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Stephen I. Vladeck

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ARTICLE

BIVENS REMEDIES AND THE MYTH OF THE “HEADY DAYS”

STEPHEN I. VLADECK*

In his concurring opinion in *Correctional Services Corp. v. Malesko* in 2001,¹ Justice Scalia famously explained that the Supreme Court’s reluctance to infer “new” remedies under the *Bivens*² doctrine was part of a larger pattern in which the Court disfavored judicial recognition of any causes of action not expressly created by Congress. As he wrote, “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”³ Invoking the Court’s decision from seven months earlier in *Alexander v. Sandoval*⁴ as proof that “we have abandoned that power to invent ‘implications’ in the statutory field,”⁵ Justice Scalia concluded that “[t]here is even greater reason to abandon it in the constitutional field, since an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.”⁶

* Professor of Law and Associate Dean for Scholarship, American University Washington College of Law. My thanks to Greg Sisk for inviting me to participate in the symposium that led to this essay, to Jim Pfander and Carlos Vázquez for helpful conversations, and to the editors of the *University of St. Thomas Law Journal* for their patience.

1. 534 U.S. 61 (2001). The issue in *Malesko* was whether a federal prisoner could maintain a *Bivens* action against the private operators of a halfway house under contract with the Federal Bureau of Prisons. Writing for a 5-4 Court, Chief Justice Rehnquist answered that question in the negative. *See id.* at 70–74.

2. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a private plaintiff may sue federal officers directly under the Fourth Amendment for damages arising out of a violation thereof).

3. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring); *see also* *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (quoting this passage).

4. 532 U.S. 275 (2001) (refusing to recognize a private cause of action to enforce regulations promulgated by the Department of Justice to enforce section 602 of the Civil Rights Act of 1964).

5. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

6. *Id.*

This passage from *Malesko* has been repeatedly cited by lower courts in subsequent cases.⁷ It is perhaps the single best testament to a broader trend documented by numerous scholars, in which the Supreme Court has made it increasingly difficult, over the past two decades, to recognize causes of action for private plaintiffs to challenge official misconduct at both the state and federal levels.⁸ Indeed, this trend has also seeped into jurisprudence concerning express causes of action, with the Court holding in *Gonzaga University v. Doe* that 42 U.S.C. § 1983 cannot be used to enforce a federal statute against a state officer unless Congress, in that statute, unambiguously intended to create a privately enforceable right—citing *Sandoval*, among other decisions, in support.⁹

Whatever one's views about these decisions in general, what cannot be gainsaid is the extent to which lower courts and commentators over the past decade have treated these doctrinal developments as being in line with each other—whether for better or worse.¹⁰ To that end, it presumably follows that judicial reluctance to infer remedies from constitutional provisions under *Bivens* necessarily derives from—or is at the very least analytically related to—the Court's more systematic reluctance to infer remedies from federal statutes that fail to provide an express cause of action under *Sandoval*.

In this short symposium essay, I suggest that, however descriptively accurate it may be to compare the contemporaneous developments in these discrete bodies of jurisprudence, it is analytically incoherent to conclude that one follows from the other. More to the point, conflating the federal courts' power to infer statutory causes of action with their power to fashion constitutional remedies inverts the very different role Congress plays in the two spheres and fails to account for the distinct considerations, and precedents, that factor into the existence *vel non* of judicial remedies for constitutional claims. Put simply, reading these two lines of cases together distorts the fundamentally distinct considerations that animate them and thereby risks obscuring the critical constitutional questions lurking in *Bivens*' background.

To unpack this thesis, I begin in Part I with a brief overview of the Court's jurisprudence with respect to both implied statutory causes of action and *Bivens*. In Part II, I turn specifically to the claim at the heart of

7. See, e.g., *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 859 (9th Cir. 2010), cert. granted sub nom. *Minneci v. Pollard*, 131 S. Ct. 2449 (May 16, 2011) (No. 10-1104); *Boney v. Valline*, 597 F. Supp. 2d 1167, 1182 (D. Nev. 2009).

8. See, e.g., Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

9. 536 U.S. 273, 283–84 (2003).

10. See, e.g., *Hamilton v. Allen*, 396 F. Supp. 2d 545, 554 (E.D. Pa. 2005).

Justice Scalia’s *Malesko* concurrence and why contemporary courts should not take the *Sandoval-Bivens* analogy seriously. Whether or not the early 1970s were “heady days” in which the Supreme Court “assumed common-law powers to create causes of action” should ultimately be immaterial in resolving whether the Constitution requires a judicial remedy in appropriate cases.

I. THE SHORT COURSE ON IMPLIED REMEDIES

In tracing *Bivens* to the “heady days” in his *Malesko* concurrence, Justice Scalia no doubt had in mind the Supreme Court’s 1964 decision in *J.I. Case Co. v. Borak*,¹¹ which endorsed the sweeping proposition that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose” reflected in a particular statute.¹² As Justice Rehnquist put it in 1979:

Congress, at least during the [1960s,] tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as [*Borak*,] and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.¹³

And yet, although *Borak* may have come at the high-water mark of the Court’s recognition of non-express causes of action, it clearly was not the beginning.

A. *Implied Nonstatutory Remedies*

Indeed, by the time *Borak* was decided, it was black-letter law that federal officers could be held liable under state (or, as was typically the case prior to *Erie*,¹⁴ “general”) law,¹⁵ at least where sovereign or official immunity did not preclude recovery.¹⁶ Although cases abound, a particularly tell-

11. 377 U.S. 426 (1964).

12. *Id.* at 433. To be fair, Justice Scalia’s *Malesko* concurrence only cites to *Sandoval* for this proposition. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). But both the majority opinion in *Malesko*, see *id.* at 67 n.3 (majority opinion), and the cited passage in *Sandoval*, see 532 U.S. at 287, single out *Borak* as emblematic of “the understanding of private causes of action that held sway . . . when Title VI was enacted.”

13. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (citation omitted).

14. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

15. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (citing *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10, 12 (1817)) (“When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.”).

16. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion). For more on the interaction between officer suits and sovereign immunity, including the convoluted history of the “party-of-record” rule, see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 850–55 (Robert C. Clark et al. eds., 6th ed. 2009). See also

ing early example is *Teal v. Felton*, an 1852 decision in which the Supreme Court unanimously upheld the power of the New York state courts to entertain an action in trover against a federal postmaster, specifically rejecting the argument that federal jurisdiction in suits against federal officers should be exclusive.¹⁷ Many of these cases began in state court, but Professor Woolhandler has documented numerous instances in which federal courts afforded similar relief,¹⁸ both in diversity cases before Congress provided for general federal question jurisdiction in 1875¹⁹ and pursuant to either diversity or the federal courts' "arising under" jurisdiction thereafter.²⁰ Inasmuch as claims ostensibly arising under state law could also encompass privileges or immunities grounded in the federal Constitution, "constitutional torts" could thereby be litigated as a species of common-law torts, despite the absence of an underlying statutory cause of action.²¹

Scholars have long debated whether these cases are best understood as state law causes of action raising federal claims or suits that, by "imperceptible steps," transmogrified from state law remedies into federal causes of action.²² But whether such state law remedies were themselves compelled by the Constitution or were available merely as a matter of state law, the upshot for present purposes is a resulting jurisprudence of private litigation against federal officers without any regard for congressional intent.

Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 457 (2006) (explaining "Larson-Malone sovereign immunity doctrine").

17. 53 U.S. (12 How.) 284 (1852); see also Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 81–82 & n.171 (1975) (noting that state courts "clearly have power to impose personal liability against federal officers").

18. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 85–88 (1997); see also Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969) (explaining constitutional remedies generally and describing the issue of whether the right to relief against a federal officer arises under state or federal law); Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964) (explaining why state courts appropriately have jurisdiction over federal officials). For an earlier treatment of similar issues reaching comparable conclusions, see James L. Bishop, *The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397 (1909).

19. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 474 (codified as amended at 28 U.S.C. § 1331 (2006)).

20. See Michael G. Collins, "Economic Rights," *Implied Constitutional Acts, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1496 (1989).

21. See, e.g., JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 66 (Robert C. Clark et al. eds., 2d ed. 2007). Moreover, whereas early cases were often about damages or other forms of legal relief, the Supreme Court after *Ex parte Young*, 209 U.S. 123 (1908), repeatedly recognized a comparable power on the part of federal district courts to enjoin federal executive officers from unconstitutional actions despite the absence of a statute specifically authorizing such relief. See, e.g., *Stark v. Wickard*, 321 U.S. 288, 290 (1944); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183–84 (1938).

22. See, e.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 353–54 (1993). For a summary of Hart's views—and their difficulties—see Woolhandler, *supra* note 18, at 100 n.116.

As Louise Weinberg has explained, *Erie*²³ may well have precipitated the next step because it “sorted out the respective common law powers of the nation and the states, and thus cleared the way for unambiguously federal common law, binding on the states under the supremacy clause.”²⁴ Whereas the pre-*Erie* regime of general common law allowed the federal courts to exercise both procedural and substantive control over the law governing tort suits against government officers, “*Erie* posed a rather obvious threat to such control, famously foreswearing any body of general federal common law and raising questions about the extent to which the measure of federal official liability for constitutional torts might appear to depend on tort principles defined by state courts.”²⁵ The effect was an effort by courts and commentators alike to articulate theories of “constitutional common law,” in other words, the possibility that some provisions of the U.S. Constitution might provide a self-executing damages remedy separate from those that were already available under state or federal law.²⁶ When first confronted with such an argument during its 1945 Term, the Supreme Court in *Bell v. Hood* ducked,²⁷ holding only that it was a sufficiently plausible theory on which to sustain subject-matter jurisdiction under the federal question statute before remanding for further proceedings.²⁸

Thus, when the issue came back to the Court in *Bivens*, the Court took for granted the existence of common-law damages remedies and largely understood the question before it as whether the common-law remedy should remain the exclusive one. It rejected the government’s argument for such exclusivity as “unduly restrictive,”²⁹ and it recognized an “independent” federal claim affording damages to victims of Fourth Amendment violations by federal officials,³⁰ “regardless of whether the State in whose jurisdiction [the federal] power is exercised would . . . penalize the identical act if engaged in by a private citizen.”³¹ The Court also explicitly rejected the government’s argument that the federal remedy need be “indispensable” for vindicating the Fourth Amendment.³² In his concurrence, Justice Harlan

23. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

24. Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 761 (1991).

25. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 977 n.294 (1997).

26. See generally Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (describing federal common law civil liberties, including the right to collect damages from federal officers).

27. 327 U.S. 678 (1946).

28. See *id.* at 683–85.

29. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 391 (1971).

30. *Id.* at 395.

31. *Id.* at 392.

32. *Id.* at 397; see also *id.* at 406 (Harlan, J., concurring).

instead posed the question as whether damages were “‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.”³³

But what is most telling about *Bivens* is the Court’s discussion of Congress. Even though the federal government, and the *Bivens* dissenters, argued vigorously that a federal remedy should turn largely on whether Congress had given its explicit or implicit imprimatur, Justice Brennan disagreed:

[W]e have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may *not* recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.³⁴

In other words, although Congress could attempt to displace such a remedy, the Court’s power to fashion relief did not require—or implicitly derive from—some affirmative legislative sanction. Thus, a *Bivens* remedy should be available unless Congress had displaced it, or, as Justice Brennan explained, “special factors counseling hesitation”³⁵ mitigated against such relief.

In *Carlson v. Green*, Justice Brennan went one step further, suggesting that Congress could only displace a *Bivens* remedy by “provid[ing] an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”³⁶ So understood, the question was not whether Congress had merely *acted* to preclude *Bivens* relief, but whether Congress had provided an adequate *substitute* for *Bivens*. Otherwise, presumably, legislative attempts to displace *Bivens* relief could raise constitutional concerns because they would run the risk of barring access to a judicial forum for resolution of colorable constitutional claims.³⁷ In *Carlson*, the Court concluded that the Federal Tort Claims Act could not meet this standard because “we have here no explicit congressional declaration that persons injured by federal officers’ violations of the Eighth Amendment may not recover money damages from

33. *Id.* at 407 (Harlan, J., concurring).

34. *Id.* at 397 (majority opinion) (emphasis added).

35. *Id.* at 396.

36. 446 U.S. 14, 18–19 (1980).

37. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting the “‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

the agents but must be remitted to another remedy, equally effective in the view of Congress.”³⁸

But since *Carlson*, the Supreme Court’s *Bivens* jurisprudence has retreated rather dramatically from Brennan’s framing of the congressional displacement inquiry. In *Bush v. Lucas*, for example, the Court declined to recognize a First Amendment retaliation claim under *Bivens* for federal civil service employees given the existence of a statutory review process administered by the Civil Service Commission in which the plaintiff’s constitutional claims were “fully cognizable.”³⁹ Thus, even though the statutory scheme did not—like *Bivens*—“permit recovery for loss due to emotional distress and mental anguish,”⁴⁰ it was enough that Congress acted in a manner that *it* believed to be comprehensive.

And in *Schweiker v. Chilicky*, the Court denied *Bivens* relief for a due process violation arising out of Social Security benefits application processing, relying on the intricate scheme of administrative and judicial remedies the Social Security Act provides.⁴¹ Although the majority conceded that the remedies Congress provided were not commensurate with those that would be available under *Bivens*, it nevertheless reasoned that “Congress . . . has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.”⁴²

Thus, by the time *Malesko* was decided in 2001, the Court had moved back in small but significant steps from the view Justice Brennan articulated in *Carlson*. Nevertheless, whether or not Congress had to provide an equally effective remedy to displace *Bivens* relief, the existence of a *Bivens* remedy in no way required indicia of legislative intent. To the extent that legislative intent has mattered in *Bivens* cases, it has only been with respect to whether such intent cuts against allowing *Bivens* remedies, rather than in favor.⁴³

B. *Implied Statutory Causes of Action*

In marked contrast to the *Bivens* cases, congressional intent has always been a linchpin of the Supreme Court’s jurisprudence concerning implied statutory remedies. At a fundamental level, this understanding makes per-

38. *Carlson*, 446 U.S. at 19.

39. 462 U.S. 367, 385–86 (1983).

40. *Id.* at 390–91 (Marshall, J., concurring).

41. 487 U.S. 412, 424–29 (1988).

42. *Id.* at 425. *But see id.* at 430–49 (Brennan, J., dissenting).

43. To be fair, another place where legislative intent shows up in *Bivens* cases is the argument that Congress, in various amendments to the FTCA, has affirmatively ratified the *Bivens* decision and has thereby given its sanction to the Court’s work in this area. *See, e.g.*, James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009). Except for a brief passage in Justice Brennan’s opinion in *Carlson*, *see* 446 U.S. at 19–20 n.5, the Court has never paid much attention to this argument, which only further undermines the gravamen of Justice Scalia’s complaint in *Malesko*.

fect sense: Because Congress's control over statutory rights is virtually plenary,⁴⁴ it should follow that whether a statute is privately enforceable, against federal officers or others, is a question for Congress. Thus, the focus of the evolution in the Court's implied cause-of-action jurisprudence has not been the central role of congressional intent nearly as much as it has been how clear that intent must be.

In *Borak*, for example, the Court concluded that shareholders could bring derivative suits to enforce section 14(a) of the Securities Exchange Act of 1934 in light of section 27 of the same Act, which granted jurisdiction to the district courts "of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act]."⁴⁵ As Justice Clark explained for the unanimous Court,

[i]t is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."⁴⁶

Borak thereby suggested that even *plausible* indicia of legislative intent would be sufficient to support the inference of a cause of action from a statute that failed to expressly create one.

The Court retreated somewhat from *Borak* in *Cort v. Ash* eleven years later, with Justice Brennan discerning from the Court's prior cases a four-prong standard to apply in ascertaining whether a statute implicitly supported a private cause of action:

First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?⁴⁷

Although *Cort* thereby represented a more nuanced approach than the fairly open-ended standard endorsed in *Borak*, such analysis nevertheless

44. I use the term "virtually" because there may be (exceptionally rare) cases in which the Constitution does constrain the means pursuant to which Congress provides for the enforcement of statutory rights. *Cf.* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 *Nw. U. L. Rev.* 437 (2006).

45. *See* *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

46. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

47. 422 U.S. 66, 78 (1975) (citations and internal quotation marks omitted).

centered on what the Court could divine from congressional intent; all factors but the fourth focus on legislative purpose.⁴⁸ Thus, even when then-Justice Rehnquist suggested in *Cannon v. University of Chicago* that subsequently enacted statutes should be more explicit about whether or not Congress intended to allow for private enforcement,⁴⁹ the point remained: Courts could infer causes of action so long as it seemed consistent with the statutory scheme to do so.

Justice Scalia decisively repudiated that understanding in *Sandoval*.⁵⁰ There, the Court refused to recognize a cause of action in regulations that the Department of Justice promulgated pursuant to section 602 of the Civil Rights Act of 1964. As Scalia explained for the 5-4 majority: “In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.”⁵¹ Thus, a statute could only be read to support a private cause of action when its text supported such a reading—even though that would usually only be true in cases in which the text provided an express cause of action. *Sandoval* thereby inverted the prevailing standard, such that contemporary courts will only recognize implied causes of action when the text of the statute establishes that Congress unambiguously intended to provide one even though it failed to do so expressly.⁵² Needless to say, such statutes are few and far between.

But, whatever the merits of *Sandoval*'s approach, it is worth emphasizing that the crux of the dispute between the majority and the dissenters—and between more recent and older case law—boils down to methodological disagreements over statutory interpretation. There is simply no dispute today that congressional intent is dispositive when it comes to the existence of a private cause of action to enforce a federal statute; the debate is only over how that intent should be divined. In addition, the question of whether a private cause of action should be inferred under a particular statute is entirely devoid of constitutional considerations. Although distinct issues may arise when plaintiffs seek to use the Supremacy Clause to enjoin ongoing violations of federal statutes (rather than suing under the statutes themselves),⁵³ constitutional avoidance does not—and should not—factor into the question of whether to infer a cause of action directly under the statute.

48. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (applying *Cort v. Ash*, 422 U.S. 66 (1975)).

49. See *id.* at 718 (Rehnquist, J., concurring).

50. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

51. *Id.* at 288 (citation omitted).

52. See, e.g., *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008) (per curiam). For a useful post-*Sandoval* debate over whether a particular statute can be so read, compare *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 301–08 (3d Cir. 2007), with *id.* at 309–13 (Sloviter, J., dissenting).

53. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert. granted sub nom. Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992 (U.S. Jan. 18, 2011) (No. 09-958).

In that regard, the relationship between Congress and the courts in the context of implied statutory remedies is fundamentally different than their relationship vis-à-vis constitutional remedies.

II. LEGISLATURES AND CONSTITUTIONAL REMEDIES

As Part I demonstrated, although contemporary courts tend to treat judicial reluctance to recognize *Bivens* remedies and implied statutory causes of action as related jurisprudential developments, they actually have analytically distinct underpinnings. Although Part I focused on the Court's own understanding of, and explanations for, these developments, such discussion only scratches the surface of why judicial skepticism in the statutory remedies context is not a justification for judicial hesitation in the *Bivens* context. Thus, Part II offers a brief discussion of the far more comparable doctrinal frame in which to situate *Bivens*: the murky but critical area of constitutionally compelled remedies.

Take habeas, for example. It is now settled that, in at least some cases, the Constitution requires the availability of *some* judicial forum for the consideration of a federal prisoner's habeas claim.⁵⁴ Tellingly, the remedy need not be "habeas." As the Supreme Court has repeatedly suggested, Congress is free to displace habeas with alternative remedies, so long as those remedies adequately test the underlying legality of the prisoner's detention.⁵⁵ Thus, in *Boumediene*, the majority devoted a substantial portion of its analysis to explaining why the review scheme created by the Detainee Treatment Act of 2005⁵⁶ and the Military Commissions Act of 2006⁵⁷ was an inadequate substitute for habeas.⁵⁸ Congress therefore has some discretion in defining the parameters of the judicial remedy, but that discretion is bounded by the Constitution itself.

To related—if less controversial—effect is the Court's jurisprudence concerning state tax refund remedies and the proposition that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the

54. See *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that, where it applies, the Suspension Clause protects a right of access to a judicial forum for resolution of a detainee's challenge to his present physical confinement). See generally Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009) (discussing *Boumediene's* implications with respect to access to courts).

55. See, e.g., *Boumediene*, 553 U.S. at 774–76; *Swain v. Pressley*, 430 U.S. 372, 384 (1977); *United States v. Hayman*, 342 U.S. 205, 223–24 (1952). See generally Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. 411 (2008) (discussing the limits of *Swain* and *Hayman*).

56. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.).

57. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, 42 U.S.C.).

58. See 553 U.S. at 771–92.

Fourteenth Amendment.”⁵⁹ Thus, as Justice O’Connor explained in *Reich v. Collins*, the Due Process Clause itself requires states to provide “clear and certain” remedies for the refund of state taxes that violate federal law.⁶⁰ Again, the legislature has *some* discretion in crafting the parameters of such a remedy,⁶¹ but that discretion is bounded by the Constitution.

The Court’s jurisprudence concerning injunctive relief under the Supremacy Clause reflects a similar theme. Thus, although *Ex parte Young*⁶² and its progeny require the existence of a judicial remedy for prospective relief against government officers acting in violation of federal law, the Supreme Court has suggested that such a remedy can be displaced, at least in cases in which Congress “has prescribed a detailed remedial scheme for the enforcement . . . of a statutorily created right.”⁶³

Much more can, and should, be said about each of these bodies of law. The relevant point for present purposes, though, is that each of these examples provides a far better lens through which to understand the relationship between Congress and *Bivens* remedies than the jurisprudence concerning implied statutory remedies does. It is beyond question that the existence of a *Bivens* remedy should turn in at least some meaningful way on the extent to which Congress has legislated in the field, but, whereas the *Sandoval* line of cases considers legislative intent necessary to *support* the existence of a cause of action, legislative intent matters under *Bivens* only in cases in which that intent was to *displace* a *Bivens* remedy.

Moreover, I do not offer the above merely as a descriptive claim. Although the Supreme Court has never squarely suggested that *Bivens* remedies are constitutionally compelled, it has also never held that they are not. Indeed, notwithstanding at least some lower court decisions to the contrary,⁶⁴ the Supreme Court has never declined to recognize a *Bivens* remedy in a case where the absence of such relief left the plaintiff with no legal remedy whatsoever. Thus, whereas there is no question that Congress in the typical case may foreclose a private cause of action to enforce a federal statute, it is an open question whether Congress may similarly foreclose a *Bivens* remedy without providing any alternative means for relief. So long as that question remains open, courts should not approach the question of whether to recognize a *Bivens* remedy with the same reluctance and hesitation that has come to characterize judicial approaches to implied statutory remedies.

59. *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930).

60. *See* 513 U.S. 106, 110–11 (1994).

61. *See id.* at 111.

62. 209 U.S. 123 (1908).

63. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996).

64. *See, e.g., Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

CONCLUSION

In his *Malesko* concurrence, Justice Scalia argued that judicial skepticism toward new *Bivens* remedies is even more appropriate than such skepticism is in the statutory context because “an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.”⁶⁵ As indicated above, there are two distinct flaws with this reasoning: First, it is simply not true that Congress has no power to displace *Bivens* remedies. To the contrary, as *Chilicky* makes clear,⁶⁶ Congress can create alternative remedial schemes that are *not* commensurate with the remedies available under *Bivens*, and such statutes will still be held to displace a judicially inferred cause of action. Second, and more fundamentally, to whatever extent Congress cannot repudiate such a remedy, it is because the Constitution compels its availability, and so, like habeas, state tax refund remedies, or Supremacy Clause-based injunctions, legislative constriction of the remedy would itself risk violating the Constitution.

Put simply, in cases in which the Constitution does not require a *Bivens* remedy, Justice Scalia is wrong; nothing would stop Congress from repudiating such relief. And in cases in which the Constitution *does* require such a remedy, Justice Scalia is exactly right about Congress but wrong about the courts. If the Constitution requires relief, it should compel the courts to act when Congress has not or cannot. Thus, to the extent that contemporary courts have bought into Justice Scalia’s rhetoric, they are not only missing the point, but may be doing affirmative violence to the scope of *Bivens* and the availability of damages to remedy constitutional violations by federal officers.

65. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

66. *See supra* notes 41–42 and accompanying text.