CONSTITUTIONAL LAW—EQUAL PROTECTION—IMPLIED CAUSE OF ACTION AND DAMAGES FOR SEX DISCRIMINATION ALLOWED UNDER DUE PROCESS CLAUSE OF FIFTH AMENDMENT—*Davis v. Passman*, 442 U.S. 228 (1979).

In June 1974, Shirley Davis was fired from her job as deputy administrative assistant to Representative Otto E. Passman.[1] In his letter of dismissal the Louisiana Congressman informed Davis of his conclusion "that it was essential that the understudy to [his] Administrative Assistant be a man."[2] No other reason for terminating Davis' employment was stated.

Lacking a remedy under statutory or common law, Davis brought suit in federal district court alleging an infringement of her

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[1] Brief for Petitioner at 4, Davis v. Passman, 442 U.S. 228, 230 (1979). Passman, then a United States Congressman from the Fifth Congressional District of Louisiana, employed Davis on February 1, 1974, for an annual salary of $18,000. She performed general secretarial work and was responsible for the supervision of the office clerical staff. As understudy to defendant's administrative assistant she expected promotion to that position upon the incumbent's imminent retirement. Davis v. Passman, 442 U.S. 228, 230 n.2 (1979).

Davis was not hired through the competitive service and her firing by Passman was predicated upon 2 U.S.C. § 92 allowing dismissal of congressional staff members with or without cause. Davis v. Passman, 544 F.2d 865, 868–69 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[2] The full text of Passman's "rather remarkable letter" is quoted in all three opinions and stated:

> Dear Mrs. Davis:
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> My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all the pleasure out of your work. I must be completely fair with you, so please note the following:
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> You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.
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> It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.
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> I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and

constitutional rights.[3] Her complaint asserted that Passman's conduct constituted sex discrimination in violation of the due process clause of the fifth amendment.[4] Invoking the court's federal question jurisdiction,[5] she sought money damages, including back pay,[6] as well as specific and declaratory relief.[7]

Defendant Passman moved to dismiss for failure to state a claim upon which relief can be granted.[8] He not only disputed that his discharge of Davis conflicted with the fifth amendment, but also contended that the law did not afford her a private right of action. Additionally he relied upon the doctrines of sovereign and official immunity to shield him, as a Congressman, from liability.[9] The district court rejected the immunity defense, but nonetheless granted defendant's motion to dismiss, finding neither unconstitutional conduct nor a private right of action.[10]

The court of appeals reversed and remanded, with a divided panel holding that the allegations of employment discrimination were sufficient to entitle Davis to her day in court.[11] Moreover, the panel

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your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,
/s/ Otto E. Passman
OTTO E. PASSMAN
Member of Congress

Davis v. Passman, 544 F.2d 865, 867 & n.1 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793, 806 n.1 (5th Cir. 1978) (Goldberg, J., dissenting), *rev'd and remanded*, 442 U.S. 228, 230–31 n.3 (1979).

[3] Brief for Petitioner, *supra* note 1, at 4. Employment discrimination claims find no analogue at common law and statutory remedies are confined to those arising under Title VII of the Civil Rights Act of 1964. Initially, all federal government employees were excluded from the remedial scheme established by that statute, but in 1972 Congress extended Title VII protection to members of the competitive civil service. Congressional staff members are, however, not covered by the provisions of the amended statute. *See* 42 U.S.C. § 2000e-16(a) (1974).

[4] Davis v. Passman, 544 F.2d 865, 868 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[5] Federal question jurisdiction as originally provided for in the Judiciary Act of 1789 is now codified at 28 U.S.C. § 1331(a). This statute provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution . . . of the United States." 28 U.S.C. § 1331(a) (1979).

[6] Davis v. Passman, 544 F.2d 865, 868, 877 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[7] *Id.* at 868.

[8] Davis v. Passman, 442 U.S. 228, 232 (1979). The motion was made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[9] Davis v. Passman, 544 F.2d 865, 868 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[10] *Id.*

[11] *Id.* at 870, 882. The case was remanded for trial since the panel found that dismissal from employment on the basis of gender would dishonor the constitutional guarantee of freedom from

decided that relief in the form of damages would be available, because this remedy could be implied directly from the Constitution,[12] as the Supreme Court had first held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[13] Sovereign immunity was held inapplicable to a suit against Passman individually[14] and congressional immunity inaccessible for activities other than "legislative tasks."[15] The panel declared that, at best, Passman might assert some qualified immunity generally available to government officials acting in "good faith."[16]

Claiming that the political question doctrine and the speech or debate clause foreclosed judicial review of congressional hiring and firing, defendant filed a petition for rehearing en banc.[17] The petition was granted and the fourteen judges of the United States Court of Appeals for the Fifth Circuit heard plaintiff's claim for monetary relief.[18] The en banc majority acknowledged the "seminal" nature of the Supreme Court decision in *Bivens* but ruled that, despite *Bivens*, rights arising under the due process clause of the fifth amendment may not be vindicated by an award of compensatory damages in the absence of congressional authorization.[19] The court reached this result via a two-step analysis which had as its core the thesis that the *Bivens* remedy had been implied "as a matter of federal common

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invidious discrimination. *Id.* Although the Supreme Court had not yet formulated the intermediate level scrutiny for gender-based discrimination cases which was subsequently developed in Craig v. Boren, 429 U.S. 190 (1976), the court of appeals in its panel decision correctly predicted that "sex based classification must withstand at least middle-level equal protection scrutiny." 544 F.2d 865, 871 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979). The court, however, found no need to specify the applicable standard because defendant had not asserted any governmental interest as justification for the firing. *Id.*

[12] *Id.* at 876. The issues of injunctive and declaratory relief were deemed to have lost their significance, since the panel decision was announced on the same day Passman's tenure in Congress ended, as a result of his defeat in the 1976 primary election. These changed circumstances, however, had no bearing on the question of immunity. *Id.* at 872, 882.

[13] 403 U.S. 388 (1971).

[14] *Id.* at 877.

[15] *Id.* at 877–81. "Rather than blanket immunity from burdensome litigation, the clause provides protection only against inquiries into legislative policy-formulation processes." *Id.* at 879.

[16] *Id.* at 881–82. The panel reached these conclusions despite objections based on the doctrine of separation of powers. *Id.* at 882 (Jones, J., dissenting).

[17] Davis v. Passman, 571 F.2d 793, 807 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), *rev'd and remanded*, 442 U.S. 228 (1979).

[18] Davis v. Passman, 571 F.2d 793, 795 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979).

[19] Davis v. Passman, 571 F.2d 793, 800–01 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979).

law."[20] By reversing the panel decision, the en banc court of appeals affirmed the district court's dismissal of Davis' action.[21] The ground for this ruling was dubbed "jurisdictional" by Judge Clark in his opinion for the majority.[22]

The United States Supreme Court granted certiorari, and in *Davis v. Passman*[23] reversed the en banc decision of the court of appeals.[24] Holding that a "cause of action" and a damages remedy can be implied directly under the Constitution when the due process clause of the fifth amendment has been violated, the Court remanded the case for further proceedings.[25]

The Constitution confers certain substantive legal rights without making it clear what remedies are available in the event these rights are denied.[26] The general principle that every right should find vindication in an effective remedy[27] raises the difficult question whether

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[20] *Id.* at 797. *Bivens* was interpreted as creating a "cause of action . . . not wholly of constitutional dimensions," thus, implying a remedy under federal common law. *Id.* at 796–97. Asserting that all such law exists at the sufferance of Congress, the court relied in the first step of its analysis, on criteria for determining when "causes of action" should be implied from statutory rights. *See* note 132 *infra*. It found only factors militating against "creating a remedial right under [its] federal common law powers." Therefore, the court examined in the second step, the possibility that the Constitution nevertheless compelled the existence of a damage action, beyond the reach of Congress, for the protection of fifth amendment rights. Davis v. Passman, 571 F.2d 793, 800 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979). Considerations of federalism and "an already precariously overloaded federal judicial system" were held to counsel restraint so that "no civil action for damages" could be implied. *Id.* at 800–01. However, the en banc majority's reasoning created an artificial distinction between federal common law and constitutional common law, when the terms are essentially synonymous. *See* Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–26 (1974).

[21] Davis v. Passman, 571 F.2d 793, 795 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979).

[22] *Id.* at 801. The judgment of the district court was affirmed in part, and vacated in part. *Id. See* note 45 *infra* and accompanying text.

[23] Davis v. Passman, 439 U.S. 925 (1978).

[24] 442 U.S. 228 (1979).

[25] *Id.* at 248–49.

[26] *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798–800, 913–17 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

[27] The time-honored principle *ubi jus ibi remedium* found early expression by Chief Justice Marshall whose celebrated language has become a cynosure:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
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> . . .
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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

federal courts have the power and the duty to create suitable remedies for the violation of constitutional rights. The explicit extension of the power of article III courts "to all Cases . . . arising under this Constitution"[28] suggests an affirmative answer even prior to Congress granting these courts general jurisdiction in such cases.[29] However, disagreement continues as to whether a jurisdictional grant implies the power to make substantive rules of decision or merely confers the power to choose the applicable law.[30] When called upon to fashion a remedy for the violation of a constitutional guarantee, the Court has not been reluctant to create such a remedy so long as the constitutional infringement was raised as a defense.[31] But implying a federal remedy such as money damages directly from a constitutional provision is a relatively recent development.[32] Its history is largely intertwined with the quest for the most effective protection of fourth amendment rights.[33]

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The opinion in *Marbury*, though criticized by Jefferson as "merely an obiter dissertation of the Chief Justice," still serves as a reminder that only where extraordinary circumstances exist will the violation of a vested legal right be permitted to remain remediless. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 15 (9th ed. 1975) (citation omitted).

[28] Article III, section 2, clause 1 of the United States Constitution reads in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution." U.S. CONST. art. III, § 2, cl. 1.

[29] *See* note 5 *supra*. Prior to 1948 federal question jurisdiction was codified at 28 U.S.C. § 41(1).

[30] HART & WECHSLER, *supra* note 26, at 786.

[31] Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972). The use of the Constitution as a shield is exemplified by the exclusion of constitutionally tainted evidence in criminal trials. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). It is also exemplified by the refusal to impose civil liability for the exercise of constitutionally protected rights. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[32] A private right of action against the government under the fifth amendment for compensatory damages had been allowed in Jacobs v. United States, 290 U.S. 13 (1933). However, *Jacobs* can be distinguished from the present case on the basis of the particular constitutional clause involved. In *Jacobs*, the suit arose from the taking of private property for public use for which the very language of the Constitution provides a remedy. *Id.* at 16. Payment of money damages may well be considered within the meaning of "just compensation." *Id.*

[33] *Bivens*, 403 U.S. at 392. The right of privacy guaranteed by the fourth amendment's prohibition of unreasonable searches and seizures has long enjoyed judicial protection through the imposition of injunctive relief, the exclusionary rule and the availability of common law tort damages. The courts were mostly satisfied that these forms of protection effectuated the fourth amendment. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 723–24 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971). Additionally, a suit for damages against state officers violating this right under color of state law could be brought under the Civil Rights Act of 1871. 42 U.S.C. § 1983 (1974). But a person upon whom federal authority had been exercised in an abusive manner had no equivalent remedy. *See generally* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

In *Bell v. Hood*,[34] when the issue was first squarely presented, the Court offered a seemingly straightforward answer. Bell and others, all members of the "United Mankind" organization, alleged that early one morning in December 1942, agents of the Federal Bureau of Investigation had come to their houses, conducted searches, seized papers and arrested them without warrants.[35] The targets of this concerted raid, believing themselves deprived of liberty and property without due process of law and subject to unreasonable searches and seizures, brought suit in federal district court to recover damages from the agents.[36] Federal question jurisdiction was invoked for claims arising directly under the fourth and fifth amendments.[37] After hearing defendants' motion to dismiss for failure to state a claim for which relief can be granted, the court moved *sua sponte* to dismiss for want of federal jurisdiction.[38] Granting his own motion, the district court judge dismissed the action as one not "aris[ing] under the Constitution" as required by the predecessor statute to 28 U.S.C. § 1331(a).[39] The court of appeals agreed and denied leave to clarify the complaint.[40] The Supreme Court found the jurisdictional issue important enough to grant certiorari.[41]

Refuting defendants' argument that the complaint actually made out a cause of action for the common law tort of trespass actionable only under state law, the Court held that federal courts must entertain claims squarely based on federal law.[42] Justice Black declared that unless a federal claim is clearly "immaterial and made solely for the purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous,"[43] the district court should respect the plaintiff's choice of law particularly where reliance on that choice is unequivocally stated.[44] The majority reasoned that only after assuming jurisdiction

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[34] 327 U.S. 678 (1946).

[35] *Id.* at 679–80 n.1.

[36] *Id.* The indictment of the defendants in *Bell* did not result in a trial. 150 F.2d at 98.

[37] 327 U.S. at 679. Damages in excess of $3,000 were claimed, thus meeting the jurisdictional amount as required by 28 U.S.C. § 41(1) [now $10,000 under 28 U.S.C. § 1331(a)]. Subsequent cases rarely discuss the jurisdictional minimum, presumably because the standard by which allegations of damages are measured is relatively easy to meet. It only requires a showing that it is far from a "legal certainty" that plaintiff will not be entitled to more than $10,000 damages. *See* Mount. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977).

[38] 327 U.S. at 680.

[39] *Id.*

[40] *Id.*

[41] Bell v. Hood, 326 U.S. 706 (1945).

[42] 327 U.S. at 680–81.

[43] *Id.* at 682–83.

[44] *Id.* at 681–82.

could a court decide whether the allegations stated a claim upon which relief could be granted and determined whether the facts supported the claim. According to the *Bell* decision, an inquiry into whether a court has subject matter jurisdiction is entirely separate from a question concerning the sufficiency of the pleadings, even though the result of a negative answer would be the same, namely dismissal. The former is determined by statute or the Constitution, while the latter raises issues of substantive law and reaches the merits of the complaint.[45] The Court held that the question whether federal courts can grant financial compensation for damages suffered by private persons as a result of federal officers violating their fourth and fifth amendment rights raised such serious issues of law and fact as to compel the exercise of federal jurisdiction.[46] Apparently encouraging the lower courts to take a fresh look, at their remedial powers, Justice Black went on to say that under the given circumstances "federal courts may use any available remedy to make good the wrong done."[47] On remand, however, the district court refused to grant the

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[45] *Id.* at 682. *See* FED. R. CIV. PRO. 12(b), 41(b). Rule 12(b) clearly distinguishes between lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. The distinction between these two defenses is stressed by their different treatment under Rule 12(b)(2) and (3) calling for obligatory dismissal if "the court lacks jurisdiction of the subject matter." That such a dismissal does not "operate as an adjudication upon the merits" is mandated by Rule 41(b). Therefore, it may seem somewhat surprising that the *Bell* Court enlarged upon a subject so clearly enunciated in the Federal Rules of Civil Procedure without ever mentioning them. But it must be remembered that the rules were young and the holding in *Bell* reversed the decision of two lower courts steeped in the traditions of code pleading. That the need for such teachings has not yet vanished is demonstrated by the en banc opinion in *Davis*. After finding the requested relief unavailable, the Court of Appeals for the Fifth Circuit dismissed Davis' suit on "this jurisdictional ground." Davis v. Passman, 571 F.2d 793, 801 (5th Cir. 1978) (en banc), *rev'd and remanded*, 422 U.S. 228 (1979). *See* text accompanying note 22 *supra*.

[46] 327 U.S. at 683–84. The Court relied on three types of cases in which it had upheld the jurisdiction of district courts over actions involving violation of constitutional rights. *Id.* & nn.3–5. One such type were the voting rights cases, also relied upon by the *Bivens* majority. For a discussion of the precedential value of these cases, see Dellinger, *supra* note 31, at 1544–45 n.70 and accompanying text.

[47] 327 U.S. at 684. The language which later guided the Supreme Court's decisions on this issue is:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Id. (footnotes omitted). In support of this statement, the opinion cited to the famous language in *Marbury v. Madison*. *See* note 27 *supra*.

requested monetary relief holding that an award of this legal remedy exceeded its power.[48]

Not until *Bivens*, decided twenty-five years later, was the question raised by *Bell* finally answered. In the opinion for the Court, Justice Brennan's reasoning relied mainly on Justice Black's dictum in the earlier case.[49] The facts in *Bivens*[50] were remarkably reminiscent of those in *Bell*. Like Bell, Bivens sought money damages claiming a violation of his fourth amendment rights by federal agents acting under color of their authority. Moreover, as in *Bell* the search and arrest of Bivens did not result in a trial, thereby precluding the remedial application of the exclusionary rule.[51] As they had done in *Bell*, the federal courts also refused to grant Bivens the requested relief, reminding him of the remedies available under state law.[52] The Supreme Court reversed.

The Court found Bivens entitled to monetary compensation for his injuries, because his complaint stated a cause of action under the fourth amendment.[53] The majority rejected the contention that the conduct of federal agents was only limited by the law of the state in whose jurisdiction that conduct occurred.[54] The Constitution was held to offer greater protection against the exercise of federal power than that tendered by state law against the acts of private persons.[55]

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[48] Bell v. Hood, 71 F. Supp. 813, 820–21 (S.D. Cal. 1947). While asserting its broad constitutional equity jurisdiction, the court declined to afford a remedy in an action at law absent diversity jurisdiction. *Id.* at 817.

[49] 403 U.S. at 392, 396.

[50] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969), *rev'd and remanded*, 403 U.S. 388, 389 (1971). Bivens complained that early one morning six federal narcotics agents searched his apartment, handcuffed him in front of his family, arrested him and threatened to arrest his family. 403 U.S. at 389. Bivens was ultimately transferred to the Federal Bureau of Narcotics where he was fingerprinted, photographed, strip-searched, interrogated and booked. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969), *rev'd and remanded*, 403 U.S. 388 (1971). This warrantless search and arrest might well have been the result of mistaken identity, because the complaint filed against him was later dropped. *Id. See also* Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531, 536 n.30 (1977).

[51] In a later case, Chief Justice Burger noted that "a grave defect of the exclusionary rule is that it offers no relief whatever to victims of overzealous police work who never appear in court." Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring).

[52] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 725–26 (2d Cir. 1969), *rev'd and remanded*, 403 U.S. 388 (1971).

[53] 403 U.S. at 390–95, 397.

[54] *Id.* at 392–94. Since state law may neither authorize federal agents to exceed constitutional boundaries nor limit their exercise of federal power, the fourth amendment provides the necessary substantive basis for the claim presented. *Id.* at 395.

[55] *Id.* at 392. The result in *Bivens* not only rejected the host of lower court decisions which had relied upon the district court's final disposition in *Bell*, *see* note 49 *supra* and accompanying

The Court held that the guarantees of the fourth amendment conferred an absolute right to be free from unreasonable searches and seizures at the hands of federal agents.[56] Viewing damages "as the ordinary remedy for an invasion of personal interests in liberty," the Court relied on four voting rights cases to term its decision in *Bivens* "hardly . . . surprising."[57] Neither the source of the right nor the nature of the remedy caused the Court to refrain from exercising its remedial power, even though explicit congressional authorization was lacking.[58] However, Justice Brennan cautioned that in the absence of affirmative legislative action the Court should consider the presence of "special factors counselling hesitation" before a cause of action for damages is implied.[59] Upon remand, the court of appeals awarded Bivens the right to a trial.[60]

In the years between 1971 and 1978 *Bivens* has been frequently cited by the Supreme Court, particularly in cases involving claims under section 1983 of the Civil Rights Act.[61] In two such cases,

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text, but also served to blunt the impact of Wheeldin v. Wheeler, 373 U.S. 647 (1963). For a discussion of *Wheeldin v. Wheeler*, see Lehmann, *supra* note 50, at 534–35.

[56] 403 U.S. at 392.

[57] *Id.* at 395–96. That new ground had been broken despite the Court's language was indicated, *inter alia*, by the stern dissent of Justice Black who had been the author of the Court's forward-pointing opinion in *Bell*. *Id.* at 427 (Black, J., dissenting). He primarily objected to the Court usurping the legislative function by creating a new cause of action. *Id.* at 428 (Black, J., dissenting). According to Justice Black, that deviated even further from the true judicial function than the mere creation of a new remedy. *Id.*

[58] *Id.* at 403 (Harlan, J., concurring). In support of this conclusion Justice Harlan argued that

> if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U.S.C. § 1331(a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.

Id. at 405 (Harlan, J., concurring) (footnote omitted).

[59] *Id.* at 396. Federal fiscal policy was named as one such factor. *Id.* This consideration is also of some importance in the context of Chief Justice Burger's proposal for legislative replacement of the exclusionary rule with compensatory damage actions against governmental units. *Id.* at 411–27 (Burger, C.J., dissenting).

[60] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). Although ruling out sovereign immunity for the narcotics agents, the court noted that they would be allowed to raise a defense of "good faith and reasonable belief." *Id.* at 1348.

This pronouncement was "said to have raised serious obstacles to successful litigation of a cause of action in federal court." Lehmann, *supra* note 51, at 542.

[61] 42 U.S.C. § 1983 (1970). The statute gives a cause of action to citizens of the United States who were deprived of their legal or constitutional rights by a person acting under color of state law. 42 U.S.C. § 1983 (1970). The absence of its federal equivalent has often been argued to require the denial of a *Bivens* remedy. *See, e.g.*, *Bivens*, 403 U.S. at 427–28 (Black, J., dissenting). Another type of case, discussing the suppression doctrine, cites to the Chief Justice's dissent in *Bivens* wherein he recommends the abolition of the exclusionary rule. *See, e.g.*, Stone v. Powell, 428 U.S. 464, 489–95 (1976).

District of Columbia v. Carter[62] and *City of Kenosha v. Bruno*,[63] section 1983 claims were rejected because the statutory provision was found inapplicable to the specific situations and both times *Bivens*-based actions were suggested as alternatives.[64] In the interim, the lower federal courts extended the *Bivens* standard in many directions, since few limitations had been imposed in that landmark case.[65]

When the high court finally addressed another *Bivens*-type claim directly in *Butz v. Economou*,[66] it did so to review the immunity question specifically reserved in the earlier decision.[67] Plaintiff Economou, a commodity futures commission merchant, alleged violation of several of his constitutional rights in the wake of an unsuccessful Department of Agriculture proceeding to revoke his company's registration.[68] Omitting any discussion of claims founded upon constitutional rights outside the fourth amendment, the Court allowed the implication of a cause of action by simply reaffirming its holding in *Bivens*.[69] After addressing solely "the personal immunity of federal officials" in *Economou*,[70] the Court did not clarify Justice Harlan's doubt whether the *Bivens*-remedy "was a permissible form of redress in a claim arising under . . . 'other types of constitutionally protected interests,' "[71] including those based upon the fifth amendment.

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[62] 409 U.S. 418 (1973).

[63] 412 U.S. 507 (1973).

[64] In *Carter*, an action against a police officer employed by the District of Columbia could not be maintained under section 1983, because the District is neither a state nor a territory. 409 U.S. at 432. In *Bruno*, an action against two cities similarly failed since it was held that municipalities are not persons for the purpose of the statute. 412 U.S. at 513. *But see* note 164 *infra*. It should be noted that the reference to *Bivens* is not found in the majority opinion. 412 U.S. at 516 (Brennan & Marshall, J.J., concurring).

[65] An excellent discussion of the first five years after *Bivens* is found in the article by Lehmann, *supra* note 51. Both court of appeals opinions in the *Davis* case contain discussions of "*Bivens*' Progeny." Davis v. Passman, 544 F.2d 865, 872–74 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793, 807–09 (5th Cir. 1978) (Goldberg, J., dissenting), *rev'd and remanded*, 442 U.S. 228 (1979). The American Civil Liberties Union submitted a brief amicus curiae to the Supreme Court. Their argument in favor of implying a damages remedy was supplemented by a comprehensive list of cases categorized by constitutional amendment. Brief of the American Civil Liberties Union Amicus Curiae at 37–42 app., Davis v. Passman, 442 U.S. 228 (1979) [hereinafter ACLU Amicus Brief].

[66] 438 U.S. 478 (1978).

[67] *Id.* at 486. *See* 403 U.S. at 397–98.

[68] 438 U.S. at 481–83.

[69] *Id.* at 486 & n.8. The defendants in *Economou*, as in *Bivens*, were members of the executive branch of government. *Id.* at 480. The doctrines of sovereign, official, and legislative immunity are discussed below. *See* notes 92–107 *infra* and accompanying text.

[70] 438 U.S. at 480.

[71] *See* Lehmann, note 50 *supra* at 566 (quoting 403 U.S. at 409 n.9 (Harlan, J., concurring)).

Unlike the fourteenth amendment, the fifth amendment does not contain an equal protection clause, but "due process of law" has been held to provide a similar, though less explicit, safeguard against unfairness and disparity of treatment.[72] Although the two phrases cannot always be used interchangeably[73] and "the two protections are not always coextensive,"[74] both amendments require the same type of analysis.[75] The Congressional Record contains expressions of concern for equality under the law predating the adoption of the fourteenth amendment.[76] Accordingly, it may be presumed that the due process clause of the fifth amendment has, from its inception, precluded the federal government from denying equal treatment under the law.

Traditionally, equal protection analysis begins with an examination of the particular classification, followed by a determination of the level of scrutiny required.[77] The proposition that sex is a suspect classification has never been accepted by a majority of the Court, even though strict scrutiny was once applied to invalidate a federal statute.[78] Since then the Court has developed a means-focused technique for such quasi-suspect classifications as those based on gender, alienage and illegitimacy.[79] As first articulated in *Craig v. Boren*,[80] this new "intermediate scrutiny" test was succinctly expressed

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[72] Bolling v. Sharpe, 347 U.S. 497, 499 (1954); U.S. CONST. amend. V. In this companion case to Brown v. Board of Educ., 347 U.S. 483 (1954), the children residing in the District of Columbia were afforded the same rights as their counterparts in the several states. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[73] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[74] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

[75] Buckley v. Valeo, 424 U.S. 1, 93 (1976).

[76] Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979).

[77] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991–94 (1978).

[78] In Frontiero v. Richardson, 411 U.S. 677 (1973), a female member of the uniformed services challenged a federal statute which provided for increased benefits automatically to wives of male service personnel while her husband qualified for such benefits only upon proof that he was not the principal breadwinner in the family. *Id.* at 688–89. While the statute was struck down on equal protection grounds in an 8:1 decision, only four justices subscribed to the reasoning that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688.

[79] Gunther, *The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 22 (1972). *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979) (alienage); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy).

[80] 429 U.S. 190 (1976). In *Craig* an Oklahoma statute providing for different drinking ages based on gender was invalidated as being not sufficiently related to achieving the important governmental interest in traffic safety. *Id.* at 192.

in *Califano v. Webster*[81] as requiring that "[t]o withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' "[82] Consequently, the mere assertion of a rational basis or administrative convenience no longer satisfies "genuine judicial inquiry."[83]

Freedom from employment discrimination on the basis of sex is a right specifically protected by Title VII of the Civil Rights Act of 1964.[84] However, federal employees were initially excluded from this protection, possibly because Congress felt uncertain about whether effective judicial relief was available against the federal government.[85] The Equal Employment Opportunity Act of 1972 corrected the omission by extending Title VII coverage to members of

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[81] 430 U.S. 313 (1977). *See* note 80 *supra*. This often quoted standard notwithstanding, it should be remembered that the Court actually upheld the federal statute (section 215 of the Social Security Act prior to its 1972 Amendment) challenged in this case. The Secretary of HEW defended the statute for its benign purpose of reducing the economic disparity caused by a long history of employment discrimination against women. The Court examined both the legislative history for the actual purpose underlying the enactment and the actual effect of the statute. No different purpose was revealed either directly or indirectly. If the actual effect had been found to be a punitive one and thus different from the purported benign objective, it would have served as indication that the original goals were probably not those alleged now. 430 U.S. at 317. The benign justification had been accepted in earlier cases, but with little scrutiny beyond a minimum rationality test. *See* Schlesinger v. Ballard, 419 U.S 498 (1975) (differential promotion scheme in Navy upheld); Kahn v. Shevin, 416 U.S. 351 (1974) (Florida statute giving tax break to widows, but not widowers upheld).

[82] 430 U.S. at 316–17 (quoting *Craig*, 429 U.S. at 197).

[83] Defeis, *The Fourteenth Amendment: A Century of Law and History*, 103 N.J.L.J. 85, 115 (1979). The continued vitality of intermediate-level scrutiny of gender-based classifications was demonstrated by the recent decision in Orr v. Orr, 440 U.S. 268 (1979). An Alabama statute under which husbands, but not wives, could be required to pay alimony was held unconstitutional. The state's preference for a particular allocation of family responsibilities was held insufficient as a basis for the classification. *Id.* at 279–80. An allegation of a benign purpose, using gender as proxy for financial need, was rejected as a generalization only serving administrative convenience. *Id.* at 280–82.

[84] Codified at 42 U.S.C. § 2000e-1 to -17, the statute provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (1974).

[85] Brown v. General Serv. Administration, 425 U.S. 820, 825 (1976). This explanation for the omission of federal employees from Title VII was advanced by the Court after stating that "federal employment discrimination clearly violated both the Constitution . . . and statutory law." *Id.*

the competitive civil service.[86] Since then the Supreme Court has concluded that the relevant provisions of Title VII constitute the exclusive judicial remedy for claims of discrimination in federal employment.[87] While claims under Title VII do not necessarily reach equal protection issues,[88] an action for unconstitutional employment discrimination can be maintained in the absence of Title VII protection.[89] Congressional failure to extend to its own employees who do not have positions in the competitive service the benefits of Title VII had prompted several attempts to adopt internal fair employment procedures.[90] However, none of these efforts came to fruition.[91]

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[86] 42 U.S.C. § 2000e-16 (1974). The statute prohibits, among other things, discriminating personnel practices "affecting employees . . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service." *Id.*

[87] Brown v. General Serv. Administration, 425 U.S. 820, 828–29 (1976). A civil servant who had failed to exhaust the administrative procedures prescribed by section 717 of the 1964 Act, as added by section 11 of the 1972 Act, was denied relief on the principle that "a precisely drawn, detailed statute preempts more general remedies." *Id.* at 834.

[88] *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (rule requiring mandatory termination of teachers four months prior to childbirth violative of fourteenth amendment's due process clause).

[89] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). In *Hampton*, a group of resident aliens attacked the constitutionality of a Civil Service Commission regulation denying them permanent employment. Although the term "national origin" as used in policy statements against federal employment discrimination such as Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969), was held inapplicable to aliens, equal protection rights under the fifth amendment were successfully invoked. Conceding that citizenship can be a legitimate prerequisite for an upper echelon position in the civil service, the Court could not see any overriding national interest for a sweeping exclusion of noncitizens from all levels. Elimination of the need to classify jobs according to the degree to which they involve sensitive policy decision-making was considered only a matter of administrative convenience and as such inadequate to justify wholesale deprivation of an entire class. Hampton v. Mow Sun Wong, 426 U.S. 88, 99–117.

[90] Brief of the Honorable Morris Udall et al, Amici Curiae, In Support of Reversal at 5, Davis v. Passman, 442 U.S. 228 (1979) [hereinafter cited as HFEPC Amicus Brief]. Amici were members of the House Fair Employment Practices Committee and Members of the United States House of Representatives.

[91] The three most recent efforts called for the establishment of a Fair Employment Practices Panel. *See* H.R. Res. 766, 95th Cong., 1st Sess., §§ 101(6)(B)(8), (9), (10), (11), 504 (1977), a House Fair Employment Relations Board, *see* H.R. Res. 1380, 95th Cong., 2d Sess., § 2 (1978) and its Senate counterpart, *see* Senate Resolution 431, identical to House Resolution 1380. This latest Resolution reached the floor of the Senate as an amendment to the "Humphrey-Hawkins Bill," but was withdrawn two days later to facilitate passage of the Full Employment and Balanced Growth Act of 1978. *See* HFEPC Amicus Brief, *supra* note 90, at 5-9. It should be noted, however, that failure to adopt any of these resolutions only deprives congressional employees of a precise mechanism to pursue their discrimination complaints. As a matter of policy the Code of Official Conduct of the House prohibits sex discrimination. *See* Clause 9 of Rule XLIII of the House of Representatives, 121 CONG. REC. 22 (1975); HFEPC Amicus Brief, *supra* note 90, at 6 n.4.

An important factor to be considered in suits against government officials is the possibility that some type of immunity will be raised as a defense. If the official merely symbolizes his office and the action is really an attempt to hold the government liable, the doctrine of sovereign immunity may operate as an absolute bar to the suit.[92] If, on the contrary, an injured party seeks to hold an official personally liable, such sovereign immunity may extend to all "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."[93] Even if it can be shown that the defendant acted outside the scope of his official duties, the doctrine of official immunity may protect his actions from liability by affording him a "good faith" defense.[94] In addition, if the official is a legislator, he may enjoy the special privilege conferred by the speech or debate clause.[95]

The case law construing official immunity has generated much confusion, but nonetheless, courts are beginning to apply the doctrine more consistently.[96] Conflicts between private persons and executive branch officials are commonplace by the very nature of their daily interaction. Indeed, the creation of the *Bivens* remedy bears witness to the need for redress of grievances of constitutional dimensions. On the other hand, the official requires freedom from the constant threat of litigation for the effective performance of his duties. The long sequence of claims brought against state officials for their conduct under color of state law refined the doctrine to the present standard as formulated in *Scheuer v. Rhodes*.[97] Under this standard, a state executive officer enjoys a less than absolute immunity based on "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief" in the propriety of his official acts.[98] Not surprisingly then, the Supreme Court in *Economou* extended that same type of qualified im-

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[92] Sovereign immunity would also bar a judgment which orders recovery from the public treasury. Davis v. Passman, 544 F.2d 865, 877 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[93] Barr v. Matteo, 360 U.S. 564, 575 (1959) (quoted in *Bivens*, 456 F.2d at 1342–43) (on remand).

[94] *Id.* at 571 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[95] The Constitution provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. *See Davis*, 442 U.S. at 234, 235 n.11.

[96] For an excellent discussion of official immunity, see Jaffe v. United States, No. 79-1543, slip op. at 6–14 (3d Cir. Feb. 20, 1980).

[97] 416 U.S. 232 (1974). *See also* Wood v. Strickland, 420 U.S. 308 (1975).

[98] 416 U.S. at 247–48.

munity to federal officials when called to account for their actions under color of federal law.[99]

The doctrine of legislative immunity is by its nature much less refined. Having its roots in the speech or debate clause of the Constitution, its purpose is to guard the legislator engaged "in the sphere of legitimate legislative activity" against the burdens of litigation.[100] However, case law delineating the scope of congressional immunity under the speech or debate clause is scarce.[101] Indeed, Supreme Court opinions applying the doctrine in civil suits have cited to criminal prosecutions and conversely, reasoning in criminal cases has had to rely on civil precedent. Fortunately, this apparent difficulty is not serious since in either context the basic inquiries are the same. A court must determine how closely the legislator's action was related to the deliberative and legislative process and how critically a non-member's function was connected with the member's performance of the legislative task.[102]

Recent cases have revealed a fine dividing line between protected and unprotected activities and immune and non-immune personnel. In one case,[103] the Court found that introducing, and thereby making public, documents at a committee hearing was part of the protected legislative process, but private republication of those same documents was not.[104] In another case,[105] the Court concluded that immunity extended to certain subcommittee members who compiled and internally distributed a report showing some high school students in an unfavorable light, but did not extend to those who printed it.[106] However, in both cases the Court adhered to its interpretation of the "speech or debate privilege [as] designed to preserve legisla-

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[99] 438 U.S. at 508–17. *Economou* answered the immunity question left unanswered in *Bivens*. The Court, while recognizing that the *Scheuer* standard is the general rule, nonetheless made an exception for those members of the executive branch who perform functions analogous to those of the judge or a prosecutor in administrative proceedings and granted absolute immunity. *Id.*

[100] Tenney v. Brandhave, 341 U.S. 367, 376 (1951) (quoted in Dombrowski v. Eastland, 387 U.S. 82, 83 (1967)).

[101] *See, e.g.*, Note, *Evidence of Congressman's Legislative Activities Inadmissable at his Bribery Trial: Waiver of Privilege Must be Express*, 9 SETON HALL L. REV. 861 (1978).

[102] *See* notes 103–105 *infra* and accompanying text.

[103] Gravel v. United States, 408 U.S. 606 (1972).

[104] *Id.* at 622. Senator Gravel from Alaska, one of his aides and the Pentagon Papers were involved in a sequence of events leading to the criminal prosecution of the Senator for conversion of government property. *Id.*

[105] Doe v. McMillan, 412 U.S. 306 (1973).

[106] *Id.* at 311–18. In *Doe*, parents of District of Columbia school children brought an action against members of a House committee who, by disseminating a congressional report, allegedly invaded the pupils' privacy. *Id.* at 314–15.

tive independence, not supremacy"[107] and emphasized the general accountability of legislators under the law they themselves create.[108]

In *Davis v. Passman*, the Supreme Court considered for the first time the applicability of the *Bivens* holding to a case where violation of constitutional rights other than those protected by the fourth amendment had been claimed.[109] Indeed, the remedy created in *Bivens* had been based primarily on the nature of the protected right and on the history of the Court's fourth amendment rulings.[110] Moreover, Justice Harlan had cautioned that monetary relief may not be a panacea for injuries to "other types of constitutionally protected interests."[111] This caveat, together with the precision of the Court's rationale, left room for doubt whether the *Bivens* holding could be extended beyond its facts. But whatever restraints these considerations may have been thought to impose were largely swept away by the broad restatement of the *Bivens* doctrine in *Economou*,[112] which was decided after the en banc rehearing of Davis' appeal.[113]

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[107] United States v. Brewster, 408 U.S. 501, 508 (1972).

[108] Gravel v. United States, 408 U.S. 606 (1972). In the Court's view, "legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." *Id.* at 615.

[109] 442 U.S. at 230. Many lower federal courts had found no difficulty extending the *Bivens* rule to claims arising under the first, fifth, sixth, eighth, ninth, thirteenth and fourteenth amendments as well as prayers for relief from violations of "any constitutional right." *See* Lehmann, *supra* note 50, at 567 n.229 and accompanying text. *See also* ACLU Amicus Brief, *supra* note 65, at 37–42 app.

[110] 403 U.S. at 392–94, 397. Justice Brennan's tracing of fourth amendment rights to eighteenth century English case law has led at least one judge to the conclusion that the basis for a *Bivens* remedy can only be found in pre-constitutional common law rights, which were not " 'created' " but only "recognized" by the framers. Davis v. Passman, 571 F.2d 793, 802 (5th Cir. 1978) (en banc) (Roney, J., concurring), *rev'd and remanded*, 442 U.S. 228 (1979).

[111] 403 U.S. at 409 n.9 (Harlan, J., concurring). "[T]he appropriateness of money damages may well vary with the nature of the personal interest asserted." *Id. See* note 71, *supra* and accompanying text. Consequently some courts were reluctant to extend *Bivens* to other contexts. Among the courts observing these mostly self-imposed limitations several were within the Fifth Circuit. *See, e.g.*, Davis v. Passman, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979); La Bar v. Royer, 528 F.2d 548 (5th Cir. 1976); Schofield v. County of Volusia, 413 F. Supp. 908 (M.D. Fla. 1976); McLaughlin v. Callaway, 382 F. Supp. 885 (S.D. Ala. 1974).

[112] 438 U.S. 478 (1978). Arthur N. Economou's complaint listed several first and fifth amendment violations. *Id.* at 482–83. Prior to deciding the immunity question, the Court stated that

> the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official.

Id. at 504. *See* notes 66–70 & 99 *supra* and accompanying text.

[113] The Court of Appeals for the Fifth Circuit, sitting en banc, reached its decision in *Davis* in April 1978, 571 F.2d 793 (5th Cir. 1978), whereas the Supreme Court announced its ruling in

Emphasizing the value of *Bivens* and *Economou* as precedents, the Court in *Davis* held that a cause of action and a damages remedy could be implied directly under the Constitution when the due process clause of the fifth amendment had been violated.[114] A brief review of its recent decisions led the Court to conclude that the equal protection component of the fifth amendment did confer a federal constitutional right to be free from gender discrimination that did not meet the *Craig v. Boren* test.[115]

Thus, the central inquiry was whether damages were the appropriate remedy in this case.[116] The key to this question was found in an examination of those " 'special factors counselling hesitation.' "[117] " '[D]amages or nothing' " were seen as the only alternatives available to Davis,[118] because under the circumstances of her case equitable relief was as unavailable as it had been in *Bivens*[119] and because, unlike Webster Bivens, Shirley Davis did not even have a cause of action under state law.[120]

The Supreme Court discerned neither philosophical nor practical difficulties for the lower courts when called upon to consider an award of damages as opposed to other remedies. The Court found that from a philosophical viewpoint financial compensation must be regarded as an ordinary form of redress for the invasion of a personal liberty interest and that the practical aspects of valuation and causation should be "judicially manageable," particularly in view of the experience accumulated from appraising Title VII claims.[121]

Furthermore, this particular remedy has not been explicitly prohibited by Congress.[122] Title VII, which constrains its protégés in

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Economou in June of the same year. *Compare Davis*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979) *with Economou*, 438 U.S. 478 (1978).

[114] 442 U.S. at 233–34. Also invoked was the famous dictum in *Bell*. *See* note 47 *supra* and accompanying text.

[115] 442 U.S. at 234–35. This test requires a showing of the specific " 'important governmental objectives' " served by the gender-based employment of congressional staff. *Id*. *See* notes 80–81 *supra*.

[116] 442 U.S. at 244.

[117] *Id*. at 245. *See* note 59 *supra* and accompanying text.

[118] 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

[119] *See* note 13 *supra*. Reinstatement, promotion and salary increase were the forms of injunctive relief which Davis had originally sought. Bivens had been in a similar situation, because his arrest never led to a trial. *See* note 50 *supra*.

[120] 442 U.S. at 245–46 n.23. Whereas Davis "ha[d] no cause of action under Louisiana law," Brief for Petitioner, *supra* note 1, at 19, Bivens could have sued under New York law asserting tort claims of trespass and false imprisonment. 403 U.S. at 391 n.4, 394.

[121] 442 U.S. at 245. Back pay due because of illegal sex discrimination is frequently claimed in Title VII litigation. *Id*.

[122] *Id*. at 246–47. Again the Court relied on *Bivens* where defendant had urged that the availability of money damages should turn on whether they were necessary to effectuate the

federal employment to an exclusive remedial scheme,[123] does not apply to all congressional employees. Moreover, judicial relief from unconstitutional discrimination had been granted in a situation where plaintiffs were both aliens and federal employees and the statute protected neither class.[124]

Having rejected Passman's claim that Congress intended to leave those in Davis' quandary totally without recourse, the Court found similarly unpersuasive the familiar "floodgates-of-litigation" argument. Quoting Justice Harlan's concurrence in *Bivens*, the Court endorsed the view that limited judicial resources must not be permitted to curtail " 'the recognition of otherwise sound constitutional principles.' "[125] The Court also reasoned that Congress could always stem the tide by creating viable alternatives.[126] Thus, the foretold deluge of claims was not perceived as a real danger.

However, before reaching the pivotal issue discussed above, the Court was forced to address the preliminary question of whether Davis had a cause of action.[127] This was in response to the court of

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fourth amendment. Rejecting this formulation of the key issue, the *Bivens* Court found instead that "[t]he question is merely whether petitioner . . . is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." 403 U.S. at 397. This conclusion would be different if Congress had expressly forbidden the recovery of money damages and devised in its stead "another remedy, equally effective in the view of Congress." *Id.*

[123] Brown v. General Serv. Administration, 425 U.S. 820, 824–29 (1976). *See* notes 85–87 *supra* and accompanying text.

[124] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). *See* note 89 *supra*. At the time this controversy arose, section 717 had not yet been amended to cover federal employees and Title VII did not then, as it does not now, prohibit discrimination against aliens. Though cited for the proposition that omission of alienage from the coverage of Title VII did not preclude a judicial remedy for denial of due process, Title VII was never mentioned in the *Mow Sun Wong* litigation. *See* Hampton v. Mow Sun Wong, 333 F. Supp. 527 (N.D. Cal. 1971), *rev'd and remanded*, 500 F.2d 1031 (9th Cir. 1974), *aff'd*, 426 U.S. 88 (1976). This is probably due to the fact that events giving rise to the complaint occurred prior to the 1972 amendment of the Civil Rights Act of 1964. However, Executive Order Number 11,478, entitled "Equal Employment Opportunity in the Federal Government," established the spirit of Title VII as federal policy, so that the overall argument remained the same. Exec. Order No. 11, 478, 34 Fed. Reg. 12985 (1969).

[125] 442 U.S. at 248 (quoting 403 U.S. at 411) (Harlan, J., concurring)).

[126] *Id.* The Supreme Court gave two explanations for its lack of concern. First, the federal courts were already accessible under 42 U.S.C. § 1983 for analogous claims against state officials. Second, the threshold for maintaining a *Bivens* action remained high; only a violation of a constitutional right, and not just any tort, by a federal official could overcome it. 442 U.S. at 248. The Court thus allayed Judge Goldberg's fear that "the *Bivens* landmark [be] washed away in a new constitutional downpour." Davis v. Passman, 571 F.2d 793, 820 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), *rev'd and remanded*, 442 U.S. 228 (1979).

[127] 442 U.S. at 236–44. A relic from the days of code pleading, this troublesome term of art is slow to die. Having taken on many varying shades of meaning, its "doctrinal complexity" became a burden. But it is still frequently used to mean "claim for relief," the phrase which was meant to supplant it with the advent of the Federal Rules of Civil Procedure. *Id.* at 237.

appeals decision that the lack of a cause of action prevented plaintiff from enforcing her constitutional right to be free from gender-based discrimination.[128] The en banc majority had achieved this result by insisting that *Cort v. Ash*[129] governed the instant case.[130]

Over the past two decades a new body of case law conferring a private right of action, even where the pertinent statute does not expressly provide for one, has developed around certain complex regulatory legislation.[131] *Cort v. Ash*, a recent case in this area, set forth criteria for determining when a private "cause of action" should be implied from a federal statute.[132] The *Ash* Court formulated these criteria to aid the inquiry into legislative intent and to help define the plaintiff's status as a member of the particular class of litigants who may judicially enforce the rights or obligations expounded in the pertinent statutory provision.[133] The Court in *Davis*, however, concluded that these criteria were not germane to the fundamentally different question of whether a remedy should be implied directly under the Constitution.[134] Therefore, it held that the court of appeals had erred in applying the *Cort v. Ash* standards to Davis' claim.[135]

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[128] Davis v. Passman, 571 F.2d 793, 801 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979). The Supreme Court politely ignored the additional twist in the en banc opinion which labelled these grounds for dismissal "jurisdictional." *See id. See also* note 46 *supra*.

[129] 422 U.S. 66 (1975).

[130] Davis v. Passman, 571 F.2d 793, 796–98 (5th Cir. 1978) (en banc), *rev'd and remanded*, 442 U.S. 228 (1979).

[131] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Court allowed private persons to sue for violations of Security and Exchange Act although Congress only provided for enforcement of Act's provisions by SEC).

[132] 422 U.S. at 78. The criteria listed there are: does the plaintiff belong to "the class for whose especial benefit the statute was enacted;" is there any explicit or implict indication of legislative intent to create or deny such a "cause of action;" are the underlying purposes of the legislative scheme consistent with implying such a remedy for the plaintiff; "[a]nd finally, is the cause of action one traditionally relegated to state law" so that inferring such a right under federal law would be inappropriate. *Id.* (citations omitted). *See Davis*, 442 U.S. at 232–33 n.8.

[133] 422 U.S. at 78. Remedies are available to this class of litigants for "reasons related to the substantive social policy embodied in an act of positive law." *Bivens*, 403 U.S. at 402 n.4 (Harlan, J., concurring).

[134] 442 U.S. at 232–33 n.8, 241. Notwithstanding the fact that the Supreme Court referred to this type of case in *Bivens*, there was no indication that a similar analysis should be used. *Borak* was merely given as an example to show that "implying a remedy" was not as novel as some may claim. 403 U.S. at 397.

[135] 442 U.S. at 241.

After finding that the district court had jurisdiction,[136] that the plaintiff had both standing[137] and a cause of action,[138] and that a remedy was available,[139] the Court turned to defendant's final objection that the doctrine of separation of powers rendered the suit nonjusticiable.[140] The majority rejected this contention. Judicial review of this congressional employment decision was held to involve no more than the Court's traditional function of interpreting the Constitution. Only the speech or debate clause was acknowledged as a possible bar to the suit.[141]

In dissent, Chief Justice Burger expressed a strong belief that concepts of separation of powers demanded that the judiciary respect the autonomy of legislators and presidents in choosing their personal staffs.[142] He rested his argument on an historical perspective citing no authorities other than the Sinking Fund Cases.[143] The Chief Justice also defended a Congressman's right to unencumbered selection of his staff employees utilizing a rationale bordering on equal protection analysis. He indicated that a member of Congress, in attempting to secure total loyalty, confidentiality and support, as well as the approval of his constituency, may occasionally employ a person on a racial, ethnic, religious, or gender basis.[144] Having argued that the gathering of a devoted staff might well constitute a valid governmental interest justifying sex-based discrimination, Chief Justice Burger

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[136] *Id.* at 2274 n.18. Jurisdiction was based on 28 U.S.C. § 1331(a). *See* note 5 *supra*.

[137] 442 U.S. at 239–40 n.18. The real reason for turning down Davis' prayers for relief may have been that the en banc court of appeals believed that she lacked standing rather than a cause of action. At least this was suggested by the Supreme Court majority which, of course, disagreed. *Id.* The court noted that Davis complained of invasion of a personal right, a circumstance which not only gave her a personal stake in the outcome of the case, but also made her "sufficiently adversary to" Passman "to overcome [article III] limitations on federal court jurisdiction." *Id.*

[138] *Id.* at 244. The Court equated having a "cause of action" with being the appropriate party to invoke the general federal jurisdiction question. *Id.* at 239–40 n.18.

[139] *Id.* at 248. Damages were held to be, as in *Bivens*, a " 'remedial mechanism normally available in the federal courts.' " *Id.* (quoting *Bivens*, 403 U.S. at 397).

[140] *Id.* at 235–36 n.11. *See* note 16 *supra* and accompanying text. *See also* Brief for Respondent at 21–23, Davis v. Passman, 442 U.S. 228 (1979).

[141] 442 U.S. 235–36 n.11.

[142] *Id.* at 250 (Burger, C.J., dissenting).

[143] 99 U.S. 700, 718 (1878). Concerned with the financial problems of constructing transcontinental railroads, these cases contain some eminently quotable language on the danger of one branch of government encroaching on another's domain. Otherwise they bear little, if any, relationship to *Davis*. Not only was the potential conflict there between the states and Congress, rather than between coequal branches of government, but the statement also merely served as preamble to a holding that Congress nevertheless may get involved in what may seem to be a matter of state law.

[144] 442 U.S. 250 (Burger, C.J., dissenting).

then neglected to consider the second test required in equal protection inquiries. This test requires that a substantial relationship exist between achieving this goal and the race, national origin, religion or sex of the person selected. Of course, the entire dissent failed to take into account that nothing in the majority opinion would prevent Passman from showing at trial how his conduct had met the most exacting constitutional standards.[145]

Subscribing to the Chief Justice's concern about "principles of comity and separation powers," Justice Powell, in a separate dissent, objected to this "intrusion upon the legitimate powers of Members of Congress."[146] Citing to the leading cases which developed the doctrines of abstention and nonintervention by federal courts in state judicial proceedings,[147] he urged a similar "exercise of principled discretion."[148] But even without such general considerations against interfering with another branch of government, Justice Powell believed that *Brown v. General Services Administration*[149] completely barred from judicial relief those congressional employees not already protected by Title VII.[150]

In contrast to the other dissenters, Justice Stewart considered the speech or debate clause a threshold issue of paramount importance, particularly since the absolute immunity that would flow from it would completely dispose of the controversy.[151]

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[145] *Id.* at 248, 249–51; Davis v. Passman, 554 F.2d 865, 870 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979).

[146] *Id.* at 251–52 (Powell, J., dissenting). Both dissenting opinions envisioned protection of a Congressman's prerogatives and privileges above and beyond the scope of the speech or debate clause and did not even discuss this strong shield warding off litigation. *Id.* at 251–55 (Powell, J., dissenting), 249–51 (Burger, C.J., dissenting).

[147] *Id.* at 253 n.2 (Powell, J., dissenting). *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Although these cases dealt mainly with questions of federalism, they do have some relevance to the present case despite the different context. In several of these cases the difficult question of abstention versus intervention arose from a complaint against state officials under section 1983. *Bivens* can be considered the equivalent federal action.

[148] 442 U.S. at 254 (Powell, J., dissenting). Following the Chief Justice's lead, the extraordinarily close working relationship between a high ranking official and his staff was offered as both explanation and justification for allowing a Congressman to select his staff free from judicial interference. Surprisingly, Justice Powell cited to his dissent in Elrod v. Burns, 427 U.S. 347 (1976), which, though distinguishable on its facts, is actually closer to supporting the majority opinion in *Davis*. 442 U.S. at 254 (Powell, J., dissenting).

[149] 425 U.S. 820 (1976). *See* note 82 *supra*.

[150] 442 U.S. at 254 (Powell, J., dissenting). Claiming that Congress "took pains to exempt itself from the coverage of Title VII," Justice Powell found this to be a clear and unmistakable indication of Congress' intent to leave its aggrieved employees without recourse in the courts. However, no legislative history was given to support this view. *Id.*

[151] *Id.* at 251 (Stewart, J., dissenting). The en banc court of appeals had not reached the issue of immunities and therefore, this question was not before the Supreme Court. *Id.* at

When the Supreme Court agreed to review the en banc decision in *Davis v. Passman*, it was presented with an opportunity to clarify some of the uncertainties remaining in the aftermath of *Bivens*.[152] One uncertainty in particular concerned the phraseology of the earlier holding, but unfortunately *Davis* preserved the antiquated language of *Bivens* by again speaking of implying a "cause of action."[153] The elusive meaning of this outmoded term of art had not only caused its expurgation from the federal rules of civil procedure,[154] but had also triggered the erroneous reasoning in the en banc decision by the court of appeals.[155] Instead of condemning the continued use of the obsolete phrase, the Court endeavored to devise yet another definition for it. This latest meaning will no doubt heighten the concomitant confusion, since it has been adopted from the area of statutory interpretation.[156] According to this definition, a person belonging to the particular "class of litigants" for whose especial benefit certain legislation has been enacted, is said to have a cause of action under that statute.[157] Thus, a cause of action is the badge worn by any "litigant [who] is an appropriate party to invoke the power of the courts."[158] It is less than obvious how this concept differs from that of a party having standing to bring a suit.[159] For

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235–36 n.11. The panel had concluded that legislative immunity could not be stretched to cover activities as remote from the legislative process as hiring and firing an employee. Davis v. Passman, 544 F.2d 865, 880 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979). The panel's further finding that qualified official immunity should be available to the defendant, *id.* at 881, was implicitly rejected by the Supreme Court when it declared the speech or debate clause the only limitation on judicial review of Passman's actions. 442 U.S. at 235–36 n.11.

[152] *See* Lehmann, *supra* note 50, at 540 (describing *Bivens* decision as "remarkably open-ended").

[153] 442 U.S. at 230. *See Bivens*, 403 U.S. at 389.

[154] 442 U.S. at 237.

[155] Davis v. Passman, 571 F.2d 793, 796–800 (5th Cir. 1978), *rev'd and remanded*, 442 U.S. 228 (1979). *See* 442 U.S. at 238.

[156] 442 U.S. at 236–41. *See* note 120 *supra*. While registering displeasure with a term whose meaning "is far from apparent," the Court proceeded to discuss it. 442 U.S. at 237. In a different context, one commentator observed that

> some of the old terms are made clear by skillful refinement. But others are useless, and these useless ones become an impediment to intelligible judicial speech, and a trap for the unwary judge or lawyer. Yet the natural conservatism of the judicial mind seems to prevent courts from destroying useless concepts.

Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

[157] 442 U.S. at 238.

[158] *Id.* at 239.

[159] *Id.* at 239–40 n.18. The Court recognized that the court of appeals had probably labored under this misconception and offered the following differentiation:

> *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limita-

want of a better expression, the term "cause of action" may retain some usefulness in the context of enforcing statutory rights and obligations, but there seems to be no need to perpetuate its usage in questions of a right to a remedy for a violation of a constitutional guarantee.[160] There, the courts need only decide whether a "valid claim for relief ha[s] been stated"[161] and whether any adequate alternative remedies exist.[162]

Furthermore, procedural questions concerning the amount in controversy, the timing of the lawsuit, and substantive queries involving the problem of immunity and the scope of protected rights have frequently arisen in the lower courts.[163] While summarily extending *Bivens* to a fifth amendment claim and thereby opening wider the federal courtroom doors,[164] the Court declined the opportunity to formulate more detailed standards to aid lower courts. This seems regrettable in light of the conflicting results sometimes reached in different circuits, but it has, at the same time, the advantage of leaving the entire body of case law unperturbed and of allowing the continued creative application of the *Bivens* doctrine.[165]

While the narrowness of the *Davis* decision was due partly to judicial restraint, the ideological divergence of the Justices was also a contributing factor. Whereas *Bivens* had been a six to three decision, both *Economou* and *Davis* could only muster a five justice majority despite the noticeable absence of any cohesive reasoning among the dissenters.[166]

> tions on federal court jurisdiction; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available.

Id. (emphasis in original)(citations omitted).

[160] *See* notes 26–32 *supra* and accompanying text.

[161] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1342 (2d Cir. 1972) (on remand from the Supreme Court).

[162] *See, e.g.*, 442 U.S. at 245.

[163] *See* Lehmann, *supra* note 50, at 544–603. For an excellent discussion of the interpretations given to *Bivens* by the lower federal courts with "[e]mphasis . . . on four procedural topics (statute of limitations, amount in controversy, standards for judging the sufficiency of the pleadings, and injunctive relief), and then on four substantive subjects (applications of *Bivens* to other amendments, the problem of respondeat superior, applications of *Bivens* to nonfederal defendants, and the problems of immunity and good faith)," see *id.* at 544–45.

[164] 442 U.S. at 248. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978), *overruling* Monroe v. Pape, 365 U.S. 167 (1961) (municipalities are within class of "persons" who can be sued under 42 U.S.C. § 1983). *See* notes 61–64 *supra* and accompanying text.

[165] *See* note 109 *supra*.

[166] Some arguments advanced in dissent were based on different aspects of the doctrine of separation of powers. Fashioning a remedy by the court was condemned as ursurping the legis-

Nevertheless, the Court did address the major weakness of the *Bivens* opinion. There, the primary role of the judiciary in enforcing constitutional rights was mentioned only in passing.[167] *Bivens* did not discuss what considerations would justify a court granting a remedy where Congress had failed to act. Nor did *Bivens* ponder the fundamental issue of whether it would render the Constitution meaningless for Congress to have the exclusive power to choose which constitutional provisions should be backed up by statutes and which should be allowed to lie fallow. The *Davis* decision corrected this omission[168] and claimed for the *courts* the privilege to enforce constitutional rights unless there is " 'a textually demonstrable constitutional commitment of [the] issue to a coordinate political department.' "[169] Thus, the Court in *Davis* not only confirmed the reach of *Bivens* beyond the fourth amendment, but also provided the doctrine with more candid jurisprudential underpinnings.

Author's Note:

The United States Supreme Court has recently ruled in this area. In Carlson v. Green, *48 U.S.L.W. 4425 (1980), the Court held that compensatory and punitive damages could be claimed under* Bivens *against the individual officials even though the alleged violations of plaintiff's eighth amendment rights could also support a suit against the United States under the Federal Tort Claims Act. The opinion of the Court underscores the vitality of* Bivens *and its seed.*

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lative power, while allowing a suit against a legislator was denounced as interfering with the internal affairs of another branch of government. *Compare Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting), *with Davis*, 442 U.S. at 249–51 (Burger, C.J., dissenting) *and Davis, id.* at 251–55 (Powell, J., dissenting). A third roadblock to a *Bivens* action was seen in the congressional refusal to enact the federal equivalent to section 1983 thereby discouraging "frivolous lawsuits." 403 U.S. at 427–28 (Black, J., dissenting). No necessity for "developing a body of federal common law . . . to insure the vitality of a constitutional right" was perceived, 409 F.2d at 726, for fear of "open[ing] the door for another avalanche of new federal cases." 403 U.S. at 430 (Blackmun, J., dissenting). Finally, a large obstacle to a *Bivens* action was thought to arise from questions of official and legislative immunity. *Davis*, 442 U.S. at 251 (Stewart, J., dissenting); *Economou*, 438 U.S. at 522 (Rehnquist, J., concurring in part and dissenting in part). *See also* notes 142–51 *supra*.

[167] 403 U.S. at 392, 396–97. The only reference to this fundamental issue consists of the two quotations from *Bell* and *Marbury*. *See* notes 27 & 47 *supra*.

[168] 442 U.S. at 241–42.

[169] *Id.* at 242 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).