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## Using the Constitution: Separation of Powers and Damages for Constitutional Violations

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## USING THE CONSTITUTION: SEPARATION OF POWERS AND DAMAGES FOR CONSTITUTIONAL VIOLATIONS

James A. Thomson\*

“For people in *Bivens*’ shoes, it is damages or nothing.”<sup>1</sup>

### INTRODUCTION

*Bivens*<sup>2</sup> received nothing.<sup>3</sup> Subsequent litigants, endeavoring to build upon *Bivens*’s “victory”—the Supreme Court’s crea-

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1. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment). Despite this “cursory comment,” *Carlson v. Green*, 446 U.S. 14, 39 n.5 (1980) (Rehnquist, J., dissenting), it has been suggested “that presumably *Bivens* had available, for instance, a declaratory judgment action.” Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1259 n.49 (1988). “For [Shirley] Davis . . . ‘it [was also] damages or nothing.’” *Davis v. Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)).

2. Webster *Bivens* sued six Federal Narcotics Bureau agents in a federal district court. *Bivens v. 6 Unknown Named Agents of Fed. Bureau of Narcotics*, 276 F. Supp. 12 (E.D.N.Y. 1967), *aff’d*, 409 F.2d 718 (2d Cir. 1969), *rev’d*, 403 U.S. 388 (1971). On the morning of November 26, 1965, the agents entered his apartment without a search or arrest warrant, conducted an unreasonable search, arrested him for violation of narcotics laws, and, in the presence of his wife and children, manacled him. 403 U.S. at 389. *Bivens* was taken to the Brooklyn federal court building and subsequently transferred to the New York headquarters of the Federal Narcotics Bureau where he was interrogated, photographed, strip-searched, and booked. *Id.* The narcotics complaint was dismissed by a U.S. Commissioner. *Bivens*, 409 F.2d at 719. *Bivens*, claiming “to have suffered great humiliation, embarrassment, and mental suffering,” sought \$15,000 damages from each agent. 403 U.S. at 390. He alleged a cause of action under section 1983 of the Civil Rights Act, *see infra* note 42, and jurisdiction under sections 1331(a), 1343(3), and 1343(4) of the United States Code Title 28. *Id.* at 398 n.1 (Harlan J., concurring in the judgment). For the judicial responses, *see infra* note 3.

3. *Bivens v. 6 Unknown Named Agents of Fed. Bureau of Narcotics*, 276 F. Supp. 12 (E.D.N.Y. 1967) (dismissing complaint for lack of jurisdiction and holding no cause of action under section 1983 because the federal agents had not acted

tion of a damage remedy in the federal courts directly from the fourth amendment "right . . . against unreasonable searches and seizures"<sup>4</sup> by federal law enforcement officers<sup>5</sup>—generally have achieved the same—no damages—result.<sup>6</sup> Preclusion of

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under color of state law or under the fourth amendment), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971). On remand, the Second Circuit held that the federal officers had no immunity from prosecution but were entitled to raise a "good faith" defense, and remanded for further proceedings. 456 F.2d 1339, 1340 (2d Cir. 1972). On March 8, 1972 (6 years and 4 months after federal agents entered his apartment), Bivens could proceed to trial on his complaint against the agents. See Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531, 535-42 (1977) (details of Bivens's litigation). For commentary on the court of appeals's first decision, see Note, *Constitutional Law*, 83 HARV. L. REV. 684 (1970) [hereinafter *Constitutional Law I*]; Note, *Constitutional Law*, 48 TEX. L. REV. 219 (1969) [hereinafter *Constitutional Law II*]. On the court of appeals's second decision, see Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973). For bibliographies of literature on the Supreme Court's decision, see Lehmann, *supra*, at 531 n.2; Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597 n.6 (1982) [hereinafter *Rethinking Sovereign Immunity*]; see also Briefs of Counsel, 29 L. Ed.2d 1079 (1972) (petitioner's and respondent's briefs in *Bivens* case). Commentary on subsequent Supreme Court developments includes Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263 (1989); Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989); Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C.L. REV. 337 (1989); Note, *United States v. Stanley: Military Personnel and the Bivens Action*, 67 N.C.L. REV. 233 (1988); Note, *supra* note 1; Note, *Constitutional Rights of Action: Wrongful Termination of Disability Benefits*, 102 HARV. L. REV. 279 (1988). Pre-*Bivens* scholarship on the Constitution's remedial nature is listed in Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1533 n.8 (1972).

4. U.S. CONST. amend. IV.

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

6. "[O]ut of over 2,200 *Bivens*-type actions filed in the district courts against federal officers, only 12 suits have resulted in actual damage awards." *Rethinking Sovereign Immunity*, *supra* note 3, at 599 n.11 (citing *The Suits that U.S. Aides Fear*, Nat'l L.J., Jan. 18, 1982, at 1, col. 4). Even by 1982, it was being suggested that post-*Bivens* Supreme Court decisions would "further insulate government officers from liability and more victims of unconstitutional government conduct will be left without a remedy." *Id.* For a 1989 endorsement of that prediction, see Brown, *supra* note 3, at 264-65. For a different perspective on the statistics for *Bivens* constitutional tort actions and section 1983 cases, see Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 543 n.118 (1989).

## damage remedies for governmental<sup>7</sup> or individuals<sup>8</sup> violations

7. Governmental encompasses federal and state executive, judicial, and legislative branches of government. Is there a dividing line between state and private action and, if so, where is it located for fourteenth amendment purposes? See, e.g., Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503 (1985); Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193 (1984); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129; Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); *Symposium on the State Action Doctrine of Shelley v. Kraemer*, 67 WASH. U.L.Q. 673 (1989); *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); see generally L. ALEXANDER & P. HORTON, *WHOM DOES THE CONSTITUTION COMMAND? A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS* (1988); Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987) (analysis of public/private distinction).

8. Several examples exist. First, the prescription against slavery and involuntary servitude, U.S. CONST. amend. XIII, § 1, applies to individuals. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L.Q. 77, 78 n.5 (1986) ("Most constitutional rights are not protected from infringement by private actors. The Thirteenth Amendment is one clear exception, because its prohibition of slavery is geographic and applies to any party whether public or private."). Congress' enforcement power, U.S. CONST. amend. XIII, § 2, reaches private conduct. Examples are 42 U.S.C. §§ 1981, 1982. These provisions originated in the Civil Rights Act of 1866 (ch. 31 § 1, 14 Stat. 27), re-enacted by the Enforcement Act of 1870 (ch. 114 § 18, 16 Stat. 140, 144), which was codified in the Revised Statutes of 1874 (§§ 1977-1978), and recodified at 42 U.S.C. §§ 1981, 1982 (1982). See generally *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565 (1989); McClellan, *The New Liberty of Contract Under the 13th Amendment: The Case Against Runyon v. McCrary*, 3 BENCHMARK 279 (1987); Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989); Tushnet, *Patterson and the Politics of the Judicial Process*, 1988 SUP. CT. REV. 43; *Symposium on the Reconsideration of Runyon v. McCrary*, 67 WASH. U.L.Q. 1 (1989); *Symposium, Patterson v. McLean*, 87 MICH. L. REV. 1 (1988); Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399 (1979); Zuckert, *Completing the Constitution: The Thirteenth Amendment*, 4 CONST. COMMENTARY 259 (1987). Other constitutional rights—interstate travel, participation in federal elections, informing federal officials of federal law violations, and petitioning Congress—apply to private individuals. See Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 616 n.330 (1983) (references). Are *Bivens* damages available against private individuals violating the thir-

of constitutional rights and liberties is not, however, mandated by the United States Constitution. Nor is the Constitution bereft of express remedial sanctions. Just compensation for private property taken for public use,<sup>9</sup> the writ of habeas corpus,<sup>10</sup> and reduction of a state's congressional representation when the right to vote is denied or abridged<sup>11</sup> are prominent examples.<sup>12</sup> Other provisions expressly require Presidents to "pre-

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teenth amendment and these other rights? See Gildin, *supra*, at 616 (affirmative answer). But see *infra* note 116 (exclusive congressional enforcement of fourteenth and fifteenth amendments).

9. U.S. CONST. amend. V. See *Jacobs v. United States*, 290 U.S. 13 (1933). The Court held that, under the fifth amendment, individuals had a right of action against the federal government for just compensation for the taking of their property and, without express legislative authorization, awarded damages for flooded land. *Id.* at 16. As to these aspects and the non-availability and implausibility of other remedies in *Jacobs*, see Dellinger, *supra* note 3, at 1542 n.58; Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1125 n.70 (1969); *Constitutional Law I*, *supra* note 3, at 686 n.10. On the fifth amendment just compensation clause, where "it is the Constitution that dictates the remedy," *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987), see, generally, Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989); *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581 (1988); *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

10. U.S. CONST. art. 1, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). See generally Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. 748 (1987); Sharer, *Power, Idealism, and Compromise: The Coordinate Branches and the Writ of Habeas Corpus*, 26 EMORY L.J. 149 (1977).

11. U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . is denied . . . or in any way abridged . . . the basis of representation therein shall be reduced . . ."). See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 15-16, 52-54, 62, 64-68, 70-77, 97-98, 368 (1977) [hereinafter *GOVERNMENT BY JUDICIARY*]; R. BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1809-11 (Library of Congress 1987) [hereinafter *CONSTITUTIONAL ANALYSIS*].

12. See also U.S. CONST. art. IV, § 2, cl. 3 (requirement to "deliver up" fugitive slaves); see generally P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981).

serve, protect, and defend the Constitution”<sup>13</sup> and authorize congressional enforcement of Civil War and latter amendments,<sup>14</sup> without obviating judicial enforcement.<sup>15</sup> Even so, unlike several foreign constitutions,<sup>16</sup> the United States Constitu-

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13. U.S. CONST. art. II, § 1, cl. 8. See *infra* notes 88, 92.

14. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, §§ 2, 5; *id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2; see also *id.* amend. XVIII, § 2 (Congressional and state concurrent legislative enforcement power repealed by section 1 of the twenty-first amendment). On these provisions, see *supra* note 7 and *infra* notes 109-15. At least from the perspective of enforcing constitutional rights, such explicit grants may be unnecessary because the existence of a right itself confers power or because of the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18. Note, *Unconstitutional Acts as Federal Crimes*, 60 HARV. L. REV. 65, 69 (1946). But see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (section 5 of the fourteenth amendment authorizes congressional legislation subjecting states to federal court damage remedies).

15. In most instances judicial review involving these amendments has not abated. Apart from the political question doctrine, see *infra* note 102, there have been suggestions that such express congressional enforcement power may oust judicial power. For example, it has been suggested:

Implying a Fourteenth Amendment cause of action for damages from *Bivens* is not without considerable difficulty despite some very broad language in *Bivens*. . . . [A] Fourteenth Amendment action for damages against a municipality must get around the existence of . . . § 5 of the Fourteenth Amendment which would appear to give Congress the primary role in enforcing Fourteenth Amendment rights through legislation creating damage actions.

S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983*, 339-40 n.15 (2d ed. 1986). See also *infra* note 116 (exclusive congressional enforcement).

16. For Canada, see CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 24 (1982); D. GIBSON & S. GIBSON, *Enforcement of The Canadian Charter of Rights and Freedoms*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 781 (G. Beaudoin & E. Ratushy 2d ed. 1989); Pilkington, *Monetary Redress for Charter Infringement*, in CHARTER LITIGATION 307 (R. Sharpe ed. 1987); Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 CAN. B. REV. 517 (1984); Cooper-Stephenson, *Tort Theory for the Charter Damages Remedy*, 52 SASK. L. REV. 1 (1988).

For India, see INDIA CONST. 1949, §§ 32, 226; 2 H. SEERVAI, *CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY* 1179-1576 (3d ed. 1984).

Other national constitutions with such express provisions are listed in D. GIBSON & S. GIBSON, *supra*, at 784 n.3; see also International Covenant on Civil and Political Rights 1966, arts. 2(3), 9(5), 999 U.N.T.S. 171.

Australia is more analogous to the United States. See, e.g., M. COPER, *FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION* 329 n.28 (1983) (citing *James v. Commonwealth*, 62 C.L.R. 339, 361-62 (Austl. 1939) (decision that section 92 of the Australian Constitution does not create a private cause of action for damages)); 1 FINAL REPORT OF THE CONSTITUTIONAL COMMISSION 497-

tion does not explicitly empower courts to create or grant remedies<sup>17</sup> to victims for violations of their constitutional rights. Enticing responses to constitutional law conundrums, therefore, becomes a necessary, but nonetheless an alluring, enterprise.

A sword, a shield, or both? What nomenclature best portrays the Constitution's character? Does the Constitution require a remedy for violations of rights it enumerates?<sup>18</sup> Is judicial creation of damage remedies constitutional? Does it matter whether federal or state courts are the damage entrepreneurs? In this venture, can the separation of powers doctrine be other than deleterious? Do the Constitution's grants of legislative and executive power preclude judicially created damage remedies? Are congressional or executive requirements constitutionally capable of partially or totally curtailing such judicial creations? When, where, and how can affirmative answers be proffered?

## I. THE CONSTITUTION

Paradigmatic visions of the Constitution abound.<sup>19</sup> Unhesitatingly, at least three examples protrude in any assessment of the constitutional attributes of judicial power, without legislative intervention, to beget damages. Most audible is the rights-remedies refrain. Created and amended by the people,<sup>20</sup>

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502 (1988). As to American state constitutions, see R. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 169-77 (1988); Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985).

17. Other than habeas corpus, see *supra* note 10, such judicial remedies might include injunctions, mandamus, declarations, and damages. See Rotenberg, *supra* note 8, at 77, 84-89 (discussing remedies); see also *infra* note 32 (constitutional basis for injunctions).

18. For the Supreme Court's answer, see *infra* note 49.

19. Economic, republican, religious, and slavery perspectives are examples. See sources cited in Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059, 1071 n.52 (1989).

20. U.S. CONST. preamble and art. V. But see Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (blacks and others excluded from constitution-making process); Roll, *We, Some of the People: Apportionment in the Thirteen State Conventions Ratifying the Constitution*, 56 J. AM. HIST. 21 (1969) (Constitution's Ratification Conventions malapportioned); see also Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987)

the Constitution is eulogized as conferring rights and requiring remedies.<sup>21</sup> Why, in the absence of textual adumbration, the latter flows from the former, is explained, first, by resort to the antiquarian legal maxim *ubi jus, ibi remedium*: "Where there is a right, there is a remedy."<sup>22</sup> Remedies, thus, inhere in rights. Reliance also is placed on the Framers' intent,<sup>23</sup> structural intricacies of the Constitution,<sup>24</sup> and judicial utterances.<sup>25</sup> At this juncture, courts, rather than legislatures, executive officials, or even the people themselves,<sup>26</sup> are peremptorily pro-

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(Constitution's creation unconstitutional). Are the Civil War amendments unconstitutional? See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, 305-06 (1982); J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 395-98, 584-85, 633-37 (2d rev. ed. 1969) (fourteenth amendment); Zuckert, *supra* note 8, at 262-69 (thirteenth amendment). See generally Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456-59, 486-515 (1989) (constitutional validity of the Constitution and Civil War amendments); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754-57 (1980) (constitutional amendments can be unconstitutional); Vile, *Judicial Review of the Amending Process: The Dellinger-Tribe Debate*, 3 J.L. & POL. 21 (1986).

21. Proponents of this view include Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1484-95 (1987); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 955-57 (1988). Is the concept of "rights" coherent, subversive, or important? See, e.g., Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); see also *infra* note 183 (sources on Critical Legal Studies).

22. BLACK'S LAW DICTIONARY 1363 (5th ed. 1979). That definitive emphasis is used in *Bush v. Lucas*, 462 U.S. 367, 373 n.10 (1983); Note, *supra* note 1, at 1259 n.52. Professor Amar's translation is normative: "Where there is a right, there should be a remedy." Amar, *supra* note 21, at 1486. Justice Brennan has been eulogized for implementing this maxim. Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1619-21 (1988); see also H. BROOM, *A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED* 150-52 (H. Manisty & H. Chitty eds. 7th ed. 1900) (maxim's history).

23. See, e.g., Amar, *supra* note 21, at 1488-89. For literature assessing the jurisprudential appeal, factual accuracy, Framers' views, and merits of an originalist approach to constitutional interpretation, see Thomson, *Comparative Constitutional Law: Entering the Quagmire*, 6 ARIZ. J. INT'L & COMP. L. 22, 37 n.44 (1989).

24. See, e.g., Amar, *supra* note 21, at 1487 n.246, 1489-91; see also *infra* note 64 (structuralist interpretative theories).

25. See, e.g., Amar, *supra* note 21, at 1486 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803)); Fallon, *supra* note 21, at 956 n.230.

26. See Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 774-75 (1987) (citi-



claimed to be the primary guardians of the Constitution and, especially, of its rights provisions.<sup>27</sup> Consequently, remedies, almost surreptitiously, acquire the adjective “judicial” or “legal.”<sup>28</sup> Support for this composite picture is garnered from several sources. Express provisions in state constitutions,<sup>29</sup> the intent, at least with respect to the Bill of Rights, of the Framers,<sup>30</sup> and Supreme Court precedents,<sup>31</sup> are the usual litany. Judicial review and prospective relief, for example, injunctions,<sup>32</sup> mandamus, and declarations, add credence to this characterization of the Constitution. Whether, within that broad focus, Supreme Court cases prior to *Bivens* establish a narrower proposition—that courts could and did infer a damage remedy directly from the Constitution—is, however, subject to debate.<sup>33</sup> Finally, normative judgments are advanced in

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zens’ role in interpreting the Constitution). For congressional and presidential constitutional exegesis, see sources cited in Thomson, *supra* note 19, at 1074 n.83.

27. See Amar, *supra* note 21, at 1486-89; Fallon, *supra* note 21, at 955-61.

28. Amar, *supra* note 21, at 1486; Fallon, *supra* note 21, at 955 n.223.

29. See, e.g., Amar, *supra* note 21, at 1486 n.241 (Delaware, Maryland, and Massachusetts constitutions); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1898 n.44 (1983). See generally Friesen, *supra* note 16.

30. See, e.g., Amar, *supra* note 21, at 1486-89.

31. See *supra* note 25. But see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 274 (2d ed. 1988) (Supreme Court rarely reads the Constitution as requiring “particular remedies” for constitutional infringements).

32. It has been suggested that “courts have long recognized actions for injunction based on the Constitution.” *Constitutional Law II*, *supra* note 3, at 221 n.16 (citing *Ex parte Young*, 209 U.S. 123, 156 (1908)). For the contrary view, see, for example, *Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting); Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 523-24 (1954). See generally G. McDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982).

33. Did the Supreme Court, in voting rights cases, infer damages directly from the United States Constitution, article I, section 2, and the fourteenth amendment? For affirmative views, see *Bush v. Lucas*, 462 U.S. 367, 375 (1983); Hill, *supra* note 9, at 1125; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 950 n.145 (1976) [hereinafter *Damage Remedies*]; *Constitutional Law II*, *supra* note 3, at 221 n.16. But see *Carlson v. Green*, 446 U.S. 14, 46 (1980) (Rehnquist, J., dissenting) (prior to *Bivens*, except for the just compensation clause, federal courts not recognized as authorized to infer from the Constitution damages for constitutional rights violations); Dellinger, *supra* note 3, at 1544-45 (legislative basis for damages). It has been suggested that *White v. Greenhow*, 114 U.S. 307 (1885), “held that the Constitution itself gave the plaintiff

favor of courts as the pre-eminent rights protectors and remedy providers.<sup>34</sup>

Others perceive a vastly different Constitution. Here, governmental structures, institutions, and powers claim chronological and textual primacy.<sup>35</sup> "[T]o form a more perfect Union"<sup>36</sup> was and continues to be <sup>37</sup> first in the Constitution's prefatory list of priorities. Only<sup>38</sup> when ventures into the Constitution reach its amendments are rights confronted. There, they<sup>39</sup> merely express what was already thought to have been accomplished by a written constitution—clear enunciation and limitation of federal powers to protect the states and the people.<sup>40</sup> A panorama of power, simultaneously conferred and constrained, emerges. Exertion of governmental authority, constantly accompanied by threats of restraint and impeded by checks and balances, is the animating imperative. The resulting portrait of the Constitution is antithetical to the rights-remedies refrain. Despite varying nomenclature—limitations,

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[whose property was seized in violation of the contract clause] a right to damages." Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 272 (1981). Other discussions of this case and other Virginia Coupon cases do not allude to this aspect. See, e.g., D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 423-25 (1985); 7 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88* Pt. 2, 712-24 (1987); J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 98-101 (1987); see also *supra* note 9 (pre-*Bivens* damage award under just compensation clause).

34. See, e.g., Amar, *supra* note 21, at 1491 n.262; Fallon, *supra* note 21, at 955-56.

35. The first portion of the Constitution is occupied by articles I, II, and III. The Constitution was ratified in 1789 and the Bill of Rights adopted in 1791. Rights in the original Constitution include the privileges and immunities clause. U.S. CONST. art. IV, § 2, cl. 1.

36. U.S. CONST. preamble.

37. Even during the Civil War, President Lincoln's objective was to save the union, not to free the slaves. D. FEHRENBACHER, *LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS* 115-16, 283-84 (1987).

38. But see *supra* note 35 (rights in original Constitution).

39. U.S. CONST. amends. I-IX, XIII-XV.

40. See, e.g., Amar, *supra* note 21, at 1493-95 (Madison's and Hamilton's federalism vindication of constitutional rights); Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988). See generally R. MORGAN, *JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS* (1988).

prohibitions, guarantees, and rights—constitutional provisions only provide individuals with defensive responses to government's actions. To repel, not attack, is the remedial solace offered by the Constitution.<sup>41</sup> Foreclosing invocations of the Constitution as an affirmative remedial response does not, however, preclude the constitutionality of other methods of redressing constitutional violations. Federal legislation mandating damages is the pre-eminent example.<sup>42</sup> This vision might be pressed even further. Without contesting the assumption that Congress and state legislatures are not exclusively endowed with authority to remedy constitutional infringements,<sup>43</sup> courts are viewed as empirically and normatively inferior in the enterprise of initiating monetary damages against governments and their officials. Spasmodically, courts—state, federal, and Supreme<sup>44</sup>—have sustained litigants' pleas for protection under

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41. For examples, see Dellinger, *supra* note 3, at 1532-33; Note, *supra* note 14. See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1220-29 (1982) (elaborating and criticizing this "formalist thesis" prohibiting private rights of action unless conferred by legislation or the Constitution).

42. For example, 42 U.S.C. § 1983 (1982) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* See generally S. NAHMOD, *supra* note 15; M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES (1986); Beerman, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989); Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987); Symposium, *Section 1983: The Constitution and the Courts*, 77 GEO. L.J. 1441 (1989). See also *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989) (states and state officials acting in official capacities not section 1983 "persons"). As to the relationship between section 1983 and direct fourteenth amendment damages, see *infra* note 71.

43. See *infra* text accompanying notes 55-71, 126-27 (courts' constitutional authority to create damage remedies).

44. See Thomson, *supra* note 19, at 1089 n.180 (references to comparative assessments of state and federal courts).

the Constitution's provisions.<sup>45</sup> Perhaps only during the Warren and, possibly, Burger eras has judicial performance sufficed to deserve civil libertarian accolades.<sup>46</sup> Otherwise, the judiciary's record over a two-hundred-year period can be characterized as almost unrelenting antipathy to the recognition and enforcement of constitutional rights and guarantees.<sup>47</sup> On that basis alone, it might be suggested that courts should be precluded from creating damage awards. Sustenance can, however, be added to that suggestion merely by pointing to courts' anti-majoritarian and anti-democratic characteristics.<sup>48</sup> Ultimately, the quest is to promulgate a constitutionally sustainable conclusion: no damages for constitutional violations without legislative authorization.

Absolute primacy, at present,<sup>49</sup> belongs to neither view of the Constitution. A more nuanced balance prevails.<sup>50</sup> Damages and other remedies are accommodated between the demand for

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45. See *id.* at 1066 n.21 (references); see also J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 79-128 (1980) (individual rights judicial review record); Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981); Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983).

46. See Thomson, *supra* note 19, at 1066 n.21 (references).

47. See *supra* note 45.

48. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962). For an attempt to dissolve this classic conundrum, see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). But see Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1090-96 (1988) (criticizing Ackerman's dissolution thesis).

49. "To date, the Supreme Court has never expressly stated whether the Constitution requires the existence of a damage action or some other effective remedy to vindicate and protect a citizen's rights. Indeed, in *Bush* the Court explicitly left this question open." Note, *supra* note 1, at 1254 (citing *Bush v. Lucas*, 462 U.S. 367, 378 n.14 (1983)). See also Nichol, *supra* note 3, at 1125 ("Decisions are unclear about whether the Constitution demands an effective remedy for the deprivation of fundamental interests.") (footnote omitted). Post-*Bivens* cases appear to reject "the proposition that the Constitution requires an effective remedy for constitutional rights violations." Fallon, *supra* note 21, at 955 (footnote omitted). *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988), reinforces this perception. As to the corollary question of the Supreme Court's source of constitutional authority to create a damage remedy, see *infra* text accompanying notes 55-71, 126-27.

50. Other examples include A. BICKEL, *supra* note 48, at 65-72 (Lincolnian tension between, and reconciliation of, principle and expediency); Fallon, *supra* note 21, at 956-61 (amalgamating principles to constitute a public rights doctrine).

comprehensive and effective remedial coverage of all violations of constitutional rights<sup>51</sup> and recognition that remedial gaps may, do, and should, in appropriate circumstances, exist at the behest of Congress and the Constitution.<sup>52</sup> Caught in the middle, this compromise redresses some, but not all, constitutional wrongs. Fears resonating from opposing viewpoints can, therefore, be explored and allayed. For example, without remedies will constitutional guarantees become nullities, foreshadowing an erosion of the rule of law?<sup>53</sup> Do the existence and exercise of judicial power to create and contour damage remedies for victims of constitutional violations exacerbate democratic sensibilities, rely on inadequate empirical foundations, and unnecessarily expose, chill, or hinder official conduct? Engendering this freedom to oscillate need not provoke jurisprudential anarchy. Careful consideration of the circumstances—statutory provisions, constitutional structures, historical exigencies, judicial precedents, and facts—surrounding each case<sup>54</sup> can establish a framework within which to debate intelligently the pertinent questions and possible answers. First, however, the participants' constitutional credentials to engage in this enterprise must be verified.

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51. See, e.g., Amar, *supra* note 21, at 1487 n.246, 1491 n.262 (normative evaluation). But see *id.* at 1506-09 (actual position inferior to normative preference).

52. See, e.g., Fallon, *supra* note 21, at 959-61.

53. Chief Justice Marshall appeared to respond affirmatively in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). *Bivens* has been eulogized as being "[i]n the best tradition of the remedial principles set forth in *Marbury v. Madison*." Amar, *supra* note 21, at 1507 (footnote omitted). See also *supra* note 22. But see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449-50 (1793) (Iredell, J.) ("every word in the Constitution may have its full effect without involving [the] consequence" of allowing "a compulsive suit against a state for the recovery of money") (quoted and discussed by Amar, *supra* note 21, at 1486-89).

54. A careful and sensitive case-by-case approach is advocated in Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Michelman, *supra* note 22. See also Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989) (dialogic conception of judicial process).

## II. CONSTITUTIONAL POWER

Failure by the Supreme Court to enunciate a constitutional basis from which federal courts, absent a legislative mandate to do so, derive authority to formulate directly from the Constitution a damage remedy<sup>55</sup> need not be fatally debilitating. Several textual sources might be proffered. Most frequently, scholars are driven to the language and values underlying article III.<sup>56</sup> Specifically, the “tightly packed” words “judicial power,”<sup>57</sup> with their common law antecedents, are presumed, in the absence of “some contrary indication,” to suffice.<sup>58</sup> Yet, even bolstering that presumption into a sustainable conclusion may, given the legislative power that also inheres in article III,<sup>59</sup> merely produce a fragile foundation. Reliance also is placed on the due process clauses.<sup>60</sup> But to intone that “due process of law”<sup>61</sup> entails monetary compensation belies virtually all of the learning in this fertile corner of constitutional law.<sup>62</sup> Other provisions, including rights and guarantees, in the Constitution offer no greater encouragement. *Bivens*’s forthright concession provides the quintessential example: “the Fourth Amendment does not in so many words provide for its

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55. See Note, *supra* note 1, at 1254 (“The Supreme Court in *Bivens* never acknowledged the source of its authority for creating a damage remedy for violation of an individual’s fourth amendment rights.”); see also *infra* note 67 (rebutting the *Bivens* historical tradition justification). Compare Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 902-05 (1986) (discussing whether *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), rests on a constitutional or statutory basis).

56. See Dellinger, *supra* note 3, at 1541-42; Fallon, *supra* note 21, at 955 n.223.

57. U.S. CONST. art. III, §§ 1, 2. These words also appear in the eleventh amendment of the United States Constitution.

58. Dellinger, *supra* note 3, at 1542. For “contrary indications,” see the enforcement provisions, *supra* note 14. See also *infra* text accompanying notes 109-15. Compare Nichol, *supra* note 3, at 1130-31, 1132, 1141-42, 1145 (courts’ authority to create *Bivens* remedy flows from power to decide “cases” and “arising under” jurisdiction of article III, section 2 and constitutional interpretation).

59. U.S. CONST. art. III, §§ 1 and 2, cl. 2. See *infra* notes 78, 79.

60. Fallon, *supra* note 21, at 955 n.223. See also *Davis v. Passman*, 442 U.S. 228 (1979) (fifth amendment due process clause right to damages).

61. U.S. CONST. amends. V, XIV.

62. See, e.g., L. TRIBE, *supra* note 31, at 629-32, 663-738 (procedural due process), 553-86, 1302-1435 (substantive due process), 1673-87 (structural due process).

enforcement by an award of money damages for the consequences of its violation."<sup>63</sup> Structural adumbration of the Constitution<sup>64</sup> is the remaining aspirant that might supply a textual linkage connecting federal courts, damages, and constitutional infringements.<sup>65</sup> By coalescing facets of separation of powers, checks and balances, and judicial independence, it is possible to characterize some attributes of the judicial process as constitutionally promulgated.<sup>66</sup> History indicates one reason why damages may not be among those constitutionalized elements. Catastrophic consequences for federal court authority, integrity, and viability have not been exultant in the face of the omission to claim and exercise, without congressional sanction, power to award damages.<sup>67</sup> Rather, the reverse has prevailed. Victims seek refuge from perpetrators of unconstitutional conduct in federal courts. Any retort that precisely those circumstances illuminate the intrinsic importance of remedial concerns does not, however, necessitate endorsement of

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63. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). See also Note, *Protecting Privacy under the Fourth Amendment*, 91 YALE L.J. 313, 317 n.24 (1981) ("The Fourth Amendment does not specify how its commands are to be followed or enforced, and its text has been criticized as 'brief, vague, general [and] unilluminating.' . . . [The] Fourth Amendment is 'one of the Constitution's richly generative texts . . . [and] does not answer specific questions.'") (citations omitted). Other amendments from which the Supreme Court has inferred damages—fifth and eighth—are no more helpful.

64. The classic exposition is C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Others also do not require the Supreme Court to identify specific provisions. See, e.g., Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1055 (1981) ("The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account . . . all of the values to which the Constitution . . . gives expression."). This moves towards non-interpretivism. See Moore, *The Written Constitution and Interpretivism*, 12 HARV. J.L. & PUB. POL'Y 3 (1989). See the sources cited in Thomson, *supra* note 19, at 1075 n.77.

65. See, e.g., Amar, *supra* note 21, at 1487 n.246 ("my structural argument[:]. . . full remedies were woven into the fabric of the" Constitution).

66. Judicial review is an example. See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 27-31 (1986) (various bases for judicial review).

67. Although the majority in *Bivens* cursorily concluded "that '[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty' . . . the independent *judicial* creation of [such] remedies . . . directly from the Constitution is virtually unprecedented." Dellinger, *supra* note 3, at 1544 (quoting *Bivens*, 403 U.S. at 395).

the proposition that pre-*Bivens* remedies or, by exponential extension, damages are predicated directly on the Constitution. Finally, the authority of the Framers is invoked.<sup>68</sup> At its zenith, this originalism declares the Framers to have intended a regime of “full remedies” for constitutional rights violations.<sup>69</sup> Which institutions would provide what remedies and when seems not to have been so fervently articulated. Even if inferences from the Framers’ documentary records lead to conclusions favoring judicial, rather than congressional, authority in this arena of remedies,<sup>70</sup> was that explicitly obviated by the language and intent of those who framed the Civil War and subsequent amendments? At least one ramification might be the restriction of federal court authority to award *Bivens* damages to pre-Civil War provisions of the Constitution.<sup>71</sup> Tantalizing speculation also erupts over whether state courts can

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68. See *supra* note 23.

69. See Amar, *supra* note 21, at 1487 n.246, 1489; see also *supra* note 65.

70. See *supra* note 28.

71. Courts have not taken this approach but have, for example, inferred *Bivens* remedies from the fourteenth amendment. Several situations arise: can states, and state officials, and municipalities, their subdivisions, and officers, incur such liability directly or on a *respondeat superior* basis? As to municipalities, see, for example, Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978); Gerhardt, *supra* note 42, at 554-55 (suggesting the Supreme Court has done so); Lehmann, *supra* note 3, at 567, 580-87 (federal court decisions); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); *Damage Remedies*, *supra* note 33, at 922, 926, 928-29, 934-35 (1976) (federal court decisions); Student Project, *Constitutional Torts Ten Years After Bivens*, 9 HOFSTRA L. REV. 943, 1009-16 (1981) (federal court decisions). As to states, see Nichol, *supra* note 3, at 1142 n.139 (*Bivens* actions against state officials). But see Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 70 n.48 (1989) (Supreme Court has not decided “whether a federal court private cause of action against a state may be inferred directly from the Fourteenth or Fifteenth Amendments, or any other constitutional provision.”). See also *supra* note 15 (Congress primary enforcer of fourteenth amendment) and *infra* note 116 (exclusive congressional enforcement of fourteenth amendment).

What is the relationship between fourteenth amendment and congressional damages? Municipalities may incur section 1983 liability. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Does section 1983 constitute a hesitation factor or special remedy (discussed *infra* notes 175-77) precluding fourteenth amendment damages? See *Damage Remedies*, *supra* note 33, at 935-51 (negative answer). Even if it does, as section 1983 may not cover all municipal fourteenth amendment violations, see Gerhardt, *supra* note 42, can direct fourteenth amendment damages be



participate in this enterprise.<sup>72</sup> Are state courts authorized or required by the Constitution to provide remedies for violations of federal constitutional rights? Do those remedies include damages? What provisions of the Constitution dictate the answers? Does Congress have any role in adjusting or denying state court remedies for federal constitutional rights? Must state judges disregard state legislation, common law, and constitutional law when litigants claim a federal constitutional entitlement to damages? Ultimately, an array of affirmative answers would rectify federal judicial deficiencies.<sup>73</sup> At present, however, the Supreme Court, if not others,<sup>74</sup> has left these questions open for further debate.<sup>75</sup>

More formidable and textually explicit are Congress' powers to enforce constitutional rights. Their explication pivots around three general issues. Initially and, perhaps, least troublesome is the quest to locate in the Constitution the source of congressional power to mandate damages where constitutional rights are infringed. Express grants of power to Congress to "enforce by appropriate legislation" their substantive provisions are appended to the thirteenth, fourteenth, fifteenth, nineteenth, twenty-fourth, and twenty-sixth amendments. Examples of en-

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inferred in those situations? See Blum, *supra*, at 418-19, 432-41 (affirmative answer).

States and their officials are not section 1983 "persons." *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989). Under the commerce clause, *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2280 (1989), and section 5 of the fourteenth amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), Congress can subject states to damages. Do such damages preclude direct fourteenth amendment damages? See *infra* text accompanying notes 168-74.

72. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 584-90 (3d ed. 1988) [hereinafter HART AND WECHSLER]; Dellinger, *supra* note 3, at 1539-40; Fallon, *supra* note 21, at 955; Nichol, *supra* note 3, at 1131 (state courts must entertain *Bivens* claims against federal officials); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1247-64 (1978); Wolcher, *supra* note 33; Note, *State Remedies for Federally-Created Rights*, 47 MINN. L. REV. 815 (1963).

73. Removal of federal courts' jurisdiction to determine cases arising under the Constitution, which was not conferred until 1875, is an example. See *infra* note 138 (*Bivens* actions authorized by jurisdictional grant).

74. See Wolcher, *supra* note 33; see also Note, *supra* note 72.

75. HART AND WECHSLER, *supra* note 72, at 588.

forcement legislation are available.<sup>76</sup> No similar clause is attached to the first eight amendments. Purloining authority from among the following provisions will, however, suffice:<sup>77</sup> enumerated congressional powers, including the power to create federal courts<sup>78</sup> and the necessary and proper clause<sup>79</sup> and the exceptions and regulations power over the Supreme Court's appellate jurisdiction.<sup>80</sup> Second, is constitutional power to create damage remedies exclusively a congressional prerogative? Several Supreme Court Justices have read the Constitution as commanding a positive response. Apart from a formalistic separation of powers approach<sup>81</sup> classifying damage creation as a legislative function, which must reside only with Congress, the mere presence of such congressional power has been interpreted as precluding judicial participation.<sup>82</sup> Adoption of a more flexible, functional, and pragmatic constitutional exegesis enables opposite conclusions to be espoused by other Justices.<sup>83</sup>

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76. See, e.g., 42 U.S.C. § 1983 (1982) (quoted *supra* note 42); see also *supra* note 8.

77. See generally Dellinger, *supra* note 3, at 1546-47; Rotenberg, *supra* note 8, at 91; Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 281 (1984); Note, *supra* note 14, at 69. The dissenters in *Bivens*, although concluding that Congress could create a damage remedy for federal fourth amendment violations, did not identify particular constitutional provisions. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 412, 418 (1971) (Burger, C.J., dissenting), 427-28 (Black, J., dissenting), 430 (Blackmun, J., dissenting). But see Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 858 n.126 (1986) (rejecting article I, section 8 of the United States Constitution as authorizing Congress to protect constitutional rights); Note, *supra* note 14, at 69 n.17 (interpreting *Screws v. United States*, 325 U.S. 91, 140 (1945) (Roberts, Frankfurter, Jackson, JJ., dissenting) as indicating that section 5 of the fourteenth amendment is, in light of article I, section 8, clause 18, superfluous). See also *infra* note 111.

78. U.S. CONST. art. I, § 8, cl. 9. See also art. III, § 1.

79. *Id.* art. I, § 8, cl. 18.

80. *Id.* art. III, § 2, cl. 2. See generally Thomson, *An Endless but Productive Dialogue: Some Reflections on Efforts to Legitimize Judicial Review*, 61 TEX. L. REV. 743, 759-63 (1982) (scope of Congress' exceptions and regulations power).

81. See *infra* notes 149, 150.

82. *Carlson v. Green*, 446 U.S. 14, 38 (1980) (Rehnquist, J., dissenting); Dellinger, *supra* note 3, at 1546 n.76 (attributing this view to *Bivens* dissenters). Compare *infra* note 116 (Congress as exclusive fourteenth amendment enforcer).

83. Noteworthy is Justice Brennan. See, e.g., Brown, *supra* note 3, at 269-72 (analysis of Justice Brennan's *Bivens* positions). For other analyses of Justice Bren-

Inevitably, on this view, an interplay of congressional and federal judicial powers will ensue.<sup>84</sup> That occurrence ignites the third issue. In any clash of such legislative and judicial powers, which possesses the necessary constitutional prerequisites to prevail? Can legislatures alter or abrogate judicial damages or must Congress' remedial performance conform to judicially mandated requirements?<sup>85</sup> Before venturing onto that rocky terrain, other sources of power to right constitutional wrongs ought to be perused.

Presidential power is the obvious possibility. Four express<sup>86</sup> provisions ought to be considered: the executive power clause,<sup>87</sup> the oath of office,<sup>88</sup> the commander-in-chief clause,<sup>89</sup> and the duty to faithfully execute the laws.<sup>90</sup> Divergent views concerning each phrase have been expressed.<sup>91</sup> For example, does the presidential oath to "preserve, protect, and defend the Constitution" authorize executive measures, including levying of damages, against federal officials who violate the Constitution or, at least, oblige Presidents to exercise other powers conferred on them by Congress or the Constitution to rectify such unconstitutional actions?<sup>92</sup> Might "faithful execution of the

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nan's constitutional methodologies, see, for example, Berger, *Justice Brennan vs. The Constitution*, 29 B.C.L. REV. 787 (1988); Friedelbaum, *Justice Brennan and the Burger Court: Policy-Making in the Judicial Thicket*, 19 SETON HALL 188 (1989); Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988); Reason, *Passion and Justice Brennan: A Symposium*, 10 CARDOZO L. REV. 25 (1988).

84. See *infra* notes 99 (supplemental state remedies), 175-77 (alternative federal remedies and special factors).

85. See *infra* text accompanying notes 96-142.

86. As to inherent or implied executive power, see Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1 (1979).

87. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . .").

88. *Id.* cl. 8 ("I . . . will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

89. *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

90. *Id.* art. II, § 3 (The President "shall take Care that the Laws be faithfully executed").

91. See Winterton, *supra* note 86, at 24-35.

92. See *id.* at 29-31.

laws,” which includes not only legislation, but also the Constitution,<sup>93</sup> permit Presidents, without statutory sanction, to apply remedial measures, such as damages, as part of executive endeavors to ensure that the Constitution’s rights and guarantees are observed?<sup>94</sup> Assuming the requisite constitutional warrant exists, would these presidential exertions impede or succumb to congressional or judicial power?<sup>95</sup> Again, the crucial conundrum emerges. In articulating a remedial system for constitutional violations, what are the appropriate and constitutionally viable roles for the federal and state branches of government?

### III. JUDICIAL REVIEW AND CONGRESSIONAL REVISION

Resisting the blandishments of judicial supremacy is the primary prerequisite in any attempt adequately to adumbrate a spectrum of answers. Submission to the perception that constitutional adjudication by courts in “cases” and “controversies”<sup>96</sup> is inviolable from legislative or executive hegemony,<sup>97</sup> even if correct,<sup>98</sup> need not preclude action by others. Remedial requirements enunciated when resolving litigation may not, for example, demand exclusivity. Minimum standards may be established in judicial opinions upon which other branches of government can build, vary, or replicate with equally efficacious analogies but not in the final analysis obviate.<sup>99</sup> From this perspective, judicial decisions remain ultimately<sup>100</sup> respon-

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93. *See id.* at 34 n.223.

94. *See id.* at 35 n.236 (differing views).

95. As to the constitutional dimensions of executive-legislative power, including spheres of executive independence and inviolability, see, generally, L. TRIBE, *supra* note 31, at 209-96.

96. U.S. CONST. art. III, § 2, cl. 1.

97. See the sources cited in Thomson, *supra* note 23, at 39 n.52.

98. For a differing view, see *infra* text accompanying notes 109-18.

99. Professor Amar considers that *Bivens* establishes “a constitutional remedial floor” and “in no way automatically ousts supplemental state law remedies that might be more generous” than *Bivens* damages. Amar, *supra* note 21, at 1508 n.322. *See also* Note, *supra* note 1 (alternative remedies and their required appropriateness or effectiveness).

100. *But see* U.S. CONST. art. V (amendment of Constitution).

sible for determining the existence and adequacy of remedies, including damages, to repair infringed constitutional rights.

Inevitably, other perspectives present antithetical resolutions of this struggle between judicial review and congressional revision. A spectrum of possibilities exists. Constitutional interpretation is not solely a judicial prerogative. Congress, Presidents, executive officials, and the people participate.<sup>101</sup> Occasionally, courts may be precluded from this interpretative task.<sup>102</sup> Resolution of constitutional law issues is, in these circumstances, ultimately<sup>103</sup> a legislative or executive responsibility.<sup>104</sup> Even when courts make constitutional determinations, their congressional<sup>105</sup> revision or abrogation may be constitutionally permissible. Most of the Constitution does not provide any guidance to resolve confrontations between judicial, legislative, and executive decisions on issues of constitutional law.<sup>106</sup> In this context, history, practical experience, and normative judgments

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101. *See supra* note 26 (Congress, Presidents, and individuals as interpreters of the Constitution).

102. The political question doctrine is an example. *See generally* L. TRIBE, *supra* note 31, at 96-197; Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125 (1987). *See supra* note 71 (conflicting federal court decisions and views about Supreme Court cases). *See also infra* note 116 (exclusive congressional enforcement of the fourteenth amendment).

103. *See supra* note 100 (constitutional amendments).

104. *See supra* note 102.

105. Executive non-enforcement—either total, partial, or by delay—can nullify judicial decisions. For examples, see Thomson, *Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective*, 62 TEX. L. REV. 559, 562 n.12 (1983) (Civil War and Reconstruction era, segregation decisions, and *United States v. Nixon*, 418 U.S. 683 (1974) (Nixon Tapes case)). Judicial appointments by the President, with Senate advice and consent, also influence courts' constitutional decisions. *See generally* Eastland, *Ultra-Wrong About the "Ultra-Right,"* 87 MICH. L. REV. 1450 (1989); Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); Griffin, *Politics and the Supreme Court: The Case of the Bork Nomination*, 5 J.L. & POL. 551 (1989); Thomson, *Prologue to Power: Selecting Supreme Court Justices* (Book Review), 12 U. DAYTON L. REV. 71 (1986); Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987). *See also infra* note 107 (political checks on judicial supremacy).

106. *But see supra* note 102 (political question doctrine) and *infra* note 116 (enforcement provisions).

have ensured that, generally, the courts prevail.<sup>107</sup> It would, therefore, be unexceptional in these circumstances to conclude that Congress does not have constitutional power to eliminate a judicial damages remedy fashioned directly from the Bill of Rights.<sup>108</sup> Explicit textual warrant for Congress to intervene and supplant courts' constitutional decisions does, however, reside in the enforcement provisions of the thirteenth and most subsequent amendments.<sup>109</sup> Principally,<sup>110</sup> the correctness and limits of this proposition have been debated within the confines of section 5 of the fourteenth amendment.<sup>111</sup> Whatever "defini-

107. Thus, it has been suggested that "[a]fter a history of far more struggle than is generally remembered, it is now settled that (absent a constitutional amendment) the [Supreme] Court has the last say, and in that sense its constitutional interpretations are both authoritative and final." Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2 (1975) (footnotes omitted). Such judicial supremacy may, however, in practice and theory, be a myth. See the sources cited in Thomson, *supra* note 23, at 39 n.52; *infra* note 132 (pluralistic constitutional law model). In any event, judicial supremacy can be blunted, for example, by judicial appointments and removals, and amending or removing courts' jurisdiction. See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 66, at 65-76 (reprisal powers).

108. For example, Congress could not eliminate the remedy created in *Carlson v. Green*, 446 U.S. 14 (1980), *Davis v. Passman*, 442 U.S. 228 (1979), and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

109. See *supra* note 14 (Congress' enforcement powers). For example, section 5 of the fourteenth amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5. On these enforcement provisions, see, generally, L. TRIBE, *supra* note 31, at 330-53. See also *infra* note 116 (debate as to exclusivity of Congress' enforcement powers).

110. But see, e.g., L. TRIBE, *supra* note 31, at 330-50 (thirteenth and fifteenth amendments).

111. See generally GOVERNMENT BY JUDICIARY, *supra* note 11, at 221-29; CONSTITUTIONAL ANALYSIS, *supra* note 11, at 1812-20; L. TRIBE, *supra* note 31, at 334-50; Carter, *supra* note 77; Erler, *The Fourteenth Amendment and the Protection of Minority Rights*, 1987 B.Y.U. L. REV. 977; Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENTARY 123 (1986). See also *infra* notes 170-73.

Under section 5, can Congress validly enact a law that, if passed by a state, would violate the equal protection clause? See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Views differ on the relationship and comparative scope of Congress' article I, section 8 and fourteenth amendment, section 5 powers. See *supra*

tional"<sup>112</sup> dimension of section 5—Congress' power to adjust, dilute, or expand the scope of fourteenth amendment rights as defined by the Supreme Court—may emerge from that discussion,<sup>113</sup> its "remedial"<sup>114</sup> function validates congressional legislation authorizing damages for violations of fourteenth amendment rights.<sup>115</sup> Activating all of these elements produces an explosive question: what if a judicially created damage remedy was premised directly on the fourteenth amendment<sup>116</sup> and Congress, acting under its section 5 enforcement power, legislatively abrogated it without installing any other remedial scheme? Validating such congressional power would risk ren-

note 77; Monaghan, *supra* note 107, at 18-19 n.100 (powers rest on "different principles" and former "is a limited, backstopping authority" permitting congressional correction of state wrongs).

112. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 303 (1982).

113. For possibilities, see sources cited *supra* note 111. Some contend that section 5 has no "definitional" dimension and is exclusively "remedial." See Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U.L. REV. 129, 138-40 (1982). But see Carter, *supra* note 77, at 841-43 (criticizing exclusively "remedial" view of section 5).

114. Choper, *supra* note 112, at 303.

115. One example is 42 U.S.C. § 1983 (quoted *supra* note 42). Section 1983 may be unnecessary if the fourteenth amendment itself creates a damages remedy or would fill the void if such damage actions were against states. See *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). But see Nowak, *supra* note 111, at 1464 (congressional legislation under section 5 imposing damages upon states for their actions prior to enactment "may be" unconstitutional). See also *supra* notes 14, 77 (section 5 may be superfluous). But see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (section 5 authorizes congressional legislation subjecting states to federal court damage remedies); *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989) (commerce clause authorizes congressional legislation rendering states liable to damages in federal court).

116. See Nowak, *supra* note 111, at 1464 (history does not support an inherent fourteenth amendment damage remedy); see also *supra* note 71 (conflicting federal court decisions and views about Supreme Court cases).

It has been suggested that courts have no judicial review power under the fourteenth amendment and only can decide fourteenth amendment cases to the extent they are authorized to do so by congressional legislation. That is, only Congress can enforce the fourteenth amendment. See GOVERNMENT BY JUDICIARY, *supra* note 11, at 221-29. For differing views, see Berger, *Paul Dimond Fails to "Meet Raoul Berger on Interpretivist Grounds,"* 43 OHIO ST. L.J. 285, 287 (1982); Berger, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427, 446-50 (1981). Similarly, as to the fifteenth amendment's enforcement clause, see Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 350-53 (1979).

dering asunder traditional American conceptions of constitutionalism<sup>117</sup> and overruling, at least in enforcement clause contexts, *Marbury v. Madison*.<sup>118</sup>

Confrontation between Congress and the courts is much less volatile<sup>119</sup> if constitutional common law,<sup>120</sup> rather than “pure”<sup>121</sup> or “authoritative”<sup>122</sup> constitutional law, is involved. Conceding to Congress’ power to permeate,<sup>123</sup> perhaps, within limits,<sup>124</sup> constitutional law enunciated by the Supreme Court is the distinguishing characteristic of constitutional common

117. To this extent, there would be some movement towards British Parliamentary supremacy. Compare *infra* note 118. Assessments of federalism effects must take into account states’ representation in Congress but not, except in Senate advice and consent to judicial appointments, in the Supreme and federal courts. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

118. 5 U.S. (1 Cranch) 137 (1803). “The fundamental issue is Morgan’s consistency with *Marbury v. Madison*.” L. TRIBE, *supra* note 31, at 36 (referring to *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). Compare suggestions that *Garcia* also overruled *Marbury v. Madison*. See Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1721-27, 1731-33 (1985) (overruling *Marbury v. Madison* may have separation of powers problems to the extent that Congress becomes the arbiter of constitutionality). But see *infra* note 132 (pluralistic model of constitutional law). Federalism objections to such plenary section 5 congressional power were anticipated and rejected by the fourteenth amendment’s Framers. See Nowak, *supra* note 111, at 1460-64; Zuckert, *supra* note 111.

119. But see Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1176 (1978) (constitutional common law will “dissolve [American] constitutionalism”).

120. It has been “understood as . . . a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; . . . a constitutional common law subject to amendment, modification, or even reversal by Congress.” Monaghan, *supra* note 107, at 2-3. Elaboration provided, *id.* at 10-30, is disputed by Shrock & Welsh, *supra* note 119, at 1146-71. Constitutional common law differs from federal common law. For the latter, see Field, *supra* note 55; Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1167-76 (1986). Is *Bivens* federal common law? See Brown, *supra* note 3, at 291-98 (negative answer). An affirmative response would represent the ultimate “deconstitutionalization” of *Bivens*. See *infra* note 140.

121. Nichol, *supra* note 3, at 1124.

122. Monaghan, *supra* note 107, at 2.

123. See *id.* at 3 (congressional legislation amending, modifying, or reversing constitutional common law).

124. See *infra* note 131 (judicial supremacy).



law. Enforcement provisions<sup>125</sup> are not required for such congressional power, which can be utilized due to constitutional common law's defeasible nature. Assuming the constitutional common law thesis is valid and viable,<sup>126</sup> are *Bivens* damages pure constitutional law or merely an exemplary illustration of constitutional common law? Advocates of each approach are prominent.<sup>127</sup> Limited congressional remedial activity may be constitutionally feasible even on the former perspective.<sup>128</sup> Much more appears to be possible if *Bivens* is constitutional common law. Amendment, modification, and, perhaps, reversal of judicially created damage remedies by congressional legislation might validly occur.<sup>129</sup> Ultimately, however, even with constitutional common law,<sup>130</sup> the judiciary prevails.<sup>131</sup>

Retention of a constitutional focus on damage awards where the Constitution is violated, without eventually succumbing to judicial supremacy may, nevertheless, be attainable. A third model of constitutional law—not pure or common, but pluralistic—can provide more satisfactory conclusions.<sup>132</sup> Renunciation

125. See *supra* note 14.

126. But constitutional common law is attacked from both extremities—the “pure” constitutional law model, see Schrock & Welsh, *supra* note 119, and the “pluralistic” constitutional law model, see L. TRIBE, *supra* note 31, at 36-42.

127. See generally Brown, *supra* note 3, at 269-74, 285-99 (discussing each *Bivens* characterization). Supporters of a pure constitutional law *Bivens* include Dellinger, *supra* note 3, at 1543-59; Nichol, *supra* note 3; Schrock & Welsh, *supra* note 119, at 1117-38; Steinmann, *supra* note 77, at 279-81. Supporters of a constitutional common law *Bivens* include Justice Rehnquist, *Carlson v. Green*, 446 U.S. 14, 53 (1980) (Rehnquist, J., dissenting); Meltzer, *supra* note 120, at 1172; Monaghan, *supra* note 107, at 23-24; Note, *The Limits of Implied Constitutional Damages Actions: New Boundaries for Bivens*, 55 N.Y.U. L. REV. 1238, 1244-45 nn.50-51 (1980).

128. See *supra* text accompanying notes 96-100.

129. Monaghan, *supra* note 107, at 3. Compare Fallon, *supra* note 21, at 956-61 (defeasible public rights doctrine).

130. As to pure constitutional law, see *supra* text accompanying notes 96-100.

131. Monaghan, *supra* note 107, at 29-30. See also L. TRIBE, *supra* note 31, at 37 (criticizing Monaghan's retention of an ultimate constitutional law arbiter).

132. See L. TRIBE, *supra* note 31, at 36-42. Professor Tribe's theory of the Constitution is:

despite the growth of federal judicial power, the Constitution remains in significant degree a democratic document—not only written, ratified and amended through essentially democratic processes but indeed open at any given time to competing interpretations limited only by the values which in-

of the existence of, or any requirement for, an ultimate arbiter of constitutional law is its major premise. Equating constitutional law with judicial enforcement of the Constitution and the confusion that this generates also are eliminated. Consequently, in any dialogue between the courts, Congress, Presidents, and the states pursued, for example, by constructing, altering, or destroying remedies, no participant is constitutionally preeminent. *Bivens* damages are, therefore, at least as a matter of constitutional law, always debatable and continuously open to revision.

Depriving damage remedies of any direct<sup>133</sup> constitutional foundation is another alternative.<sup>134</sup> Damage awards are then merely judicial implementation of statutory commands. Their creation and development can proceed only where legislation provides the requisite authority.<sup>135</sup> Do any such legislative directions exist?<sup>136</sup> Clearly, for some constitutional violations, Congress has provided damage actions.<sup>137</sup> Much more ambiva-

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form the Constitution's provisions themselves, and by the complex political processes that the Constitution creates—processes which on various occasions give the Supreme Court, Congress, the President, or the states, the last word in constitutional debate.

*Id.* at 41-42. *See also supra* note 26 (Constitution's various interpreters).

133. Of course, congressional legislation ultimately must be based on, and be compatible with, the Constitution.

134. This seems to be the Supreme Court's present sentiment and direction. *See Brown, supra* note 3, at 269-72, 276-78, 298; Fallon, *supra* note 21, at 955 n.228. For another—federal common law—view of *Bivens*, see Brown, *supra* note 3, at 291-93, 295-98; *see also supra* note 120 (federal common law as opposed to constitutional common law).

135. *See Carlson v. Green*, 446 U.S. 14, 38 (1980) (Rehnquist, J., dissenting); *Bush v. Lucas*, 426 U.S. 367, 378 (1983); Steinman, *supra* note 77, at 278. *But see* Nichol, *supra* note 3, at 1130-32 (criticizing legislative view of *Bivens*). *See also supra* text accompanying notes 76-85 (Congress' legislative powers).

136. This question also arises in federal common law and abstention doctrines. *See Field, supra* note 55, at 927-45; Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114-15 (1984). In the *Bivens* context, see *Carlson v. Green*, 446 U.S. 14, 38 (1980) (Rehnquist, J., dissenting). The Judicial Reform Bill proposed that "[n]o Act of Congress shall be construed to grant to any party any cause of action at law or in equity unless that Act expressly grants a cause of action." S. 3018, 97th Cong., 2d Sess. § 171 (1982).

137. *See, e.g.*, 42 U.S.C. § 1983 (1982) (quoted *supra* note 42). "Congress, . . . under section 5 of the Fourteenth Amendment, has established a network of federally protected substantive rights and simultaneously vested the federal courts with

lence surrounds federal Bill of Rights violations. One possibility is the congressional grant of jurisdiction to federal courts to decide federal questions.<sup>138</sup> Judges and scholars easily can be garnered to endorse or refute the proposition that this legislation confers power to award damages to victims of constitutional deprivations.<sup>139</sup> Supporters, of course, are faced with the possibility of legislative repeal or variation<sup>140</sup> and are conscious that this jurisdictional grant does not extend to state courts. Opponents, although investigating other legislation, have concluded that Congress never has provided federal courts with authority to award damages for federal constitutional torts.<sup>141</sup> Whether it will do so remains speculative.<sup>142</sup>

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jurisdiction to enforce those laws . . . ." Redish, *supra* note 136, at 77 (footnote omitted).

138. 28 U.S.C. § 1331 (1982). For an attempt to abolish the general federal question jurisdiction, see proposed Judicial Reform Bill, *supra* note 136.

139. For views that federal question jurisdiction does not constitute a damages direction, see *Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting); Nichol, *supra* note 3, at 1130-31. The contrary view is espoused by *Bush v. Lucas*, 462 U.S. 367, 378 (1983); Brown, *supra* note 3, at 286; Steinmann, *supra* note 77, at 278.

140. See, e.g., proposed Judicial Reform Act of 1982, *supra* note 136. If *Bivens* is federal common law, see *supra* note 120, Congress can amend or repeal such damages. For an attempt to avoid and rebut this possibility, see Brown, *supra* note 3, at 297-98 n.260.

141. See, e.g., *Carlson v. Green*, 446 U.S. 14, 39-40, 43-44 (1980) (Rehnquist, J., dissenting) (referring to 28 U.S.C. §§ 1331 (Federal question; amount in controversy; costs), 1651 (All Writs Act), 1652 (Rules of Decision Act)); Stewart & Sunstein, *supra* note 41, at 1226. See also Nichol, *supra* note 3, at 1131-32 (discussing Justice Rehnquist's view). Compare contradictory congressional efforts to repeal the legislative basis for damages, see, e.g., Judicial Reform Bill, *supra* note 136, and efforts to amend the Federal Tort Claims Act to provide a damage remedy for federal constitutional violations. See Madden, Allard & Remes, *Bedtime For Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469 (1983); Steinmann, *supra* note 77, at 280 n.69.

142. For unsuccessful congressional attempts to impose damages on the United States for constitutional violations, see *supra* note 141 (proposals to amend Federal Torts Claims Act). *Bivens* concerned federal officers. Efforts to obtain *Bivens* damages against the United States have been unsuccessful. See HART AND WECHSLER, *supra* note 72, at 1153 n.24. States and their officials are not within 42 U.S.C. § 1983, see *supra* note 42, but might be subject to a *Bivens* remedy. See *supra* note 71 (divergent views). Municipalities are subject to 42 U.S.C. § 1983, see Gerhardt, *supra* note 42, and might be subject to a *Bivens* remedy. See *supra* note 71. Private individuals may be subject to *Bivens* damages. See *supra* note 8; see also *infra* note 192 (reform proposals).

## IV. SEPARATION OF POWERS

Conjecture also permeates the separation of powers contribution to this enterprise of creating a damage remedy for federal constitutional torts. Each *Bivens* damages predicate—pure, common, or pluralistic constitutional law, legislative authorization or federal common law<sup>143</sup>—implicates separation of powers concerns and values.<sup>144</sup> These concerns and values preceded the American Constitution,<sup>145</sup> flourish in other countries,<sup>146</sup> are relevant in numerous contexts,<sup>147</sup> and can be, and often are, normatively and empirically assessed. Supreme Court separation of powers jurisprudence, therefore,

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143. See *supra* notes 120, 140 (possibility and effect of *Bivens* being federal common law).

144. See generally Brown, *supra* note 3, at 267-69, 274-91; Monaghan, *supra* note 107, at 34-35; Nichol, *supra* note 3, at 1128, 1150-53; Schrock & Welsh, *supra* note 119, at 1127-29. Compare separation of powers concerns in judicial creation of statutory rights of action. See Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 647-49 (1984); Stewart & Sunstein, *supra* note 41, at 1223-29.

145. See generally M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212-24 (1989); Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 477-84 (1989); Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393, 434-43 (1989).

146. For Australia and Canada, see Thomson, *supra* note 19, at 1078. See also L. ZINES, THE HIGH COURT AND THE [AUSTRALIAN] CONSTITUTION 146-61 (2d ed. 1987). For comparative assessments, see A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 1-51 (1953); Gibbs, *The Separation of Powers: A Comparison*, 17 FED. L. REV. 151 (1987); Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

147. See, e.g., Blumoff, *Illusion of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079 (1988); Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037 (1987); Field, *supra* note 55, at 936-41, 947 (federal common law); Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 642-49 (1985); Redish, *supra* note 136 (abstention doctrine); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983); Schrock & Welsh, *supra* note 119, at 1127-29; Thomson, *supra* note 19, at 1077-79 (state constitutional law); Note, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263 (1989).

perhaps predictably, contains a plethora of approaches.<sup>148</sup> Included are formalism, functionalism, eclecticism, and non-justiciability.<sup>149</sup> Whether the Constitution's text or Framers' intent contemplates, embodies, or specifies any content to the notion of separation of powers also engenders divergent views.<sup>150</sup> Promoting acrimonious confrontation or harmonious dialogue between the legislative, executive, and judicial branches is another ambivalent dimension of separation of

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148. See, e.g., *Mistretta v. United States*, 109 S. Ct. 647 (1989); *Morrison v. Olson*, 484 U.S. 1058 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *I.N.S. v. Chadha*, 462 U.S. 919 (1983); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Commentaries include Alexander, *Separation of Powers after the Independent Counsel Decision*, 29 SANTA CLARA L. REV. 1 (1989); Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719; Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341 (1983) [hereinafter *Presidential Immunity*]; Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Elliot, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Pierce, *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1987 SUP. CT. REV. 1; Weigand, *Morrison v. Olson: Renewed Acceptance for a Functional Approach to Separation of Powers*, 16 HASTINGS CONST. L.Q. 603 (1989); Yassky, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 YALE L.J. 431 (1989); Note, *Separation of Powers*, 103 HARV. L. REV. 279 (1989); Note, *Separation of Powers*, 100 HARV. L. REV. 220 (1986); Note, *Separation of Powers—Presidential Immunity from Damages Liability*, 29 N.Y.L. SCH. L. REV. 449 (1984) [hereinafter *Separation of Powers*]; Note, *Political Accountability and Independent Counsel: A Sheep in Wolf's Clothing?*, 57 U. CIN. L. REV. 1471 (1989).

Symposia include *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989); *Separation of Powers and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO. WASH. L. REV. 401 (1989); *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U.L. REV. 255 (1989); *Separation of Powers in Foreign Policy: Do We Have an "Imperial Congress"?* 11 GEO. MASON U.L. REV. 61 (1988); *Symposium: Separation of Powers*, 37 EMORY L.J. 535 (1988); *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*, 43 U. MIAMI L. REV. 1 (1988); *The Uneasy Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987); *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987). See also Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986) (general overview).

149. See, e.g., Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493-96, (1987) (summarizing approaches); Werhan, *supra* note 145 (eclectic approach). See also *supra* note 147.

150. Werhan, *supra* note 145, at 427-31 (differing views).

powers discussions. Whether separation of powers principles are used to reinforce separate and independent precincts—a checking and balancing function pitting each branch against the other—or used to encourage responsive exchanges and co-operative assistance may depend, at least surreptitiously, on the objective sought to be attained. Against that unsettled background, seemingly definitive discussions meshing separation of powers and damage remedies proceed.

Postulating separation of powers themes for diametrically opposed purposes—to retard or stimulate judicial creation of a federal constitutional tort damage remedy—is the inevitable result. Prominent among the examples are efforts to categorize remedial action, especially damages,<sup>151</sup> as legislative and to stipulate that only Congress, not the federal courts, possesses the requisite lawmaking authority.<sup>152</sup> Others, drawing on article III, including its life-tenure requirements,<sup>153</sup> advance separation of powers principles to support and protect the existence and exercise of judicial power to identify, check, and remedy lawless and unconstitutional behavior.<sup>154</sup> Stimulating, but not resolving, the *Bivens* conundrums is the only valuable contribution separation of powers analysis can make.

Indeed, that beckoning benefit, to a considerable extent, already exists. Hibernating in judicial opinions and academic literature are debates on several separation of powers issues: categorizing the procreation of damage remedies as a legisla-

151. Compare *supra* note 32 (differing views on injunctions).

152. See *Carlson v. Green*, 446 U.S. 14, 36-44 (1980) (Rehnquist, J., dissenting); *Dellinger*, *supra* note 3, at 1541 (referring to *Bivens*'s dissenters).

153. U.S. CONST. art. III, § 1. See generally Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980).

154. See, e.g., Fallon, *supra* note 21, at 937-40, 959. "To the extent that questions of fidelity to legal norms can be immunized from judicial inquiry, separation-of-powers values are put at risk." *Id.* at 950; Field, *supra* note 55, at 934 (principles limiting judicial flexibility hinder judicial performance, "thus raising separation of powers problems"); Nichol, *supra* note 3, at 1150-51 (*Bivens* special factors exception consistent and inconsistent with separation of powers). But see *infra* note 165 (separation of powers limits judicial control of executive behavior). For a general assessment of separation of powers in the *Bivens* context, see *Rethinking Sovereign Immunity*, *supra* note 3, at 659-66. In a non-*Bivens* context, see, for example, Zwieter & Piermattei, *Who Knows Best About Damages: A Case for Courts' Rights*, 93 DICK. L. REV. 689 (1989).

tive or judicial function,<sup>155</sup> assessing institutional competence from democratically representative and operational ability perspectives,<sup>156</sup> requiring judicial deference to or independence from other branches of government,<sup>157</sup> and seeking to affirm within the Constitution's textual and structural parameters separation of powers principles.<sup>158</sup> Despite this conglomeration, other separation of powers facets inherent in *Bivens* require further elaboration. While most attention has focused on the interdependence or independence of the relationship between Congress and the Supreme Court, the majority of Supreme Court decisions have responded to requests for judicial condemnation, supervision, and rectification, through damages, of federal executive action.<sup>159</sup> Such judicial intrusion into executive activities can generate separation of powers concerns.<sup>160</sup> In constitutional tort actions, those problems primarily are addressed when deciding whether executive immunity from *Bivens* damages liability exists and, if so, in what circumstances.<sup>161</sup> Imposition of damages, except on Presidents,<sup>162</sup>

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155. See Nichol, *supra* note 3, at 1134-42.

156. In the *Bivens* context, see, for example, Brown, *supra* note 3, at 274-91 (judicial versus legislative competence). For courts, see, generally, Alcinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For legislatures, see Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process* (Book Review), 66 TEX. L. REV. 1071 (1988); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

157. See, e.g., Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

158. See, e.g., Fallon, *supra* note 21, at 937-40, 950, 959. But should the Constitution's text and structure be the sole source of constitutional law? See *supra* notes 23, 66 (interpretative strategies).

159. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (law enforcement agents); *Carlson v. Green*, 446 U.S. 14 (1980) (prison officials); *Bush v. Lucas*, 462 U.S. 367 (1983) (director of National Aeronautics and Space Administration); *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988) (Secretary of Health and Human Services).

160. Classic examples include *Myers v. United States*, 272 U.S. 52 (1926); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Nixon*, 418 U.S. 683 (1974).

161. See generally Butz v. Economou, 438 U.S. 478 (1978); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Presidential Immunity*, *supra* note 148; Field, *supra* note 55, at 948-50; Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989); *Separation of Powers*, *supra* note

however, remains possible. Where that occurs, because the immunity defense is not established, judicial regulation of executive behavior ensues. It is at this juncture in the *Bivens* context that, if they are going to be so, separation of powers implications ought to be influential. If the Supreme Court is imposing a constitutionally required remedy, the traditional *Marbury v. Madison*<sup>163</sup> model of judicial review<sup>164</sup> overrides any separation of powers imbroglio.<sup>165</sup> According less than that status to *Bivens* requires greater explication of executive-judicial relations. What justifies judicial supervision of executive officials? No analogy to Congress' ability to protect itself by legislation from non-constitutional judgments is available. While conceding that such general judicial authority violates separation of powers principles, one suggestion maintains that a more circum-

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148; Student Project, *supra* note 71, at 1072-76; Note, *Immunity of Federal Executive Officials*, 92 HARV. L. REV. 265 (1978). See also Note, *Immunity of Presidential Aides from Criminal Prosecution*, 57 GEO. WASH. L. REV. 779 (1989); Soble, *The Derivative and Discretionary-Function Immunities of Presidential and Congressional Aides in Constitutional Torts*, 44 OHIO ST. L.J. 443 (1983).

162. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (President immune from individual's damage action). But compare *United States v. Nixon*, 418 U.S. 683, 706 (1974) (President amenable to judicial process). Professor Carter suggests *United States v. Nixon* raised the question of whether federal courts could hold Presidents in contempt for refusal to comply with a subpoena and "*Nixon v. Fitzgerald* leads almost ineluctably to the proposition that the judicial power of the United States does not include the authority to punish the President of the United States." *Presidential Immunity*, *supra* note 148, at 1343.

163. 5 U.S. (1 Cranch) 137 (1803).

164. See *supra* notes 96-100 and accompanying text.

165. Schrock & Welsh, *supra* note 119, at 1128 (no separation of powers problem when Supreme Court vindicates constitutional rights). Professor Amar suggests that "[t]he most politically delicate part of . . . [*Marbury v. Madison*] was not [judicial review] . . . but [the] . . . claim that the judicial department could, in appropriate cases, order coercive relief directly against" an executive officer. Amar, *supra* note 21, at 1508 n.323. But Professor Carter suggests:

Judicial power to reach misconduct within the other branches of government . . . has a political aspect. The power is exercised within a system of checks and balances, and the creation of any new remedy against one of the branches of government must affect the entire system. *Nixon v. Fitzgerald* suggests a judicial reluctance to create new remedies against the executive branch—even where needful to right a wrong—except in instances of the most compelling necessity.

*Presidential Immunity*, *supra* note 148, at 1343.



spect judicial role is constitutionally sustainable.<sup>166</sup> Even if *Bivens* remedies were circumspect, others, in such less than "pure" constitutional law circumstances, deny that courts can proceed that far.<sup>167</sup> When immunity is legislatively abrogated or *Bivens* remedies are congressionally requisitioned, the contest changes to a legislative-executive dispute.

Resurrecting separation of powers analyses of relationships between Congress and the Supreme Court is necessary when confronting another *Bivens* question. Can federal courts create a damage remedy against states or their officials for federal constitutional violations?<sup>168</sup> Congress, although it has not always done so,<sup>169</sup> is able, notwithstanding the eleventh amendment,<sup>170</sup> to accomplish that task.<sup>171</sup> Such a congressional judgment is made in a forum where state interests are represented. Even if they do not prevail, Congress retains<sup>172</sup> the capacity to evaluate and be influenced by state concerns that exceeds, in qualitative and quantitative dimensions, that possessed by the Supreme and federal courts.<sup>173</sup> Consequently, this federalism facet of the separation of powers intimates that the creation of damage remedies against states is, and ought to be, a federal legislative enterprise.<sup>174</sup>

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166. Monaghan, *supra* note 107, at 34-35.

167. Schrock & Welsh, *supra* note 119, at 1128-29.

168. *See supra* note 71 (divergent views on fourteenth amendment *Bivens* action against states).

169. *See, e.g.,* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (states and their officials not liable under 42 U.S.C. § 1983).

170. *See, e.g.,* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

171. *See, e.g., id.*

172. Some, but not all, of the original state protections have been removed. *See, for example,* the seventeenth amendment of the United States Constitution (senators elected by people), replacing article I, section 2, clause 1 (senators elected by state legislatures); Field, *supra* note 117, at 99-100, 110.

173. *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Field, *supra* note 117; Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

174. *See generally* Field, *supra* note 55, at 924-25, 932-33 (federalism dimension of separation of powers). This is supported by the presence of the fourteenth amendment's enforcement power and Raoul Berger's thesis. *See supra* note 116. States can supplement *Bivens* with "more generous" remedies. Amar, *supra* note 21, at 1508 n.322. Can Congress enhance, diminish, or abrogate such state generosity?

Inflating the circumstances—special hesitation factors<sup>175</sup> and alternative remedies<sup>176</sup>—in which Congress precludes judicial creation of damage remedies for constitutional torts<sup>177</sup> and, simultaneously, slouches towards solely legislative or federal common law authority for *Bivens* damages<sup>178</sup> invigorates a notable separation of powers consequence:<sup>179</sup> dialogue between courts and Congress.<sup>180</sup> Participation in the evolution of a remedial edifice becomes a joint venture, “a conversation, not a monologue.”<sup>181</sup> Utilization of their different institutional expertise<sup>182</sup> should induce the most appropriate and constitutionally feasible responses to federal violations of the Constitution. For example, broad congressional mandates for judicial action may invite creative Supreme Court responses. Judicial ventures perceived by Congress to exceed national needs or expectations or

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*See supra* note 111 (concerning section 5 of the fourteenth amendment of the United States Constitution).

175. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (“special factors counselling hesitation in the absence of affirmative action by Congress”). *See Note, Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 GA. L. REV. 683, 685-86, 692, 701-08, 715-16 (1985) (origins and evolution of special factors exception).

176. *Bivens*, 403 U.S. at 397 (“explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the [offender], but must instead be remitted to another remedy, equally effective in the view of Congress”). *See Note, supra* note 175, at 685, 691-92, 694-701, 716-17 (origins and demise of alternative remedies exception).

177. As to the conglomeration and expansion of special hesitation and alternative remedies exceptions, *see supra* note 176; *Note, supra* note 1.

178. *See supra* text accompanying notes 76-85, 101-142.

179. Other consequences also protrude. For example, *Bivens* damages become more vulnerable to legislative annihilation or improvement. *See id.*

180. On a congressional-Supreme Court dialogic theory and its consequences, *see Carter, The Right Questions in the Creation of Constitutional Meaning*, 66 B.U.L. REV. 71 (1986); *Carter, The Dissent of the Governors*, 63 TUL. L. REV. 1325, 1347-51 (1989); *Field, supra* note 55, at 930-50; *Monaghan, supra* note 107, at 29. Such dialogue can encompass everyone. *See supra* notes 26 (Congress, Presidents, and individuals), 132 (pluralistic constitutional law); *Lofgren, Constitutive Conversation or Desperate Discourse?*, 17 REV. AM. HIST. 346 (1989).

181. A. BICKEL, *THE MORALITY OF CONSENT* 111 (1975). For expositions and criticisms of Bickel’s “conversation,” *see Kronman, Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); *Moeller, Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113 (1985).

182. *See supra* note 156.

not to extend far enough can then be legislatively remodelled. In turn, courts, at least interstitially,<sup>183</sup> can renovate, repair, or limit Congress' response. That, of course, is one extremity. Dialogic theory, generated by a dynamic, not a static, separation of powers system, however, permeates, in varying degrees, each *Bivens* predicate.<sup>184</sup> Anxious observers of current Supreme Court trends<sup>185</sup> denying damages to victims of constitutional violations<sup>186</sup> and undercutting *Bivens*'s constitutional parameters<sup>187</sup> may, therefore, be able to use the latter developments to facilitate changes to the former.

### CONCLUSION

All flux and no repose. That, at least for the present, seems to be *Bivens*'s fate. Unrelenting struggles within the Supreme Court,<sup>188</sup> Congress,<sup>189</sup> and academic literature<sup>190</sup> to determine

183. Justice Holmes "recognize[d] without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917). For one attempt to elucidate Holmes's conception of law, see Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). Critical legal scholars go considerably further. See generally M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982). But see Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989) (suggesting that critical legal scholars are retreating from extreme positions).

184. See text accompanying notes 98-100 (dialogue in pure constitutional law model), 142 (*Bivens* predicates).

185. See generally Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Stern, *State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court*, 57 U. CIN. L. REV. 1175 (1989); Stewart, *Civil Rights: Just a Trim?*, 75 A.B.A. J. 40 (Aug., 1989). But see Howard, *Living With The Warren Legacy*, 75 A.B.A. J. 69 (Oct., 1989) (predicting no dramatic Rehnquist Court break with past decisions). See also *supra* note 45 (Supreme Court's performance).

186. "Four times in the last six years the Court has held *Bivens* actions unavailable and has intimated that a similar result should be reached in remanding a fifth case to a circuit court." Brown, *supra* note 3, at 264 (footnotes omitted). Some applaud this trend. See, e.g., *Carlson v. Green*, 446 U.S. 14, 32 (1980) (Rehnquist, J., dissenting) (*Bivens* should be overruled); Madden, Allard & Remes, *supra* note 141, at 472 ("wide dissatisfaction" with *Bivens*). But see Nichol, *supra* note 3, at 1154 (too much judicial hesitancy in creating *Bivens* damages).

187. See *supra* text accompanying notes 101-42.

188. Justices remain divided over the existence and contours of *Bivens* damages. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403

the basis and contours of federal constitutional tort damage awards against the United States; states; municipalities; municipal subdivisions; federal, state, and local officials; and private individuals<sup>191</sup> are not abating. Without succumbing to routine or revolution,<sup>192</sup> maintaining some momentum, even where written constitutions are involved, is vital if legal systems are not to stagnate. Remedies for constitutional violations provide merely an exemplary illustration. Each contending interest group—victims, offenders, the community, and governments—seeks recognition and victory. Celebrating *Bivens* is, therefore, not a finale, but a stimulating challenge. New proposals must be advanced and pursued.<sup>193</sup> In doing so, the very best features of American constitutional law are prominently displayed.

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U.S. 388 (1971) (five-to-four decision); *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988) (six-to-three). That situation is neither unusual nor, necessarily, unhealthy.

189. See *supra* note 141 (contradictory congressional efforts).

190. See Nichol, *supra* note 3, at 1154. But see Madden, Allard & Remes, *supra* note 141, at 472.

191. See *supra* notes 8 (individuals), 71 (states and municipalities), 142 (United States).

192. See Sunstein, *Routine and Revolution*, 81 Nw. U.L. REV. 869, 869 (1987) (discussing proposals in R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987), "designed to break down the distinctions between routine and revolution and to facilitate individual and collective self-transformation"). Other assessments include Herzog, *Rummaging Through The Emperor's Wardrobe*, 86 MICH. L. REV. 1434 (1988); Holmes, *The Professor of Smashing*, NEW REPUBLIC, Oct. 19, 1987, at 30; Rorty, *Unger, Castoriadis, and the Romance of a National Future*, 82 Nw. U.L. REV. 335 (1988); *Symposium: Roberto Unger's Politics: A Work in Constructive Social Theory*, 81 Nw. U.L. REV. 589 (1987).

193. See, e.g., P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983); Burnham, *supra* note 6 (constitutional theory of duty to distinguish common law and constitutional torts); Madden, Allard & Remes, *supra* note 141 (congressional proposals); Rotenberg, *supra* note 8 (protecting private remedies for constitutional wrongs from congressional dilution); Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Phipps*, 93 HARV. L. REV. 966, 985-91 (1980) (measuring damages for constitutional violations); see also Jefferies, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989); Jefferies, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989).

