). There are three major flaws in Justice Thomas’ argument. First, there are situations in which a damage remedy is unavailable against individual defendants yet is available against the government itself. In such cases, there is no danger of inappropriately bypassing individual damage actions. A second flaw with this argument is that it seriously misstates the purpose of *Bivens*. Although deterrence is part of that purpose, the *Bivens* Court was more concerned with compensating the plaintiff. In Justice Harlan’s concurrence in *Bivens*, he stated:

[T]he appropriateness of according *Bivens* compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result.

Bivens, 403 U.S. at 407-08 (Harlan, J., concurring). The very passage in *Carlson v. Green* cited by Justice Thomas actually says: “[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.” *Carlson*, 446 U.S. at 21 (emphasis added). The goal of compensation is advanced by enterprise liability, particularly in cases where individual liability is unavailable, and also in cases in which the individual is judgment proof. Third, even when measuring the deterrent effect of the remedy, Justice Thomas’ reasoning is, to put it kindly, opaque. Limiting the plaintiff to a suit against an individual defendant who has qualified immunity seems a strange way of achieving the goal of deterrence. Moreover, Justice Thomas assumes incorrectly that enterprise liability has no deterrent effect. In fact, as the quoted passages from Peter Schuck and the *Owen* opinion note, enterprise liability often has a much greater deterrent effect than does individual liability. See *infra* notes 245-47 and accompanying text.

245. SCHUCK, *supra* note 9, at 100.

246. 445 U.S. 622, 652 (1980).

on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.²⁴⁷

At bottom, the proof rests upon the original principle. If one accepts that every wrong requires a remedy, then a governmental wrong should be no different.²⁴⁸ But the argument here goes further: When the government itself is the wrongdoer, the argument for a remedy is even more compelling. For example, Fallon and Meltzer argued that gaps in remediation are tolerable so long as the Court discharges its structural function of providing a check on the political branches.²⁴⁹ When the government insulates itself from judicial review, the checking function is irreparably compromised.²⁵⁰

2. *The Hurdles to Governmental Accountability*

There are two major hurdles to governmental accountability, the view of government as a private party, and the existence of federal sovereign immunity. As to the first, I detailed above the limitations of the notion that the government is equivalent to a private, individual wrongdoer.²⁵¹ Acceptance of this notion makes the need for governmental accountability seem much less urgent because it denies the existence of unique governmental harms requiring unique remedies.

The notion of government as a private party is tenaciously rooted in common law and history.²⁵² Ironically, some of the more successful attempts to ensure governmental accountability have also succeeded in reinforcing the private party notion. Specifically, as discussed above, the fiction of *Ex parte Young* is partly responsible for mischaracterizing government in its effort to ameliorate the effects of sovereign immunity.

247. *Id.* at 651-52 (footnotes omitted); see also Bandes, *supra* note 9, at 120-27.

248. Amar, *supra* note 74, at 1486 (arguing that immunity drives a wedge between right and remedy).

249. See *supra* text accompanying notes 91-95.

250. See *supra* part II.B.3.

251. See *supra* part III; see also Bandes, *supra* note 54, at 271-81 (the Court's decisions reflect the assumption that a case should be defined according to a private rights model of adjudication); Bandes, *supra* note 139, at 2320-23 (treating the government as an individual overlooks the many ways it can cause harm).

252. See Bandes, *supra* note 139, at 2321.

Sovereign immunity is the major hurdle to governmental accountability. The *Bivens* Court proceeded on the assumption that individual liability was the sole possible avenue of recourse because governmental liability was precluded by sovereign immunity. The presumption has always been that, unlike injunctive actions,²⁵³ damage actions against the federal government must be authorized by Congress.²⁵⁴ That is, Congress must explicitly waive sovereign immunity.

Sovereign immunity need not, and should not, pose an obstacle to governmental accountability. Certainly Congress has the power to override federal sovereign immunity, not only as a bar to individual actions, but also as a bar to actions against the federal government itself. But it is not necessary for Congress to do so. The Court has the same power.

The doctrine of federal sovereign immunity is purely a creature of common law, with no statutory or constitutional basis. It originates from a "magnificent irony,"²⁵⁵ a perversion of English common law. As Louis Jaffe and others have chronicled, in England a party could bring a suit (for damages and other forms of relief) against the Crown through a petition of right, a device that allowed suit against the King with his consent, which was freely given.²⁵⁶ In the American translation, because we had no king, the courts concluded that there was no one authorized to consent to suit and thus jettisoned the petition of right.²⁵⁷

This selective borrowing of English common law is only partly to blame. There was ample opportunity for our courts to repudiate or

253. Injunctive relief was always assumed to be available against federal officials. *See supra* text accompanying notes 43-47. In 1976, Congress amended the Administrative Procedure Act, 5 U.S.C. § 701, to withdraw the defense of sovereign immunity as a bar to judicial review of federal administrative action. 5 U.S.C. § 702 (1988). The amendment applies only to equitable relief. *Id.*

254. For example, both the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1988 & Supp. IV 1992), and the Tucker Act, 28 U.S.C. §§ 1346(a), 1491 (1988 & Supp. IV 1992), authorize damage actions against the federal government. *See* Jeremy Travis, Note, *Rethinking Sovereign Immunity after Bivens*, 57 N.Y.U. L. Rev. 597, 642-52 (1982).

255. Jaffe, *supra* note 217, at 2.

256. Engdahl, *supra* note 214, at 1-20; Jaffe, *supra* note 217, at 1-19; Note, *supra* note 254, at 604-05.

The other method of suing the Crown was a suit against an officer of the Crown, which did not require consent. *See* Jaffe, *supra* note 217, at 3. The officer suit, of course, has survived.

257. *See, e.g.,* Jaffe, *supra* note 217, at 2. Another version is contained in Justice Iredell's dissent in *Chisolm*, in which he argued that the analogue to the King's consent in the United States would be the express consent of the legislature. *Id.* at 20.

limit the doctrine. As with Eleventh Amendment jurisprudence, there have been many wrong turns.²⁵⁸ But in the federal context, the wrong turns are even less excusable: There is not even a constitutional amendment to misinterpret,²⁵⁹ only an unreasoned willingness to follow the disastrous course of Eleventh Amendment doctrine.²⁶⁰ Thus, in freeing ourselves from the shackles of monarchy,²⁶¹ we traded a system in which the King was accountable²⁶² for one in which the government was above the law.

The sovereign immunity doctrine is built largely on the belief that assessing monetary damages against the government would be impermissibly intrusive, or even ruinous.²⁶³ One possible response is that

258. See generally Shapiro, *supra* note 89 (arguing that the government's immunity from suit is a fiction).

259. Nor are the federalism grounds invoked to justify expansive interpretations of the Eleventh Amendment, such as protection of state treasuries or a more general reluctance of the federal government to interfere with the sovereign states, applicable in the context of federal sovereign immunity. But see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 94-95 n.379 (1988) (arguing that federal sovereign immunity is more justified than state, because Congress is the sole federal body with the power to appropriate funds, and it has been held improper to mandamus a federal official to draw money from the treasury absent an appropriation). For discussion of the Appropriations Clause objection, see *infra* note 263.

260. In *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which four of five justices found no consent was needed to sue the sovereign, the sole justice who addressed the issue of federal sovereign immunity thought it did not follow from state amenability to suit. See Note, *supra* note 254, at 609. (*Chisolm*, of course, led to the Eleventh Amendment, which regulates suits against state government). Justice Marshall assumed the applicability of the doctrine to the United States in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411 (1821). See Jaffe, *supra* note 217, at 20. The doctrine of federal sovereign immunity was not explicitly invoked as a ground of decision until 1846, in the case of *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846). See Byse, *supra* note 214, at 1484; Mayer G. Freed, *Suits to Remedy Discrimination in Government Employment—The Immunity Problem*, 5 COLUM. HUM. RTS. L. REV. 383, 386 (1973). Yet the reasons for it have never been discussed; it has always been treated as established doctrine. See Amar, *supra* note 74, at 1484.

261. See Jackson, *supra* note 259, at 80: "[T]he common law doctrine was founded on a notion that sovereignty resides in the person of the monarch, whereas the premise of the Constitution was that sovereignty derived from the people and that the government created under the Constitution was subject to that written law."

262. The principle that the King was capable of doing wrong and should be held accountable for it was the premise of the Magna Carta. See Engdahl, *supra* note 214, at 3.

263. See, e.g., *FDIC v. Meyer*, 114 S. Ct. 996 (1994) (holding that direct action against federal agencies would create a potentially enormous financial burden for the federal government). This is in part a separation of powers concern—that it is up to the legislature to determine government expenditures and spending priorities. *Id.*; see Bandes, *supra* note 139, at 2329-30 (taking issue with the premise). In this regard, it should be noted that the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, which provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" ought not bar judicial awards of damages, because a *Bivens* award is an appropriation made under the Constitution, and hence by law. See J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1168.

the distinction between damages and injunctive relief has become an increasingly incoherent way to protect governmental autonomy or treasuries, as cases like *Pennhurst*, which involved a highly intrusive and expensive decree, illustrate.²⁶⁴ Another is that the concern for individual remediation and governmental accountability for constitutional wrongs ought to trump the concern for state autonomy or treasuries.

3. Proposed Solution

Congress could abrogate federal sovereign immunity.²⁶⁵ However, Congress has to date exempted itself from fourteen major pieces of legislation, including the Privacy Act, Title VII, Title IX, the Freedom of Information Act, the Americans with Disabilities Act, the Age Discrimination Act, the Family and Medical Leave Act, the Ethics in Government Act, and the Occupational Safety and Health Act.²⁶⁶ And of course, in passing section 1983, Congress limited it to actions under state, not federal law. Thus, if a judicial solution seems quixotic, a legislative solution is no less so.

For a narrower view of the clause see Kate Stith, *Congress' Power of the Purse*, 97 *YALE L.J.* 1343 (1988) (arguing that the clause grants exclusive control over the federal Treasury to Congress, so long as that control is not used in an unconstitutional manner).

264. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Bandes*, *supra* note 54, at 242-45, 307 n.551.

265. See *Davis*, *supra* note 209, at 457 (arguing that Congress could resolve all problems of sovereign immunity in a single statute).

266. See, e.g., Freedom of Information Act, 5 U.S.C. § 551 (1988); Privacy Act of 1974, 5 U.S.C. § 552(a) (1988); Educational Amendments of 1972 § 902, 20 U.S.C. § 1682 (1988); Ethics in Government Act of 1978 § 3601(a), 28 U.S.C. § 591 (1988); Age Discrimination in Employment Act of 1967 § 11, 29 U.S.C. § 630 (1988); Occupational Safety and Health Act of 1970 § 3, 29 U.S.C. § 652 (1988); Family and Medical Leave Act of 1993 § 101, 29 U.S.C. § 2611(2)(b) (Supp. 1993); Americans with Disabilities Act of 1990 § 101, 42 U.S.C. § 1201 (Supp. 1990); Title VII of the Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000(e) (1988); see also *Make Congress Obey Itself*, N.Y. TIMES, Apr. 12, 1993, § 1, at A10 (discussing Congress exempting itself from legislation). In addition, it has several times failed to pass bills creating a *Bivens*-type remedy against the federal government. For a list see the bills cited in *FDIC v. Meyer*, 114 S. Ct. 996, 1006 n.11 (1994). However, just before this Article went to press, President Clinton signed Public Law 104-1, the Congressional Accountability Act. See Jerry Gray, *The 104th Congress: The Overview; Congress Approves Measure Extending Work Laws to Itself*, N.Y. TIMES, Jan. 18, 1995, at A1; Martin Kasindorf, *Clinton Signs Reform, Hones Speech*, NEWSDAY, Jan. 24, 1995, at A13. The Act will end Congress' exemption from most discrimination and workplace laws and from lawsuits by employees. If this development undercuts my argument by signalling that Congress will soon pass a statute abrogating sovereign immunity, I will be thrilled. Unfortunately, ending sovereign immunity was not part of the "Contract with America."

The salient point is that the reluctance of Congress is not a barrier to abrogation; rather, it makes judicial action all the more necessary. Congress is self-interested. To allow the wrongdoer to stymie judicial review of its wrongful acts is at odds with the central purpose of the separation of powers: to defend against governmental tyranny.

Since the principle of federal sovereign immunity is judge-made, the judiciary can easily reform it. To uphold the supremacy of the Constitution, the courts have a duty to ensure that the effectuation of constitutional guarantees is not thwarted by a common law principle.²⁶⁷ Even if Congress were to pass a statute *forbidding* suits against the federal government, the judicial duty to enforce constitutional rights ought to take precedence.²⁶⁸ The mere inaction of Congress is not a meaningful barrier to the supremacy of constitutional rights.²⁶⁹

In short, the judiciary possesses the authority to override sovereign immunity. This leaves one largely pragmatic issue: If the judiciary creates a cause of action against the federal government, what should it look like? The normative element of this issue is whether the judiciary is competent to create such a cause of action.²⁷⁰

Some commentators suggest that federal governmental liability should be structured according to the *Monell* model.²⁷¹ As I will discuss in more detail in the context of municipal liability,²⁷² there seems to be no good reason to do so, and there are compelling reasons not to. In brief, *Monell* and the line of municipal liability cases following it are meant to interpret section 1983, not the Constitution. Their self-described method is to divine the intent of the 1871 Congress which

267. It is true that Congress has the same duty under the Supremacy Clause. U.S. CONST. art. VI. But at least since *Marbury v. Madison*, the argument has been that when Congress or the Executive flouts this duty, it is up to the Court to keep it within bounds.

268. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1224-33.

269. The argument has been made that courts must defer to the inaction of Congress. Chief Justice Rehnquist, for example, argued that Congress knows how to create damage remedies for constitutional violations and has chosen not to do so with regard to federal officials. *Carlson v. Green*, 446 U.S. 14, 40 (1980) (Rehnquist, J., dissenting). But see Note, *supra* note 254, at 621 (arguing that *Bivens* shows that the Court gave no credence to the argument that section 1983 meant to bar all government liability not mentioned). The crux of my separation of powers argument is that not only the inaction, but the inadequate action of Congress, is insufficient to block proper judicial enforcement of constitutional guarantees. See *supra* part II.

270. This latter question is covered in some detail in Part II.

271. See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); Note, *supra* note 254, at 631.

272. See *infra* part IV.D.

enacted the statute either from the highly ambiguous legislative history,²⁷³ or from the legal status quo in 1871.²⁷⁴ This method has been roundly criticized as an ineffective way of giving meaning to the statute.²⁷⁵ It has resulted in a body of case law that lacks coherence, probably does not even faithfully carry out the wishes of the late nineteenth-century Congress, explicitly ignores policy considerations,²⁷⁶ and does not profess to be the best way to effectuate constitutional guarantees. There seems to be no defensible reason to replicate this method when section 1983 is not at issue.

I have sought to establish that just as the Court inferred a cause of action and a remedy against individual officers, it can infer a cause of action and a remedy against the federal government itself. Other than judge-made sovereign immunity, there is no bar to doing so. Numerous questions of interpretation will arise. Among them are the following: When is the government the cause of a violation? How specifically must the allegation be pleaded? Should there be state of mind requirements apart from those in the constitutional provisions themselves? Should the government be liable on a *respondeat superior* theory? Can it claim qualified immunity? How should damages be measured? Should both compensatory and punitive damages be available? Should complex structural injunctive relief be available? Is fee shifting a possibility?

To the extent the massive body of section 1983 precedent is helpful in answering these questions, there is no reason not to learn from it—from its mistakes and its successes. But as to each of the questions posed above, the Court has attempted, however torturously, to interpret the statute.²⁷⁷ In the federal liability context, it can work with a

273. *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) (“[T]he battle of the string citations can have no wimmer.”); see also *Monell*, 436 U.S. at 665-89; *Monroe v. Pape*, 365 U.S. 167, 173-87 (1961) (conflicting readings of legislative histories); Cass Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396-411 (1982) (legislative history is subject to dispute among courts and commentators).

274. For example, because section 1983 provides for no immunities, the Court has inferred an intent to adopt those which existed at the time of its passage. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Tenney v. Brandhove*, 341 U.S. 367 (1951). But see David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. REV. 497 (1992) (criticizing the Court's inference that Congress intended to adopt the immunities in section 1983 that existed at the time of its passage); Matasar, *supra* note 67 (same).

275. See, e.g., Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755 (1992).

276. *Monell*, 436 U.S. at 694 n.58; *Monroe*, 365 U.S. at 191.

277. In the case of attorney's fees, the relevant statute is The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (1988).

clean slate. For example, the courts could concentrate on the task of determining when the governmental entity should be held accountable without reference to the practice in 1871 or the meaning of "person" under the Dictionary Act or the lessons to be drawn from the failure to pass the Sherman Amendment.²⁷⁸ It need not try to interpret the meaning of "subject or cause to be subjected" or "custom . . . or usage."²⁷⁹

What, then, would guide the courts? The answer is the usual tools of constitutional interpretation. Suppose, for example, that in *Carlson v. Green*²⁸⁰ the mother of Joseph Jones, who claimed her son died in prison because he received inadequate medical care, had the option of suing the Federal Bureau of Prisons in addition to its director. The district court would need to determine when it should hold the Bureau itself accountable for a deprivation.²⁸¹ It might hold, for example, that the Bureau caused the violation if it had knowledge or constructive knowledge of its agents' wrongdoing and had either directly ordered that wrongdoing, condoned it, or failed to exercise its duty to prevent or contain it.²⁸² It might even decide that the Bureau caused the deprivation of constitutional rights simply by employing a wrongdoer under a theory of *respondeat superior*.²⁸³

Courts routinely fashion rules of causation without statutory guidance. Certainly common law courts do—*Palsgraf*²⁸⁴ is a famous example of judicial definition of causation based on the distribution of social costs. Thus, any question of the competence of courts to fashion such rules is easily answered—like measuring damages, crafting causation rules is an ordinary judicial function. Courts construing statutes may also need to fashion rules of causation. Faced with the minimalist language of section 1983, the Court fashioned such a rule for causation by municipalities, arguably out of whole cloth.²⁸⁵

278. Presumably the inscrutable lessons to be derived from the failure of the Sherman Amendment are of little relevance to federal governmental liability in any case.

279. 42 U.S.C. § 1983 (1988).

280. 446 U.S. 14 (1980).

281. It would start, of course, with the Eighth Amendment deliberate indifference standard. See, e.g., *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993); *Estelle v. Gamble*, 429 U.S. 97 (1976).

282. See *Bandes*, *supra* note 9, at 113.

283. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting) (discussing the defense of *respondeat superior*).

284. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 341-45 (1928) (discussing causation as means of distributing social costs).

285. In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the Court had to determine when a municipality "subjects or causes [the plaintiffs] to be subjected" to the deprivation

More to the point, courts in constitutional cases also routinely fashion causation rules. I will highlight a few of the innumerable examples. In the Article III standing context, the Court has required that plaintiffs show that the defendant caused their injuries and has defined causation as a "substantial probability" that the defendant's actions caused the deprivation.²⁸⁶ In the First Amendment context, the clear and present danger test rests on judicial determination of whether speech is likely to bring about "the substantive evils that Congress has a right to prevent."²⁸⁷ In the Fourth Amendment context, the Court has crafted the fruit of the poisonous tree doctrine, under which illegally obtained evidence will be admissible if an intervening act breaks the causal chain of illegality.²⁸⁸ In the Sixth Amendment context, counsel is ineffective if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁸⁹

None of these formulations appear in the text of the Constitution. All were adopted from among several alternative formulations.²⁹⁰ All have required substantial continuing effort from the courts to apply their causation analyses. Although many have taken issue with the relative success of particular formulations, the courts' power to craft such rules is well entrenched.²⁹¹

Thus, in *Carlson v. Green* the district court would have both the power and the competence to determine whether the Bureau had caused the death of Joseph Jones. It could use the common law tools at its disposal. It would look to prior Eighth Amendment precedent and evidence of the Framers' intent. It could look to such policies as

of constitutional rights. 42 U.S.C. § 1983 (1988). It determined that the plaintiff must prove that the deprivation was the result of a policy, despite the fact that neither the word itself nor the concept is contained in the statute or the legislative history. See Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 541 (1989); Lewis & Blumoff, *supra* note 275, at 787-88.

286. *Warth v. Seldin*, 422 U.S. 490, 504 (1975); Bandes, *supra* note 54, at 269-70.

287. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

288. *Wong Sun v. United States*, 371 U.S. 471 (1963).

289. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

290. See, e.g., *Strickland*, 466 U.S. at 706-19 (Marshall, J., dissenting); *Warth*, 422 U.S. at 518-30 (Douglas, J., dissenting; Brennan, J., dissenting); *Wong Sun*, 371 U.S. at 498-504 (Clark, J., dissenting).

291. Of course certain formulations have been attacked as exceeding the judicial power, such as the Miranda rules, *Miranda v. Arizona*, 384 U.S. 436 (1966); the exclusionary rule, *Mapp v. Ohio*, 367 U.S. 643 (1961); and the *Roe v. Wade* trimester rules, *Roe v. Wade*, 410 U.S. 113 (1973). If these formulations differ at all from the examples above, it is only by slight degree, and perhaps by their unpopular content. See also *supra* text accompanying notes 184-96 (the discussion of constitutional common law).

deterrence, compensation, avoidance of undue chilling of official discretion, and accountability. It could look to what has and has not worked in the section 1983 context. Likewise, it could determine the appropriate remedies to award if the government was found liable. Ultimately, it would be determining how best to effectuate the Eighth Amendment guarantee.

In sum, the development of federal governmental liability affords a rare opportunity to correct old mistakes and start anew. More important, it is necessary to give full effect to constitutional guarantees which are, under current law, too easily transgressed by the federal government.

C. SUING THE STATE AND STATE OFFICIALS

State sovereign immunity immunizes state government from accountability for its constitutional violations, no matter how widespread or egregious, unless the victim can fit within one of the doctrines designed to circumvent its broad reach.²⁹² As with federal sovereign immunity, state sovereign immunity bars recovery for damages in the absence of legislative consent.²⁹³ It thus poses a serious challenge to the ideal of the Constitution as positive law.

If the guarantees of the Bill of Rights are not merely precatory but have remedial force, the notion that the Eleventh Amendment stands as a barrier to their enforcement is highly problematic. Even assuming the principle of sovereignty is constitutionally based, the current jurisprudence that permits it to trump the constitutional principle of supremacy is likewise problematic.²⁹⁴ Whether sovereign immunity is constitutionally or prudentially based, the Fourteenth Amendment ought to override it, without the need for congressional authorization.

1. *Enforcing the Fourteenth Amendment Against the States*

The argument for this proposition differs only partially from that for federal accountability. Federal sovereign immunity allows the

292. The two major means of abrogation are the officer suit for injunctive relief, *Ex parte Young*, 209 U.S. 123 (1908), and congressional abrogation, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

293. In addition to congressional abrogation, the state itself may waive sovereign immunity. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

294. If the principle of sovereignty is constitutionally based, the ability of Congress to abrogate it is bewildering. See CHEMERINSKY, *supra* note 41, § 7.3, at 334.

wrongdoing government to immunize itself—a classic separation of powers problem. That is only part of the problem here. Under current doctrine, if the wrongdoing state will not consent to suit, the federal government may consent for it—but only through its legislative branch. Although not strictly a separation of powers problem, this state of affairs offends the same principle. It permits the accretion of governmental power and the immunization of governmental overreaching at the expense of the rule of law.

The Fourteenth Amendment should, by its own force, override the Eleventh Amendment to the extent the two are inconsistent. The Fourteenth Amendment expressly forbids states to deprive persons of their fundamental rights. The Eleventh Amendment, which precedes it, permits states to do so with impunity (at least as currently interpreted). *Ex parte Young* attempts to ameliorate this affront to constitutional supremacy but succeeds only in small part.²⁹⁵ What is needed is a recognition that Fourteenth Amendment guarantees trump this antecedent barrier to their enforcement.

2. *Why the Fourteenth Amendment Overrides the Eleventh Where Inconsistent*

a. *The primacy of the Fourteenth Amendment:* Current Eleventh Amendment jurisprudence has created, unnecessarily, a clash of absolutes. Only under the currently accepted theory that the Amendment itself acts as a jurisdictional bar to in-state suits need the Eleventh clash with the Fourteenth Amendment.²⁹⁶ It is understandable that the clash did not occur until the early twentieth century in *Ex parte Young*. The protection of federal constitutional rights against

295. See *id.* § 7.5.

296. The diversity theory would bar only suits grounded in diversity, not federal question suits. See, e.g., *Gibbons*, *supra* note 66. The common law bar theory would pose only a common law barrier to in-state suits, subject to judicial override. See *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964), *overruled in part* by *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987). Tribe and Nowak's congressional abrogation theory would pose a problem for judicial override because it argues that the Eleventh Amendment limits the exercise of judicial but not congressional power. See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1441 (1975); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-95 (1976). Tribe and Nowak's theories have been widely criticized as speculative and unsupported by history. See REDISH, *supra* note 38, at 186; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1258-61 (1978).

state incursion was not yet a paramount concern. There was no general federal question jurisdiction until 1875, with wholesale incorporation of the Bill of Rights nearly a century away. Thus there were few federal constitutional guarantees for states to violate, and protection of federal question jurisdiction was, until the late nineteenth century, largely academic.

In addition, the Eleventh Amendment was not considered the formidable obstacle it is today. Some argue that the diversity theory reflected the common understanding of the Amendment until the late nineteenth century.²⁹⁷ Others argue that the real-party-in-interest rule kept the Amendment a mere technical pleading device until after Reconstruction, when concern about the collection of civil war debts propelled its transformation into a jurisdictional bar.²⁹⁸

It was not until the Fourteenth Amendment confronted the jurisdictional bar theory that the problem of reconciliation arose. Thus positioned, a clash of absolutes was unavoidable. It was nothing less than the clash of immunity and accountability. *Ex parte Young*, recognizing that constitutional supremacy was at stake, tried to find the middle ground, but there is no middle ground.

Bruce Ackerman's theory of intergenerational synthesis provides an insightful way to make sense of *Ex parte Young*.²⁹⁹ The Eleventh Amendment was a product of the founding period, passed in the aftermath of the Revolution as part of the attempt to check the power of the federal government.³⁰⁰ The Fourteenth Amendment, like the other Civil War Amendments, embodied the principles of Reconstruction, which meant to limit the powers of the states. *Young* seeks to find a balance between these principles, but, to the extent the Eleventh Amendment limits federal power by granting states the power to flout the new rights of equal protection and due process, the only possible solution is for the Eleventh Amendment to give way.

b. *The judicial power to effectuate the Fourteenth Amendment:* Many commentators, and even Chief Justice Rehnquist, might be

297. See *Gibbons*, *supra* note 66, at 1968. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court construed the Eleventh Amendment to bar in-state suits.

298. JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 58 (1987).

299. BRUCE ACKERMAN, *WE THE PEOPLE* 105-30 (1991). I thank Bruce Ackerman for suggesting this to me.

300. See Paul R. Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C. L. REV. 548, 609 (1972).

willing to concede all this, but still maintain that congressional authorization is the threshold condition for overriding the Eleventh Amendment. To the extent this argument is based on pragmatic concerns about the competence of Congress, the increased likelihood that congressional remedies will be enforceable, or the superior flexibility of legislative remedies, it has nothing to do with the *authority* of the Court to override sovereign immunity. When Congress is not willing or able to enforce constitutional rights, the question is whether the Court may step in to remedy the breach.

The argument against judicial authority is that without Section 5, the Fourteenth Amendment is merely precatory—that the purpose of Section 5 was to prescribe the exclusive means of enforcing the Amendment's guarantees. This position has only one major proponent, Raoul Berger,³⁰¹ and both his conclusion³⁰² and his methodology³⁰³ have been attacked as thoroughly as seems possible. Most historians view the Fourteenth Amendment as enforceable by the courts as well as Congress.³⁰⁴ One of their most persuasive arguments is that the legislative history reflects the desire of the enacting Congress to insulate the Amendment from sabotage by subsequent legislatures. Thus it ensured that both judicial and legislative enforcement were available.³⁰⁵

301. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 221-29 (1977).

302. See, e.g., Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 689 n.193 (1979).

303. ACKERMAN, *supra* note 299, at 90-92 & n.21. Ackerman refers to Berger's "bad history" and advises that his use of sources should be treated with extreme caution. See also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 128 (1986) (claiming that Berger's inference is based on language that was in a precursor of the Fourteenth Amendment, not in the final version, and in fact that the final version was specifically changed to ensure that it would be enforceable without congressional action).

304. See, e.g., CURTIS, *supra* note 303, at 128-29; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 122 (1988); JACOBUS TENBROEK, *EQUAL UNDER LAW* 225 (1951); Soifer, *supra* note 302, at 689.

This reading does not render Section 5 superfluous. Section 5 permits Congress to act to secure the guarantees of the Fourteenth Amendment without an explicit judicial holding that there has been unconstitutional state action. *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966). It may also grant to Congress greater leeway in crafting remedies than is available to the courts. See TRIBE, *supra* note 123, at 334-49. Tribe concludes that congressional power to define the content of Fourteenth Amendment rights need not violate the principles of *Marbury* and judicial review. Congress need not arrive at the same interpretation of the Fourteenth Amendment that the Court does, so long as its own interpretation is consistent with the Bill of Rights and other limits on federal authority. *Id.* at 349-50.

305. See, e.g., ROBERT JENNINGS HARRIS, *THE QUEST FOR EQUALITY* 34-35 (1960); TENBROEK, *supra* note 304, at 225.

D. SUING MUNICIPALITIES AND MUNICIPAL OFFICIALS

The argument for *Bivens*-type liability against municipalities and municipal officials under the Fourteenth Amendment differs from arguments for state and federal suit in two important respects. The argument for suit against municipalities is made easier because sovereign immunity has been held inapplicable to municipalities, so that amenability to suit need not be addressed.³⁰⁶ However, the existence of 42 U.S.C. § 1983 raises a formidable hurdle: the question of whether comprehensive federal legislation should preempt judicial efforts in the same area.

I will first demonstrate that the courts have the authority to infer suits against municipalities directly under the Fourteenth Amendment without Section 5 authorization. I will then address whether the existence of section 1983 should preclude or limit such suits. Finally, I will make specific proposals for the contours of such suits.

1. *Judicial Power to Authorize Suits Against Municipalities*

The power to infer suits directly under the Fourteenth Amendment stems from the same sources as the power to do so under the Fourth Amendment, as in *Bivens* itself, or the remainder of the Bill of Rights. That is, it derives from the Article III role of constitutional enforcement in the cases before the court, and from the grant of jurisdiction contained in 28 U.S.C. § 1331. The Fourteenth Amendment context raises only one additional issue: whether the existence of Section 5 precludes judicial enforcement. As indicated above, this question has been overwhelmingly answered in the negative.³⁰⁷

The longstanding use of the power also confirms its existence. As in the context of suits against federal officials, suits against municipal officials for injunctive relief have long been taken for granted.³⁰⁸

306. *Workman v. New York*, 179 U.S. 552 (1900) (Eleventh Amendment does not extend to municipalities); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (same as to counties).

307. See *supra* part IV.C.2.b.

308. See, e.g., *Hays v. Port of Seattle*, 251 U.S. 233 (1920) (injunction to enforce Contract and Due Process Clauses); *City of Mitchell v. Dakota Cent. Tel. Co.*, 246 U.S. 396 (1918) (same); *Chicago Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226 (1897) (injunction to enforce Due Process and Takings Clauses); see also *Collins*, *supra* note 167, at 1509 & n.88.

Many of these cases arose in the long period of section 1983's dormancy between the conferral of general federal question jurisdiction³⁰⁹ and the decision in *Monroe v. Pape*.³¹⁰ *Ex parte Young* is a famous example of such a suit. *Brown v. Board of Education*,³¹¹ a watershed example of a much more intrusive sort of injunctive relief, was also a suit that arose directly under the Fourteenth Amendment.³¹²

It is also known that certain types of damage suits were traditionally brought directly under the Fourteenth Amendment, particularly suits for deprivation of the right to vote.³¹³ According to Michael Collins, damage suits were a good deal more prevalent than is now assumed. He argues that "the federal question statute was once the preferred vehicle for enforcing constitutional limits on state and local governmental action"³¹⁴ and that courts routinely awarded not only injunctive relief, but damages for a wide range of constitutional violations. Direct suits were the norm throughout the dormant period of section 1983; but once section 1983 became the dominant cause of action, the tradition of awarding damages was largely forgotten.³¹⁵

This historical perspective will become relevant again in discussing whether section 1983 precludes direct suits. For now, its lesson is

309. I do not mean to suggest that the lack of general federal question jurisdiction was necessarily a major factor in section 1983's dormancy. Section 1343, providing jurisdiction for civil rights suits, was adopted concurrent with section 1983.

310. During the period between the decisions in *Monroe* and *Monell*, the argument was unsuccessfully made that municipalities should be considered persons in injunctive suits, though not in damage suits. See *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) (rejecting the above argument); *Moor v. County of Alameda*, 411 U.S. 693, 723-25 (1973) (Douglas, J., dissenting) (making the above argument). In the aftermath of *Will v. Michigan State Police*, 491 U.S. 58 (1989) (holding that state officials cannot be sued in state court for damages) and *Hafer v. Melo*, 112 S. Ct. 358 (1991) (holding that state officials may be sued in state court for injunctive relief), this very state of affairs now exists on the state level. See William Burnham & Michael C. Fayz, *The State as a "Non-Person" Under Section 1983: Some Comments on Will and Suggestions for the Future*, 70 OR. L. REV. 1, 30-33 (1991) (criticizing the holding in *Will*); Lewis & Blumoff, *supra* note 275, at 827 nn.304-05.

311. 347 U.S. 483 (1954).

312. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 950 n.146 (1976).

313. See, e.g., *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902); *Wiley v. Sinkler*, 179 U.S. 58, 64-65 (1900); *Brickhouse v. Brooks*, 165 F. 534, 543 (C.C.E.D. Va. 1908).

314. Collins, *supra* note 167, at 1494.

315. *Id.* at 1517-26. According to Collins, the prevailing notion in 1875 was that the federal courts would act as general common law and equity courts. The assault on the idea of general federal common law was one of the factors contributing to the demise of judicially created damage actions. *Id.* at 1527-32; see also *supra* part III.A.

that suits directly under the Fourteenth Amendment have a long history—for nearly a century they were taken for granted.

2. *Hurdles to Suit Directly Under the Fourteenth Amendment*

The primary hurdle to direct suits is the existence of section 1983, a comprehensive federal statute passed to enforce the Fourteenth Amendment pursuant to Congress' Section 5 power.³¹⁶ It might be argued that the statute's very existence precludes judicial enforcement. There is little doubt that the current Court would accept such an argument in light of its decision in *Jett v. Dallas Independent School District*.³¹⁷ In *Jett*, the Court held that it would not interpret 42 U.S.C. § 1981 to permit *respondeat superior* liability because section 1983, which does not permit such liability, constitutes the exclusive federal remedy for violation of the rights guaranteed in section 1981.³¹⁸ The Court claimed that it based its decision on the balance drawn by the Reconstruction Congress between local autonomy and vindication of federal rights. It noted that the unanimous rejection by the courts of appeal of *Bivens*-type liability against municipalities on a *respondeat superior* theory also reflects this balance.³¹⁹ Thus, it assumed that if Congress meant section 1983 to preclude damage suits under section 1981, it also meant to preclude damage suits under the Constitution itself.

In short, current case law is not favorable for direct suits against municipal defendants.³²⁰ However, there are several problems with the Court's analysis and particularly with its assumption that the analysis is applicable to suits directly under the Constitution.

316. It seems a classic no-win situation. A hurdle to direct suits against federal officials is the fact that section 1983 does *not* authorize such suits. *Carlson v. Green*, 446 U.S. 14, 40 (1980) (Rehnquist, J., dissenting); *see also* *United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (rejecting a claim for a *Bivens* remedy based on exclusion of the same type of remedy from the FTCA).

317. 491 U.S. 701 (1989).

318. *Id.* at 733; *see also* Meltzer, *supra* note 79, at 30 n.131 (discussing the Court's holding in *Jett*).

319. *Jett*, 491 U.S. at 734. Note that this unanimity occurred only post-*Monell*. Pre-*Monell*, a majority of circuits had upheld *Bivens*-type liability against municipalities. *See* Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies and Realism*, 90 MICH. L. REV. 1062, 1104-05 & n.224 (1992).

320. *See* PAUL M. BATOR ET AL., HART & WECHSLER'S, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 185-86 (3d ed. Supp. 1993) (suggesting that it follows a fortiori from the Court's unwillingness to recognize a statutorily based remedy in *Jett* that it would not recognize a judicially implied damages remedy in a pure *respondeat superior* case).

The core assumption of the *Jett* opinion, that section 1983 was intended to be the exclusive avenue for remediation of constitutional claims against municipal officials, is highly suspect. Despite the Court's certainty on the issue, there is little evidence of such intent. The contemporaneous proliferation of supplementary statutory causes of action suggests that the enacting Congress conceived of section 1983 as part of a larger arsenal of civil rights statutes.³²¹ Neither the statute nor the legislative history contains a statement, explicit or otherwise, of intent to supplant existing remedies.³²² Rather, the legislative history is replete with arguments that the statute was necessary because of the inadequacies of existing remedies.³²³ Indeed, Justice Douglas' famous summary of the purposes of the legislation emphasizes that these inadequacies made it necessary.³²⁴

The Court's rather breezy comment that preclusion of *Bivens*-type suits rests on the balance struck by the Reconstruction Congress raises a host of problems. The most serious problem, as I discuss below, is that construction of a statute cannot resolve the question of how the Court ought to enforce the Constitution. But even assuming that deference to congressional action is justifiable, the argument for it is particularly incoherent in the section 1983 context.

The *Bivens* Court would phrase the deference question in terms of whether Congress intended to create a comprehensive remedy, to which courts should defer because of Congress' superior abilities at weighing competing policies and creating remedial schemes.³²⁵ There are several problems with this question. First, the section 1983 remedy looked substantially different in 1871 than it does now. Particularly pre-*Monroe*, it was anything but comprehensive in its reach. As mentioned, during this period direct suits under the Fourteenth

321. 42 U.S.C. §§ 1981-1982, 1985 (1970); see also Reed Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U. L. REV. 770, 784 (1975) (noting the absence of legislative history as to whether Congress intended an exclusive remedy).

322. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961). On the contrary, the existence of state remedies, despite the legislative intent to create a supplementary remedy, is often used as an argument to limit the reach of the federal statute. See, e.g., *Parratt v. Taylor*, 451 U.S. 527 (1981); *Paul v. Davis*, 424 U.S. 693 (1976); see also *Jett*, 491 U.S. at 746 (Brennan, J., dissenting) (holding that repeal by implication (of section 1981 damage remedy by section 1983) is disfavored; especially because section 1983 provides that nothing therein shall be construed to supersede or repeal any former law except to the extent it is repugnant).

323. S. REP. NO. 1, 42d Cong., 1st Sess. (1871).

324. *Monroe*, 365 U.S. at 180.

325. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). There is a fine line between asking whether Congress intended its remedy to be exclusive and whether it created a comprehensive remedy which deliberately excluded the type of judicial action sought.

Amendment were well accepted and section 1983 was virtually forgotten.³²⁶ In the time between *Monroe* and *Monell*, the majority of federal circuit courts upheld suits directly under the Fourteenth Amendment designed to impose municipal liability.³²⁷ Although the statute was in much greater use during this period, it is an interesting question whether it was a comprehensive remedy when it did not reach municipalities. Precedent suggests it was not considered as such.³²⁸ As this brief history suggests, comprehensiveness may be an evolving concept. Perhaps today's version of section 1983, with its parsimoniously construed "policy" requirement, lack of *respondeat superior* liability, and readily available immunity for individual defendants, ought not be considered comprehensive either.³²⁹ In short, to judge the comprehensiveness of the statute based on its origins is problematic. It makes little sense to defer to the abilities of the 1871 Congress to weigh competing policy considerations, hold fact-finding hearings, and craft remedies. It is not persuasive that a balance struck in an 1871 statute should be entitled to deference in interpreting the Constitution 120 years later.³³⁰

326. See *supra* part III.A.

327. Hundt, *supra* note 321, at 775; Mazzuchi, *supra* note 319, at 1104-05 & n.224.

328. See, e.g., *Hostrop v. Board of Junior College*, 523 F.2d 569 (7th Cir. 1975); *Redding v. Medica*, 402 F. Supp. 1260 (W.D. Pa. 1975); *Williams v. Brown*, 398 F. Supp. 155 (N.D. Ill. 1975); *Wright v. Houston Indep. School Dist.*, 393 F. Supp. 1149 (S.D. Tex. 1975); *Waltenberg v. New York City Dep't of Correction*, 376 F. Supp. 41 (S.D.N.Y. 1974); *Dahl v. Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973). But see *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972); *Payne v. Mertens*, 343 F. Supp. 1355 (N.D. Cal. 1972).

Indeed, as Justice Brennan points out in *Jett*, under the majority's theory section 1983 would not have precluded a section 1981 damage action against a municipality during the period between *Monroe* and *Monell*. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 750 (1989) (Brennan, J., dissenting).

329. See, e.g., Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812-14 (1994) (speaking of the shocking remedial gap caused by a lack of strict entity liability coupled with wide zones of individual immunity).

330. Note, *supra* note 312, at 949; see *Moor v. County of Alameda*, 411 U.S. 693, 709 (1973) ("[I]t is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather we must construe the statute in light of the impressions under which Congress did in fact act.").

Alternatively, it might be argued that the factors counseling hesitation analysis should be based on the existence of section 1983 in its current incarnation. This argument assumes that, in the absence of congressional amendment, the statute represents the will of the current Congress. This is a stronger argument. Despite its many gaps, section 1983 is currently a more comprehensive statute than it was pre-*Monroe* and pre-*Monell*. The premise of the argument is somewhat torturous—it requires accepting that the courts should defer to the greater expertise of Congress, as reflected in thirty years of detailed, complex, judicially created common law. Yet, given the current Court's distaste for *Bivens* and enshrinement of hands-off federalism, it is an argument that could prevail.

3. *Proposal for Suits Directly Under the Fourteenth Amendment*

Ultimately, there is no escaping the problem, which is the deference model itself. Although initial deference to Congress is appropriate, the idea of ultimate deference on constitutional issues is not. When the limitations of a statute thwart enforcement of the Constitution, the Supremacy Clause is turned on its head. Although there may be flexibility regarding the means of vindicating rights, the Court must ensure that the rights themselves are vindicated in each case before it.

To the extent plaintiffs with meritorious Fourteenth Amendment claims are left remediless under section 1983, they ought to be able to sue directly under the Constitution. Although section 1983 was passed to enforce the Fourteenth Amendment, its coverage should not be considered contiguous with the Fourteenth Amendment's. Certainly there have been restrictive interpretations of the Fourteenth Amendment itself in section 1983 cases, like *Paul v. Davis*,³³¹ *Parratt v. Taylor*³³² and its progeny, and *DeShaney v. Winnebago County Department of Social Services*,³³³ among others, and their damage will be hard to undo. But most of the damage has been done in the name of statutory interpretation, including the creation of the "policy" requirement³³⁴ and its increasingly onerous standards;³³⁵ the rejection of *respondeat superior*,³³⁶ the wholesale creation of individual immunities and the heightened threshold for overcoming them;³³⁷ and the refusal to accord monetary value to the denial of constitutional rights.³³⁸

331. 424 U.S. 693 (1976); see Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978).

332. 451 U.S. 527 (1981). See generally Bades, *supra* note 9 (discussing *Monell*, *Parratt*, *Daniels*, and *Davidson*).

333. 489 U.S. 189 (1989). See generally Bades, *supra* note 139 (discussing *DeShaney* and suggesting an alternative approach).

334. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978); *Lewis & Blumoff*, *supra* note 275, at 787-800.

335. See, e.g., *City of Canton v. Harris*, 489 U.S. 378 (1989) (holding that municipal liability for failure to train must rest on a showing of deliberate indifference); *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988) (enumerating a narrow and mechanistic definition of policymaking officials); *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985) (precluding municipal liability for a single act of low-ranking official).

336. *Monell*, 436 U.S. at 691-95; see also *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 725-29 (1988) (rejecting *respondeat superior* in the section 1981 context based on the same result in the section 1983 context).

337. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Pierson v. Ray*, 386 U.S. 547 (1967).

338. *Memphis Community Sch. Dist. v. Stachura*, 466 U.S. 299, 308 (1986); *Carey v. Piphus*, 435 U.S. 247, 264-66 (1978).

These restrictive decisions are based either on various methods of attempting to divine the intent of the enacting Congress or on common law gap filling.³³⁹ They do not purport to interpret the Constitution. They leave numerous plaintiffs with meritorious, even compelling claims, without an effective remedy. The fact that a comprehensive statute exists which provides a remedy for many *other* plaintiffs is irrelevant to these plaintiffs and should be irrelevant to the court hearing their claims, just as it was in *Bivens* itself.

The final question is whether the courts are competent to craft the cause of action. The argument essentially tracks the one for judicial causes of action against the federal government. The argument can be made even more emphatically in the Fourteenth Amendment context. The Court has demonstrated that it is quite capable of construing the spare language of the Fourteenth Amendment. Although I and others have criticized many of its results, the point is that the Court has freely derived from constitutional language, legislative history, and other tools at its disposal a wide variety of complex rules to govern Fourteenth Amendment claims. These include rules about state of mind,³⁴⁰ adequacy of remedies,³⁴¹ causation,³⁴² and numerous other issues. Moreover, it has long done so in direct suits, without benefit of statutory guidance.

If, for example, the Court wished to consider whether *respondeat superior* liability should lie in a direct suit, instead of drawing dubious and irrelevant inferences from the 1871 failure of the Sherman Amendment in Congress, it could look to the legislative history of the Amendment, the rich store of Fourteenth Amendment precedent, and its own ability to fashion rules to flesh out spare constitutional provisions, to make a determination. The Court might conclude that because the Fourteenth Amendment was intended to stem the abuse of governmental power, it ought to protect all those whose deprivations were caused by the municipality. It might define "caused by" to include directly perpetrating the deprivation, condoning it, or failing to prevent it where it had notice that it would occur. Alternatively, it might determine that the abuse of power would be better stemmed

339. See, e.g., Achtenberg, *supra* note 274; Gerhardt, *supra* note 285.

340. See Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Washington v. Davis, 426 U.S. 229 (1976).

341. Zinermon v. Burch, 494 U.S. 113 (1990); Parratt v. Taylor, 451 U.S. 527 (1981).

342. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989); Martinez v. California, 444 U.S. 277 (1980).

and its victims more effectively compensated by including deprivations caused by the municipality's employment of the wrongdoer—*respondeat superior*. There are compelling arguments for doing so,³⁴³ and to take them into account is well within the competence and the power of the courts.

If the Court in a direct suit should not defer to the intent of Congress to exclude *respondeat superior* from section 1983, when is it appropriate to defer to Congress? The crucial distinction is between deference that leaves meritorious plaintiffs without a remedy—or a cause of action—and deference that gives Congress leeway to remedy deprivations in one of several acceptable ways. Questions of causation concern the availability and scope of constitutional protection, and thus the Court must have the last word on their resolution. Congress might appropriately have more leeway in determining the nature of remedies—for example whether punitive damages should be available, how courts should measure compensatory damages, when courts should award complex structural injunctive relief and how courts might administer it. The key proviso is that, ultimately, the Court must have the power to determine whether the relief awarded is sufficient to vindicate the constitutional rights at stake.

343. See *supra* text accompanying notes 280-83.

