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## Separation of Powers and the Exercise of Concurrent Constitutional Authority in the *Bivens* Context

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### I. INTRODUCTION

Despite initially extending its holding, the United States Supreme Court has crept towards overruling *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>1</sup> during the last 25 years. *Bivens* held that the Supreme Court had the authority to fashion a remedy at law for a violation of the Fourth Amendment committed by federal officers.<sup>2</sup> In recent decisions, a majority of the Court has indicated its hostility towards this holding; this hostility is rooted in separation of powers concerns.<sup>3</sup> The majority of the Court believes that, absent explicit statutory authorization from Congress, the Court lacks the authority to craft remedies at law for constitutional violations committed by federal officers. Although the Court has refused to overturn *Bivens*, its recent decisions have rendered meaningless the remedy declared in that case. As such, the Court has left the responsibility for remedying constitutional violations committed by federal officers entirely with Congress.

This article examines separation of powers and the exercise of congressional and judicial authority in the *Bivens* context. Section I traces

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<sup>1</sup> 403 U.S. 388 (1971).

<sup>2</sup> *Id.* at 396.

<sup>3</sup> *See, e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604–05 (2007) (“We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”); *Corr. Servs. Co. v. Malesko*, 534 U.S. 61, 72 (2001) (“Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.”).

the doctrinal development of *Bivens*, particularly focusing on the ascent of the early dissenters into the majority of the Supreme Court. Section II analyzes the formalistic view of the separation of powers held by the early dissenters—a view that has come to dominate the Court. It argues that this is an unworkable theory of separation of powers and that a functionalist theory—under which the Supreme Court and Congress exercise concurrent authority to fashion remedies for constitutional violations—should be adopted. Section III discusses the functionalist framework set forth in Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>4</sup> for the exercise of concurrent constitutional authority among coordinate branches of government. It uses this framework to develop a normative approach for the exercise of concurrent authority in the *Bivens* context. Section IV assesses the obligation of Congress and the Supreme Court to exercise their authority to remedy constitutional violations committed by federal officers. Section V sets forth a reformulation of the *Bivens* doctrine and urges a reconsideration of the Supreme Court’s recent decisions in this line of cases.

This article concludes that the Supreme Court’s *Bivens* doctrine has been needlessly rendered meaningless in the name of separation of powers. The *Bivens* remedy should be revived under a functionalist theory of separation of powers. Under this theory, the Supreme Court and Congress possess not only concurrent authority, but also an obligation, to remedy constitutional violations committed by federal officers.

## II. FRAMING THE PROBLEM: THE *BIVENS* NON-DOCTRINE

At the outset, in order to understand the problem presented, it is important to trace the doctrinal development and the dissenting opinions in the *Bivens* line of cases. Despite strong dissents based on separation of powers concerns, *Bivens* was initially expanded by the Supreme Court. The Court, however, quickly retreated from this path, expanding the limited exceptions established in *Bivens* to the point where they swallowed the rule. This change in course was driven by the separation of powers concerns articulated in the early dissents in the *Bivens* line of cases. Thus, although the Court has continually “affirmed” the holding in *Bivens*, the rationale of the early dissenters has largely prevailed, rendering meaningless the remedy declared in that case.<sup>5</sup> Given this doctrinal confusion, it is not surprising that this line of cases has been referred to as

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<sup>4</sup> 343 U.S. 579 (1952).

<sup>5</sup> See *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting); Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 483–84 (2006).

the “*Bivens* nondoctrine.”<sup>6</sup>

*A. Bivens and Its Dissents*

In 1971, *Bivens* established the principle that the Supreme Court possesses the authority to fashion a remedy at law for violations of the Fourth Amendment committed by federal officers.<sup>7</sup> The plaintiff in this case alleged that agents of the Federal Bureau of Narcotics, lacking probable cause and a search warrant, entered his home, subjected him to a humiliating search, and threatened his family.<sup>8</sup> The plaintiff brought suit for damages in federal district court directly under the Fourth Amendment to the Constitution.<sup>9</sup> The defendants sought and were granted dismissal of the claim on the grounds that no cause of action was available to the plaintiff under the Fourth Amendment; his sole remedy was state tort law.<sup>10</sup> The Court of Appeals for the Second Circuit affirmed this decision.<sup>11</sup>

Writing for a majority of the Supreme Court, in an opinion reversing the lower courts, Justice Brennan asserted that the Fourth Amendment guaranteed citizens of the United States the “absolute right” to be free from unreasonable searches and seizures carried out by the federal government.<sup>12</sup> He stated that a federal right could not depend on state law and argued that the federal judiciary had the authority and duty to adjust its remedies in order to ensure adequate relief for violations of federal rights.<sup>13</sup> The Court, therefore, held that the plaintiff could bring suit for money damages under the Fourth Amendment against the federal officers who violated his rights.<sup>14</sup> This has become known as a “*Bivens* remedy.”<sup>15</sup>

Despite this strong language, the Court qualified its holding with two exceptions. First, the Court stated that it would not afford a *Bivens* remedy where there were “special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>16</sup> Second, the Court stated that it would not craft such a remedy if Congress had specified an equally effective alternative remedy.<sup>17</sup> These exceptions demonstrated the majority’s

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<sup>6</sup> Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1128 (1989).

<sup>7</sup> *Bivens*, 403 U.S. at 396.

<sup>8</sup> *Id.* at 389–90.

<sup>9</sup> *Id.* at 390–91.

<sup>10</sup> *Id.* at 390.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 392; See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 591 (4th ed. 2003).

<sup>14</sup> *Bivens*, 403 U.S. at 397.

<sup>15</sup> See, e.g., *Carlson v. Green*, 446 U.S. 14, 19 (1980); *United States v. Stanley*, 483 U.S. 669, 684 (1987).

<sup>16</sup> *Bivens*, 403 U.S. at 396.

<sup>17</sup> *Id.* at 397.

recognition that, while the Court had the power to create this remedy, there were certain instances in which it should defer to Congress.

Three Justices—Chief Justice Burger, Justice Black, and Justice Blackmun—dissented from this opinion; each wrote separately to emphasize different points, but they all focused on separation of powers considerations.<sup>18</sup> The thrust of their opinions was that the Court lacked the power to create a remedy for constitutional violations committed by federal officers absent congressional authorization to do so.<sup>19</sup> The Chief Justice characterized the opinion as creating a remedy “not provided for by the Constitution and not enacted by Congress.”<sup>20</sup> He argued that “[l]egislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”<sup>21</sup> Justices Black and Blackmun expressed similar sentiments, asserting that this holding amounted to “judicial legislation.”<sup>22</sup> Justice Black also lodged an additional argument against the Court’s holding: he cited 42 U.S.C. § 1983—which authorized suits for money damages against state officers, but not federal officers, for constitutional violations—as evincing a congressional determination that these types of remedies should not be available against federal officers.<sup>23</sup>

The positions staked out in this opinion formed the core of the *Bivens* debate over the subsequent four decades. Initially, the argument of the majority prevailed, but that soon changed.

#### *B. The Extension of Bivens over the Dissent of Justice Rehnquist*

The next two cases in which the Supreme Court addressed *Bivens* remedies indicated that the Court would be taking an expansive view of this doctrine. In *Davis v. Passman*,<sup>24</sup> the Court upheld a cause of action under the Fifth Amendment for a female aide’s gender discrimination claim against her employer, a U.S. Congressman.<sup>25</sup> In extending the holding of *Bivens*, the Court stated:

[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights

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<sup>18</sup> Newman, *supra* note 5, at 478.

<sup>19</sup> *Id.*

<sup>20</sup> *Bivens*, 403 U.S. at 411 (Burger, C. J., dissenting).

<sup>21</sup> *Id.* at 412.

<sup>22</sup> *Id.* at 430 (Blackmun, J., dissenting); *id.* at 427–28 (Black, J., dissenting) (“If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties . . . . For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.”).

<sup>23</sup> *Id.* at 429 (Black, J., dissenting) (“Should the time come when Congress desires such lawsuits [against federal officials], it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers.”).

<sup>24</sup> 442 U.S. 228 (1979).

<sup>25</sup> *Id.* at 228.

are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.<sup>26</sup>

This extension of *Bivens* came despite the fact that when Congress amended Title VII of the Civil Rights Act of 1964 to protect federal employees from employment discrimination, it specifically exempted congressional employees.<sup>27</sup> The Court rejected the argument that this constituted a congressional determination that Congressmen should not be subject to such suits.<sup>28</sup>

*Carlson v. Green*<sup>29</sup> marked the first time that the Court considered *Bivens* relief where a congressionally created alternative remedial scheme already existed.<sup>30</sup> This case confirmed the implication of the previous two cases that the exceptions to *Bivens* would be read narrowly. The plaintiff brought suit against federal prison officials under the Eighth Amendment for the death of her inmate son.<sup>31</sup> An alternative remedy was available under the Federal Tort Claims Act (“FTCA”).<sup>32</sup> Recasting the alternative remedy exception in stronger language that demanded a clear statement from Congress, the Court found no congressional intent to preclude a *Bivens* remedy with the FTCA.<sup>33</sup> The Court also emphasized that the FTCA was not as effective as the *Bivens* remedy in providing relief for the constitutional violation, since it only established a claim against the United States, not the officers accused of the violation.<sup>34</sup> The Court, therefore, extended *Bivens* to this context.<sup>35</sup>

Importantly, in examining the legislative history of the FTCA, the Court found that Congress had endorsed the *Bivens* remedy.<sup>36</sup> The Court asserted that when Congress amended the FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal officers, the “congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as

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<sup>26</sup> *Id.* at 242.

<sup>27</sup> CHEMERINSKY, *supra* note 13, at 597.

<sup>28</sup> *Id.* at 597-98.

<sup>29</sup> 446 U.S. 14 (1980).

<sup>30</sup> CHEMERINSKY, *supra* note 13, at 598.

<sup>31</sup> *Carlson*, 446 U.S. at 16.

<sup>32</sup> CHEMERINSKY, *supra* note 13, at 598.

<sup>33</sup> *Carlson*, 446 U.S. at 19.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.* at 25.

<sup>36</sup> *Id.* at 19-20.

parallel, complementary causes of action . . . .<sup>37</sup> The legislative history cited by the Court stated:

[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progeny [*sic*], in that it . . . make[s] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).<sup>38</sup>

Thus, just three years after *Bivens* was decided, Congress endorsed the decision as an appropriate means of remedying constitutional violations committed by federal officers.

Despite this congressional endorsement, Justice Rehnquist wrote a vigorous dissent. He began by claiming that “[t]o dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an ‘unreality.’”<sup>39</sup> He then built upon the separation of powers dissents in *Bivens* to craft his own attack upon the doctrine. First, he contended that the task of creating remedies was essentially a legislative one, citing 42 U.S.C. § 1983 as evidence.<sup>40</sup> Second, he argued that the Supreme Court lacked the institutional competence to evaluate competing policy considerations in crafting a remedy.<sup>41</sup> Adding a new argument to those of the past, Justice Rehnquist then stated that the fashioning of “expansive” remedies by the Court for constitutional violations undermined congressional authority to control federal court jurisdiction by “diverting judicial resources from areas that Congress has explicitly provided for by statute.”<sup>42</sup> Lastly, he argued that, unlike equitable remedies, there was no historical precedent for allowing courts to grant remedies at law without congressional approval.<sup>43</sup> This broad attack on the legitimacy of *Bivens* led Justice Rehnquist to conclude that “absent a clear indication from Congress, federal courts lack the authority to grant

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 20 (citing S. Rep. No. 93-5888, at 3 (1973)) (emphasis and alterations added by the Supreme Court).

<sup>39</sup> *Carlson*, 446 U.S. at 32 (Rehnquist, J., dissenting) (citing *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring)).

<sup>40</sup> *Id.* at 35 (Rehnquist, J., dissenting); Newman, *supra* note 5, at 480–81.

<sup>41</sup> Newman, *supra* note 5, at 481.

<sup>42</sup> *Carlson*, 446 U.S. at 37, 39 (Rehnquist, J., dissenting).

<sup>43</sup> Newman, *supra* note 5, at 481.

damages relief for constitutional violations.”<sup>44</sup> This dissent had a profound influence upon the Court’s future *Bivens* jurisprudence.

C. *Institutional Competence as a Rationale to Foreclose Bivens Relief*

In the cases following *Carlson*, the Supreme Court began to focus on institutional competence as a rationale for denying relief under *Bivens*. In *Bush v. Lucas*,<sup>45</sup> the Court for the first time found *Bivens* relief to be precluded by the existence of an alternative remedy.<sup>46</sup> The issue in this case was whether a NASA employee fired in retaliation for publicly criticizing the Agency was entitled to a remedy at law under the First Amendment.<sup>47</sup> At the outset of the opinion, the Court assumed that the plaintiff’s First Amendment rights were violated, that the remedies through the Federal Employee Appeals Authority were not as effective as a *Bivens* remedy, and that Congress had not explicitly precluded a *Bivens* suit.<sup>48</sup> Discarding the clear statement rule of *Carlson*, the Court stated that Congress could indicate its desire to preclude a *Bivens* remedy through “statutory language, by clear legislative history, or perhaps even by the statutory remedy itself.”<sup>49</sup> Based on this determination, the Court concluded that the existence of an alternative federal remedy, albeit one inferior to a *Bivens* suit, was a “special factor counseling hesitation.”<sup>50</sup> Thus, in deciding this case, the Court blended the two exceptions articulated in *Bivens*.<sup>51</sup>

This opinion—in which both Justice Rehnquist and Justice Brennan (the author of *Bivens*) joined—is notable because it indicated the trend in which the Court’s *Bivens* decisions would head. The Court did not deny the availability of *Bivens* relief because the Court lacked the *power* to grant such relief.<sup>52</sup> Rather, the Court adopted the institutional competence rationale put forth by Justice Rehnquist and the *Bivens* dissenters.<sup>53</sup> The Court assumed that it had the power to grant a *Bivens* remedy, but it chose not to exercise this power because it “was convinced that Congress [was] in a better position to decide whether or not the public interest would be served by creating [such a remedy].”<sup>54</sup> Congress’s ability to make this

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<sup>44</sup> *Carlson*, 446 U.S. at 41 (Rehnquist, J., dissenting).

<sup>45</sup> 462 U.S. 367 (1983).

<sup>46</sup> CHEMERINSKY, *supra* note 13, at 599.

<sup>47</sup> *Bush*, 462 U.S. at 367–68.

<sup>48</sup> CHEMERINSKY, *supra* note 13, at 601–02.

<sup>49</sup> *Bush*, 462 U.S. at 378.

<sup>50</sup> CHEMERINSKY, *supra* note 13, at 602.

<sup>51</sup> *Id.*

<sup>52</sup> George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs – Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 286 (1988-89).

<sup>53</sup> Newman, *supra* note 5, at 483.

<sup>54</sup> *Bush*, 462 U.S. at 390.

decision was superior not only because it had “developed considerable familiarity with balancing governmental efficiency and the rights of employees, but also [because it] may inform itself through factfinding procedures such as hearings that are not available to the courts.”<sup>55</sup> Accordingly, the Court found that there was no need to augment “an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations” with a “new judicial remedy for the constitutional violation at issue.”<sup>56</sup> The congressional scheme was “clearly constitutionally adequate” as constitutional challenges were fully cognizable and prevailing employees were entitled to a wide-variety of damages.<sup>57</sup> Thus, *Bivens* relief was denied in this case based upon separation of powers concerns that took the form of institutional competence, not absence of authority. The Court believed that where Congress had carefully considered its options and provided an adequate remedy, separation of powers considerations dictated that it stay its hand.<sup>58</sup>

Institutional competence concerns dominated the Court’s next *Bivens* decision as well. In *United States v. Stanley*,<sup>59</sup> the Supreme Court used the special factors exception to bar a *Bivens* suit, despite the fact that no other alternative remedy existed.<sup>60</sup> *Stanley* represented an egregious violation of constitutional rights by the United States military, which tested LSD on the plaintiff without his knowledge, leading to devastating consequences during the two decades following the tests.<sup>61</sup> In line with a previous case denying *Bivens* relief to a military officer, the Court found 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.”<sup>62</sup> In its “plenary constitutional authority over the military,” Congress had enacted a “comprehensive internal system of justice to regulate military life,” which permitted constitutional challenges and significant consequential damages.<sup>63</sup> Thus, because “congressionally uninvited intrusion into military affairs by the judiciary is *inappropriate*,” the Court found that “no *Bivens* remedy is available for injuries that ‘arise out of or are in the course

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<sup>55</sup> *Id.* at 389.

<sup>56</sup> *Id.* at 388.

<sup>57</sup> *Id.* at 378 n.14, 386.

<sup>58</sup> *Id.* at 390.

<sup>59</sup> 483 U.S. 669 (1987).

<sup>60</sup> CHEMERINSKY, *supra* note 13, at 603.

<sup>61</sup> *See Stanley*, 483 U.S. at 671.

<sup>62</sup> *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (denying relief for a discrimination claim against military officers).

<sup>63</sup> *Id.* at 302.

of activity incident to service.”<sup>64</sup>

*Bush* and *Stanley* indicate that where, after careful consideration, Congress has created an adequate remedial scheme for constitutional violations or where Congress has special competence in a certain area, like military affairs or federal employment, the Court should defer to Congress and choose not to create a *Bivens* remedy.<sup>65</sup> In three subsequent Supreme Court cases, however, this institutional competence rationale was expanded far beyond the limited areas articulated in those cases and far beyond the dictates of the separation of powers doctrine.

#### D. A Retreat from *Bivens* under the Guise of Institutional Competence

Again, blending the exceptions originally set forth in *Bivens*, the Court in *Schweiker v. Chilicky*<sup>66</sup> found the existence of a congressionally created remedial scheme to be a special factor counseling hesitation that foreclosed a *Bivens* remedy.<sup>67</sup> In this case, the plaintiff brought suit under the Due Process Clause of the Fifth Amendment in response to the hardship he experienced as a result of the Reagan Administration’s illegal policy of disqualifying large numbers of Social Security disability recipients from their benefits.<sup>68</sup> Justice O’Connor for the majority stated: “When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.”<sup>69</sup> The Court asserted that it must give “an appropriate judicial deference to indication that congressional inaction has not been inadvertent.”<sup>70</sup>

Justice Brennan wrote a scathing dissent in this case because, unlike in *Bush* or *Stanley*, the Court was not deferring to the superior competence of Congress in remedying a constitutional violation.<sup>71</sup> Congress had not remedied the constitutional violation at all in this case: disqualified recipients were not allowed to present constitutional challenges to agency action at any of the four tiers of administrative review under the statute.<sup>72</sup> Constitutional challenges could be raised at the level of judicial review, but those who won at the administrative level and had their benefits restored

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<sup>64</sup> *Stanley*, 483 U.S. at 683-84 (emphasis added) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

<sup>65</sup> See *Schweiker v. Chilicky*, 487 U.S. 412, 443 (1988) (Brennan, J., dissenting).

<sup>66</sup> 487 U.S. 412 (1988).

<sup>67</sup> CHEMERINSKY, *supra* note 13, at 602.

<sup>68</sup> *Id.* at 600-01.

<sup>69</sup> *Schweiker*, 487 U.S. at 423.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 435-36 (Brennan, J., dissenting).

<sup>72</sup> Nichol, *supra* note 6, at 1148.

had no standing to press constitutional challenges.<sup>73</sup> Justice Brennan noted that while “neither the military justice system nor the federal employment relations scheme affords aggrieved parties full compensation for constitutional injuries . . . the relief provided in both is far more complete than [here].”<sup>74</sup> Moreover, Justice Brennan asserted that there was no reason for the Court to afford deference to Congressional *inaction* with respect to the constitutional violations at issue; this inaction in no way demonstrated intent to foreclose *Bivens* relief.<sup>75</sup> This was not an area in which Congress had special expertise that the Court lacked; in fact, the social welfare system turned “on the relationship of the Government and those it governs—the relationship that lies at the heart of constitutional adjudication.”<sup>76</sup> Thus, while this case was ostensibly decided under the auspices of institutional competence, the majority’s opinion once again suggested that the Court *lacked the power* to create a *Bivens* remedy without congressional authorization.

In *Correctional Services v. Malesko*,<sup>77</sup> it became apparent that the Court had adopted the view that it lacked the power to fashion *Bivens* remedies.<sup>78</sup> The plaintiff in this case, an inmate living at a halfway house, filed suit against the federal contractor operating the home for violating his Eighth Amendment rights.<sup>79</sup> Although not explicitly discussing which *Bivens* exception foreclosed a remedy, the Court for the first time found that a *Bivens* remedy could be precluded by state law remedies,<sup>80</sup> a proposition explicitly rejected in *Bivens* itself.<sup>81</sup> In “affirming” the core holding of *Bivens*, Chief Justice Rehnquist gave *Bivens* and its progeny the narrowest possible reading, stating that the Court should not create a *Bivens* remedy unless it is necessary “to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer’s unconstitutional conduct.”<sup>82</sup> Indeed, in asserting that this remedial issue was a question for Congress to decide, the Chief Justice stated that “[s]o long as the plaintiff had an avenue for *some* redress, bedrock principles of separation of power foreclosed judicial imposition of a new substantive

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<sup>73</sup> *Id.*

<sup>74</sup> *Schweiker*, 487 U.S. at 437 (Brennan, J., dissenting).

<sup>75</sup> *Id.* at 440 (Brennan, J., dissenting).

<sup>76</sup> *Id.* at 443 (Brennan, J., dissenting).

<sup>77</sup> 534 U.S. 61 (2001).

<sup>78</sup> See Newman, *supra* note 5, at 488.

<sup>79</sup> *Malesko*, 534 U.S. at 64.

<sup>80</sup> *Id.* at 72–74.

<sup>81</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394–95 (1971).

<sup>82</sup> *Malesko*, 534 U.S. at 70 (emphasis in original).

liability.”<sup>83</sup>

These sweeping statements were a far cry from the narrow exceptions articulated in *Bivens* and adhered to through *Stanley*, where the Court precluded a *Bivens* remedy only upon a showing of an adequate remedial alternative or special factors counseling hesitation, such as unique congressional expertise in a specific area. After *Malesko*, as long as *any* alternative remedy is available, regardless of its adequacy or whether it is a federal remedy, a *Bivens* remedy is foreclosed. This dramatic reduction in the scope of the doctrine led Justice Stevens to proclaim in his dissent that, “the driving force behind the Court’s decision is a disagreement with the holding in *Bivens* itself.”<sup>84</sup>

This statement by Justice Stevens must be correct; otherwise, the Court’s finding that state remedies can foreclose a *Bivens* remedy is logically incoherent. Where Congress has taken action in an area in which it possesses superior institutional competence, it is reasonable for the Court to defer to that action. But, there is no legitimate argument that the “state courts are more competent to make such remedial decisions in the absence of Congress than are federal courts.”<sup>85</sup> Thus, the only logical explanation for the holding in *Malesko* is that the majority believes that the Court lacks the power to craft *Bivens* remedies; thus, it will only do so under the precise circumstances presented in *Bivens*, *Passman*, and *Carlson*.<sup>86</sup> Indeed, this was the conclusion that Justice Scalia reached in his concurrence.<sup>87</sup>

#### E. *The Thinly-Veiled Death of Bivens*

If *Malesko* left *Bivens* on life support, the 2007 case of *Wilkie v. Robbins*<sup>88</sup> pulled the plug, leaving *Bivens* to struggle for breath on its own. In this case, the Supreme Court disentangled the *Bivens* exceptions in a manner that expanded them far beyond the plausible realm of institutional competence. Asserting that “any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee” and that “in most instances we have found a *Bivens* remedy unjustified,” the Court asserted that “the

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<sup>83</sup> *Id.* at 69 (emphasis added).

<sup>84</sup> *Id.* at 82 (Stevens, J., dissenting).

<sup>85</sup> Newman, *supra* note 5, at 488.

<sup>86</sup> *See id.*

<sup>87</sup> *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (“In joining the Court’s opinion, however, I do not mean to imply that, if the narrowest rationale of *Bivens* did apply to a new context, I would extend its holding. I would not. *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition . . . . I would limit *Bivens* and its two follow-on cases . . . to the precise circumstances that they involved.”).

<sup>88</sup> 127 S. Ct. 2588 (2007).

decision whether to recognize a *Bivens* remedy may require two steps.”<sup>89</sup> First, courts must examine “whether *any* alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.”<sup>90</sup> Second, the Court asserted that “even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: ‘the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.’”<sup>91</sup> Later in the opinion, Justice Souter described this step as “weighing reasons for and against the creation of a new cause of action, the way common law judges have always done.”<sup>92</sup>

The plaintiff in this case claimed that federal officials had engaged in a prolonged campaign of harassment against him—which was characterized by the Court as a campaign to bring about “death by a thousand cuts”—after he refused to grant the government an easement over his property.<sup>93</sup> He brought a *Bivens* action under the Fifth Amendment for alleged retaliation against him for exercising his right to exclude the government from his property.<sup>94</sup> In examining the first exception to *Bivens*, the Court found that there was a “patchwork” of state and federal law remedies for the specific federal government violations, but no remedy existed for the retaliatory campaign in the aggregate, which he alleged violated the Constitution.<sup>95</sup> The Court, however, considered it to be a close question whether or not this “patchwork” of remedies precluded a *Bivens* remedy, stating: “[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim.”<sup>96</sup> As a result of this indecision, the Court ducked the question and did not determine whether or not a *Bivens* remedy was foreclosed by the non-existent constitutional remedy. The Court then proceeded to decide this case under “*Bivens* step two.”<sup>97</sup>

Under the second exception, the Court engaged in an open-ended balancing test for creating a *Bivens* cause of action, weighing “the inadequacy of discrete, incident-by-incident remedies” against “the difficulty of defining limits to legitimate zeal on the public’s behalf in

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<sup>89</sup> *Id.* at 2597-98.

<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> *Id.* at 2598.

<sup>92</sup> *Id.* at 2600.

<sup>93</sup> *Id.* at 2593, 2600.

<sup>94</sup> *Wilkie*, 127 S. Ct. at 2596-97.

<sup>95</sup> *Id.* at 2600.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

situations where hard bargaining is to be expected.”<sup>98</sup> The Court ultimately argued that it was not competent to devise a workable cause of action for cases such as this:

A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out, and a general provision for tortlike liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions.<sup>99</sup>

These considerations were special factors counseling hesitation.<sup>100</sup> Accordingly, the Court stated that “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”<sup>101</sup>

The sheer breadth of these exceptions indicates that *Bivens* has lost all force; a *Bivens* remedy is no longer a viable means to remedy a constitutional violation. Under the current formulation of the *Bivens* exceptions, there are almost no circumstances in which a *Bivens* remedy must be recognized. The first exception allows *any process* that is a “convincing reason” to preclude the remedy, but the Court gives no indication of what amounts to such a convincing reason.<sup>102</sup> Presumably, based upon *Malesko* and *Wilkie* a “convincing reason” need not amount to an effective alternative remedy for the constitutional violation. The second exception affords the Court even greater discretion. The recasting of the special factors exception as an open-ended balancing test allows the Court to discard *Bivens* remedies as a matter of course, without the burden of utilizing specific criteria. The articulation in this case of the potential “onslaught of litigation” and the difficulty of defining a workable standard as “special factors” shows just how low the preclusion standard has fallen. The former “special factor” was rejected as a reason to preclude a *Bivens* suit in both *Passman* and *Bivens*.<sup>103</sup> The latter simply “rings hollow” as defining the boundaries of such a cause of action is a “prototypical judicial function.”<sup>104</sup>

The *Wilkie* opinion shows that the separation of powers rationale of Justice Rehnquist and the *Bivens* dissenters has prevailed. As Justice

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<sup>98</sup> *Id.* at 2600.

<sup>99</sup> *Id.* at 2604.

<sup>100</sup> *Wilkie*, 127 S. Ct. at 2604–05.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2598.

<sup>103</sup> *Id.* at 2613 (Ginsburg, J., dissenting).

<sup>104</sup> Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies after Wilkie v. Robbins*, 2006–2007 CATO SUP. CT. REV. 23, 71 (2007).

Ginsburg noted in her dissent, the Court barred a *Bivens* remedy in this case—despite the fact that Robbins, the plaintiff, had no “effective alternative remedy”—by recognizing “a special factor counseling hesitation quite unlike any we have recognized before.”<sup>105</sup> Both Justice Ginsburg and Professor Laurence Tribe, who argued this case before the Court on behalf of Robbins, have characterized this case as the “first genuine departure from *Bivens*’s ‘core holding.’”<sup>106</sup> This is the first time that the Court “has found a *Bivens* remedy unavailable to redress a run-of-the-mill constitutional claim against a federal official in the absence of an alternative remedial scheme that is even arguably designed to be comprehensive.”<sup>107</sup> The reformulation of the *Bivens* exceptions—in a manner that ensures that *Bivens* remedies will not be crafted to remedy future constitutional violations—indicates that the Court is a breath away from overruling *Bivens* under the rationale that the Court lacks the authority to fashion such remedies.<sup>108</sup>

### III. FORMALISM VERSUS FUNCTIONALISM IN THE *BIVENS* CONTEXT

The *Bivens* non-doctrine makes it apparent that the Court is close to overruling *Bivens* based on the rationale that it lacks the authority to craft *Bivens* remedies.<sup>109</sup> This Section contends that separation of powers principles do not mandate such a result. The view to the contrary, originally expressed by the *Bivens* dissenters and Justice Rehnquist in *Carlson* (hereinafter “the dissenters”), is based on an exceedingly and unnecessarily formalistic view of the separation of powers doctrine. An examination of (1) the Framers’ view of separation of powers, (2) the nature of the judicial power, and (3) the purpose for which governmental powers are separated demonstrates that this view is flawed. This examination demonstrates that Congress and the Judiciary have concurrent authority to create remedies at law for constitutional violations committed by federal officers.

#### A. *The Formalistic View of the Dissenters*

To make the claim that the judiciary oversteps the bounds of its

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<sup>105</sup> *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., dissenting).

<sup>106</sup> Tribe, *supra* note 104, at 70; *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., dissenting) (arguing that, until this decision, the Court had not strayed from the core holding of *Bivens*).

<sup>107</sup> Tribe, *supra* note 104, at 70.

<sup>108</sup> See CHEMERINSKY, *supra* note 13, at 596 (“The opinions of Chief Justice Rehnquist and Justice Scalia [in *Malesko*] show that a majority of the current Court is opposed to any extension of *Bivens* and that perhaps a reconsideration of *Bivens* may occur as the composition of the Court changes.”).

<sup>109</sup> *Id.*

authority when it fashions a *Bivens* remedy, the dissenters rely on a formalistic view of the separation of powers. As discussed in Section I, the dissenters make three arguments as to why the Court *lacks authority* to fashion these remedies: (1) as made evident by 42 U.S.C. § 1983, the task of crafting remedies for constitutional violations is legislative, not judicial; (2) fashioning *Bivens* remedies impermissibly expands federal court jurisdiction beyond the limits authorized by Congress; and (3) unlike equitable remedies, there is no historical tradition of the Court creating remedies at law without congressional approval.

This narrow view of the judicial power stems from a formalistic understanding of the separation of powers.<sup>110</sup> Formalism relies on a “strict interpretation of the Constitution to resolve separation of powers problems.”<sup>111</sup> It is a theory that desires that the powers be separated to the “degree practicable” and focuses on the “limitations on articulated powers.”<sup>112</sup> In short, it is a theory that adheres closely to the classic tripartite model of separation of powers: the legislature makes the law, the executive implements the law at a general level, and the judiciary applies the law to particular disputes.<sup>113</sup> The theory claims that it would be a violation of this principle to vest “any group of officials with more than one of the three governmental functions;” formalism holds that governmental powers are mutually exclusive.<sup>114</sup> Thus, when the crafting of remedies for constitutional violations is characterized as legislative action, it violates formalism for the Supreme Court to engage in such activity.

### *B. The Formalistic View of the Dissenters is Flawed*

The formalistic view espoused by the dissenters is flawed. The Framers did not hold a formalistic view of the separation of power and did not intend to incorporate such a view into the Constitution. Understanding the fluid nature of governmental powers, the Framers sought to incorporate a functional separation of powers principle into the Constitution. When the mutual exclusivity requirement of formalism is removed, it is evident that the power to fashion remedies at law for constitutional violations committed by federal officers inheres in the judicial power. In light of the purpose for which powers are separated, a principled view of the doctrine would recognize and encourage the use of this power by the Supreme

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<sup>110</sup> Newman, *supra* note 5, at 488.

<sup>111</sup> Samuel W. Cooper, Note, *Considering “Power” in Separation of Powers*, 46 STAN. L. REV. 361, 368 (1994).

<sup>112</sup> *Id.*

<sup>113</sup> Burt Neuborne, *Judicial Review and Separation of Power in France and the United States*, 57 N.Y.U. L. REV. 363, 370 (1982).

<sup>114</sup> *Id.* at 372; Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385, 391 (1991).

Court.

1. *The Framers held a functionalist view of separation of powers*

While the structure of the Constitution closely parallels the classical model of separation of powers,<sup>115</sup> there is reason to believe that the Framers rejected a mutually exclusive view of governmental power. In fact, to the extent that the Framers had a coherent view of separation of powers, they were interested in a much more functionalist approach.<sup>116</sup> Functionalism is a theory of separation of powers that “argues for the allocation of each function to the institution structurally engineered to perform it best.”<sup>117</sup> It does not posit mutual exclusivity of governmental functions; rather, it maintains that as long as one branch is not interfering with the “core functions” of another there is no separation of powers violation.<sup>118</sup>

While there was no clear doctrine of separation of powers at the time of the Founding, there is evidence that the Framers held a view closer to functionalism.<sup>119</sup> As Professor William Gwyn points out:

Both the framers and the men participating in the first administration under the new Constitution (often, of course, the same persons) were concerned more with improving the efficiency and capabilities of the national government than with creating a system of government based on the abstract maxims of political philosophers.<sup>120</sup>

To be sure, the evidence suggests that the Framers had an “unformed and tentative” notion of the separation of powers and that they had “few fixed institutional arrangements in mind beyond the basic principle that there should be separation.”<sup>121</sup> The lack of definitive and articulated institutional arrangements satisfying the separation of powers is understandable considering the “large variety of institutional arrangements” that can satisfy the principle.<sup>122</sup>

The Framers adoption of a more functionalist approach, their decision not to explicitly incorporate the principle into the Constitution, and the

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<sup>115</sup> Neuborne, *supra* note 114, at 389.

<sup>116</sup> William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263 (1989).

<sup>117</sup> Neuborne, *supra* note 114, at 391.

<sup>118</sup> Cooper, *supra* note 111, at 368.

<sup>119</sup> Gwyn, *supra* note 116, at 263 (citing Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM & MARY L. REV. 211, 261 (1989)).

<sup>120</sup> Gwyn, *supra* note 116, at 263.

<sup>121</sup> Larry Kramer, *Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 287 (1990).

<sup>122</sup> Gwyn, *supra* note 116, at 264.

rejection of a separation of powers amendment in the Bill of Rights makes sense in light of the fluid nature of governmental functions.<sup>123</sup> The distinction between legislative, executive, and judicial power has always been “inexact and highly misleading.”<sup>124</sup> While there is certainly a core to each power, the powers often blend into one another.<sup>125</sup> The Constitution makes no effort to define the bounds of legislative, executive, and judicial power,<sup>126</sup> and the operation of the government in practice has offered little guidance. Each branch of government habitually practices functions that can be characterized as belonging to another branch:

Courts enunciate policy whenever they decide a hard case; executive officials enunciate policy, both formally and informally, whenever they administer an even mildly complex scheme; legislatures implement policy whenever they act to advance existing goals (constitutional or otherwise); courts routinely implement policy whenever they act in aid of an existing rule; legislatures frequently resolve disputes about the meaning of existing policies; and the executive resolves factual and legal disputes as a matter of course.<sup>127</sup>

Thus, an assertion—such as the one made by the dissenters when referencing 42 U.S.C. § 1983—that a certain type of governmental action belongs solely to one branch of government simply because that branch has performed that action in the past carries little weight.<sup>128</sup> Formalism simply cannot account for the fact that certain governmental actions can be characterized as falling within more than one type of governmental power.<sup>129</sup>

2. *The authority to create remedies at law for constitutional violations committed by federal officers inheres in the judicial power.*

Once the formalistic requirement that a governmental action can belong only to one branch of government is discarded, it is apparent that the Supreme Court does not violate separation of powers principles when it fashions remedies at law for constitutional violations committed by federal officers. The authority to do so inheres in the judicial power, which the

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<sup>123</sup> *Id.* at 264–65.

<sup>124</sup> *Id.* at 265.

<sup>125</sup> Neuborne, *supra* note 113, at 374.

<sup>126</sup> Newman, *supra* note 5, at 495.

<sup>127</sup> Neuborne, *supra* note 113, at 370–71 (internal citations omitted).

<sup>128</sup> See *supra* note 23 and accompanying text; Newman, *supra* note 5, at 502–03.

<sup>129</sup> Neuborne, *supra* note 113, at 370–71.

Constitution vests entirely in the Supreme Court.<sup>130</sup>

As Justice Brennan pointed out in *Bivens*, “[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>131</sup> Justice Rehnquist’s assertion to the contrary in *Carlson*<sup>132</sup> is simply inaccurate. In the Anglo-American common law tradition, Courts have long possessed the power to fashion remedies to redress grievances appropriately before them: “[U]nder common law methodology, the ‘remedy is merely the means of carrying into effect [the] substantive principle or policy’ upon which the claim of illegality is based.”<sup>133</sup> Courts have traditionally exercised discretion in determining the most effective remedy for carrying out the substantive policy or principle articulated in the common law.<sup>134</sup> Absent extraordinary circumstances, remedies at law were typically utilized as the remedy of choice for the invasion of a protected interest.<sup>135</sup> Equitable remedies, by contrast, were “normally available only after legal remedies [had] been demonstrated inadequate.”<sup>136</sup>

It is unclear why the Court would lack the power to enforce constitutional rights using the remedial powers typically available to courts under the common law. To begin with, it is important to make clear that violations of constitutional rights are justiciable by federal courts.<sup>137</sup> The Constitution is the “Supreme Law of the Land” and is applicable in ordinary courts.<sup>138</sup> Federal courts are granted jurisdiction to hear claims “arising under the Constitution” by both the Constitution and Congress.<sup>139</sup> The Constitution is largely silent with respect to the means by which these violations are to be redressed; however, the jurisdictional grant to redress these violations must have some content.<sup>140</sup> The Court, therefore, must be empowered to create remedies of some sort for these violations.<sup>141</sup> Is there any reason that remedies at law would be excluded from this power, necessitating congressional authorization before the Court can act?

The answer is no: “[I]f there is something peculiar about the Constitution that precludes this remedy, it has gone without mention for almost two centuries . . . .”<sup>142</sup> Since the Founding, the Court has assumed

<sup>130</sup> U.S. CONST. art. III, § 1.

<sup>131</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

<sup>132</sup> *Carlson v. Green*, 446 U.S. 14, 32, 42 (1980) (Rehnquist, J., dissenting).

<sup>133</sup> Nichol, *supra* note 6, at 1134 (quoting D. Dobbs, *Remedies* § 1.2, at 3 (1973)).

<sup>134</sup> Nichol, *supra* note 6, at 1134.

<sup>135</sup> *Id.* at 1135.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1117.

<sup>138</sup> Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 43 (1968).

<sup>139</sup> U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2003).

<sup>140</sup> Nichol, *supra* note 6, at 1133, 1135.

<sup>141</sup> *Id.* at 1133.

<sup>142</sup> Katz, *supra* note 138, at 43.

the power to create a wide-variety of remedies for constitutional violations without specifically being authorized by Congress to do so.<sup>143</sup> To remedy a constitutional violation, the Court has claimed, inherent in the judicial power, the authorization to declare legislation void,<sup>144</sup> to issue injunctions,<sup>145</sup> to exclude evidence from court,<sup>146</sup> and to create numerous other remedies.<sup>147</sup> These remedies were all judicially created pursuant to a grant of jurisdiction to the federal courts by the Constitution and Congress.<sup>148</sup> If the Court can create these remedies without explicit congressional authorization—some of which the Court created out of whole cloth<sup>149</sup>—it certainly has the power to craft remedies at law for constitutional violations.<sup>150</sup>

After all, although the Framers did not explicate the remedial mechanisms through which constitutional rights are to be enforced, they “saw themselves as building upon the English legal institutions that had taken root in the colonies.”<sup>151</sup> Equity was barely developed in the colonies at the time of the Founding and there were few, if any, other remedial mechanisms available: “It was the common law that was generally understood as governing rights and obligations.”<sup>152</sup> Considering this common law background, the Framers likely assumed that the judicial power encompassed the power to grant remedies at law for constitutional violations.<sup>153</sup> “Thus, neither the source of the right (the Constitution) nor the nature of the (rather customary) remedy (money damages) would seem to require that the judiciary await explicit legislative authorization before employing the remedy to vindicate the right.”<sup>154</sup>

It is an “historical anomaly” that remedies at law have come to be considered extraordinary, such that it is debatable whether they need special congressional authorization.<sup>155</sup> Remedies at law are “far more readily justified than the great bulk of modern remedies that dot our constitutional landscape.”<sup>156</sup> Far from expanding federal jurisdiction beyond the bounds that Congress authorized, as Justice Rehnquist asserted

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<sup>143</sup> See Nichol, *supra* note 6, at 1139.

<sup>144</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>145</sup> *Osborn v. United States*, 22 U.S. 738, 869 (1824).

<sup>146</sup> *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1913).

<sup>147</sup> Nichol, *supra* note 6, at 1139.

<sup>148</sup> Katz, *supra* note 138, at 22–23.

<sup>149</sup> Nichol, *supra* note 6, at 1137–38.

<sup>150</sup> Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542–43 (1971–1972).

<sup>151</sup> Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131 (1969).

<sup>152</sup> *Id.*

<sup>153</sup> Dellinger, *supra* note 150, at 1542–43.

<sup>154</sup> *Id.* at 1543.

<sup>155</sup> Katz, *supra* note 138, at 43.

<sup>156</sup> Nichol, *supra* note 6, at 1141.

in *Carlson*,<sup>157</sup> the recognition of the *Bivens* remedy simply enabled the Court to give substance to its jurisdiction over constitutional violations through the traditional remedial power available to courts.<sup>158</sup> By contrast, “the Rehnquist view of constitutional implementation bars the use of the one remedial device most likely to have been within the actual contemplation of the framers.”<sup>159</sup>

3. *A principled theory of separation of powers would encourage the use of remedies at law by the federal courts.*

A principled theory of separation of powers—one that takes into account the rationale for separating governmental powers—would encourage the use of remedies at law by the federal courts. Formalism, which demands strict separation of governmental powers, involves a great deal of inefficiency, as the coordinate branches of government are prevented from working together and allocating responsibility to the branch most competent.<sup>160</sup> This theory sacrifices governmental efficiency without gaining much.<sup>161</sup> In fact, such strict separation may undercut the purposes for which powers are separated.

Although American law has historically lost sight of this, separation of powers is not an end in itself.<sup>162</sup> The theory was formed to accomplish specific objectives:

[T]he seventeenth-century Englishmen who first urged a separation of legislative and executive power had fairly clear objectives in mind: to limit government officials by legal rules (the “rule of law”), to provide for the accountability of government officials, to eliminate a powerful group bias (that of government officials) from the legislature, to allow for governmental checks and balances, and to promote government efficiency.<sup>163</sup>

Professor Gwyn contends that, because modern judges and lawyers have lost sight of these purposes, they invoke the doctrine without understanding the “range of institutional principles that might satisfy the doctrine” and the “values maximized” by separating powers.<sup>164</sup> He concludes that “[i]ronically, a doctrine conceived originally to minimize

<sup>157</sup> *Carlson v. Green*, 446 U.S. 14, 37–39 (1980) (Rehnquist, J., dissenting).

<sup>158</sup> Nichol, *supra* note 6, at 1137.

<sup>159</sup> *Id.*

<sup>160</sup> *See* Neuborne, *supra* note 113, at 368.

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*; Gwyn, *supra* note 116, at 264–65.

<sup>163</sup> Gwyn, *supra* note 116, at 264–65.

<sup>164</sup> *Id.* at 265.

partiality in government and to assure accountability of executive officials” has been used to frustrate those efforts.<sup>165</sup>

This is precisely what the formalist view of separation of powers has done in the *Bivens* context. In the name of preventing “judicial-legislation,” the Court has moved towards overruling *Bivens*. The dissenters view embraces separation as an end in itself. It refuses to consider that there might be an alternative institutional arrangement—in which both the Court and Congress have the power to create remedies at law for constitutional violations committed by federal officers—that might satisfy the doctrine *and* further its rationale. By neglecting to consider this, the dissenters are actually frustrating the purposes that the separation of powers is meant to serve.

As the Court has long recognized, one of the central functions of *Bivens* remedies is to deter executive misconduct.<sup>166</sup> This deterrence serves the core principles underlying the separation of powers. An effective *Bivens* remedy (as opposed to the empty doctrine that is left after *Wilkie*) would ensure that government officials are subject to constitutional mandates and are accountable for the violation of these mandates. It would allow the federal courts to check executive misconduct by resolving private claims against individual officers and affording money damages where appropriate. This would presumably improve the overall efficiency of the executive as less executive violations would be committed by officers in the face of monetary sanctions. In short, an effective *Bivens* remedy would provide “a means to assure that the government does not overreach in sensitive areas which are most vulnerable to majoritarian excess . . . .”<sup>167</sup>

Thus, disallowing a *Bivens* remedy in the name of separation of powers turns the doctrine on its head. This result demonstrates the inadequacy of the formalistic theory employed by the dissenters. In the *Bivens* context, formalism reduces the efficiency of the government and undercuts judicial checks on the executive without advancing any principle other than separation for the sake of separation. This theory has lost sight of the principles underlying the doctrine of separation of powers. A principled theory of separation of powers, such as the functionalist approach, would encourage the Court to exercise the authority inherent in the judicial power to fashion such remedies.

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<sup>165</sup> *Id.*

<sup>166</sup> See e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (“*Bivens*’ core purpose [is] deterring individual officers from engaging in unconstitutional wrongdoing.”); *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.”)

<sup>167</sup> Neuborne, *supra* note 113, at 368.

*B. The Supreme Court and Congress have Concurrent Authority to Fashion Remedies for Constitutional Violations by Federal Officers*

Based on the foregoing discussion, it is plain that under a principled view of the separation of powers both Congress and the Supreme Court have authority to create remedies at law for constitutional violations committed by federal officers. The Supreme Court's authority inheres in the judicial power to craft remedies at law for a claimed invasion of a protected interest properly before it.<sup>168</sup> This is a power that falls "comfortably within our judicial tradition."<sup>169</sup> The power of Congress to fashion these remedies, although not explicit within the Constitution, may be inferred from judiciary clauses of articles I and III, which confer on Congress the power "[to] constitute Tribunals inferior to the Supreme Court and to create such inferior Courts as [it] may from time to time ordain and establish."<sup>170</sup> Further, Congress has the power to create all laws "necessary and proper" to effectuate "all Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>171</sup> This arguably carries with it the authority to pass laws implementing all congressional, executive, and judicial powers.<sup>172</sup>

Thus, "both branches are constitutionally empowered, within the limits of their institutional capabilities, to create remedial systems for fully effectuating the substantive protection afforded by the [Constitution]."<sup>173</sup> It remains to be seen, however, in what manner Congress and the Supreme Court will exercise this concurrent authority in relation to each other.

#### IV. THE APPROPRIATE EXERCISE OF CONCURRENT CONSTITUTIONAL AUTHORITY IN THE *BIVENS* CONTEXT

This Section analyzes the manner in which Congress and the Supreme Court should exercise their concurrent constitutional authority to fashion remedies at law for constitutional violations committed by federal officers. In making this determination, it is instructive to examine the oft-cited concurrence of Justice Jackson in *Youngstown*, which set forth a functionalist framework for the exercise of concurrent legislative and executive authority. When this framework is applied in the *Bivens* context, it demonstrates: (1) Where Congress has not created a remedial scheme addressing a certain constitutional violation by a federal officer, the Court should fashion a *Bivens* remedy, unless doing so would infringe upon a

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<sup>168</sup> Nichol, *supra* note 6, at 1141.

<sup>169</sup> *Id.*

<sup>170</sup> Dellinger, *supra* note 150, at 1546–47 (internal quotations omitted); U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 1.

<sup>171</sup> U.S. CONST. art. I, § 8.

<sup>172</sup> Dellinger, *supra* note 150, at 1547.

<sup>173</sup> *Id.* at 1552.

core power of Congress; and (2) Where Congress has created a remedial scheme, the Court should defer to that congressional scheme, as long as it is constitutionally adequate.

*A. The Youngstown Framework*

In his important and oft-cited concurrence in *Youngstown*, Justice Jackson set forth a functionalist framework for the exercise of concurrent legislative and executive authority.<sup>174</sup> Justice Jackson recognized that governmental power was fluid and that no reasonable conception of separation of powers could mandate the mutually exclusive exercise of governmental functions:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.<sup>175</sup>

With the understanding that more than one coordinate branch of the federal government is empowered to perform certain tasks, Justice Jackson set forth a framework for the exercise of concurrent authority between the executive and legislative branches.

Justice Jackson's framework acknowledged that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Based on this principle, Justice Jackson articulated how concurrent authority should be exercised in three different scenarios:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.<sup>176</sup>

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<sup>174</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

<sup>175</sup> *Id.* at 635.

<sup>176</sup> *Id.*

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as practical matter, enable, if not invite, measures of independent presidential responsibility.<sup>177</sup>
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.<sup>178</sup>

Although this framework was intended to address the exercise of presidential power in relation to congressional power, it is instructive to apply the reasoning to the exercise of concurrent congressional and judicial power in the *Bivens* context.

*B. Application of the Youngstown Framework to the Exercise of Concurrent Authority by Congress and the Supreme Court in the Bivens Context.*

The framework set forth in *Youngstown* is useful in determining how a functionalist theory of the separation of powers would operate in the *Bivens* context. Applying the *Youngstown* framework to the exercise of concurrent congressional and judicial authority in this context demonstrates that: (1) Where Congress has not created a remedial scheme for a certain constitutional violation, the Supreme Court should create a *Bivens* remedy, unless doing so would infringe upon a core power of Congress; and (2) Where Congress has created a remedial scheme for a certain constitutional violation, the Supreme Court should defer to that congressional scheme, as long as it provides a constitutionally adequate remedy.

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<sup>177</sup> *Id.* at 637.

<sup>178</sup> *Id.*

1. *Judicial authority in the absence of a congressional remedial scheme*

Where Congress has not created a remedial scheme to address a constitutional violation committed by a federal officer, the Supreme Court should not hesitate to fashion a *Bivens* remedy. In this situation, the Supreme Court is acting under scenario 1 of the *Youngstown* framework. As Justice Stevens stated in his dissent in *Malesko*, it “is clear from the legislative materials cited in *Carlson* . . . [that] Congress has effectively ratified the *Bivens* remedy; surely Congress has never sought to abolish it.”<sup>179</sup> As discussed in Section I, Congress explicitly endorsed the *Bivens* remedy when it amended the Federal Tort Claims Act in 1974.<sup>180</sup> Even if the comments accompanying the FTCA are, for some reason, not understood as an explicit congressional endorsement, the fact that Congress has not altered, amended, or attempted to prohibit<sup>181</sup> the *Bivens* remedy through legislation implies endorsement of the doctrine. “The *Bivens* analog to § 1983 is hardly an obscure part of the Court’s jurisprudence,” and if Congress wished to alter it, it certainly knows how to do so.<sup>182</sup>

Justice Rehnquist in his *Carlson* dissent and Justice Black in his *Bivens* dissent contended that 42 U.S.C. § 1983 functioned as an implicit congressional determination that a remedy at law should not be available against federal officers for constitutional violations.<sup>183</sup> This argument would place the Court in *Youngstown* scenario 3, where its power would be at its lowest ebb. This argument, however, is flawed.

Section 1983 was passed in the wake of the Civil War as part of the Civil Rights Act of 1871.<sup>184</sup> It created a private cause of action against state officers for money damages to remedy violations of federal constitutional rights.<sup>185</sup> The legislative history of the Act demonstrates that the Congress was overwhelmingly concerned with altering the relationship between the federal and state governments in order to ensure the protection of federal constitutional rights, which the states were disregarding.<sup>186</sup> As the Supreme Court has stated: “[T]he very purpose of

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<sup>179</sup> *Corr. Servs. Co. v. Malesko*, 534 U.S. 61, 83 (2001) (Stevens, J., dissenting).

<sup>180</sup> *Carlson v. Green*, 446 U.S. 14, 20 (1980). See *supra* notes 33–38 and accompanying text.

<sup>181</sup> See *infra* Section IV (discussion of the power of Congress to prohibit *Bivens* remedies through legislation).

<sup>182</sup> *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (Ginsburg, J., dissenting).

<sup>183</sup> *Carlson*, 446 U.S. at 35 (Rehnquist, J., dissenting); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 429 (1971) (Black, J., dissenting).

<sup>184</sup> CHEMERINSKY, *supra* note 13, at 470.

<sup>185</sup> *Id.* at 471–72.

<sup>186</sup> *Id.* at 469–70 (“Following the Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, violence against blacks was endemic throughout the South. The United States Senate conducted extensive investigations on this lawlessness, especially focusing on the role of the Ku

§ 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’<sup>187</sup> The enactment of § 1983, in the face of gross neglect of federal constitutional rights by the states, in order to protect those rights, does not demonstrate a congressional unwillingness to protect constitutional rights by similar means at the federal level; it simply shows that Congress was addressing the issue at hand. Moreover, since the *Bivens* remedy has been recognized, Congress has not taken any affirmative action to alter it and has, in fact, endorsed it. Thus, in the absence of this type of congressional action, the Court should exercise its authority under *Youngstown* scenario 1.

Under scenario 1, the Supreme Court's power is at its maximum and, thus, it should not hesitate to create a *Bivens* remedy. As discussed in Section II,<sup>188</sup> the authority to craft remedies at law inheres in the judicial power. The competency of the Court lies in particularizing “rules to specific fact situations in the context of resolving disputes between parties.”<sup>189</sup> Where Congress has not legislated a remedy that enables the Court to effectively perform its core function—that of granting a remedy for an invasion of a protected right to a litigant properly before it—the Court possesses plenary authority to grant remedies that lie within the judicial power. “In its role of supervision over the federal judicial system the Court must, of course, develop procedures and remedial forms which no other source of law provides.”<sup>190</sup> Indeed, it has the “duty reasonably to elaborate upon and effectuate the principles and policies established by the [Constitution].”<sup>191</sup> It is clear that, generally speaking, where Congress has not acted, the Supreme Court should fashion *Bivens* remedies for constitutional violations committed by federal officers.

The only instance in which the Court should hesitate to act in the face of congressional inaction is where the creation of a *Bivens* remedy would amount to judicial interference with a core congressional power.<sup>192</sup> While a functionalist view of separation of powers recognizes that concurrent power exists with respect to many governmental tasks, it prohibits one branch from interfering with the core functions of the other two coordinate

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Klux Klan. A 600-page Senate report detailed the unwillingness or inability of Southern States to control the activities of the Klan.”).

<sup>187</sup> *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

<sup>188</sup> See *supra* notes 128–157 and accompanying text.

<sup>189</sup> *Neuborne*, *supra* note 113, at 370.

<sup>190</sup> *Dellinger*, *supra* note 150, at 1547.

<sup>191</sup> *Id.* at 1549.

<sup>192</sup> See *Nichol*, *supra* note 6, at 1151 (“[J]udicial intrusion – whether via damages relief or equally through injunctive intervention – can threaten the constitutional ‘independence’ of coordinate branches of the federal government.” In such circumstances it is appropriate for the Court to deny relief where, “in interpreting the Constitution, it comes to the conclusion that judicial relief is inappropriate.”).

branches.<sup>193</sup> In such a situation—such as where the creation of a *Bivens* remedy would require the Court to enter an area that is textually committed to Congress by the Constitution or an area that lies within the special expertise of Congress—the Court is no longer operating within the *Youngstown* framework, which governs the exercise of concurrent authority. The Court does not have authority to intrude upon those areas. In this narrowly defined set of circumstances—for example, in the military or federal personnel context—the Court may not create a *Bivens* remedy.<sup>194</sup>

## 2. *Judicial authority where Congress has created a remedial scheme*

Where Congress has created a remedial scheme, the Court should consider itself to be acting in scenario 3 of *Youngstown*, where its authority is at its lowest ebb. The creation of a remedial scheme by Congress to address constitutional violations committed by federal officers, even if it does not explicitly state so, strongly implies a congressional intent to foreclose a *Bivens* remedy. This is because the core competency of Congress is in creating generally applicable rules.<sup>195</sup> Congress is a partial, majoritarian body that is in a better position than the Supreme Court to strike the appropriate balance between competing societal interests.<sup>196</sup> This superior position derives not only from its proximity and accountability to the people, but also from procedural advantages, such as the ability to conduct in-depth hearings into specific matters.<sup>197</sup> Where, through this process, Congress has made a remedial determination with respect to a certain constitutional violation, the implication is that it has struck what it deems to be the appropriate balance.

A functionalist theory of separation of powers demands deference to this determination, as the theory seeks to allocate governmental tasks to those most competent to perform them.<sup>198</sup> In this situation, the Court is exercising its “constitutional powers minus any constitutional powers of Congress over the matter.”<sup>199</sup> Since Congress has created a remedy that demands deference, the Court’s power to displace that remedy with a *Bivens* remedy has been stripped. The Court is left with the duty of applying the generally applicable congressional remedy to the case before it.

This, however, is not the whole extent of the Court’s function in this situation. The Court obviously retains its core functions under scenario 3 of *Youngstown*, despite the fact that it must defer to the congressional

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<sup>193</sup> Cooper, *supra* note 111, at 368.

<sup>194</sup> See Nichol, *supra* note 6, at 1127.

<sup>195</sup> Neuborne, *supra* note 113, at 370.

<sup>196</sup> Newman, *supra* note 5, at 511.

<sup>197</sup> *Id.* at 512 n.237.

<sup>198</sup> Neuborne, *supra* note 113, at 372.

<sup>199</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

remedial scheme. In the American constitutional structure, one of the core functions of the Supreme Court is judicial review to determine whether legislation is constitutional.<sup>200</sup> While the Congress is permitted a “wide choice” in the selection of remedies for constitutional violations, the determination of whether the remedy selected meets the minimum requirements of the Constitution must rest with the Court as “ultimate arbiter of the Constitution.”<sup>201</sup> In other words, the Court has the power to determine whether a congressionally created remedy is constitutionally adequate to effectuate the right in question.<sup>202</sup>

Where the Court determines that the congressional remedy for a constitutional violation committed by a federal officer is not constitutionally adequate, it may fashion a *Bivens* remedy to redress the grievance.<sup>203</sup> This makes sense under the *Youngstown* analysis. Where the Supreme Court determines that Congress has not provided a constitutionally adequate remedy, the Court is no longer operating under scenario 3, since Congress has not, in fact, remedied the constitutional violation. The lack of a congressional remedy moves the Supreme Court out of the deferential scenario 3 and back into scenario 1, where it possesses plenary power to fashion a remedy for the constitutional violation. Of course, the caveat from scenario 1 still pertains in this situation: if Congress has failed to provide a remedy for a constitutional violation in an area that is textually committed to Congress by the Constitution or an area that lies within the special expertise of Congress, then the *Youngstown* framework is not applicable as the Court does not have authority to intrude upon that area. Absent such circumstances, though, the Court should create a *Bivens* remedy where it deems a congressional remedy to be constitutionally inadequate.

While *Youngstown* provides a normative framework for the exercise of the concurrent authority of Congress and the Supreme Court to remedy constitutional violations committed by federal officers, it leaves one key question unanswered: to what extent are Congress and the Supreme Court constitutionally obligated to provide adequate remedies for these violations? This article has established that both Congress and the Supreme Court have the authority to provide remedies for these violations and set forth a framework for the exercise of that concurrent authority, but it has not addressed whether or not Congress and the Supreme Court are required to exercise this authority under the Constitution. It is to this question that the article now turns.

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<sup>200</sup> Brown, *supra* note 52, at 297; Cooper v. Aaron, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”).

<sup>201</sup> Nichol, *supra* note 6, at 1144–45.

<sup>202</sup> *Id.* at 1145.

<sup>203</sup> *Id.*

## V. UBI JUS, IBI REMEDIUM: THE BIVENS REALITY

This Section analyzes the extent to which Congress and the Supreme Court are constitutionally obligated to provide remedies for constitutional violations committed by federal officers. The maxim *ubi jus, ibi remedium*—where there is a right, there is a remedy—clearly does not hold true in all contexts in American jurisprudence. However, despite the fact that the Supreme Court has never explicitly addressed the issue, there is a strong argument that the maxim holds true in the *Bivens* context. Under the theory of “constitutional common law,” although a *Bivens* remedy is not necessarily constitutionally required to remedy a constitutional violation committed by a federal officer, an “adequate remedy” is required.

### A. The Remedial Requirement in American Jurisprudence

In *Marbury v. Madison*, Chief Justice John Marshall famously proclaimed: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>204</sup> Since this statement, there has been a scholarly debate concerning to what extent it holds true in American jurisprudence.<sup>205</sup> Over the last two centuries, it has become apparent that this statement does not hold true in all circumstances. Numerous doctrines—such as standing, personal jurisdiction, qualified immunity, and sovereign immunity—limit the remedial authority of the federal courts.<sup>206</sup> This undeniable reality has led Justice Scalia to declare that there is no “general principle that *all* constitutional violations must be remediable in the courts” and that “it is simply untenable that there must be a judicial remedy for every constitutional violation.”<sup>207</sup>

While this may be true, Professor Laurence Tribe has noted the distinction between the prudential and constitutional limitations on remedial availability and the denial of a remedy in situations like *Bivens*:

[T]here is an important distinction among (1) restrictions on the timing and method of presenting claims, which are necessary to enable courts to function at all; (2) sovereign immunity and other rules that restrict the ability of courts to entertain claims in the first instance; and (3) limitations on the power of courts to *grant relief* in cases that they are otherwise authorized to *hear*. The fact that

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<sup>204</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>205</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 599 (3d ed. 2000).

<sup>206</sup> *Id.* at 599–600.

<sup>207</sup> *Id.* at 600 (quoting *Webster v. Doe*, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting)).

remedies are not available in *every* case does not mean that they need not be available as a general matter . . . .<sup>208</sup>

Writing for the majority in *Davis v. Passman*, Justice Brennan declared as much, stating that unless constitutional rights are to become “merely precatory,” the Court must “presume that justiciable constitutional rights are to be enforced through the courts.”<sup>209</sup> This presumption stems from the principles underlying the Constitution.<sup>210</sup> The fact that sovereignty resides in the People of the United States and not in the government is

indicative of the broader truth that the Constitution draws its life from postulates that limit and control lawless government, not postulates that limit and control citizens in their efforts to vindicate constitutional rights, nor postulates that limit and control federal courts in their efforts to provide that vindication.<sup>211</sup>

These principles suggest that a *Bivens* remedy—which is aimed at ensuring that federal officials are bound to respect the constitutional rights of United States citizens—is a constitutional mandate. The Court, however, has refused to pronounce such a holding.

#### *B. Bivens and the Remedial Requirement*

The Supreme Court has not made its position with respect to the constitutional status of *Bivens* clear. It explicitly left open the question of whether a *Bivens* remedy is constitutionally required in footnote 14 of *Bush v. Lucas*, stating:

We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. . . . The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate.<sup>212</sup>

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<sup>208</sup> *Id.* at 600.

<sup>209</sup> *Davis v. Passman*, 442 U.S. 228, 242 (1979).

<sup>210</sup> *TRIBE*, *supra* note 205, at 601.

<sup>211</sup> *Id.* (internal quotations omitted).

<sup>212</sup> *Bush v. Lucas*, 462 U.S. 367, 378 n.14 (1983).

The Court has not returned to the question since this decision.

This has led to a scholarly debate regarding whether *Bivens* is constitutionally required or whether it is merely federal common law.<sup>213</sup> If it is constitutionally required—as the Court has found other remedies, such as the exclusionary rule, to be<sup>214</sup>—then Congress would not be able to displace the remedy through legislation: where the Court creates a *Bivens* remedy, it is holding that the remedy is required to effectuate the constitutional guarantee.<sup>215</sup> On the other hand, if *Bivens* is federal common law, then, not only can Congress displace the *Bivens* remedy with a remedy of its own choosing, it may also *foreclose* a remedy at law for constitutional violations committed by federal officers without providing an alternative remedy through legislation.<sup>216</sup>

The doctrine is, not surprisingly, ambiguous on this point. While the Court has stressed the need to remedy constitutional violations committed by federal officers,<sup>217</sup> “[t]he 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” notion that *Bivens* is constitutionally required as an “elaboration of constitutional rights.”<sup>218</sup> Many commentators, though, have found a resolution to this ambiguity implicit in the Court’s decisions.<sup>219</sup>

### C. *Bivens* as Constitutional Common Law

Based on the doctrine, a strong argument can be made that *Bivens* remedies are constitutional common law.<sup>220</sup> Although *Malesko* and *Wilkie* indicate that the Court may be moving away from this view, prior to those cases the Court continually “emphasized the importance of an adequate remedy for constitutional violations and denied *Bivens* suits only where [it found] either an alternative remedy that [was] equally effective or special factors justifying the absence of such litigation.”<sup>221</sup> This emphasis by the Court supports the contention that *Bivens* is constitutional common law.

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<sup>213</sup> CHEMERINSKY, *supra* note 13, at 594.

<sup>214</sup> *Weeks v. United States*, 232 U.S. 383, 393 (1914) (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

<sup>215</sup> CHEMERINSKY, *supra* note 13, at 594.

<sup>216</sup> *Id.*

<sup>217</sup> *See e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) (distinguishing *Bivens* on the basis that in this case the Court was not “confronted with a situation in which claimants in respondent’s shoes lack effective remedies.”); *Davis v. Passman*, 442 U.S. 228, 246 (1979) (“Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . .”) (citation omitted).

<sup>218</sup> *Brown*, *supra* note 52, at 291–92.

<sup>219</sup> *Id.* at 291.

<sup>220</sup> *Id.* at 294.

<sup>221</sup> CHEMERINSKY, *supra* note 13, at 595.

The theory of constitutional common law states that there is a “substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.”<sup>222</sup> In the *Bivens* context, this theory separates the constitutional status of the cause of action and the remedy: “[T]he Constitution provides a cause of action with specific rights and duties but flexibility as to remedies.”<sup>223</sup> *Bivens* is a constitutional decision in the sense that it requires adequate relief for justiciable constitutional violations.<sup>224</sup> The type of relief, though, is federal common law “in the sense that the nature and scope of relief is fundamentally a prudential or policy question.”<sup>225</sup> In other words, under this view, “the existence of effective relief—though not necessarily in the form of *Bivens* suits—is constitutionally required.”<sup>226</sup> Thus, Congress may not foreclose the availability of a *Bivens* remedy through legislation where it has not provided an adequate remedy of its own<sup>227</sup>—unless, of course, it is legislating in an area over which it has exclusive constitutional authority or special expertise.<sup>228</sup> Likewise, in the absence of a congressionally provided remedy, the Court *must* provide a litigant presenting a justiciable constitutional claim constitutionally adequate relief.<sup>229</sup> This relief may take the form of *Bivens* relief—the traditional judicial remedy—or other relief, which, in the opinion of the Court “effectively enforce[s] the constraints of the Constitution.”<sup>230</sup> Adequate relief, though, must be provided by either Congress or the Court.

In light of the preceding discussion in this article, the theory of constitutional common law presents the most complete and desirable explanation for the constitutional status of *Bivens*. Given the presumption in American jurisprudence that there should be an adequate remedy available for the violation of constitutional rights, it is “unrealistic” to treat *Bivens* remedies as mere federal common law.<sup>231</sup> This would allow the legislature to deny the protection and enforcement of constitutional rights at will. On the other hand, considering the concurrent authority and institutional competence of Congress in fashioning remedies for constitutional violations, *Bivens* remedies cannot be treated as a

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<sup>222</sup> Brown, *supra* note 52, at 293 (quoting Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975)).

<sup>223</sup> *Id.* at 294.

<sup>224</sup> Newman, *supra* note 5, at 506 n.214.

<sup>225</sup> *Id.* at 506–07 n.214.

<sup>226</sup> CHEMERINSKY, *supra* note 13, at 595.

<sup>227</sup> *Id.*

<sup>228</sup> See generally Delinger, *supra* note 190.

<sup>229</sup> Brown, *supra* note 52, at 293–94.

<sup>230</sup> *Id.* at 297.

<sup>231</sup> *Id.* at 294.

constitutional mandate.<sup>232</sup> The constitutional common law view embraces the principle that the Constitution permits a choice in the remedy utilized to satisfy its requirements.<sup>233</sup> At the same time, it ensures that the Court does not “shy away from the effort to ensure that bedrock constitutional rights do not become ‘merely precatory.’”<sup>234</sup>

Bearing in mind the concurrent authority of Congress and the Court to craft remedies for constitutional violations committed by federal officers and the constitutional mandate for adequate relief of those violations, it is now important to reassess the *Bivens* doctrine.

## VI. REFORMULATION AND RECONSIDERATION: A NEW LOOK AT THE *BIVENS* DOCTRINE AND THE SUPREME COURT’S RECENT *BIVENS* DECISIONS

Based upon the principles articulated throughout this article, this Section asserts that the Supreme Court should reformulate the *Bivens* doctrine. It then argues that the most recent Supreme Court decisions in the *Bivens* line must be reconsidered based on this reformulation.

### A. *Reformulating the Bivens Doctrine*

Based on the preceding analysis, this article concludes that the Supreme Court should reformulate the *Bivens* doctrine in the following manner:

An adequate remedy for the violation of a constitutional right committed by a federal officer is constitutionally required. The Supreme Court will provide a *Bivens* remedy—the traditional remedy at law for the invasion of a protected right—or other relief necessary to effectuate the substantive constitutional guarantee, unless: (1) Congress has provided a constitutionally adequate alternative remedial scheme; or (2) affording such relief would bring about judicial intrusion into an area that is textually committed to Congress by the Constitution or an area in which Congress has special expertise, rendering the Court incompetent to act. The applicability of the exceptions to the requirement of a constitutionally adequate remedy is a judicial determination.

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<sup>232</sup> *Id.*

<sup>233</sup> Nichol, *supra* note 6, at 1143.

<sup>234</sup> *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, J., dissenting).

This reformulation embraces the functionalist theory of separation of powers. It recognizes the concurrent authority of the Court and Congress to fashion remedies for constitutional violations committed by federal officers and affords deference to the superior institutional competence of Congress. Additionally, it ensures that the Court will not violate the functionalist theory of the separation of powers by intruding upon the core functions of Congress. The doctrine makes clear that an adequate remedy is required by the Constitution, but it also embraces the constitutional common law approach by allowing flexibility in the type of remedy afforded. The duty remains with the Court to determine whether the requirements of the Constitution have been met.

This reformulation attempts to bring coherence to the *Bivens* doctrine by grounding it in the functionalist theory of separation of powers and the theory of constitutional common law. In giving life to *Bivens*, principles underlying the separation of powers—checking governmental abuse and ensuring executive accountability—will be advanced by providing a meaningful remedy for individuals whose constitutional rights have been violated and a powerful deterrent for federal officials. These are the principles that have been frustrated by the Court’s most recent decisions in the *Bivens* line of cases.

*B. Reconsidering Schweiker, Malesko, and Wilkie.*

Reformulating the *Bivens* doctrine in the manner above necessitates a reconsideration of *Schweiker*, *Malesko*, and *Wilkie*. As discussed in Section I, these are the cases in which the Supreme Court broadly expanded the *Bivens* exceptions. The Court denied a *Bivens* remedy in *Schweiker* based on the determination that Congress considered the remedial scheme adequate, despite the fact that the scheme did not remedy the constitutional violation and Congress was not legislating in an area of special expertise.<sup>235</sup> In *Malesko*, the Court stated that it would foreclose a *Bivens* remedy if the plaintiff had *any alternative remedy*.<sup>236</sup> The Court further expanded this exception in *Wilkie* by declaring that it would not grant a *Bivens* remedy where there was any alternative “process” that amounted to a “convincing reason” not to create one.<sup>237</sup> Moreover, the Court turned the second exception into an open-ended balancing test that theoretically allows for almost any consideration to outweigh the need for an adequate remedy of a constitutional violation.<sup>238</sup>

Although these cases ostensibly affirmed the holding of *Bivens*, their

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<sup>235</sup> See *supra* text accompanying notes 65-75.

<sup>236</sup> See *supra* text accompanying notes 76-86.

<sup>237</sup> See *supra* text accompanying notes 89-91.

<sup>238</sup> See *supra* text accompanying notes 90-91.

rationale expanded the breadth of the *Bivens* exceptions to the point where they now swallow the rule. This methodical destruction of the *Bivens* doctrine resulted from the ascension of the formalistic view of Justice Rehnquist and the *Bivens* dissenters into the majority of the Supreme Court. The decisions in *Schweiker*, *Malesko*, and *Wilkie* are based upon this view, which postulates that the Court lacks the authority to fashion *Bivens* remedies. Thus, to ground the doctrine in the functionalist theory of separation of powers, these cases must be reconsidered. The Court must break with these recent precedents, but it need not take an unprecedented direction. It must merely return to the principles that it employed in deciding *Bush* and *Stanley* and the cases prior to it. Those cases afforded deference to Congress where *the Court* determined that Congress had created adequate constitutional remedies. Where the Court determined that Congress had not done so, it crafted *Bivens* remedies. The Court should adhere to the principles expounded in these cases—as articulated in the reformulation set forth above—in order to bring about coherence in the *Bivens* doctrine.

## VI. CONCLUSION

The Supreme Court has rendered the *Bivens* remedy meaningless in the name of separation of powers; the remedy has been left a mere form of words, lacking any substance. The doctrine of separation of powers does not mandate this result. *Bivens* is consistent with a functionalist theory of this doctrine and furthers the principles underlying it. The Supreme Court should reconsider the *Bivens* line of cases in this light and embrace *Bivens* as a constitutional common law decision, under which both the Court and Congress have the authority and duty to effectively implement the substantive guarantees of the Constitution.

