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Rethinking Bivens: Legitimacy and Constitutional Adjudication

James E. Pfander
Northwestern University School of Law, j-pfander@law.northwestern.edu

David Baltmanis
Northwestern University School of Law

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Abstract

The Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* provides an uncertain framework for the enforcement of constitutional rights against the federal government. Rather than recognizing a federal common law right of action for use in every case, the Court views itself as devising actions on a case-by-case basis in light of a range of factors. Critics on all sides question the Court's approach, doubting either its power to fashion federal common law or the tendency of its case-by-case analysis to create gaps in constitutional enforcement. Particularly when compared with actions under section 1983—the statutory predicate for constitutional tort claims against state actors—the *Bivens* action has a hit or miss quality that may reflect lingering doubts about the legitimacy of the Court's role.

This Essay argues that the Court should abandon its case-by-case approach in favor of routine recognition of *Bivens* claims. In 1974 and more clearly in the Westfall Act of 1988, Congress adopted amendments to the Federal Tort Claims Act that assume the availability of suits against federal officers for "violations of the Constitution." Congress's decision to ratify and preserve the *Bivens* action provides a legislative foundation for such claims that answers longstanding questions of legitimacy.

After tracing the history of the Westfall Act, the Essay explores the doctrinal implications of the proposed switch to a routinely available *Bivens* action. Rather than advocating a dramatic break with the past, the Essay proposes to harmonize cases in the *Bivens* line with certain doctrines that shape the availability of remedies under section 1983. The resulting body of law will provide a more coherent *Bivens* framework and will ensure that constitutional rights apply with equal force to the interactions between individuals and officials at all levels of our federal government

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[1] Professor of Law, Northwestern University School of Law. Thanks to Mark Brown, Dick Fallon, Vicki Jackson, Kit Kinports, Bob Pushaw, Judith Resnik, and the members of the faculty workshop at Northwestern for helpful comments on earlier drafts of this essay.

[2] J.D., 2009, Northwestern University School of Law; B.A., 2004, Northwestern University.

I. Introduction

Critics of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[3] have long questioned the Supreme Court's decision to fashion a federal common law right of action to enforce the Fourth Amendment.[4] While the criticism ranges broadly, a consistent theme has been to question the democratic and institutional legitimacy of the judicial role in fashioning remedies for constitutional violations. Thus, in *Bivens* itself, Chief Justice Burger and Justice Black both dissented on the ground that the creation of rights of action was a matter for Congress.[5] More recently, Justices Scalia and Thomas have characterized the *Bivens* decision as ripe for reconsideration, arguing that the decision was the product of an earlier time, when the Court wrongly took on the legislative task of recognizing new rights of action.[6] Perhaps in response, the Court has grown a good deal more circumspect. In its most recent decision, *Wilkie v. Robbins*,[7] the Court echoed earlier cases in concluding that "special factors" argued against the recognition of a right of action for a novel Fifth Amendment retaliation claim.[8]

The Court's willingness to analyze the existence of a *Bivens* action on a case-by-case basis introduces a layer of uncertainty into constitutional litigation. Rather than assuming the existence of a *Bivens* action for claims against federal

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

[4] For a concise summary of the objection that only the legislature can or should authorize such a remedy, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.2 593–94 (4th ed. 2003); *cf.* Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 51–53 (1985) (arguing that before recognizing a remedy like that in *Bivens*, the federal courts must "first determine whether Congress or the framers specifically intended to create a federal right enforceable by judicial action"). A substantial body of literature defends the *Bivens* action as well. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995) (arguing that *Bivens* vindicate the principle that "[t]he Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals"); Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (finding a source for the remedy provided in *Bivens* in Article III's grant of the judicial power to the federal courts). For a useful summary of the *Bivens* case law and a primer on the academic literature on the subject, consult RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 812–25 (5th ed. 2003) [hereinafter HART & WECHSLER].

[5] *See Bivens*, 403 U.S. at 411 (Burger, C.J., dissenting); *id.* at 427 (Black, J., dissenting).

[6] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2608 (2007) (Thomas, J., concurring); Correctional Servs. Co. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

[7] 127 S. Ct. 2588.

[8] *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412 (1988); United States v. Stanley, 483 U.S. 669 (1987); Bush v. Lucas, 462 U.S. 367 (1983).

officers and agents, the federal courts must conduct a threshold inquiry to determine if the specific constitutional claim at issue will support an implied right of action. Often, the federal courts undertake this analysis at a high level of particularity.[9] Thus, the discharged employee of a member of Congress may bring a Fifth Amendment equal protection claim,[10] but a dissatisfied applicant for government benefits may not press a Fifth Amendment due process claim.[11] Fifth Amendment takings claims have fared slightly better,[12] but retaliation aimed at the exercise of the Fifth Amendment right to resist a government taking of property does not give rise to a *Bivens* action.[13] Inmates of federal institutions may bring Eighth Amendment claims for cruel and unusual punishment,[14] but individuals confined in privately run facilities have been less successful.[15]

Cases growing out of the Bush administration's terrorism-related detention and extraordinary rendition programs highlight these concerns with the case-by-case evaluation of the viability of novel *Bivens* claims. In a series of cases involving individuals who were allegedly subjected to extraordinary rendition and to harsh and degrading conditions of confinement at Guantanamo Bay and elsewhere, the lower federal courts have consistently refused to recognize a

[9] Debates over the level of particularity or generality at which to define rights pervade constitutional law. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (Scalia, J.) (arguing that courts should define liberty interests at the most specific level of abstraction); Teague v. Lane, 489 U.S. 288 (1989) (foreclosing application of new rules of law to federal habeas petitioners and thus inviting a debate over how broadly or narrowly to define existing right). In the context of *Bivens* litigation, courts confront a similar question in defining the availability of a right to sue. *Compare* Davis v. Passman, 442 U.S. 228 (1979) (allowing *Bivens* action for violation of the equal protection component of the Fifth Amendment), *with* Wilkie 127 S. Ct. 2588 (foreclosing *Bivens* action for retaliation against individual who resisted government action in violation of Fifth Amendment's taking clause)

[10] See Davis v. Passman, 442 U.S. 228 (1979)

[11] See Schweiker v. Chilicky, 487 U.S. 412 (1988)

[12] Takings claims generally give rise to suits for damages against the United States under the Tucker Act. Such litigation proceeds in the United States Court of Federal Claims. *See* Presault v. ICC, 494 U.S. 1, 12 (1990) (holding that the Tucker Act is presumptively available for all claims arising out of a taking); United States v. Causby, 328 U.S. 256, 258(1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine [under the Tucker Act]."). *See generally* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 566-574 (2006) (charting the doctrinal development of claims under the Tucker Act).

[13] See Wilkie v. Robbins,127 S. Ct. 2588 (2007).

[14] See Carlson v. Green, 446 U.S. 14 (1980).

[15] See Correctional Servs. Co. v. Malesko, 534 U.S. 61 (2001)

Bivens remedy.[16] Partly, these decisions may reflect a reluctance on the part of lower courts to second-guess military judgments during a time of war. The decisions may also reflect uncertainty about how to apply the Court's malleable standards and a presumption against the viability of any novel claim. Apart from the uncertainty it engenders, the practice of judicial selectivity raises legitimacy issues of its own along with the very real possibility that judicial evaluation of the merits of the constitutional claim may influence the *Bivens* calculus.[17]

Scholars have offered a range of theories to shore up the legitimacy of the *Bivens* action. An early article by Walter Dellinger viewed the grant of "judicial power" in Article III of the Constitution as providing the ultimate source of remedial authority.[18] Henry Monaghan sought to include the *Bivens* remedy within the framework of what he called "constitutional common law," law that grows out of permissible choices among remedial alternatives and (like other federal common law) remains subject to some degree of congressional control.[19] Gene Nichol defended the Court's exercise of remedial creativity, pointing out

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[16] *See* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008) (no *Bivens* action for alleged victim of extraordinary rendition program), *reh'g en banc granted*, (Aug. 12, 2008); *In re* Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85, 105-06 (D.D.C. 2007) (special factors counsel hesitation in recognizing a *Bivens* action for those allegedly subjected to cruel and inhumane treatment while detained overseas; alternative holding); *cf.* Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008) (detainees at Guantanamo Bay do not enjoy Fifth Amendment rights enforceable through a *Bivens* action), *vacated and remanded*, 129 S. Ct. 763 (2008) (ordering reconsideration in light of the Court's ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that aliens detained at Guantanamo Bay enjoy constitutional right to habeas corpus). The terrorism cases also raise questions about the application of the state secrets privilege, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (rejecting *Bivens* claim by person allegedly subjected to extraordinary rendition on the ground that litigation would threaten disclosure of state secrets), and about the level of detail required in a pleading aimed at high government officials. *See* Iqbal v. Ashcroft, __ U.S. __ (2009).

[17] For a suggestion that the implied right of action calculus may reflect judicial views of policy issues, see PETER LOW, JOHN C. JEFFRIES JR. & CURTIS BRADLEY, FEDERAL COURTS 14-15 (2008 Supp.) (noting the willingness of "[c]onservative justices" to consider policy issues in deciding how to shape an implied private right of action).. Given the factual detail available to the Court, its decision in *Wilkie* may have reflected judicial perceptions of the strength of the constitutional claim and of the burden of allowing such claims to proceed.

[18] *See* Dellinger, *supra* note 4, at 1541-43. For a critique, see Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (noting that constitutional litigation may also proceed in state courts that do not themselves exercise the judicial power of the United States).

[19] *See* Monaghan, *supra* note 18, at 1-3. For a critique, see Thomas S. Shrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (contending that the remedy should best be viewed as constitutionally compelled and thus immune to legislative tinkering).

that courts in the common law tradition have long played a role in defining the remedies needed to vindicate important rights.[20] Richard Fallon and Daniel Meltzer would incorporate the *Bivens* remedy into a remedial framework that seeks to ensure that government actors generally operate within the bounds of the law.[21] Notably, the Fallon and Meltzer approach places greater emphasis on systemic issues than on the right of any particular individual to secure a remedy. Thus, a *Bivens* remedy operates as a fallback device and its availability necessarily depends in part, as it did in *Wilkie*, on a case-by-case evaluation of the array of available alternative remedies. Despite these efforts at justifying, narrowing, and defending the *Bivens* remedy, critics remain dubious.

In this Essay, we offer a new account of the legitimacy of the *Bivens* right of action. In our view, scholars and courts have paid too much attention to the state of the law in 1971, when *Bivens* came down, and too little to legislative developments that have occurred in its wake. Congress has taken steps to preserve and ratify the *Bivens* remedy with amendments to the Federal Tort Claims Act that took effect in 1974 and 1988. In 1974, responding to concerns with the adequacy of a *Bivens* remedy, Congress expanded the right of individuals to sue the government itself for certain law enforcement torts. At the time, Congress deliberately chose to retain the right of individuals to sue government officers for constitutional torts and rejected draft legislation from the Department of Justice that would have substituted the government as a defendant on such claims. Similarly, in the Westfall Act of 1988, Congress took further steps to solidify the *Bivens* remedy. The Westfall Act virtually immunizes federal government officials from state common law tort liability, substituting the government as a defendant under the FTCA for such claims.[22] In the course of

[20] Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damage Claims*, 75 VA. L. REV. 1117 (1989).

[21] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

[22] Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, 102 Stat. 4564 [hereinafter Westfall Act]. Under the Westfall Act, individuals may pursue common law tort claims against federal government officials in state court. If the Attorney General finds that the defendant government officer acted in the course and scope of his employment, certification of that fact leads the substitution of the federal government as a defendant and removal of the action to federal court. Under this scheme, government officials may be sued for state common law torts only for actions taken outside their official capacity. Such claims do not typically involve government action and do not present constitutional issues. For a summary of the Westfall certification process, see Part III. Courts have struggled to define when employees acting willfully and in violation of state law nonetheless act under color of state law for purposes of triggering the application of section 1983. See Doe v. Taylor Indep. School Dist., 15 F.3d 443,

doing so, it declares that the remedy provided against the federal government shall be deemed "exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the action."[23] In order to preserve the *Bivens* action, Congress declared the exclusivity rule inapplicable to suits brought against government officials "for a violation of the Constitution of the United States."[24]

Although the Supreme Court has apparently never considered the issue, we think the Westfall Act should be interpreted to provide for the routine availability of *Bivens* claims. Both the language of the Act, with its express preservation of claims for constitutional violations, and its structure support this conclusion. The structural confirmation flows from the fact that Congress, by transforming claims for law enforcement (and other) torts into claims against the United States under the FTCA,[25] has largely eliminated state common law remedies as a relevant source of relief for individuals who have suffered a constitutional injury. It is no longer possible, as it was in Bivens' day, to proceed to judgment against federal officers on the basis of the common law.[26] Moreover, Congress has declined to make a remedy for constitutional violations available against the federal government under the FTCA, a decision that (under the prevailing law of federal sovereign immunity) forecloses that remedial option.[27]

461-62 (5th Cir. 1994) (concluding that high school teacher acted under color of state law in using his position to molest a student in his class).

[23] 28 U.S.C. 2679(b)(1) (2006).

[24] 28 U.S.C. 2679(b)(2) (2006).

[25] The mechanics of the substitution by the federal government as the defendant are explained in Part III.

[26] Although no brief summary can capture the complexity of accountability rules in the nineteenth century, individuals could bring a variety of actions (injunction, mandamus, trespass, assumpsit, ejectment) to test the legality of government action. *See, e.g.*, Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (damages for wrongful seizure of property to enforce illegal fine); Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815) (ejectment); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (injunction against trespassory taxation); Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) (assumpsit to recover customs tax from the collector). Often, as in *Osborn*, officials would justify by reference to statutory authority, thus posing the question of the constitutionality of their action or its statutory justification. *See* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1875) (declaring in such a case of justification that an "unconstitutional law will be treated by the courts as null and void."); *cf.* Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.) (in trespass action for compensation for destruction of property, due process entitlement to compensation framed court's analysis of agency's statutory defense). *See generally* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

[27] *See* Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 510-16 (1976) (discussing the

As a result, it makes little sense to assume (as the dissenting Justices did in *Bivens* and as others have done in later cases) that the denial of a *Bivens* remedy will leave individuals fully able to pursue claims on a state law theory of liability. Today, *Bivens* provides the only generally available basis on which individuals can seek an award of damages for federal violations of constitutional rights. In 1971, it was "damages or nothing" for Webster Bivens, as Justice Harlan vividly explained;[28] today, it has become *Bivens* or nothing for those who seek to vindicate constitutional rights.

Recognition that the *Bivens* remedy enjoys a much firmer federal statutory foundation than conventionally understood will require some rethinking of the way constitutional litigation proceeds. If, as our analysis suggests, Congress has ratified the pursuit of *Bivens* claims, courts need no longer agonize at the threshold about whether to recognize the existence of such an action. We suggest instead that federal courts should treat the *Bivens* action, much like its counterpart under section 1983, as routinely available. Such an approach would build on the Court's sensible decision to treat the *Bivens* action and the section 1983 claims as parallel proceedings that warrant similar treatment. As the Court explained long ago, it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials . . . and suits brought directly under the Constitution against federal officials."[29] With the right to bring a *Bivens* action routinely available, the federal courts no longer need to see themselves as fashioning a right of action to vindicate a novel constitutional claim; rather, the litigation would focus as it does under section 1983 on whether the complaint states a claim for violation of the Constitution that overcomes the officers' qualified immunity defense. Such a course of action would answer critics of the judicial role and end the case-by-case process by which the federal courts now evaluate the availability of a *Bivens* action.

By presuming the availability of a *Bivens* action, our proposed reconceptualization provides a more satisfying explanation of the Court's cases and a more coherent account of the shape of constitutional tort doctrine. Many

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consideration and rejection of proposed legislation by the Justice Department that would have created liability for constitutional violations against the federal government). The Supreme Court has held that constitutional tort actions cannot lie against the federal government. FDIC v. Meyer, 510 U.S. 471, 484–86 (1994) (rejecting *Bivens* claim directly against federal agency); *see also* cases cited *infra* note 84.

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

[29] Butz v. Economou, 438 U.S. 478, 504 (1978).

scholars have puzzled over the Court's willingness in cases such as *Bush v. Lucas*[30] and *Correctional Services Corp. v. Malesko*[31] to treat the availability of alternative remedies as fatal to the individual's right to pursue a *Bivens* claim.[32] Those decisions may make more sense when viewed through the lens of section 1983. In *Fitzgerald v. Barnstable School Committee*,[33] the Court provided a framework for evaluating when alternative statutory remedies displace the section 1983 remedy for constitutional tort claims. One might sensibly apply this framework in assessing the Court's decision in *Bush v. Lucas*, where civil service remedies for a whistleblower's constitutional claims served to displace a *Bivens* remedy. Similarly, in *Parratt v. Taylor*,[34] the Court held that the existence of post-deprivation remedies may, in certain circumstances, obviate procedural due process claims that section 1983 would otherwise remedy. Cases in the *Parratt* line may help to explain *Malesko*, which featured allegations of negligence that would apparently fail to support a claim of actionable deprivation. By drawing on the section 1983 framework for the analysis of remedial alternatives, the Court would avoid the ad hoc reliance on "special factors" that has characterized its recent *Bivens* decisions.

Our Essay proceeds in three parts. Part II sketches the Court's current approach to the recognition of a *Bivens* right of action, focusing on the comparatively recent decision in *Wilkie v. Robbins* and the questions of legitimacy it raises. Part III sets forth the case for viewing the Westfall Act as providing an all-purpose statutory predicate for suits for "a violation of the Constitution." Such an interpretation not only would give effect to the language of the statute, but would bring the treatment of suits against federal officers into line with that of actions against state and local officials under section 1983. Part IV works out the implications of the Westfall Act's recognition of an all-purpose right to sue. Under our suggested approach, the existence of alternative remedies would continue to play a role in the evaluation of the right to sue, as would consideration of a range of limiting factors that now inform the existence of relief under section 1983. We conclude with a review of cases in the *Bivens* line, showing how our approach would re-shape current doctrine. In the end, we believe that *Bivens* and section 1983 doctrine would both gain from the development of the parallel approach we advocate here. Rather than

[30] 462 U.S. 367 (1983).
[31] 534 U.S. 61 (2001).
[32] *See, e.g.* Bandes, *supra* note 4; Laurence Tribe, *Death By a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23.
[33] 129 S.Ct. 788 (2009).
[34] 4 51 U.S. 527 (1981)

administering separate bodies of law for state and federal officers, the federal courts would offer similar redress for alleged violations of the Constitution at all levels of government.

II. *Bivens* and the Quest for Legitimacy

Questions about the legitimacy of *Bivens* date from the decision's announcement in 1971 and have persisted over the years. In *Bivens*, the Court recognized a federal right of action to enforce the Fourth Amendment.[35] The plaintiff, Webster Bivens, alleged that agents of the Federal Bureau of Narcotics entered his home without a warrant and conducted a search of the premises that violated his constitutional rights.[36] Although he might have brought suit in state court, seeking damages for a common law trespass, Bivens chose to file his suit in federal court, seeking damages directly under the Constitution.[37] In upholding his right to sue, the Court effectively held that federal law enables individuals to sue federal officers for constitutional violations.[38] *Bivens* thus provides a federal law analog to the right of individuals to bring constitutional tort claims against state and local government officials. But in contrast to suits against state actors, which Congress specifically authorized in section 1983, no federal statute authorized individuals in the position of Webster Bivens to sue federal officials.

The absence of federal statutory support for the right to sue provided one important focus of the dissent's criticism of the *Bivens* decision. Chief Justice Burger, along with Justices Black and Blackmun, argued that Congress should take the lead in defining the way individuals enforce the Constitution.[39] Perhaps the most interesting response to the dissent was that provided by the concurring opinion of Justice Harlan. Harlan argued that a federal right of action already existed; that individuals in Bivens' position could have sued in federal court for injunctive relief against a pending or threatened Fourth Amendment violation.[40] All the Court was really adding was a federal remedy in the nature of tort

[35] 403 U.S. 388, 389 (1971).
[36] *Id.*
[37] *Id.* at 389–90.
[38] *See id.* at 394–96.
[39] *See id*. at 411–12 (Burger, C.J., dissenting) ("We would more surely preserve the important values of the doctrine of separation of powers-and perhaps get a better result-by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power."); *id.* at 427–28 (Black, J., dissenting); *id*. at 430 (Blackmun, J., dissenting).
[40] *Id.* at 404–05 (Harlan, J., concurring in the judgment).

damages for folks like Bivens who lacked any effective alternative.[41] Moreover, Harlan pointed to the fact that the Court had previously allowed individuals to bring federal claims to enforce rights conferred by statute, even though the statute at issue had failed to provide that the rights in question were enforceable by individual suit.[42] If the Court could legitimately expand the range of remedies for statutory violations, Harlan suggested, the Court might well recognize a judge-made remedy for constitutional violations.

Since *Bivens*, the Court has withdrawn in two respects from the ground it occupied there. First, as noted above, the Court now takes a case-by-case approach to the evaluation of the availability of a *Bivens* action for particular constitutional claims. In deciding whether to "devise" a right of action, the Court considers the array of alternative remedies and the implications, if any, of the action Congress has taken (or failed to take) in furnishing an action for damages. Coupled with this greater selectivity, the Court has essentially abandoned the practice of recognizing implied rights of action to enforce statutory claims. The Court recently described its decision in *J.I. Case* as following a discredited approach, and reaffirmed its reluctance to recognize an individual right to sue except where "the underlying statute can be interpreted to disclose an intent to create" a right of action.[43] This change deprives the *Bivens* doctrine of one supporting prop and fuels the argument by Justices Scalia and Thomas that *Bivens* was the product of a different time and should be either confined to its facts or overruled.

The critique of *Bivens* rests at bottom on claims about the proper roles of the federal courts and Congress in the recognition of rights to sue. As Justice Powell observed in his dissenting opinion in *Cannon v. University of Chicago*, Congress normally takes the lead in deciding who can sue to enforce rights in federal courts.[44] As Justice Kennedy observed more recently, echoing Justice Powell, judicial willingness to recognize implied rights of action may interfere with the legislative process by adding new provisions to a statute that Congress

[41] *Id.* at 410 ("It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.").
[42] *Id.* at 402 (citing J.I. Case Co. v. Borak, 377 U.S. 426 (1964)).
[43] *See* Stoneridge Investment Partners, LLC v. Scientific-Atlanta Inc., 128 S. Ct. 761, 772 (2008); *see also* Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).
[44] 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

had not seen fit to insert.[45] More fundamentally, the Court understands that the recognition of a federal right to sue—given current jurisdictional arrangements—inevitably results in the expansion of access to the federal courts for individual suitors. The Court's more recent decisions suggest that Congress should make the decision about expanded access, rather than the federal courts.[46] One can, of course, question the validity of these criticisms on their own terms and their application to the different situation in *Bivens*, where constitutional (rather than statutory) rights were at stake. But questions of institutional competence lie at the heart of the call to overrule *Bivens*.

The Court's own approach in recent cases does little to answer critics of the judicial role. In *Wilkie v. Robbins*, the record tended to show that officials of the Bureau of Land Management had retaliated against Robbins for refusing to grant the Bureau a right-of-way across his land.[47] Robbins claimed that he had a right, protected by the Fifth Amendment, to exclude the federal government from his land. He further argued that BLM officials' retaliation for the exercise of that right to exclude gave rise to an action for damages under *Bivens*. The Court set for itself the task of deciding whether to "devise a new *Bivens* damages action" for retaliation against landowner rights.[48] In deciding whether to take this affirmative step, the Court first evaluated the range of alternative remedies available to Robbins and next considered the propriety of extending constitutional litigation into borderline cases where citizens and government officials predictably clash in negotiations over rights in land.[49] With its first-step focus on alternative remedies, the Court assumed (perhaps mistakenly) that trespass

[45] *See Stoneridge*, 128 S. Ct. at 771-73.

[46] *See, e.g.*, Thompson v. Thompson, 484 U.S. 174 (1988) (focusing on congressional intent and legislative history in denying an implied right of action under the Parental Kidnapping Prevention Act).

[47] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2593-96 (2007).

[48] *Id.* at 2597.

[49] The Court suggested that the analysis breaks down into two steps, focusing first on the availability of any "alternative, existing process" to vindicate the interest at stake. *Id.* at 2598. Even at the second stage of the process, in the absence of an alternative, the Court cautioned that a *Bivens* remedy "is a subject of judgment." The judgment at hand requires that the federal courts "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." *Id.* (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)). Ultimately, the Court found that the patchwork array of alternative remedies was not decisive of the availability of a *Bivens* action and proceeded to the second stage of the analysis, the common law remedial determination.

remedies were available as a matter of state tort law.[50] In its second-step analysis, which the Court likened to the remedial judgment of a common-law tribunal, the Court expressed reluctance to burden federal officers with a new category of constitutional litigation, thus sounding themes reminiscent of those given voice by the *Bivens* dissenters.[51] In the end, the Court declined to allow a *Bivens* action, and held that the matter was one for Congress to consider.

The Court's suggestion that each extension of *Bivens* requires an act of judicial creativity based upon the exercise of common-law, case-by-case analysis tends to obscure the precise import of its decision. One might read the decision as a blanket prohibition against landowner retaliation claims under the Fifth Amendment. After all, the Court decided the case on the assumption that it was one of first impression; the parties had looked in vain for other reported cases in which the plaintiff sought damages after the government attempted to secure property rights coercively.[52] On the other hand, the Court stayed very close to the factual record in the case, emphasizing that BLM officials had a legitimate interest in obtaining a right-of-way across Robbins' land and had successfully defended many of the adverse actions they had taken against Robbins. It was the perceived difficulty of drawing lines between the government's legitimate right to engage in hard bargaining and the claim that it had gone too far in pursuing the right-of-way that informed the Court's decision. The Court thus distinguished Robbins' retaliation claim, death by a thousand cuts, from actionable retaliation claims that grow out of one or more discrete government actions.[53]

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[50] *Id.* The Court cited *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001), for the proposition that common law remedies were presumptively available, but that case involved a suit against a private firm, working under contract with the federal government. Suits cannot go forward against federal officers as a matter of state common law; under the Westfall Act, as we discuss at greater length in Part III below, federal officials enjoy an absolute immunity from state common law tort liability. Rather, litigants must pursue tort claims against the federal government under the FTCA. Similarly puzzling is the Court's suggestion that Robbins might have pursued a malicious prosecution claim under state law. *See Wilkie*, 127 S. Ct. at 2599 (noting the possibility that malicious prosecution claim would be "unavailable against federal officials"; citing Blake v. Rupe, 651 P.2d 1096, 1007 (Wyo. 1982) for the proposition that such claims will not lie against law enforcement officers). This comment mistakenly assumes the viability of state law claims against federal officials and apparently overlooks the fact that the Court had previously made *Bivens* relief available for cases of malicious prosecution. *See* Hartman v. Moore, 547 U.S. 250 (2006).

[51] *See Wilkie*, 127 S. Ct. at 2601-05.

[52] *See id.* at 2615-16 (Ginsburg, J., dissenting) (citing the parties' agreement as to the absence of reported cases involving allegations of coercive action by state officials to secure a property right in violation of the Takings Clause).

[53] *See id.* at 2600-04 (majority opinion).

Its focus on the particulars of what the Court described as a factually plentiful record opens the door to the criticisms of arbitrariness that inevitably accompany any fact-specific analysis. Similar criticisms follow from the *Wilkie* Court's decision to single out the Fifth Amendment retaliation claim for rejection.[54] Only a year earlier, in *Hartman v. Moore*,[55] the Court had confirmed that First Amendment retaliatory or malicious prosecution claims were viable under *Bivens*, as long as the plaintiff pleads and proves a lack of probable cause for the prosecution.[56] In upholding the viability of such retaliation claims, the *Hartman* Court reaffirmed a line of cases that stretches back some twenty years and includes such venerable decisions as *Butz v. Economou* and *Harlow v. Fitzgerald*.[57] All of these cases present a variation on the same theme: an individual claims that government officials have taken superficially legitimate action for the improper purpose of punishing him for exercising his constitutional rights. All of these cases inevitably present line-drawing problems as well.[58] Thus, in *Hartman*, the trier of fact would have had to decide if the defendant postal inspectors launched a criminal investigation to punish the plaintiff for

[54] Indeed, one has difficulty escaping the conclusion that the plaintiff in *Wilkie* could have successfully pursued a *Bivens* action had he framed his claims either as a malicious prosecution claim, as approved in *Hartman*, or a retaliation claim based on the exercise of rights under the First Amendment.

[55] 547 U.S. 250 (2006).

[56] As the Court explained in an opinion by Justice Souter, "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of Bivens." Hartman v. Moore, 547 U.S. 250, 256 (2006).

[57] *See* Butz v. Economou, 438 U.S. 478 (1978) (allegations that government initiated enforcement proceeding to retaliate against critic of the agency); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (allegations that high government officials discharged the plaintiff from government employment to punish the plaintiff for speaking out against a wasteful federal project); *cf.* Crawford-El v. Britton, 523 U.S. 574, 589, 592 (1998) (treating the right to pursue retaliation claims as a general rule that has long been clearly established for purposes of qualified immunity and characterizing *Harlow* as a case in which the plaintiff would have prevailed but for the availability of the immunity doctrine). *See generally* Mark Brown, T*he Failure of Fault Under Section 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503 (1999) (evaluating the state of qualified immunity law after *Crawford-El*); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989) (interrogating the qualified immunity regime of *Harlow v. Fitzgerald*).

[58] As the *Hartman* Court explained, some actions "might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Hartman*, 547 U.S. at 256. Had it taken such an approach, the Court might have permitted Robbins to argue that the range of government actions could not be explained on nonretaliatory grounds.

lobbying against a new feature of the zip code program or to vindicate genuine concerns with the legality of his lobbying activities. The line-drawing problems identified in *Wilkie* do not seem either particularly difficult or different in kind from those faced in other retaliation litigation.[59]

The selectivity entailed in the Court's case-by-case approach invites attacks from critics on both sides. Those who question the judicial role in *Bivens* can point to recent cases in support of their claim that the Court has yet to articulate a justification for taking on the essentially legislative task of deciding when to fashion a damages action. For these critics, as for the concurring Justices in *Wilkie*, recent experience demonstrates the wisdom of abandoning the enterprise altogether.[60] Those who continue to view *Bivens* as rightly decided can mount a similar criticism of the Court's failure to make the action available to all suitors who allege serious violations of their constitutional rights.[61] For these critics, as for the dissent in *Wilkie,* the Court's refusal to allow claims for retaliation under the Fifth Amendment cannot be squared with its willingness to permit First Amendment retaliation claims to proceed.

III. Congress and the Ratification of the *Bivens* Remedy

We believe the Court's case-by-case evaluation of the *Bivens* remedy rests on an outmoded understanding of the statutory framework of federal government accountability. That framework now includes, most importantly, the revised terms of the Federal Tort Claims Act, which authorizes individuals to sue the federal government for claims sounding in tort and which specifically preserves and ratifies the *Bivens* remedy. Preservation and ratification of the *Bivens* remedy began in 1974, when Congress amended the FTCA to expand the right of

[59] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2613-15 (2007) (Ginsburg, J., dissenting) (likening Robbins's claim to recognized causes of action for retaliation against the exercise of constitutional rights). The majority argued that the inquiry in the Robbins case was complicated by the obligation to separate acceptable hard bargaining from tactics that went too far The Court reasoned that a standard looking for "too much" of an impermissible motive would not be workable. *See id.* at 2601-04 (majority opinion). Yet as Justice Ginsburg's dissent observed, the assessment that a "too much" standard would prove unworkable glosses over the fact that standards of this sort are employed elsewhere, such as in the Title VII sexual harassment context where the mere existence of offensive statements do not create a violation. Instead, courts must determine that the harassment is so pervasive as to create a hostile environment. Such a standard might well be workable for plaintiffs like Robbins. *See id.* at 2616-17 (Ginsburg, J., dissenting).

[60] *See Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring, joined by Scalia, J.) (arguing that *Bivens* should not be extended under any circumstances and should be confined to its facts).

[61] *See generally* Tribe, *supra* note 32.

individuals to sue the government for certain law enforcement torts.[62] In doing so, Congress deliberately retained the right of individuals to sue government officers for constitutional torts and rejected proposed legislation from the Department of Justice that would have substituted the government as a defendant on such claims.[63] Similarly, in 1988, Congress took steps virtually to immunize federal government officials from state common law tort liability, substituting the government as a defendant under the FTCA for such claims.[64] At the same time, Congress fashioned an exception to the statutory grant of official immunity, expressly preserving the right of individuals to pursue *Bivens* actions for "a violation of the Constitution of the United States."[65]

This statutory framework provides important and overlooked legislative support for the right of individuals to pursue claims against government officers for a violation of the Constitution. While the language does not follow section 1983 in expressly creating a right to sue federal government officials, the statute clearly recognizes and preserves the right to sue that the Court had established in *Bivens* and elaborated in subsequent cases. By speaking in broad and unqualified terms, moreover, the statute suggests that *any* alleged violation of the Constitution will support a claim against federal officials. In other words, the statute does not contemplate the use of the kind of case-by-case analysis that characterized the Court's approach in *Wilkie v. Robbins* but takes the view that actions are presumptively available so long as the plaintiff alleges a constitutional violation. We do not mean to suggest that a simple claim of constitutional breach will enable the plaintiff to reach a jury; the plaintiff must still allege an actionable constitutional violation and overcome any qualified immunity defense. But we do mean to argue that Congress has now ratified the *Bivens* remedy, providing statutory recognition of such claims that largely answers the old legitimacy problem. The Court need no longer act as a common-law tribunal in "devising" a new remedy without any guidance from Congress. Instead, the Court can simply point to the statute as evidence that Congress has approved and preserved the availability of a *Bivens* action.

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[62] *See* Reorganization Plan No. 2 of 1973, amendments, Pub. L. No. 93-253, 88 Stat. 50 (1974) (amending FTCA to permit suits for assault, battery, false imprisonment, abuse of process, and malicious prosecution).

[63] *See* S. 2558, 93d Cong. (1973) (authorizing a cause of action against the federal government for intentional torts committed by law enforcement officers, including actions arising "under the Constitution or statutes of the United States"); *see also* Boger, Gitenstein & Verkuil, *supra* note 27, at 500-02 (describing the DOJ proposal and its subsequent rejection).

[64] Westfall Act § 6. (codified at 28 U.S.C. § 2679(b)(2)(B) (2006)).

[65] *Id.* § 5 (codified at 28 U.S.C. § 2679(b)(2)(A) (2006)).

The case for recognizing that Congress has established a presumptive remedy in the nature of a *Bivens* action draws support both from the language of the statute and from the considerations that led to its adoption. In 1974, Congress was concerned about a series of federal no-knock drug enforcement raids on private homes in and around St. Louis, Missouri.[66] Although it recognized that the victims could pursue a *Bivens* action, Congress was concerned that such actions against government officials might not adequately compensate injured victims and deter government wrongdoing. Accordingly, Congress added the federal government as a defendant by making suits available under the FTCA for a series of law-enforcement torts. These new remedies under the FTCA were designed to supplement, not displace, the *Bivens* action.[67] Congress rejected statutory language, proposed by the Department of Justice, that would have eliminated the *Bivens* action altogether in favor of suits against the government for constitutional violations. In so doing, members of Congress made clear that the *Bivens* action was to survive the expansion of government liability for law enforcement torts. The federal courts quickly confirmed this conclusion.[68]

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[66] *See Hearings on Reorganization Plan No. 2 of 1973 Before the Subcomm. On Reorganization, Research, and Internal Organizations of the Senate Comm. On Government Operations*, 93d Cong., 1st Sess., pt. 3, at 446 (hearings regarding raids in Collinsville, Illinois, including testimonies from families subject to raids); 119 CONG. REC. 23242–58 (1973) (expressing concern over the raids); 119 CONG. REC. 15170 (same). A more detailed history of the raids and reaction is provided in Boger, Gitenstein & Verkuil, *supra* note 27, at 500–07.

[67] S. REP. NO. 93-588, at 3 (1973) ("[T]his provision should be viewed as counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make 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.").

[68] *See, e.g.*, Carlson v. Green, 446 U.S. 14, 19–20 & n.5 ("[T]he congressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . . . In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officers . . . .") (citations omitted); Birnbaum v. United States, 588 F.2d 319, 327–28 (2d Cir. 1978) (distinguishing suits under the FTCA from constitutional torts). For a time, at least one federal court of appeals misread the amendment to permit *Bivens* actions against the federal government itself. *See* Norton v. United States, 581 F.2d 390 (4th Cir. 1978) (concluding that the FTCA amendments authorized *Bivens* suits against the United States). This conclusion can no longer be supported in light of *Carlson*'s interpretation of the amendment, and the Fourth Circuit has subsequently incorporated *Carlson*'s understanding of the relationship between the FTCA and *Bivens*. *See* Holly v. Scott, 434 F. 3d 287, 296 (4th Cir. 2006) (discussing the relationship between the FTCA and *Bivens* as explained in *Carlson*).

Congress took a second step in 1988. Acting to protect government officials from state common-law tort liability,[69] Congress adopted the Westfall Act. In doing so, Congress chose to substitute the federal government as a defendant for any federal officers who were sued on state common law tort theories of liability for actions taken within the outer perimeter of their official capacity. The Act accomplishes this substitution by empowering the Attorney General to certify that the allegedly tortious conduct occurred within the officer's line of duty.[70] Upon certification, the government substitutes in as the defendant and can remove the action from state to federal court.[71] Thereafter, the action proceeds against the federal government under the FTCA.[72] In such actions, the FTCA incorporates state common law as the foundation of the federal government's liability, and refers to the law of the place where the tort occurred in defining such liability.[73] But the FTCA does not rely on state common law as the final measure of the government's liability. A well-known collection of federal law defenses protect the government's interests. For example, the FTCA bars liability for the exercise of discretionary functions,[74] requires a notice of the claim,[75] imposes a fairly short statute of limitations,[76] and incorporates the official's own federal immunity from liability.[77]

By foreclosing suit against federal officers on state law theories of liability and shifting to remedies against the government under the FTCA, the Westfall Act assumes the routine availability of a *Bivens* remedy. That conclusion seems clear both from the language of the Act, which broadly preserves the availability

[69] *See* Westfall Act § 2(a)(4), 2(b) (explaining findings and purposes of the Act, which was named after the government official whose claim of immunity was rejected in *Westfall v. Erwin*, 484 U.S. 292 (1988)).
[70] *Id.* § 6 (codified at 28 U.S.C. § 2679(d) (2006)).
[71] *See id.* § 6; Osborn v. Haley, 549 U.S. 225 (2007) (treating the Attorney General's certification as conclusive for purposes of removal jurisdiction). *But see* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995) (Attorney General's scope-of-employment certifications subject to judicial review).
[72] Westfall Act § 6.
[73] 28 U.S.C. § 1346(b)(1) (2006).
[74] 28 U.S.C. § 2680(a) (2006).
[75] 28 U.S.C. § 2675(a) (2006) (requiring notice and disposition of a claim by the appropriate federal agency prior to filing FTCA suit); *see* Celestine v. Mount Vernon Neighborhood Health Center, 403 F.3d 76 (2d Cir. 2005) (FTCA exhaustion requirement applies to claims commenced against federal officers in state court and removed to federal court under the Westfall Act).
[76] 28 U.S.C. § 2401(b) (2006) (requiring notice of possible tort claims to federal agency within two years).
[77] Westfall Act § 4 (codified at 28 U.S.C. § 2674 (2006)).

of a *Bivens* action for violations of the Constitution,[78] and from the Act's structural implications. Under the Westfall Act, state common law no longer applies by its own force to the actions of federal officials.[79] As a result, plaintiffs can no longer invoke state law to contest the constitutionality of the conduct of federal officers. This represents a significant change from the remedial framework in place at the time of the *Bivens* decision. Back then and for much of the nation's history, state common law provided victims with a right of action that, although somewhat cumbersome, could eventually result in a vindication of their constitutional rights. For example, the victim of an unlawful search might sue the responsible federal official for a trespass. The official could respond by trying to show that the search was authorized by federal law. In reply, the plaintiff could argue that the official's violation of the constitutional prohibition against unreasonable searches invalidated any authority conferred by federal law. In the end, the common law claim would eventually lead to an evaluation of the extent of federal authority in light of constitutional limitations and to an award of damages to victims of government wrongdoing.[80]

Today, this background system of state common law remedies for the violation of constitutional rights has been superseded by the Westfall Act. With the elimination of state common law, Congress faced the question of how to provide for the assertion of federal constitutional claims. One possibility was to have made an explicit provision for the assertion of constitutional claims against the government itself. As we have seen, the Department of Justice proposed that approach in the early 1970s, but Congress rejected it in favor of preserving the *Bivens* action.[81] In the Westfall Act, Congress again chose to retain the *Bivens*

[78] Westfall Act § 5 (creating an exception to the exclusivity provision of 28 U.S.C. § 1346(b) for actions "brought for a violation of the Constitution of the United States").
[79] *See supra* note 72 and accompanying text.
[80] Although the Court established an absolute immunity for federal officers sued for defamatory statements made in the course of their official duties, *see* Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896), this immunity did not impose a similarly absolute bar to other kinds of common law liability. *See supra* note 26; *see also* Westfall v. Erwin, 484 U.S. 282 (1988) (no immunity from suit at common law unless the conduct was both within the scope of official duty and discretionary). Some suits based on theories of trespass and false imprisonment as well as those growing out of a taking of private property went forward even though one could argue that they resulted from discretionary acts. *See* Miller v. Horton, 26 N.E. 100 (Mass. 1891) (Holmes, J.). *See generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 249-50 (1965). Claims for improper exaction of customs duties were also permitted to proceed without any discussion of official immunity. *See* Irving v. Wilson, 4 Term R. 485, 100 Eng. Rep. 1132 (K.B. 1791); Elliot v. Swartwout, U.S. (10 Pet.) 137 (1836).
[81] *See supra* note 67 and accompanying text.

action when faced with such a proposal.[82] Not only does the statute specifically recognize suits for constitutional violations against government officials, the FTCA contains no provision authorizing the assertion of constitutional claims against the federal government. Under the prevailing approach to the doctrine of federal sovereign immunity, the absence of a clear statement authorizing suits against the government has proven fatal to their assertion. [83] A long line of cases holds that constitutional claims for damages may not be brought against the federal government itself, but may proceed only against government officials on a *Bivens* theory. [84] The only exception, established in the Tucker Act, authorizes the U.S. Court of Federal Claims to hear Fifth Amendment takings claims against the federal government.[85] For constitutional tort claims, the Westfall Act makes clear that *Bivens* provides the only right of action.

By approving of *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress has provided a solid legislative foundation for routine recognition of a *Bivens* remedy. Such congressional ratification, moreover, requires that the Court adjust its approach to the evaluation of constitutional claims for damages. The Court should no longer regard itself as creating rights of action on a case-by-case basis. Rather, the Court should simply recognize that Congress has authorized suits against federal officials for constitutional violations and has foreclosed all alternative remedies. Along with this recognition, the Court should no longer consider the possible existence of

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[82] Once again, the DoJ proposed funneling all liability, including that for constitutional torts, into suits brought against the federal government. Congress again self-consciously chose to retain the *Bivens* action. *See* H.R. REP. 100-700, at 5 (1988) ("Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort as a more serious intrusion of the right of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights."); 134 CONG. REC. 15963 (June 27, 1988) (statement of Rep. Frank) ("We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it. You might be individually sued.").

[83] *See, e.g.*, Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Village Inc., 503 U.S. 30, 33 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed.") (internal quotation marks and citations omitted).

[84] *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 484–86 (1994) (rejecting *Bivens* claim directly against federal agency); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (same); Rivera v. United States, 924 F.2d 948 (9th Cir. 1991) (rejecting on sovereign immunity grounds a First Amendment *Bivens* claim against the United States); Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1985) (same with respect to Fourth Amendment claim); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982) (same with respect to Fifth Amendment claim).

[85] 28 U.S.C. § 1491 (2006).

state common law remedies as a reason to proceed cautiously. Congress has eliminated the state common law option and has failed to replace it with suits under the FTCA to vindicate constitutional rights. It thus makes little sense for the Court in *Wilkie v. Robbins* to tout the possible existence of state common law remedies as the basis for proceeding cautiously in the recognition of a *Bivens* right of action.[86] State common law, as such, no longer applies and no longer offers a way to present constitutional claims.

One can imagine an argument that the Westfall Act's reference to actions for violation of the Constitution operates not to approve an all-purpose *Bivens* action but to codify the case-by-case *Bivens* calculus that was in place in 1988 when the statute took effect. The text of the Westfall Act provides little basis for such a contention. The statute refers to a "civil action" "brought" against federal officers asserting a claim for "violation of the Constitution."[87] The unqualified references in the statute seemingly authorize the pursuit of all "civil actions[]" that assert constitutional claims, without suggesting that the federal courts may refrain from hearing certain claims. We explain below why Congress may have chosen to switch from the case-by-case approach to a more routinely available right of action.

Finally, one can imagine a formal argument that the statute does nothing more than create an exception to the rule of immunity that the Westfall Act adopted to shield federal employees from common law claims. On such a view, the Act creates no affirmative right to sue, but simply prevents the statutory rule of immunity from displacing the *Bivens* action. As we have seen, however, the Westfall Act goes well beyond conferring a selective grant of immunity on federal officers; it forecloses pursuit of constitutional claims either by action predicated on state common law or by action against the government itself. Read against the backdrop of the wholesale withdrawal of alternative remedies, the saving reference operates less as a modest exception to immunity than as a congressional selection of the *Bivens* action as the only method individuals were authorized to use in pressing constitutional claims.[88]

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[86] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007) (citing Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001), for the proposition that state law tort remedies could serve as a possible alternative for the plaintiff's claims). One can see the *Wilkie* Court's confusion reflected in its citation to the *Malesko* case. There, state tort liability remained intact because the defendant was a private firm, rather than a federal government actor entitled to Westfall Act immunity.

[87] Westfall Act § 5 (codified at 28 U.S.C. § 2679(b)(2) (2006)).

[88] Congress took modest steps to curtail *Bivens* actions by federal prisoners when it adopted the Prison Litigation Reform Act, Pub. L. No. 104-134 (codified in scattered sections of U.S.C.). But

The withdrawal of alternative remedies explains why Congress made the *Bivens* action routinely available, rather than dependent on case-by-case analysis. In pre-Westfall days, individual litigants had a right to sue federal officers for constitutional torts by relying on common-law theories of liability and filing suit in state court. Such suits were subject to removal and to the assertion of immunity defenses of varying stringency, but the right of action was available as a matter of course (assuming the plaintiff could identify a common law theory of liability).[89] Having cut off that routinely available remedy in the Westfall Act, Congress understandably felt some obligation to provide a statutory alternative. The unqualified terms of the resulting ratification of *Bivens* suggest that the Westfall Act contemplates rights of action as a matter of course.

IV. Rethinking *Bivens*: Toward a New Remedial Calculus

Recognition of the routine availability of a *Bivens* action will require some changes in the way the federal courts approach constitutional litigation. But the adoption of our approach need not threaten a disruptive break with the past or a ruinous expansion of federal official liability. On the view we take in this Essay, the Westfall Act provides, as section 1983 does in suits against state actors, statutory recognition of a right to pursue constitutional tort claims against federal actors. The existence of an all-purpose right to sue federal officers would eliminate the threshold inquiry into the availability of a *Bivens* right of action. Constitutional litigation would focus instead on the sufficiency of the alleged constitutional violation, the clarity of constitutional rules, and the qualified immunity of government officials. Instead of the somewhat open-ended inquiry into "special factors" that may counsel hesitation, federal courts would conduct a more focused analysis to determine whether an alternative remedial scheme displaces the *Bivens* remedy,

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the legislation casts no doubt on the general availability of constitutional tort litigation. The operative provision of the PLRA amends the FTCA to foreclose actions by federal prisoners "for mental or emotional injury" without a prior showing of physical injury. 28 U.S.C. § 1346(b)(2). The provision applies to suits against the United States and its agencies, as well as those against federal officers and employees. A parallel provision curtails such litigation by state prisoners under section 1983. *See* 42 U.S.C. § 1997(e) (2006).

[89] As noted, a variety of common law theories of liability were available to the plaintiff. *See supra* note 26. For an account of the role of state courts in securing federal government accountability, subject either to removal or to review in the Supreme Court, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

Such an approach would help clarify and simplify constitutional tort litigation without threatening federal officials with novel forms of personal liability or disrupting existing administrative law schemes. As noted earlier, constitutional tort litigation against state actors under section 1983 now proceeds without any threshold inquiry into the existence of a right of action. The Westfall Act suggests that *Bivens* claims against federal actors should be treated in precisely the same way.[90] Such parallel treatment already prevails over a wide swath of constitutional tort law. When the Court defines the elements of a legally sufficient constitutional claim, the definition applies to constitutional claims against both state and federal actors.[91] Similarly, when the Court refines the rules of qualified immunity, it does so with the recognition that the same rules apply to officers at all levels of government.[92] As the Court explained long ago, it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials . . . and suits brought directly under the Constitution

[90] Critics of the *Bivens* action also recognize the close connection between that form of constitutional tort litigation and suits under section 1983. Justice Scalia has argued that *Bivens* was the product of improper judicial activism and should be limited to its facts. *See supra* note 6. He has taken much the same view of the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which authorized individuals to pursue constitutional tort claims against individual state officers and rejected the argument that the statute applied only to attacks on state policies. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (characterizing section 1983 as one "the [*Monroe*] Court created in 1961" rather than as one Congress enacted in 1871). In both instances, Justice Scalia focuses on the legislative framework in place at the time of the initial decision, and ignores subsequent legislation. Yet just as the Westfall Act ratified the *Bivens* action, so too one can argue that Congress ratified *Monroe* in 1976 by adopting an attorney's fee provision that sought to encourage section 1983 litigation. *See* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, § 2 (codified as amended at 42 U.S.C. § 1988) (authorizing, among other things, attorney's fees for successful litigation under section 1983); *see also* S. REP. NO. 94-1011, at 4 (explaining that the amendment brings section 1983 litigation in line with modern civil rights statutes by providing attorney's fees in suits against government officials).

[91] *See* Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006) (specifying elements of malicious prosecution claim in the context of *Bivens* litigation and describing the *Bivens* action as the "federal analog to suits brought against state officials" under section 1983). The Court in *Hartman* granted review to resolve a division among the circuits that involved both *Bivens* and 1983 cases and it apparently expected its decision to apply in both settings. *See id.* at 255 (citing division of circuit court authority and relying on *Crawford-El v. Britton*, 523 U.S. 574 (1998), a 1983 case). Subsequent section 1983 suits treat the *Hartman* analysis as controlling. *See, e.g.*, Beck v. City of Upland, 527 F.3d 853, 863-64 (9th Cir. 2008); *cf.* Wilson v. Layne, 526 U.S. 603, 609 (1999) (noting that in claims under section 1983 and Bivens, "qualified immunity analysis is identical").

[92] *See* Pearson v. Callahan, __ U.S. __ (Jan. 21, 2009) (treating *Bivens* and 1983 decisions as interchangeable on the subject of an official's qualified immunity).

against federal officials."[93] With the recognition that Congress has approved routine suability under the Westfall Act, distinctions between the right to sue state and federal officials seem equally untenable.[94]

We think the law of government accountability has much to gain from extending what the Court has already described as the "analog[ous]" relationship between the *Bivens* action and section 1983 claims.[95] For starters, we see real advantages in the development of a body of law that applies with presumptively equal force to both state and federal government officials. Such presumptive equality provides individuals with some assurance that their rights will not vary depending on whether the allegedly unconstitutional conduct at issue was undertaken by state or federal government actors.[96] In addition, a regime of presumptive equality will provide a framework for evaluating specific constitutional claims and defenses. In particular, the law that frames and limits the viability of section 1983 claims can provide an appropriate basis for evaluating specific *Bivens* actions, just as *Bivens* developments can inform litigation against state actors. While there may be situations in which differences in the two levels of government will warrant the development of disparate rules, a presumption of equality provides a starting point for analysis and a context in which to evaluate remedial choices. The Court's approach to the immunity of the President provides an illustration: its previous decision to extend qualified immunity to state governors obliged the Court to explain why the President's executive obligations required a more sweeping immunity.[97]

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[93] Butz v. Economou, 438 U.S. 478, 504 (1978).

[94] *Cf.* Wilkie v. Robbins, 127 S. Ct. 2588, 2605-06 (2007) (suggesting that protection of federal officers from excessive liability, a concern ordinarily vindicated through qualified immunity law, should also inform the question whether to recognize a *Bivens* action and thus opening a potential gap in the level of immunity protection afforded officers of state and federal governments).

[95] *See Hartman*, 547 U.S. at 254 n.2.

[96] After all, in a world of cooperative federalism, state and federal law enforcement officials often work together on particular projects. *See, e.g.*, *Wilson*, 526 U.S. 603 (recounting cooperation between state and federal law enforcement); Schweiker v. Chilicky, 487 U.S. 412 (1988) (noting that both federal and state officials bore responsibility for the administration of the social security disability program).

[97] *Compare* Fitzgerald v. Nixon, 457 U.S. 751 (1982) (emphasizing the "unique" responsibilities associated with the office of the president and distinguishing the qualified immunity of state governors and cabinet level officials), *with* Scheuer v. Rhodes 416 U.S. 232 (1974) (governor of Ohio entitled only to a qualified immunity from damages liability). Interestingly, Fitzgerald recovered civil service remedies, including reinstatement and backpay, that were later said to crowd out a *Bivens* action.

In any case, incorporation of the section 1983 framework can help to dampen any dislocating effects of our proposed approach to *Bivens* litigation. Our suggested elimination of a threshold inquiry into the availability of a right to sue may appear to threaten federal officers with liability the Court had previously rejected in its analysis of "special factors counseling hesitation." The reference to "special factors" first appeared in *Bivens* itself,[98] and has since informed a variety of cases in which the Court has taken a narrow view of the availability of a *Bivens* remedy. Thus, in cases such as *Bush v. Lucas* and *Schweiker v. Chilicky*, the Court has found that "special factors" argued against the recognition of a right to sue.[99] By stripping away any inquiry into such factors as part of the evaluation of the existence of a right of action, our proposed interpretation of the Westfall Act may appear to threaten new federal liability. Put in other terms, it may seem unlikely that Congress, in ratifying the *Bivens* action, would have made so dramatic an alteration in existing law without calling attention to the fact.[100]

We share this concern with continuity, but we note that the section 1983 framework provides useful tools with which to evaluate the impact of some "special factors" on the viability of the *Bivens*/Westfall right of action. Indeed, we think our new approach can accommodate the instincts, if not the analysis and result, of many cases in the *Bivens* line even as we abandon the threshold focus on the existence of a right of action. Consider the Court's approach in *Bush v. Lucas*. There, a federal employee of the National Aeronautics and Space Administration sought damages under *Bivens* after having been demoted for making remarks highly critical of the Alabama office where he worked.[101] The plaintiff also pursued remedies under federal civil service protections, and ultimately obtained an agency decision that overturned the demotion as a violation of his First Amendment rights and awarded him some $30,000 in back pay.[102] Assuming that a constitutional violation had occurred, the Court faced the question of whether to recognize a *Bivens* action in addition to the civil service remedies the plaintiff had already secured. Although the Court recognized that a *Bivens* suit could entitle the plaintiff to a wider range of relief, the Court viewed the civil service remedies as "constitutionally adequate."[103] As the Court saw matters, the existence of a

[98] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971) ("The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.").
[99] *See* Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicky, 487 U.S. 412 (1988).
[100] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).
[101] *Bush*, 462 U.S. at 369–70.
[102] *Id.* at 370–71.
[103] *Id.*. at 378 n.14.

comprehensive and elaborate remedial scheme ruled out the recognition of a *Bivens* remedy. There were, as the Court noted, "special factors counseling hesitation."[104]

A more refined version of this analysis would survive the recognition of a Westfall Act right of action, although it would come into play in a different doctrinal context. Rather than informing the threshold decision about whether the courts should devise a right to sue, a focused and elaborate remedial scheme might operate to displace or impliedly preempt the Westfall Act's more general remedy for constitutional violations.[105] The Supreme Court's recent decision in *Fitzgerald v. Barnstable School Committee*,[106] provides a useful framework for evaluating the claim that a statutory scheme impliedly displaces constitutional tort claims under section 1983. There, the plaintiffs sought damages under section 1983 for a violation of equal protection, contending that their daughter had been subjected to peer-on-peer sexual harassment to which the school district responded inadequately.[107] The school district argued that Title IX provided a remedial scheme for such harassment claims sufficiently detailed to displace section 1983 relief. In rejecting this claim, the Court emphasized that Congress in

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[104] *Bush*, 462 U.S. at 378–79 (citing Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971)); *see also id.* at 390 (Marshall, J., concurring) ("I join the Court's opinion because I agree that there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'") (citing *Bivens*, 403 U.S. at 396).

The *Bush* Court's conclusion that the remedies provided under the civil service laws were constitutionally adequate provides an appropriate factor in an inquiry into the possible implied displacement of the Westfall Act. It would make little sense to authorize the substitution of constitutionally inadequate remedies..

[105] One can see the implied displacement of general remedies at work in a variety of cases, most notably under section 1983. There, the Court has sometimes treated a detailed federal statute as impliedly foreclosing the enforcement of rights against state actors through the use of an all-purpose section 1983 remedy. *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) (remedy under the federal Telecommunications Act supersedes remedy under section 1983). *Compare* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (complex administrative statute displaces section 1983 remedies), *with* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987) (no implied displacement). Similarly, the Court has occasionally, though not uncontroversially, found that statutory remedies (even those invalidated in part on other grounds) may impliedly displace an *Ex parte Young* remedy. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Indian Gaming Regulatory Act, though invalidated on Eleventh Amendment grounds, nonetheless displaces the availability of an enforcement action under *Ex parte Young* for injunctive and declaratory relief against the state's governor). For the critique, see Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 40.

[106] 129 S. Ct. 788 (2009).

[107] *Id.* at 792–93.

enacting Title IX had expressed no legislative intent to displace 1983 claims and had not put in place detailed or more restrictive remedies that would suggest the inapplicability of constitutional tort litigation.[108] Moreover, the Court pointed to differences in the substantive scope of coverage; while Title IX's prohibition against gender discrimination applied only to the recipients of federal funds, and included numerous exceptions, the Equal Protection Clause made actionable through section 1983 applied more universally to all state actors.[109] Finally, the Court noted that the remedies under section 1983 were available against individual officers, whereas those contemplated under Title IX reached only the responsible governmental entities.[110] In the end, the Court viewed the two remedial schemes as parallel rather than inconsistent.

The decision in *Fitzgerald*—by a unanimous Court—suggests a relatively narrow view of the implied displacement of section 1983 claims, particularly when the alternative statute does not specifically purport to redress the alleged constitutional violation. Application of the *Fitzgerald* framework to *Bivens* litigation might confirm the result in *Bush v. Lucas* but it would cast doubt on some of the Court's more expansive applications of the "special factors" calculus. In *Bush v. Lucas*, the civil service scheme provided a remedy for the violation of a federal employee's constitutional rights,[111] although recent scholarship casts doubt on the effectiveness of the remedy.[112] The agency that reviewed Bush's claim expressly found that the government had violated the employee's First Amendment rights and awarded him relief in the form of reinstatement and back pay.[113] In other cases, however, the processes available did not purport to address

[108] *Id.* at 795–97.
[109] *Id.* at 796.
[110] *Id.*
[111] *See* Bush v. Lucas, 462 U.S. 367, 388 (1983) (describing "the comprehensive nature of the remedies currently available").
[112] *See* Paul Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101 (2008) (observing that the civil service scheme endorsed in *Bush* has not led to a single successful First Amendment claim by a federal employee since *Bush*, and arguing that the *Bivens* action should be revived); John Preis, Constitutional Enforcement by Proxy 38-39 (unpublished draft, on file with authors) (arguing that the CSRA remedies are insufficient to protect First Amendment rights due to procedural deficiencies, and advocating a *Bivens* remedy instead).
[113] Of course, the remedies in *Bush v. Lucas* appear inadequate in other respects, when measured against the standard of *Fitzgerald*. The civil service scheme does not allow litigation against government officials, and provides remedies that do not correspond perfectly to those available under *Bivens*. *See Bush*, 462 U.S. at 372 & nn. 8, 9 (highlighting the remedial differences). But *Bush* came down in 1983, well before the passage of the Westfall Act created a statutory right of action. As a result, the Court in *Bush* had no occasion to assume the availability of a statutory

the constitutional issue and thus would seem to fail the *Fitzgerald* test. Thus, in *Wilkie v. Robbins*, the Court identified state common law remedies, federal administrative process, and the opportunity to defend against a federal criminal proceeding as modes by which Robbins could secure redress against the pattern of retaliation.[114] Importantly, however, none of these alternative remedies provided Robbins with an opportunity to vindicate his constitutional rights. The constitutional claim was not viable as a matter of state common law, whether brought against a state official or against the federal government under the FTCA, and the administrative scheme, as far as the record revealed, did not provide a forum for a claim of retaliation.[115] With no other opportunity under a federal statute to secure an adjudication of his constitutional rights, there was no basis in *Wilkie* for finding that federal law impliedly displaced the Westfall Act remedy.[116]

Our approach also calls for some re-conceptualization of the cases in which the Court has denied a *Bivens* remedy on grounds that would also appear to call for the rejection of a constitutional claim under section 1983. Consider *Schweiker v. Chilicky*.[117] There, the plaintiff sought to challenge the denial of social security benefits on procedural due process grounds under the Fifth Amendment.[118] As in *Bush v. Lucas*, the litigants who challenged the practice at issue had obtained significant relief, including a fully retroactive award of the benefits that had been wrongfully withheld. Plaintiffs sought an additional award of damages under *Bivens*. The *Schweiker* Court refused to permit the *Bivens* action to proceed, citing *Bush v. Lucas* and arguing that the remedies available

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Bivens action or to evaluate the circumstances in which other federal statutory schemes might be said to have displaced the Westfall Act approach.

[114] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2598–2600 (2007) ("In sum, Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.").

[115] The *Wilkie* Court merely discussed the availability of administrative and judicial review of adverse actions concerning Robbins's permits. *Id.* at 2599. The fact that no redress for retaliation was available in such review likely informed the Court's concession later in the opinion that even a patchwork of remedies might not suffice to make Robbins whole against the retaliation of the Bureau. *See id.* at 2600-01 ("But Robbins's argument for a remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, 'death by a thousand cuts.' . . . Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.").

[116] Use of the Fitzgerald framework would also call into question

[117] Schweiker v. Chilicky, 487 U.S. 412 (1988).

[118] *Id.* at 418–19.

under the social security system counseled hesitation.[119] *Schweiker* may appear to go beyond *Bush* in that it appears to recognize the possibility of a displacing federal remedy, even in circumstances where the remedy in question did not expressly address the constitutional claim.[120] Yet in other respects, the remedial scheme in *Schweiker* includes features that could give rise to an implied displacement claim under *Fitzgerald v. Barnstable School Committee*. Not only did Congress impose an exhaustion requirement that funneled disability claims through the administrative process,[121] but Congress also gave an indication that it meant to bar other modes of pursuing benefit claims against the government and its employees.[122]

Apart from the possibility of implied statutory displacement under *Bush* and *Fitzgerald*, we think that *Bivens* actions should take account of *Parratt v. Taylor*.[123] In *Parratt*, the plaintiff brought suit against officers of a state prison under section 1983, seeking damages on the basis of procedural due process for the loss of a hobby kit.[124] Although the Court recognized in *Parratt* that a section 1983 claim was available for any actionable constitutional violation, it sought to avoid the use of that statute as a vehicle with which prisoners could litigate modest property claims in the federal courts. Instead of cutting back on the section 1983 action,[125] the Court found that the existence of an adequate post-deprivation remedy, available through the state tort system, was sufficient process

[119] *See id.* at 425–28 ("The case before us cannot reasonably be distinguished from *Bush v. Lucas*. . . . The remedy sought in Bush was virtually identical to the one sought by respondents in this case . . . . Respondents' effort to separate the two does not distinguish this case from Bush in any analytically meaningful sense.").

[120] *See id.* at 427–28 (dismissing the notion that the remedial scheme was inadequate because it failed to provide redress for "the constitutional violation itself" and reasoning that "the harm resulting from the alleged constitutional violation [cannot] be separated from the harm resulting from the denial of the statutory right").

[121] *See id.* at 424-25 (citing the exhaustion rule).

[122] *See* 42 U.S.C. 405(h) (2006) (declaring that administrative scheme provides the exclusive mode of review and foreclosing suit against the federal government and its employees for claims under the statute). See generally Weinberger v. Salfi, 422 U.S. 749, 764-66 (1975) (interpreting section 405(h) to foreclose the assertion of jurisdiction over some constitutional claims arising from the denial of social security benefits); *cf. Schweiker*, 487 U.S. at 429 n.3 (refusing to resolve government's claim that statutory exclusivity barred the assertion of jurisdiction over constitutional theories of liability).

[123] *See* Parratt v. Taylor, 451 U.S. 527 (1981).

[124] *Id.* at 529–30.

[125] In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court held that the existence of state tort remedies for the unlawful police conduct at issue did not foreclose the availability of a remedy under section 1983.

to satisfy the constitutional requirement.[126] The Court viewed state tort remedies as vitiating not the section 1983 right of action but the underlying constitutional claim.[127] We think a similar approach might help to harmonize decisions in the *Bivens* line with our proposal to recognize a routinely available action under the Westfall Act.[128] The plaintiff in *Schweiker* sought declaratory, mandamus, and injunctive relief to cure constitutional flaws in the social security system; the combined availability of such specific relief, coupled with the recovery of benefits due, could well provide the plaintiff with all the process constitutionally due under the Fifth Amendment.[129]

More recent decisions in the *Parratt* line suggest that *Bivens* relief may vary to some extent depending on the nature of the constitutional claim. The Court has held that negligent conduct by government officials does not constitute a deprivation that brings the due process clause into play.[130] Moreover, the Court has distinguished between violations of the right to procedural due process and violations of substantive due process and the Bill of Rights. Procedural due process violations have been said to occur when the government fails to provide appropriate curative process; courts considering such claims evaluate remedial alternatives.[131] Violations of substantive constitutional rights, by contrast, are said to be complete when the wrongful action is taken.[132] Remedial options do not inform the evaluation of such substantive constitutional claims. As a consequence, the scope of remedial displacement under the *Parratt* doctrine would be rather narrow. While *Parratt* could bar the procedural due process claims, the doctrine would have no obvious effect on retaliation claims based on

[126] *See Parratt* at 538–41.
[127] *See id.* at 543–44 ("Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment.").
[128] In *Parratt*, the Court characterized the conduct of the prison guards as random and unauthorized and looked to state post-deprivation remedies. *See Parratt*, 451 U.S. at 541. The policies at issue in *Schweiker* were apparently the product of some deliberation on the part of the agency heads. Moreover, state tort remedies would have no relevance to the evaluation of remedial alternatives for claimants seeking to challenge the administration of social security benefits.
[129] Plaintiffs sought the certification of a class to press these claims for injunctive and declaratory relief, but dropped the claims after Congress revamped the administrative program that had allegedly led to their benefit termination. *See* Chilicky v. Schweiker, 796 F.2d 1131, 1134 (9th Cir. 1986), *rev'd*, 487 U.S. 412 (1988). After achieving a restoration of benefits, plus a lump sum to cover the period of wrongful denial, the plaintiffs had only their claim for damages under *Bivens* to pursue.
[130] *See* Daniels v. Williams, 474 U.S. 327 (1986).
[131] *See*, *e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984).
[132] *See* Zinermon v. Burch, 494 U.S. 113, 135-39 (1990) (distinguishing *Parratt* and *Hudson*).

the First Amendment or other substantive guarantees of the Bill of Rights.[133] On this view, the FTCA could provide a relevant remedial option, but only for procedural due process claims.[134]

Our suggested incorporation of *Parratt v. Taylor* analysis into the *Bivens* context provides an alternative explanation for the Court's decision in *Correctional Services Corp. v. Malesko*.[135] In *Malesko*, the plaintiff brought suit for injuries he sustained as an inmate of a halfway house operated for the federal Bureau of Prisons by Correctional Services Corp. (CSC).[136] In evaluating the existence of a *Bivens* action, the Court assumed that CSC, a private firm, was acting under color of federal law and thus subject to constitutional oversight.[137] But the Court nonetheless rejected the claim, emphasizing two considerations: its previous decision to decline to extend a *Bivens* claim against a federal agency[138] and its perception that the plaintiff had alternative remedies available as a matter of state common law.[139] In addition to these bases for its holding, the Court

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[133] *See generally* HART & WECHSLER, *supra* note 4, at 1106-10.

[134] From this vantage point, the Court's rejection of the FTCA as a remedial option in the Eighth Amendment context, *see* Carlson v. Green, 446 U.S. 14, 23 (1980), does not seem inconsistent with its reliance on alternative remedies as a bar to procedural due process claims in *Schweiker v. Chilicky*, 487 U.S. 12 (1988). *Cf.* HART & WECHSLER, *supra* note 4, at 820-22 (questioning the doctrinal consistency of the Court's approach).

[135] *See* Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

[136] *Id.* at 64-65.

[137] *See id.* at 70-71; *see also* Richardson v. McKnight, 521 U.S. 399, 413 (1997) (prison guards at private prison operating under state contract subject to liability under section 1983).

[138] *See Malesko*, 534 U.S. at 70-73 (citing FDIC v. Meyer, 510 U.S. 471 (1994) and assuming the existence of parallel tort remedies under state law for prisoners housed in privately run prisons).

[139] *Id.* at 72-73 (discussing "parallel tort remedies" available to inmates in private prisons). The Court assumed that such remedies would be effective, an empirical proposition which it did not attempt to substantiate. Examination of state law tort suits against private prisons finds some support for the Court's view that such suits would be permitted to go forward, but the case law is sparse. *See, e.g.*, Stephens v. Correctional Servs. Corp., 428 F. Supp. 2d 580 (E.D. Tex. 2006) (allowing both section 1983 and state law claims against private prison because while prison was acting under color of state law, neither the Texas statutes nor the Texas Constitution extends private prisons sovereign immunity). Defendants in such cases routinely invoke federal immunities, which have not proven effective to this point. *See, e.g.*, *id.* at 583 (rejecting state sovereign immunity defense); Adorno v. Correctional Servs. Corp., 312 F. Supp. 3d 505, 521-22 (S.D.N.Y. 2004) (rejecting government contractor's defense). Such defenses could certainly prove effective in other litigation.

To the extent that federal law presents hurdles to successful state court litigation, we believe the Court's approach in *Malesko* requires that it take some responsibility for ensuring the adequacy of state common law remedies. So far, we see no cause for undue alarm. Some private prisons have attempted to interpose their status as federal contractors as a defense to liability they would otherwise face at common law and as a justification for removal of state law actions to

described the origins and later evolution of the *Bivens* remedy in terms that a leading casebook characterized as "exceptionally grudging."[140] We share this view of the *Malesko* dicta and point out that the case, coming after the adoption of the Westfall Act in 1988, provided the Court with a missed opportunity to re-evaluate the legitimacy of the *Bivens* action in light of congressional ratification.[141]

Despite our disagreement with the *Malesko* dicta, we believe the dismissal of the action may make sense under *Parratt*. In *Malesko*, the plaintiff alleged that his injuries were the result of the negligence of CSC employees; CSC was said to have been negligent in failing to provide him with medication and negligent in refusing to permit him to use the elevator.[142] While the federal district court characterized Malesko's claims as arising under the cruel and unusual punishment clause of the Eighth Amendment,[143] it's not immediately obvious that negligent conduct alone can give rise to such a claim.[144] In the context of section 1983 litigation, moreover, the Court had previously ruled that the merely negligent

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federal court. The Court anticipated the first possibility, describing the government contractor defense as applicable only where the government commanded the "very thing" at issue in the litigation. See *Malesko*, 534 U.S. at 74 n.6 (citing Boyle v. United Technologies Corp., 487 U.S. 500 (1988)); *cf. Adorno*, 312 F. Supp. 3d at 521-22 (rejecting government contractor's defense on the strength of the *Malesko* Court's dictum). The Court has also narrowed federal officer removal under 28 U.S.C. § 1442, excluding private firms acting within what they claimed was the scope of federal permission. *See* Watson v. Philip Morris Companies, Inc., 551 U.S. 142 (2007).

[140] HART & WECHSLER, *supra* note 4, at 820.

[141] As in *Wilkie v. Robbins*, the Court in *Malesko* failed to discuss the implications of the Westfall Act for the recognition of a *Bivens* right of action. The Court also ignored the Westfall Act in *FDIC v. Meyer*, 510 U.S. 471 (1994). In *Meyer*, the Court found that section 1346(b) of the FTCA failed to authorize constitutional tort actions against the government. *See Meyer*, 510 U.S. at 478-79. Although the Court found the FDIC generally amenable to suit under a sue-and-be-sued clause in its organic law, the Court refused to expand the *Bivens* doctrine to allow constitutional tort claims against suable federal agencies. *See id.* at 484-86. Notably, the Westfall Act allows a civil action for constitutional violations to proceed against federal officers and employees but says nothing to authorize such suits against federal agencies. The Act thus supports the *FDIC v. Meyer* result.

[142] *See Malesko*, 534 U.S. at 64-65 (quoting amended complaint).

[143] *See id.* at 73 ("The District Court, however, construed the complaint as raising a *Bivens* claim, presumably under the Cruel and Unusual Punishments Clause of the Eighth Amendment."); *cf.* Preis, *supra* note 112, at 42 (purporting that Malesko asserted a deliberate indifference claim under the Eighth Amendment in the District Court).

[144] *See Malesko*, 534 U.S. at 73 (noting the negligence allegation and contrasting it with the requirement that claims for cruel and unusual punishment ordinarily must meet at least a "deliberate indifference" threshold) (citing Farmer v. Brennan, 511 U.S. 825, 835 (1994) and Estelle v. Gamble, 429 U.S. 97 (1976) for deliberate indifference standard under Eighth Amendment).

conduct of prison officials, causing personal injury to a state prisoner, does not constitute a deprivation of liberty within the meaning of the Fourteenth Amendment's due process clause.[145] If one were to characterize Malesko's claim as one for deprivation of liberty under the due process component of the Fifth Amendment, the complaint's failure to allege more than mere negligence could support a denial of relief.

Whatever its implications for *Malesko*, the *Parratt* decision offers scant support for the Court's grudging approach in *Wilkie v. Robbins*. There, the plaintiff sought relief for claims of intentional and malicious retaliation under the Takings Clause of the Fifth Amendment. The Court failed to identify any robust body of state common law as a source of alternative remedies; indeed, as we have seen, the FTCA forecloses common law claims against federal officials.[146] Nor could the plaintiff seek vindication of his constitutional claim before the US Court of Federal Claims. While post-deprivation relief through the Tucker Act may substitute for the right of plaintiffs to obtain injunctive relief against certain federal projects,[147] the Tucker Act provides no remedy for constitutional tort claims.[148] One thus has difficulty identifying a body of remedial law that could operate to foreclose Robbins' claim; remedial displacement under *Fitzgerald* and *Bush v. Lucas* makes no sense where Robbins lacks an alternative forum for his constitutional claim. Moreover, the intentional character of the alleged violations seemingly forecloses the conclusion that Robbins suffered no deprivation within the meaning of cases in the *Parratt* line. Although the *Wilkie* Court did not treat the existence of alternative remedies as decisive,[149] the Court's reliance on such

[145] *See* Daniels v. Williams, 474 U.S. 327 (1986).
[146] *See supra* Part III.
[147] *See* Preseault v. ICC, 494 U.S. 1 (1990) (owner may not challenge federal statute that threatens a taking of land where owner may bring a taking claim for compensation before the Court of Federal Claims under the Tucker Act); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (denying injunctive relief against federal government where owner of wrongly withheld property could assert a breach of contract claims for money damages under the Tucker Act).
[148] The Tucker Act itself limits its damage remedy to cases "not sounding in tort." 28 U.S.C. § 1491(a)(1) (2006). *Cf.* Brown v. United States, 105 F.3d 621, 624 (Fed. Cir. 1997) ("The Tucker Act grants the Court of Federal Claims jurisdiction over suits against the United States, not against individual federal officers. Thus, the *Bivens* actions asserted by appellants lie outside the jurisdiction of the Court of Federal Claims.") (citation omitted).
[149] The extent of the Court's reliance on alternatives in *Wilkie* remains unclear. While the Court cited the availability of remedial options in the first stage of its analysis, it concluded that these options were not decisive and conducted a stage-two analysis of factors counseling hesitation. *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2600 (2007) ("This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it

remedies would not be warranted at all on the view we take of litigation under the Westfall Act.

V. Conclusion

Although the statutory schemes differ for state and federal official action, the Court has in many cases self-consciously attempted to develop rules for section 1983 claims that parallel those applicable to *Bivens* litigation. In keeping with this practice of conscious parallelism, the Court has made clear that its rulings on such matters as the allocation of the burdens of pleading and proof,[150] the definition of the elements of a claim of constitutional violation, [151] and the refinement of the law of qualified immunity apply with equal force in both settings.[152] No one doubts, for example, that the Court's qualified immunity decision in *Pearson v. Callahan* will govern the analysis of claims brought against both state and federal officials.[153]

In a departure from this practice of parallel development, the Court takes a narrow view of the availability of the *Bivens* right of action. In suits against state actors, the Court views section 1983 as providing an express right of action for constitutional tort claims. As a consequence, the Court presumes the availability of such actions as it fills out remedial details. But in the *Bivens* context, as we have seen, the Court views itself as devising a right to sue on a case-by-case basis. In its most recent effort in this vein, the Court conducted an evaluation, likely mistaken, of the availability of state common law remedies and reached a judgment, certainly contestable, about the wisdom of opening the door to a new category of constitutional tort litigation. Such judicial selectivity invites criticism from those who view the task of recognizing rights to sue as inherently legislative. Judicial selectivity also suggests that the individual citizen's constitutional rights may differ, as a practical matter, depending on whether the violation occurs at the hands of a state or federal officer.

We do not believe that the Court can any longer fairly attribute this state of affairs to congressional inaction. As we have seen, the Westfall Act of 1988

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plainly answer no to the question whether he should have it. . . . This, then, is a case for Bivens step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done.") (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

[150] Gomez v. Toledo, 446 U.S. 635 (1980).

[151] Hartman v. Moore, 547 U.S. 250 (2006).

[152] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[153] See Pearson v. Callahan (overruling Saucier v. Katz, 533 U.S. 194 (2001)).

contains express language confirming the availability of civil actions against federal officials for violations of the Constitution. Taking account of this statutory development, the Court should abandon its case-by-case approach in favor of the routine recognition of the viability of the *Bivens* claim. Such a change in its approach would answer longstanding questions of legitimacy and would do so without occasioning any wrenching departure from the existing remedial framework. The Court could continue to honor conflicting congressional signals by borrowing section 1983's analysis to evaluate when another federal administrative scheme impliedly displaces the *Bivens* remedy. The resulting framework would better reflect Congress's desire to preserve the *Bivens* action and would enable the Court to ensure that constitutional rights apply with equal force to the interactions between individuals and officials at all levels of our federal government.