

CRIMINAL LAWS AND CONSTITUTIONAL REMEDIES

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I. INTRODUCTION

Can a criminal law remedy a constitutional violation? In *Wilson v. Libby*, the United States District Court for the District of Columbia was faced with that very question. There, Valerie and John C. Wilson sued I. Lewis Libby, Jr., Chief of Staff to Vice President Richard Cheney and Assistant for National Security Affairs, alleging that Libby violated the Wilsons' First and Fifth Amendment rights by disclosing to the public Ms. Wilson's identity as a CIA agent.¹ Premising liability under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,² which established that a federal court may, in the absence of any congressional authorization, fashion a damages remedy for the victim of an unconstitutional act committed by a federal officer if the court has jurisdiction to hear the case,³ the Wilsons argued that a damages action was necessary because no other congressionally created form of relief was adequate to give them recourse.⁴ Without a *Bivens* remedy, the Wilsons contended that their constitutional rights would not be fully vindicated.⁵

In turn, Libby argued in part that the court need not create an implied action in damages because Congress had already given the Wilsons an avenue of recourse—the Intelligent Identities Protection Act (IIPA).⁶ That criminal statute, according to Libby, was sufficient

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¹ *Wilson v. Libby*, 498 F. Supp. 2d 74, 77–83 (D.D.C. 2007). More specifically, Ms. Wilson's name appeared in an article written by Robert Novak, who identified Ms. Wilson as a CIA agent. *Id.* at 79–80. That article was published by the *Chicago Sun Times* and the *Washington Post* on July 14, 2003. *Id.* In their complaint, the Wilsons alleged that Vice President Richard Cheney and Libby were involved in “outing” Ms. Wilson as an operative. *Id.* at 80.

² 403 U.S. 388 (1971).

³ *Id.* at 388–90.

⁴ *Wilson*, 498 F. Supp. 2d at 91.

⁵ *Id.*

⁶ 50 U.S.C. §§ 421–426 (2006). Under the IIPA, anyone who

to address the Wilsons' constitutional injuries.⁷ Therefore, Libby concluded, the district court should respect Congress's decision to exempt federal officers, such as himself, from damages by declining to fashion *Bivens* relief for injuries arising out of a federal officer's intentional disclosure of a private citizen's CIA status.⁸

In rejecting Libby's IIPA argument, the court found that the statute did not amount to a convincing reason for it to restrain its *Bivens* hand.⁹ The obvious shortcomings of such a course of action, according to the court, were plainly evident. First, nothing in the text of the law or in its legislative history indicated that Congress ever contemplated the IIPA to serve as the sole means of recourse for those claiming constitutional injuries for intentional disclosures of their covert identity.¹⁰ Second, even if such an indication existed, the claim that the IIPA was sufficient to address the Wilsons' constitutional injuries was dubious at best because it did not provide them with even the possibility of obtaining substantive relief.¹¹ Accordingly, the court stated that it would not refrain from giving the Wilsons an adequate damages remedy.¹²

Although the *Wilson* court ultimately rejected the plaintiffs' *Bivens* claims,¹³ it seems to have left open the possibility that it would at least entertain the argument that a criminal law can remedy a constitutional violation if the criminal law contains some indication that it was meant to preempt *Bivens* relief and provides substantive recompense to the victim of that crime. Indeed, the claim that a criminal law could remedy a constitutional violation seems increasingly meritorious given the unwillingness of the Supreme Court of the United

having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined under [T]itle 18 or imprisoned not more than ten years, or both.

Id. § 421(a).

⁷ *Wilson*, 498 F. Supp. 2d at 85–86.

⁸ *Id.*

⁹ *Id.* at 92–93.

¹⁰ *Id.* at 92. Specifically, the court found that “the legislative history shows that Congress was responding to a series of high-profile incidents . . . and the IIPA was a targeted effort to punish such behavior criminally.” *Id.*

¹¹ *Id.* at 92–93; see also 50 U.S.C. §§ 421–426 (2006).

¹² *Wilson*, 498 F. Supp. 2d at 92–93.

¹³ *Id.* at 93.

States and lower federal courts to create damages remedies for claimants who lack alternative congressional relief or who can only obtain less-than-adequate relief.¹⁴

The basis for this argument rests, in part, in the Constitution itself, which does not on its face delegate a remedy-making power to any specific branch of the federal government.¹⁵ It has unquestionably been assumed that Congress naturally possesses a remedy-making right because of Congress's authority to craft substantive laws.¹⁶ The assumption that the federal courts are also imbued with this power has proven to be more controversial, but that controversy has been countered on the grounds that federal courts must decide cases and controversies (both under the Constitution and federal law) and for every right, a remedy must exist, lest the right becomes illusory.¹⁷

But if federal courts do have the statutory and constitutional authority to fashion relief, how can they do so without offending separa-

¹⁴ See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66 n.6 (1999) (noting that in the federal-prisoner litigation context, where most *Bivens* claims originate, 1513 *Bivens* claims were filed between 1992 and 1994, but only two resulted in monetary judgments, and sixteen resulted in monetary settlements); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 344 n.46 (1989) ("A *Bivens* defendant is unlikely to settle . . . because the success rate for such defendants (99.75% before appeal) is so high. The defendant has no incentive to settle . . . because any federal employee sued for actions taken within the scope of his employment receives free representation from the Department of Justice."); see generally Note, "Damages or Nothing"—*The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667 (1979) (arguing that *Bivens* actions are so unsuccessful that individual government officers are unlikely to settle).

¹⁵ See U.S. CONST. arts. I–III.

¹⁶ See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548 (1972); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1143–44 (1989) ("[I]t is clear that both Congress and the courts are empowered to fashion remedies for the violation of constitutional right The Supreme Court has regularly reminded us that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (internal citation and quotation marks omitted)).

¹⁷ See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971); *Bell v. Hood*, 327 U.S. 678, 684 (1946); Nichol, *supra* note 16, at 1122. Indeed, as far back as *Marbury v. Madison*, the Court recognized that "[t]he 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." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); but see *Carey v. Piphus*, 435 U.S. 247, 265–67 (1978); Richard H. Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 329–39, 366–72 (1993) (noting that circumstances exist in which the law provides no remedy for the invasion of a legal interest).

tion of powers, especially when Congress has explicitly or implicitly excluded damages as a possible remedy against federal officers? Indeed, the Supreme Court has largely agreed that federal courts toe, if not cross, the separation-of-powers line by giving recourse to a *Bivens* claimant absent congressional authorization.¹⁸ In a series of decisions, the Court has strongly suggested that federal courts should refrain from crafting *Bivens* relief and instead defer to congressional decisions regarding federal-officer liability for claimed constitutional violations.¹⁹

But separation of powers is not an insurmountable bar to a federal court in fashioning congressionally unauthorized relief for a particular claimant.²⁰ At least when a claimant has no remedy or no constitutionally adequate remedial process to vindicate the constitutional right that has been violated, the Court has found reason to sustain *Bivens* actions.²¹ The Court, however, has not justified its decisions in those instances on the basis that the Constitution or federal law compels the Court to give a remedy to one who lacks any relief; rather, the Court has done so on grounds related to fairness to the *Bivens* claimant and the lack of strong federal interests counseling against this course of action.²² The importance of that distinction cannot be understated. That distinction suggests that by deferring to statutory remedies regarding constitutional violations because of separation-of-powers concerns, the Court is willing to rely on Congress in giving substance and shape to constitutional norms.²³ The practical implication of federal courts deferring to congressional remedies is that in-

¹⁸ See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (noting that “[s]o long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability” (citing *Schweiker v. Chilicky*, 487 U.S. 412, 425–27 (1988))).

¹⁹ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (2007); *Malesko*, 534 U.S. at 73; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Chilicky*, 487 U.S. at 423–24; *United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Bush v. Lucas*, 462 U.S. 367, 389 (1983); *Chappell v. Wallace*, 462 U.S. 296, 302–05 (1983).

²⁰ *Davis v. Passman*, 442 U.S. 228, 248 (1979) (finding no constitutional limitation preventing a federal court from fashioning a damages remedy against a federal officer for an alleged Equal Protection violation).

²¹ *Carlson v. Green*, 446 U.S. 14, 25 (1980); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 407–10 (1971) (Harlan, J., concurring).

²² *Bivens*, 403 U.S. at 406–08 (Harlan, J., concurring).

²³ Dellinger, *supra* note 16, at 1548 (arguing that “even where the Court concludes that a particular remedy is ‘part and parcel’ of the underlying constitutional right, Congress is not necessarily barred from substituting an alternative remedial scheme, provided it affords comparable vindication of the constitutional provision involved”).

dividuals, such as the Wilsons, must navigate a maze of complex statutory schemes in search of a remedy that often falls short of making them whole.²⁴

This Comment explores the circumstances in which a congressionally created criminal law is a sufficient reason for a federal court to back away from fashioning a damages remedy for the victim of an unconstitutional act. Based on recent Supreme Court jurisprudence regarding *Bivens* claims, this Comment argues that in certain instances a criminal law is adequate to supplant a *Bivens* remedy. Part I details the few cases in which the Supreme Court has used its powers to fashion an implied damages remedy directly from the Constitution. Part II addresses the Court's hesitancy in creating damage relief and particularly emphasizes the two general exceptions to *Bivens* claims. Finally, Part III describes the necessary components of the criminal law and the context in which this type of remedy is sufficient to preclude a *Bivens* remedy. Part III also addresses the shortcomings of this approach and discusses the normative justifications for permitting a punitive remedy to guarantee an individual's constitutional right.

II. *BIVENS* AND THE PROMISE OF IMPLIED DAMAGES REMEDIES FOR CONSTITUTIONAL OFFENSES COMMITTED BY FEDERAL OFFICERS

A. *The Origins of Implied Damages Remedies*

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,²⁵ the Supreme Court of the United States held that a federal court, acting under a statutory grant of subject-matter jurisdiction, can imply a damages remedy against federal officers who have violated an individual's constitutional rights.²⁶ Webster Bivens was at home with his family one morning in November 1965 when six agents of the Federal Bureau of Narcotics, acting under color of federal law, entered his dwelling.²⁷ Claiming that he violated certain federal drug laws, the agents arrested Bivens, threatened his family, examined his home, and subjected him to a strip search.²⁸ Bivens was later interrogated, but no federal criminal charges were brought.²⁹

²⁴ See, e.g., *Chilicky*, 487 U.S. at 423–24, 427–28.

²⁵ 403 U.S. 388 (1971).

²⁶ *Id.* at 397.

²⁷ *Id.* at 389.

²⁸ *Id.*

²⁹ *Id.* at 389–90.

Arguing that the officers acted without a warrant and had no probable cause for his arrest, Bivens sued them for money damages in federal district court for violating his Fourth Amendment rights.³⁰ The Federal District Court for the Eastern District of New York and the U.S. Court of Appeals for the Second Circuit dismissed Bivens's case for failing to state a cause of action because he lacked statutory authority to sue federal officers for monetary damages for Fourth Amendment violations, and Bivens appealed to the Supreme Court.³¹

Rather than dismissing the case as the lower courts had done, the Court entertained Bivens's claim.³² The Court justified that decision on the grounds that it had subject-matter jurisdiction under the federal-question statute³³ and 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."³⁴ As such, the question before the Court was whether the Fourth Amendment permitted Bivens to exact money damages from federal officers for their invasion of his rights.³⁵ The Court found particularly crucial the fact that a damages remedy was Bivens's only hope of relief: the exclusionary rule of the Fourth Amendment, prohibiting a prosecutor from using or relying upon evidence illegally obtained by federal officers,³⁶ did not apply because no criminal proceeding was brought against Bivens,³⁷ and state tort remedies were "inconsistent [with] or even hostile" to the guarantees of the Fourth Amendment.³⁸ Further, the Court determined that damages were the "ordinary remedy for an invasion of personal interests in liberty."³⁹

³⁰ *Id.* Bivens sought \$15,000 in monetary damages from each officer for their actions. *Id.*

³¹ *Bivens*, 403 U.S. at 389–90.

³² *Id.* at 389.

³³ *Id.* at 398–99 (Harlan, J., concurring). At the time that *Bivens* was decided, the federal-question statute provided that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (a) (1976).

³⁴ *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

³⁵ *Id.* at 389.

³⁶ *See generally* *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914) (holding that evidence obtained in contravention of the Fourth Amendment cannot be used in a federal criminal proceeding).

³⁷ *Bivens*, 403 U.S. at 394–95.

³⁸ *Id.* at 394.

³⁹ *Id.* at 395.

Although finding that the Fourth Amendment permitted an action in damages, the Court stated that its inquiry did not end there.⁴⁰ Rather, the Court suggested that it would refrain from crafting relief if there was an “explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents” or any “special factors counsel[ing] hesitation in the absence of affirmative action by Congress.”⁴¹ Finding that neither exception applied to the case at hand, the Court permitted *Bivens* to seek monetary damages against the federal transgressors.⁴²

In a notable and revealing concurring opinion, Justice Harlan made clear that the Court did not need statutory authority from Congress to accord compensatory relief to *Bivens*.⁴³ According to Justice Harlan, federal courts had the “presumed” power to fashion equitable relief directly under the Constitution based on a general statutory grant of subject-matter jurisdiction.⁴⁴ Thus, Justice Harlan argued, the belief that the federal tribunals lacked the authority to imply a *damages* remedy directly under the Constitution based on that same general statutory grant of subject-matter jurisdiction was indefensible, if not illogical.⁴⁵ Further, Justice Harlan stressed that the fact that the federal tribunals routinely implied damages remedies into statutory schemes mooted the criticism that the Court was impermissibly making substantive relief for *Bivens*.⁴⁶ That proved, Justice Harlan continued, that the federal courts were more than capable of making the considered policy decisions normally thought to be reserved for Congress.⁴⁷ Moreover, Justice Harlan emphasized that the Bill of Rights existed to “vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities,” which suggested that federal courts had to distance themselves from expressed congressional desires regarding constitutional remedies.⁴⁸

⁴⁰ *Id.* at 396–97.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Bivens*, 403 U.S. at 399–400, 402–07 (Harlan, J., concurring).

⁴⁴ *Id.* at 404.

⁴⁵ *Id.* at 404–06.

⁴⁶ *Id.* at 402–03 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–34 (1964)). Notably, the practice of implying private remedies into statutory schemes was later discredited and abandoned by the Court. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). In *Bivens*, the Court implied a damages remedy directly from the Constitution itself. *See Bivens*, 403 U.S. at 396–97.

⁴⁷ *Bivens*, 403 U.S. at 402–03.

⁴⁸ *Id.* at 407.

To him, the question was whether compensatory relief was “‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.”⁴⁹ Justice Harlan wrote that “[i]n resolving that question, . . . the range of policy considerations we may take into account is at least as broad as the range [] a legislature would consider with respect to an express statutory authorization of a traditional remedy.”⁵⁰ In considering the “traditional judicial remedies” used by federal courts to vindicate a legal interest,⁵¹ Justice Harlan concluded that a damages remedy was “appropriate” because for *Bivens* “it is damages or nothing.”⁵²

In *Davis v. Passman*,⁵³ the Court applied the reasoning of *Bivens* in implying a damages action directly under the Fifth Amendment.⁵⁴ In that case, Davis brought an equal-protection claim against her employer, Congressman Otto Passman, because he fired her on account of her gender.⁵⁵ Davis sought monetary and equitable relief for her injuries against Passman, but Davis lacked statutory authority to sue a member of Congress for the violation that she asserted.⁵⁶ The Court relied heavily on *Bivens* in stating that damages were appropriate because it had general subject-matter jurisdiction to hear Davis’s constitutional claims⁵⁷ and because Davis could not avail herself of any alternative federal remedy.⁵⁸ Finding damages to be the traditional form of relief for equal protection infringements,⁵⁹ the Court found

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 408 n.8.

⁵² *Id.* at 410.

⁵³ 442 U.S. 228 (1979).

⁵⁴ *Id.* at 248.

⁵⁵ *Id.* at 230. Representative Passman stated that he fired Davis from her position as his administrative assistant because he preferred a man for the job. *Id.*

⁵⁶ *Id.* at 231. Specifically, Davis sought reinstatement of her position as an administrative assistant; however, because Passman had resigned from the House of Representatives by the time of Davis’s lawsuit, her claims for reinstatement were unavailing. *Id.* Davis had no standing to sue under the Civil Rights Act of 1964 because § 717 of Title VII of that Act, as amended in 1972, excluded congressional employees from protection. Equal Opportunity Employment Act of 1972, § 717, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111–12 (1972) (codified as amended at 42 U.S.C. § 2000e-16 (2006)). Nor did Davis have any standing to sue Passman for violating the rules of conduct governing the House of Representatives because those rules were promulgated and adopted after the alleged unconstitutional behavior occurred. *Davis*, 442 U.S. at 243 n.21.

⁵⁷ *Davis*, 442 U.S. at 236. The Court considered § 1331(a), the statute for federal-question jurisdiction, to be the basis for Davis to sue for an invasion of her constitutional right. *Id.*

⁵⁸ *Id.* at 243–44 n.21, 245–46.

⁵⁹ *Id.* at 245.

neither an explicit congressional declaration nor any special factors counseling hesitation against giving Davis recourse.⁶⁰ Accordingly, the Court sustained Davis's claims for direct monetary relief against Passman for his unconstitutional behavior.⁶¹

The last case to extend *Bivens* was *Carlson v. Green*,⁶² in which the Court applied the doctrine to an Eighth Amendment violation.⁶³ Unlike *Bivens* and *Davis*, the plaintiff in this case was not without recourse: the Federal Tort Claims Act (FTCA) provided the decedent's estate with a damages action against the Federal Bureau of Prisons.⁶⁴ Thus, the Court faced the question of whether to extend *Bivens* relief to a plaintiff who could avail himself of alternative congressional relief.⁶⁵ In deciding in the affirmative, the Court found in the FTCA's legislative history that Congress intended to preserve *Bivens* claims, which silenced the argument that the FTCA represented an express declaration by Congress that *Bivens* relief was precluded.⁶⁶ Further, the Court reasoned that even if such language did not exist, an implied damages remedy was appropriate because the FTCA was wholly inadequate to relieve the injuries claimed by the decedent's estate.⁶⁷ The Court particularly was concerned with the fact that, unlike the FTCA's remedies, damages against federal officers would deter them from engaging in unconstitutional behavior in the future.⁶⁸ Because of the FTCA's inadequacy, the Court found no impediment to fashioning a freestanding damages remedy for the plaintiff.⁶⁹

⁶⁰ *Id.* at 246–48.

⁶¹ *Id.* at 248–49.

⁶² 446 U.S. 14 (1980).

⁶³ *Id.* at 16. In *Carlson*, a federal prisoner suffered an acute asthmatic attack while in the custody of officials of the Federal Bureau of Prisons (BOP). *Id.* at 16 n.1. The prison officials failed to timely treat or find help for the prisoner, who subsequently died from his ailment. *Id.* at 16. The prisoner's estate then sued the federal officers for money damages. *Id.*

⁶⁴ *Id.* at 19–20; *see also* 28 U.S.C. § 2680(h) (1970).

⁶⁵ *Carlson*, 446 U.S. at 19–20.

⁶⁶ *Id.*

⁶⁷ *Id.* at 21. Specifically, the Court reasoned that the FTCA remedies were inadequate to preclude the Court from implying a *Bivens* damages remedy for four reasons: (1) a *Bivens* remedy had more of a deterrent effect on the individual federal officer who has committed the constitutional violation; (2) a *Bivens* suit allows for punitive damages, while the remedies offered by the FTCA do not; (3) a plaintiff invoking the FTCA remedies is not entitled to a trial by jury; and (4) a plaintiff attempting to invoke the remedies under the FTCA must prove that he would have standing to sue in the state where the particular misconduct occurred. *Id.* at 20–23.

⁶⁸ *Id.* at 21.

⁶⁹ *Id.* at 25.

B. Bivens as Constitutional Common Law

Despite the apparent simplicity of the doctrine—that a federal court can create a damages remedy for a plaintiff who has suffered a constitutional injury at the hands of a federal officer if the court has subject-matter jurisdiction to hear the case⁷⁰—*Bivens* has generated substantial debate over the extent to which the Constitution compels a federal court to fashion a remedy in damages for an otherwise remedy-less plaintiff.⁷¹ Indeed, a cursory reading of *Bivens*, *Davis*, and *Carlson* suggests that when a plaintiff lacks a constitutionally adequate remedy and a federal court has subject-matter jurisdiction to hear his claim, the Constitution in fact commands the federal courts to give the plaintiff some form of recourse.⁷² Therefore, when damages are

⁷⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring). Notably (despite being beyond the scope of this Comment), that statement presents an interesting question regarding the federal judiciary's role in regard to Congress within the system of separation of powers. In the context of a *Bivens* claim, the question can be phrased as the following: would a federal court have the power to hear a *Bivens* claim and imply a damages remedy for a constitutional violation committed by a federal officer if Congress has not provided the victim of the wrongdoing with a constitutionally adequate remedy and has also repealed § 1331? Perhaps an even more interesting question is whether *Bivens* can be read to give state courts the power to fashion freestanding constitutional remedies given that Congress does not have to create lower federal courts at all. Several scholars have discussed those and related questions. See generally Akhil Amar, *Five Views of Federalism: "Converse—1983" in Context*, 47 VAND. L. REV. 1229 (1994); Akhil Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse—1983*, 64 U. COLO. L. REV. 159 (1993); Dellinger, *supra* note 16; Nichol, *supra* note 16; Rosen, *supra* note 14; Joan Steinman, *Backing Off Bivens and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984).

⁷¹ Compare Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135–36 (1978) ("*Bivens* is a constitutional (not common law) decision. It is a constitutional decision, we believe, because it prevents the Fourth Amendment from being rendered a 'mere form of words' in the relevant sense of that phrase."), with George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 291 (1989) ("The view that *Bivens* is constitutional law in the sense of being compelled by the document itself, fairly interpreted, has attracted some academic support [I]t is a somewhat stretched reading of *Bivens* itself, let alone subsequent cases."), and Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28 (1975) (suggesting that the *Bivens* decision is an example of the Court's constitutional common-law powers). See also Nichol, *supra* note 16, at 1124.

⁷² *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, *must* be able invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional

the “ordinary” mode of vindication for the infringed right, federal courts have the duty to fashion that type of relief for the claimant.⁷³

But if this is so, then it is difficult to reconcile that understanding of the doctrine with the Court’s practice in determining whether a claimant has alternative remedies.⁷⁴ Why should a federal court care about other congressional remedies if the constitutional right in question demands a damages action when that right is violated? Even assuming that the purpose of this inquiry is to see if the claimant already has adequate recourse that makes added relief unnecessary,⁷⁵ the *Bivens* exceptions themselves cast doubt on the constitutional underpinnings of the doctrine. One way to account for the exceptions is to say that when neither applies to a particular case, *then* the Constitution compels a damages remedy for an individual with no alternative, adequate relief.⁷⁶ The Court, however, in later cases has implicitly rejected that approach because the Court has stated that a *Bivens* damages remedy must be the “best way to implement a constitutional guarantee” and “is not an automatic entitlement no matter what other means there may be to vindicate a protected interest.”⁷⁷ Thus, even if an individual has no other remedy and damages are “ordinary” for the asserted right that has been violated, a *Bivens* action may still not be the “best way” for a federal court to proceed.⁷⁸

Perhaps the one way to read *Bivens* and its two exceptions as a coherent rule is to consider it completely within the federal court’s

rights.”) (emphasis added); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (noting that “[t]he 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” (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803))).

⁷³ *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) (“[A] court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies.”) (emphasis added).

⁷⁴ See, e.g., *Davis*, 442 U.S. at 245 (noting that plaintiff had no alternative form of recourse).

⁷⁵ The claimant, however, unlikely would have adequate recourse because if the claimant has a congressionally created damages remedy at his disposal, he would have no need to bring the *Bivens* action in the first instance unless, as *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007), demonstrates, his congressional remedy in damages is directed against a federal agency rather than against a federal officer, and the plaintiff desires to collect from the officer personally.

⁷⁶ *Davis*, 442 U.S. at 242–45; *Bivens*, 403 U.S. at 397–98.

⁷⁷ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

⁷⁸ The Court has yet to address the question of whether the “best way” is code for “required by the constitutional right in question.” The Court likely would not hold that way, however, given the circular nature of that argument.

discretion to fashion a damages remedy for an alleged unconstitutional act committed by a federal officer.⁷⁹ Under this view of *Bivens*, the Constitution does not compel but, rather, merely permits federal courts to fashion adequate relief for a claimant who lacks it (assuming, of course, that the court has jurisdiction to entertain the claim).⁸⁰ Federal courts, in the view of Justice Harlan, use reasoned judgment to determine if a *Bivens* remedy is the “best way” to vindicate a constitutional right in a particular case.⁸¹ That necessarily involves balancing the individual’s need to obtain recompense against the concerns codified in the two *Bivens* exceptions, which generally touch on broader governmental and constitutional values.⁸² Clearly, the fact that a claimant has no remedy is material to this balancing of interests, but it may not be decisive.⁸³ Although the distinction between *Bivens* as a constitutional decision and *Bivens* as a “constitutional common law”⁸⁴ decision appears academic, it has been crucial to the Court’s understanding of and attitudes toward the doctrine in later cases.

III. THE EXCEPTIONS BECOME THE LAW: WHEN SPECIAL FACTORS PRECLUDE IMPLIED DAMAGES REMEDIES

In the twenty-eight years since *Carlson*, the Court has declined to extend *Bivens* to any new contexts⁸⁵ and has cautioned against fashioning a freestanding remedy in damages except in the narrowest circumstances.⁸⁶ A few current justices have even gone so far as to call

⁷⁹ See *Wilkie*, 127 S. Ct. at 2597; see also *Bivens*, 403 U.S. at 407 (Harlan, J., concurring).

⁸⁰ *Davis*, 442 U.S. at 252 (Powell, J., dissenting); Brown, *supra* note 71, at 291; Monaghan, *supra* note 71, at 28.

⁸¹ *Bivens*, 403 U.S. 407–08 (Harlan, J., concurring).

⁸² See, e.g., *id.*

⁸³ See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *United States v. Stanley*, 483 U.S. 669, 683 (1987); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983).

⁸⁴ This term was coined by Professor Monaghan in his influential article *The Supreme Court 1974 Term: Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

⁸⁵ In the past decade, the Supreme Court has only heard two *Bivens* cases and has declined to extend the doctrine in both instances. In *Malesko*, 534 U.S. at 68 (2001), the Court remarked that “[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.” Similarly, in *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604–05 (2007), the Court expressed great caution in implying a damages remedy for any unconstitutional act committed by a federal officer. *Id.* at 2597–98.

⁸⁶ See *Wilkie*, 127 S. Ct. at 2604–05; *Malesko*, 534 U.S. at 68; *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

an end to the practice of implying remedies for constitutional violations in all instances.⁸⁷ Federal circuit and district courts almost universally deny *Bivens* remedies, and federal officers rarely settle *Bivens*-style cases against them because of the low success rate of those cases.⁸⁸ What can explain the Court's near complete reversal in its attitude toward implied damages remedies against federal officers?

Since its inception, the *Bivens* doctrine has been rife with controversy.⁸⁹ The main criticism of *Bivens*, one which has resonated most loudly in the Court's recent decisions involving the doctrine, is that it undermines separation of powers.⁹⁰ Indeed, if the Constitution does not compel damages actions to vindicate a specific constitutional right (a supposition which the Court seems to have embraced in its most recent cases⁹¹), then it would appear that a federal court acting under its *Bivens* power judicially crafts substantive relief.⁹² Not only do federal courts lack the institutional competence to weigh competing policy considerations in fashioning remedies,⁹³ but any decisions that federal courts make regarding a federal officer's liability in damages necessarily impermissibly chills federal decision making.⁹⁴ Un-

⁸⁷ See *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring); see also *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition I would limit *Bivens* . . . to the precise circumstances that they involved.").

⁸⁸ See *supra* note 14.

⁸⁹ *Brown*, *supra* note 71, at 264–67.

⁹⁰ See, e.g., *Carlson v. Green*, 446 U.S. 14, 53–54 (1980) (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 253 (1979) (Powell, J., dissenting) (The Court must show "comity toward an equal and coordinate branch of government Even where the authority of one branch over a matter is not exclusive . . . we have recognized that the principle of separation of powers continues to have force as a matter of policy."); *Davis*, 442 U.S. at 249–50 (Burger, C.J., dissenting).

⁹¹ *Wilkie*, 127 S. Ct. at 2597–99; *Malesko*, 534 U.S. at 68–71; *FDIC v. Meyer*, 510 U.S. 471, 484–486 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 421–22 (1988); *United States v. Stanley*, 483 U.S. 669, 681 (1987); *Bush v. Lucas*, 462 U.S. 367, 388–90 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

⁹² *Bush*, 462 U.S. at 388–90; *Carlson*, 446 U.S. at 53–54 (Rehnquist, J. dissenting); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting) (arguing that the Court should not be making "judicial legislation" by implying a damages remedy when Congress had not provided one).

⁹³ See, e.g., *Chilicky*, 487 U.S. at 425–27; *Carlson*, 446 U.S. at 52–53 (Rehnquist, J., dissenting); *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting) (noting that Congress "has the facilities and competence" for the task of creating legislation and accompanying remedies).

⁹⁴ *Carlson*, 446 U.S. at 47 (Rehnquist, J., dissenting).

der this view of *Bivens*,⁹⁵ a federal court usurps Congress's prerogative to make laws, incidental to which is the power to create remedies.⁹⁶ Such separation-of-powers concerns therefore trump an individual's need for a remedy in damages in most, if not all, cases because the Constitution does not require such a remedy to exist in the first place.⁹⁷ Even if the Constitution gives federal courts the ability to create constitutional remedies, federal courts should not (and perhaps cannot) do so unless Congress has explicitly or implicitly reserved room for the courts to exercise that power.⁹⁸ In the absence of an express congressional declaration to preserve *Bivens*, separation of powers demands the federal courts' respect for congressionally created relief.⁹⁹

Most commentators have roundly criticized the Court for refusing to recognize the federal judiciary's duty to fashion relief for a re-

⁹⁵ On the other hand, if one views federal-court action as constitutionally mandated when a claimant has no remedy, then the dispute over *Bivens* takes on a greater constitutional dimension. At that level, the attack on *Bivens* as judicial lawmaking resonates with less clarity because a federal court is not "making" substantive law so much as it is *finding* that the Constitution requires a damages remedy that Congress has failed to provide. Rather, that disagreement over *Bivens* reflects a more fundamental disagreement about the constitutional justifications for permitting federal courts to create remedies based solely on their "inherent" powers when acting under a transient grant of statutory jurisdiction. That was the position taken by then-Justice Rehnquist in *Carlson*. According to Justice Rehnquist, a statutory grant of jurisdiction by Congress was insufficient authority for a federal court to create a damages remedy against a federal officer for the officer's unconstitutional behavior. *Id.* at 41. Interestingly, Rehnquist believed that a federal court had the power to fashion equitable relief based on a statutory grant of jurisdiction because federal courts historically wielded such power. *Id.* at 42–44. Justice Rehnquist later abandoned that view by the time the Court decided *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 66–67 (2001).

⁹⁶ When Congress expressly or implicitly exempts federal officers from damages actions, a federal court exacting *Bivens* relief is, in one sense, acting in contravention to what Congress deems appropriate (or rather inappropriate) relief for the alleged constitutional injury. *Davis v. Passman*, 442 U.S. 228, 249–50 (1979) (Burger, C.J., dissenting); *Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting); *see also* Nichol, *supra* note 16, at 1143.

⁹⁷ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597–600 (2007); *Malesko*, 534 U.S. at 69–70; *Bush v. Lucas*, 462 U.S. 367, 421–22 (1983).

⁹⁸ *Wilkie*, 127 S. Ct. at 2600 ("It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand . . ."); *Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

⁹⁹ *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (noting that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Court] ha[s] not created additional *Bivens* remedies").

remedy-less plaintiff.¹⁰⁰ They argue that if the Constitution does not compel the federal courts to find a remedy for a claimant who lacks one, then the judicial branch is relegated to a secondary role in the enforcement of constitutional norms.¹⁰¹ Congress would, in effect, dictate the mode of vindication regarding constitutional rights and tangentially control their interpretations.¹⁰² Further, even if the Constitution does not force the federal courts' hands when the courts are presented with a remedy-less plaintiff, the commentators attack as illogical the general hesitancy of those tribunals to fashion *Bivens* relief under the guise of judicial lawmaking.¹⁰³ The idea that Congress can fashion remedies is premised on Congress's power to enact legislation and create legal rights in the first instance.¹⁰⁴ But Congress does not create *constitutional rights*; those rights come from the People.¹⁰⁵ Thus, the demands for respecting separation of powers seem less pressing, even non-existent, in the case of constitutional remedies because the federal courts are giving effect to guarantees that are not the product of Congress.¹⁰⁶

Those arguments, however, have fallen mostly on deaf ears among the justices of the Court. In practice, the distaste for *Bivens* manifests itself in the federal courts' policy of deference toward statutory and administrative remedies.¹⁰⁷ The breadth of that deference has become so substantial that it is now assumed that statutory regimes foreclose *Bivens* relief unless Congress expressly intends to preserve it.¹⁰⁸ That is true even when the statutory remedy is either inadequate as compared to an implied damages remedy¹⁰⁹ or wholly unavailable to a particular claimant.¹¹⁰ The end result has been a

¹⁰⁰ Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 303–05 (1995); Brown, *supra* note 71, at 285–86; Nichol, *supra* note 16, at 1132; Rosen, *supra* note 14, at 337–40; Steinman, *supra* note 70, at 281.

¹⁰¹ Bandes, *supra* note 100, at 320–22; Nichol, *supra* note 16, at 1132.

¹⁰² Bandes, *supra* note 100, at 316; Brown, *supra* note 71, at 285–86.

¹⁰³ See Bandes, *supra* note 100, at 316 (arguing that “[e]ven under a rigidly separationist view of the Constitution, when considered in light of the core judicial role of giving meaning to constitutional values as a bulwark against government overreaching, judicial remedies are not merely legitimate, but crucial”); see also Brown, *supra* note 71, at 285–86; Steinman, *supra* note 70, at 295–96.

¹⁰⁴ Nichol, *supra* note 16, at 1129–30.

¹⁰⁵ U.S. CONST. pmbl.

¹⁰⁶ Brown, *supra* note 71, at 285–86; Steinman, *supra* note 70, at 281.

¹⁰⁷ See Bandes, *supra* note 100, at 294; Rosen, *supra* note 14, at 338.

¹⁰⁸ Brown, *supra* note 71, at 286.

¹⁰⁹ See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 426–27 (1988).

¹¹⁰ See, e.g., *United States v. Stanley*, 483 U.S. 669, 682 (1988); *Chappell v. Wallace*, 462 U.S. 296, 301–02 (1983).

near complete subversion of the *Bivens* doctrine through the use of its two exceptions.¹¹¹ As one commentator aptly put it, “*Bivens* contained the seeds of its own demise.”¹¹²

A. *The Bivens Exceptions: When Congress Expressly “Says So”*

Under *Bivens*, when Congress expressly declares one of its remedies to be the sole form of relief for a victim of an unconstitutional act, a federal court is incontestably precluded from implying an additional remedy in damages.¹¹³ For that exception to apply, Congress need not recite any special words or proclaim that a particular remedy excludes a *Bivens* damages remedy.¹¹⁴ If the legislative history or any other source evinces congressional intent to make a particular remedy the exclusive form of relief for a particular constitutional violation, an implied *Bivens* remedy cannot be sustained.¹¹⁵

Although the Court has reiterated that test in numerous cases,¹¹⁶ it has yet to find a law that satisfies the first *Bivens* exception.¹¹⁷ How directly Congress must speak to trigger the first exception is unclear, but the Court’s decisions indicate that only an express and unequivocal statement by Congress will preempt *Bivens*.¹¹⁸ Presumably, when Congress has in fact spoken, the Court’s role is solely to determine whether the congressional relief is nonetheless constitutionally adequate to vindicate the underlying right.¹¹⁹

B. *The Bivens Exceptions: When Special Factors Counsel Hesitation*

The special-factors exception is the main vehicle that the Court uses to defeat attempts at resurrecting *Bivens*, and that exception is

¹¹¹ Brown, *supra* note 71, at 264–66.

¹¹² Bandes, *supra* note 100, at 291.

¹¹³ See Nichol, *supra* note 16, at 1143.

¹¹⁴ Carlson v. Green, 446 U.S. 14, 20 n.5 (1980).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *id.* at 19; Davis v. Passman, 442 U.S. 228, 247 (1979).

¹¹⁷ See, e.g., Bush v. Lucas, 462 U.S. 367, 378 (1983); Carlson, 446 U.S. at 22–24.

¹¹⁸ Carlson, 446 U.S. at 20 n.5.

¹¹⁹ That is because without a finding of constitutional adequacy by the Court, the remedy would not serve its purpose of vindicating the underlying constitutional right. If the Court were to approve a remedy that did not pass constitutional muster, significant due process concerns would ensue for the victim of the act and separation-of-powers concerns would also arise. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). Commentators agree that the Court must at least ensure that congressional remedies meet certain minimum criteria. Dellinger, *supra* note 16, at 1549; Nichol, *supra* note 16, at 1143; Steinman, *supra* note 70, at 281.

rooted in the belief that a *Bivens* remedy offends “bedrock principles of separation of powers.”¹²⁰ The clearest examples of that exception involve claimed constitutional violations arising out of federal activities, such as military service, where the Constitution expressly gives another branch of government near complete authority or control.¹²¹ In such cases, a federal court using its *Bivens* power is ostensibly acting without constitutional authority to do so.¹²² Where there is no direct constitutional provision justifying *Bivens* preclusion, the affront to “bedrock principles” manifests itself most commonly in a federal court’s failure to show comity toward congressional decisions regarding federal-officer liability.¹²³ At least when Congress has created a statutory scheme, the design of which implies an intent to exclude federal officers from damages for violations of that statute, the concerns over *Bivens* as sounding in judicial lawmaking resonate with particular clarity.¹²⁴ In other situations, the offense is more subtle and arises out of concern over the federal judiciary’s competency to weigh competing policy concerns when asked to extend *Bivens* liability beyond the unconstitutional acts of federal officers.¹²⁵ Regardless of the reasoning used by a federal court, however, the special factors exception has clearly proven to be an incredibly malleable standard that has been used by courts to avoid fashioning an implied damages remedy in almost all contexts.¹²⁶

1. Special Factors: Constitutional Violations Incidental to Federal Military Service

The criticism that *Bivens* steps beyond the parameters of separation of powers is most vividly apparent when federal courts are asked to imply a damages remedy for constitutional injuries arising out of a claimant’s military service.¹²⁷ Article I, Section 8 of the Constitution states that Congress has the power to “make rules for the Govern-

¹²⁰ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001).

¹²¹ *See, e.g.*, *United States v. Stanley*, 483 U.S. 669, 684 (1987).

¹²² *Id.* at 682–84.

¹²³ *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

¹²⁴ *Id.*

¹²⁵ *Malesko*, 534 U.S. at 70–71; *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

¹²⁶ *See, e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604–05 (2007) (holding that the “serious difficulty of devising a workable cause of action” amounted to a special factor for precluding *Bivens* liability); *Meyer*, 510 U.S. at 486 (holding, in part, that a *Bivens* action directly against a federal agency amounted to a special factor because of the “potentially enormous financial burden for the Federal Government”).

¹²⁷ *United States v. Stanley*, 483 U.S. 669, 684 (1987).

ment and Regulation of the land and naval Force”¹²⁸ When a federal court implies a damages remedy against a military officer, the court gives the claimant substantive relief in the absence of congressional authorization.¹²⁹ That would seem to directly flout Article I’s language, which calls on Congress to make those types of liability decisions involving military officers.¹³⁰ Recognizing this conflict, the Court has ruled that federal courts cannot fashion *Bivens* relief in that area.¹³¹ Rather, a court’s duty is merely to ensure that adequate remedies are on the books to redress a plaintiff’s injury.¹³² Whether the claimant can actually obtain recompense under those schemes is of no consequence.¹³³

*Chappell v. Wallace*¹³⁴ illustrates that point. In *Chappell*, the plaintiffs were naval servicemen who were discriminated against on account of their race, and they sued their commanding officers on the basis of equal-protection violations.¹³⁵ The plaintiffs attempted to hold their superiors liable under the Uniform Code of Military Justice (UCMJ);¹³⁶ however, the UCMJ required that other superior officers bring forth the plaintiffs’ claims before a military tribunal.¹³⁷ After no such superior officer asserted the plaintiffs’ claims, the

¹²⁸ U.S. CONST. art. I, § 8, cl. 14.

¹²⁹ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

¹³⁰ *Id.* at 301–04.

¹³¹ *Stanley*, 483 U.S. at 682.

¹³² *Chappell*, 462 U.S. at 304.

¹³³ *Stanley*, 483 U.S. at 706 (Brennan, J., dissenting) (noting that “no intramilitary system” existed that provided the plaintiff with a remedy for his constitutional injury).

¹³⁴ 462 U.S. 296 (1983).

¹³⁵ *Id.* at 297. Specifically, the plaintiffs claimed that their commanding officers had denied them promotions and exacted harsher penalties on them because of their race. *Id.*

¹³⁶ 10 U.S.C. § 938 (1976).

¹³⁷ In pertinent part, the UCMJ states the following:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Id. § 938, art. 138.

plaintiffs petitioned the Court to provide them with a remedy in damages because they had no alternative recourse.¹³⁸

In rejecting the plaintiffs' *Bivens* claim, the Court stated that the Constitution gave Congress near "plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies related to military discipline."¹³⁹ Acting pursuant to that power, Congress created the UCMJ and the Board for the Correction of Naval Records, both of which, according to the Court, adequately addressed the plaintiffs' claimed injuries.¹⁴⁰ A *Bivens* remedy, the Court wrote, would make federal officers liable in damages when Congress had not provided for such liability in either of its remedial statutes. The mere threat of liability would have the undesirable consequence of chilling "decisive action" on the part of commanding officers and the "disciplined response" of their subordinates.¹⁴¹ That, in turn, would significantly alter "the unique disciplinary structure of the [m]ilitary" that Congress had created and undermine Article I's directive for Congress to make regulations regarding the military.¹⁴² Further, even if Article I could somehow be read to permit the Court to fashion relief for the plaintiffs in this case, the Court stated that it would not do so because it could not "conceive of an area of government activity in which the courts have less competence."¹⁴³ Thus, the Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."¹⁴⁴

¹³⁸ *Chappell*, 462 U.S. at 297–98. The plaintiffs also asked the Court to provide them with injunctive relief. *Id.*

¹³⁹ *Id.* at 301.

¹⁴⁰ *Id.* at 302–03. The Board for the Correction of Naval Records provides another method by which a member of the military "may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice." *Id.* at 303 (quoting 10 U.S.C. § 1552(a) (1976)). The Board has the discretion to promote the officer whose rights have been violated or provide him with back pay. § 1552(a)(2), (c). Further, a federal court can review and set aside any decision by the Board where evidence exists that shows that the Board's decision is arbitrary, capricious, or not based on substantial facts. *See Grieg v. United States*, 640 F.2d 1261, 1268 (Ct. Cl. 1981).

¹⁴¹ *Chappell*, 462 U.S. at 304. Specifically, the Court remarked that a commanding officer's "decisive action" and a subordinate's "disciplined response" would both be undermined if the commanding officer were exposed to a judicially created damages remedy for his actions. *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 302 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

¹⁴⁴ *Id.* at 305.

In *United States v. Stanley*,¹⁴⁵ the Court extended the reasoning of *Chappell* by foreclosing *Bivens* actions altogether in the context of military service.¹⁴⁶ The plaintiff in *Stanley* was an officer in the U.S. Army who was subject to a series of experiments by military scientists without his knowledge and in contravention of his Fifth Amendment rights.¹⁴⁷ Premising liability under *Bivens*, the plaintiff argued that *Chappell* was distinguishable from his case on the ground that *Chappell* involved constitutional misconduct by the plaintiffs' *commanding officers*, and in the plaintiff's case, the misconduct came at the hands of officers with no superior relationship to him.¹⁴⁸ Because of that distinction, the plaintiff argued that he could not invoke intra-military remedies, such as the UCMJ, and, therefore, had no alternative recourse.¹⁴⁹ The plaintiff also argued that the "unique disciplinary structure" of the military was not implicated in his case, as it was in *Chappell*, because the defendants' acts were not incidental to the plaintiff's service.¹⁵⁰

The Court found both of the plaintiff's arguments unavailing. The officer-subordinate relationship, according to the Court, was not crucial to the holding of *Chappell*.¹⁵¹ The Court in *Chappell* refrained from crafting an implied damages remedy based on Article I's mandate "for Congress 'to make Rules for the Government and Regulation of the land and naval Forces.'"¹⁵² Thus, any *Bivens* remedy for injuries arising out of one's service would necessarily disrupt the "military regime" and undermine Congress's constitutional authority in that area.¹⁵³ Flatly rejecting the plaintiff's other argument that his constitutional injuries were not incidental to his service,¹⁵⁴ the Court found the case indistinguishable from *Chappell*. Accordingly, the

¹⁴⁵ 483 U.S. 669 (1987).

¹⁴⁶ *Id.* at 675–76.

¹⁴⁷ *Id.* at 671–72. The plaintiff was told by officers that the experiment would test the durability of newly issued military clothing and equipment against chemical attacks. *Id.* In reality, however, the experiment was designed to test the effects of lysergic acid diethylamide (LSD) on the human body. *Id.* Throughout the month-long experiment, the officers periodically administered doses of LSD to the plaintiff while he slept. *Id.* The plaintiff first learned of the actual objectives of the experiment seventeen years later when the military sent him a letter asking him to come back for follow-up studies. *Id.*

¹⁴⁸ *Id.* at 679.

¹⁴⁹ *Id.* at 683.

¹⁵⁰ *Id.* at 679–80.

¹⁵¹ *Stanley*, 483 U.S. at 680–81.

¹⁵² *Id.* at 682 (quoting U.S. CONST. art. I, § 8, cl. 14).

¹⁵³ *Id.* at 682–83.

¹⁵⁴ *Id.* at 680–81.

Court considered it “irrelevant to a ‘special factors’ analysis whether the laws currently on the books afford[ed]” the plaintiff complete relief to redress his injuries,¹⁵⁵ and the Court suggested that Congress would have to decide whether to give recourse to officers “whenever the injury arises out of activity ‘incidental to service.’”¹⁵⁶

2. Special Factors: Upsetting a Comprehensive Congressional Statute

Offense to the foundations of separation of powers also occurs where federal courts are asked to augment the remedies found in a comprehensive congressional statute with *Bivens* relief.¹⁵⁷ Congress has the obligation and duty to legislate and fashion substantive laws and the tangential power to create remedies.¹⁵⁸ The Constitution gives Congress that power, in part, because Congress is accountable to the people and is therefore competent to weigh multiple factors and make complex policy decisions.¹⁵⁹ In light of those concerns, the Court has directed the federal tribunals to refrain from invoking *Bivens* when the “design” of a statutory scheme suggests that Congress’s failure to include damages against federal officers as a possible remedy is not inadvertent.¹⁶⁰ The crucial factor triggering that *Bivens* exception relates to the statute’s comprehensiveness—both in terms of its breadth in regulating a field of federal activity and the remedies it offers for its violation.¹⁶¹

¹⁵⁵ *Id.* at 683.

¹⁵⁶ *Id.* at 684.

¹⁵⁷ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007) (asking whether there is “any alternative, existing process for protecting the [constitutional] interest [that] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages” (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983))); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

¹⁵⁸ *Davis v. Passman*, 442 U.S. 228, 249–50 (1979) (Burger, C.J., dissenting); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411–12 (1971) (Burger, C.J., dissenting); see also *Nichol*, *supra* note 16, at 1143.

¹⁵⁹ That is because a federal tribunal is limited to hearing and resolving only certain “cases” and “controversies” actually before the tribunal. See U.S. CONST. art. III. Indeed, Congress is the body generally charged with making those decisions and finding consensus amongst conflicting viewpoints. See, e.g., *Chilicky*, 487 U.S. at 425–27; *Carlson v. Green*, 446 U.S. 14, 52–53 (1980) (Rehnquist, J., dissenting); *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting) (noting that Congress “has the facilities and competence” for the task of creating legislation and accompanying remedies).

¹⁶⁰ *Chilicky*, 487 U.S. at 423.

¹⁶¹ *Id.* at 423–27.

In *Bush v. Lucas*,¹⁶² the Court first invoked the special factors exception to deny *Bivens* relief because of the existence of a comprehensive statutory regime.¹⁶³ Bush, an employee of the National Aeronautics and Space Administration (NASA), was demoted by his superiors because he told reporters that his job was worthless and a waste of taxpayer dollars.¹⁶⁴ Claiming that he suffered retaliation for speaking his mind, Bush invoked his statutory right under the Civil Service Act to challenge his demotion as unlawful before the Federal Employee Appeals Authority (FEAA).¹⁶⁵ The FEAA found no retaliatory firing, and Bush asked the Appeals Review Board of the Civil Service Commission to rehear his claims.¹⁶⁶ While the appeal was pending, Bush filed suit in state court (later removed to federal district court), premising liability against his supervisors under *Bivens*.¹⁶⁷ Arguing that the statutory remedies were incomplete because they did not authorize money damages against his superiors, Bush claimed that *Bivens* relief was necessary to fully redress his constitutional injury.¹⁶⁸

¹⁶² 462 U.S. 367 (1983).

¹⁶³ *Id.* at 367–68.

¹⁶⁴ *Id.* at 369.

¹⁶⁵ *Id.* at 369–70. Under the version of the Civil Service Act in place at the time of Bush's demotion, federal employees had the right to challenge any removal or demotion that was not made for reasons of efficiency. 5 U.S.C. §§ 7501(a), 7512(a) (1976); Exec. Order No. 10,988, § 14, 27 Fed. Reg. 551, 556 (Jan. 17, 1962); Exec. Order No. 11,491, § 22, 34 Fed. Reg. 17,605, 17,614 (Oct. 29, 1969). Under that hodgepodge of rules and regulations, the federal agency pursuing the demotion was required to give to the employee thirty-days notice of the adverse action and the reasons for the demotion. 5 C.F.R. § 752.202(a) (1975). The employee, in turn, had the right to answer the charges, make sworn statements, and examine the evidence upon which the agency relied for the demotion. § 752.202(b). The agency had the ultimate discretion in deciding whether to provide an evidentiary hearing. 5 U.S.C. § 7501(b) (1976); 5 U.S.C. § 7513(c) (Supp. V 1976); 5 C.F.R. § 752.404(g) (1983). The final decision regarding the employee's demotion was placed in the hands of an officer in that agency who was of higher rank than the official who suggested the demotion. 5 C.F.R. § 752.202(f) (1975). The employee had the right to appeal that decision to the FEAA. §§ 752.203, 772.101. On appeal, the FEAA, acting like a trial court, would conduct an evidentiary hearing, and the employee had the right to bring forth and cross-examine witnesses. § 772.307(c). The employee further had the right to judicial review of any adverse decision made by the FEAA, 5 U.S.C. § 7703 (Supp. V 1976), and could also ask the Civil Service Commission's Appeals Review Board to reopen his case, 5 C.F.R. § 772.310 (1975). The burdens of proof and persuasion were placed on the federal agency to show that it had sufficient cause for the demotion. *Bush v. Lucas*, 462 U.S. 367, 385–88 nn.26–35 (1983).

¹⁶⁶ *Bush*, 462 U.S. at 370. Ultimately, the Appeals Review Board concluded that Bush's demotion was unlawful and that Bush was entitled to \$30,000 in back pay. *Id.*

¹⁶⁷ *Id.* at 371.

¹⁶⁸ *Id.* at 372.

At the outset, the Court found no express or implied congressional intent that the remedies in the Civil Service Act were meant to be exclusive.¹⁶⁹ Thus, the case turned on whether “special factors” counseled against a new remedy in damages for Bush. The Court clarified that that exception required a federal court to “make the kind of remedial determination that is appropriate for a common-law tribunal . . . before authorizing a new kind of federal litigation.”¹⁷⁰ That “remedial determination,” the Court wrote, amounted to reasoned judicial discretion involving a balancing of the claimant’s need for damages against broader governmental and separation-of-powers concerns.¹⁷¹

The Court found the existence of special factors for interrelated reasons. Crucial to the Court’s analysis was the fact that Bush could obtain back pay and reinstatement of his position under the Civil Service Act, and although those remedies were incomplete, the remedies were nonetheless constitutionally adequate to vindicate his Free Speech right.¹⁷² As such, an implied damages remedy was not Bush’s only source of recourse, as in *Bivens* and *Davis*, and the Civil Service remedies were not ineffective in securing his constitutional rights, as in *Carlson*.¹⁷³ According to the Court, that meant that Bush was simply asking for more relief than Congress had provided.¹⁷⁴

On the other hand, the Court viewed the Civil Service Act as a comprehensive statutory scheme that provided “meaningful” recourse to federal employees.¹⁷⁵ Indeed, the Court catalogued the history of the statute to emphasize that throughout the years Congress had carefully constructed the most appropriate remedies for misbehavior in the context of federal employment.¹⁷⁶ The fact that Congress excluded money damages as a possible remedy for someone in

¹⁶⁹ *Id.* at 378.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 378–80.

¹⁷² *Bush*, 462 U.S. at 379 n.14. Presumably, when the Court declared that the remedies under the Civil Service Act were constitutionally adequate, the Court meant that the remedies provided a certain minimum level of relief to the victim to compensate him for his injuries, and that the remedies have a deterrent effect upon the wrongdoer. Without the direct relief to the victim or the deterrent effect on the wrongdoer, the violated right would not be respected or protected from further invasion.

¹⁷³ *Id.* at 388.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 386.

¹⁷⁶ *Id.* at 381–88.

Bush's position, the Court wrote, was therefore not likely inadvertent.¹⁷⁷

Because of those reasons, the Court stated that

[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.¹⁷⁸

In answering that question in the negative, the Court wrote that because of Congress's historical and institutional capacity to make those types of policy decisions, it was up to Congress "to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."¹⁷⁹ Accordingly, the Court concluded that it would not augment the Civil Service Act with a new remedy in damages for Bush simply to give him complete relief.¹⁸⁰

In *Schweiker v. Chilicky*,¹⁸¹ the Court again denied *Bivens* relief, but this time the Court based the denial on the existence of a federal benefits program.¹⁸² In *Chilicky*, the plaintiffs' disability benefits under Title II of the Social Security Act were terminated because state authorities administering the program determined that the plaintiffs' various disabilities no longer existed.¹⁸³ As per their statutory right under the Act, the plaintiffs challenged those decisions before an administrative law judge and succeeded in restoring their previously denied benefits.¹⁸⁴ The plaintiffs then sued the federal officers who

¹⁷⁷ *Id.* at 388–89.

¹⁷⁸ *Bush*, 462 U.S. at 388.

¹⁷⁹ *Id.* at 389.

¹⁸⁰ *Id.* at 388–90.

¹⁸¹ 487 U.S. 412 (1988).

¹⁸² *Id.* at 428–29.

¹⁸³ *Id.* at 417. Title II of the Social Security Act allows individuals to receive disability benefits if both of the following requirements are met: (1) the individual has paid into the social security program for a certain number of years; and (2) the individual has a recognized physical or mental disability that prohibits the individual from being gainfully employed. 42 U.S.C. § 423(a), (d) (Supp. IV 1982). Under Title II, designated state welfare agencies coordinate the program at the state level and provide benefits to disabled individuals who meet the above criteria so long as their disability persists. *Id.* §§ 421(a), 423(a)(1). To determine whether a disability persists, the Social Security Administration is required to review a beneficiary's disability status every three years. *Id.* § 421(i).

¹⁸⁴ *Chilicky*, 487 U.S. at 417. A Title II beneficiary who fails to carry his burden of proof before a continuing disability review board and loses his benefits is permitted to appeal that decision to an administrative law judge. *See* 42 U.S.C. § 421(d) (Supp.

designed the disability review system, claiming that the entire review procedure had violated their due process rights and that that, in turn, had caused the denial of their benefits.¹⁸⁵ The plaintiffs argued that a *Bivens* remedy was necessary because having their benefits restored after months of delay, which was the only remedy to which they were entitled under Title II, was wholly inadequate to protect their due process rights.¹⁸⁶ Alternatively, the plaintiffs claimed that the restoration of their benefits addressed the *statutory* violations of Title II but left them with no redress for their constitutional injuries.¹⁸⁷

The issue again before the Court was whether any special factors weighed against the creation of a new remedy in damages.¹⁸⁸ Similar to *Bush*, the Court noted that the plaintiffs in this case could, and did, avail themselves of an alternative and adequate remedial process—Title II—to vindicate their constitutional rights.¹⁸⁹ The case therefore came down to whether the Court should augment the constitutionally sufficient Title II remedies, though lacking in a damages action against federal officers, with *Bivens* relief to make the plaintiffs whole.¹⁹⁰ The Court cautioned against doing so and stated that the special factors exception

has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.¹⁹¹

IV 1982); 20 C.F.R. §§ 404.929–404.965 (1987). At the time that this case was before the Court, individuals who lost their benefits were not entitled to receive any payments while their appeal was pending before the administrative law judge. *Chilicky*, 487 U.S. at 415–17. Further, Title II beneficiaries were not entitled to any judicial review by Article III courts for violations of any of the provisions of the Social Security statute. *Id.*

¹⁸⁵ *Chilicky*, 487 U.S. at 418–19.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 418–20, 427. The plaintiffs alleged that, as a result of their constitutional injuries, they suffered severe emotional distress as well as loss of food and shelter. *Id.* at 419.

¹⁸⁸ *Id.* at 422–23.

¹⁸⁹ *Id.* at 425. With little discussion, the Court stated that the restoration of benefits was “meaningful” and considerably more elaborate than the remedies at issue in *Bush*. *Id.* Thus, the restoration of benefits was sufficient to vindicate the plaintiffs’ due process rights even though that remedy had resulted in months of delay and unjustified hardship. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Chilicky*, 487 U.S. at 423.

In concluding that Title II's exclusion of damages against federal officers was not inadvertent, the Court emphasized the comprehensive nature of the statute (the Social Security Act "affect[ed] virtually every American") and the fact that it provided "an unusually protective [multi]-step process for the review and adjudication of" most violations of the statute, including the plaintiffs' claims.¹⁹² The Court wrote that Congress likely chose not to make Title II officers liable in damages because of the resulting "difficulties and expense in recruiting administrators for the [Title II] programs."¹⁹³ Any implied damages remedy, the Court stated, would therefore undermine Congress's decision to exempt Title II officers from the same.¹⁹⁴

As to the plaintiffs' argument that the Title II remedies only addressed their statutory injuries, the Court found "no distinction between compensation for a 'constitutional wrong' and the restoration of statutory rights that ha[ve] been unconstitutionally taken away."¹⁹⁵ The Court continued by stating that "statutory violations caused by unconstitutional conduct" do not "necessarily require remedies in addition to the remedies provided generally for such statutory violations."¹⁹⁶ Consequently, the Court ruled that special factors—including the existence of a comprehensive statutory scheme—precluded it from implying a new remedy in damages.¹⁹⁷

During the 2007 term, the Court again struck down *Bivens* relief for a claimant where statutory remedies were available even though the Court found that the statutory remedies lacked any inference of *Bivens* preclusion. In *Wilkie v. Robbins*,¹⁹⁸ the plaintiff, Frank Robbins, purchased land in Wyoming subject to a right-of-way easement held by the Federal Bureau of Land Management (BLM).¹⁹⁹ When Robbins took title to the land, however, BLM failed to rerecord its easement, thereby extinguishing its claim on the premises.²⁰⁰ After failing to convince Robbins to regrant the property interest, BLM employees engaged in a series of direct and covert tactics designed to force Robbins into submission.²⁰¹ Over the course of six years, BLM em-

¹⁹² *Id.* at 424 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

¹⁹³ *Id.* at 425.

¹⁹⁴ *Id.* at 425–26.

¹⁹⁵ *Id.* at 427.

¹⁹⁶ *Id.*

¹⁹⁷ *Chilicky*, 487 U.S. at 428.

¹⁹⁸ 127 S. Ct. 2588 (2007).

¹⁹⁹ *Id.* at 2593.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 2593–94.

ployees denied permits to Robbins, did not inform him of administrative review procedures, purposefully trespassed on Robbins's lands, instigated and incited animosity between Robbins and his neighbors, broke into Robbins's house to find evidence of possible permit violations, and secretly videotaped Robbins and the guests at his resort.²⁰² Robbins eventually sued several BLM officials under *Bivens*, claiming that the officers were retaliating against him for exercising his Fifth Amendment right to property by keeping the government off his lands.²⁰³

The Court began by noting that for each specific act of wrongdoing, Robbins had numerous ways to adequately redress his injuries, including state trespassing laws, administrative review procedures to challenge the denial of permits, and tort-based remedies for illegal invasion.²⁰⁴ At the same time, however, the Court stated that this "patchwork" of relief was significantly different from the remedial mechanisms that the Court found sufficient to preclude *Bivens* relief in *Bush* and *Chilicky*.²⁰⁵ Unlike *Bush* and *Chilicky*, where the comprehensiveness of the statutory regimes evidenced a congressional intent to exclude damages as a possible remedy,²⁰⁶ the Court noted that no comprehensive statute addressed Robbins's claims.²⁰⁷ Instead, the "assemblage" of remedies available to Robbins required him to go before numerous state and federal forums and expend a considerable amount of time and money to redress his injuries.²⁰⁸ The Court concluded that Robbins's available relief neither raised the inference nor indicated that Congress intended to stay the Court's "*Bivens* hand."²⁰⁹

But that did not end the Court's inquiry. According to the Court, Robbins was not entitled to *Bivens* relief simply because he had established that no congressional scheme existed that evidenced an intent to foreclose *Bivens* relief.²¹⁰ Instead, the Court wrote, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter

²⁰² *Id.* at 2594–96.

²⁰³ *Id.* at 2596–97.

²⁰⁴ *Wilkie*, 127 S. Ct. at 2598–99.

²⁰⁵ *Id.* at 2600.

²⁰⁶ *Schweiker v. Chilicky*, 487 U.S. 412, 424–26 (1988); *Bush v. Lucas*, 462 U.S. 367, 381–88 (1983).

²⁰⁷ *Wilkie*, 127 S. Ct. at 2600.

²⁰⁸ *Id.* at 2600–01.

²⁰⁹ *Id.* at 2600.

²¹⁰ *Id.*

what other means there may be to vindicate a protected interest.”²¹¹ The Court continued by stating that the majority of the time, “*Bivens* relief is not the ‘best way’ to protect a constitutional right.”²¹² In fact, the Court noted only two circumstances where it had found *Bivens* relief justified—for a plaintiff who had no other remedy and for a plaintiff who lacked effective alternative relief to vindicate the constitutional right at issue.²¹³ Robbins did not fall into either one of those categories.²¹⁴ The Court, therefore, would have to rely on reasoned judgment to determine whether any other reasons suggested denying a damages remedy for Robbins against the BLM officials.²¹⁵

Ultimately, the Court denied Robbins any *Bivens* relief because of the “difficulty in defining a workable cause of action.”²¹⁶ The Court’s prior Fifth Amendment retaliation cases premised liability upon a finding of improper purpose or motive.²¹⁷ Here, the Court wrote, BLM officials had a proper purpose in harassing Robbins: “as a landowner, the Government may have, and in this instance does have, a valid interest in getting access to neighboring lands.”²¹⁸ For Robbins to show that BLM officers deprived him of his constitutional rights, the Court would have to significantly alter its Fifth Amendment retaliation jurisprudence.²¹⁹ The Court declined to do so because it could not define the parameters of that proposed cause of action, and the Court left it to Congress “‘to evaluate the impact of a new species of litigation’ against” public officials.²²⁰

²¹¹ *Id.* at 2597.

²¹² *Id.*

²¹³ *Wilkie*, 127 S. Ct. at 2600.

²¹⁴ *Id.* at 2597–98.

²¹⁵ *Id.* at 2600.

²¹⁶ *Id.* at 2601.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Wilkie*, 127 S. Ct. at 2601–02. For a concise overview of the Court’s retaliation jurisprudence, see generally *Bd. of County Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996) (holding that an employee who was fired for discussing a topic of public interest must show “that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination”); *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that the government may not retaliate against an individual who exercises his right to Free Speech); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (prohibiting government retaliation for exercising one’s Fifth Amendment right against self-incrimination).

²²⁰ *Wilkie*, 127 S. Ct. at 2605 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)).

3. Special Factors: Extending *Bivens* Liability Beyond Federal Officers

The federal courts' hesitancy to embrace *Bivens* relief under the special-factors exception also stems from the courts' own perceived incompetence or impotency to make the considered and multifaceted policy decisions that a damages action against federal actors generally entails.²²¹ As noted in *Carlson*, one of the justifications for the *Bivens* doctrine is that it deters federal officers from acting unconstitutionally.²²² When plaintiffs ask the federal courts to extend *Bivens* actions against a new set of defendants, this institutional incompetence takes center stage.²²³ Such policy decisions are generally deemed to be Congress's prerogative and, thus, the Court has met with hostility any attempt to extend *Bivens* beyond its core purpose.²²⁴ Instead, the Court has instructed the federal tribunals to let Congress establish liability against federal entities for their unlawful acts.²²⁵

In *Federal Deposit Insurance Corporation v. Meyer*,²²⁶ the Court declined to extend *Bivens* to claimed constitutional violations committed by federal agencies. In that case, the plaintiff, John Meyer, was a senior manager of a California bank.²²⁷ When the bank became financially insolvent, the Federal Home Loan Bank Board directed the Federal Savings and Loan Insurance Corporation (FSLIC) to act as the bank's receiver under federal law.²²⁸ The FSLIC hired a special representative to direct the bank's operations and, through that representative, fired Meyer.²²⁹ Meyer then sued the representative and the FSLIC based on his assertion that they unlawfully denied him his

²²¹ See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 425–27 (1988); *Carlson v. Green*, 446 U.S. 14, 52–53 (1980) (Rehnquist, J., dissenting); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting) (noting that Congress “has the facilities and competence” for the task of creating legislation and accompanying remedies).

²²² *Carlson*, 446 U.S. at 21.

²²³ See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (noting that “decisions involving ‘federal fiscal policy’ [by extending *Bivens* liability] are not [the Court’s] to make”) (internal quotation omitted).

²²⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

²²⁵ *Id.* at 72.

²²⁶ 510 U.S. 471 (1994).

²²⁷ *Id.* at 473.

²²⁸ *Id.* As receiver, the FSLIC had the power to “take such action as may be necessary to put [the bank] in a sound solvent condition.” *Id.* (quoting National Housing Act, ch. 847, 48 Stat. 1259 (codified as amended at 12 U.S.C. § 1729(b)(1)(A)(ii) (1934)) (repealed 1989)).

²²⁹ *Id.*

“property right . . . to continued employment” at the bank.²³⁰ A jury found the FSLIC liable under *Bivens* but denied relief against the special representative on qualified immunity grounds.²³¹

After determining that the FSLIC waived its sovereign immunity, the Court expressed doubt about permitting a *Bivens* remedy to stand against a federal agency.²³² The Court stated that it created a freestanding damages remedy in *Bivens* “in part *because* a direct action against the Government was not available.”²³³ Meyer had other ways to exact relief from the FSLIC based in administrative and contractual law,²³⁴ but Meyer chose not to invoke them because he would have had difficulty overcoming the defendant’s qualified-immunity defense.²³⁵ But issues of immunity, the Court explained, do not factor into its analysis of whether to sustain a *Bivens* claim.²³⁶ Rather, that decision depends entirely upon reasoned judgment unaffected by whether a particular defendant is judgment proof.²³⁷

The Court then went on to reject the plaintiff’s *Bivens* claim against the FSLIC because a damages action against a federal agency would “viscerat[e] . . . the *Bivens* remedy rather than [amount to] its extension.”²³⁸ The Court reasoned that, to get around immunity problems, any plaintiff, given the choice between suing a federal agency or a federal officer under *Bivens*, would always seek to hold the agency liable over the officer.²³⁹ If that were to happen, “the deterrent effects of the *Bivens* remedy would be lost.”²⁴⁰ The Court also remarked that an implied damages remedy was inappropriate because it would create “a potentially enormous financial burden for the Federal Government.”²⁴¹ Because Congress normally made decisions regarding “federal fiscal policy,” the Court determined that

²³⁰ *Id.* at 474.

²³¹ *Id.* at 473–74.

²³² *Meyer*, 510 U.S. at 484.

²³³ *Id.* at 485 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

²³⁴ *Id.* at 485 n.10.

²³⁵ *Id.* at 485.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Meyer*, 510 U.S. at 485.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 486.

Congress must also decide whether to extend *Bivens* liability against federal agencies.²⁴²

In *Correctional Services Corporation v. Malesko*,²⁴³ the Court reiterated that *Bivens* liability does not extend beyond the unconstitutional acts of federal officers.²⁴⁴ In that case, the plaintiff, a federal prisoner, sued Correctional Services Corporation (“Corporation”), a private entity, for injuries he suffered because of the negligence of the Corporation’s employees.²⁴⁵ Although administrative remedies were available,²⁴⁶ the plaintiff instead alleged an Eighth Amendment violation against and sought monetary relief under *Bivens* from the Corporation and its negligent employees.²⁴⁷ The plaintiff argued that because the Corporation was acting under the color of federal law in operating the correctional facility,²⁴⁸ the deterrent purposes of *Bivens* would be served.²⁴⁹

The Court held that private entities acting under the color of federal law cannot be liable under *Bivens* for monetary damages.²⁵⁰ Relying heavily on *Meyer*, the Court stated that *Bivens* “is concerned solely with deterring the unconstitutional acts of individual officers.”²⁵¹ And as individual officers would likely be judgment proof, extending *Bivens* liability to private entities, according to the Court, lacked any deterrent effect at all because a plaintiff would go after the private entity rather than the individual officers responsible.²⁵² Reiterating that issues of immunity played no role in deciding whether to

²⁴² *Id.* (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1947)).

²⁴³ 534 U.S. 61 (2001).

²⁴⁴ *Id.* at 73.

²⁴⁵ *Id.* at 64. The plaintiff suffered from a heart condition that prevented him from overexerting himself. *Id.* Although aware of the plaintiff’s debilitating disease, the Corporation nonetheless placed the plaintiff in a fifth-floor room of the facility. *Id.* When one of the Corporation’s employees forced the plaintiff to take the stairs to his room instead of using the elevator, the plaintiff suffered a heart attack, fell down the stairs, and was injured. *Id.*

²⁴⁶ *Id.* at 72–74. The Court noted that Malesko had numerous alternative remedies at his disposal that were “at least as great, and in many respects greater, than anything that could be had under *Bivens*.” *Id.*

²⁴⁷ *Id.* at 64–65.

²⁴⁸ *Id.* at 64.

²⁴⁹ *Malesko*, 534 U.S. at 64. The plaintiff sought compensatory and punitive damages. *Id.* at 65.

²⁵⁰ *Id.* at 74.

²⁵¹ *Id.* at 71.

²⁵² *Id.*

sustain a *Bivens* claim,²⁵³ the Court concluded that Congress would have to make that type of liability decision against entities acting under the color of federal law.²⁵⁴

IV. PRECLUDING *BIVENS* EVEN FURTHER: ARE CRIMINAL LAWS THE NEXT STEP?

Having catalogued the Court's ambivalence, if not hostility, toward crafting freestanding damages relief, the final question still remains: can a criminal law remedy a constitutional violation such that a federal court would consider that criminal law to be a "sufficient reason" to refrain from using its *Bivens* power?

Wilson is an obvious starting point. In *Wilson*, the court found the IIPA insufficient to restrain its *Bivens* power because that statute lacked any indication that Congress purposefully desired that federal officers implicated under the act be free from civil damages, and, more broadly, the IIPA failed to give the Wilsons any sort of direct recompense for their constitutional injuries.²⁵⁵ Is there any room in this district court's opinion to argue that where the design of a congressional criminal law suggests *Bivens* preemption and that law also gives substantive relief to the victim of the unconstitutional act, a federal court therefore has enough justification to deny a claimant *Bivens* relief? Clearly, the *Wilson* Court's first reason is seemingly easy to satisfy because Congress can suggest whatever it wants in a law's text or legislative history.²⁵⁶ Moreover, restitution as damages is commonly tied to criminal laws,²⁵⁷ which at least superficially addresses the concerns of the *Wilson* Court that the victim of an unconstitutional act be given some type of direct relief. Do additional concerns, either inherent in the criminal process itself or external, militate against having a criminal law vindicate a constitutional right that has been violated? If so, what are they? If not, what are the circumstances where a criminal law will remedy a constitutional violation? Finally, what are the broader implications of this finding? Answering those questions requires several distinct inquiries. First, how does a criminal remedy fit into one of the *Bivens* exceptions? Second, can a criminal law carry

²⁵³ *Id.* at 70 ("Meyer made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity . . .").

²⁵⁴ *Id.* at 72.

²⁵⁵ *Wilson v. Libby*, 498 F. Supp. 2d 74, 92–93 (D.D.C. 2007).

²⁵⁶ The Speech and Debate Clause of the Constitution protects members of Congress from liability. U.S. CONST. art. I, § 6, cl. 1.

²⁵⁷ *See, e.g.*, 18 U.S.C. § 3663 (2006).

with it some form of relief to redress the victim of a constitutional injury? Third, is such relief ever adequate to vindicate the victim's constitutional right? Fourth, what is the broader justification for a federal court deferring or not deferring to a congressional criminal law instead of fashioning *Bivens* relief?

A. *A Criminal Law as a Bivens Exception*

At the outset, a criminal law must fit within one of the *Bivens* exceptions for it to stay a federal court's power to fashion damages relief. As discussed above, the two exceptions to the *Bivens* doctrine are where Congress expressly declares a remedy to be exclusive ("When Congress Says So") or when special factors counsel hesitation.²⁵⁸

If a criminal law is to preclude *Bivens* relief at all, it would likely fit within the special-factors comprehensive-statutory-scheme exception. Although the "When Congress Says So" exception is ostensibly easy to satisfy—all that needs to appear in the text of the law is some express statement that "this criminal law is intended to preempt any *Bivens* action for every constitutional violation herein"²⁵⁹—Congress has never done so in the past, and little indicates that Congress would do so in the future.²⁶⁰ Similarly, the special-factors military exception premises *Bivens* exclusion on grounds relating to Article I's command for Congress to make regulations in regard to the military.²⁶¹ Indeed, *Stanley* shows that the Court is not concerned with whether a claimant has an alternative remedy so much as the Court is concerned with the disruption of the "unique disciplinary structure of the military" that any *Bivens* remedy would cause.²⁶² The existence of a criminal law then would not likely have any impact under the special-factors military exception.²⁶³ Finally, the fact that a criminal law would likely deter federal officers from acting unconstitutionally does not counsel against the creation of a freestanding remedy in damages. The *Bivens* deterrence principle, or lack thereof, speaks to reasons why a federal court *should not* expand the doctrine rather than to justify why another

²⁵⁸ See *supra* Parts III.A–B.

²⁵⁹ See *supra* Part III.A.

²⁶⁰ *Id.* Presumably, that is because an incredibly high failure rate for *Bivens* actions already exists such that Congress is not worried about preempting a judicially created damages remedy against federal officers. See sources cited *supra* note 14.

²⁶¹ *United States v. Stanley*, 483 U.S. 669, 682–83 (1987).

²⁶² *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

²⁶³ *Stanley*, 483 U.S. at 683 (noting that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford" the plaintiff complete relief to redress his constitutional injuries).

er remedy is preferable to the *exclusion of* a freestanding damages remedy.²⁶⁴ As such, the question becomes how a criminal law fits into the special-factors comprehensive-statutory-scheme exception.

B. A Criminal Law as a Special-Factors Comprehensive-Statutory-Scheme Exception

According to this subset of the special-factors exception, a *Bivens* remedy is inappropriate when “the design of a Government program” suggests that Congress purposefully excluded federal officers from monetary liability for violating provisions in the program.²⁶⁵ *Wilkie* informs us that a statute’s breadth in regulating an area of federal activity and the remedial mechanisms that address such a statute’s violations are generally revealing and indicative of its design.²⁶⁶ Moreover, *Bush* and *Chilicky* support the proposition that a statute that both is pervasive in its scope and provides a mechanism that addresses most, if not all, injuries arising from its breach, creates the inference that Congress intended to preempt *Bivens* relief.²⁶⁷

The Court has not expounded a definitive standard to gauge the comprehensiveness of a statutory regime. What may be gleaned from the cases, however, is that the likeliest candidates for the “comprehensive” label are congressional regimes that create statutory rights and purport to govern exclusively the exercise of the rights created.²⁶⁸ One need not look any further than *Bush* and *Chilicky* to illustrate that point. The Civil Service Reform Act at issue in *Bush* protected federal employees who exercised their First Amendment rights from retaliation by their employers—a protection that did not previously exist.²⁶⁹ The *Bush* Court found the Act “comprehensive” because it was the only statute that regulated job security for federal employees, and it did so with great detail.²⁷⁰ Similarly, Title II of the Social Security Act, under scrutiny in *Chilicky*, entitled certain Social Security recipients to disability benefits.²⁷¹ The Court there extended the “com-

²⁶⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

²⁶⁵ *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

²⁶⁶ *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2598–600 (2007).

²⁶⁷ *Chilicky*, 487 U.S. at 423–28; *Bush v. Lucas*, 462 U.S. 367, 381–88 (1983).

²⁶⁸ *Chilicky*, 487 U.S. at 423–28; *Bush*, 462 U.S. at 386–88. That is not to say that only congressional regimes that create statutory rights may be deemed comprehensive. Having a statute that regulates or governs an existing right in a particular area potentially could be comprehensive in nature.

²⁶⁹ *Bush*, 462 U.S. at 381–86.

²⁷⁰ *Id.* at 388.

²⁷¹ *Chilicky*, 487 U.S. at 414–17, 424–26.

prehensive” label to Title II because Title II exclusively defined and limited the scope of that benefits scheme.²⁷² Decisions by lower federal courts give further support to that point because the courts have found the Privacy Act,²⁷³ Title VII of the Civil Rights Act of 1964,²⁷⁴ and the administrative scheme governing veterans’ benefits decisions,²⁷⁵ all of which create and limit statutory rights, to be comprehensive in nature.

The remedies for the violation of a comprehensive statute are also particularly telling of whether Congress intended to preempt *Bivens* relief. According to *Wilkie*, a remedial mechanism must be part and parcel of the statutory regime giving rise to the violation: if the relief is “piecemeal” in nature and not codified together with a statute’s provisions, Congress likely did not think of precluding a freestanding damages remedy.²⁷⁶ *Wilkie* also suggests that a remedial mechanism requiring a *Bivens* claimant to appear before various forums (i.e., administrative agencies and federal and state courts) to achieve sufficient recourse argues against *Bivens* preemption.²⁷⁷

Additionally, the inference of congressional intent to preclude *Bivens* is likely strengthened when the remedial mechanism provides relief for most, if not all, of the statute’s violations. Not uncommonly, Congress uses its power over jurisdiction to restrict a federal court to hearing only those claims arising directly under a particular statute.²⁷⁸ A remedial scheme that limits federal-court jurisdiction to particular claims arising under a certain statute certainly gives further weight to the idea that the statutory remedies are meant to be exclusive. Simi-

²⁷² *Id.* at 424–25.

²⁷³ *Downie v. City of Middleburg Heights*, 301 F.3d 688, 698–99 (6th Cir. 2002); *Sullivan v. U.S. Postal Serv.*, 944 F. Supp. 191, 195–96 (W.D.N.Y. 1996); *Williams v. Dep’t of Veterans Affairs*, 879 F. Supp. 578, 587–88 (E.D. Va. 1995).

²⁷⁴ *Ethnic Employees of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1415–16 (D.C. Cir. 1985).

²⁷⁵ *Thomas v. Principi*, 394 F.3d 970, 975–76 (D.C. Cir. 2005).

²⁷⁶ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600 (2007).

²⁷⁷ *Id.* That is not to suggest that a remedial mechanism directing a plaintiff to an administrative proceeding with a right of appeal to the federal judiciary would violate that principle. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 388–90 (1983) (holding that the remedies of the Civil Service Reform Act raised the inference that Congress intended to preclude *Bivens* relief even though, to obtain relief, the plaintiff had to appear before an administrative board with the right to appeal the board’s decision to federal district court). Rather, that point builds upon the previous assertion that “piecemeal” relief, where the *Bivens* claimant is forced to look to different statutes, regulations, and the common law to find his relief, does not raise the inference of *Bivens* preclusion.

²⁷⁸ *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 429 n.3 (1988).

larly, a mechanism offering relief to all of the statute's beneficiaries, rather than only to certain groups, gives credence to a congressional bias against *Bivens* relief. That is not to say that the mechanism must give the beneficiaries complete relief against all violators of the statute. Rather, when all, or substantially all, of the beneficiaries have some avenue of redress under the statute, Congress more likely considered and rejected other forms of relief than those expressly provided. Indeed, that description unsurprisingly sounds strikingly similar to the doctrine of field preemption, and it has been persuasively argued that the two standards are similar, if not the same.²⁷⁹

The Federal Food Stamp Program²⁸⁰ is an example of a congressional scheme that comes close to the scenario just described. First, the program is comprehensive in its scope: it is a federal-entitlement program administered by the states and designed to promote the health of low-income individuals.²⁸¹ The program contains detailed provisions that govern the exercise and use of food stamps and defines those eligible to participate.²⁸²

Second, the Act contains a remedial mechanism to address violations of the program that likely raises the inference that the remedies found in the Act are meant to be exclusive. Depending on the particular provision that is breached, power is vested in the Secretary of Agriculture to bring civil actions, including removal of households or food concerns from the program²⁸³ or monetary penalties against state agencies for transgressions.²⁸⁴ Individual households are also entitled to administrative and ultimately judicial review of a state agency's decision to terminate their benefits.²⁸⁵ Finally, the Act makes it a crime for anyone to knowingly take or use a food stamp in an unauthorized manner.²⁸⁶ When an individual is convicted of that crime,

²⁷⁹ Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1127–29 (1992).

²⁸⁰ 7 U.S.C. §§ 2011–2036 (2006).

²⁸¹ *Id.* § 2011.

²⁸² *See id.* §§ 2012–2019.

²⁸³ *Id.* §§ 2020–2021.

²⁸⁴ *Id.* §§ 2022, 2025(c).

²⁸⁵ *Id.* §§ 2020(e)(10), (i)(2), 2023.

²⁸⁶ 7 U.S.C. § 2024(b)(1) (2006). Specifically, the law states that whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall . . . be guilty of a felony [if the coupons are valued at \$100 or more] . . . or . . . of a misdemeanor [if the coupons are valued at \$100 or less].

Id.

the statute requires forfeiture to the government of the stamps and any other property used in the commission of the crime and permits a court to order the defendant to work to pay “restitution for losses incurred by the United States.”²⁸⁷ Clearly, this criminal law is aimed at deterring and punishing the food-stamp recipients themselves for selling their benefits for profit, but the law can be read to apply to third parties who take and sell the food stamps of another.²⁸⁸ Thus, for all practical purposes, the Act contains remedies for nearly every contemplated transgression and gives the food-stamp recipients at least some protection and security of their statutory right.

Under this statutory scheme, there may arise a scenario involving a food-stamp recipient whose home is broken into by federal Drug Enforcement officers acting upon an anonymous tip in search of evidence relating to an alleged drug crime. The officers seize the food stamps²⁸⁹ and, realizing that they entered the wrong house and that their search was illegal, dispose of the stamps to avoid culpability. As the *Bivens* case itself tells us, state remedies for the illegal trespass, search, and seizure are “inconsistent or even hostile” to the individual’s Fourth Amendment rights and likely unavailing for our low-income beneficiary.²⁹⁰ Looking to federal remedies for help, the individual has two forms of recourse under the Food Stamp Program: a criminal prosecution against the officers or a civil monetary penalty instituted by the Secretary of Agriculture against the officers.²⁹¹ In either situation, the individual has no possibility of recovery.²⁹² Moreover, the Food Stamp Program purports to limit other federal remedies beyond the four corners of the statute.²⁹³ If the Secretary of Agriculture determines that prosecuting the federal officers under the criminal law is the most appropriate way to proceed, the officers’

²⁸⁷ *Id.* § 2024(b)(2), (c), (g), (h).

²⁸⁸ *Id.* § 2024(b)(1). The broad language of that criminal law calls for punishment for “whoever” misuses a food stamp and is not limited to members of qualified households who are guilty of misuse. *Id.*

²⁸⁹ Notably, a “food stamp” is no longer a tangible item that can best be described as a physical stamp. Instead, the monetary benefit that a household receives is accessible through an electronic card (similar to a debit or credit card) that members of the household possess and can use at qualified stores to purchase goods. *Id.* § 2016(i)(1).

²⁹⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

²⁹¹ 7 U.S.C. §§ 2021(f), 2024(b)(1) (2006).

²⁹² Under the civil monetary penalty provision, damages awards go to the government. *Id.* § 2024(f).

²⁹³ *Id.* § 2022(a)(1).

conviction would entitle the government to restitution of the statutory benefit but would leave the victim wanting a remedy.²⁹⁴ Under those circumstances, if the victim brought a *Bivens* claim seeking monetary relief for the unconstitutional taking, a federal court apparently would be presented with the precise question of whether Congress intended § 2024(b) of the Act to be the victim's only recourse in obtaining relief.

C. *Constitutional Adequacy of a Criminal Law*

To answer the above question of whether a criminal law could adequately redress a constitutional injury, a federal court must first determine whether the statutory relief is constitutionally adequate. Although that principle is not noticeably apparent, *Bush* and *Chilicky* are particularly informative. In both cases, the Court stressed that it was not faced with the task of implying a damages remedy in the face of constitutionally inadequate relief crafted by Congress.²⁹⁵ Instead, the Court was being asked to fashion *Bivens* relief when Congress already provided "meaningful" and "adequate" remedies to vindicate the underlying right.²⁹⁶ *Wilkie* gives further credence to that proposition. In that case, the Court stated that it sustained *Bivens* remedies only in two types of cases: where a plaintiff lacked any congressional relief and where a plaintiff's statutory relief was inadequate to secure his constitutional right.²⁹⁷ Thus, the Court seems to suggest, without directly saying, that the Court fashioned *Bivens* relief in those instances, at least in part, *because it found* that the plaintiff's relief was constitutionally inadequate. To make that finding then, the Court must have independently assessed the constitutional adequacy of the statutory remedy before concluding that *Bivens* relief was inappropriate.²⁹⁸

The role that the Court appears to have carved out for itself in ensuring the constitutional validity of a congressional remedy is rela-

²⁹⁴ *Id.* § 2024(b)(2), (c), (g), (h).

²⁹⁵ *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *Bush v. Lucas*, 462 U.S. 367, 386 (1983).

²⁹⁶ *Chilicky*, 487 U.S. at 425; *Bush*, 462 U.S. at 386.

²⁹⁷ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

²⁹⁸ If the Court did not independently assess the constitutional adequacy of the statutory remedies at issue in *Carlson* and *Davis*, then the Court must have fashioned the *Bivens* remedies because Congress considered its own remedies to be constitutionally inadequate. And that proposition is highly unlikely (if not illogical).

tively uncontroversial.²⁹⁹ The federal judiciary has the duty to “say what the law is” and interpret the Constitution.³⁰⁰ If the judiciary were to mechanically defer to statutory remedies, the court would in effect be sanctioning Congress to put a stamp of constitutionality on Congress’s own relief without judicial scrutiny of that decision. That abdication of the judicial power would not only appear to violate the Constitution but would also undermine the judicial branch’s legitimacy as protector of that document. Because of those grave constitutional repercussions, separation of powers arguably requires federal courts to independently review the constitutionality of any congressional remedy.

At this point, it is important to emphasize again that the Court’s *Bivens* cases strongly suggest that the federal court should decide whether to craft a freestanding remedy in damages.³⁰¹ According to *Bivens*, *Davis*, and *Carlson*, the constitutionality of an alternative remedy is clearly material to the question of whether a federal court should fashion additional relief, but such an alternative remedy does not compel a federal court to act in a certain way.³⁰² Ultimately, if it determines that the congressionally provided relief is constitutionally inadequate to vindicate the violated right, a federal court must determine whether a *Bivens* damages remedy is nonetheless appropriate given the circumstances.³⁰³ That common law method of adjudication necessarily involves consideration of larger governmental concerns about whether to make federal officers liable in damages when Congress has not done so.

Thus, the next issue becomes whether the prosecution of a criminal law is ever sufficient to guarantee a particular constitutional right. The adequacy of a mode of relief necessarily depends on the right at issue and the context surrounding its deprivation.³⁰⁴ At the outset, however, it should be apparent that the victim of an unlawful

²⁹⁹ Most commentators agree that the federal judiciary has not entirely abdicated its role in gauging the constitutionality of congressional remedies. See Bandes, *supra* note 100, at 320–22; Dellinger, *supra* note 16, at 1549; Nichol, *supra* note 16, at 1121.

³⁰⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁰¹ See *supra* Part II.B.

³⁰² *Schweiker v. Chilicky*, 487 U.S. 412, 421–22 (1988) (“The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.”).

³⁰³ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597, 2600–01 (2007).

³⁰⁴ See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994) (noting that damages remedies are appropriate for certain types of constitutional violations but not for others).

act must be able to receive some type of direct recompense—either retrospectively or prospectively—for any remedy to be deemed adequate.³⁰⁵ For example, a torture victim's claims for relief for an Eighth Amendment deprivation could hardly be satisfied merely by the criminal conviction of the responsible federal agents. One who has suffered a legally cognizable injury must be afforded some type of recovery that is tangible and real to give substance to his violated interest.³⁰⁶

1. Restitution

Few criminal laws provide direct relief to the victim. The obvious shortcoming of § 2024(b) of the Food Stamp Program is that it gives the government, rather than the victim, recovery from the defendant for his crime.³⁰⁷ Section 2024(b) therefore falls short of alleviating the victim's injury in a manner required by the Constitution.

A criminal law, however, could possibly provide direct relief to the victim. Restitution is the most obvious example. Restitution returns to the victim his property or the benefits denied to him as the result of a crime,³⁰⁸ but restitution does not provide him with compensatory damages for the deprivation his rights.³⁰⁹

When restitution is tied to a criminal law or statute, it is either mandatory or within the discretion of federal judges to provide that form of relief.³¹⁰ Because constitutional rights are at stake, however,

³⁰⁵ Steinman, *supra* note 70, at 283, 321. That may also be inferred from the Court's language in *Bush* and *Chilicky*. Part of the reason why the Court found the remedies implicated in those cases to be "meaningful" is because the victim of the unconstitutional act could directly benefit from their application. *Chilicky*, 487 U.S. at 423–25; *Bush v. Lucas*, 462 U.S. 367, 386 (1983).

³⁰⁶ That is opposed to the psychological benefit that may arise from the satisfaction of seeing the transgressor punished by the government and sent to jail or fined. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); Nichol, *supra* note 16, at 1122. *But see Carey v. Phipps*, 435 U.S. 247, 254 (1978); Fallon, *supra* note 17, 329–39, 366–72.

³⁰⁷ 7 U.S.C. § 2024(b)(2), (c), (g), (h) (2006).

³⁰⁸ BLACK'S LAW DICTIONARY 1428 (9th ed. 2009). If the perpetrator of an illegal act cannot restore the ill-gotten property or benefits, restitution may take the form of monetary relief. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 (Tentative Draft 2000). Such monetary relief is usually determined with reference to the fair market value of the property or benefits at the time of restoration. *Id.* §§ 4, 48.

³⁰⁹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt.

³¹⁰ *See generally* 18 U.S.C. § 3663 (2006) (providing discretionary restitution to the victims of certain enumerated crimes); *id.* § 3663A (providing mandatory restitution).

relief should be guaranteed and not discretionary. Indeed, a right is hardly adequately secured when the relief is contingent upon judicial notions of fairness rather than guaranteed to the victim.

When mandatory restitution is required under a criminal law, the victim is afforded relief after the defendant is convicted of the crime.³¹¹ Generally speaking, the victim is given notice of the sentencing hearing and the right to submit sworn affidavits to the court stating the value of property or money taken by the defendant.³¹² The prosecution, however, has to prove the extent of the victim's damages by a preponderance of the evidence.³¹³ The victim's affidavits are compiled into a presentence report, which is given to the sentencing judge.³¹⁴ When a judge makes an order of restitution, the victim can enforce it in any jurisdiction and may ask for lump-sum or periodic payments.³¹⁵

2. The Circumstances in Which Restitution Is Adequate

Even though restitution is not likely to fully compensate the victim of an unconstitutional act,³¹⁶ it still may nonetheless be adequate given the type of constitutional injury asserted and circumstances surrounding the violation.³¹⁷ Without describing the universe of situations in which restitution could adequately redress a constitutional injury, accurately describing at least a few instances in which the Court has found restitution to be sufficient is possible. The most prominent example occurs, as in *Bush* and *Chilicky*, where the alleged constitutional infringement results in the denial of a statutory benefit or right. Here, the constitutional deprivation is indistinct from the statutory deprivation in question, and the restoration of the statutory right is sufficient to compensate both injuries.³¹⁸ For example, the *Chilicky* Court expressly recognized that the return of a statutory right, which in that case was the collection of disability benefits after

³¹¹ *Id.* § 3664(a).

³¹² *Id.* § 3664(d)(2)(A)(iii)–(vi).

³¹³ *Id.* § 3664(e).

³¹⁴ *Id.* § 3664(d)(4).

³¹⁵ *Id.* § 3664(f)(3)(A), (m)(1)(B).

³¹⁶ *See, e.g.,* *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (holding that restoration of disability benefits was incomplete but nonetheless satisfactory to fully redress plaintiffs' constitutional injuries); *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (holding that reinstatement of position and back payment for Free Speech retaliatory action was incomplete but sufficient to redress constitutional injuries).

³¹⁷ *See* *Chilicky*, 487 U.S. at 428; *Bush*, 462 U.S. at 388.

³¹⁸ *Chilicky*, 487 U.S. at 428–29.

months of suffering and delay, was enough to address the plaintiffs' statutory claims as well as vindicate their due process right for the unlawful denial.³¹⁹ Similarly, back payment and reinstatement of position were adequate to secure the plaintiff's guarantee of Free Speech in *Bush* even though the relief appeared to directly address statutory violations of the Civil Service Reform Act.³²⁰ Further, restitution is normally adequate when the alleged constitutional deprivation is one that involves a Takings Clause violation by federal officers.³²¹

Finally, the fact that a federal officer may be judgment proof does not render restitution, or any other form of relief, inadequate to vindicate a constitutional right. Issues of immunity, according to *Meyer* and *Malesko*, are analytically distinct and entirely separate from the question of whether a federal court should fashion a new remedy in damages under *Bivens*.³²² Indeed, the very purpose of a federal officer's immunity is to protect him from culpability for his constitutional transgressions.³²³ Therefore, to defeat the adequacy of an existing remedy that is in fact unobtainable because the federal defendant may shield himself from liability is no excuse.

In the present context, a criminal law offering mandatory restitution is likely to be substantively adequate in cases involving the taking of a property right, such as a statutory benefit or entitlement. In such cases, the federal officer's unconstitutional usurpation of the benefit violates the beneficiary's statutory and constitutional rights. The return or restoration of that benefit is enough to compensate both injuries such that additional recourse under *Bivens* is unwarranted.

3. Procedural Concerns

Although this Comment has addressed the *Wilson* Court's twin concerns of congressional intent to preclude *Bivens* and giving the victim recourse, that does not end the inquiry into whether a criminal law can remedy a constitutional violation. The existence of additional aspects of any remedy that factor into the determination of wheth-

³¹⁹ *Id.*

³²⁰ *Bush*, 462 U.S. at 386; see also *Chilicky*, 487 U.S. at 428 (describing *Bush* as standing for the proposition that when the constitutional injury cannot be separated from the statutory injury, the statutory remedy is generally sufficient to redress both claims).

³²¹ See, e.g., *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

³²² *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71 (2001); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

³²³ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

er the remedy passes constitutional muster should be apparent. Indeed, the Court in *Chilicky* acknowledged as much by recognizing that additional “safeguards” are intertwined with any remedy and factor into its constitutionality.³²⁴ That shows that the Court was concerned with the entire *process* of the alternative remedy when gauging its adequateness rather than the level or amount of relief.³²⁵ The deficiency of an alternative congressional remedy in those procedural safeguards presumably is constitutionally inadequate and, thus, an insufficient reason to stay a federal court’s *Bivens* power. What the Court means by “procedural safeguards” is unclear, but that term seems to be rooted in our traditional notions of due process in giving the claimant notice and a fair opportunity to be heard.³²⁶ That seems relatively uncontroversial because a remedy could hardly be considered sufficient if the procedures or mechanisms required to invoke the remedy are nearly impossible to satisfy or at least unduly burdensome to vindicate the underlying right.

In respect of considering a criminal law’s “procedural safeguards” to measure its constitutional adequacy, some problems arise. The inherent procedural shortcomings of criminal laws, as compared to other tort-based forms of relief that the Court has found palatable to foreclose *Bivens* relief, are numerable. First, criminal laws take the cause of action out of the hands of the victim and place it with the prosecution.³²⁷ In the context of the present discussion, that would mean that federal prosecutors (and ultimately the Executive Branch) would have the sole responsibility and power in vindicating a victim’s constitutional rights. Generally speaking, third-party standing is only permissible under certain discrete circumstances.³²⁸ That prohibition

³²⁴ *Chilicky*, 487 U.S. at 425. The Court emphasized in *Chilicky* the “elaborate” nature of Title II of the Social Security Act, which contained a “[multi]-step process for the review and adjudication of disputed claims.” *Id.* at 424 (citing *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

³²⁵ *Id.*

³²⁶ See, e.g., *Lisenba v. California*, 314 U.S. 219, 228, 236 (1941).

³²⁷ See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2247 (1999) (“[O]ur long-standing practice (albeit one not required by Article III) is that the victim of the crime may not bring a federal criminal prosecution.”); see also Harold J. Kent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 293 (1989).

³²⁸ Where parties stand in such a relationship that the exercise of a person’s constitutional right is dependent upon a third party being allowed to engage in particular conduct, the Court has found third-party standing permissible. See, e.g., *Craig v. Boren*, 429 U.S. 190, 195–96 (1976). Third-party standing is also permissible to challenge substantially overbroad statutes on Free Speech grounds even if the application

is not directly implicated here because the government has standing to prosecute the federal wrongdoer for his criminal act.³²⁹ Nonetheless, the proposition that a criminal law can vindicate a victim's rights may indirectly undermine that principle. The government's reasons for prosecuting the federal wrongdoer may genuinely be at odds with, or tangential to, the victim's desire to obtain relief. That misalignment of interests could very well lend itself to less-than-adequate representation on the prosecutor's part and, ultimately, undermine the victim's constitutional right itself.

Further, having a criminal law act as a constitutional remedy may be particularly egregious to our notions of Due Process and Equal Protection. Although the restitution process described above does give the victim the bare minimum of notice of the proceedings and an opportunity to submit sworn affidavits regarding the extent of his damages,³³⁰ the notice provision and opportunity to be heard come *after* the defendant's conviction.³³¹ Under the American criminal system, the government is the prosecution and controls all aspects of the litigation, and the victim has only limited rights to immerse himself in the prosecution's case-in-chief against the defendant.³³² The govern-

of the statute is legal as applied to the plaintiff. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

³²⁹ See Hartnett, *supra* note 327, at 2248–49; Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 554 (1995).

³³⁰ 18 U.S.C. § 3664(d)(2)(A)(iii)–(vi) (2006).

³³¹ *Id.* § 3664(a).

³³² A mandamus action is one way in which the victim of a crime may try to compel a federal prosecutor to bring charges against the criminal actor. *Id.* § 3771. In fact, the Crime Victims' Rights Act expressly grants the criminal victim the statutory right to immerse himself in the government's criminal case against the defendant. *Id.* § 3771(a)(1)–(8). To enforce those rights, the statute allows the criminal victim to seek mandamus against the prosecution. *Id.* § 3771(d). Specifically, those provisions state the following:

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). . . .

. . . .

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing [this section]. If the court of appeals

ment's discretion and authority not to prosecute a federal officer at all regardless of the victim's need for recovery are especially offensive.³³³ If that were to happen, the victim would be left wanting a remedy without any means of obtaining it. In fact, a federal court may not even consider a criminal law within a comprehensive congressional scheme as an alternative remedy to the plaintiff.

Finally, the substantially higher burden of proof imposed in criminal cases as compared to civil cases is most problematic.³³⁴ Thus, the prosecution must go to great lengths to prove the defendant's culpability before relief may be obtained by the victim. Why should it be made harder to protect constitutional rights from invasion? The idea that the criminal process should be a source of vindication for America's most valued and treasured rights seems patently inconsistent with the notion that the Constitution codifies those rights. If anything, constitutional rights should be easily vindicable to ensure and promote the values those rights embody and to keep the government within the parameters of the law.

Although those reasons present a formidable barrier, they are not an absolute bar to viewing criminal laws as adequate to vindicate certain constitutional rights. Initially, the prohibition on third-party

denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

Id. § 3771(d)(1), (3).

But given the discretionary nature of the decision whether to prosecute, a mandamus action would not likely succeed in most, if not all cases, given federal court hesitancy to compel federal actors to perform discretionary functions. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170–71 (1803) (“It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation); *see also* *Jarrett v. Ashcroft*, 24 Fed. App'x 503, 504 (6th Cir. 2001) (holding that mandamus action could not lie against Attorney General or United States Attorney to investigate or prosecute alleged civil rights violators); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (holding that investigation by FBI is a “clearly discretionary act” and that a federal district court lacked the authority to issue a writ of mandamus to force an employee of the FBI to initiate an investigation of an alleged crime).

³³³ The fact that federal prosecutors may not appeal an adverse judgment given the Double Jeopardy Clause of the Constitution is additionally offensive. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb”); *see also* *Ashe v. Swenson*, 397 U.S. 436, 445–47 (1970).

³³⁴ To hold the accused liable for his actions, the prosecution is required to prove beyond a reasonable doubt all the elements of the crime. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970).

standing is only a prudential limitation on a party's access to Article III courts.³³⁵ Arguments against criminal laws as a source of constitutional vindication rest on the supposition that the victim is in the best position to assert his or her case. The Court has made clear several times, however, that most *Bivens* claimants sit on their rights.³³⁶ Often times, a plaintiff does not seek relief for his injury because he believes that the federal officer will evade liability on qualified-immunity grounds.³³⁷ Many *Bivens* claimants, in fact, wait until the last minute to ask the federal judiciary to give them a better remedy.³³⁸ That "better remedy" is generally unavailing, and a *Bivens* claimant is ultimately left with no relief whatsoever because of statute-of-limitations problems.³³⁹ Other instances exist in which an individual who has suffered a constitutional injury may not seek redress. The victim may not even be aware that he has suffered a constitutional deprivation, may consider the injury too insignificant to warrant civil action, or may lack the resources or time to pursue his claims.

Building on that point, the federal government also acceptably could secure an injured party's constitutional rights via the criminal process. Federal prosecutors may have more resources and time to challenge the unlawful acts of a federal officer. That is likely to be true when the *Bivens* claimant is indigent or on fixed income and receiving monetary assistance from federal-entitlement statutes, such as Title II or the Food Stamp program. In such cases, the simple fact that litigation is expensive and time-consuming may dissuade a private litigant from seeking the possibility of relief. Moreover, a federal prosecutor's independent interest in pursuing a criminal action may actually lend itself to greater zeal and tenacity in pursuing colorful or difficult-to-prove claims that the victim might not find worthwhile. Finally, federal prosecutors may have more legal training than a private litigant, which may manifest itself in better representation of the victim's interests.

The more difficult question to address is in respect of the higher burden of proof standing in the way of a constitutional right's vindication. Obviously, Americans want their most treasured rights to be free from invasion, and consistent with that desire, the burden of

³³⁵ See *Craig v. Boren*, 429 U.S. 190, 194–96 (1976).

³³⁶ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

³³⁷ *Malesko*, 534 U.S. at 72; *Meyer*, 510 U.S. at 485.

³³⁸ *Malesko*, 534 U.S. at 72 (noting that the plaintiff had failed to avail himself of available administrative remedies).

³³⁹ *Id.*

proof to establish a constitutional violation is generally placed at a lower threshold. Even though the bar is set lower, however, the doctrines of absolute and qualified immunity and federal sovereignty seemingly make it more difficult for the victim of an unconstitutional act to redress his injuries.³⁴⁰ Indeed, for constitutional injuries resulting from the actions of a federal officer, qualified immunity will almost always present the victim with a sizeable obstacle that may be insurmountable in a given case and, thus, may ultimately result in the victim having no remedy.³⁴¹ As *Meyer* and *Malesko* hold, issues of immunity do not factor into *Bivens* determinations.³⁴² But the point to be made here is that a criminal law is not so clearly constitutionally inadequate because it imposes a higher burden of proof; other doctrines exist that make the easy vindication of a constitutional interest an illusion.

D. Why a Criminal Law Should Vindicate a Constitutional Right

The final and perhaps most difficult question to answer is why a federal court should show deference to a congressional scheme containing only criminal laws as a source of constitutional vindication. As has been pressed throughout this Comment, *Bivens* is a common-law doctrine of constitutional proportions: a federal court has the power, but not the duty, to fashion damages relief as it sees fit for alleged constitutional violations committed by federal officers.³⁴³ Crucial to any federal court's decision regarding *Bivens* liability has been whether the claimant has access to an adequate, alternative remedial process.³⁴⁴ When he does, his need for a judicially created remedy is viewed as less pressing than in the case of a claimant who has no remedy, and other separation-of-powers concerns, such as the need to show deference to a comprehensive statutory scheme, are likely to outweigh the claimant's *Bivens* demands.³⁴⁵

³⁴⁰ See generally *Maine v. Alden*, 527 U.S. 706 (1999) (holding that sovereign immunity prevents a state from being sued in its own courts under federal causes of action); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that state officers generally have qualified immunity from suits for damages unless the officers have violated clearly established constitutional rights that a reasonable officer would have known were being violated); see also Fallon, *supra* note 17, at 329–39, 366–72.

³⁴¹ *Meyer*, 510 U.S. at 485.

³⁴² *Malesko*, 534 U.S. at 70 (noting that “*Meyer* made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity”); *Meyer*, 510 U.S. at 485.

³⁴³ See *supra* Parts II.B, III.A.

³⁴⁴ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007).

³⁴⁵ See *supra* Part III.B.2.

The result of that process has arguably provided Congress greater authority and leeway in giving effect and substance to constitutional norms. At face value, that result is attractive: because Congress is accountable to the people, Congress should have the primary responsibility of shaping relief for deprivations of constitutional values. That result also seems justifiable on a separation-of-powers ground. When Congress creates a statutory right, Congress makes a policy decision as to the appropriate relief for the deprivation of that right.³⁴⁶ Congress can decide that the right is not important enough to warrant significant protection even in the face of unconstitutional infringement upon that right. Congress can also decide that the federal government is better equipped or in a better position to handle all violations of the right even when such a violation implicates the Constitution. In essence, a statutory benefit vindicable only through the criminal process may reflect Congress's attitudes toward that right. Regardless of congressional motive, the federal judiciary should respect and defer to the democratically elected branch's determination of appropriate relief for a statutory, and ultimately constitutional, injury.

Even assuming, as Justice Harlan stated in *Bivens*, that the Bill of Rights exists to protect an individual's interests from the majority's will, which is expressed in the legislature, that does not lead to the conclusion that federal courts must therefore actively announce constitutional norms without showing deference to Congress. Indeed, Justice Harlan himself justified the Court's creation of a remedy in *Bivens* by noting that a damages action brought directly under the Constitution by a remedy-less claimant would be a very rare occasion³⁴⁷ and that no strong countervailing federal interests were at stake.³⁴⁸ Moreover, the Court's envisioned role in *Bivens* actions has not led to a total abdication of its power to interpret and establish those norms. The Court has routinely and independently assessed the constitutionality of the congressional remedies in its *Bivens* cases and has been willing to give damages when it finds the congressional

³⁴⁶ *Davis v. Passman*, 442 U.S. 228, 249–50 (1979) (Burger, C.J., dissenting); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411–12 (1971) (Burger, C.J., dissenting); see also Nichol, *supra* note 16, at 1143.

³⁴⁷ *Bivens*, 403 U.S. at 409–11 (Harlan, J., concurring).

³⁴⁸ *Id.* at 411 (“Of course, for a variety of reasons, the [*Bivens*] remedy may not often be sought. . . . I deem it proper to venture the thought that at the very least [the *Bivens*] remedy would be available for the most flagrant and patently unjustified sorts of police conduct.”).

relief constitutionally inadequate.³⁴⁹ Thus, the Court has effectively staked out a middle ground between its dual needs to protect individual rights and to defer to Congress's authority to create constitutional remedies. Therefore, a federal court's cessation of its *Bivens* power because of the existence of a criminal law fits within the framework that the Court has constructed in which the courts defer to congressional remedies where those remedies are adequate to secure a constitutional right.

Additionally, federal courts preferably should permit Congress to experiment with unconventional or atypical constitutional remedies. The simple fact that Congress has failed to provide the "traditional" relief of damages does not, and should not, imply that Congress has not created a mechanism that will adequately safeguard a victim's constitutional rights. In fact, given the punitive nature of criminal laws, it may be that a victim's constitutional guarantees will be more secure under the unconventional scheme created by Congress than if a damages remedy were available to enforce the right at issue. In the context of certain statutory schemes, criminal laws may be the easiest method—at least compared to a damages action—of circumscribing unconstitutional conduct.

Finally, if a criminal law is still undesirable as a constitutional remedy even though such a remedy may represent congressional preference, a criminal law may still preclude *Bivens* relief where the *Bivens* claim is brought after a successful criminal prosecution. Consider a comprehensive congressional scheme like the Food Stamp program that entitles certain individuals with a benefit and uses criminal laws with mandatory restitution to enforce its provisions. Even if a federal court believes that the criminal law lacks the procedural safeguards necessary for the security of the constitutional right at issue, the victim has already obtained substantively adequate relief as a result of the prior criminal conviction and restitution. Thus, the federal court must decide whether *Bivens* relief is permissible when an inadequate process has resulted in adequate relief. Under that narrow circumstance, preclusion of *Bivens* relief might be acceptable because the victim's injury is redressed, and a federal court would have little incentive to fashion a new damages remedy, especially with the likely separation-of-powers criticisms that come with any *Bivens* decision.

³⁴⁹ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

V. CONCLUSION

Attempting to fit a criminal remedy with mandatory restitution within the Court's jurisprudence of declining to extend *Bivens*-type remedies is not an easy task. The *Bivens* case dealt with the power of a federal court to give a civil damages remedy to an individual whose constitutional rights had been violated by a federal officer. In the cases subsequent to *Bivens*, the Court has substantially dealt with the same question of whether fashioning such a remedy for a constitutional violation without statutory authorization is prudent. Substituting a *Bivens* tort remedy for a congressionally created criminal action with mandatory restitution seems patently illogical given the Court's jurisprudence in that area. But that statement fails to consider the core concerns of the Court when presented with a *Bivens* claim.

As the Court has made clear many times, *Bivens* and its progeny are really about the federal judiciary and Congress deterring federal officers from violating the Constitution. Grandiose themes of separation of powers and institutional competency resonate loudly throughout those cases, and often times the victim's demands for full and complete compensation are lost in the cacophony. That discord reflects the enormous discomfort that the Court feels in embracing its implied remedy-making power, which is further exacerbated when Congress has provided alternative relief for constitutional infringements.

A criminal law with mandatory restitution is, at one level, no different from any other congressionally created remedy in the context of *Bivens*. The completeness or form of the relief is not in question when a *Bivens* case comes before a federal court; the question is whether the federal judiciary finds a convincing reason to fashion a new damages remedy. The recent trend in *Bivens* jurisprudence is to deny an implied damages action if the victim has *any* alternative federal remedies at his disposal. Taking the leap to preclude a *Bivens* remedy based on the existence of an alternative criminal law with mandatory restitution is not as farfetched as it seems at first glance, as that form of relief arguably satisfies the minimum criteria to be constitutionally adequate. Therefore, given the appropriate circumstances, a federal court may decide, under its traditional common-law powers, that a criminal law with mandatory restitution may be an acceptable way to vindicate a constitutional right and, thus, that an implied damages remedy under *Bivens* is unnecessary.