ASKING THE FIRST QUESTION: REFRAMING *BIVENS* AFTER *MINNECI*

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ABSTRACT

In Minneci v. Pollard, *decided in January 2012, the Supreme Court refused to recognize a* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics *suit against employees of a privately run federal prison because state tort law provided an alternative remedy, thereby adding a federalism twist to what had been strictly a separation-of-powers debate. In this Article, we show why this new state-law focus is misguided. We first trace the Court's prior alternative-remedies-to-*Bivens *holdings, illustrating that this history is one narrowly focused on separation of powers at the federal level.* Minneci*'s break with this tradition raises several concerns. On a doctrinal level, the opinion destroys* Bivens*'s long-established parallelism with 42 U.S.C. § 1983 actions, where suits against privately employed individuals are allowed. Additionally, it creates asymmetries between the constitutional liability faced by privately and federally employed prison employees. More significantly, it conflicts with congressional intent as expressed in the Westfall Act, which codified the* Bivens *remedy in 1988, by conflating two distinct questions: whether a suit requires the courts to extend* Bivens *jurisprudence to a new context and whether, assuming an extension is necessary, such an extension is warranted. This piece offers the only full discussion to date of the importance of this "first question" to the* Bivens *canon. We end this Article by offering several strategies for limiting* Minneci*'s impact and for returning* Bivens *jurisprudence to its separation-of-powers roots.*

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INTRODUCTION

> *Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.*
> —Justice Harlan, concurring in the judgment in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[1]

As he faced the reality of a Supreme Court moving consistently to his right on civil liberties issues, Justice William Brennan, Jr. famously implored state courts to interpret their own constitutions to provide greater protection against governmental misconduct than his own Court was recognizing under the federal Constitution.[2] "New federalism" was born.[3] In *Minneci v. Pollard*,[4] the United States Supreme Court turned new

1. 403 U.S. 388, 409 (1971) (Harlan, J., concurring).
2. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977).
3. *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 771–78 (1992) (examining history of new federalism); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132 (1999).
4. 565 U.S. ___, 132 S. Ct. 617 (2012).

federalism on its head, relying on the availability of state law remedies to *reject* a federal constitutional remedy against employees of private contractors acting under color of federal law.[5] Thus, rather than finding refuge in state law, claimants seeking to vindicate constitutional rights like those at issue in *Minneci* may find themselves stymied by it.

On one view, *Minneci* is simply another in a long line of decisions[6] refusing to find a *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[7] action available to recompense a violation of constitutional rights. In *Minneci*, a private prison operating under a contract with the federal government housed the plaintiff, Richard Pollard. Mr. Pollard alleged that employees of the prison, acting under color of federal law, denied him constitutionally adequate medical care after he fractured both of his elbows.[8] Assuming he could prove these allegations, "[w]ere Pollard incarcerated in a federal . . . facility, he would have a federal [*Bivens*] remedy [against the prison employees] for the Eighth Amendment violations he alleges."[9] The Supreme Court, however, continuing its trend of rejecting the application of *Bivens* to "new" contexts,[10] found no federal remedy for Mr. Pollard.

The result was not surprising. Since 1988, *Bivens* doctrine, which provides a cause of action for individuals harmed by the unconstitutional conduct of federal officials, has resided in a state of suspended animation.

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5. *See id*. at 626 ("[W]here, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law.").

6. *See* Wilkie v. Robbins, 551 U.S. 537, 554 (2007) (holding *Bivens* relief inappropriate against federal officers for land-use disputes); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (holding *Bivens* relief inappropriate against a private corporate entity defendant); FDIC v. Meyer, 510 U.S. 471 (1994) (holding *Bivens* relief inappropriate against a federal agency defendant); Schweiker v. Chilicky, 487 U.S. 412 (1988) (holding *Bivens* relief in government-benefits disputes inappropriate given the existence of congressionally created alternative remedies); United States v. Stanley, 483 U.S. 669 (1987) (holding *Bivens* relief inappropriate when plaintiff's injury arises out of activity incident to military service); Bush v. Lucas, 462 U.S. 367 (1983) (holding *Bivens* relief in government-employment disputes inappropriate given the existence of congressionally created alternative remedies); Chappell v. Wallace, 462 U.S. 296 (1983) (holding *Bivens* relief inappropriate as between military personnel given the unique structure of the military).

7. 403 U.S. 388 (1971) (holding that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment) [hereinafter *Bivens*]. Conventionally speaking, a *Bivens* action is the federal equivalent of a 42 U.S.C. § 1983 action. *See generally* SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 16–22 (Anderson Pub. Co. 1995); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 608–26 (5th ed., Aspen Pub. 2007).

8. *Minneci*, 132 S. Ct. at 620–21.

9. *Id*. at 626 (Ginsburg, J., dissenting).

10. *See supra* note 6 (listing cases declining to extend the *Bivens* remedy).

Announced in 1971 to remedy Fourth Amendment violations, by 1980 the Court had announced only two additional decisions extending the *Bivens* remedy, for Equal Protection and Eighth Amendment violations.[11] Since then, despite numerous opportunities, the Court has consistently refused to announce any additional *Bivens* remedies.[12] During the same time period, however, Congress codified *Bivens*, at least as it existed in 1988, when it passed the Westfall Act.[13] Thus, *Bivens* has been at a standstill—any further expansion limited by a hostile Court; any retraction barred by congressional action.

If the result was to be expected, what was noteworthy in *Minneci* was the Court's embrace of state law as a *per se* bar to a *Bivens* suit, holding that because "state tort law authorizes adequate alternative damages actions . . . we cannot do so."[14] To appreciate the novelty of this reasoning, it is necessary to more precisely frame the issues at stake in *Minneci*. As we see it, resolving *Minneci* required answering two distinct questions. First, whether the plaintiff sought an extension of *Carlson v. Green*,[15] a case in which the Court previously recognized a *Bivens* cause of action for violations of the Eighth Amendment by federally employed prison officials. And second, if he sought to extend *Carlson*, whether the Court should, on separation-of-powers grounds, imply a new *Bivens* remedy against *private* prison employees acting under color of federal law. In *Minneci*, the Court resolved this second question by turning to state law *simpliciter*, importing tort law to remedy constitutional violations without considering congressional intent.

The significance of *Minneci*'s federalism turn in answering this second question is more obvious when one considers the *Bivens* framework that the Court adopted in *Wilkie v. Robbins* only five short years ago. There the Court identified two steps in deciding whether to imply a new *Bivens* remedy (that is, after one has determined that a plaintiff's claim does not

11. Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Equal Protection).

12. *See supra* note 6.

13. *See* Westfall Act, Pub. L. No. 100-694, §§ 2(a)(4), 2(b), 102 Stat. 4563, 4563–64 (1988) (codified in part at 28 U.S.C. § 2679(b)(2)(A) (2006)) ("Paragraph (1) [creating exclusive remedies for tort liability against federal officers] does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States"); James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 122 (2009) (noting that Congress preserved the *Bivens* action in § 2679(b)(2)(A) and arguing that "the Westfall Act supports . . . the routine availability of *Bivens* claims."); *see also* Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2012).

14. *Minneci*, 132 S. Ct. at 620.

15. 446 U.S. 14 (1980).

fit within a recognized *Bivens* remedy).[16] First, the Court considers whether Congress or the Executive has chosen a remedial scheme as an alternative to a *Bivens* action.[17] Although the Court has occasionally considered state-law remedies as an alternative to a *Bivens* action, it has done so as a separation-of-powers inquiry into congressional intent to deploy state law as the appropriate remedial scheme.[18] Under *Wilkie*'s second step—a step not reached in *Minneci*—the Court, acting as a common law tribunal, contemplates factors that counsel hesitation in crafting a remedy from a separation-of-powers vantage point.[19]

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16. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

17. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (declining to extend a *Bivens* remedy, in part, because the Bureau of Prisons already provided an administrative remedial scheme); Schweiker v. Chilicky, 487 U.S. 412, 424 (1988) (declining to extend a *Bivens* remedy for violations of constitutional rights within the Social Security system because Congress already put in place "'an unusually protective'" remedial scheme); Bush v. Lucas, 462 U.S. 367, 388–89 (1983) (similar).

18. *See Wilkie*, 551 U.S. at 554 (looking to the availability of state-law claims as a factor counseling against finding a *Bivens* action to determine whether it could "infer that *Congress* expected the Judiciary to stay its *Bivens* hand . . . ." (emphasis added)).

19. *Wilkie*, 551 U.S. at 550. While not the focus of this Article, it is worth noting that the Court's treatment of the *Wilkie* step-two inquiry also consistently focuses upon separation-of-powers, not federalism, concerns. The Court has considered four factors on the factors counseling hesitation inquiry—all of which are grounded in separation of powers. First, on separation-of-powers grounds, that Court has always considered claims against the federal treasury directly to be inappropriate in the *Bivens* context. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971) (citing United States v. Standard Oil, 332 U.S. 301, 315–16 (1947) (noting that if Congress had wished to take steps to create a cause of action to protect the federal fisc, it may so choose)); *see also* FDIC v. Meyer, 510 U.S. 471, 484 (1994) (similar). Second, relying upon separation of powers, the Court holds that judicially crafted constitutional claims should not lie in areas uniquely within the competency of a separate branch of the federal government. *See Bivens*, 403 U.S. at 396 (citing United States v. Gilman, 347 U.S. 507, 509–12 (1954) (not inferring an action because "a complex of relations between federal agencies and their staffs [was] involved" to which Congress had not taken a position on the policy question before the Court)); *see also* Chappell v. Wallace, 462 U.S. 296, 300–01, 304 (1983) (similar); United States v. Stanley, 483 U.S. 669, 681–82 (1987) (similar). Third, the Court also considers judicial manageability as a factor to consider when inferring a constitutional action. *See Bivens*, 403 U.S. at 391 n.4 (rejecting the concern raised by Justice Blackmun in dissent that the decision would create an avalanche of federal cases); *id.* at 411 (Harlan, J., concurring) ("Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."); *id.* at 430 (Blackmun, J., dissenting); *see also* Davis v. Passman, 442 U.S. 228, 245 (1979) (noting that the courts' experience with Title VII sex-discrimination cases renders this Fifth Amendment claim standard fare); *id.* at 248 (rejecting docket-control concerns as a reason not to hear a *Bivens* claim in this context); Carlson v. Green, 446 U.S. 14, 36 (1980) (Rehnquist, J., dissenting) (discussing manageability matters); *Wilkie*, 551 U.S. at 561–62 (similar); *id.* at 577 (Stevens, J., dissenting) (similar). Fourth, the final factor that arises in the *Bivens*-extension jurisprudence is the potential for deterrence of constitutional violations by persons acting under color of federal law. *See Bivens*, 403 U.S. at 397 (holding that the Court need not find that monetary damages is necessary to deterrence in order to infer a cause of action); *id.* at 407–08 (Harlan, J., concurring) ("In this regard I

As *Wilkie*'s synthesis of the *Bivens* caselaw makes apparent, the *Minneci* Court's eschewing of the traditional separation-of-powers framework in the alternative-remedies analysis lacks foundation in the *Bivens* canon. This full-throated embrace of state law in *Bivens* doctrine, in addition to being without precedent,[20] is wrought with complications. First, it conflicts with the traditional parallelism of *Bivens* and 42 U.S.C. § 1983 actions, given that § 1983 law does not hinge the availability of constitutional remedies upon the defendant's employment status as either public or private.[21] Second, *Minneci* runs counter to the presumption favoring symmetrical remedies for public and private employees for violations of constitutional rights.[22] Our increasing reliance on private corporations to carry out the responsibilities of the federal government, moreover, gives these critiques increased salience.[23]

Minneci also reveals the underappreciated significance of the "first question" raised above: whether Mr. Pollard sought to extend prior *Bivens*

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agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct."); *id.* at 413 (Burger, C.J., dissenting) ("The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy."); *id.* at 430 (Blackmun, J., dissenting) (similar); *see also Carlson*, 446 U.S. at 21–23 (discussing the role of punitive damages in deterring conduct); *Meyer*, 510 U.S. at 485 ("If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under *Meyer*'s regime, the deterrent effects of the *Bivens* remedy would be lost."); *Malesko*, 534 U.S. at 70 (same). This factor also has a separation-of-powers component, as the deterrence question asks whether the judiciary's actions "will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical" or whether the judiciary—despite interference with executive action—has a duty to limit unconstitutional action. *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting). For a useful discussion of the relationship between special factors analysis and separation of powers considerations, *see generally* Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719 (2012).

20. *See* Erwin Chemerinsky, *Civil Rights Cases Will Face New Hurdles*, ABA J. (Feb. 1, 2012, 8:50 AM) http://www.abajournal.com/mobile/article/chemerinsky_new_hurdles_for_civil_rights_cases/ ("for the first time, the court has said that the existence of state remedies can preclude a *Bivens* cause of action."). *But see* Vazquez & Vladeck, *supra* note 13, at 571 (arguing that in some contexts it might be appropriate to limit *Bivens* based on the availability of state *constitutional* torts against federal officers).

21. *See infra* Part II.B.1.

22. *See Malesko*, 534 U.S. at 72.

23. *See* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 897–99 (2004); Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 340–41 (2001) (concluding private prisons will continue to exist and grow in the United States and not replace public prisons, but compete with them and stimulate improvement of the total prison system); Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2218 (1998) ("The number of inmates in private prisons is expected to grow thirty percent per year."); *see also infra* note 153 (citing additional sources).

doctrine at all such that it was necessary to infer a new remedy. In this Article, we provide a detailed analysis of this first question that the Court needed to answer in *Minneci*. If Mr. Pollard's claim could be encompassed by the Court's prior holding in *Carlson*, it should have proceeded without further analysis, just as other *Bivens* remedies have been applied to "new" contexts without controversy.[24] Moreover, Congress codified then-existing *Bivens* remedies in 1988 by passage of the Westfall Act. Thus, the "first question" we explicate here is sound not only as a matter of stare decisis, but also as *required* on separation-of-powers grounds.

The *Minneci* Court, however, elided this analytically prior question of when a plaintiff seeks to extend *Bivens* with the distinct question of when alternative remedies, be they state or federal, should prohibit such an extension. This conflation of concepts, we assert, runs contrary to the Court's prior analyses and Congress's codification of the *Bivens* remedy in the Westfall Act. Unfortunately, *Minneci* is not alone in neglecting to distinguish these two inquiries adequately; many commentators have made the same mistake, failing to recognize the importance of the predicate question of whether a plaintiff even seeks an extension of a recognized *Bivens* action.[25] Our account, by contrast, is the first to coherently

24. The Supreme Court and lower courts have consistently assumed without analysis that the *Bivens* remedy applies to Fourth Amendment excessive force claims despite the fact that *Bivens* involved a challenge to a search and seizure without probable cause. *See* Saucier v. Katz, 533 U.S. 194 (2001), *overruled on other grounds*, Pearson v. Callahan, 555 U.S. 223 (2009); *see also* Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (in dicta, assuming that *Bivens* applies to excessive force claims); Soto-Torres v. Fraticelli, 654 F.3d 153 (1st Cir. 2011) (reviewing *Bivens* claim for excessive force); Thomas v. Durastini, 607 F.3d 655 (10th Cir. 2010) (same); Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (rejecting qualified immunity in *Bivens* excessive force claim); Ting v. United States, 927 F.2d 1504 (9th Cir. 1991) (same); Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987) (in dicta, treating excessive force claims as a "classic *Bivens*-style tort"); King v. United States, 576 F.2d 432, 439 (2d Cir. 1978) (in dicta assuming that a *Bivens* action would lie for excessive force). The Court has made similar assumptions in Eighth Amendment cases, not limiting *Carlson* to the medical care context. *See* Hui v. Castaneda, 130 S. Ct. 1845, 1851–52 (2010) (recognizing that an Eighth Amendment *Bivens* claim is generally available while holding that the instant case presented the separate question of official immunity); Farmer v. Brennan, 511 U.S. 825, 832–34 (1994) (applying *Bivens* to failure to protect claim by prisoner); McCarthy v. Madigan, 503 U.S. 140, 142 (1992) (similar). The Court also has assumed the existence of a *Bivens* remedy to enforce the First Amendment. *See* Hartman v. Moore, 547 U.S. 250, 256 (2006) (assuming the viability of a *Bivens* action for retaliation against individual in violation of the First Amendment); *see also* Walden v. Ctrs. for Disease Control and Prevention, 669 F.3d 1277, 1284 n.3 (11th Cir. 2012) (assuming without deciding that *Bivens* applied to Free Exercise Clause claim); Howards v. McLaughlin, 634 F.3d 1131, 1149–50 (10th Cir. 2011) (rejecting qualified immunity motion to dismiss First Amendment *Bivens* claim for retaliatory arrest).

25. *See, e.g.*, Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1457–58 (2011) (treating extension solely as function of special factors and alternative remedies analysis); Morgan Leigh Manning, *Less Than Picture Perfect: The Legal Relationship Between Photographers' Rights and Law Enforcement*, 78 TENN. L. REV. 105, 145

synthesize the Court's approach to both the predicate extension question and the more developed question of whether to imply a new *Bivens* remedy. Providing this structure further demonstrates the poverty of *Minneci*'s analysis.

We proceed as follows. In Part I, we address the Court's federalism turn in *Minneci*. We first discuss the treatment of alternative remedies in *Bivens* and its progeny as a matter of separation of powers for the forty years prior to *Minneci*. In so doing, we address the lack of new separation-of-powers concerns raised in *Minneci* vis-à-vis prior *Bivens* decisions. We then outline the Court's federalism-centric reasoning in the case. We end the section with a discussion of the Court's odd intertwining of the extension question with the alternative-remedies issue.

In Part II, we contend that this federalism turn in *Bivens* jurisprudence runs contrary to the status quo that Congress codified in the Westfall Act. Here we briefly review the Act. We then argue that the Court's confusion of the questions of whether an extension of *Bivens* is needed with the question of whether an extension is warranted runs contrary to congressional intent as expressed in the Westfall Act. Next, we contend that the *Minneci* opinion, undermining legislative intent, rejects the presumption of parallel doctrine with § 1983 cases and eschews the *Malesko* Court's symmetrical public-private liability principle.

In Part III, we briefly consider several remedial options. We first discuss how state law might be used to ensure that constitutional norms are respected. Then we turn to doctrinal and theoretical matters that should be brought to bear in limiting *Minneci*, contending that the separation-of-powers framework should be reinstated as the lodestar for application of *Bivens* doctrine. We conclude that, while *Minneci* is out of step with the *Bivens* canon, there remains some hope that this area of jurisprudence can be set back upon its separation-of-powers foundation.

I. *MINNECI* AND THE FEDERALISM TURN

In this part, we detail the evolution of the Court's alternative-remedies doctrine. We begin with the *Bivens* Court's original rejection of a state-law-focused approach to constitutional remedies. We turn to the Court's

(2010) (conflating extension analysis with special factors and alternative remedies analysis); Blake R. Bertagna, *Reservations About Extending* Bivens *to Reservations: Seeking Monetary Relief Against Tribal Law Enforcement Officers for Constitutional Violations*, 29 PACE L. REV. 585, 627–28 (2009) (ignoring predicate extension question); George D. Brown, *"Counter-Counter-Terrorism Via Lawsuit"—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 881–82 (2009) (focusing on confusion in special factors and alternative remedies analysis).

similar rejection of state-law *simpliciter* prior to *Minneci*. We end this section by describing the Court's federalism turn in which it both relies upon state law to provide alternative remedies to a *Bivens* action and elides the extension question with the alternative remedies question in one fell swoop.

A. Separation of Powers Reasoning in Bivens

Bivens itself highlights the controlling nature of separation-of-powers concerns in the decision to provide a damages cause of action for violations of the Constitution. In *Bivens*, the Supreme Court held that a "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[26] Mr. Bivens alleged that federal agents, under color of federal law, illegally restrained him, searched his home, and arrested him.[27] The lower courts dismissed Mr. Bivens's action, agreeing with the defendants' argument that Mr. Bivens's proper remedy lied in a state-law trespass claim.[28] The Supreme Court reversed.[29]

Central to the Court's decision was its conclusion that, even in the absence of implementing legislation, the Constitution provides a direct remedy in monetary damages for a violation of Fourth Amendment rights.[30] The Court acknowledged that it lacked a statutory basis for providing this remedy and that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation."[31] The Court, nevertheless, held that it could infer such a cause of action directly from the Constitution when three conditions were met. First, analogizing from its cases involving implied rights of action under statutes, the Court assumed that the Constitution could imply actions as well.[32] Second, and more directly

26. *Bivens*, 403 U.S. 388, 389 (1971).

27. *Id.* ("The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.").

28. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967).

29. *Bivens*, 403 U.S. at 390.

30. *Id.* at 395.

31. *Id.* at 396.

32. *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). What the Court means by "general right to sue" in this context is far from clear. Section 1983 is limited to actions against state officials.

rooted in separation-of-powers analysis, the *Bivens* Court held that it is appropriate to infer a constitutional remedy when there are no special factors counseling hesitation.[33] Third, and our immediate focus, the Court held that the inference is appropriate when Congress had not foreclosed awarding money damages for constitutional violations caused by federal agents.[34] In so holding, the *Bivens* Court cited to *Wheeldin v. Wheeler*[35] and its reasoning based on separation-of-powers concerns that the Court should not find a constitutional cause of action in an area where Congress already had contemplated remedial schemes.[36] Finding no similar congressional scheme to remedy the Fourth Amendment injuries to Mr. Bivens, the Court found the cause of action implied by the Constitution.

The dissent and concurrence saw the alternative-remedies issue in *Bivens* to be primarily one of separation of powers as well. The dissenters concluded that separation-of-powers concerns were the central issue, arguing that the creation of federal remedies was essentially a legislative act that fell within the exclusive power of Congress.[37] Justice Harlan's concurrence also identified the principal question to be "whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands."[38]

Federalism concerns, on the other hand, did not control the *Bivens* Court's holding. The Court rejected the notion that the protections afforded under the Fourth Amendment are strictly co-extensive to those found under state law.[39] Indeed, the Court held that the Fourth Amendment is an independent check upon federal power consistently applied throughout the country, which "is not tied to the niceties of local

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See, e.g., Wheedlin v. Wheeler, 373 U.S. 647 (1963) (holding federal agents are not liable under 42 U.S.C. § 1983). Thus, at the time *Bivens* was decided there was not a general right to sue federal agents for constitutional violations, merely a general right to sue state agents.

33. *Bivens*, 403 U.S. at 396. For a discussion of special factors analysis, *see supra* note 19 and accompanying text.

34. *Bivens*, 403 U.S. at 396–97.

35. 373 U.S. 647 (1963).

36. *See id.* at 652 ("We conclude, therefore, that it is not for us to fill any *hiatus* Congress has left in this area.").

37. *See Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting) ("Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."); *id.* at 427–28 (Black, J., dissenting) (the majority's holding is "an exercise of power that the Constitution does not give us."); *id*. at 430 (Blackmun, J., dissenting) (if adequate remedies do not exist for Fourth Amendment violations, "it is the Congress and not this Court that should act.").

38. *Id.* at 401–02 (Harlan, J., concurring).

39. *Id*. at 392–94 (majority opinion).

trespass laws."[40] Moreover, the Court held that the interests protected under state-law trespass and invasion of privacy doctrines may be inconsistent or even hostile to those interests protected by the Fourth Amendment.[41] For example, the Court noted that to bring a state-law trespass claim the plaintiff must show that he did not allow the defendant into the home.[42] But the Court reasoned that an officer who demands admission under a claim of federal authority stands in a far different position from the typical trespasser.[43] As a result, the Court concluded that, in most cases, a mere invocation of authority by a federal official will cause the average citizen to allow the official access to the home, rendering trespass doctrine an ineffective remedy against abuses of federal power.[44]

In concurrence, Justice Harlan also specifically rejected a federalism approach to the alternative-remedies question, observing that "there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs."[45] Justice Harlan proceeded to reason that

> [p]utting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. . . . For people in Bivens' shoes, it is damages or nothing.[46]

Ironically, this last sentence, which is the culmination of a two-paragraph argument *against* the advisability of a state-law approach to constitutional damages enforcement, is regularly cited by those who have argued for *Bivens* remedies to be rejected based on the availability of state-law remedies.[47]

The *Bivens* Court's focus on separation of powers in the alternative-remedies discussion makes clear that the availability of state-law remedies had been irrelevant to whether a *Bivens* remedy should lie. In *Bivens*, the Court's focus was on the distinction between private citizens and an

40. *Id*. at 393–94.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*. at 409 (Harlan, J., concurring).
46. *Id*. at 409–10.
47. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (quoting Justice Harlan's *Bivens* concurrence as an authority to rely upon state law to remedy constitutional violations); *see also* Wilkie v. Robbins, 551 U.S. 537, 555 (2007) (quoting *Passman*'s quotation of Justice Harlan).

"agent" acting "in the name of the United States"; the right to be free of unconstitutional conduct "carried out by virtue of federal authority"; and the invasion of "federally protected rights"[48]—not on "the niceties of local trespass laws [*i.e.*, state tort law]."[49]

B. Alternative Remedies After Bivens *and Separation of Powers*

Following the *Bivens* separation-of-powers-based opinion, the Court has consistently looked to the existence of federally approved or created remedies as a reason to prohibit a *Bivens* action on alternative-remedies grounds. *Davis v. Passman*,[50] for example, followed this separation-of-powers focus in its alternative-remedies discussion. Here, a former congressional staffer sued her past employer, a retired member of the House, alleging that she was terminated because of her sex in violation of the Fifth Amendment.[51] The Court's discussion of alternative remedies did not focus solely on remedies created by Congress, but separation-of-powers analysis drove the inquiry. Thus, although the Court noted that Ms. Davis lacked relief at both state and federal law, it first quoted Justice Harlan's *Bivens* concurrence, which itself rejected a federalism approach to the *Bivens*-extension analysis in favor of a separation-of-powers approach.[52] The relevance of any state-law relief was questionable given the Court's observation that the case involved violation of federal law by a federal actor, creating the presumption that federal court was the appropriate site of any remedy.[53] Moreover, the Court noted that Congress had not specifically prohibited the award of damages in suits such as *Passman*.[54] The dissenting opinions also viewed this case as primarily a separation-of-powers question.[55]

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48. *Bivens*, 403 U.S. at 391–92.
49. *Id*. at 393–94.
50. 442 U.S. 228 (1979).
51. *Id*. at 231.
52. *Id*. at 245.
53. *Id.* at 245 n.23 ("Deference to state-court adjudication in a case such as this would in any event not serve the purposes of federalism, since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damages remedy be awarded.").
54. *Id*. at 247.
55. *Id*. at 249 (Burger, C.J., dissenting) ("I dissent because, for me, the case presents very grave questions of separation of powers, rather than Speech or Debate Clause issues, although the two have certain common roots."); *id.* at 251 (Powell, J., dissenting) ("I write separately to emphasize that no prior decision of this Court justifies today's intrusion upon the legitimate powers of Members of Congress."). Justice Stewart dissented as well, but on procedural grounds that the Speech or Debate Clause issue should have first been ruled on by the lower courts. *Id*. at 251 (Stewart, J., dissenting).

Carlson v. Green[56] took a separation-of-powers approach to the alternative-remedies question as well. In *Carlson*, the estate of a federal prisoner brought, among other things, *Bivens* claims for alleged Eighth Amendment violations after prison officials failed to give him proper medical attention.[57] The Court found that two factors could bar a *Bivens* claim in this situation: special factors counseling hesitation or alternative remedies.[58] In addressing the question of alternative remedies, the Court held that a *Bivens* action would not lie if "*Congress* has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[59] Thus, the Court looked to prior congressional action in its *Bivens*-extension analysis and found that Congress specifically contemplated that *Bivens* suits would be an available remedy in cases such as *Carlson*.[60] Moreover, this separation-of-powers stance was taken in the face of a remedy, the scope of which was defined by state law. In addition to a *Bivens* claim, the plaintiff in *Carlson* had a claim under the Federal Torts Claim Act,[61] which creates vicarious liability in the federal government for state-law torts committed by federal employees.[62] The Court held, however, that Congress, absent an explicit statement to the contrary, would not want state law, as incorporated by the FTCA, to displace *Bivens* liability because it would not provide an adequate safeguard against constitutional injuries.[63] Moreover the concurring[64] and

56. 446 U.S. 14 (1980).

57. *Id*. at 16 n.1.

58. *Id*. at 18.

59. *Id*. at 18–19 (first emphasis added).

60. *Id*. at 19–20 ("[T]he congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . . .").

61. 28 U.S.C. § 1346(b) (2006).

62. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred . . . ."); Carlson v. Green, 446 U.S. 14, 16–17, 17 n.2, 23 (1980).

63. *Carlson*, 446 U.S. at 23 ("The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.").

64. *See id.* at 26 (Powell, J., concurring) ("*Bivens* recognized that implied remedies may be unnecessary when Congress has provided 'equally effective' alternative remedies."); *id*. at 27 ("The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. . . . Such a drastic curtailment of discretion would be inconsistent with the Court's long-standing recognition that Congress is ultimately the appropriate body to create federal remedies."); *id*. at 29 ("In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice."); *id.* at 29–30 (allowing the possible operation of state-law liability rules, not of their own force as state-law causes of action, but only as incorporated as a rule of decision under a federal common law cause of action).

dissenting[65] opinions also focused upon the separation-of-powers aspects—not federalism aspects—of the alternative-remedies issue.

Even in the multitude of cases since *Carlson* in which the Court has declined to adopt new *Bivens* remedies, the Court has predominantly approached the question of alternative remedies from a separation-of-powers perspective. In *Bush v. Lucas*,[66] the Court declined to recognize a *Bivens* claim alleging First Amendment violations brought by government civil service employees against superiors.[67] Determining that its application of *Bivens* depended on "relevant policy determinations made by the Congress,"[68] it found that the plaintiff had access to congressionally created alternative "comprehensive procedural and substantive provisions giving meaningful remedies against the United States."[69] Indeed, the *Bush* Court showed greater deference to congressional action by requiring only that congressionally created remedies be "meaningful,"[70] moving away

65. *See id.* at 34 (Rehnquist, J., dissenting) ("The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority."); *id.* at 35 ("the Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress . . . ."); *id.* at 36 ("Because the judgments that must be made here involve many 'competing policies, goals, and priorities' that are not well suited for evaluation by the Judicial Branch, in my view '[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States.'" (alterations in original)); *id.* at 37 ("Just as there are some tasks that Congress may not impose on an Art. III court, there are others that an Art. III court may not simply seize for itself without congressional authorization. This concern is initially reflected in the notion that federal courts do not have the authority to act as general courts of common law absent congressional authorization." (internal citations omitted)); *id.* at 41 ("In my view, absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations. Although Congress surely may direct federal courts to grant relief in *Bivens*-type actions, it is enough that it has not done so."); *id.* at 48–50 (rejecting a norm of uniform federal rules of decisions for federal officer liability, but doing so in a manner suggested in Justice Powell's concurring opinion—namely, doing so under the guise of a federal common law incorporating a state-law rule of decision). Chief Justice Burger's short dissent, however, could be construed, in part, as favoring a federalism approach, but this is far from transparent. *See id.* at 31 (Burger, C.J., dissenting) ("Until today, I had thought that *Bivens* was limited to those circumstances in which a civil rights plaintiff had no other effective remedy.").

66. 462 U.S. 367 (1983).

67. *Id.* at 368.

68. *Id.* at 373.

69. *Id.* at 368; *see also id.* at 390 (Marshall, J., concurring) ("I write separately only to emphasize that in my view a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights.").

70. *Id.* at 386. *See also* David C. Nutter, 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, 694 (1985) (contending that after *Davis* and *Carlson* the Court abandoned the "Equally Effective" Approach).

from the requirement that alternative remedies be "viewed as equally effective" to a *Bivens* claim.[71]

Following this same track, the Court in *Schweiker v. Chilicky*[72] held that no *Bivens* remedy exists for Equal Protection Clause claims filed by disabled social security beneficiaries who lacked administrative monetary relief for emotional distress due to delays in receiving their social security benefits.[73] As in *Bush*, the Court relied upon Congress's creation of alternative, although not equivalent, administrative relief to prohibit the *Bivens* claim.[74] Forming a general principle, again one focused on separation-of-powers, the Court held that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."[75]

The next Supreme Court case to consider alternative remedies as a ground not to find a *Bivens* claim available came in *Correctional Services Corp. v. Malesko*,[76] a decision that, under some readings, changed the nature of the *Bivens* action dramatically.[77] Mr. Malesko, a federal prisoner living in a privately run halfway house, had a heart condition that entitled him to use the elevator to access his fifth floor room despite the general policy requiring inmates to use the stairs.[78] Nevertheless, an employee of the halfway house required Mr. Malesko to climb the stairs, which resulted

71. Carlson v. Green, 446 U.S. 14, 19 (1980); Davis v. Passman, 442 U.S. 228, 248 (1979).

72. 487 U.S. 412 (1988).

73. *Id*. at 424–25.

74. *Id*. at 429 ("Congress . . . has addressed the problems created by state agencies' wrongful termination of disability benefits" through the creation of administrative remedies).

75. *Id*. at 423.

76. 534 U.S. 61 (2001).

77. *See, e.g.*, Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685 (2006) (arguing that the death of the *Bivens* action will merely recast federal constitutional issues as hybrid claims with federal questions arising on certiorari under the government-contractor defense and under § 1331 jurisdiction under *Grable and Sons*); Matthew G. Mazefsky, Note, Correctional Services Corp. v. Malesko*: Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639 (2003) (concluding that *Malesko* marks the final throes of the cause of action implied directly under the Constitution); Andrea Robeda, Note, *The Death of Implied Causes of Action: The Supreme Court's Recent* Bivens *Jurisprudence and the Effect on State Constitutional Tort Jurisprudence:* Correctional Services Corp. v. Malesko, 33 N.M. L. REV. 401 (2003) (same); Mariana Claridad Pastore, Note, *Running from the Law: Federal Contractors Escape* Bivens *Liability*, 4 U. PA. J. CONST. L. 850 (2002) (same). *But see* Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Round Table Dialogue*, 19 TOURO L. REV. 625, 678 (2003) ("[A]lthough the Court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned.") (Chemerinsky speaking).

78. *Malesko*, 534 U.S. at 64.

in a heart attack.[79] Mr. Malesko then brought a *Bivens* suit alleging Eighth Amendment violations against the halfway house, a private corporation under contract with the United States Bureau of Prisons.[80]

The Court held that such a suit could not be brought against corporate, federal contractors who operate prisons,[81] providing three rationales for its decision. First, the Court held that the purpose of a *Bivens* action is to deter individual federal officers from committing constitutional violations—not governmental agencies or corporate entities.[82] Following this principle, publicly held prisoners may not seek a *Bivens* claim against the Bureau of Prisons, and similarly, privately held prisoners may not seek a *Bivens* claim against the corporation running the prison.[83] While this no-entity-liability principle was seemingly sufficient to decide the case, the Court proceeded—in what reads as dicta[84]—to provide two more rationales for its decision.

The second factor provided by the *Malesko* Court was the need to maintain parity between the remedies afforded prisoners at privately operated facilities and those at government-operated facilities.[85] Relying on familiar themes, the Court held that the judicial creation of asymmetrical remedies between government contractors and government employees would violate separation-of-powers principles.[86] The Court reasoned, "[w]hether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide."[87] Thus, the Court rejected Mr. Malesko's *Bivens* claim against the private prison because federal prisoners incarcerated in federally run facilities do not have plaintiff's contemplated entity-liability remedy against the Bureau of Prisons.[88]

Finally, the Court stated that the existence of alternative remedies precluded a *Bivens* claim.[89] The Court pointed to two alternative remedies available to Mr. Malesko. The Court first stated, unexceptionally given its

79. *Id*.
80. *Id*. at 63.
81. *Id*.
82. *Id*. at 71.
83. *Id*. at 72.
84. *See* Pfander & Baltmanis, *supra* note 13, at 147–48 (describing the *Malesko* discussion of alternative state remedies as dicta).
85. *Malesko*, 534 U.S. at 71–72.
86. *Id.*
87. *Id*. at 72.
88. *Id.* at 72–74.
89. *Id*. at 72 (finding that Mr. Malesko was not "confronted with a situation in which claimants in [his] shoes lack effective remedies.").

prior separation-of-powers-based case law from *Bivens* to *Schweiker*, that the possibility of administrative relief within the Bureau of Prisons precluded a *Bivens* claim.[90] However, in a move that is quite exceptional given its rulings in *Bivens* and *Carlson* rejecting the notion that state torts sufficiently protect constitutional interests, the Court also stated that Mr. Malesko's claim was quintessentially one for negligence and, thus, a state-law tort claim was available to remedy his constitutional claim.[91]

The Court's over-determination of its holding in *Malesko* has only fostered confusion. Even assuming each *Malesko* factor (*i.e.*, the no-entity-liability principle, the symmetry principle, and the alternative-relief principle) is sufficient standing alone to bar a *Bivens* claim,[92] the *Malesko* decision raises the further question of whether the existence of alternative *federal* remedies, alternative *state-law* remedies, or *both* working in conjunction barred Mr. Malesko's *Bivens* claim.[93] If *Malesko*, properly understood, endorses the view that the existence of a state-law remedy standing alone precludes a *Bivens* action against a private defendant, then the *Malesko* Court radically departed from its past separation-of-power, *Bivens*-extension jurisprudence.[94] Indeed, both parties to the *Malesko* case,

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90. *Id*. at 74; *see also* 28 C.F.R. § 542.10 (2012); Schweiker v. Chilicky, 487 U.S. 412 (1988) (holding that the existence of alternative federal remedies is sufficient, standing alone, to bar a *Bivens* suit); Bush v. Lucas, 462 U.S. 367 (1983) (same).

91. *Compare Malesko*, 534 U.S. at 73 ("[R]espondent's complaint . . . arguably alleged nothing more than a quintessential claim of negligence"), *with* Carlson v. Green, 446 U.S. 14, 23 (1980) ("the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.") *and Bivens*, 403 U.S. 388, 393–94 (1971) (holding that the Fourth Amendment "is not tied to the niceties of local trespass laws.").

92. There are good reasons to make this assumption. *See* FDIC v. Meyer, 510 U.S. 471 (1994) (holding that the no-entity-liability principle, standing alone, is sufficient to bar a *Bivens* action as against a government agency); *Schweiker*, 487 U.S. 412 (holding that the existence of alternative *federal* remedies is sufficient, standing alone, to bar a *Bivens* suit); *Bush*, 462 U.S. 367 (same); *Malesko*, 534 U.S. at 71–72 (discussing the symmetry principle as a reason to extend liability to private parties acting color of state law in the § 1983 context).

93. *Malesko*, 534 U.S. at 70–72 (presenting both sets of alternative remedies as grounds for barring a *Bivens* claim); *see also* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 729–30 (2008) (noting that *Malesko* is not clear on whether state law standing alone, or in conjunction with B.O.P. remedies, presented effective alternative grounds for relief).

94. *See supra* notes 30–75 and accompanying text (discussing the Court's pre-*Malesko*, separation-of-powers jurisprudence); *see also* Preis, *supra* note 93, at 725 (noting *Malesko* as a sea change for the use of state-law remedies). *But see* Vazquez & Vladeck, *supra* note 13 (arguing that in some contexts it might be appropriate to limit *Bivens* based on the availability of state *constitutional* torts against federal officers). Indeed, prior to *Malesko*, the Courts of Appeals regularly heard *Bivens* claims against private defendants acting under color of federal law without a determination that plaintiff lacked a state-law alternative remedy. *See, e.g.*, Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 698 (6th Cir. 1996) (holding that a *Bivens* claim may be brought against a private actor if the defendant was acting under color of federal law); Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1337–38 (9th Cir. 1987) (same); Reuber v. United States, 750 F.2d 1039, 1057 (D.C. Cir. 1984) (same); Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1222–23 (5th Cir. 1982) (same);

and the United States as amicus, assumed that a *Bivens* action would lie against employees of privately run prisons, regardless of the existence of state-law remedies[95]—strongly suggesting that they viewed the no-entity-liability and symmetry principles as controlling.

The Court offered clarification on the use of alternative state-law remedies in *Wilkie v. Robbins*, which brought the ambiguous alternative state-law remedies language of *Malesko* back into conformity with the Court's separation-of-powers tradition.[96] In *Wilkie*, government officials inadvertently let an easement on Mr. Robbins' property expire.[97] After Mr. Robbins refused to renew the easement without compensation, the officials engaged in a multi-year project of harassment of Mr. Robbins and his business ventures.[98] Mr. Robbins brought a retaliation theory of recovery against the government agents using a *Bivens* cause of action as the vehicle.[99]

Although the Court in *Wilkie* refused to find a *Bivens* action on judicial-manageability grounds,[100] a step-two concern, the case clarified

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Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282, 307 (D. Mass. 1999) (same). The First Circuit, pre-*Malesko*, appears to have assumed that such an action was appropriate. *See* Gerena v. Puerto Rico Legal Servs., Inc., 697 F.2d 447, 449 (1st Cir. 1983). Prior to *Malesko*, three courts of appeals had declined to answer whether a plaintiff may assert a *Bivens* claim against a private actor. *See* DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 720 n.5 (10th Cir. 1988); Morast v. Lance, 807 F.2d 926, 930–31 (11th Cir. 1987); McNally v. Pulitzer Publ'g Co., 532 F.2d 69, 75–76 (8th Cir. 1976). Notably, prior to *Malesko*, only the First Circuit, in dicta, had stated that "[w]hile federal officers may, at times, be subject to suit for unconstitutional behavior, there is no cause of action against private parties acting under color of federal law or custom." Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 932 n.8 (1st Cir. 1974) (citation omitted). As is illustrated above, however, the First Circuit appeared to have rejected this dicta by 1983. *See Gerena*, 697 F.2d at 449. In any event, no circuit predicated the existence of a *Bivens* claim upon the absence of a state-law remedy. After *Malesko*, however, the lower courts split on this issue. *See Minneci*, 132 S. Ct. at 621 (noting the circuit split). The district courts also split on the issue, with some finding that a *Bivens* action remained against private persons acting under color of federal law. *See, e.g.*, Sanusi v. INS, 100 Fed. Appx. 49, 52 n.3 (2d Cir. 2004) (remanding the question); Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52 (D.R.I. 2003) (holding that existence of a state-law remedy standing alone does not foreclose a *Bivens* action against employees of a federal contractor running a private prison); Jama v. INS, 343 F. Supp. 2d 338, 362–63 (D.N.J. 2004) (adopting *Sarro*). Others did not. *See* Preis, *supra* note 93, at 731 n.37 (listing cases).

95. *See* Br. of Pet'r, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860) 2001 WL 53566 at *13; Br. of Resp., Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 993679 at *8, *12; Br. for the United States as Amicus Curiae Supporting Petitioner, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 558228 at *11–*12. This question was specifically reserved by the Court. *Malesko*, 534 U.S. at 65 ("[T]he parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.").

96. 551 U.S. 537 (2007).

97. *Id.* at 542.

98. *Id.* at 543–46.

99. *Id.* at 547–48 (pressing violations of the Fourth and Fifth Amendments).

100. *Id.* at 562 (perceiving the issue to be "endlessly knotty to work out" and that finding a claim

the role of alternative state-law remedies in the step-one analysis. The *Wilkie* Court considered whether Mr. Robbins had adequate alternative state remedies, ultimately finding he did not. Although the Court cited by analogy to *Malesko* for looking to state law,[101] its reference must be read against the *Wilkie* Court's later discussion that state-law remedies will bar a *Bivens* claim only if the Court concludes that *Congress* intended to rely upon state-law remedies as an alternative remedy. The Court devoted a paragraph to this topic:

> This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it. Like the combination of public and private land ownership around the ranch, the forums of defense and redress open to Robbins are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes, and common law rules. It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim. Compare *Bush*, 462 U.S., at 388 (refusing to create a *Bivens* remedy when faced with "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); and *Schweiker*, 487 U.S., at 426 ("Congress chose specific forms and levels of protection for the rights of persons affected"), with *Bivens*, 403 U.S., at 397 (finding "no explicit congressional declaration that persons injured [in this way] may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress").[102]

As this passage makes clear, the Court considered alternative state-law remedies only to determine whether it could "infer that *Congress* expected the Judiciary to stay its *Bivens* hand."[103] Moreover, the *Wilkie* opinion's citations to *Bush*, *Schweiker*, and *Bivens*—all of which focus on the separation-of-powers question of whether Congress chose an alternative to *Bivens* and tellingly not to *Malesko*'s federalism language—further

here "would invite an onslaught of *Bivens* actions,"); *see also id.* at 554 (explaining that *Wilkie* is "a case for *Bivens* step two" (special factors analysis), not step one (alternative remedies analysis)).

101. *Id*. at 551.

102. *Id*. at 554.

103. *Id*. (emphasis added).

cements the conclusion that the quest for alternative state-law remedies in *Wilkie* was done within the context of divining congressional intent.[104] That is to say, the alternative state-law remedies discussion in *Wilkie* was not a blanket rule that the presence of state-law relief bars a *Bivens* suit in every case. Rather, the *Wilkie* analysis fixed the alternative-state-law-remedies question as a part of the Court's traditional separation-of-powers inquiry into congressional intent—as found in *Bivens*,[105] *Carlson*,[106] *Bush*,[107] *Schweiker*[108] and (in part in) *Malesko*[109]—to deploy a remedial scheme as an alternative to a constitutional action as a reason stay its *Bivens* hand.

C. State-Law Alternative Remedies in Minneci

With this background in mind, we can turn our attention more directly to *Minneci*. In rendering its opinion, the *Minneci* Court did not look, contrary to this past practice, to congressional approval of alternative remedies as a basis to refuse *Bivens* relief. This failure to point to congressional action flows, at least in part, from the fact that Congress has not chosen to exercise an alternative scheme to remedy Eighth Amendment violations that occur in privately run prisons by persons acting under color of federal law. Unlike *Malesko*, *Schweiker*, and *Bush*, the plaintiff in *Minneci* did not have access to any congressionally or administratively created alternative remedies. Also, unlike *Wilkie*, the Court found no evidence to suggest that Congress desired the courts to employ state-law remedies as an alternative to a *Bivens* claim against employees of federal contractors acting under color of federal law. Thus in accord with the assumption of all the parties involved in the last private-actor *Bivens* case before the Court,[110] given that no evidence supported the finding that Congress or the Executive intended for victims of

104. *Id*.

105. 403 U.S. 388, 397 (finding no congressionally created alternative to a constitutional action).

106. 446 U.S. 14, 19–20 (1980) ("the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action").

107. 462 U.S. 367, 388 (1983) (finding a congressionally created alternative to a constitutional action).

108. 487 U.S. 412, 429 (1988) (finding a congressionally created alternative to a constitutional action).

109. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (noting the existence of alternative administrative relief).

110. *See supra* note 95 and accompanying text (noting that in *Malesko*, the plaintiff, the private prison and the United States all assumed that a *Bivens* action would lie against employees of a private prison when they acted under color of federal law).

constitutional violations committed by employees of federal government contracts acting under color of federal law to deploy an alternative remedial scheme, a *Bivens* claim should have been available under prior law. Nevertheless, the *Minneci* Court looked to the existence of state-law remedies *simpliciter* as the basis to reject a *Bivens* suit.

The Court's justification for this federalism turn in alternative remedies was terse, offering only two brief bursts of support for its new view. First, the Court summarized in one sentence its federalism-based view in the introduction to the opinion. Citing *Wilkie*, but failing to note that *Wilkie* looked to state law only within the context of divining congressional intent, the Court stated that "[b]ecause we believe that . . . state tort law authorizes adequate alternative damages actions . . . we cannot [provide a *Bivens* remedy]."[111]

The Court's primary argument was not much longer. After the Court reviewed the facts, procedural posture of the case and its *Bivens* case law, the Court offered a one-paragraph defense of the turn to federalism. Here, the Court again cited to *Wilkie* and held, in full:

> [W]e conclude that Pollard cannot assert a *Bivens* claim.
>
> That is primarily because Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an "alternative, existing process" capable of protecting the constitutional interests at stake. The existence of that alternative here constitutes a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[112]

In the final section of the opinion, the Court proceeded to rebut counter-arguments related to the adequacy of state-law remedies to protect constitutional interests—not the separation-of-powers question of whether Congress desired to deploy state law in this manner.[113] Nevertheless, the Court briefly considered in this section whether a uniform, federal alternative to *Bivens* is required.[114] Citing to dicta from *Malesko* that looked to state-law actions—without noting *Wilkie*'s rehabilitation of this use of state law as part of the traditional congressional intent analysis—the

111. Minneci v. Pollard, 132 S. Ct. 617, 620 (2012).
112. *Id*. at 623 (internal citations to *Wilkie* omitted).
113. *Id*. at 623–26.
114. *Id*. at 624.

Court quickly reasserted that state law alternative remedies are sufficient.[115]

Finally, the Court considered the argument that Mr. Pollard's case did not present an extension of *Bivens* at all, but rather was an application of existing doctrine under the *Carlson* decision, which held that federally employed prison guard are amenable to *Bivens* suits to remedy Eighth Amendment violations.[116] The Court dismissed this concern. Here it argued that the "existence of an adequate 'alternative, existing process' differs dramatically in the two sets of cases. Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government. But [privately housed] prisoners ordinarily *can* bring state-law tort actions against employees of a private firm."[117] Again citing dicta from *Malesko* that looked to state-law actions—and again without noting *Wilkie*'s treatment of the same—the Court equated the extension question as co-extensive with "the existence of alternative 'effective' state tort remedies."[118] And with that, the Court turned its back on forty years of separation-of-powers jurisprudence under the *Bivens* doctrine.

II. PROBLEMS WITH RELIANCE ON STATE LAW IN THE *BIVENS* CANON

The *Minneci* Court's federalism turn incurs many costs, some of which have been previously noted. For instance, this practice gives the states a reverse preemption power contrary to the dictates of the Supremacy Clause.[119] Moreover, commentators have noted that state tort law, having developed to regulate the interactions of private individuals, cannot well absorb the unique problems posed by the governmental character of constitutional torts.[120] In this section we outline two additional reasons why the Court's turn to federalism is misguided from a congressional-intent perspective. First, eliding the extension question with a federalism-based approach to alternative remedies radically reduces the scope of *Bivens* relief which Congress attempted to codify in the Westfall Act. Second, the practical impact of *Minneci* may be to permit a *Bivens* cause

115. *Id*.
116. *Id*. at 623.
117. *Id.* (citations omitted).
118. *Id.* at 624.
119. Indeed, the very purpose intended by the Supremacy Clause was to avoid the "disparities, confusions and conflicts" that would follow if the federal government's general authority were subject to local controls. U.S. v. Allegheny Cnty., 322 U.S. 174, 183 (1944).
120. *See* Preis, *supra* note 93, at 750–56. *But see* Vazquez & Vladeck, *supra* note 13 (arguing that in some contexts it might be appropriate to limit *Bivens* based on the availability of state *constitutional* torts against federal officers).

of action to be contracted away by federal entities that outsource their responsibilities to private corporations. This will create even greater asymmetries than already exist between *Bivens* and the § 1983 cause of action and between the remedies available against private and public defendants.

A. Minneci *and the Predicate "Extension" Question*

Minneci neglected to provide a framework for addressing the predicate question of whether a litigant is even seeking an extension of an existing *Bivens* cause of action. In *Minneci*, this was critical because the Court already had held that the Eighth Amendment may be enforced directly against federal employees of the Bureau of Prisons.[121] Only if Mr. Minneci's cause of action—brought under the Eighth Amendment against employees of contractors with the federal government—were considered an extension of *Carlson* would it be necessary to proceed with *Wilkie*'s step-one and step-two analysis. The Court implicitly acknowledges this, but in rejecting the argument that *Carlson* applied directly in *Minneci*, it rested entirely on the existence of alternative state-law remedies.[122] In other words, to decide whether it needed to proceed to *Wilkie*'s step-one analysis, the Court simply applied *Wilkie*'s step-one analysis. The conflation of the predicate-extension question with *Wilkie* step-one is misguided because it ignores important separation-of-powers concerns that arise from congressional approval of the *Bivens* action in the Westfall Act.[123]

1. The Westfall Act and the Codification of Bivens

Despite the Court's rhetoric that *Bivens* represents the Court acting entirely on its own accord, Congress has ratified the *Bivens* remedy twice. First, in the 1974 amendments to the Federal Tort Claims Act (FTCA), which provides a direct remedy against the United States for common law torts committed by federal employees, legislative history supported the notion that Congress viewed *Bivens* as a complementary remedy to the FTCA's.[124] Indeed, the Court itself recognized that these amendments

121. *See* Carlson v. Green, 446 U.S. 14 (1980).

122. *See Minneci*, 132 S. Ct. at 623–24.

123. For a detailed argument along these lines, *see* Pfander & Baltmanis, *supra* note 13, at 132–38.

124. *See* S. REP. NO. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 ("[T]his provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives

"made it crystal clear" that Congress intended for *Bivens* actions to be available as a general matter.[125]

Second, and our focus here, Congress, in 1988, textually adopted *Bivens* in the Westfall Act, another amendment to the FTCA. Under the Westfall Act, federal employees are rendered immune from state-law tort claims.[126] The Act mandates that if a state-law tort claim is brought against federal employees and they are certified to have been acting within the scope of their official duties by the Attorney General, then the United States must be substituted for the employee as the defendant.[127] The Act further states that this remedy against the United States under the FTCA constitutes the exclusive remedy for such tort plaintiffs.[128] The Westfall Act, nevertheless, explicitly embraces *Bivens* actions, stating that the exclusive remedy provision "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States."[129]

The Westfall Act significantly affects the *Bivens* jurisprudential landscape. As Pfander and Baltmanis have argued, "Congress, in enacting the Westfall Act, should be understood to have preserved judicial review of constitutional tort claims through the vehicle of the *Bivens* action."[130] Most importantly, the Westfall Act effectively prohibits the Court from eviscerating the *Bivens* remedy. Under the Westfall Act, the only avenue for the pursuit of remedies for constitutional violations at the hands of those acting under color of federal law lies with the *Bivens* action.[131] The

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the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual government officials involved)."); *Carlson*, 446 U.S. at 19–20, 19 n.5 (1980) ("[T]he congressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action . . . . In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials . . . .").

125. *See Carlson*, 446 U.S. at 19–20, 19 n.5 (summarizing the congressional comments accompanying the FTCA amendments).

126. Carlos Vazquez and Stephen Vladeck argue that the Westfall Act should not be read to preempt state *constitutional* tort claims against federal officers. *See* Vazquez & Vladeck, *supra* note 13. From this, they conclude that the availability of adequate state constitutional tort claims may in some circumstances justify refusing to recognize a *Bivens* remedy because the Constitution "is presumably indifferent to whether the required damage remedy is provided by federal or state law." *Id.* at 576. We assume for the purpose of our argument that state law claims brought directly against federal officers, whatever their source, are unavailable under the Westfall Act.

127. 28 U.S.C. § 2679(d)(1)–(2) (2006).

128. 28 U.S.C. § 2679(b)(1).

129. 28 U.S.C. § 2679(b)(2)(A).

130. Pfander & Baltmanis, *supra* note 13, at 138; *see also* Vazquez & Vladeck, *supra* note 13.

131. Pfander & Baltmanis, *supra* note 13, at 137–38.

preempting of state-law torts coupled with sovereign immunity that prohibits *Bivens* suits against the United States mandates this conclusion.[132] Placed against this backdrop, the Westfall Act cannot be read as a mere waiver of immunity for whatever manner of liability the Court deems fit to mandate under later *Bivens* jurisprudence. Rather, the Act's saving reference to *Bivens* "operates less as a modest exception to immunity than as a congressional selection of the *Bivens* action as the only method individuals were authorized to use in pressing constitutional claims."[133] Thus, prior to *Minneci*, *Bivens* jurisprudence had reached a stasis with the Westfall Act preserving its availability and the Court refusing to extend further.

2. The Westfall Act and Minneci

Given this understanding of the Westfall Act, all *Bivens* analyses should begin by asking whether any given remedy fits within the scope of the remedies that were approved by the legislature in 1988. In *Minneci*, this would have meant, prior to conducting a separate *Wilkie* analysis, determining whether the remedy sought by Mr. Pollard fit within the *Bivens* remedies that already had legislative approval. To do otherwise would be to disregard legislative action and undermine the central separation-of-powers thrust of the *Bivens* inquiry. Unfortunately, this is exactly what the Court did. Thus, in our view, the Court should have explicitly asked whether a *Bivens* claim against privately employed prison guards falls within Congress's codification of the remedy in the Westfall Act.[134] As we defend in the next section, we think that such a claim does fall within the scope of Congress's approval. We turn first, however, to a fuller defense of asking this predicate question.

Assuming that every new context in which a *Bivens* remedy is proposed triggers a new step-one and step-two *Wilkie* inquiry, the alternative-remedies analysis is inconsistent with prior jurisprudence and the Westfall Act. Let's take *Bivens* as an example. In that case, the plaintiff sought remedies for "great humiliation, embarrassment, and mental suffering" as a result of an arrest and search carried out without a warrant or probable cause.[135] If the Court's analysis in *Minneci* were

132. *Id.*

133. *Id.* at 137.

134. The Court did briefly address the Westfall Act. *See* Minneci v. Pollard, 132 S. Ct. 617, 623 (2012) (noting that the Act bars suits against federal officers for state-law torts).

135. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389–90 (1971). Although the Court also characterized additional allegations in the complaint as alleging the

correct, then a plaintiff seeking to apply *Bivens* in a case seeking damages for physical injuries arising from excessive force context might have to show that a "new" *Bivens* remedy is appropriate pursuant to *Wilkie*'s step-one and step-two analysis. But neither lower courts nor the Supreme Court has ever applied *Bivens* in such a constrained manner.[136] Similarly, the Court's decision in *Carlson* has never been thought to be limited to Eighth Amendment claims for deliberate indifference to medical needs, but instead has been applied without question to all varieties of Eighth Amendment claims.[137]

This all begs the question of how to decide when a putative *Bivens* claim is presented in a context that requires renewed application of *Wilkie* steps one and two. In other words, when is a plaintiff seeking an extension of *Bivens* such that an alternative-remedies analysis is required and when is a plaintiff seeking solely to apply a previously accepted *Bivens* cause of action such that an alternative-remedies analysis would be inappropriate? This is an important question for courts at all levels, but the Supreme Court has yet to provide a clear framework for answering this question.

In our view, the best way to approach the question is from the separation-of-powers perspective that drives the rest of the *Bivens* analysis. It asks whether the new context in which the claim arises—perhaps it is a new category of defendant, plaintiff, or a different theory of recovery—alters the prior separation of powers analysis in which a *Bivens* remedy was inferred and later codified. In other words, is there any reason

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use of "unreasonable force," *id.* at 389, the plaintiff apparently only referred to the "forcibl[e]" use of handcuffs while making the arrest, *see* Br. for Pet'r at 2, *Bivens*, 403 U.S. 388 (1971); *see also* James E. Pfander, *The Story of* Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275 (Judith Resnik & Vicki C. Jackson eds., 2009).

136. For instance, the Supreme Court and lower courts have consistently assumed without analysis that the *Bivens* remedy applies to Fourth Amendment excessive force claims. *See* Saucier v. Katz, 533 U.S. 194 (2001), *overruled on other grounds* Pearson v. Callahan, 555 U.S. 223 (2009); *see also* Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (in dicta, assuming that *Bivens* applies to excessive force claims); Soto-Torres v. Fraticelli, 654 F.3d 153 (1st Cir. 2011) (reviewing *Bivens* claim for excessive force); Thomas v. Durastini, 607 F.3d 655 (10th Cir. 2010) (same); Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (rejecting qualified immunity in *Bivens* excessive force claim); Ting v. United States, 927 F.2d 1504 (9th Cir. 1991) (same); Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987) (in dicta, treating excessive force claims as a "classic *Bivens*-style tort"); King v. United States, 576 F.2d 432, 439 (2d Cir. 1978) (in dicta assuming that a *Bivens* action would lie for excessive force).

137. *See* Farmer v. Brennan, 511 U.S. 825, 832–34 (1994) (applying *Bivens* to failure to protect claim by prisoner); Lineberry v. United States, 436 Fed. App'x. 293, 295 (5th Cir. 2010) (finding insufficient facts alleged to state *Bivens* claim for overcrowding); Jones v. Simek, 193 F.3d 485 (7th Cir. 1999) (reviewing *Bivens* Eighth Amendment excessive force claim); Munz v. Michael, 28 F.3d 795 (8th Cir. 1994) (finding summary judgment inappropriate in Eighth Amendment excessive force claim).

to think that Congress would want the Court to treat this defendant, or this plaintiff, or this theory of recovery, differently, given the existence of the already-established *Bivens* action?

It cannot be that the answer to this question will always be "yes." That would imply that every new application of an established *Bivens* action would require an alternative remedy and special factors analysis. And it would undermine the congressional decision to recognize *Bivens* actions in the Westfall Act. Nor would it make sense to rely on something like the "clearly established" law inquiry from qualified immunity—that doctrine focuses on the notice to an individual defendant,[138] and not the structural limitations on the power of the coordinate branches of the federal government.

The consequence of this focus on separation of powers is that generally the identity of the defendant—assumed to be indicative of a new context in *Minneci*—is irrelevant to whether a *Bivens* remedy is appropriate. In *Bivens*, then, the Court's focus was on the distinction between private citizens and an "agent" acting "in the name of the United States"; the right to be free of unconstitutional conduct "carried out by virtue of federal authority"; the invasion of "federally protected rights," and so on.[139] To that end, the Court relied on precedent that treated non-federal employees acting pursuant to federal authority identically to federally employed agents.[140] Thus, the Court recognized that such violations could be perpetrated by all individuals acting under color of federal law, whether directly employed by or simply acting at the behest of the federal government.

Since *Bivens*, the Court has never held that it must undergo a renewed *Bivens* inquiry every time a new category of defendant is implicated in a case. Instead, the Court has focused on whether the identity of the defendant alters the separation-of-powers considerations that inform the *Bivens* doctrine. Take the Court's decisions in *Chappell* and *Stanley*, both of which involved challenges by members of the military. In *Chappell v. Wallace*, the Court declined to provide a *Bivens*-type remedy for a service-member against his superior officers, because of the constitutional commitment to Congress to regulate military affairs.[141] *United States v.*

138. *See, e.g.*, Hope v. Pelzer, 36 U.S. 730, 739 (2002).

139. *Bivens*, 403 U.S. at 391–92.

140. *See id.* at 392–94 (citing Gambino v. United States, 275 U.S. 310 (1927) and Byars v. United States, 273 U.S. 28 (1927), cases in which state officials acted under color of federal law in violation of the Fourth Amendment).

141. 462 U.S. 296, 300–01, 304 (1983).

Stanley was distinguishable from *Chappell* because it involved defendants not within the military chain of command and, similar to *Minneci*, not even directly employed by the United States.[142] Despite the plaintiff's attempts to distinguish the cases on this ground, the Court did not rest its extension analysis on the difference between the defendants in *Chappell* and *Stanley*, but instead considered the separation-of-powers implications to be the same in both cases.[143] Indeed, the Court made clear that what mattered for the extension analysis in both cases was the "degree of disruption" of military decisionmaking that a particular rule would impose, a consideration that is rooted almost entirely in separation-of-powers doctrine—not defendant identity.[144]

The Court's decision in *FDIC v. Meyer*[145] is to the same effect. In *Meyer*, the plaintiff sought to apply *Bivens* liability to federal agencies rather than individual officers. The Court relied on the extension analysis to decline the invitation, but not because of an interpretive rule triggered by this new category of defendant *per se*. Instead, the Court noted that applying *Bivens* to federal agencies in particular would raise significant separation-of-powers concerns because of the burden it would place on the federal fisc.[146]

In sum, the *Minneci* Court, contrary to past practice, failed to ask whether finding a *Bivens* remedy for Mr. Pollard constituted an extension at all. Rather, it asserted that the existence of alternative state-law remedies illustrated that *Bivens* was inapt here. Such a change in doctrine—one eliding this predicate scope question with the alternative-remedies question—would be momentous on its own. But given that Congress codified *Bivens* in the Westfall Act, the failure to address this first-order inquiry is a blatant disregard for the intent of Congress.

B. Congressional Intent and Exacerbating Remedial Asymmetries

We turn now to answering the question that the *Minneci* Court ignored: does the finding of a *Bivens* remedy as against privately employed prison guards acting under color of federal law constitute an extension of *Bivens*? If one considers this question implicit in *Minneci* through the lens of

142. 483 U.S. 669, 674 n.2 (1987) (noting that defendants included physicians, the Board of Regents of the University of Maryland, and unknown federal agents).

143. *Id.* at 679–82.

144. *Id.* at 682–83 (choosing a test that "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters").

145. 510 U.S. 471 (1994).

146. *Id.* at 486 (citing United States v. Standard Oil, 332 U.S. 301, 311 (1947)).

separation-of-powers, as we suggest, there seems to be no compelling reason to depart from *Carlson*'s liability rule. We rest this conclusion upon two arguments. First, the Court should construe *Bivens* remedies in parallel with § 1983 remedies. And second, absent explicit congressional statements to the contrary, *Bivens* remedies as against private and public employees acting under color of federal law should be symmetrical.

1. Bivens *and Section 1983 Parallelism*

Under the Westfall Act, *Bivens*, at least as it stood in 1988, stands on near equal footing with § 1983 actions, the statutory cause of action provided to remedy constitutional violations committed under color of state law.[147] That is to say, both remedies have the full, statutory backing of Congress. As Pfander and Baltmanis aptly put it, after "Congress . . . confirmed the *Bivens* action in the Westfall Act, distinctions between the right to sue state and federal officials seem . . . untenable."[148] The Court, moreover, often treats *Bivens* and § 1983 doctrine as parallel.[149] Absent a strong showing to the contrary, then, congressional intent weighs heavily towards construing the scope of the *Bivens* remedy in parallel with § 1983. *Minneci*, however, creates a large remedial asymmetry between *Bivens* and § 1983.

Victims of unconstitutional conduct caused by persons acting under color of state law, be they privately or publicly employed, may seek a remedy via § 1983. Although § 1983 actions were initially brought against state or municipal employees acting under color of state law,[150] they also may be maintained against private contractors whose conduct can fairly be attributed to the State. Thus, in 1988—the same year that the Westfall Act was passed—the Court in *West v. Atkins* held that privately employed doctors who provide services to State prisoners may be held liable under § 1983[151] for violations of the Eighth Amendment.

147. Pfander & Baltmanis, *supra* note 13, at 139–41.

148. *Id.* at 139.

149. *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006) (holding that the elements of malicious prosecution, *Bivens* claims are the "federal analog to suits brought against state officials" under § 1983); Wilson v. Layne, 526 U.S. 603, 609 (1999) (stating that in claims under § 1983 and *Bivens* the "qualified immunity analysis is identical").

150. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) *overruled in part on other grounds*, Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658 (1978) (holding that state officials act "under color of law" for Section 1983 purposes even when those officials are acting contrary to state or municipal law).

151. 487 U.S. 42 (1988).

The logic of holding private individuals to constitutional standards of behavior when their actions are clothed with state authority is based in part on the Supreme Court's concern in *West* that the alternative would leave states free to limit constitutional scrutiny by contracting out their public responsibilities.[152] In the absence of a theory that linked private actors to the State when their conduct is fairly attributable to the State, the possibility exists that § 1983, the principal means of enforcing constitutional rights, would fade into obscurity with greater public-private partnership in the delivery of public services.[153] The Court later re-affirmed this basic premise in the context of a § 1983 suit against private prison guards,[154] and the lower courts have applied this notion to myriad other private individuals who take on state responsibilities or who otherwise act pursuant to state authority.[155]

Minneci's impact on *Bivens* likely will have the exact result on regulation of federal actors that the Court feared for § 1983 litigation in *West*. In *Minneci*, it was assumed that the individual defendants had acted under color of federal law.[156] Yet the Court rejected liability under *Bivens* for these same actors. Nor could Mr. Minneci sue the federal agency that

152. *Id.* at 56 n.14.

153. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 725 (2010) (providing examples of public-private partnerships); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 417–21 (2006) (describing trends in privatization); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003) (providing examples of privatization).

154. Richardson v. McKnight, 521 U.S. 399 (1997) (assuming § 1983 liability for the purposes of determining whether privately employed prison guards have a qualified immunity defense); *see also* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (holding that employees of private prison-management company may be sued under § 1983 because confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function); Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (holding that employees of private prison-management company were acting under color of state law for § 1983 purposes in that they were performing a "traditional state function" (internal quotation marks omitted)); Ancata v. Prison Health Servs., 769 F.2d 700, 703 (11th Cir. 1985) (holding that employees of a private medical service responsible for treating state prisoners engaged in state action subjecting it to suit under § 1983 because it performed "a function which is traditionally the exclusive prerogative of the state"); *see also* Robin Miller, Annotation, *Rights of Prisoners in Private Prisons*, 119 A.L.R. 5th 1, 28–29 (2004).

155. Chudacoff v. Univ. Med. Ctr. of S. Nevada, 649 F.3d 1143 (9th Cir. 2011) (holding that private physicians sitting on county hospital's credentialing committee were state actors); Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007) (private provider of rehabilitation services to released prisoners was state actor for First Amendment purposes); Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 639–40 (6th Cir. 2005) (private security officer at casino state actor in Fourth Amendment challenge); Payton v. Rush-Presbyterian, 184 F.3d 623, 627–30 (7th Cir. 1999) (private police officers given power to make arrests may be state actors); *cf.* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) (ban on use of race in peremptory strikes applied to private civil litigant); Marsh v. State of Alabama, 326 U.S. 501 (1946) (company town considered arm of state for First Amendment challenge).

156. Minneci v. Pollard, 132 S. Ct. 617, 627 (Ginsburg. J., dissenting).

contracted with the *Minneci* defendants.[157] In the absence of any federal employee who could be said to have been personally involved in Mr. Minneci's mistreatment, there appears to be no means of enforcing federal constitutional norms[158] against actors clothed with federal authority. Thus under *Minneci*, as the Court suggested in *West*, the federal government may choose to contract out their public obligations, thereby eliminating any *Bivens* cause of action for unconstitutional conduct by federal actors. Such a result is prohibited under § 1983 and because the Westfall Act cements a parallelism to § 1983 practice, such a result should have been avoided under *Bivens* doctrine.

2. Symmetrical Bivens *Relief in the Public-Private Context*

In a similar manner, the *Minneci* opinion improperly widens asymmetries between public and private employees who commit constitutional violations while acting under color of federal law. In *Malesko*, one reason the Court offered for not imposing *Bivens* liability upon the corporate private prison was that prisoners held in federally run prisons lacked a remedy against the Bureau of Prisons.[159] The Court offered a separation-of-powers-based defense of this view, stating that "[w]hether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide."[160] Interestingly, this symmetrical-liability principle played no part in the *Minneci* opinion. The Court simply never mentions this aspect of *Malesko*, despite relying on *Malesko* to justify the use of state law as an alternative remedy.

If the Court would have followed *Malesko*'s symmetrical-liability principle, it would have found that a *Bivens* claim lies in *Minneci*. The only factual deviation between *Minneci* and *Carlson* is the happenstance that the United States government incarcerated the *Minneci* plaintiff in a facility that is privately run pursuant to a contract with the federal government rather than a facility run directly by the federal government.

157. *Cf.* FDIC v. Meyer, 510 U.S. 471 (1994).

158. State tort law might provide damages, but it will not enforce the constitutional norm. *See* Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1109–11 (10th Cir. 2005), *rev'd evenly divided en banc*, 449 F.3d 1097 (10th Cir. 2006) (Ebel, J., dissenting in part) (arguing that state-law torts are not, under Supreme Court law, fungible with remedies designed to remedy constitutional violations). And state law does not reach all areas regulated by federal constitutional norms. *See infra* notes 173–79.

159. As we note above, there is some question whether this is a holding or dicta. *See supra* note 84 and accompanying text.

160. Corr. Servs. Corp. v. Malesko, 354 U.S. 61, 72 (2001).

As the Court held in *West*, it would be perverse to condition the ability to protect constitutional rights on the assignment of a federal prisoner to one facility or another.[161] The symmetrical-liability principle, coupled with *Carlson*, calls for *Bivens* liability in a situation like *Minneci*.

The Westfall Act's ratification of *Bivens* actions against federal employees, moreover, cannot be construed to create asymmetrical public-private liability. To the extent that congressional inaction has posed a separation-of-powers barrier to implying *Bivens* remedies in past cases, the Court had limited such a barrier to those circumstances in which the inaction "has not been inadvertent" and suggested that Congress "has provided what it considers adequate remedial mechanisms for constitutional violations," thus meriting judicial deference.[162] Given this interpretative canon, the language in the Westfall Act strongly supports the view that a *Bivens* action should be generally available to those injured by persons acting under color of federal law.[163] As such, the plaintiff's claim in *Minneci*, like *Carlson*, had a strong claim to congressional approval.

III. LIMITING *MINNECI*'S IMPACT

Because of these three concerns, it is worth taking some time to examine the potential limitations on *Minneci*'s reach. In so doing, we seek to call upon insights that are practical, doctrinal, and theoretical. We first identify some of the ways that advocates might use state and federal law to ensure, perhaps indirectly, that constitutional norms are followed. Then we turn to some doctrinal and theoretical considerations that could be brought to bear in limiting *Minneci*'s impact on the enforcement of constitutional rights. We include in these the separation-of-powers framework that we argue for here as a natural guide for application of *Bivens* doctrine.

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161. 487 U.S. at 56. The Court, however, has once found public versus private employment a matter of concern in inmate constitutional rights litigation. *See* Richardson v. McKnight, 521 U.S. 399 (1997) (assuming § 1983 liability for the purposes of determining that privately employed prison guards do not have a qualified immunity defense). Importantly, *Richardson* speaks to the availability of a defense for the guards, not the constitutional rights of the defendant inmates. That is to say, even in *Richardson* the rights of inmates are not modified by the employment status of the guards.

162. *See* Schweiker v. Chilicky, 487 U.S. 412, 423 (1988); *id*. at 425–26 (detailing history of congressional consideration of remedies for delays in receipt of government benefits); *id*. at 429 ("Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program.").

163. *See, e.g*., Pfander & Baltmanis, *supra* note 13, at 122 (noting that Congress preserved the *Bivens* action in § 2679(b)(2)(A) and arguing that "the Westfall Act supports . . . the routine availability of *Bivens* claims").

First, advocates might increasingly turn to state law, in at least two ways. For instance, a return to the converse § 1983 action proposed some time ago by Akhil Amar may now be more appealing.[164] Twenty-five years ago, Amar proposed that states provide a cause of action for violations of the federal constitution by federal officials, be it through constitutional amendment, statutory enactment, or judge-made common law.[165] As Amar has since recognized, no State has passed a converse § 1983 action, either through constitutional amendment or statutory enactment.[166] But the possibility exists that such a cause of action might exist or be created through common law.[167]

However, even were such a cause of action to exist at state law, one might wonder how it could be enforced against private contractors with the federal government. One possibility is that such laws could be applied against private individuals when they act under color of federal law, on the same theory that traditional § 1983 actions are applied against private contractors. Another possibility is that actions for negligent hiring, supervision, or retention could be used to interpose federal constitutional norms via state tort law.[168]

In each of these proposed work-arounds of *Minneci*, a cause of action would be brought against a private entity or individual. But it might also be possible, even after *Minneci*, to bring either *Bivens* claims or FTCA claims against the government employee or agency that contracts with the private individual or entity. It is well established that private corporations and employees are not covered by the FTCA, even when they are doing the work of the federal government.[169] But the federal agencies and

164. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers about Converse-1983*, 64 U. COLO. L. REV. 159 (1993) [hereinafter Amar, *Using State Law*]. John Preis has assessed this approach in a recent article, but he is skeptical of its effectiveness. *See generally* John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1709–26 (2012).

165. *See* Amar, *Using State Law*, *supra* note 164, at 161.

166. *Id*. at 160.

167. For instance, state trespass law has vindicated rights analogous to the Fourth Amendment for hundreds of years. *See id*.

168. Some courts have found that a state law claim for negligent supervision, training, hiring, or retention may be brought where the negligence caused a constitutional violation, although to our knowledge none have done so where the defendant was a private actor. *See, e.g.*, Prince George's Cnty. v. Longtin, 19 A.3d 859, 886 (Md. 2011); McDermitt v. Corr. Corp. of Am., 814 P.2d 115, 115–16 (N.M. Ct. App. 1991) (holding that state law immunity is unavailable where negligent training or supervision caused a constitutional violation); Brown v. State, 674 N.E.2d 1129, 1144 (N.Y. 1996) (recognizing cause of action for negligent training and supervision that causes constitutional violation).

169. 28 U.S.C. § 2671; B & A Marine Co. v. Am. Foreign Shipping Co., 23 F.3d 709 (2d Cir. 1994).

employees who agree to contracts that provide insufficient protections from misconduct by the contracting entity may be amenable to suit through the FTCA or *Bivens*. Under the FTCA, claimants may argue that, based on negligence in monitoring the private bodies which take on public functions, a public employee has violated state law. There is reason to think that such negligence should be actionable when it causes a constitutional violation given that state constitutional claims often incorporate federal constitutional law as the standard of care.[170] More directly, a federal employee who contracts with a private entity without taking adequate measures to ensure that the private contractor adheres to constitutional standards may also be held accountable under a *Bivens* theory if they have acted with sufficient culpability.[171]

Aside from these practical suggestions, *Minneci* also may be subject to limitations along the lines proposed in this Essay. First, recall that *Minneci* never explicitly proposed a structure for deciding the predicate question of whether a *Bivens* plaintiff seeks to "extend" existing *Bivens* doctrine or only seeks to enforce an existing *Bivens* remedy. Even after *Minneci*, then, it may be fair game to argue that a particular application of *Bivens* doctrine to private individuals is not an extension of the cause of action—using separation-of-powers analysis—and hence not subject to the *Wilkie* two-step creation analysis.

Second, even if *Minneci* signals the increased importance of state law to a *Bivens* analysis, it should not be read to prohibit all *Bivens* actions

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170. *See, e.g.*, *Ex parte* Duvall, 782 So. 2d 244, 245–48 (Ala. 2000) (holding state law torts of assault, unlawful arrest, false imprisonment, and conspiracy barred as a matter of law because the police officer met the Fourth Amendment's probable cause standard when detaining the plaintiff); Susag v. City of Lake Forest, 115 Cal. Rptr. 2d 269, 278–79 (Ct. App. 2002) (holding that the plaintiff's state law claims of battery, intentional infliction of emotional distress, and false imprisonment failed as a matter of law because the plaintiff "did not meet his burden of producing evidence showing [the defendants] used physical force against or exerted authority over him that resulted in a 'seizure' under the Fourth Amendment" (internal quotation marks omitted)); Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994) (noting that a plaintiff alleging false imprisonment must show that a defendant's actions were unlawful, which often amounts to whether a defendant acting under color of law had probable cause).

171. Indeed, courts have acknowledged the existence of such a remedy even after *Minneci*. *See, e.g.*, Doe v. Neveleff, No. 11 Civ. 907 2013 WL 489442, *8 (W.D. Tex. Feb. 8, 2013) (recognizing *Bivens* claim against federal officials who were responsible for arranging and monitoring contract with private prison corporation whose employees abused immigration detainees). The underlying theory of such actions is that a federal official who is deliberately indifferent to the risk of harm facing federal prisoners or detainees has violated the Eighth Amendment, whether the risk of harm is created by another federal employee, a prisoner or detainee, or a private contractor whose performance is monitored by the federal official. *See id.*; *see also* Farmer v. Brennan, 511 U.S. 825 (1994) (recognizing *Bivens* claim for prison officials' deliberate indifference to the risk of harm posed by other prisoners).

against private contractors with the federal government. The Supreme Court has recognized three distinct areas in which *Bivens* remedies should be enforced: Fourth Amendment violations,[172] employment discrimination,[173] and Eighth Amendment violations.[174] *Minneci* leaves undisturbed that aspect of *Bivens* which found a tension between the interests protected by state law torts and those protected by the Fourth Amendment.[175] Presumably, then, private contractors with the federal government who are sued under *Bivens* for Fourth Amendment violations would not be able to make the same claims regarding alternative state law remedies that convinced the Court in *Minneci*. In other words, Fourth Amendment violations are not the "kind of conduct that typically falls within the scope of traditional state tort law."[176] This may even be true in the private prison context, where some limited Fourth Amendment rights survive incarceration.[177]

A similar argument could be made about the unconstitutional discrimination that *Davis* found actionable against federal actors.[178] Thus, private contractors who act under color of law to discriminate in ways that would violate equal protection principles[179] may be held accountable on a *Bivens* theory. State tort law, after all, does not provide comparable protections against discriminatory conduct. And although federal law provides protections against discrimination in some contexts—employment, contractual relations—it does not encompass all kinds of discrimination that could be engaged in by others. Indeed, to the extent that the Supreme Court has come to identify the harm in equal protection cases to be the fact of classification itself and not necessarily the consequences, it may be that neither state nor federal law provides a similar remedy against private actors.[180] For instance, if a private prison engages in discrimination by, say, segregating prison housing, it is not

172. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).
173. Davis v. Passman, 442 U.S. 228 (1979).
174. Carlson v. Green, 446 U.S. 14 (1980).
175. Minneci v. Pollard, 132 S. Ct. 617, 621–22 (2012).
176. *Id*. at 623.
177. Prisoners retain privacy rights in bodily integrity, for instance. *See* Sanchez v. Pereira-Castillo, 590 F.3d 31, 42 n.5 (1st Cir. 2009) (collecting cases).
178. Davis v. Passman, 442 U.S. 228 (1979).
179. Although *Davis* was brought pursuant to the Fifth Amendment's due process clause, the equal protection principles specifically guaranteed by the Fourteenth Amendment have been held applicable to the Federal Government through the Fifth. Bolling v. Sharpe, 347 U.S. 497 (1954).
180. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007); *id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment).

obvious that any federal law would provide a cause of action to an injured plaintiff.[181]

Finally, even within the context of Eighth Amendment claims, *Minneci* leaves some room for litigants and courts to distinguish failure to provide medical care cases and failure to protect cases.[182] Although the Court acknowledged this limitation grudgingly,[183] it is an opening for future cases. And if litigants and courts focus more squarely on the separation-of-powers dimensions that have governed *Bivens* creation-and-extension analysis since its inception, then the doctrine will maintain some coherence.

One also may limit *Minneci*'s reach by focusing on the separation-of-powers analysis identified here. If we return to the three areas of constitutional jurisprudence in which *Bivens* actions have already been recognized—Fourth Amendment, Equal Protection (through the Due Process Clause), and the Eighth Amendment—it is evident that the rights that flow from each of these areas of jurisprudence have different implications for separation of powers. Although like the rest of the Bill of Rights, the Fourth, Fifth, and Eighth Amendments each act formally as a limitation on the power of the federal government, the Eighth Amendment right litigated in *Minneci* is more complex. Mr. Pollard sought relief for the failure to provide constitutionally adequate medical care, a rare affirmative obligation imposed by the Constitution as a corollary to the State's use of its power to incarcerate.[184] As the Court explained in *Estelle*, a prisoner has no choice but to rely on the prison administration for medical treatment. If the Government did not have a constitutional obligation to provide treatment, a prisoner would suffer unnecessary pain and suffering, or even death.[185] A similar logic justified the Court in finding an Eighth Amendment right to be protected from harm while in prison, imposing upon prison administrators an affirmative duty to protect prisoners because incarceration leaves prisoners without the traditional

181. By contrast, such segregation by federal officials would trigger strict scrutiny and likely would be invalidated. *See* Johnson v. California, 543 U.S. 499, 505–06 (2005) (applying strict scrutiny to California's policy of segregating prisoners by race).

182. Minneci v. Pollard, 132 S. Ct. 617, 626 (2012).

183. *Id.* at 625–26 (noting that while Pollard "does not convincingly show that there are such cases," the Court would "concede that we cannot prove a negative or be totally certain that the features of state tort law relevant here will universally prove to be, or remain, as we have described them.").

184. Estelle v. Gamble, 429 U.S. 97 (1976).

185. *Id*. at 103.

means of self-defense.[186] But affirmative obligations are rare, and the federal judiciary operates at the furthest extent of its authority when it imposes affirmative obligations.[187]

Thus, for separation-of-powers reasons, the Court's authority in an Eighth Amendment case such as *Minneci* may already be at its weakest, making the invocation of a remedy that much more difficult to justify. This may be particularly true where the need to vindicate the affirmative obligation of the Government is rendered less essential by the presence of alternative forms of action that more or less accomplish the same goal. From a separation-of-powers perspective, however, Equal Protection and Fourth Amendment principles may stand on different footing. When a court enforces these negative protections, it is acting at the height of its constitutional authority. The reason for enforcing these rights is not that the government has taken upon itself a particular obligation with respect to the claimant, but that the Constitution expresses the worry that the government cannot be trusted to behave fairly or reasonably towards the claimant. Rather than mediating between institutional penological needs and the obligations that arise from imprisonment—as in the Eighth Amendment context—the Court enforcing equal protection and Fourth Amendment principles can more comfortably claim to be directly enforcing constitutional norms. And the concern that the Executive may seek to contract away the negative limitations imposed by the Fourth and Fifth Amendments may be more pressing than in the Eighth Amendment context.

Finally, limitations on the scope of *Minneci* may also arise, ironically, from the federal common law government contractor doctrine, which in some circumstances immunizes contractors with the federal government from state law liability.[188] *Minneci*, *Malesko* and other lower court

186. Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("[H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

187. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 53 (2010) ("It is primarily for *institutional* reasons that the Supreme Court has declined to announce or enforce affirmative obligations and has focused on enforcing limits and negative rights."); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2327–30 (1990) (reviewing and criticizing judicial hesitancy to enforce affirmative obligations); *see also* Harris v. McRae, 448 U.S. 297, 318 (1980) ("To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman . . . . Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

188. For general discussions of the government contractor doctrine, *see* Kenneth G. English, Note, *Government Complicity and a Government Contractor's Liability in* Qui Tam *and Tort Cases*, 33 PUB.

decisions have failed to contemplate this issue fully.[189] The leading government contractor doctrine case is *Boyle v. United Technologies Corp.*,[190] where the Supreme Court held that federal common law preempts state-law tort actions against independent contractors who manufacture munitions for the federal government. In *Boyle*, a copilot of a Marine Sikorsky helicopter drowned following its crash into the Atlantic. His estate brought a successful state law tort claim against Sikorsky, contending that the outward-opening escape hatch was ineffective in an underwater crash and that its handle was obstructed by other equipment.[191] The Court overturned the jury verdict on the grounds that the government contractor defense, as a matter of federal common law, preempted the state law claim.[192]

The Court reasoned that state law is preempted by federal common law where there is a uniquely federal interest and there is a significant conflict between federal policy and the operation of state law.[193] The Court found these criteria met in *Boyle*, striking separation-of-powers chords familiar to a student of the Court's *Bivens* canon. Raising concerns about the federal fisc, the court noted that without government-contractor immunity "the contractor will [either] decline to manufacture the design specified by the government, or it will raise its price."[194] Next, raising unique competency concerns, the Court reasoned that the threat of state law liability would interfere with the Government's legitimate balancing of

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CONT. L.J. 649, 657–59 (2004) (critiquing government contractor doctrine as economically inefficient); Matthew G. Mazefsky, Note, Correctional Services Corporation v. Malesko*: Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639, 659–61 (2003) (discussing the government contractor doctrine as it is addressed in *Malesko*); Sean Watts, Note, Boyle v. United Technologies Corp. *and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687 (1999) (arguing for Congressional action to resolve doctrinal confusion in this area); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities From Exemplary Damages?*, 58 OHIO ST. L.J. 175 (1997) (critiquing the extension of immunities government immunities to institutions such as private prisons under the government contractor doctrine); Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991) (providing an economic analysis of the government contractor doctrine); A.L. Haizlip, *The Government Contractor Defense in Tort Liability: A Continuing Genesis*, 19 PUB. CONT. L.J. 116 (1989).

189. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 n.6 (2001) (acknowledging defense but finding nothing in record to support it); Peoples v. CCA Detentions Ctrs., 422 F.3d 1090, 1108 n.13 (10th Cir. 2005) (without specifying reasons, finding that record did not support government contractor immunity). The *Minneci* Court failed to discuss the government contractor doctrine at all.

190. 487 U.S. 500 (1988).

191. *Id*. at 503.

192. *Id*. at 512.

193. *Id*. at 507–08.

194. *Id*. at 507.

safety features against military efficacy in designing war material.[195] The Court then fashioned a three-prong test to determine when a defendant has successfully asserted a defense under the government contractor doctrine. To wit, state-law liability for design defects in military equipment is preempted by federal common law when: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[196]

The lower federal courts have since split on the scope of the federal contractor doctrine outside of the military supplier context.[197] A minority of courts refuse to apply the doctrine outside of military procurement cases.[198] A majority of courts, however, apply the government contractor doctrine in any scenario that satisfies the *Boyle* three-part test.[199] Moreover, privately run federal prisons have attempted to use the government contractor doctrine as a bar to prisoner plaintiffs' state law claims.[200]

If a court were to find that the government contractor doctrine applies to claims brought against privately run federal prisons, however, the assumption driving the holding in *Minneci*—that state law provides an alternative remedy—would no longer obtain. But if so, two potential avenues of relief would open up. First, a *Bivens* claim against the private

195. *Id*. at 511.

196. *Id*. at 512.

197. *See generally* Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing A Manufacturer's Liability for Defective Products?*, 28 SETON HALL L. REV. 430, 432–33 (1998).

198. *Id*.

199. Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985). *See also* Brown v. Nationsbank Corp., 188 F.3d 579, 588–89 (5th Cir. 1999) (extending the doctrine to protect persons from state-law liability when they in good faith assist the government in law enforcement operations); Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (applying the doctrine in "civilian relationships" where "a contractor has acted in the sovereign's stead and can prove the elements of the defense" (citation and internal quotation marks omitted)).

200. *See, e.g.*, Adorno v. Corr. Servs. Corp., 312 F. Supp. 2d 505 (S.D.N.Y. 2004). In *Adorno*, the plaintiffs brought state law claims against a privately run federal prison alleging sexual misconduct by the prison's guards. *Id.* at 508–11. The defendant argued that it was entitled to the government contractor defense because it hired, supervised and trained employees in conformity with policies that had been specifically approved by the BOP. *Id.* at 521. Although the district court rejected the application of *Boyle* to the case, it assumed that it applied outside the military supplier context. *Id*. at 520–22. Other district courts have applied nearly the same reasoning. *See* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005) (rejecting government contractor doctrine in suit by Iraqi nationals held in privately run federal prison in Iraq); Scainetti v. United States *ex rel.* Fed. Bureau of Prisons, No. 01 Civ. 9970, 2002 WL 31844920, at *1 (S.D.N.Y. Dec. 18, 2002) (unpublished); Norwood v. Esmor, Inc., No. 95 Civ. 8281, 1997 WL 65913, at *4 (S.D.N.Y. Feb. 13, 1997).

contractors may become viable—just as in *Bivens* itself, the plaintiff would otherwise be denied any remedy whatsoever.[201] Second, and perhaps more importantly, because a requirement of the federal contractor defense is that the private conduct be directed by the federal government, a *Bivens* remedy would presumably be available against the federal officials who directed the contractor to engage in the allegedly unconstitutional act. As the Tenth Circuit has made clear in other contexts, "[t]he government contractor defense . . . [only applies] when the [contractor] has conformed to reasonably precise specifications established or approved by the government."[202] The Second Circuit has suggested this same principle applies in the privately run prison cases as well. "The government contractor defense only shields a [privately run federal prison] from claims arising out of its actions where the government has exercised its discretion and judgment in approving precise specifications to which the contractor must adhere."[203] Given that the government contractor defense is essentially a claim that "[t]he Government made me do it,"[204] the successful invocation of this defense by private contractors may provide an avenue for relief out from under *Minneci*'s holding.

CONCLUSION

The *Minneci* Court's novel federalism turn to inform the *Bivens* analysis imposes a structure that bears no logical relation to the separation-of-powers question at the heart of the *Bivens* dilemma. If the Court's reasoning is extended it will rapidly extinguish whatever coherence that has been found in the doctrine. The decision lacks foundation in doctrine, thwarts congressional intent, and fails to provide a coherent structure to resolve subsequent *Bivens* inquiries. Along the way it confuses the question of whether an extension of *Bivens* is needed with the question of whether an extension is warranted, breaks with the presumption of parallel doctrine with section 1983 cases and rejects the *Malesko* Court's symmetrical public-private liability principle.

But *Minneci* need not be another in a line of cases that mark the eventual demise of *Bivens* doctrine. Its practical impact can be limited by

201. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring).

202. Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371, 372 n.2 (10th Cir. 1990).

203. Malesko v. Corr. Servs. Corp., 229 F.3d 374, 382 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001).

204. *In re* Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990) (internal quotation marks omitted).

recourse to state law. Its doctrinal foundations can be undermined by the critical appraisal that we provide here and that others are sure to contribute to. And its reasoning can be confined by the very separation-of-powers principles that we contend run throughout *Bivens* jurisprudence.