

# Rethinking *Bivens*: Legitimacy and Constitutional Adjudication

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	117
I. <i>BIVENS</i> AND THE QUEST FOR LEGITIMACY . . . . .	125
II. CONGRESS AND THE RATIFICATION OF THE <i>BIVENS</i> REMEDY . . . . .	131
A. THE WESTFALL ACT AS A RATIFICATION OF <i>BIVENS</i> . . . . .	132
B. DRAWING A CLOSER PARALLEL BETWEEN <i>BIVENS</i> AND SECTION 1983 . . . . .	139
III. RETHINKING <i>BIVENS</i> : TOWARD A NEW REMEDIAL CALCULUS . . . . .	141
CONCLUSION . . . . .	150

## INTRODUCTION

The Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>1</sup> plays a central role in our system of constitutional remedies.<sup>2</sup> Yet critics have long questioned the Court’s decision to fashion a federal common law right of action to enforce the Fourth Amendment.<sup>3</sup> While

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1. 403 U.S. 388 (1971).

2. Remedies for constitutional violations include suppression of evidence, injunctive and declaratory relief against threatened or continuing violations of constitutional rights, and damages for constitutional torts. For a useful summary of the *Bivens* case law and a primer on the academic literature on the subject, see generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 726–42 (6th ed. 2009).

3. For a concise summary of the objection that only the legislature can or should authorize such a remedy, see ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 9.1.2, at 593–94 (4th ed. 2003); cf. Thomas W. 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, 292 (1995) (arguing that *Bivens* vindicates the principle that “[t]he Constitution is meant to circumscribe the power of government

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.<sup>4</sup> 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.<sup>5</sup> Perhaps in response, the Court has grown a good deal more circumspect. In a recent decision, *Wilkie v. Robbins*, 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.<sup>6</sup>

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 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.<sup>7</sup> Thus, a discharged employee of a member of Congress may bring a Fifth Amendment equal protection claim,<sup>8</sup> but a dissatisfied applicant for government benefits may not press a Fifth Amendment due process claim.<sup>9</sup> Fifth Amendment takings claims have fared slightly better,<sup>10</sup> but retaliation

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where it threatens to encroach on individuals”); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541–42 (1972) (finding a source for the remedy provided in *Bivens* in Article III’s grant of the judicial power to the federal courts).

4. See *Bivens*, 403 U.S. at 411 (Burger, C.J., dissenting); *id.* at 427–28 (Black, J., dissenting).

5. See *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

6. *Wilkie*, 551 U.S. 537; see, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

7. 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) (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 rights). In the context of *Bivens* litigation, courts confront a similar question in defining the availability of a right to sue. Compare *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (assuming the viability of a *Bivens* action for retaliation against individual who invoked his First Amendment rights in dealings with the government), with *Wilkie*, 551 U.S. at 560–62 (foreclosing *Bivens* action for retaliation against individual who resisted government action in violation of Fifth Amendment’s Taking Clause). See generally *Stanley*, 483 U.S. at 681 (noting that there are “varying levels of generality” at which one can evaluate the availability of a *Bivens* action).

8. See *Davis v. Passman*, 442 U.S. 228, 236–38 (1979).

9. See *Schweiker*, 487 U.S. 412.

10. The *Bivens* doctrine does not extend to takings claims. Instead, such claims proceed against the United States under the Tucker Act in the United States Court of Federal Claims. See *Preseault v. ICC*, 494 U.S. 1, 12 (1990) (holding that a Tucker Act remedy is presumptively available for all claims arising out of a taking); *United States v. Causby*, 328 U.S. 256, 267 (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

aimed at the exercise of the Fifth Amendment right to resist a government taking of property does not give rise to a *Bivens* action.<sup>11</sup> Inmates of federal institutions may bring Eighth Amendment claims for cruel and unusual punishment,<sup>12</sup> but individuals confined in facilities run by federal government contractors have been less successful.<sup>13</sup> With their hit-or-miss quality, these decisions display the sort of incoherence that often betrays the absence of a clear rationale.

Cases arising 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 Guantánamo Bay and elsewhere, the lower federal courts have thus far consistently refused to recognize a *Bivens* remedy.<sup>14</sup> These decisions reflect some reluctance on the part of lower courts to second-guess military judgments during a time of war, some uncertainty about how to apply the Court's malleable standards, and a presumption against the viability of novel claims.<sup>15</sup> Apart from the uncertainty it engenders,

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determine [under the Tucker Act]."). See generally Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 566–74 (2008) (charting the doctrinal development of claims under the Tucker Act).

11. See *Wilkie*, 551 U.S. at 560–62.

12. See *Carlson v. Green*, 446 U.S. 14, 18–20 (1980).

13. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

14. See *Arar v. Ashcroft*, 532 F.3d 157, 180–84 (2d Cir. 2008) (no *Bivens* action for alleged victim of extraordinary rendition program), *reh'g en banc granted* (Aug. 12, 2008); *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 103–07 (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 in such facilities as Abu Ghraib); *cf. Rasul v. Myers*, 512 F.3d 644, 663–67 (D.C. Cir.) (detainees at Guantánamo 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) (holding that aliens detained at Guantánamo Bay enjoy constitutional right to habeas corpus)), *judgment reinstated*, 563 F.3d 527 (D.C. Cir. 2009). The terrorism cases also raise questions about the application of the state secrets privilege, see *El-Masri v. United States*, 479 F.3d 296, 310–12 (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 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (dismissing complaint as insufficiently pleading facts to state discrimination claim). Similar issues arose in *Bivens* claims against federal officials for damages flowing from the Bush Administration's warrantless wiretapping and domestic surveillance programs. See Reply Memorandum of the United States in Support of the State Secrets Privilege & the Motion To Dismiss or for Summary Judgment by the United States & the Official Capacity Defendants, *In re NSA Telecomms. Records Litig.*, No. 06-cv-1791-VRW, 2007 WL 3219332 (N.D. Cal. Aug. 16, 2007) (invoking state secrets privilege); Class Action Complaint / Demand for Jury Trial ¶¶ 93–107, *Shubert v. Bush*, No. CV 06 2282, 2006 WL 1783595 (E.D.N.Y. May 17, 2006) (asserting *Bivens* and statutory claims against high government officials for warrantless wiretapping and domestic spying).

15. See *Rasul*, 512 F.3d at 672–73 (Brown, J., concurring) (invoking a presumption against new rights of action, arguing that special factors counseled hesitation in recognizing a *Bivens* action for those detained at Guantánamo Bay, and invoking national security concerns during a time of war as justifications for declining to recognize such an action), *vacated and remanded*, 129 S. Ct. 763. In *Rasul*, on remand from the Supreme Court, the D.C. Circuit held that qualified immunity barred

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 specific claim may influence the *Bivens* calculus.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> Gene Nichol defended the Court’s exercise of remedial creativity, pointing out that courts in the common law tradition have long played a role in defining the remedies needed to vindicate important rights.<sup>19</sup> 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.<sup>20</sup> 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

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recovery for the plaintiffs and, in the alternative, that “[t]he danger of obstructing U.S. national security policy” was a special factor counseling hesitation against recognizing a *Bivens* action. *Rasul v. Myers*, 563 F.3d. 527, 532 n.5 (D.C. Cir. 2009) (citation omitted).

16. For a suggestion that the implied right of action calculus may reflect judicial views of policy issues, see PETER W. LOW ET AL., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 14–15 (6th ed. Supp. 2008), 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 federal interest in providing a forum for the assertion of the particular constitutional claim and an evaluation of the burden of allowing similar claims to proceed. *Cf. Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 315, 319–20 (2005) (evaluating federal jurisdiction in light of the strength of the federal interest and the potential threat of new cases to the federal docket).

17. See Dellinger, *supra* note 3, at 1541–43. For a critique, see Henry P. Monaghan, *The Supreme Court, 1974 Term—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.

18. See Monaghan, *supra* note 17, at 1–3. For a critique, see Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135–36 (1978), contending that the *Bivens* remedy should best be viewed as constitutionally compelled and, thus, immune to legislative tinkering.

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

20. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1796 (1991). In a recent article, David Zaring identifies and skeptically evaluates the symbolic and political value of the *Bivens* action, explaining why plaintiffs may obtain benefits from suits against high governmental officials even when the suit will not ultimately prevail. See David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 317–18 (2009). A similar skepticism about such suits seemingly informs the Court’s recent decision on the pleading requirements for *Bivens* actions against high government officials. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (rejecting as conclusory the plaintiff’s allegations as to the involvement of the Attorney General in an allegedly unconstitutional scheme to discriminate against Muslims).

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 Article, we argue for a fundamental change in the way courts evaluate the viability of a *Bivens* claim. Instead of the case-by-case approach that characterizes current law, we think the federal courts should presume that a well-pleaded complaint, alleging an unconstitutional invasion of individual rights, gives rise to an action for damages under *Bivens*. In such a world of presumptive rights to sue, the “special factors” that the Court has taken into account in deciding whether to allow an action would no longer operate as a threshold barrier to litigation.<sup>21</sup> Instead, the federal courts would look for evidence that Congress deliberately displaced the *Bivens* remedy through the adoption of an alternative remedial scheme. Such an approach would simplify the evaluation of constitutional tort claims against federal actors and bring the doctrine into line with that which governs similar suits against state actors under 42 U.S.C. § 1983. It would neither open the courthouse doors too broadly nor threaten federal officers with an unwarranted expansion in constitutional tort liability.

Identifying support for our approach begins with a new account of the legislative framework that now governs 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 (FTCA) 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.<sup>22</sup> Similarly, in the Westfall Act of 1988, Congress took further steps to solidify the

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21. Although the *Bivens* Court referred to the possibility that “special factors” might counsel hesitation in the recognition of an action, the Court characterized the special-factors analysis in relatively narrow terms. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971). Thus, the Court noted that there was “no explicit congressional declaration” of a desire to foreclose a suit against federal officers and to substitute an alternative remedy, “equally effective in the view of Congress.” *Id.* at 397. Although intervening cases, including *Wilkie v. Robbins*, 551 U.S. 537 (2007), have taken a broader view of the remedial alternatives that can create special action-displacing factors, we do not think these expansive accounts find support in *Bivens*. We therefore recommend that the special-factors analysis either be discarded or reframed along the lines suggested by the Court’s recent remedial displacement analysis in the § 1983 context. See *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 793–95 (2009); *infra* Part III.

22. For a description of the legislative history and provisions of the 1974 amendment, see *infra* notes 78–79, 84–86 and accompanying text.

*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 these claims.<sup>23</sup> In the course of 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 claim.”<sup>24</sup> 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.”<sup>25</sup>

Although the Supreme Court has apparently never squarely considered the issue,<sup>26</sup> we think the Westfall Act supports our argument for the routine availability of *Bivens* claims. Both the language of the Act, with its express

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23. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. 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 to 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 II. 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 § 1983. See *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 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).

24. 28 U.S.C. § 2679(b)(1) (2006).

25. *Id.* § 2679(b)(2)(A).

26. A footnote in the plaintiff-respondent’s brief in *Wilkie* referred in passing to the Westfall Act and the exclusivity provision, but the brief did not emphasize the argument of presumptive availability pressed here. See Brief for the Respondent at 41 n.33, *Wilkie v. Robbins*, 551 U.S. 537 (2007) (No. 06-219), 2007 WL 550926 (“Congress’s ratification of *Carlson* in the Westfall Act provides further reason to doubt petitioners’ preclusion claim. It would be passing strange for Congress to have taken steps to confirm the availability of *Bivens* actions against federal employees if it believed that the APA already precluded nearly all *Bivens* suits against officials of administrative agencies.” (first citation omitted) (citing 28 U.S.C. § 2679(b)(2); H.R. REP. NO. 100-700 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949–50)). The point was not raised at oral argument and went unaddressed in the *Wilkie* opinions.

Briefs in earlier cases advocated a view of the 1974 FTCA amendment similar to that advanced for the Westfall Act in this Article. See Brief of the ACLU Found., Inc. & Legal Aid Soc’y of the City of N.Y. as Amici Curiae Supporting Respondents at 19, *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261), 1979 WL 199276 (“Moreover, in the single instance where Congress has directly considered the relationship of the FTCA to the *Bivens* remedy, Congress not only refrained from declaring the FTCA an exclusive remedy but indicated that it was quite comfortable with the coexistence of the *Bivens* remedy and the FTCA. In 1974, when Congress amended the FTCA to extend its coverage to include certain intentional torts committed by federal investigative or law enforcement officers, it clearly acknowledged the viability of the *Bivens* remedy as an alternative to the FTCA.” (citation omitted)); Brief for Petitioner at 33 n.31, *Davis v. Passman*, 442 U.S. 228 (1979) (No. 78-5072), 1978 WL 207321 (“Congress has taken *Bivens* to be law and expanded it by enacting a statutory ‘counterpart’. The 1974 amendment to the Federal Tort Claims Act provided a cause of action against the United States for certain intentional torts of federal investigative and law enforcement officers. A *Bivens* action already existed against the offending officials themselves.” (citations omitted)). Aside from the discussion in *Carlson v. Green*, the Court has largely ignored the statute’s relationship to *Bivens*. See *infra* note 86 and accompanying text.

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,<sup>27</sup> 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 Webster Bivens's day, to proceed to judgment against federal officers on the basis of the common law.<sup>28</sup> 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.<sup>29</sup> 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;<sup>30</sup> today, it has become “*Bivens* or nothing” for those who seek to vindicate constitutional rights.

Congressional recognition puts the *Bivens* action on a much firmer federal statutory foundation, analogous if not identical to § 1983. We suggest that federal courts should treat the *Bivens* action as presumptively available, much like its counterpart under § 1983. Such an approach would build on the Court's sensible decision in many contexts to treat the *Bivens* action and the § 1983 claim as parallel proceedings that warrant similar treatment. As the Court explained long ago, it would be “untenable to draw a distinction for purposes of

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27. The mechanics of substituting the federal government as the defendant are explained in Part II.

28. 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.*, *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836) (assumpsit to recover customs tax from the collector); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (injunction against trespassory taxation); *Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11 (1815) (ejectment); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806) (damages for wrongful seizure of property to enforce illegal fine). 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* *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875) (declaring in such a case of justification that “[a]n unconstitutional law will be treated by the courts as null and void”); *cf.* *Miller v. Horton*, 26 N.E. 100, 101 (Mass. 1891) (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).

29. *See* Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 *N.C. L. REV.* 497, 510–17 (1976) (discussing the 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 do not 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 102.

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

immunity law between suits brought against state officials . . . and suits brought directly under the Constitution against federal officials.”<sup>31</sup> We agree that such distinctions are untenable, but we view both the plaintiff’s right to sue and the defendant’s right to invoke qualified immunity as matters deserving parallel treatment. With the right to bring a *Bivens* action presumptively available, the federal courts would 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 § 1983, on whether the complaint states a claim for a violation of the Constitution that overcomes the officer’s qualified immunity defense. Such an approach would ensure that constitutional limitations on government misconduct would apply with equal force to both state and federal government actors.

By broadening the analogy to § 1983 and 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 scholars have puzzled over the Court’s willingness in cases such as *Bush v. Lucas*<sup>32</sup> and *Correctional Services Corp. v. Malesko*<sup>33</sup> to treat the availability of alternative remedies as fatal to the individual’s right to pursue a *Bivens* claim.<sup>34</sup> Those decisions may make more sense when viewed through the lens of § 1983. In *Fitzgerald v. Barnstable School Committee*, the Court provided a framework for evaluating when alternative statutory remedies displace the § 1983 remedy for constitutional tort claims.<sup>35</sup> One might sensibly apply this framework in assessing the Court’s decision in *Bush v. Lucas*, in which civil service remedies for a whistleblower’s constitutional claims served to displace a *Bivens* remedy.<sup>36</sup> Similarly, in *Parratt v. Taylor*, the Court held that the existence of post-deprivation remedies may, in certain circumstances, obviate procedural due process claims for which § 1983 would otherwise provide a remedy.<sup>37</sup> 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 § 1983 framework, the Court could avoid the ad hoc reliance on “special factors” that has characterized its recent *Bivens* decisions without inviting an unwarranted expansion of federal official liability.

Our Article proceeds in three parts. Part I sketches the Court’s current approach to the recognition of a *Bivens* right of action, focusing on the

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31. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

32. *Bush v. Lucas*, 462 U.S. 367 (1983).

33. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

34. *See, e.g.*, Bandes, *supra* note 3, at 319–22; Laurence Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006–2007 CATO SUP. CT. REV. 23, 67–72.

35. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 794–95 (2009).

36. *Bush*, 462 U.S. at 388–90.

37. *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).



comparatively recent decision in *Wilkie v. Robbins* and the questions of legitimacy that it raises. Part II describes the adoption of the Westfall Act and its provision allowing suits against federal officers for “violation of the Constitution.” Part II also makes the case that the Westfall Act recognizes and confirms the presumptive availability of a *Bivens* action for constitutional violations. Part III builds on this overlooked source of statutory legitimacy in arguing that the treatment of suits against federal officers should be brought into line with that of actions against state and local officials under § 1983. Part III also explores the implications of recognizing a presumptive right to sue. Under our suggested approach, the existence of alternative remedies would continue to play a role in the evaluation, as would the consideration of a range of limiting factors that now inform the existence of relief under § 1983. We conclude with a review of cases in the *Bivens* line, showing how our approach would reshape current doctrine. In the end, we believe that the *Bivens* doctrine and § 1983 doctrine would both gain from the development of the parallel approach we advocate here. Rather than 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.

#### I. *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.<sup>38</sup> 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.<sup>39</sup> Although he might have brought suit in state court, seeking damages for a common law trespass,<sup>40</sup> Bivens chose to file his suit in federal court, seeking damages directly under the Constitution.<sup>41</sup> In upholding his right to sue, the Court effectively held that federal law enables individuals to sue federal officers for constitutional violations.<sup>42</sup> *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 rest on § 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 dissenters’ criticisms of the *Bivens* decision. Chief Justice Burger, along with Justices Black and Blackmun, argued that Congress

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38. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

39. *Id.*

40. *See id.* at 390–91, 394–95.

41. *Id.* at 389–91.

42. *See id.* at 394–96.

should take the lead in defining the way individuals enforce the Constitution.<sup>43</sup> 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*'s position could have sued in federal court for injunctive relief against a pending or threatened Fourth Amendment violation.<sup>44</sup> All the Court was really adding was a federal remedy in the nature of tort damages for folks like *Bivens* who lacked any effective alternative.<sup>45</sup> Moreover, Harlan pointed out 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> In a related development, the Court has essentially abandoned the practice of recognizing implied rights of action to enforce federal statutory rights.<sup>49</sup> 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

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43. 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).

44. *Id.* at 403–05 (Harlan, J., concurring in the judgment).

45. See *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.")

46. *Id.* at 402 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)).

47. See *supra* note 6 and accompanying text.

48. See *supra* notes 32–37 and accompanying text.

49. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008); see also *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). The Court described *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the implied statutory right-of-action decision on which it had relied in *Bivens*, 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 the intent to create" a right of action. See *Stoneridge*, 128 S. Ct. at 772 (referring to *J.I. Case*).

federal courts.<sup>50</sup> 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 had not seen fit to insert.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> But questions of institutional competence lie at the heart of the call to overrule *Bivens*.

The Court’s approach to 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 (BLM) had retaliated against Robbins for refusing to grant the Bureau a right-of-way across his land.<sup>54</sup> Robbins claimed that he had a right, protected by the Fifth Amendment, to exclude the federal government from his land.<sup>55</sup> He further argued that BLM officials’ retaliation for the exercise of that right to exclude gave rise to an action for damages under *Bivens*.<sup>56</sup> The Court set for itself the task of deciding whether to “devise a new *Bivens* damages action” for retaliation against landowner rights.<sup>57</sup> 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.<sup>58</sup>

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50. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

51. See *Stoneridge*, 128 S. Ct. at 771–73.

52. 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).

53. If one begins with the view that every alleged constitutional violation requires an effective judicial remedy, then routine recognition of a *Bivens* action would follow as a matter of course. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1484–92, 1504–09 (1987) (explaining *Bivens* on this ground while critiquing current doctrines of immunity and arguing for the provision of more robust remedial mechanisms). Professors Fallon and Meltzer have questioned both the normative and descriptive accuracy of the claim that the Constitution requires individually effective remedies in every case; they argue that the Court should intervene where needed to ensure that the system of remedies as a whole fosters broad government compliance with constitutional values. See Fallon & Meltzer, *supra* note 20, at 1779–97. We share Professor Redish’s view that the Supreme Court need not identify clear legislative support for every feature of its web of constitutional remedies. See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 Nw. U. L. REV. 761, 796–97 (1989).

54. See *Wilkie v. Robbins*, 551 U.S. 537, 541–47 (2007).

55. *Id.* at 547–48.

56. *Id.*

57. *Id.* at 549.

58. 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 550. The second stage of the process calls for the exercise “of judgment.” The judgment at hand requires that the

With its first-step focus on alternative remedies, the Court assumed (perhaps mistakenly) that trespass remedies were available as a matter of state tort law.<sup>59</sup> 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.<sup>60</sup> In the end, the Court declined to allow a *Bivens* action and held that the matter was one for Congress to consider.<sup>61</sup>

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.<sup>62</sup> On the other hand, the Court stayed close to the factual record in the case, emphasizing that BLM officials had a legitimate interest in obtaining a right-of-way across Robbins's 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's retaliation claim—"death by a thousand cuts"—from actionable retaliation claims that grow out of one or more discrete government

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federal courts "make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *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. *See id.* at 553–54.

59. *Id.* at 550–51. 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 II, 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*, 551 U.S. at 552 (noting the possibility that a malicious prosecution claim would be "unavailable against federal officials" and citing *Blake v. Rupe*, 651 P.2d 1096, 1107 (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).

60. *See Wilkie*, 551 U.S. at 555–62.

61. *See id.* at 561–62.

62. *See id.* at 580–82 (Ginsburg, J., dissenting in part) (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).

actions.<sup>63</sup>

The Court's focus on the particulars of what it described as a "factually plentiful" record<sup>64</sup> 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.<sup>65</sup> Only a year earlier, in *Hartman v. Moore*, the Court had confirmed that First Amendment retaliation or malicious prosecution claims were viable under *Bivens*, as long as the plaintiff pleads and proves a lack of probable cause for the prosecution.<sup>66</sup> 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 *Harlow v. Fitzgerald* and *Butz v. Economou*.<sup>67</sup> 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. These cases inevitably present line-drawing problems, as well.<sup>68</sup> 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 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

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63. See *id.* at 555–61 (majority opinion) (citation omitted).

64. *Id.* at 551.

65. 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 or a retaliation claim based on the exercise of rights under the First Amendment, as approved in *Hartman v. Moore*, 547 U.S. 250 (2006).

66. *Hartman*, 547 U.S. at 256 ("When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*."); cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (noting the Court's "reluctance" to extend *Bivens* and assuming, without deciding, that a First Amendment religious discrimination claim is actionable).

67. See *Harlow v. Fitzgerald*, 457 U.S. 800, 804–05 (1982) (allegations that high government officials discharged the plaintiff from government employment to punish the plaintiff for speaking out against a wasteful federal project); *Butz v. Economou*, 438 U.S. 478, 480 (1978) (allegations that government initiated enforcement proceeding to retaliate against critic of the agency); 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 R. Brown, *The Failure of Fault Under § 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) (questioning the qualified immunity regime of *Harlow*).

68. 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.

from those faced in other retaliation litigation.<sup>69</sup>

Decisions in the lower federal courts since September 11, 2001 display the same willingness to use the special-factors analysis and case-by-case selectivity to foreclose novel *Bivens* claims. Thus in *Wilson v. Libby*, the D.C. Circuit rejected a *Bivens* claim by a former covert intelligence agent whose identity was revealed by high government officials in the Bush administration in an apparent effort to discredit her husband.<sup>70</sup> Key to the court's decision was its determination that the Privacy Act,<sup>71</sup> which regulates the manner in which federal agencies collect, maintain, use, and disseminate information about individuals, provided a comprehensive federal remedial scheme that displaced the availability of a *Bivens* action under the special-factors calculus.<sup>72</sup> The lower court reached this conclusion despite the acknowledged fact that the Privacy Act failed to provide an effective remedy against the offices of the President and Vice President, where several of the defendants were employed.<sup>73</sup> Similarly, in *Rasul v. Myers*, the D.C. Circuit twice rejected constitutional claims by aliens detained at Guantánamo Bay of illegal detention and mistreatment by relying, in part, on a special-factors analysis.<sup>74</sup> One judge who earlier rejected the discredited territorial basis for the D.C. Circuit's first decision nonetheless agreed that special factors counseled against the recognition of an action for damages on behalf of enemy combatant detainees, invoking a presumption against novel *Bivens* claims.<sup>75</sup>

The selectivity entailed in this 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

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69. See *Wilkie*, 551 U.S. at 576–80 (Ginsburg, J., dissenting in part) (likening Robbins's claim to recognized causes of action for retaliation against the exercise of constitutional rights). The majority argued that the inquiry 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 be unworkable. See *id.* at 555–61 (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 does 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 582–83 (Ginsburg, J., dissenting in part).

70. See *Wilson v. Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008).

71. 5 U.S.C. § 552a (2006).

72. See *Wilson*, 535 F.3d at 707.

73. *Id.* at 709–10.

74. *Rasul v. Myers*, 512 F.3d 644, 663, 667 (D.C. Cir. 2008) (detainees at Guantánamo 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) (holding that aliens detained at Guantánamo Bay enjoy constitutional right to habeas corpus)), *judgment reinstated*, 563 F.3d 527, 527–32 & n.5 (D.C. Cir. 2009) (rejecting detainees' claims on grounds of qualified immunity and holding in the alternative that national security concerns are a special factor precluding a *Bivens* claim).

75. See *Rasul*, 512 F.3d at 672–73 (Brown, J., concurring).

fashion a damages action. For these critics, as for the concurring Justices in *Wilkie*, recent experience demonstrates the wisdom of abandoning the enterprise altogether.<sup>76</sup> 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 claimants who allege serious violations of their constitutional rights.<sup>77</sup> For these critics, as for the dissenters 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.

## II. CONGRESS AND THE RATIFICATION OF THE *BIVENS* REMEDY

We believe that the Court should re-evaluate its case-by-case approach to the *Bivens* remedy in light of the current statutory framework of federal government accountability. That framework now includes, most importantly, the revised terms of the Federal Tort Claims Act (FTCA), 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 individuals to sue the government for certain law enforcement torts.<sup>78</sup> 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.<sup>79</sup> 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 these claims.<sup>80</sup> 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."<sup>81</sup>

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 of the Westfall Act does not follow § 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. Moreover, by speak-

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76. See *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (arguing that *Bivens* should not be extended under any circumstances and should be confined to its facts).

77. See generally Tribe, *supra* note 34.

78. See Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending FTCA to permit suits for assault, battery, false imprisonment, abuse of process, and malicious prosecution).

79. 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 et al., *supra* note 29, at 510-16 (describing the DOJ proposal and its subsequent rejection).

80. Westfall Act, Pub. L. No. 100-694, § 6, 102 Stat. 4563, 4564-65 (1988) (codified at 28 U.S.C. § 2679(b)(2)(B) (2006)).

81. *Id.* § 5, 102 Stat. at 4564 (codified at 28 U.S.C. § 2679(b)(2)(A) (2006)).

ing in broad and unqualified terms, the statute suggests that *any* alleged violation of the Constitution will support a claim against federal officials. In other words, the statute does not appear to contemplate the kind of case-by-case analysis that characterized the Court's approach in *Wilkie v. Robbins* but presumes a right to sue 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.<sup>82</sup> Moreover, federal officials can continue to argue that another federal statutory scheme displaces the suit for damages under *Bivens*.<sup>83</sup> We therefore believe that our approach does not threaten an unwarranted expansion of federal officer liability or open the federal courts to a wave of frivolous claims. But instead of recent hostility to new *Bivens* claims, we would emphasize 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 recognized and preserved the availability of a *Bivens* action. We first sketch the statutory support for such a conclusion and then consider the case for drawing a closer parallel between *Bivens* and § 1983.

#### A. THE WESTFALL ACT AS A RATIFICATION OF *BIVENS*

The case for acknowledging that Congress has joined the Court as a partner in recognizing remedies in the nature of a *Bivens* action draws support both from the Westfall Act's preservation of suits for violation of the Constitution and from the considerations that led to its adoption. The story begins in 1973, when Congress grew concerned about a series of federal no-knock drug enforcement raids on private homes in and around St. Louis, Missouri.<sup>84</sup> 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

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82. The task of pleading an actionable constitutional violation was complicated by the Court's extension of its recent emphasis on plausibility in complex litigation. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–54 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in support of a "facial plausibility" pleading requirement).

83. See *infra* Part III.

84. See *Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the S. Comm. on Government Operations*, 93d Cong. 446 (1973) (hearings regarding raids in Collinsville, Illinois, including testimonies from families subject to raids); 119 CONG. REC. 23,242–58 (1973) (expressing concern over the raids); 119 CONG. REC. 15,170 (1973) (same). A more detailed history of the raids and reaction is provided in Boger et al., *supra* note 29, at 500–07.



under the FTCA were designed to supplement, not displace, the *Bivens* action.<sup>85</sup> 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.<sup>86</sup>

Congress took a second step in 1988. Acting to protect government officials from state common law tort liability,<sup>87</sup> 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.<sup>88</sup> Upon certification, the government substitutes in as the defendant and can remove the action from state to federal court.<sup>89</sup> Thereafter, the action proceeds against the federal government under the FTCA.<sup>90</sup> 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.<sup>91</sup> But the FTCA does not rely on state common law as the final measure of the government's liability. A well-known collection of

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85. S. REP. NO. 93-588, at 3 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 (“[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny [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).”).

86. See, e.g., *Carlson v. Green*, 446 U.S. 14, 19–20 & n.5 (1980) (“[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 officials . . . .” (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*).

87. See Westfall Act, Pub. L. No. 100-694, §§ 2(a)(4), 2(b), 102 Stat. 4563, 4563–64 (1988) (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)).

88. *Id.* § 6, 102 Stat. at 4564–65 (codified at 28 U.S.C. § 2679(d) (2006)).

89. See *id.*; *Osborn v. Haley*, 549 U.S. 225 (2007) (Attorney General's scope-of-employment certification conclusive for purposes of removal jurisdiction). *But cf.* *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (Attorney General's scope-of-employment certification subject to judicial review).

90. Westfall Act § 6.

91. 28 U.S.C. § 1346(b)(1) (2006).

federal law defenses protect the government's interests. For example, the FTCA bars liability for the exercise of discretionary functions,<sup>92</sup> requires a notice of the claim,<sup>93</sup> imposes a fairly short statute of limitations,<sup>94</sup> and incorporates the officials' own federal immunity from liability, when applicable.<sup>95</sup>

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. Indeed, this conclusion seems clear from the language of the Act, which broadly preserves the availability of a *Bivens* action for "[v]iolations of the Constitution."<sup>96</sup> The recognition of *Bivens* also flows 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 taken within the zone of their official duties.<sup>97</sup> 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. In 1971 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.<sup>98</sup>

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92. *Id.* § 2680(a).

93. *Id.* § 2675(a) (requiring notice and disposition of a claim by the appropriate federal agency prior to filing FTCA suit); *see* *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 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).

94. 28 U.S.C. § 2401(b) (2006) (requiring notice of possible tort claims to federal agency within two years).

95. Westfall Act § 4 (codified at 28 U.S.C. § 2674 (2006)) ("With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.").

96. *Id.* § 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").

97. *See supra* note 90 and accompanying text.

98. Although the Court established 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, 570 (1959); *Spalding v. Vilas*, 161 U.S. 483, 493 (1896), this immunity did not impose a similarly absolute bar to other kinds of common law liability. *See supra* note 28; *see also* *Westfall v. Erwin*, 484 U.S. 292, 297 (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). *See generally* LOUIS

Today, this background system of state common law remedies for the violation of constitutional rights has been superseded by the Westfall Act's provision for the transformation of such claims into suits under the FTCA. 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 make 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.<sup>99</sup> In the Westfall Act, Congress again chose to retain the *Bivens* action when faced with such a proposal.<sup>100</sup> 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 failure of Congress to provide a clear statement authorizing constitutional suits against the government has proven fatal to their assertion.<sup>101</sup> 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.<sup>102</sup> The only significant exception, established in the Tucker Act, authorizes the U.S. Court of Federal Claims

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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 *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836); *Irving v. Wilson*, 100 Eng. Rep. 1132 (K.B. 1791).

99. See *supra* note 85 and accompanying text.

100. Once again, the Department of Justice proposed funneling all liability, including that for constitutional torts, into suits brought against the federal government. Congress again consciously chose to retain the *Bivens* action. See H.R. REP. NO. 100-700, at 6 (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.” (citation omitted)); 134 CONG. REC. 15,963 (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.”).

101. See, e.g., *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Vill., 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)).

102. 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, 951 (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). To be sure, the FTCA allows suits for damages for certain law enforcement torts, but those suits do not expressly vindicate constitutional rights and, importantly, were intended by Congress in 1974 to supplement rather than displace the *Bivens* action. See 28 U.S.C. § 2680(h) (2006); see also *supra* notes 85–86 and accompanying text (describing congressional and judicial understanding of the FTCA and *Bivens* as complementary remedies).

to hear Fifth Amendment takings claims against the federal government.<sup>103</sup> For constitutional tort claims, the Westfall Act makes clear that *Bivens* provides the only right of action.<sup>104</sup>

By accepting *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress has joined the Court in recognizing the importance of the *Bivens* remedy in our scheme of governmental accountability law. Such congressional support and ratification, moreover, suggest that the Court should 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 presumed the availability of 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 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.<sup>105</sup> 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 violations of the Constitution operates not to approve an all-purpose *Bivens*

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103. 28 U.S.C. § 1491 (2006). The Tucker Act can also be employed to seek monetary compensation under other "money-mandating" provisions of the Constitution, such as Article I's Export Clause or Article III's Compensation Clause, but such claims are rare. See GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 4.09(c) (4th ed. 2006).

104. The FTCA judgment bar, which provides that an FTCA judgment serves as a "complete bar" to any action against the employee arising from "the same subject matter," see 28 U.S.C. § 2676 (2006), also demonstrates that the FTCA itself is an incomplete vehicle by which to vindicate constitutional claims. This provision has been interpreted to bar *Bivens* actions, regardless of whether the FTCA judgment was favorable to the plaintiff. See, e.g., *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008) (vacating \$6.5 million *Bivens* judgment due to subsequent FTCA judgment); *Gasho v. United States*, 39 F.3d 1420, 1437–38 (9th Cir. 1994) (barring subsequent *Bivens* action after unsuccessful FTCA claim). Thus, the judgment bar may operate to preclude recovery for constitutional claims, despite suggestions that an FTCA action might serve as the functional equivalent to a claim for constitutional redress. Cf. *Carlson v. Green*, 446 U.S. 14, 20–23 (1980) (suggesting four reasons why FTCA claims may provide incomplete redress for constitutional claims). Moreover, the FTCA might not provide relief for certain constitutional claims at all because the 1974 amendment only permits suits concerning intentional torts by law enforcement officers. See 28 U.S.C. § 2680(h) (2006). Thus, for instance, a false imprisonment claim would not be actionable under the FTCA against an employee who is not a law enforcement officer, leaving *Bivens* as the only possible vehicle for relief.

105. See *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citing *Correctional Services 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 *Malesko*. There, state tort liability remained intact because the defendant was a private firm rather than a federal government actor entitled to Westfall Act immunity. See *Malesko*, 534 U.S. at 71–74 (noting the availability of remedies under state law); cf. *Osborn v. Haley*, 549 U.S. 225 (2007) (illustrating the operation of Westfall Act immunity).

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 reason to question such a contention. The statute refers to a “civil action . . . brought” against federal officers asserting a claim for a “violation of the Constitution.”<sup>106</sup> The unqualified references in the statute seemingly authorize the pursuit of all civil actions that assert constitutional claims, without suggesting that the federal courts should 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 adopted in the Westfall Act 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 expressly forecloses pursuit of constitutional claims by action predicated on state common law and implicitly forecloses the bringing of such claims against the government itself by failing to provide the clear statement that would overcome federal sovereign immunity. 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.<sup>107</sup>

The withdrawal of alternative remedies explains why Congress may have chosen to regard the *Bivens* action as routinely available, rather than as dependent on a 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).<sup>108</sup> Having cut off that routinely

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106. Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified at 28 U.S.C. § 2679(b)(2) (2006)).

107. Congress took modest steps to curtail *Bivens* actions by federal prisoners when it adopted the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996). But the legislation casts no doubt on the general availability of constitutional tort litigation. The operative provision of the PLRA amended 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) (2006). The provision applies to suits against the United States and its agencies, as well as those against federal officers and employees. *Id.* A parallel provision curtails such litigation by state prisoners under § 1983. *See* 42 U.S.C. § 1997(e) (2006).

108. As noted, a variety of common law theories of liability were available to plaintiffs. *See supra* note 28. 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). On the model of private law, state court litigation that preceded the *Bivens* action, see Amar, *supra* note 53, at 1506–09.

available remedy in the Westfall Act, Congress may have understandably felt some obligation to protect the only alternative by statute. The unqualified terms of the statute's restatement suggest that the Westfall Act embraces the *Bivens* remedy as the primary basis for constitutional tort litigation against the federal government.

This suggested interpretation of the Westfall Act draws support from a long line of cases in which the Court has applied a presumption in favor of judicial review of constitutional claims.<sup>109</sup> Although the presumption in favor of judicial review applies to all legal challenges to administrative action,<sup>110</sup> it applies with special force to constitutional claims.<sup>111</sup> Thus, in *Webster v. Doe*, the Court confronted a federal statute that seemingly placed the personnel decisions of the CIA director beyond the purview of the federal courts.<sup>112</sup> State courts were effectively closed, as well. The Court responded by reading an implied exception for constitutional claims into the statute in order to avoid what it described as the "serious constitutional question" that would arise if the statute were construed to preclude all judicial review of the constitutional challenge.<sup>113</sup>

This well-established presumption in favor of judicial review provides further support for our conclusion that Congress, in enacting the Westfall Act, should be understood to have preserved judicial review of constitutional tort claims through the vehicle of the *Bivens* action.<sup>114</sup> As in the case of *Webster*, state courts no longer offer a viable forum for the pursuit of state common law tort claims against federal officers. With the Westfall Act amendments, those claims are all subject to removal and transformation into claims against the federal government.<sup>115</sup> Although the FTCA subjects the federal government to common law tort liability, it makes no other provision for the adjudication of constitutional tort claims. The presumption in favor of judicial review thus suggests, at least in cases where retrospective relief provides the only effective avenue of redress for alleged constitutional violations, that any ambiguity in the Westfall Act should be resolved in favor of presumptive viability of the *Bivens* action.

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109. See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (no preclusion of constitutional challenge to certain Medicare awards); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (no preclusion of constitutional challenges under statute that purported to make benefit determinations by the Veterans' Administration final and unreviewable); cf. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (Congress may not deny individuals their right to the independent judgment of a court on the "ultimate question of constitutionality"). For scholarly treatments of the presumption, see MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 42–47 (2d ed. 1990); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). See generally FALLON ET AL., *supra* note 2, at 308–14.

110. See, e.g., *Bowen*, 476 U.S. at 670–73, 680–81.

111. See, e.g., *Bartlett v. Bowen*, 816 F.2d 695, 702 (D.C. Cir. 1987) (applying the presumption in rejecting government's argument for preclusion of review of constitutional challenges to Medicare Act).

112. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

113. *Id.* at 603.

114. The Court handed down its *Webster* decision in June 1988, several months before Congress enacted the Westfall Act.

115. See *supra* notes 87–95 and accompanying text.

B. DRAWING A CLOSER PARALLEL BETWEEN *BIVENS* AND SECTION 1983

As noted above, constitutional tort litigation against state actors under § 1983 now proceeds without any threshold inquiry into the existence of a right of action. The Westfall Act suggests that Congress may have expected that *Bivens* claims against federal actors would be treated in much the same way.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> As previously noted, the Court views distinctions in the definition of immunity for state and federal officials as “untenable.”<sup>119</sup> With the recognition that Congress has confirmed the *Bivens* action in the Westfall Act, distinctions between the right to sue state and federal officials seem equally untenable.

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 § 1983 claims.<sup>120</sup> For starters, we see real advantages in the development of a body of law that applies with presumptively

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116. Critics of the *Bivens* action also recognize the close connection between that form of constitutional tort litigation and suits under § 1983. Justice Scalia has argued that *Bivens* was the product of improper judicial activism and should be limited to its facts. See *supra* note 5 and accompanying text. 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 under § 1983 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 § 1983 right of action 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 § 1983 litigation. See Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)) (authorizing, among other things, attorney’s fees for successful litigation under § 1983); see also S. REP. NO. 94-1011, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5911–12 (explaining that the amendment brings § 1983 litigation in line with modern civil rights statutes by providing attorney’s fees in suits against government officials).

117. See *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (specifying elements of malicious prosecution claims in the context of *Bivens* litigation and describing the *Bivens* action as the “federal analog to suits brought against state officials” under § 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 255–56 (citing division of circuit court authority and relying on *Crawford-El v. Britton*, 523 U.S. 574 (1998), a § 1983 case). Subsequent § 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 § 1983 and *Bivens*, “qualified immunity analysis is identical”).

118. See *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (treating *Bivens* and § 1983 decisions as interchangeable on the subject of an official’s qualified immunity).

119. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

120. See *Hartman*, 547 U.S. at 254 n.2.

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. After all, in a world of cooperative federalism, state and federal law enforcement officials often work together on particular projects.<sup>121</sup> It would make little sense for the law of government accountability to vary depending on whether the state or federal government's officials were named as defendants; both plaintiffs and defendants would have incentives to adjust their behavior and their claims and defenses to take advantage of any disparities.

In addition, although we share the Court's view that disparities in the treatment of qualified immunity are untenable, we regard disparities in the right to sue as equally untenable. The doctrine of qualified immunity seeks to strike a balance between official accountability and immunity.<sup>122</sup> Thus, in cases where damages provide the "only realistic avenue for vindication of constitutional guarantees," both *Bivens* and § 1983 provide some prospect of liability for abuse of office.<sup>123</sup> Qualified immunity strikes a balance between this accountability goal—and the desire to shield innocent officials from the burden of litigation—and its tendency to "dampen the ardor" with which officers perform their duties.<sup>124</sup> The Court's confirmation that the qualified immunity line that balances these competing values should be the same for both state and federal officials suggests that the blend of accountability and immunity should be the same for both. That in turn implies that the right to sue should be equally available for plaintiffs pursuing both kinds of claims; a difference in the definition of the right to sue would alter the balance between accountability and immunity as assuredly as a difference in the standard for immunity.<sup>125</sup>

Finally, a regime of presumptive equality will provide a more consistent framework for evaluating specific constitutional claims and defenses. In particular, the law that frames and limits the viability of § 1983 claims can provide an appropriate basis for evaluating specific *Bivens* actions, just as *Bivens* developments can inform litigation against state actors. Although 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

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121. See, e.g., *Wilson*, 526 U.S. at 607 (recounting cooperation between state and federal law enforcement); *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988) (noting that both federal and state officials bore responsibility for the administration of the Social Security disability program).

122. *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982).

123. *Id.* at 814.

124. *Id.*

125. Cf. *Wilkie v. Robbins*, 551 U.S. 537, 560–64 (2007) (suggesting that protecting federal officers from excessive liability—a concern ordinarily vindicated through qualified immunity law—should also inform the question of whether to recognize a *Bivens* action, thus opening a potential gap in the level of immunity protection afforded officers of state and federal governments).



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.<sup>126</sup>

### III. 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 Article, the Westfall Act provides statutory recognition of a right to pursue constitutional tort claims against federal actors, much the way § 1983 does in suits against state actors. The existence of a 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.

This 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. In particular, our proposed incorporation of the § 1983 framework can help to dampen any dislocating effects of the suggested change. Our suggested elimination of the 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<sup>127</sup> 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 found that "special factors" argued against the recognition of a right to sue.<sup>128</sup> 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

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126. Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (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, 247 (1974) (entitling governor of Ohio 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. See *Bush v. Lucas*, 462 U.S. 367, 386–90 (1983).

127. *Bivens v. Six Unknown Named Agents of Fed. 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.")

128. See *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Bush*, 462 U.S. at 388–89.

threaten new federal liability.<sup>129</sup>

We share this concern, but we note that the § 1983 framework provides useful tools with which to evaluate the impact of some “special factors” on the viability of the *Bivens* 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 whether to devise 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.<sup>130</sup> 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.<sup>131</sup> 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.”<sup>132</sup> As it saw matters, the existence of a comprehensive and elaborate remedial scheme ruled out the recognition of a *Bivens* remedy. There were, as the Court noted, “special factors counseling hesitation.”<sup>133</sup>

Under our approach, a more refined version of this analysis would survive. 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.<sup>134</sup> The Supreme Court’s recent decision in *Fitzgerald*

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129. Put in other terms, it may seem unlikely that Congress, in approving of the *Bivens* action, would have made so dramatic an alteration in existing law without calling attention to the fact. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 944–45 (1992).

130. *Bush*, 462 U.S. at 369–70.

131. *Id.* at 370–71.

132. *Id.* at 378 n.14.

133. *Id.* at 378–79 (citing *Bivens v. Six Unknown Named Agents of Fed. 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.’” (quoting *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.

134. One can see the implied displacement of general remedies at work in a variety of cases, most notably under § 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 § 1983 remedy. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (remedy under the federal Telecommunications Act supersedes remedy under § 1983). Compare *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 21 (1981) (complex administrative statute displaces § 1983 remedies), with *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 429

*v. Barnstable School Committee* provides a useful framework for evaluating the claim that a statutory scheme impliedly displaces constitutional tort claims under § 1983.<sup>135</sup> There, the plaintiffs sought damages under § 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.<sup>136</sup> The school district argued that Title IX provided a remedial scheme for such harassment claims sufficiently detailed to displace § 1983 relief. In rejecting this claim, the Court emphasized that Congress, in 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.<sup>137</sup> Moreover, the Court pointed to differences in the substantive scope of coverage: although 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 § 1983, applied more universally to all state actors.<sup>138</sup> Finally, the Court noted that the remedies under § 1983 were available against individual officers, whereas those contemplated under Title IX reached only the responsible governmental entities.<sup>139</sup> 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 § 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 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,<sup>140</sup> although recent scholarship casts doubt on the effectiveness of the remedy.<sup>141</sup> The agency that

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(1987) (no implied displacement). Similarly, the Court has occasionally, though controversially, 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, 76 (1996) (holding that Indian Gaming Regulatory Act, though invalidated on Eleventh Amendment grounds, displaces the availability of an enforcement action under *Ex parte Young* for injunctive and declaratory relief against the state's governor). For a description of the *Ex parte Young* remedy and a critique of its implied displacement in *Seminole Tribe*, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 40 (1997).

135. See *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009).

136. *Id.* at 792–93.

137. *Id.* at 795–97.

138. *Id.* at 796.

139. *Id.*

140. See *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (describing "the comprehensive nature of the remedies currently available").

141. See John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. (forthcoming Nov. 2009) (manuscript at 41–42, on file with authors) (arguing that the Civil Service Reform Act remedies are insufficient to protect First Amendment rights due to procedural deficiencies and advocating a *Bivens* remedy instead); Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U.

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.<sup>142</sup> In other cases, however, the processes available did not purport to address 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.<sup>143</sup> 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.<sup>144</sup> With no apparent evidence of congressional desire to displace a *Bivens* remedy and no other opportunity under a federal statute to secure an adjudication of his constitutional rights, there was no basis in *Wilkie* for finding implied displacement.

Our approach also calls for some reconceptualization 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 § 1983. Consider *Schweiker v. Chilicky*.<sup>145</sup> There, the plaintiff sought to challenge the denial of social security benefits on procedural due process grounds under the Fifth Amendment.<sup>146</sup> 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

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COLO. L. REV. 1101, 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).

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

143. See *Wilkie v. Robbins*, 551 U.S. 537, 553 (2007) (“In sum, Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.”).

144. The *Wilkie* Court merely discussed the availability of administrative and judicial review of adverse actions concerning Robbins's permits. *Id.* at 552–53. 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 555 (“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.” (citation omitted)).

145. *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

146. *Id.* at 418–19.

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 under the social security system counseled hesitation.<sup>147</sup> *Schweiker* may 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.<sup>148</sup> 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,<sup>149</sup> but Congress also gave an indication that it meant to bar other modes of pursuing benefit claims against the government and its employees.<sup>150</sup>

Apart from the possibility of implied statutory displacement under *Bush* and *Fitzgerald*, we think that *Bivens* actions should take account of *Parratt v. Taylor*.<sup>151</sup> In *Parratt*, the plaintiff brought suit against officers of a state prison under § 1983, seeking damages on the basis of procedural due process for the loss of a hobby kit.<sup>152</sup> Although the Court recognized in *Parratt* that a § 1983 claim was available for any actionable constitutional violation, it sought to avoid the use of that statute as a vehicle by which prisoners could litigate modest property claims in the federal courts. Instead of cutting back on the § 1983 action,<sup>153</sup> the Court found that the existence of an adequate post-deprivation remedy, available through the state tort system, was sufficient process to satisfy the constitutional requirement.<sup>154</sup> The Court viewed state tort remedies as vitiating not the § 1983 right of action but the underlying constitu-

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147. 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.”).

148. 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”).

149. See *id.* at 424–25 (citing the exhaustion rule).

150. 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); 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). See generally *Weinberger v. Salfi*, 422 U.S. 749, 764–66 (1975) (interpreting § 405(h) to foreclose the assertion of jurisdiction over some constitutional claims arising from the denial of social security benefits).

151. See *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

152. *Id.* at 529–30.

153. 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 § 1983.

154. See *Parratt*, 451 U.S. at 538–41.

tional claim.<sup>155</sup> 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.<sup>156</sup> The plaintiff in *Schweiker* sought declaratory, mandamus, and injunctive relief to cure constitutional flaws in the Social Security system; the combined availability of specific relief, coupled with the recovery of benefits due, could well provide the plaintiff with all the process constitutionally due under the Fifth Amendment.<sup>157</sup>

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.<sup>158</sup> Moreover, the Court has distinguished between violations of 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.<sup>159</sup> Violations of substantive constitutional rights, by contrast, are said to be complete when the wrongful action is taken.<sup>160</sup> 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. Although *Parratt* could bar the procedural due process claims, the doctrine would have no obvious effect on retaliation claims based on the First Amendment or other substantive guarantees of the Bill of Rights.<sup>161</sup> On this view, the FTCA could provide a relevant remedial option, but only for procedural due process claims.<sup>162</sup>

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155. *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.”).

156. In *Parratt*, the Court characterized the conduct of the prison guards as random and unauthorized and looked to state post-deprivation remedies. *See id.* at 541. The policies at issue in *Schweiker* were apparently the product of some deliberation on the part of the agency heads. *See Chilicky v. Schweiker*, 796 F.2d 1131, 1133–34 (9th Cir. 1986), *rev’d*, 487 U.S. 412 (1988). 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.

157. 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 Schweiker*, 796 F.2d at 1134. 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. To the extent that the policy in *Schweiker* reflected a deliberate decision by administrative officials rather than the random and unauthorized act of a particular officer, one can argue that *Parratt* is less relevant.

158. *See Daniels v. Williams*, 474 U.S. 327, 335–36 (1986).

159. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 536 (1984).

160. *See Zinermon v. Burch*, 494 U.S. 113, 135–39 (1990) (distinguishing *Parratt* and *Hudson*).

161. *See generally FALLON ET AL., supra note 2*, at 1106–10.

162. 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. FALLON ET AL., supra note 2*, at 820–22 (questioning the doctrinal consistency of the Court’s approach).

Our suggested incorporation of the *Parratt v. Taylor* doctrine into the *Bivens* context provides an alternative explanation for the Court's decision in *Correctional Services Corp. v. Malesko*.<sup>163</sup> 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 Corporation (CSC).<sup>164</sup> In evaluating the existence of a *Bivens* action, the Court assumed that CSC, a private firm, was acting under color of federal law and was thus subject to constitutional oversight.<sup>165</sup> But the Court nonetheless rejected the claim, emphasizing two considerations: its previous decision to decline to allow a *Bivens* claim against a federal agency<sup>166</sup> and its perception that the plaintiff had alternative remedies available as a matter of state common law.<sup>167</sup> In addition to these bases for its holding, the Court described the origins and later evolution of the *Bivens* remedy in terms that a leading casebook characterized as "exceptionally grudging."<sup>168</sup> 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.<sup>169</sup>

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163. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

164. *Id.* at 64–65.

165. *See id.* at 70–71; *see also* *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (prison guards at private prison operating under state contract subject to liability under § 1983).

166. *See Malesko*, 534 U.S. at 70–73 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)).

167. *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 that it did not attempt to substantiate. Examination of state law tort suits against private prisons reveals 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. Corr. Servs. Corp.*, 428 F. Supp. 2d 580, 583–85 (E.D. Tex. 2006) (allowing both § 1983 and state law claims against private prison because even though prison was acting under color of state law, neither the Texas statutes nor the Texas Constitution extended private prisons sovereign immunity). Defendants in such cases routinely invoke federal immunities but have not succeeded to this point. *See, e.g., id.* at 583 (rejecting state sovereign immunity defense); *Adorno v. Corr. Servs. Corp.*, 312 F. Supp. 2d 505, 521–22 (S.D.N.Y. 2004) (rejecting government contractor's defense).

To the extent that federal law begins to present immunity hurdles to successful state court litigation, we believe the Court's approach in *Malesko* requires that it monitor the adequacy of state common law remedies. So far, we see no cause for 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 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 Techs. Corp.*, 487 U.S. 500 (1988)); *cf. Adorno*, 312 F. Supp. 2d 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 Cos.*, 551 U.S. 142, 145 (2007) (holding that the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail does not make that company an officer of the United States for removal purposes).

168. FALLON ET AL., *supra* note 2, at 820.

169. As in *Wilkie v. Robbins*, 551 U.S. 537 (2007), 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). 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

Despite our disagreement with the *Malesko* dicta, we believe the dismissal of the action may make sense under *Parratt* and its progeny. 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.<sup>170</sup> Although the federal district court characterized Malesko's claims as arising under the Cruel and Unusual Punishments Clause of the Eighth Amendment,<sup>171</sup> it is not immediately obvious that negligent conduct alone can give rise to such a claim.<sup>172</sup> In the context of § 1983 litigation, moreover, the Court had previously ruled that the merely negligent 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.<sup>173</sup> 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* line of cases offers scant support for the Court's grudging approach in *Wilkie v. Robbins*, where the plaintiff sought relief for claims of intentional and malicious retaliation under the Takings Clause of the Fifth Amendment.<sup>174</sup> 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.<sup>175</sup> Nor could the plaintiff seek vindication of his constitutional claim before the Court of Federal Claims. Although post-deprivation relief through the Tucker Act may substitute for the right of plaintiffs to obtain injunctive relief against certain federal projects,<sup>176</sup> the Tucker Act provides no remedy for

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*Bivens* doctrine to allow constitutional tort claims against suable federal agencies. *See id.* at 483–86. 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 *Meyer* result.

170. *Malesko*, 534 U.S. at 64–65 (citing amended complaint).

171. *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 141, at 42 (reporting that Malesko asserted a deliberate indifference claim under the Eighth Amendment in the District Court).

172. *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 the Eighth Amendment)).

173. *See Daniels v. Williams*, 474 U.S. 327, 335–36 (1986).

174. *Wilkie*, 551 U.S. at 547–48.

175. *See supra* Part II.

176. *See Preseault v. ICC*, 494 U.S. 1, 4 (1990) (holding that an owner may not challenge a federal statute that threatens a taking of land where the owner may bring a takings claim for compensation before the Court of Federal Claims under the Tucker Act); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (denying injunctive relief against federal government where owner of wrongly withheld property could assert a breach of contract claim for money damages under the Tucker Act).



constitutional tort claims.<sup>177</sup> Thus, one has difficulty identifying a body of remedial law that could operate to foreclose Robbins's claim; remedial displacement under *Fitzgerald v. Barnstable School Committee* 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,<sup>178</sup> the Court's reliance on such remedies would not be warranted within the framework of *Parratt* and *Fitzgerald*.

Our view might well produce different results in cases that challenge the government's actions after September 11.<sup>179</sup> In *Wilson v. Libby*, the court relied on the existence of the Privacy Act as a remedial scheme that created special factors counseling against the recognition of a *Bivens* action.<sup>180</sup> But as the court acknowledged, the Privacy Act did not provide any remedy against the individual officials who were said to have violated the plaintiff's constitutional rights.<sup>181</sup> Nor was there any evidence that Congress had enacted the Privacy Act in 1974 for the purpose of creating an alternative to relief available under *Bivens*.<sup>182</sup> Under *Fitzgerald*, these factors would make an implied displacement argument difficult to sustain.

Our suggested recognition of a routine *Bivens* action will also help to ensure the enforcement of any constitutional protections that apply to those detained by federal authorities outside the territorial boundaries of the United States. Until now, the federal courts have taken a narrow view of the territorial reach of most federal rights of action, seeing them as applying to conduct that occurs within the United States.<sup>183</sup> The Supreme Court has abetted this interpretation to some extent, ruling that the FTCA does not reach any torts the federal government

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177. 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 officials. Thus, the *Bivens* actions asserted by appellants lie outside the jurisdiction of the Court of Federal Claims." (citation omitted)).

178. The extent of the Court's reliance on alternatives in *Wilkie* remains unclear. Although the Court cited the availability of remedial options in the first stage of its analysis, it concluded that those options were not decisive and conducted a stage-two analysis of factors counseling hesitation. See *Wilkie*, 551 U.S. at 554 ("This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it 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))).

179. See *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

180. *Wilson*, 535 F.3d at 704–08.

181. See *id.* at 707–08.

182. See *id.* at 708–10.

183. See, e.g., *Rasul*, 512 F.3d at 671–72 (holding that a federal statute protecting religious freedom does not apply to those detained at Guantánamo Bay).

commits overseas.<sup>184</sup> This narrowing of the FTCA means that the federal government does not face liability for any of the law enforcement torts (assault, battery, false imprisonment) that victims might invoke in seeking a remedy for abuse at such prisons as Abu Ghraib and Guantánamo Bay. Yet the Court has also made clear, most recently in *Boumediene v. Bush*, that the Constitution continues to constrain the action of the federal government abroad.<sup>185</sup> In the absence of any relevant body of potentially applicable alternative remedies, the *Bivens* action should be available to those detained at Guantánamo Bay with constitutional claims to assert.

#### 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 § 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,<sup>186</sup> the definition of the elements of a claim of constitutional violation,<sup>187</sup> and the refinement of the law of qualified immunity apply with equal force in both settings.<sup>188</sup> 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.<sup>189</sup>

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 § 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

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184. See *Smith v. United States*, 507 U.S. 197, 203–04 (1993) (noting that “Congress legislates against the backdrop of the presumption against extraterritoriality” (citation omitted)).

185. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (holding that aliens at Guantánamo Bay have the constitutional privilege of habeas corpus).

186. See *Gomez v. Toledo*, 446 U.S. 635, 639–40 (1980) (holding that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, the plaintiff is not required to allege bad faith in order to state a claim for relief).

187. See *Hartman v. Moore*, 547 U.S. 250, 252 (2006) (holding that in a *Bivens* action against criminal investigators for inducing prosecution in retaliation for speech, the complaint must allege the absence of probable cause in order to constitute an actionable violation of the First Amendment).

188. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that the government officials performing discretionary functions generally are shielded from liability for civil damages).

189. See *Pearson v. Callahan*, 129 S. Ct. 808, 813 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)); see also *Rasul v. Myers*, 563 F.3d 527, 527–32 (D.C. Cir. 2009) (relying on *Pearson* in rejecting alien detainees' *Bivens* claims on qualified immunity grounds).

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 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 by enlisting Congress as a partner in the protection of constitutional remedies 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 § 1983's analysis to evaluate when another federal administrative scheme impliedly displaces the *Bivens* remedy. The resulting framework would give effect to the presumption favoring judicial review of constitutional claims, 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.