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Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?

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INTRODUCTION

Under the doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,1 persons whose constitutional rights have been violated by a federal official may sue that official for damages in a federal court even though no statute directly authorizes such suits. Nine years after Bivens was decided, then-Justice Rehnquist urged the Court to overrule it, denouncing it as "a decision 'by a closely divided court, unsupported by the confirmation of time.'"2 As an initial matter Justice Rehnquist's attack seems surprising, even inaccurate. Six Justices voted to allow the damages remedy in Bivens itself.3 In the next two cases raising the issue the Court was, except for Justice Rehnquist's single dissent, essentially unanimous in upholding the validity of Bivens actions.4 Furthermore, Bivens makes sense. It creates symmetry within the legal system by placing plaintiffs who claim damages from constitutional violations by federal officials on the same footing as plaintiffs with similar claims against state and local officials. The

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4. In Davis v. Passman, 442 U.S. 228 (1979), the issue was whether a discharged congressional employee could bring a Bivens action based on the fifth amendment. In an opinion by Justice Brennan, five members of the Court held that she could. Justice Powell's dissent, joined by Chief Justice Burger and Justice Rehnquist, accepted the legitimacy of Bivens. Id. at 252. He relied primarily on considerations of comity towards Congress in denying relief to the particular plaintiff. Chief Justice Burger's dissenting opinion also relied on this consideration, see id. at 249 (Burger, C.J., dissenting), while Justice Stewart relied on the speech or debate clause of the Constitution. See id. at 251 (Stewart, J., dissenting). Carlson involved a Bivens claim under the eighth amendment by the estate of a deceased federal prisoner. Justice Brennan wrote for a majority of five in an opinion allowing the action. Justices Powell and Stewart concurred separately. 446 U.S. at 25. Chief Justice Burger dissented on the ground that the Federal Tort Claims Act precluded the remedy. Id. at 30. However, he accepted, somewhat grudgingly, the validity of Bivens. Id. Only Justice Rehnquist challenged the basic validity of Bivens. Id. at 31.
latter may sue under section 1983 of Title 42. While there is no similar statutory authorization for *Bivens* actions—indeed, this was the nub of the controversy in that case—granting a *Bivens* remedy places the federal courts, which already have jurisdiction, in the not unfamiliar position of enforcing the Constitution and of doing so through a traditional form of legal action.

Today, however, Justice Rehnquist's 1980 critique has the ring of prophecy. Four times in the last six years the Court has held *Bivens* actions unavailable and has intimated that a similar result should be reached in remanding a fifth case to a circuit court. A key element considered in the recent cases has been congressional action providing some form of relief for the conduct complained of. Although the Court purports to follow *Bivens*, the themes which predominate are those which the dissenters in that case advanced: that when it comes to determining how best to remedy constitutional violations by federal officials, Congress' institutional capacity is superior to that of the judiciary and that, indeed, the entire issue is essentially legislative in nature.

The Court may insist that *Bivens* is alive and well, but one has to wonder, and worry. The criticism advanced in this article is not so much with the results—although the outcome in *United States v. Stanley*, for instance, is a little hard to take—as with how the Court gets there. One may agree with the Court's reservations about judicial lawmaking, its concern for the doctrine of separation of powers and its general views about the superior

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5. 42 U.S.C. § 1983 provides as follows:
   
   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. . . .

6. See *Bivens*, 403 U.S. at 406 (Harlan, J., concurring), 427 (Black, J., dissenting).
7. See id. at 407-09 (Harlan, J., concurring).
9. In Cooper v. Kotarski, 108 S. Ct. 2861 (1988), the circuit court held a *Bivens* remedy available to a federal employee in a probationary supervisor position. The Supreme Court vacated and remanded this decision for reconsideration in light of *Chilicky*.
10. E.g., *Bush*, 462 U.S. at 381-88 (describing and emphasizing remedies available to federal civil service employees). In *Stanley*, however, the Court suggested that the Constitution's conferral upon Congress of plenary authority over the military is enough by itself to preclude *Bivens* actions. 107 S. Ct. at 3063. The Court also mentioned, however, "Congress' activity in the field." *Id.* (quoting *Chappell*, 462 U.S. at 304). The Court suggested that although Congress had not created any relevant remedy for the injuries suffered, this was irrelevant to the analysis. *Stanley*, 107 S. Ct. at 3063.
11. See infra text accompanying notes 80-108.
13. *Id.* In *Stanley*, an ex-serviceman who had unknowingly "volunteered" for experiments involving the effects of L.S.D. was held to be without a *Bivens* remedy against either military or civilian officials. On the facts of the case, no other remedy was available either. *Id.*
in institutional competence of Congress. These positions, "conservative" positions if a label is helpful, should not be determinative in the *Bivens* context. The basic question is availability of judicial relief for constitutional violations. In the recent cases the statutory tail comes to wag the constitutional dog. That is, the Court’s emphasis on the statutory component of the remedial issues tends to obscure and downgrade their constitutional dimension. It is as if the whole problem involved only the judiciary’s role in an article I legislative scheme. Yet the *Bivens* doctrine deals with judicial enforcement of rights whose origin is outside of, and hierarchically superior to, any statute. Transmuting these matters into legislative ones calls into question the existence of any independent judicial power to remedy constitutional violations, at least through damages actions. The lack of such a power was the ultimate conclusion of the *Bivens* dissenters. To some extent, then, the recent cases represent a vindication of this position.

This article examines these developments critically, but also with a recognition that concurrent judicial and legislative power over *Bivens* remedies presents serious problems of its own. The article begins with a re-examination of the *Bivens* dissents and of Chief Justice Rehnquist’s subsequent reformulation of their theses. It also explores the ambiguities in the decision itself—in particular the Court’s refusal to place *Bivens* on a purely constitutional footing, as well as the Court’s admission of a substantial legislative role in remediing constitutional violations and its expression of judicial deference to legislative choices. The article then examines the extent to which the current Court’s analyses rest on the dissenters’ premises. I criticize two of these premises: that Congress’ institutional competence in remedial matters is so superior to that of the courts as to warrant almost automatic deference; and that, indeed, the issues are so much more legislative than judicial in character that any congressional action ousts the courts.

As noted, this approach tends to obscure the constitutional dimensions of the *Bivens* problem. Another result of the recent cases is to break down the initial symmetry between *Bivens* and section 1983. I argue against taking this development as far as the Court has, even if one accepts the argument that separation of powers considerations call for greater judicial restraint.

14. See Steinman, Backing off *Bivens* and the Ramifications of this Retreat for the Vindication of First Amendment Rights, 83 Mich. L. Rev. 269, 291-94 (1984) (Court in Bush emphasized Congress’ role in federal personnel policy). I agree with much of Professor Steinman’s analysis. However, she “assumes the constitutional power of federal courts to recognize damage remedies for the violation of constitutional rights by federal agents”—that is, that *Bivens* itself has stood the test of time. *Id.* at 272-73 n.22. I believe that the recent decisions place even this assumption in question. Professor Steinman does note that the “fundamental constitutional issue still may not have been laid to rest to the satisfaction of all present members of the Court.” *Id.* For another critique of pre-*Stanley* developments, see Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 Ga. L. Rev. 683 (1985) [hereinafter Georgia Note].
in the *Bivens* context than do federalism considerations in the section 1983 context. Congressional power can be respected without judicial abdication.

Finally, I explore the relationships between the current Court's *Bivens* decisions and an important recent development in federal courts scholarship: the thesis that all forms of judicial lawmaking by federal courts—whether presented as constitutional adjudication, statutory interpretation or federal common law—are essentially the same and should be placed under the general rubric of federal common law.\(^5\)

A centerpiece of this general thesis is the contention that courts should take the same approach both to allowing *Bivens* remedies under the Constitution and to implying private rights of action from federal statutes which do not provide for one. I argue that *Bivens* cases highlight the difference between remedial questions when the source of the right is a statute and when the source is the Constitution. The generalist thesis, because of its very need to be general, obscures these differences. Moreover, it creates a somewhat odd alliance between academic advocates of a liberal approach to federal common law and a conservative Court bent on limiting it. One doubts that this is what the proponents of the new federal common law had in mind.

I. THE *BIVENS* DISSENTS AND THE CURRENT COURT'S ACCEPTANCE OF THEIR PREMISES

A. The Dissents' Principal Themes

At issue in *Bivens*\(^6\) was whether the Court could authorize damages as a remedy for constitutional violations by federal officials. Congress had enacted no federal analogue to section 1983. The three dissenters (Chief Justice Burger and Justices Black and Blackmun)\(^7\) argued that the Court could not proceed on its own without such authorization. Three themes stood out. The first, articulated by Chief Justice Burger, was that the decision whether or not to grant a remedy involved choices which Congress was in a better position to make because of its superior institutional competence.\(^1\)

The Chief Justice's general emphasis was on the shortcomings of the exclusionary rule. However, he doubted that the *Bivens* action would be an adequate substitute.\(^1\)

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17. *Id.* at 411 (Burger, C.J., dissenting); *id.* at 427 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).
18. *Id.* at 412 (Burger, C.J., dissenting).
19. *Id.* at 412-24. The Chief Justice's general emphasis was on the shortcomings of the exclusionary rule. However, he doubted that the *Bivens* action would be an adequate substitute. *Id.* at 421-22.
remedies could only come from a legislative body.\textsuperscript{20} However, even the narrow step taken in \textit{Bivens} was seen by the dissenters as requiring "careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment."\textsuperscript{21}

Beyond the issue of institutional competence lay the dissenters' major theme: that the creation of the \textit{Bivens} remedy was such an essentially legislative task that only Congress could perform it. All three criticized the decision on this ground, Justice Blackmun referring to it as "judicial legislation,"\textsuperscript{22} and Justice Black calling it "an exercise of power that the Constitution does not give us."\textsuperscript{23} In part they saw the authorization of a judicial remedy for constitutional wrongs as a decision about the allocation of federal judicial resources among competing priorities, and thus as the kind of balance-striking which belonged to the legislative branch.\textsuperscript{24} They also seem to have viewed this authorization as the creation of a cause of action, in other words the making of a law.\textsuperscript{25} Thus, the Court had trespassed into the domain of Congress, violating the explicit wording of the Constitution as well as the doctrine of separation of powers.

A final theme was the effect of what Congress had already done, namely, enact section 1983. This statute might be cited as tending to buttress arguments that power to create such remedies lies with Congress.\textsuperscript{26} Justice Black went a step further and viewed it as "[a] strong inference . . . that Congress does not desire to permit such suits against federal officials."\textsuperscript{27} In other words, Congress had addressed the issue of judicial damages remedies for wrongdoing by public officials and had drawn a line beyond which the courts could not go.

None of the dissenters' arguments convinced the \textit{Bivens} Court, although one finds strong echoes of them in today's decisions. Even before these decisions, however, the arguments against \textit{Bivens} picked up a strong ally.

\textbf{B. Justice Rehnquist's Reformulation of the Anti-Bivens Position}

In the decade following \textit{Bivens} the Court extended it to claims under the fifth amendment in \textit{Davis v. Passman}\textsuperscript{28} and to claims under the eighth

\textsuperscript{20} \textit{Id.} at 422-24.
\textsuperscript{21} \textit{Id.} at 429 (Black, J., dissenting).
\textsuperscript{22} \textit{Id.} at 430 (Blackmun, J., dissenting).
\textsuperscript{23} \textit{Id.} at 428 (Black, J., dissenting).
\textsuperscript{24} \textit{Id.} at 429 (Black, J., dissenting).
\textsuperscript{25} \textit{Id.} at 427 (Congress could create "a federal cause of action for damages."); \textit{see id.} at 411-12 (Burger, C.J., dissenting) (\textit{Bivens} "judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress.").
\textsuperscript{26} \textit{Id.} at 427 (Black, J., dissenting).
\textsuperscript{27} \textit{Id.} at 429 (Black, J., dissenting).
\textsuperscript{28} 442 U.S. 228 (1979).
amendment in *Carlson v. Green*. These cases seemed to demonstrate general acceptance and even solidification of the *Bivens* doctrine within the Court, although there was disagreement over how to apply it. In *Carlson*, however, Justice Rehnquist re-opened the basic question, called *Bivens* a "wrong turn," and urged the Court to overrule it. To some extent his opinion tracked those of the original dissenters. He presented the authorization of *Bivens* remedies as a matter which was "not well suited for evaluation by the Judicial Branch," and which, indeed, belonged in the legislative domain as a matter of separation of powers. He also invoked section 1983 as showing that Congress knew how to authorize remedies for violation of constitutional rights if it wanted to.

An important new element in the Rehnquist dissent is his argument that Congress had done more than simply enact section 1983: It had amended the Federal Tort Claims Act to allow relief against the government for individuals such as the *Carlson* plaintiff. Therefore even if the *Bivens* remedy might provide the plaintiff with additional and more effective relief—a point Justice Rehnquist was prepared to argue—the "dispositive" fact for the Court should be that Congress had provided a remedial mechanism which addressed the problem at hand. That problem he characterized as the Court's "creation of any tort remedies, constitutional or otherwise." The Court should not go beyond that scheme because "when Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them."

Justice Rehnquist also elaborates on the original dissenters' argument that authorizing *Bivens* relief is a form of impermissible judicial lawmaking. He begins with the unquestioned premise of Congress' tight control over the jurisdiction of the federal courts. Permitting *Bivens* actions, even though it is characterized as a remedial issue, brings into federal courts a large

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29. 446 U.S. 14 (1980).
30. Compare id. at 18-19 (Brennan, J.) (describing presumptive approach to availability of *Bivens* actions) with id. at 26-29 (Powell, J., concurring) (criticizing majority for "absolute" approach and calling for more judicial discretion). It should be noted that Justice Powell's emphasis on separation of powers and his critique of "the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute," id. at 29, cast some doubt on his purported acceptance of *Bivens*.
31. Id. at 32 (Rehnquist, J., dissenting).
32. Id. at 36.
33. Id. at 34, 38.
34. Id. at 35, 40.
35. Id. at 51.
36. Id.
37. Id. at 53 (Rehnquist, J., dissenting).
38. Id. at 36-37.
number of suits not contemplated by Congress. Thus it is, in part, a judicial enlargement of federal court jurisdiction. Alternatively, Justice Rehnquist attacks Bivens as a form of presumptively invalid federal common lawmaking. Erie Railroad Co. v. Tompkins stands as a general bar to federal common law. Under Bivens, the federal courts perform just such lawmaking by developing a body of remedial doctrines concerning types of damages, compensable injuries, the question of intent and the availability of immunity defenses. Justice Rehnquist admitted that the presence of general federal question jurisdiction was enough to authorize enforcement of the Constitution through equitable remedies. He justified this apparent discrepancy as a matter of historical tradition. His observation that Marbury v. Madison itself “involved equitable relief by way of mandamus or injunction” may suggest that equitable enforcement is part of the “original understanding” about judicial review. In any event, the anti-Bivens arguments based on notions of separation of powers are presented here in a far more developed manner than in the original dissents.

Before considering the extent to which these arguments have prevailed in the recent cases it is necessary to examine the extent to which Bivens itself contains the seeds of its own destruction.

C. The Nonconstitutional Nature of Bivens and its Contemplation of a Legislative Role

The main cause of what might be called the current Bivens problem, that is, how to reconcile concurrent judicial and legislative power over remedies for constitutional violations, is the Court’s initial (and ongoing) failure to spell out where the Bivens action stands within the legal system. Justice Brennan wrote the Court’s opinion. At the outset, let us consider how he might have resolved the case: a straightforward analysis that the plaintiff asserted a right under the Constitution, that the federal courts have jurisdiction over cases arising under the Constitution, and thus, that they have the power and the duty to award damages if a compensable violation of constitutional rights is shown. Period. In other words, just as the Court in

39. Id. at 37. For an early suggestion of this critique, see Bivens, 403 U.S. at 428 (Black, J., dissenting).
40. 304 U.S. 64 (1938).
41. Carlson, 446 U.S. at 37-38 (”Erie expressly rejected the view, previously adopted in Swift v. Tyson that federal courts may declare rules of general common law in civil fields.”) (citation omitted) (Rehnquist, J., dissenting).
42. Id. at 39.
43. Id. at 42-43.
44. 5 U.S. (1 Cranch) 137 (1803).
45. Carlson, 446 U.S. at 42 n.8 (Rehnquist, J., dissenting).
Mapp v. Ohio\(^{46}\) presented the exclusionary rule as "part and parcel"\(^{47}\) of the fourth amendment and an "essential ingredient"\(^{48}\) of the rights it secures, the Court in Bivens could have treated the damages remedy as of the same constitutional status. Since Congress had not acted, there was no need to discuss congressional power as relevant to the initial existence of judicial power.

To some extent, Justice Brennan's opinion follows along the lines hypothesized above. He described the fourth amendment as "guarantee[ing] to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority,"\(^{49}\) and emphasized the role of federal courts in remedying violations of federal law.\(^{50}\) There was even an invocation of Marbury v. Madison's statement that "[t]he very essence of civil liberty consists certainly in the right of every individual to claim the protection of the laws, whenever he receives an injury."\(^{51}\) Were this analysis—as well as the rebuttal of the government's position that the plaintiff's cause of action depended on state law\(^{52}\)—all it contained, the opinion could be fairly characterized as constitutional in the sense of flowing from the document's mandates, even though Justice Brennan suggests that the question of remedies for constitutional violations stands on no different footing than the general issue of remedies for violation of federal law.\(^{53}\)

However, the opinion does not stop there. Justice Brennan hypothesizes two instances in which a damages action would not be available to a Bivens plaintiff, neither of which was before the Court. I will deal first with the second exception because it raises most directly and straightforwardly the bearing of congressional action on judicial power. Brennan's second exception evokes the possibility of Congress taking away the green light which the Court had given itself. The relevant quote is as follows:

[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages but must instead be remitted to another remedy, equally effective in the view of Congress.\(^{54}\)

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47. Id. at 651.
48. Id. at 656.
49. Bivens, 403 U.S. at 392.
50. Id. at 396.
51. 5 U.S. (1 Cranch) 137, 163 (1803).
52. Bivens, 403 U.S. at 394-96.
53. Id. at 397 ("The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.") (emphasis added).
54. Id.
One way to read this is to treat the second sentence as referring to the first through the word "for." Thus, if Congress had remitted the plaintiff to some other remedy which it thought equally effective the question of necessity would arise and the Court would proceed to decide that question as part of its responsibility under the Constitution. However, the Court has tended to ignore the first sentence and, instead, has focused on the reference to Congress as indicating that it may be able to preclude Bivens actions.\(^5\)

For example, in Carlson the Court stated that there are two exceptions to the general availability of a Bivens action, and that "[t]he second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."\(^6\) As stated in Carlson, such action defeats the Bivens remedy.\(^7\) Thus the second exception becomes a kind of clear statement rule: Congress can preclude direct damages relief for Bivens plaintiffs, at least through alternative remedies, but because to do so runs counter to constitutional values, it must be absolutely clear that it wishes that result.\(^8\) The Court's statements on the second exception vary, and a case can be made that it has reserved the last word for itself.\(^9\) The initial statement in Bivens is "somewhat cryptic" as Professor Dellinger puts it,\(^60\) but it does seem clearly to contemplate a system of shared powers over the subject matter. Both branches may act.

Should inaction by Congress have any bearing on the judiciary's initial power? It is at this point that the even more cryptic first exception must be considered. It is stated as follows: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."\(^61\) Justice Brennan contrasts the matter before the Court in Bivens with two previous decisions. The first was a case in which the Court refused

\(^{55}\) These analyses are sometimes ambiguous as to whether the Court retains some power to review what Congress has provided. Thus in Davis the Court, in discussing possible reasons not to entertain a Bivens action, noted the absence of an "explicit" congressional bar. 442 U.S. at 246-47. However, it later stated that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Id. at 248. This suggests the courts would look at effectiveness. The original Bivens reference to "another remedy, equally effective in the view of Congress" suggests that the latter has the last word, at least if the sentence is taken in isolation. 403 U.S. at 397.

\(^{56}\) 446 U.S. at 18-19 (emphasis by the Court).

\(^{57}\) Id. at 18. Here again the Court refers only to whether Congress viewed its remedy as equally effective. See also Bush v. Lucas, 462 U.S. 367, 373 (1983) ("Congress has not expressly precluded the creation of [a Bivens] remedy by declaring that existing statutes provide the exclusive mode of redress.").

\(^{58}\) See Steinman, supra note 14, at 279-84 (arguing for judicial scrutiny).


\(^{60}\) Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532, 1548 n.89 (1972).

\(^{61}\) Bivens, 403 U.S. at 396.
to allow the government to recover damages from a private party for injury to a soldier.\textsuperscript{62} That decision seemed to rest on Congress' power to create such a liability and its expertise in matters of the federal fisc.\textsuperscript{63} The second case involved a refusal to imply a damages remedy from a nonconstitutional source: statutes and Congress' rules governing actions by its employees.\textsuperscript{64} Yet \textit{Bivens} was a case in which the rights and duties were derived directly from the Constitution. Perhaps these citations simply suggest that constitutional remedial issues are like other remedial issues in that the judicial branch can exercise discretion in fashioning them. However, far more significant is the quoted passage itself and the significance it attributes to the absence of congressional action. The conclusion is inescapable that if Congress had spoken, the Court's authority would be even clearer since there would be no need to think about hesitation. In other words, Congress' inaction should give the judiciary pause before embarking on \textit{Bivens} remedies, at least to the extent of inquiring whether there are "special factors counselling hesitation."\textsuperscript{65} This reading rests on the assumption that the "affirmative" action Justice Brennan had in mind was an authorization for the courts to proceed.

In the most recent \textit{Bivens} case\textsuperscript{66} Justice Brennan's attempt to rewrite retroactively this sentence implies that the congressional action he had in mind was the provision of alternative remedies, not an authorization for the judiciary to proceed. Absent such action, any hesitation would be even more clearly a matter of judicial discretion, rather than one of judicial authority. However, as originally written, the sentence seems to say that federal courts in \textit{Bivens} cases are on weaker ground than in section 1983 cases because Congress plays a role in determining the extent of their authority. This detracts significantly from the notion of \textit{Bivens} as resting on a view of the Constitution as self-executing.

\footnotesize


\textsuperscript{63.} After discussing \textit{Standard Oil} the Court made a "see" reference to United States v. Gilman, 347 U.S. 507 (1954). The Court did not elaborate on this reference, although it did in \textit{Bush}. \textit{Gilman} involved the government's right to indemnity from an employee after it was found liable in an F.T.C.A. suit. The \textit{Bush} Court described it as involving "questions of employee discipline and morale, fiscal policy, and the efficiency of the federal service." \textit{Bush}, 462 U.S. at 380.

\textsuperscript{64.} \textit{Wheeldin v. Wheeler}, 373 U.S. 647 (1963). The plaintiff also asserted a constitutional claim, but this did not figure significantly in the Court's opinion.

\textsuperscript{65.} 403 U.S. at 396.

\textsuperscript{66.} Schweiker v. Chilicky, 108 S. Ct. 2460 (1988) (Brennan, J., dissenting). As rewritten the sentence refers to "special factors counselling hesitation [even] in the case of affirmative action by Congress." \textit{Id.} at 2474 (emphasis added). This seems to suggest that the Court should hesitate even if Congress had provided no alternative remedy and there is something special about the case, and that the case for hesitation would be even stronger if it had provided a remedy. For an analysis of the original sentence which parallels that offered here, see \textit{Butz v. Economou}, 438 U.S. 478, 503 (1978).
Justice Harlan's concurring opinion can perhaps be read as closer to a constitutional one than Justice Brennan's.\(^6\) As a general matter he emphasizes the judiciary's "particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."\(^6^8\) While the Court may choose among remedial mechanisms, it is under a "duty" to make this choice, guided by "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."\(^6^9\) In *Bivens*, Justice Harlan viewed damages as "the only possible remedy" for someone in the plaintiff's position.\(^7^0\) As he put it in what is surely the most quoted phrase in the entire case, "[f]or people in *Bivens* shoes, it is damages or nothing."\(^7^1\)

On the other hand, Justice Harlan does not doubt that Congress has a substantial role to play in the matter. He states the initial question to be resolved as "whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself *exclusively* in Congress' hands."\(^7^2\) The crux of his opinion is the emphasis on judicial discretion and choice in granting a remedy.\(^7^3\) He depicts the Court as capable of taking into consideration a range of policy considerations "at least as broad as . . . a legislature would consider with respect to an express statutory authorization of a traditional remedy."\(^7^4\) Does this mean only that in constitutional cases a court, once vested with subject matter jurisdiction,\(^7^5\) has a broad discretion over remedial issues while it would not have any such discretion as to the underlying merits issues of what the Constitution demands? Or does it mean that remedial issues are so inherently legislative that decisions with respect to them are a form of federal common law, declared in the absence of legislative resolution and subject to legislative revision? After all, Justice Harlan cites a number of federal common law cases,\(^7^6\) and repeatedly relies on an analogy between the issue in *Bivens* and the implication of private rights of action from federal statutes.\(^7^7\) He describes this process as something more than just statutory construction.\(^7^8\) It involves the judiciary in furthering the policies

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\(^6\) See Carlson, 446 U.S. at 31 n.2 (Burger, C.J., dissenting).
\(^6^8\) Bivens, 403 U.S. at 407 (Harlan, J., concurring).
\(^6^9\) Id.
\(^7^0\) Id. at 409-10.
\(^7^1\) Id. at 410.
\(^7^2\) Id. at 401-02 (emphasis added).
\(^7^3\) E.g., id. at 408 n.8.
\(^7^4\) Id. at 407.
\(^7^5\) 28 U.S.C. § 1331 (1982) grants the district courts jurisdiction over "all civil actions arising under the Constitution . . . of the United States."
\(^7^6\) E.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), discussed *infra* text accompanying notes 217-19.
\(^7^7\) Bivens, 403 U.S. at 402, 407 (citing J.I. Case Co. v. Borak, 377 U.S. 426 (1964)).
\(^7^8\) Id. at 403 n.4.
of a particular statute through remedial choices. The liberal approach to implication which prevailed at the time Justice Harlan wrote is generally viewed as a form of federal common law.79

In sum, there is enough in both the majority and concurring opinions in Bivens to indicate that it is less than a constitutional decision and that what Congress might say about remedies in any given case will carry a good deal of weight.

D. Judicial Versus Legislative Competence in the Recent Decisions

The initial formulation of the special factors exception suggested that it might be triggered by the subject matter of the case at hand80 or by the defendant's place within the government.81 The recent cases denying Bivens actions have based special factors analysis on the subject matter coupled, generally, with congressional action providing a partial remedy for the action complained of. The availability of Bivens has become crucial because it would provide more extensive relief than the alternative remedy. In Chappell v. Wallace,82 for example, servicemen alleged adverse personnel action based on their race. The Court held that "[t]aken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers."83 There are, indeed, strong suggestions in the military cases84 that the Constitution's conferral upon Congress of plenary power over military affairs is enough, by itself, to constitute a special factor which would keep the courts out.85 In the contexts of Bivens actions by federal employees86 and Social Security disability claimants,87 however, the Court seems to view congressional action as a prerequisite to

80. See Bush, 462 U.S. at 380 (cases cited in Bivens suggest that special factors involve federal fiscal policy or federal employer-employee relationships).
81. See Carlson, 446 U.S. at 19; Davis, 442 U.S. at 246. In Stanley, Justice Brennan argued that this should be the only meaning of the special factors exception. United States v. Stanley, 107 S. Ct. 3054, 3068-77 (1987) (Brennan, J., dissenting). However the notion of special factors counselling hesitation is not so easily confined, as the recent cases demonstrate. Indeed, in Bush, Justice Stevens indicated the concept goes beyond the normal inquiries that are a component of a court's remedial discretion. 462 U.S. at 380.
83. Id. at 304.
85. Chappell, 462 U.S. at 301; Stanley, 107 S. Ct. at 3063. Indeed, in Stanley, no remedy was available.
special factors analysis. In turn this action provides the Court with a basis for invoking Congress' superior competence in dealing with the subject, triggering "hesitation" by the judiciary.

Thus an important theme of the Bivens dissents (institutional competence) has become part of the Court's approach to Bivens actions through a concept found in the original majority opinion (the special factors exception). In Bush v. Lucas the Court stated that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." The Court emphasized Congress' familiarity with the subject and its ability to utilize superior fact-finding procedures such as hearings. The Court has intimated that the military Bivens cases also rest in part on Congress' superior institutional competence.

Institutional competence cannot logically be confined to any particular area, however. The Court seems to have opened the door to this argument and its implications in Schweiker v. Chilicky, the most recent refusal to allow a Bivens action. The plaintiffs claimed constitutional violations in the denial of Social Security disability benefits. The Court noted the vastness of the Social Security program and cited Bush for the proposition that Congress is more competent in fashioning remedies for constitutional violations in its administration. However, the Court took Bush a major step further. There the opinion had referred to Congress' competence at "balancing governmental efficiency and the rights of employees." In Chilicky, the quote was altered by substituting "individuals" for "employees." The reference to superior competence can now cover all Bivens actions since a crucial question in any Bivens suit is whether vindication of the individual plaintiff's right should prevail over the needs of the program, whatever the program may be. It would, for that matter, require only a bit of extrapolation to conclude that competence by itself, whether exercised or not, is a reason for the courts to stay out. Short of that, perhaps, repeated invocation of Congress' superior competence suggests acceptance of another argument in the Bivens dissents: that devising remedies for violation of federal rights is an essentially legislative task.

89. Bush, 462 U.S. at 389.
90. Id.
91. Chappell, 462 U.S. at 304. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence." Id. at 302 (quoting Gilligan v. Morgan, 413 U.S. 1, 4 (1973)).
93. Id. at 2467-68.
95. 108 S. Ct. at 2469.
E. The Court's View of Bivens Remedies as an Essentially Legislative Matter

Except possibly in the military context, the recent denials of Bivens remedies have not rested on any notion that the judiciary is without initial authority to grant them. Indeed, in Bush, Justice Stevens's opinion explicitly affirmed the major premise of Bivens: "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation." Yet the Court has refused to exercise that power because of Congress' action in providing some form of remedy. It might be that the Court has examined carefully what Congress has done, measured it against a constitutional standard of adequacy, and concluded that what exists is more or less as good as what the judiciary could come up with. There are traces of such an approach in the recent cases, but little more. The fact that Congress has acted is far more important than what it has done.

In part, the Court seems to view the subject matter of the cases before it as essentially legislative in nature. Everything depends on how one defines the subject matter. Is it remedying constitutional violations, or is it prescribing the remedies available as part of a particular governmental program? The latter formulation places control with Congress since only it can establish federal programs. Bush epitomizes this approach. A federal civil service employee alleged demotion for "whistle-blowing," a constitutional claim. According to Justice Stevens, however, "the ultimate question on the merits in this case may appropriately be characterized as one of 'federal personnel policy.'" Perforce, that makes it a legislative matter. Analytically, however, the subject matter should make no difference because any Bivens claim can only arise out of a program created by Congress. Thus the Bivens dissenters, who denied judicial power altogether, would prevail in a less categorical fashion. Because the matter is essentially legislative (and because of Congress' superior expertise) any action by Congress would displace any judicial power that might otherwise exist. Justice O'Connor's opinion for the Court in Chilicky can be read this way. Having first suggested a contextual, or subject matter, approach she then rejected it on the general ground that "Congress is in a better position to decide

96. 462 U.S. at 378.
97. E.g., Chilicky, 108 S. Ct. at 2468 (remedies provided by Congress "meaningful"); Bush, 462 U.S. at 378 n.14 (existing civil service remedies "clearly constitutionally adequate.").
100. Chilicky, 108 S. Ct. at 2467.
whether or not the public interest would be served by creating [a damages liability]."¹⁰¹

Might the Court be saying that because Bivens remedies are essentially a legislative matter, Congress' remedial schemes should be interpreted as a directive to the judiciary to stay out? Justice Black's Bivens dissent was willing to draw such an inference from the existence of section 1983.¹⁰² The Court, on the other hand, seemed to require that Congress state expressly any displacement of the judiciary. That is the second exception. To read such a directive into a remedial scheme merges the second exception—with its clear statement requirement—into the broader notion of "special factors counselling hesitation."¹⁰³

The task would then become discerning the intent of Congress. Chilicky suggests that this is precisely what courts are to do. Congress' failure to provide a judicial remedy may not have been "inadvertent."¹⁰⁴ Indeed, "the design of a government program [may] suggest that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration."¹⁰⁵ These suggestions sound more like directives. According to the Court, Congress chooses "specific forms and levels of protection"¹⁰⁶ for the rights of persons in government programs. This choice can be viewed either as a directive to the judiciary or as a form of preemption of the field.¹⁰⁷ To add a Bivens remedy would upset this choice.

Whether one focuses on the legislatively created remedies as part of an article I program or as a directive to the judiciary, the net effect is to view legislative power as superior to judicial power. This is not quite the position of the dissenters who viewed the remedial issue as solely legislative. However,

¹⁰¹. Id. at 2469 (quoting Bush, 462 U.S. at 390) (rejecting contextually limited reading of Bush). As noted, she had earlier broadened Bush to a case concerned with "balancing governmental efficiency and the rights of [individuals]." Id. (quoting Bush, 462 U.S. at 389). Justice Stevens recently equated the problem posed in constitutional and nonconstitutional cases in the following terms: "When [a] novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress." Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2528 (1988) (Stevens, J., dissenting).

¹⁰². 403 U.S. at 429 (Black, J., dissenting).

¹⁰³. Steinman, supra note 14, at 290; Georgia Note, supra note 14, at 714 n.130; Harvard Note, supra note 58, at 1255.

¹⁰⁴. 108 S. Ct. at 2468.

¹⁰⁵. Id.

¹⁰⁶. Id. at 2469.

¹⁰⁷. In its brief in Chilicky the government argued that "Congress has completely occupied the field of social security disability benefits with a carefully drawn comprehensive set of procedures that provide meaningful remedies for any constitutional violations that might occur in the processing of claims for benefits." Brief for Petitioners at 38, Chilicky, 108 S. Ct. 2460 (capitalization altered).
the Court has perhaps come close to embracing the dissenters' position, twice referring to *Bivens* remedies as "a new substantive legal liability." In any event, the Court has clearly installed Congress as the dominant branch in *Bivens* matters. This position is in harmony with the dissenters' view. And it is only a short step to concluding that a program with extremely limited remedies, or perhaps no remedies at all, represents a congressional choice as to "specific forms and levels of protection." In the next two sections I address the basic premises of this remarkable doctrinal development: the view of Congress' institutional competence as superior and the view of damage remedies as essentially a legislative matter.

II. The Comparison Between Judicial and Legislative Competence and its Bearing on *Bivens* Remedies

A. The Comparison in General

The issue of judicial versus legislative competence, which plays such a significant role in the recent *Bivens* cases, is central to the broader Burger-Rehnquist Court theme of de-emphasizing federal judicial lawmaking. The Court mixes concern for who ought, in the constitutional scheme, to make law with concern for who can best do it. At times the focus is on Congress' political accountability as legitimizing its role in making broad societal decisions. At times the focus is on the fact that federal courts are not general common law courts as their state counterparts are. Thus, they possess at best, a limited and specialized lawmaking competence. Neither of these sub-themes plays a dominant role in the recent *Bivens* cases, although both are present. However, the presence of the Constitution as a central part of any *Bivens* question goes far to rebut them. In applying the Constitution the federal courts acquire a legitimacy of their own which is separate from that bestowed by the electoral process. In this area, moreover, they exercise a substantial amount of lawmaking authority regardless of the extent to which one views it as governed by the original instrument and its framers' intent.


109. See Brown, Article III as a Fundamental Value—The Demise of Northern Pipeline and its Implications for Congressional Power, 49 Ohio St. L.J. 55, 80-81 (1988). In the *Bivens* context, however, cutting back on or even eliminating the damages action will not reduce significantly the judicial branch's ability to make new law in the sense of giving meaning to constitutional provisions. Most of the same merits issues will continue to arise in § 1983 cases.


In the *Bivens* context the Court has focused on a third sub-theme: Congress is better able to find the facts and make the resultant policies about remedies. There is a common sense element to the notion that courts and legislatures engage in different forms of fact-finding, and that each is better in its own domain. Professor Davis defines the familiar distinction between legislative and adjudicative facts as follows:

When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties.¹¹²

The prototypical fact-finding method for courts is the trial—with its adversarial nature and focus on the facts of a particular case. For legislatures, it is the more wide-ranging hearing, perhaps a series of hearings held across the nation. It is easy to assume that Congress is the superior fact-finder because of the broader range of techniques available to it, the fact that it can deal with a problem without waiting for a case to present it, and because it can exercise continuing oversight of that problem.¹¹³ Yet it is important, as Professor Monaghan states, "not to overstate the supposed superiority of legislative fact-finding."¹¹⁴ Courts can utilize expert testimony.¹¹⁵ They have the advantage of seeing how legal norms work in a concrete factual setting.¹¹⁶ And a frequently recurring problem—such as when to allow *Bivens* actions—allows them to also exercise a form of oversight.

Appellate courts, in particular, rely heavily on legislative facts to, in Professor Davis' words, "determine what course of action to take."¹¹⁷ In *Brown v. Board of Education*,¹¹⁸ for example, the Court relied extensively on sociological evaluations of the importance of education in American society. More recently, in cutting back on the exclusionary rule, the Court has taken an overtly empirical approach, drawing broad conclusions from statistical data as well as from general assumptions about how the criminal justice system works.¹¹⁹ The line between legislative facts and the policies

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¹¹⁴. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 28 n.147 (1975). In general, however, he accepts the superior competence of legislatures in many aspects of fact-finding.
¹¹⁵. *Id.*
they generate is itself a blurred one. In a classic common law appellate opinion the two are closely intermingled. The point is that courts act as though they possess a substantial degree of competence to find and utilize legislative facts, that this premise seems justified, and that this action is an accepted part of our legal system. An excellent illustration at the federal level, and one directly relevant to decisions concerning the availability of Bivens remedies, is the development of immunity defenses for public officials.

B. Judicial Competence in Action—The Immunity Defense

Federal, state and local officials sued in damages for violations of federal constitutional rights may assert immunity defenses. In some cases absolute immunity from damages is available. Judges, legislators and prosecutors may claim it, at least when acting within their core functions. For most officials, however, the available defense is one of qualified immunity. These officials cannot be sued for damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." The availability of the defense "generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."

The existence of these defenses and the elaborate network of rules governing their assertion are entirely a matter of judge-made rather than statutory law. This extensive development in constitutional cases first took place in the context of section 1983 suits. That statute grants a right to sue without mentioning immunity or any other defense. Nonetheless, the Court has reasoned that the Reconstruction Congress which enacted it would not have wished to abolish well recognized immunities existing at common law. Thus, a defendant who would have had such a defense in the nineteenth century can assert it today as long as that assertion is not inconsistent with the purposes of section 1983. Moreover, the availability of immunity in section 1983 suits is not historically frozen. If the official's position is analogous to one which would have benefitted from immunity he can assert it successfully. Realistically, what is involved is the incorporation of the common law methodology of immunity determination into

122. Id. (citation omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).
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section 1983 litigation, despite the Court's frequent assertions that the matter is one of statutory construction. As developed below, this is a broad ranging inquiry guided primarily by concerns of "public policy." It could certainly be argued that immunity defenses in Bivens actions against federal officials present different issues than do the defenses in section 1983 actions against state and local officials. However, in Butz v. Economou, the Court specifically rejected this argument, asserting that the analysis in the two inquiries is the same. It would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under section 1983 and suits brought directly under the Constitution against federal officials." The Court reasoned that the Constitution bears equally on both sets of officials and that the functional purposes of any immunity doctrine are equally applicable. After Butz, the Court's practice in all immunity cases has been to draw on both section 1983 and Bivens precedents to resolve the particular problem at hand. And the analysis makes clear that what is at work in these cases is a process of common law reasoning and development of the law, guided as much by policy as by precedent.

What does the Court do when presented with a possible immunity defense? Based in part on factual assumptions, it balances. On the one hand are the specific concerns of the plaintiff—the need for damages, as possibly "the only realistic avenue for vindication of constitutional guarantees" and the general societal interest in deterring constitutional violations as well as the legal system's basic assumption that "[n]o man in this country is so high that he is above the law." On the other side of the scale are what the Court has described as

- two mutually dependent rationales:
  - (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion;
  - (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

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128. See Butz, 438 U.S. at 506.
129. Id. at 524-26 (Rehnquist, J., concurring in part and dissenting in part).
130. 438 U.S. 478.
131. Id. at 504.
133. E.g., Harlow, 457 U.S. at 813.
134. Id. at 814.
136. Id. at 506 (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).
137. Id. at 497 (quoting Scheuer v. Rhodes, 416 U.S. 232, 240 (1974)).
The Court has identified other issues which relate to broader considerations of effectiveness in the public service including the expense of litigation, the divergence of official energy from more directly important issues and the possible deterrence of citizens from entering government service. There is surely a substantial degree of generalized fact-finding involved in addressing these issues as well.

The basic reconciliation of these competing interests has been to afford qualified immunity to officials performing discretionary functions. However, in developing what it has characterized as its "functional" approach to immunity law, the Court has accorded absolute immunity to judges and legislators. The need for judicial creativity and the extent to which notions of public policy underlie the enterprise are particularly apparent in the Court's "functional" treatment of officials who look judicial but are not judges. The Court has accorded absolute immunity to prosecutors, federal hearing examiners and administrative law judges, witnesses in judicial proceedings, and grand jurors. In doing so the Court has invoked the common law traditions of particular immunities, particularly in section 1983 cases where there is a perceived need to utilize historical justifications.

More important, however, is the common law process of reasoning by analogy in order to achieve a desirable result. Thus, in Cleavinger v. Saxner, the Court's split over whether to accord absolute immunity to members of a prison discipline committee stemmed in part from differing assessments as to how much the committee's functions resembled the judicial process and in part from differing assessments as to the effect of immunity "[i]nside the prison walls." Considerations of institutional competence have not impeded the creation of an extensive body of judge-made law, without statutory authorization—almost counter the statute in section 1983 cases—based on notions of public policy and capable of reflecting finely tuned distinctions. Plaintiffs win their share of victories, as well as defendants. The question then arises whether, and why, judicial competence should vanish when allowing a Bivens action is at issue.
C. Judicial Competence and Bivens Remedies

The kinds of things that go into consideration of whether to allow a Bivens action—putting aside temporarily the question whether that is a new "cause of action" or awarding relief for an existing one—seem essentially the same as those that go into consideration of whether to allow the immunity defense. The general issue is one of "balancing governmental efficiency with the rights of [individuals]," to use Justice O'Connor's phrase in Chilicky. Here the focus is more on the plaintiff and the appropriate response of the legal system to his complaint of a constitutional wrong. If anything, that makes the case for judicial competence stronger. The law of remedies has developed over centuries "to make good the wrong done." Justice Harlan, concurring in Bivens cited this as a classic example of judicial competence. He made the bridge between private remedies and the Bivens problem in the following terms:

the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.

Indeed, one could cite the judiciary's role in enforcement of the Constitution as an additional kind of expertise in itself.

Of course the current Court does not proceed from an explicit denial of any judicial competence. Rather, like the Bivens dissenters, it focuses on Congress' superior competence. This then becomes a special factor counselling hesitation, at least where Congress has acted. The contextual approach plays an important role here. Thus a particular subject matter—the Civil Service system in Bush, the Social Security system in Chilicky—is depicted as presenting complex institutional problems. Congress is depicted as not only better at addressing those problems, through hearings, for example, but as having developed an expertise through dealing with them. The courts do not possess a similar expertise. One could quarrel with the

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150. See infra text accompanying notes 162-68.
153. Id. at 409.
154. Id.
156. In Chilicky Justice Brennan noted that "courts do not lack familiarity or expertise in determining what the dictates of the Due Process Clause are." 108 S. Ct. at 2478 (Brennan, J., dissenting).
conclusion—citing the vast body of welfare and social security cases, for example—but it is the premise which is potentially more destructive of Bivens. Congress possesses the same expertise, even if latent, with respect to any program established under any of its powers. This expertise becomes a wall against the judiciary as long as there is legislation with respect to some form of remedies for violations of some rights within the program. If expertise is the trump card the remedies need not extend to constitutional violations. Even a decision to afford no remedies at all may be seen as a result of bringing expertise to bear on the matter.

Justice Brennan, who seems to be fighting a rearguard action to preserve Bivens, is willing to accept a limited contextual approach. Yet at the same time he sees the potential fallacy in the notion that "congressional authority over a given subject is itself a 'special factor' that 'counsel[s] hesitation [even] in the absence of affirmative action by Congress.'" He is particularly concerned with its spread to "areas in which congressional competence is no greater than that of the courts."

One need not state the matter this strongly. Even if Congress' competence in remedial matters is, generally speaking, superior to the courts', that does not mean that they possess no competence. As long as there is concurrent competence, why not allow concurrent sets of remedies? This would respect the functions and capabilities of each branch. Perhaps superior competence supports the argument that Congress should be able to preclude the judiciary if it really wants to. Short of such an intention, however, the judiciary's own competence justifies its remaining in the field.

Another problem with a subject matter focus is that it deflects attention from the presence as a constant of both a constitutional claim and a request that the judiciary vindicate it through a damages award. Vindication of constitutional claims is an important part of the judiciary's role. Stating the matter in terms of context focuses on the legislature's role in creating the program which produced that context. Relative competence apart, it is a way of concluding that legislative action should oust judicial action because the matter is essentially legislative. I believe that the Court has gone a long way beyond questions of competence toward embracing this position. As noted, any Bivens action involves "balancing governmental efficiency and the rights of individuals." Thus one must ultimately confront the Bivens dissenters' contention (reinforced by Chief Justice Rehnquist) that this is

157. E.g., Rosado v. Wyman, 397 U.S. 397 (1970) (reviewing state compliance with federal welfare requirements). In Rosado the Court noted the "escalating involvement of federal courts in [the] highly complicated area of welfare benefits." Id. at 422.

158. See Chilicky, 108 S. Ct. at 2477-78.

159. Id. at 2478 (quoting Bivens, 403 U.S. at 396).

160. Id.

161. See infra text accompanying notes 187-91, discussing a clear statement approach as a prerequisite to such preclusion.
something which only Congress can do. This is particularly so because, as
the recent cases illustrate, the presence of any congressionally created
remedial scheme allows the Court to have it both ways: asserting that Bivens
is good law while continuing to deny Bivens actions.

III. BIVENS ACTIONS AS AN ESSENTIALLY LEGISLATIVE MATTER

Is Bivens a form of lawmaking? The original dissenters said yes, primarily
based on the notion that it involved the creation of a wholly new "cause
it before turning to the current Court's emphasis on congressional remedies.

Just what the phrase "cause of action" means is a perennially perplexing
problem.\footnote{164. See Davis v. Passman, 442 U.S. 228, 237-38, 239 n.18 (1979).} The Court has said that it might "mean one thing for one
purpose and something different for another."\footnote{165. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933), quoted in United
Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).} Whether this is
anything more than old wine in new bottles can be questioned. In any event
the phrase "cause of action" continues to play an important role in Supreme
Court cases, particularly those involving private parties' rights to sue under
which sets forth a claim "a short and plain statement of the claim showing that the pleader
is entitled to relief").} A possible working definition is that a plaintiff alleges a
cause of action if he asserts a set of facts showing a violation of a legal
right and/or a correlative legal duty, for which violation the law affords
some relief. The important point is that the potential availability of relief
is part of the cause of action.\footnote{167. E.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n.13, 693-94, 696 n.21, 709,
717 (1979).}

How does Bivens fare under this definition? Certainly the Court did not
create the rights or the duties. They flow from the fourth amendment. It
is true that the Constitution does not provide for enforcement by damages
remedies, but it does not generally provide for any judicial enforcement at
all. Yet the very notion of judicial review obviously assumes judicial enforcement as does article III's conferral upon the federal courts of cases "arising under this Constitution."169 Congress might, of course, not confer this jurisdiction on the federal courts, but it has done so,170 thus removing any doubts on the jurisdictional score. Does it not then make the most sense to treat the fourth amendment, against the general backdrop of assumptions about judicial enforceability of the Constitution, as creating the entire cause of action, including the authorization to award appropriate relief at least among traditionally available judicial remedies? There is room for judicial discretion and even judicial creativity, as the "constitutional common law" thesis discussed below suggests.171 Congress can also act with respect to these remedies. No initial congressional action is necessary beyond conferring jurisdiction, however.172 This does not involve the federal courts in judicial lawmaking since the law—here the cause of action—comes from a legitimate legislative source: the Constitution. If choosing among remedies is not, in this context, a legislative act, the distinction between law and equity upon which Justice Rehnquist relied in Carlson loses its force.173

These points are made here to emphasize both the legitimacy of Bivens actions and the fact that they fit squarely within generally accepted understandings of the legal system.174 Damages actions play an important role in controlling executive branch violations of the Constitution, constituting a counterpart to equitable actions as a control on legislative violations. Thus the present Court would find it hard to question Bivens itself. The recent cases do not do so. They accept judicial power. The key element—the special factor counselling hesitation in the exercise of that power—is the presence of legislative power and legislative provision of some remedies for some aspects of the wrongs complained of. The focus shifts to the presence of these remedies as somehow foreclosing judicial action. As noted above,

172. In Bivens, both the majority opinion and Justice Harlan's concurrence relied substantially on the presence of jurisdiction. Bivens, 403 U.S. at 396 (Brennan, J.); id. at 408 n.8 (Harlan, J., concurring). See also Bush, 462 U.S. at 374 (authority to choose among remedies flows from the statutory grant of jurisdiction).
173. Bivens, 403 U.S. at 404-05 (Harlan, J., concurring). See Dellinger, supra note 60, at 1541-43. Under this view the authority to award remedies does not flow from the statutory grant of jurisdiction, although that is a precondition to its exercise. The general authority might be viewed as inherent in the "judicial power," whenever a litigant with a cause of action comes before a court with jurisdiction over the subject matter. Authority in a specific case might depend upon what the body creating the cause of action had provided. Id.
the Court treats the matter as an article I problem: how to remedy violations of federal rights which occur in the course of administration of a federal program. The Court does not just defer to the body which created the programs, although this helps decide the question of "who should decide whether [such] a remedy should be provided." It treats the Bivens remedy as something almost foreign to the whole matter which would be engrafted upon it.

To state the matter this way is essentially to resolve it against the Bivens plaintiff. It transmutes a problem with constitutional dimensions into a legislative one. Those who argue for a reading of Bivens as constitutionally required would of course reject it. For example, Professor Dellinger describes that case as "resting on the premise that constitutional rights have a self-executing force that not only permits but requires the courts to recognize remedies appropriate for their violation." Others reach the same constitutional position through emphasis on the need of individual plaintiffs for effective vindication of their constitutional rights. I believe that one can stop short of the constitutional position—i.e. that appropriate remedies are required as opposed to merely authorized—and still criticize the recent decisions on the ground that they downgrade the judiciary's particular competence in vindicating constitutional rights and that they dismiss the possibility of concurrent enforcement schemes. Concurrent enforcement makes initial sense in that Congress did not create the Bivens "cause of action." One could accept this position and still defer substantially to Congress, even giving it the power to make its remedies exclusive.

Section 1983 provides a useful starting point for considering this position. Bivens and section 1983 perform functionally similar roles at the federal and the state and local levels. As a general proposition it would seem that they ought to be available in similar circumstances. The identical treatment of the two in the immunity context reflects, I believe, this perception. Why not carry it forward to the Bivens inquiry as to the availability of a damages remedy at the outset of a case?

If one accepts this general position, a specific tenet of section 1983 doctrine becomes particularly relevant: that this remedy is supplemental to any set of remedies the state may provide, and available in a federal court no matter what the state does. The principle was laid down in Monroe v.

176. Cf. id. at 389 (declining to create "a new species of litigation between federal employees . . .").
177. Dellinger, supra note 60, at 1557.
Recent cases have dented it, but only slightly. Under the doctrine of Parratt v. Taylor, the state procedures can operate to preclude a section 1983 action for deprivation of property without due process of law. However, that is because the available procedures for redress constitute a due process remedy for the deprivation which wipes out the underlying substantive claim. In the context of constitutional challenges to state taxes, it may be that the state's judicial procedures can foreclose recourse to section 1983. The general obligation of state courts to entertain section 1983 appears to remain in force, as does the principle that that remedy is supplemental.

Given the functional equivalence of Bivens and section 1983, should the doctrine of supplemental remedies be transferred to the former context like the immunity defenses? After all, the premise of that transfer is that all public officials should stand on the same footing when it comes to federal judicial redress of their constitutional wrongs. It makes no difference to the plaintiff who violated his rights. And a fundamental premise of the legal system as a whole is the availability of judicial remedies for constitutional violations.

The argument for symmetry is tempting, but it cannot be pushed too far. In the context of section 1983 the alternate remedies come from a state, not a co-equal branch of the federal government. Section 1983, flowing directly from the fourteenth amendment itself, reflects a distrust of state processes and a decision to place the federal courts in a somewhat supervisory role over state and local actions.

Although the argument for a symmetrical application of the supplemental remedy doctrine sheds some light on the issue of concurrent enforcement, it ultimately fails for reasons of separation of powers. This is not because section 1983 comes from Congress and Bivens comes from some lesser authority. Rather it is a recognition of the need to defer to the power of Congress over federal programs and perhaps even its power over the practice and procedure of federal courts including the remedies available in those courts. The dilemma which the Court has not adequately resolved is how to reconcile this need with the important goal of retaining an important

184. Id. at 421-23.
186. See Dellinger, supra note 60, at 1546-47.
first line role for *Bivens* actions. Co-equality is a two way street, and the *Bivens* cause of action does not come from Congress. It is important to recognize that there are alternatives to the approach found in the recent cases. One approach would be to build on the second *Bivens* exception: the notion that Congress can foreclose *Bivens* actions through an express declaration. The other side of this coin is a requirement that Congress do so expressly, perhaps even through the use of some "magic words" which make it crystal clear that the normally available *Bivens* action is being displaced. In particular, this is not any utilization of the silence of Congress approach, nor does it involve drawing negative inferences from what Congress did address. As noted, the second exception can be seen as a classic example of the clear statement approach: Because displacing the *Bivens* action has constitutional ramifications, Congress must state expressly that it intends to do so. Does Congress have the power to do so? The Court's cryptic treatments of the matter are ambiguous, but suggest that it does. If so, *Bivens* can be seen as of less than purely constitutional stature, a form of "constitutional common law," so to speak. Those who view *Bivens* as a constitutional decision would require some degree of judicial review of the remedies which the legislature has declared to be a substitute. Either way, the clear statement approach has two distinct advantages. First, inertia is on the side of the *Bivens* action. It remains available to plaintiffs until Congress takes the considerable step of declaring otherwise. Second, it strikes a balance between judicial and legislative power. Neither is automatically superior. If, however, *Bivens* actions would really wreak havoc with a congressional program, Congress can do something about it.

Another approach would be for courts to exercise a high degree of deference to any congressional remedial mechanism, tilting the presumption away from the availability of *Bivens* remedies. This sounds like the current

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187. This approach has been rejected by most commentators. See, e.g., Steinman, supra, note 14, at 282-84. It does, however, strike a balance which preserves judicial power to a much greater extent than in recent cases.  
188. Carlson, 446 U.S. at 31 (Burger, C.J., dissenting).  
190. There is an analogy here to Congress' oft-discussed power to cut off the federal court's jurisdiction over certain claims. See Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1117-18 (1969).  
191. See supra notes 56-60. Most recently, the Court in *Chilicky* indicated that an "explicit statutory prohibition against the relief sought [or an] exclusive statutory alternative remedy" would preclude a *Bivens* action. 108 S. Ct. at 2467. It decided the case, however, on special factors grounds. *Id.* at 2468-71.  
192. See infra text accompanying notes 220-37.  
193. E.g., Steinman, supra note 14, at 282-84; Dellinger, supra note 60, at 1549; Hill, supra note 190, at 1157.  
194. The metaphor is borrowed from Professor Monaghan. Monaghan, supra note 114, at 29.
Court's approach, but it is not. Rather, the Court would choose the congressional scheme through the exercise of its own discretion, adopting the legislative solution as its own, so to speak. It would not act out of a reflex reaction that since there is some legislation on point its discretion has necessarily been extinguished. Furthermore, for the exercise of discretion to be meaningful the Court would have to engage in some weighing and evaluation of what remedy Congress did give the plaintiff. The Court did do this to some extent in *Bush*,195 but in *Chilicky* it seems to have moved toward the position that congressional action ends the matter.196 It may be that the deferential approach discussed here is limited by the notion that whatever Congress gives the plaintiff must be constitutionally adequate.197 If it is not constitutionally adequate, or perhaps even if the Court does not think it is enough, concurrent enforcement through the (supplementary) *Bivens* remedy remains in effect. The point is that this second approach keeps the notion of "special factors counselling hesitation" in the realm of judicial discretion rather than the realm of judicial power.

The current Court has taken neither of these approaches. The clear statement approach (the second *Bivens* exception) is neither invoked nor examined, even when it might be.198 The Court does talk about the "elaborate and comprehensive"199 nature of the remedies which Congress has provided, but the point seems to be to bolster the conclusion that the whole matter is really one for Congress anyway. The Court is coming increasingly close to abandoning the field altogether, at least when Congress has provided something. Congress is seen as the body which should act, and its remedies represent its conclusion as to how the balance should be struck.200 Apparently that balance is binding and preempts the field. As one circuit judge put it, "[t]he Supreme Court has decided that Congress is in the best position to make this decision and that, when it has done so, the courts should not interfere with the balance Congress has struck."201 This is essentially the approach the current Court uses when deciding whether to imply a private right of action from a federal statute.202 That issue is a question of statutory

196. See *Chilicky*, 108 S. Ct. at 2468, 2469. The Court did, however, note that the remedies Congress provided were "meaningful." *Id.* at 2470.
197. See *Bush*, 462 U.S. at 378.
198. See *Chilicky*, 108 S. Ct. at 2471 n.3 (declining to discuss whether Congress had "explicitly precluded the creation of a *Bivens* remedy for respondents' claims").
200. *Chilicky*, 108 S. Ct. at 2469 (Congress "chose specific forms and levels of protection for the rights of persons affected.").
construction. *Chilicky* contains another technique of statutory construction: plumbing the legislative history in search of indications that Congress wanted its remedies to be exclusive.203 As usual, different members of the Court disagree on how to interpret that history.204

It is as if the matter had been turned into solely an article I problem. As argued above, there are other ways of respecting the authority of Congress without sacrificing the judiciary's important role in *Bivens* matters.205 What I have referred to as the "*Bivens* problem"—how to reconcile the presence of concurrent enforcement schemes—flows largely from the ambiguities in the original decision. No subsequent decision has clarified those ambiguities. Without recasting *Bivens* the Court must tread a fine line between its constitutional side, which emphasizes the judiciary, and its common law side, which emphasizes the legislature. I do not think that this is an impossible or an undesirable task. The current Court, however, has largely abandoned it, viewing *Bivens* remedies as a legislative matter and the statute preeminent. To this extent the *Bivens* dissenters' fundamental premise has been accepted.

IV. *BIVENS* AND FEDERAL COMMON LAW ANALYSIS

A. Rejection of the Constitutionalist View

The view that *Bivens* is constitutional law in the sense of being compelled by the document itself, fairly interpreted, has attracted some academic support.206 As discussed above, it is a somewhat stretched reading of *Bivens* itself, let alone subsequent cases. The principal problem for proponents of the constitutionalist position is the extent to which the Court has, from the outset, uncoupled the question of remedies from that of the right. Remedies fluctuate; rights do not. The emphasis on Congress' role and even superiority in determining when and how courts should award relief for constitutional violations is sharply at variance with the judicial role in the elaboration of

203. See *Chilicky*, 108 S. Ct. at 2469 (noting expression of regret by one legislator that remedies did not go further).

204. Id. at 2476-77 (Brennan, J., dissenting).

205. See supra text accompanying notes 187-97.

206. E.g., Schrock & Welsh, supra note 178, at 1135-36. Dellinger, supra note 60; see Hill, supra note 190, at 1113, 1149, 1157. The Court, on the other hand, does not appear to regard the constitutional analysis as particularly relevant. In *Bush*, Justice Stevens stated that if the matter were one of first impression the Court might proceed in either of two ways. It "might adopt the common law approach to the judicial recognition of new causes of action and hold that it is the province of the judiciary to fashion an adequate remedy for every wrong that can be proved." Or the Court might require statutory authorization. *Bush* v. *Lucas*, 462 U.S. 367, 373 (1983) (footnote omitted). Neither approach sounds like the constitutional reading.
constitutional rights. If Bivens is not constitutional law as that term is normally used, then where does it fit within the legal system?

B. Bivens as Some Form of Federal Common Law

The most frequent response has been to treat Bivens as an example of federal common law. Although Erie Railroad v. Tompkins\textsuperscript{207} raised doubts about the power of federal courts to fashion common law, various forms of federal common law have developed and indeed flourished since that decision.\textsuperscript{208} The general view is that these are enclaves\textsuperscript{209} within a system which is predominantly governed by state law. Federal common law is found in a number of discrete areas linked by the common themes of the presence of a federal interest,\textsuperscript{210} and the need for federal, as opposed to state, law to protect that interest. The federal courts supply the law because Congress has not done so, although it obviously could.\textsuperscript{211} The source of the federal courts’ own authority is not always clear,\textsuperscript{212} although there is generally some attempt to tie it to a constitutional or statutory provision.\textsuperscript{213}

What might be called ordinary federal common law is generally developed in areas involving “federal ‘proprietary’ interests”\textsuperscript{214} or “issues affecting the functioning of the United States government.”\textsuperscript{215} As Professor Redish states, “[t]he most extensive development of federal common law has come in cases which directly implicate the interests of the United States government.”\textsuperscript{216} The leading case is Clearfield Trust Co. v. United States\textsuperscript{217} in which the Court fashioned federal common law to govern a dispute between the United States and a bank over a check, issued for services under a federal program and subsequently stolen and fraudulently endorsed. The Court apparently derived its authority from Congress’ exercise of its constitutional function in setting up the underlying program.\textsuperscript{218} No specific legislation dealing with rights and duties concerning checks nor legislative

\textsuperscript{207} 304 U.S. 64 (1938).
\textsuperscript{209} Field, supra note 15, at 885. It should be stressed that Professor Field rejects any enclavist notions in favor of a generalized approach to federal common law.
\textsuperscript{210} M. Redish, supra note 208, at 80.
\textsuperscript{212} Field, supra note 15, at 886.
\textsuperscript{213} M. Redish, supra note 208, at 81.
\textsuperscript{214} Id. at 80 (citing Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024-25 (1967)).
\textsuperscript{215} Id. at 81 n.11 (citing Note, Federal Common Law and Interstate Pollution, 85 Harv. L. Rev. 1439, 1444-45 (1972)).
\textsuperscript{216} Id. at 85.
\textsuperscript{217} 318 U.S. 363 (1943).
\textsuperscript{218} Clearfield, 318 U.S. at 366-67.
authorization for judicial creation of such law existed. Whatever its doctrinal weaknesses, *Clearfield* has been read broadly for the proposition that federal courts can fashion the law incident to federal programs, although the inroads on *Erie* have been somewhat tempered by frequent deference to state law.\(^{219}\)

The Court does not appear to have moved to a position of treating *Bivens* as nothing more than *Clearfield* type federal common law, although it may try. There is a relevant federal program under which the defendant official operates. Congress may be able to overturn the Court's final decision. On the other hand, the major federal common law question—whether to displace state law—is of limited importance at best. More importantly, the Constitution is so important in *Bivens* cases that one must consider whether they represent something more than ordinary federal common law, a so-called higher breed of the species.

### C. Bivens as Constitutional Common Law

Justice Rehnquist has described the *Bivens* doctrine as ""constitutional common law.""\(^{220}\) This striking phrase raises the question of how any legal doctrine can be both things at the same time. The classic treatment and defense of federal constitutional common law is Professor Monaghan's.\(^{221}\) According to Monaghan, not everything the court does in the name of the Constitution is classic *Marbury*-style constitutional law.\(^{222}\) It also fashions an extensive ""substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.""\(^{223}\) A principal issue for Monaghan is establishing the Court's authority to develop such a body of law, given the premise that it is not constitutionally compelled. He views it as a variant of the types of federal common law discussed: judicial formulation of rules as a matter of first resort, with Congress' role being that of a potential subsequent reviser rather than the initial lawmaker.\(^{224}\) Because the various enclaves\(^{225}\) of federal common law represent an exception within the legal system, the Court must be able to point to a nonjudicial source which authorizes their formulation. For Monaghan, the crucial point is that the Constitution can be such a source every bit as much as a statute.\(^{226}\) Thus, in the context of the Bill of Rights, the Court has created ""a sizable body of constitutionally

\(^{219}\) *E.g.*, *Kimbell Foods*, 440 U.S. 715.


\(^{221}\) Monaghan, *supra* note 114.

\(^{222}\) *Id.* at 2-3.

\(^{223}\) *Id.*

\(^{224}\) *Id.* at 10-11.

\(^{225}\) *Id.* at 15.

\(^{226}\) *Id.* at 13.
inspired implementing rules whose only sources are constitutional provisions framed as limitations on government."

Monaghan treats Bivens as an example of this constitutional common law. He rejects the constitutional interpretation of the case, although he does characterize it as "an explicit recognition that the constitutional guarantee embraces a right of action." The remedial issue is separate and, apparently, open to legislative action. This conclusion leads us to the second major component of the Monaghan thesis: a substantial role for Congress in amplifying and altering the initial rules laid down by the Court.

Monaghan has been criticized for his willingness to allow the potentially dangerous legislative branch into the domain where judicial protection from legislatures is essential. He may also be criticized for being ambiguous as to who should have the last word. At times he suggests that the need for adequate constitutional remedies reserves that say for the Court. At other times he suggests that Congress has the same power to change constitutional common law as it would any other form of federal common law. In the end, he suggests that the high degree of deference which the Court would show to Congress renders the point almost moot.

Whatever its shortcomings, the Monaghan thesis is an extremely helpful way of looking at Bivens. Treating the matter as one of ordinary federal common law is obviously unrealistic, given the extent to which the constitution is in the foreground as the source of the primary rights and duties. At the same time, by stopping short of a purely constitutional reading, it allows for the expansive congressional role which has developed. It appears to fit with the reading of Bivens offered above, under which the Constitution provides a cause of action with specific rights and duties but flexibility as to remedies. A constitutional common law analysis may have the disadvantage of not clearly answering the question of which branch has the last word—to what extent, if any, the Court can review what Congress provides—but the Court has not done so either.

Furthermore, I think that the constitutional common law thesis is consistent with the narrow view of the special factors exception argued for in this article. Special factors should be special, as opposed to generally present. Monaghan emphasizes the Court's competence and generally accepted role

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227. Id. at 19.
228. Id. at 23-24.
229. Id. at 24 n.125. Included in the right of action is enforceability "by any appropriate remedy including damages." Id.
230. Id. at 18-30.
231. Schrock & Welsh, supra note 178, at 1152-53.
233. Id. at 29, 31.
234. Id. at 42 n.217.
235. See supra text accompanying notes 207-16.
in implementing guarantees of individual rights. This suggests a presumptive approach to Bivens remedies and a clear statement requirement for a finding that Congress has displaced them. At the same time, recognition of Congress' role allows for some degree of deference to what it has provided. This may sound like trying to have it both ways (a criticism that has been levelled against Monaghan) but that is inherent in the Bivens problem of what to do when Congress has spoken. Monaghan, then, provides a framework for considering that problem. Recent federal courts scholarship provides an even broader framework, and also focuses attention on a specific question which cases such as Chilicky raise: To what extent should implication of Bivens remedies from the Constitution be viewed as identical to implying private rights of action from federal statutes?


In two important recent articles, Professors Field and Merrill advance what might be called a generalized approach to lawmaking by federal courts. Their thesis is that constitutional adjudication, statutory interpretation, and what is narrowly referred to as federal common law, share sufficient characteristics that they can all be treated as federal common law in a broad sense. Professor Field defines the term to mean "any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." An authoritative text, either the Constitution or a statute, must give the federal courts power to make law, but once they have it, "judges [possess] great freedom to make federal common law where they will." Professor Merrill's definition of federal common law is similar: "any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense."

These propositions may seem startling at first, but they rest on a number of important insights. Constitutional adjudication, for example, can rarely be tied directly to the words of the text or the framers' specific intentions.

236. Monaghan, supra note 114, at 18, 35.
237. See generally Schrock & Welsh, supra note 178.
238. Field, supra note 15; Merrill, supra note 15.
239. Field, supra note 15, at 890 (emphasis in original).
240. Id. at 888.
241. Id. at 929.
243. Id. at 2 (discussing prominence of "noninterpretative" or "nonoriginalist" theories of judicial review).
Statutory interpretation, as well, frequently shades into an attempt by courts to further generalized policy goals through judicial action. Both involve the use of the panoply of common law techniques, as does, of course, the formulation of federal common law itself, as that term is normally used. A particular advantage of this perspective is that it helps explain the importance of precedent—the quintessential common law tool—in the development of constitutional law.

What is important, for present purposes, is that both Field and Merrill seize on similarities between Bivens remedies and implying private rights of action from federal statutes as a specific illustration of their general thesis. Professor Field is even petulant about the matter, wondering "how long" it will take the Court to see the light, and expressing the "hope that the ... dichotomy between constitutional and statutory remedies will be forgotten and that the same process of reasoning from the federal enactment in its context, including the policies behind it and the purposes of its framers, will come to be seen as dominating the inquiry in both situations.

In other words, each task—granting a Bivens remedy and implying a private right of action from a statute that does not provide one—involves a similar exercise in federal judicial lawmaker, the fashioning of federal common law. It is true that in each case neither text speaks to the question of remedies, although the statute normally contains provisions for administrative enforcement. It is also true that the Court, particularly in Bivens, has at times suggested that the two inquiries are similar. However, it stated otherwise in Davis v. Passman, and it is the Davis dichotomy which Field and Merrill criticize.

Still, there are several reasons why I think their equation fails. At the outset there is the common sense notion that the Constitution and federal statutes are simply different. It is not just that the Constitution does not "partake of the prolixity of a legal code," although that is part of it. Statutes generally prescribe remedial mechanisms. The Constitution does not. More importantly, we expect the courts to play a broad role in enforcing

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245. In Clearfield, for example, Justice Douglas' opinion cited federal cases, state cases, English law, and a treatise in deciding a point of commercial law.
246. Merrill, supra note 15, at 69-70.
248. Id.
249. See, e.g., Merrill, supra note 15, at 49-50.
it. "Under our accepted traditions and governing political theory, the judicial branch has the final say as to the meaning of the Constitution, and it is therefore appropriate for the Supreme Court to develop the remedies which, in its opinion, most effectively enforce the constraints of the Constitution."253

Statutes, on the other hand, come from Congress which may have decided the remedial mechanism it wants as part of the bargain and trade necessary to get the statute passed in the first place.254 As Justice Scalia states, the remedial mechanism is a "separate" and "significant" part of the statute.255 Treating the two problems as equal attempts to piggyback an activist approach to implied statutory rights onto the legitimacy of Bivens. In part, of course, Professors Field and Merrill are simply at odds with the current Court's reluctance to imply rights of action from federal statutes.256 That reluctance is grounded in notions of separation of powers which also have a good deal of common sense appeal.257 In evaluating judicial remedies in the constitutional context, the inertia ought to be with the courts, unless Congress has spoken with some force, perhaps expressly. In the statutory context, the inertia may well lie with no additional remedy beyond what is in the statute. Both Field and Merrill recognize that a court must derive its authority from the relevant text. The argument here is that the Constitution and statutes are very different sorts of texts.

One can support the current Court's restrictive approach to implied statutory rights of action, as I do,258 while criticizing its restrictive approach to Bivens. But if Field and Merrill are right, maybe this approach is right too. After all, Congress has spoken. Professor Merrill seems to suggest that Congress' provision of an adequate remedy would deprive the federal courts of power to entertain a Bivens action.259 Even if one does not go this far, the generalist thesis appears to track the current Court in focusing on the legislative dimension of the Bivens problem. After all, the more one calls it federal common law, the stronger the implication that Congress can take away the Bivens remedy simply by acting.260

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256. E.g., Field, supra note 15, at 931-32 n.220 (rejecting Justice Powell's critique of implied rights of action based on separation of powers); Merrill, supra note 15, at 53 (The Supreme Court has been "too restrictive with respect to judicially created remedies for statutory violations."). At the same time, he characterizes the early Bivens decisions as "too expansive." Id.
258. Id.
259. Merrill, supra note 15, at 53.
260. Professor Field attempts to avoid the dilemma by the following analysis: "Congress
That is perhaps the ultimate irony of the Field-Merrill thesis: the creation of strange bedfellows between academics who favor judicial lawmaking (Merrill's enthusiasm is more tempered) and a conservative, anti-federal common law Court that wants to restrict it. If *Bivens* and implied rights analysis are the same thing, one could say, perversely, that the Court has bought the Field-Merrill thesis and is treating them the same way. However, it denies both. In this respect, it is striking that the *Chilicky* opinion, denying a *Bivens* remedy, utilized the very reasoning that Justice Powell first invoked in favor of a restrictive approach to implied rights of action: "At each step, Congress chose specific forms and levels of protection for the rights of persons affected . . . . At no point did Congress choose to extend to any person the kind of remedies that [plaintiffs] seek in this lawsuit." 261 Perhaps federal common law analyses of *Bivens* have their limits after all.

**CONCLUSION**

As the passage just quoted from *Chilicky* shows, the Court is moving closer and closer to treating the availability of *Bivens* remedies as a legislative question. If any statute can preclude the courts, then the statutory tail has come to wag the constitutional dog. So far, outside the military field at least, the cases have arisen in contexts where Congress has provided some remedy. Thus the Court has been able to deny plaintiffs access to federal courts without denying the existence of initial federal judicial power to redress their grievances. It has not embraced the ultimate conclusion of the *Bivens* dissenters. It has, however, accepted many of their premises about legislative competence and legislative power. In my view, there are ways to respect congressional competence and authority short of this abdication. Of course, the Court's opinion in *Bivens* itself sowed many of the seeds of this harvest. Finally, I do not mean to suggest that the advocates of a generalized approach to federal common law intend to provide intellectual support for always has power to alter a federal common law rule that is not constitutionally based. Moreover, even common law inferred from constitutional provisions is not always beyond Congress' power to change. But Congress sometimes lacks power to alter common law derived from the Constitution because sometimes such law is constitutionally required." Field, *supra* note 15, at 896 n.60 (emphasis added). It is not clear that calling rules "compelled by the Constitution," *id.* at 892-93 n.42, federal common law fits within her general emphasis on the judge making that law outside the clear text of any governing instrument. For example, she distinguishes between a rule being "a product of judicial creativity" as opposed to "more direct constitutional or statutory interpretation." *Id.* at 894. All of this may simply illustrate the pitfalls of a general theory which attempts to do away with enclavism.

what the Court is doing. But in equating statutory issues with constitutional ones they do just that. In treating *Bivens* plaintiffs the same way it treats statutory plaintiffs, the Court has adopted a course of action urged in another context: Just say no.