PREEMPTION OF *BIVENS* CLAIMS: HOW CLEARLY MUST CONGRESS SPEAK?

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Victims of constitutional wrongdoing by state officials have a cause of action for damages under the Civil Rights Act of 1871.[1] Victims of constitutional wrongdoing by federal officials, however, have no such legislative remedy. Their only hope for monetary redress is to convince a court to infer a remedy under the Constitution. The United States Supreme Court did precisely that over two decades ago when it held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] that an implied cause of action for damages exists for victims of Fourth Amendment violations.[3]

In the years immediately following *Bivens*, the Court extended the implied remedy to violations of other constitutional rights.[4] In so doing, the Court recognized that, absent an implied remedy, the constitutional wrong would go unredressed. In other words, "[f]or people in Bivens' shoes, it is damages or nothing."[5]

In more recent years, however, the Court has been far less willing to infer damage remedies under the Constitution.[6] It has automatically de-

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1. 42 U.S.C. § 1983 (1988).

2. 403 U.S. 388 (1971).

3. The Court had previously addressed this area in Bell v. Hood. 327 U.S. 678 (1946). The Court held that a court should not dismiss for lack of jurisdiction an action for damages for alleged Fourth and Fifth Amendment violations. Courts have historically recognized that jurisdiction for cases "arising under" the Constitution includes the authority to award *equitable* relief to remedy constitutional violations. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Carlson v. Green, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established.").

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

5 *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

6. The Court's refusal to infer damages actions under the Constitution has been analogized to the recent hands-off attitude the Court has taken in refusing to infer causes of action under federal statutes. *See* Thompson v. Thompson, 484 U.S. 174 (1988); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); GERALD GUNTHER, CONSTITUTIONAL LAW 1623 n.3 (12th ed. 1991).

nied the implied constitutional remedy whenever a congressional remedy applies—even if the legislative remedy does not fully compensate the plaintiff. The Court has adopted this position without attempting to analyze whether Congress actually intended to preclude a *Bivens* remedy. For this reason, this Article refers to this post-*Bivens* doctrine as "automatic preemption."

The thesis of this Article is that "automatic preemption" is inconsistent with both (1) other lines of cases in which the Court ordinarily has declined to find a congressional intent to diminish protection of individual rights and liberties; and (2) the federal-state preemption doctrine that determines whether Congress has intended to displace state common law remedies.

Part I of this Article demonstrates that the Court's approach to congressional remedial schemes has changed significantly since *Bivens*. The early cases emphasized compensating victims of constitutional violations and adopted a presumption in favor of implied remedies, whereas the later cases stressed deference to Congress and adopted a presumption against implied remedies. Part II of the Article investigates whether this change in approach is warranted by the principle that, when filling gaps in federal legislation (i.e., creating federal common law), the Court should exercise caution because it is acting in an area primarily entrusted to Congress. The Article concludes that even assuming *Bivens* remedies are a creature of federal common law, the Court's role in fashioning *Bivens* remedies cannot be analogized to the mere gap-filling role that the Court typically plays in federal common law areas that do not involve constitutional rights.

In Part III, the Article contrasts the Court's approach in the *Bivens* line of cases to its approach in the federal-state preemption area, where the Court is faced with a similar problem of determining whether one remedial scheme (that of a state) may coexist with another remedial scheme (that of Congress). Drawing on those cases, the Article concludes that the Court should replace the "automatic preemption" rule with a "clear statement" test that would allow the Court to balance the competing considerations at issue in *Bivens* cases.[7] On one hand, the adoption of a "clear statement" rule would insure that courts display as

7. Much has been written about *Bivens* and its progeny, but no commentator has analyzed the application of the federal-state preemption model to this issue. Two authors have suggested, but only briefly, the application of the clear statement rule to the *Bivens* context. *See* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND.

much sensitivity toward remedies for constitutional violations as they do toward remedies for state-created statutory or common law rights. On the other hand, by deferring to Congress when it clearly indicates an intent to foreclose an implied damage remedy, courts would respect Congress' role in defining federal remedies.

In striking this balance, the "clear statement" rule would avoid the Court's recent near-abdication of judicial responsibility for protecting constitutional rights when Congress has legislated in the area at issue.[8] Instead, it would require courts to perform a close analysis of Congress' intent before assuming that legislation preempts a *Bivens* remedy. Additionally, the rule would avoid resting the *Bivens* decision on the separation-of-powers question whether the remedy afforded by Congress is "adequate." Several commentators who advocate this approach contend that the Court should infer a *Bivens* remedy whenever, in its judgment, the congressional remedy does not fully redress the constitutional violation.[9] That approach would require the Court to conclude that it—and not Congress—is the branch with primary authority to define remedies for constitutional violations. The "clear statement" rule avoids such an assumption of judicial power by considering the "adequacy" of the congressional remedy as not dispositive of the *Bivens* inquiry, but rather, as just one indicator of Congress' intent.

I. THE COURT'S SHIFT IN EMPHASIS FROM REMEDYING INDIVIDUAL RIGHTS TO DEFERRING TO CONGRESS

The automatic preemption standard emerged in the years after *Bivens* without any doctrinal roots in the Court's earlier holdings. In the early cases, the Court inferred constitutional damages remedies even when congressional legislation also addressed the issue. Later, however, the Court refused to infer constitutional damages remedies whenever a congressional remedial scheme existed. To demonstrate the shift—with its resulting lessened protection of individual rights—this section briefly traces the line of cases in the series.

L.J. 263, 289 (1989); Note, Bivens *Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1261 (1988).

8. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988); Bush v. Lucas, 462 U.S. 367 (1983).

9. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548-49 (1972); Gene R. Nichol, Bivens, Chilicky *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121, 1143 (1989); Joan Steinman, *Backing Off* Bivens *and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 279-82 (1984); Note, *supra* note 7, at 1259.

A. The Early Cases

1. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics

In *Bivens*, the Supreme Court held that injuries caused by a federal violation of the Fourth Amendment were compensable in money damages.[10] It found that if the plaintiff could demonstrate an injury to his constitutional rights, he was entitled to redress through a "remedial mechanism normally available in the federal courts."[11] Noting that damages historically had been awarded to redress an invasion of individual liberties, the court relied on both the principle that courts could use any available remedy when federally protected rights were violated, and that a federal statute provided a general right to bring suit.[12]

In *Bivens*, the Court was not faced with a legislative remedial scheme for illegal searches. The Court suggested that if Congress had enacted such a scheme, it might have affected the Court's decision whether to infer a damages remedy, but only if that scheme reflected an explicit congressional intent to preclude other remedies: "[W]e have here no explicit congressional declaration that persons [so] injured . . . may not recover money damages from the agents, but must instead be remitted to another remedy equally effective in the view of Congress."[13] The Court also noted that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."[14]

In a concurring opinion, Justice Harlan agreed that a judicially inferred damage remedy was appropriate to vindicate Bivens' injuries. He went beyond the majority's criteria regarding the exercise of a court's power, however, observing that the range of policy considerations that a court may consider was as broad as those that a legislature may contem-

10. In *Bivens*, the plaintiff sued federal agents for damages ensuing from an unlawful search and seizure. The plaintiff claimed that he had been "manacled . . . in front of his wife and children" while federal agents "threatened to arrest the entire family." 403 U.S. at 389.

11. *Id.* at 397. The vote was six to three, with Chief Justice Burger and Justices Black and Blackmun dissenting.

12. *Id.* at 392, 395-96. In that case, the federal statute was 28 U.S.C. § 1331 (1970), which provided for jurisdiction in the federal courts for cases arising under "the Constitution, laws, or treaties of the United States" in which the amount in controversy exceeded $10,000. *Id.* at 398 (Harlan, J., concurring).

13. *Bivens*, 403 U.S. at 397. A literal reading of this exception could suggest that alternative remedies may exist unless Congress specifically denies them *and* provides an equally effective remedy. *See* Steinman, *supra* note 9, at 279-84.

14. *Bivens*, 403 U.S. at 396. The Court suggested that such special factors may be present when questions of federal fiscal policy are involved. *Id.*

plate when it fashioned a statutory remedy. Justice Harlan suggested that courts were "capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation" for a violation of Fourth Amendment rights.[15] Justice Harlan also stressed that the courts had a special responsibility to infer a remedy because "[f]or people in Bivens' shoes, it is damages or nothing."[16]

In dissent, three Justices argued that creating a damage remedy for federal violations of constitutional rights was *exclusively* a legislative task.[17] Justice Black asserted that the judicially inferred remedy was "an exercise of power that the Constitution does not give us."[18] Additionally, the three dissenters argued that the Court did not have the power to allow an award of damages without congressional authorization, such as that provided for violations of constitutional rights by state officials in section 1983 of Title 42.[19]

2. Davis v. Passman

In the next major case, *Davis v. Passman*,[20] the Court held that a plaintiff can sue for monetary damages directly under the Fifth Amendment when federal officials violate a constitutional right.[21] In *Davis*, Congressman Otto Passman's Deputy Administrative Assistant Shirley Davis

15. 403 U.S. at 409 (Harlan, J., concurring).

16. *Id.* at 410. Countering the argument that implying a damages remedy would strain an already overtaxed judiciary, Justice Harlan argued that mere "budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Id.* at 411.

17. Chief Justice Burger argued that the Court was incompetent as an institution to create such remedies. *Id.* at 412 (Burger, C.J., dissenting). Instead, he suggested that a broad administrative remedial scheme was needed, and that the legislative branch should devise such a scheme. *Id.* at 422-24. He also viewed *Bivens* as a part of a larger problem concerning the validity of the exclusionary rule. *Id.*

18. *Id.* at 428 (Black, J., dissenting). He viewed fashioning of a remedy as a decision that required balancing the effects on judicial resources against other competing considerations, a task he believed belonged to the Congress and state legislatures. *Id.* at 429.

19. *Id.* at 427-28. By creating a remedy for constitutional violations committed by state and local officials (i.e., § 1983), Congress demonstrated that it knew how to create a remedy if it so intended. Justice Black asserted that this created a "strong inference . . . that Congress does not desire to permit such suits against federal officials." *Id.* at 429. Therefore, according to the dissenters, because Congress already had created a judicial remedy against some public officials, the courts could go no further.

20. 442 U.S. 228 (1979).

21. *Id.* The Court split five to four, with Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissenting.

brought suit alleging gender discrimination in violation of the Fifth Amendment after the Congressman fired her.[22] Justice Brennan observed that the plaintiff had a cause of action if she was "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[23] Finding a presumption that justiciable constitutional rights were to be enforced through the courts, Justice Brennan wrote that

> the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.[24]

According to the Court, this principle did not offend separation-of-powers principles because Congress had not *explicitly* declared that individuals injured by unconstitutional federal employment discrimination " 'may not recover money damages from' those responsible for the injury."[25] The Court downplayed the significance of the 1972 amendments to Title VII of the Civil Rights Act, in which Congress enacted provisions to protect federal employees from gender discrimination, but had explicitly refused to extend those provisions to congressional staff.[26]

3. Carlson v. Green

In *Carlson v. Green*,[27] the Court upheld a damages action alleging that

22. *Id.* at 230-31.

23. *Id.* at 239 n.18. He emphasized, however, that deciding whether a plaintiff had an implied cause of action under a statute was "fundamentally different" from deciding whether a plaintiff had an implied cause of action under the Constitution. According to Justice Brennan, only the former was a question of interpreting statutory intent. *Id.* at 241.

24. *Id.* at 242.

25. *Id.* at 246-47 (quoting *Bivens*, 403 U.S. at 397). The Court also held that, although a suit against a congressman for unconstitutional actions taken in the course of official conduct raises special factors counselling hesitation, these concerns "are coextensive with the protections afforded by the Speech or Debate Clause." *Id.* at 246.

26. In dissent, Justice Powell argued that Title VII was the exclusive remedy for claims of employment discrimination by federal employees and therefore, the exemption from Title VII should bar all judicial relief for congressional employees. *Id.* at 254 (citing Brown v. GSA, 425 U.S. 820 (1976)). He believed that Congress intentionally excluded itself from coverage by Title VII because members of Congress need to have absolute confidence in their staff. *Id.*

The dissenters described the majority decision as an affront to the principles of separation of powers and comity. *Id.* at 252 (Powell, J., dissenting). Justice Powell also criticized the majority for failing to exercise "principled discretion," arguing that even if the Court was empowered to hear this type of case, it had no obligation to do so absent congressional authorization. *Id.*

27. 446 U.S. 14 (1980).

federal prison officials through their deliberate indifference to a prisoner's medical needs, had violated the prisoner's constitutional rights under the Eighth Amendment.[28] Holding *Bivens* applicable to this case, the Court rejected the argument that Congress had preempted an implied damage remedy through the 1974 amendments to the Federal Tort Claims Act ("FTCA"), which created a cause of action against the United States for intentional torts committed by federal law enforcement officers.[29] The Court reasoned that such legislation could defeat a *Bivens* remedy only if Congress had provided "an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[30] The Court held that the 1974 amendments were not such an "alternative remedy," but were merely a complementary remedial system not intended to displace *Bivens* remedies.[31] Supporting its conclusion, the Court relied on the legislative history of the FTCA,[32] Congress' practice of explicitly stating when it intended to make the FTCA remedy exclusive,[33] and four factors demonstrating that a *Bivens* remedy was more effective than the FTCA remedy.[34]

According to the majority, these four factors indicated that Congress did not intend to preempt a *Bivens* cause of action when it enacted the 1974 amendments. First, the Court found that a *Bivens* remedy was a more effective deterrent against unconstitutional behavior since it was recoverable against individuals. Second, the Court concluded that puni-

28. *Id.* at 16. The vote was seven to two, with Chief Justice Burger and Justice Rehnquist dissenting.

29. *Id.* at 19. The Court also held that no special factors counselled hesitation because the defendants, in contrast to the Congressman in Davis v. Passman, did not hold special status under the Constitution. *Id. See supra* note 25.

30. *Carlson*, 446 U.S. at 18-19.

31. *Id.* at 19; *see* 28 U.S.C. § 2680(h) (1988).

32. To support its conclusion that the FTCA and *Bivens* remedies were complementary, the Court quoted congressional comments accompanying the 1974 amendments:

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic], in that it waives 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 20.

33. The Court provided several examples: "38 U.S.C. § 4116(a), 42 U.S.C. § 233(a), 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain government health personnel); § 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine)." *Carlson*, 446 U.S. at 20.

34. *Carlson*, 446 U.S. at 20-23.

tive damages, which were available as part of a *Bivens* remedy but not under the FTCA, likewise would encourage individual federal officials to engage in constitutional behavior.[35] Third, the Court found that the right to a jury trial, which attached to a *Bivens* claim but not to a claim made under the FTCA, was significant.[36] Finally, it noted that *Bivens* claims would be applied with national uniformity, whereas FTCA claims were controlled by the law of the state in which the act or omission occurred, and that national uniformity would encourage greater protection of constitutional rights.[37]

In a lengthy dissent, Justice Rehnquist added what eventually became an important theme in his argument against the creation of *Bivens* remedies.[38] He argued that because Congress had amended the FTCA to allow plaintiffs such as the one in *Carlson* to obtain some relief from the government, the Court should not go beyond that scheme:[39] "[W]hen Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them."[40] Thus, Justice Rehnquist apparently believed that it is appropriate to assume that Congress considered all possible remedies available to the litigant and rejected them, rather than to require Congress to state explicitly that it intended an exclusive and preclusive remedy.[41]

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35. *Id.* at 21-22.

36. *Id.* at 22-23.

37. *Id.* at 23.

38. Justice Rehnquist reiterated his objection to *Bivens* relief as a form of impermissible judicial lawmaking, calling *Bivens* a "wrong turn." *Id.* at 32 (Rehnquist, J., dissenting). He stated flatly that *Bivens* should be overruled because the creation of such remedies belonged in the legislature as a matter of separation of powers. *Id.* at 32 n.1, 38.

39. *Id.* at 51.

40. *Id.* at 53.

41. Justice Rehnquist was not persuaded that the legislative comments accompanying the 1974 amendments were conclusive. Instead, he suggested that they reflected Congress' misunderstanding that *Bivens* was a constitutionally required decision and that Congress merely was attempting to avoid what it perceived as a constitutional issue. *Id.* at 33 n.2.

Justice Powell's concurring opinion in *Carlson* also questioned the majority's statement of the principles governing *Bivens* actions. He believed that the Court had gone too far in permitting *Bivens* claims any time Congress had not "clothed [alternative remedies] in the prescribed linguistic garb," stating that Congress had enacted an adequate and exclusive remedy. *Id.* at 27 (Powell, J., concurring). While the majority denied that it was requiring Congress to use "magic words" before it would preclude a *Bivens* claim, both Justice Powell and the dissenting Justices were alarmed by what they viewed as a drastic curtailment of the courts' discretion to refuse to infer a cause of action under the Constitution. *Id.* at 27-28 (Powell, J., concurring), 30-31 (Burger, C.J., dissenting), 52-53 (Rehnquist, J., dissenting). Justice Powell stated: "One is left to wonder whether judicial discretion

At this point in the *Bivens* line of cases, the presence of a congressional remedial scheme did not preclude judicial creation of an implied damages remedy. *Davis* did not even address the possible preemptive effect of a congressional remedy. And *Carlson* inferred a damages remedy even in the face of the FTCA's elaborate remedial scheme.

Since *Carlson*, the Court has embraced a far different approach to *Bivens* claims. Not only have the more recent cases consistently rejected *Bivens* actions,[42] but they have been based on an almost reflexive reaction to the presence of any congressional remedy.

B. From Dissent to Majority

1. Bush v. Lucas

In *Bush v. Lucas*,[43] a federal civil service employee sought a *Bivens* remedy, claiming that a federal official had demoted him in retaliation for exercising his right of free speech. The Court reaffirmed the power of the judiciary to award damages for violations of constitutional rights,[44] but unanimously decided not to allow a *Bivens* remedy. The Court held that congressional expertise in federal personnel matters demanded deference from the courts, especially considering that the remedial scheme provided by Congress was "comprehensive" and afforded "meaningful remedies for employees who may have been unfairly disciplined for making critical comments."[45]

In so holding, the Court admitted that "Congress has not . . . expressly den[ied Bush] the judicial remedy he seeks."[46] Moreover, the Court rec-

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in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court." *Id.* at 27 (Powell, J., concurring). Justice Powell also suggested that the Court did not provide sufficient guidance on the "special factors." *Id.* at 28.

42. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988); United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983).

43. 462 U.S. 367 (1983).

44. *Id.* at 378.

45. *Id.* at 386. Under the civil service rules which covered Bush (now embodied in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)), nonprobationary employees received various procedural protections from adverse personnel actions such as demotion or dismissal. These included written notice of the proposed action, a statement of reasons for the action, the right to respond to the charges with a statement and affidavits, and the right to a nonevidentiary hearing. The employee was also entitled to an administrative appeal, with a trial-type hearing and a written decision of the final agency action, which was judicially reviewable in federal court. *See id.* at 386-88 & nn.30-35.

46. *Id.* at 378.

ognized that the congressional remedies, which provided for retroactive seniority and back pay, were not as effective as an individual damages remedy[47] and would not necessarily put the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place."[48] Nevertheless, the Court reasoned that the congressional remedial scheme represented the culmination of Congress' lengthy effort to deal with First Amendment rights of federal employees,[49] and that Congress was in a better position to decide whether the public interest would be better served by creating a *Bivens* remedy.[50]

The Court in *Bush* appeared to redefine the focus of the issue in *Bivens* cases.[51] Before *Bush*, the Court defined the problem as whether to provide a remedy for constitutional violations—an issue well within the judiciary's role.[52] In contrast, *Bush* viewed the problem as whether to prescribe a remedy for a particular federal program—an issue more appropriately within the domain of Congress.[53] Thus, according to Justice Stevens, the whistleblowing issue in *Bush* "may appropriately be charac-

47. *Id.* at 372-73. Bush had argued that, in contrast to a damage remedy against the individual officer, the civil service remedies did not grant punitive damages or a jury trial and did not adequately deter federal officials from engaging in unconstitutional behavior. *Id.* at 372 n.8.

48. *Id.* at 388 (quoting S. REP. No. 1062, 89th Cong., 2d Sess. 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2097). Bush claimed that he suffered "uncompensated emotional and dignitary harms." *Id.* at 372 n.9.

49. *Id.* at 381-88. The Court noted that Congress had given "repeated consideration [to] the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal workforce." *Id.* at 385.

50. *Id.* at 390. The Court viewed this as a "special factor counselling hesitation." *Id.* at 380, 390 (Marshall, J., concurring). *See supra* notes 25, 29.

Some commentators have suggested that the result of this approach is a merger of the two exceptions. Brown, *supra* note 7, at 277; Steinman, *supra* note 9, at 290-91; Note, *supra* note 7, at 1255. Under the original first *Bivens* exception, the Court appears to require Congress to state expressly that the judiciary is displaced. But reading this directive into a congressional remedial scheme merges the second exception into the first. In other words, it suggests that "special factors" are present because Congress has created an alternative remedial scheme—eviscerating the first exception. The Court appears to suggest this in both *Bush* and *Chilicky*. However, the Court reiterated the two-part test for exceptions to inferring a *Bivens* remedy in its most recent case in the *Bivens* line. *See* McCarthy v. Madigan, 112 S. Ct. 1081, 1090 (1992) (not requiring prisoner who sought only money damages to exhaust administrative remedies provided by Bureau of Prison's grievance procedure).

51. *See* Brown, *supra* note 7, at 276-77.

52. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."). *Bivens*, *Davis*, and *Carlson* demonstrate this approach. They suggest that constitutional wrongs are presumptively redressed through the judiciary, using any remedy traditionally available in the federal courts. *See, e.g.*, Davis v. Passman, 442 U.S. at 245-48; *Bivens*, 403 U.S. at 397.

53. The decision whether to hold government officials responsible for harm resulting from vio-

terized as one of 'federal personnel policy.' "[54] Justice Stevens characterized the issue as a legislative matter, requiring policy choices concerning the allocation of limited resources. Therefore, the Court was able to justify its deference to the congressional remedial scheme, even though no explicit congressional declaration of an intent to substitute its remedy for a *Bivens* remedy existed. In *Bush*, the presence of the congressional scheme was itself enough to preclude a *Bivens* remedy.[55]

2. Schweiker v. Chilicky

The Court's most recent holding on the availability of a *Bivens* remedy[56] also represents its most radical departure from the original analysis in *Bivens*. In *Schweiker v. Chilicky*,[57] the Court held that a *Bivens* right of action did not exist to recover damages for due process violations that resulted from wrongful termination of social security disability benefits.[58] Significantly, the Court's decision was made in the face of congressional *inaction*, and without any serious effort to explore Congress' intent. Essentially, the *Chilicky* Court concluded that even when Congress failed to address the issue of remedies for specific individuals, courts are precluded from inferring a constitutional damages remedy if the legislation provided any remedial mechanisms.

In *Chilicky*, the plaintiffs received disability benefits under Title II of

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lations of federal programs has traditionally been assumed to lie within the legislative domain. *See* Carlson v. Green, 446 U.S. at 35 (Rehnquist, J., dissenting); Nichol, *supra* note 9, at 1122.

54. *Bush*, 462 U.S. at 380-81.

55. This trend continued in Chappell v. Wallace, 462 U.S. 296 (1983), in which the issue was whether enlisted military personnel could sue to recover damages for constitutional violations by superior officers. The Court unanimously decided not to allow a *Bivens* remedy, relying on two special factors that "counselled hesitation."

First, the Court focused on the unique disciplinary structure of the military, an area in which Congress had special expertise. Second, the Court relied on the Constitution's grant to Congress of plenary and exclusive power over the military, including power over military discipline. Because Congress had established a comprehensive internal system of justice for the military, a system that provided a remedy for the plaintiffs' kind of complaint, the Court found that it would be "plainly inconsistent with Congress' authority in this field" for civilian courts to recognize a *Bivens* cause of action. *Id.* at 304. The Court relied on similar reasoning to explain its decision in United States v. Stanley, 483 U.S. 669 (1987) (holding that a former serviceman could not assert a constitutional claim against military officials for involuntary LSD testing).

56. The Court's most recent *Bivens* decision did not involve a congressional remedial scheme. In McCarthy v. Madigan, 112 S. Ct. 1081 (1992), the issue was whether a prisoner had to exhaust administrative remedies before filing an action for damages in federal court.

57. 487 U.S. 412 (1988).

58. *Id.* at 420. The vote was six to three, with Justices Brennan, Marshall and Blackmun dissenting.

the Social Security Act until 1981 and 1982, when their benefits were terminated pursuant to the "continued disability review" ("CDR") program, which the Department of Health and Human Services ("HHS") initiated in 1981.[59] Although HHS ultimately restored the plaintiffs to their original disability status and granted them retroactive benefits, the plaintiffs alleged that they had suffered emotional distress and loss of necessities because of the "delays of many months in receiving disability benefits to which they were entitled."[60] They sued the officials with policymaking authority in the administration of CDR, alleging a violation of their rights under the Due Process Clause of the Fifth Amendment. They argued that by using impermissible quotas, the government had intentionally deprived them of fair treatment in allocating benefits.[61]

The *Chilicky* plaintiffs' experience was part of a widespread problem in the Social Security Administration. The Administration itself estimated that 200,000 people had their benefits terminated wrongfully during the first three years of CDR.[62] In response, Congress passed temporary emergency legislation in 1983.[63] In 1984, Congress enacted permanent legislation ("1984 Reform Act"),[64] which provided for the continuation of benefits, pending review by an administrative law judge, after a state agency determined that a recipient was no longer disabled. The 1984 Reform Act also shifted the burden of proof at the disability review hearing to the government.[65] The legislation, however, did not apply to persons, like the plaintiffs, whose benefits had been terminated before

59. *See id.* at 415-16. The CDR program required review of most disability determinations at least once every three years. *See id.* at 415. At the time of the *Chilicky* plaintiffs' termination, benefits were cut off immediately after a negative review and were not reinstated until after a successful appeal. *Id.*

60. *Id.* at 417-19.

61. *Id.* at 418-19. Plaintiffs alleged that the officials had

> improperly accelerated the starting date of the CDR program; illegally refused to acquiesce in decisions of the United States Court of Appeals for the Ninth Circuit; failed to apply uniform written standards in implementing the CDR program; failed to give effect to dispositive evidence in particular cases; and used an impermissible quota system under which state agencies were required to terminate predetermined numbers of recipients.

Id. at 418-19.

62. *Id.* at 416.

63. Act of January 12, 1983, Pub. L. No. 97-455, § 2, 96 Stat. 2497, 2498-99 (amendment to the Social Security Act) (codified as amended at 42 U.S.C. § 423(f)-(g) (1988)).

64. *See* Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, §§ 2, 7, 98 Stat. 1794, 1794-96, 1803-04 (codified as amended at 42 U.S.C. § 423(f)-(g) (1988)); *Chilicky*, 487 U.S. at 415-16.

65. *See* 42 U.S.C. § 423(f) (1988).

1983.[66]

The Supreme Court held that the 1983 and 1984 Reform Acts comprised the exclusive remedies for constitutional violations caused by the CDR. The Court found that "special factors counselling hesitation" included

> an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.[67]

The majority found that the design of the 1984 Reform Act suggested that Congress had provided adequate remedial mechanisms for CDR violations and, therefore, concluded that the Court should not infer a *Bivens* remedy.[68] The Court reasoned that in shifting the burden of proof and providing for the continuation of benefits pending appeal,[69] Congress had "specifically addressed the problem that had provoked the [1983] emergency legislation" and had "chose[n] specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations under CDR."[70] Because Congress had not authorized relief for persons in the plaintiffs' position whose benefits were terminated before 1983, the Court concluded that the 1984 reform demonstrated a "congressional unwillingness to provide consequential damages for unconstitutional deprivations of a statutory right."[71]

The Court did not consider the equally plausible explanations that either Congress did not enact a consequential damages remedy because it failed to address the issue, or because it expected that the courts would infer one.[72] Indeed, the Court did not examine at all whether Congress

66. *See Chilicky*, 487 U.S. at 417. Moreover, the administrative remedies for recipients of Title II of the Social Security Act did not allow constitutional challenges to agency action. *Id.* at 424-25; *see* 42 U.S.C. § 421 (1988); 20 C.F.R. §§ 404.900-.999d (1992). Although a plaintiff could raise constitutional challenges during judicial review of agency action, recipients like Chilicky, whose benefits had been fully restored, had no standing to appeal to the courts. Therefore, they were effectively denied judicial review of their constitutional claims. *See* 487 U.S. at 424-25.

67. 487 U.S. at 423.

68. *See id.* at 424-29.

69. *See supra* note 65 and accompanying text.

70. 487 U.S. at 426.

71. *Id.* Since plaintiffs' benefits were terminated before the 1983 legislation, they did not receive benefits pending appeal. *See id.* at 415. The Social Security Act contained no provision for monetary damages against officials whose unconstitutional conduct led to the wrongful denial of benefits. *Id.* at 424.

72. *See* Note, *Federal Jurisdiction and Procedure: Constitutional Rights of Action*, 102 HARV.

had intended to preclude a *Bivens* remedy.[73] Instead, the Court based its holding on the premise that "Congress is in a better position to decide whether or not the public interest would be served by creating [a new substantive legal liability]"[74]—a notion that, arguably, could preclude a *Bivens* remedy in virtually every case.[75]

The approach adopted in *Chilicky* is in marked contrast to prior cases. The earlier cases noted that Congress must provide an explicit indication

L. REV. 279, 285 & n.62 (1988). The same author observed that the legislative record of the 1984 Reform Act suggested that members of Congress were aware that retroactive benefits may not fully compensate those people who were wrongfully denied their benefits, but that Congress' immediate concern was to prevent further wrongful terminations. *Id.* at 286 & n.64 (citing 130 CONG. REC. 6600 (1984) (statement of Rep. Dyson)); 130 CONG. REC. 6596 (1984) (statement of Rep. Glickman)). Indeed, as the author emphasized, it is peculiar that the Court construed the unanimous votes in both the House and the Senate to stop wrongful terminations through legislation as a congressional intent to preclude any judicial remedies for those wrongfully denied benefits. *Id.* at 286; *see also* Spagnola v. Mathis, 809 F.2d 16, 26-27 (D.C. Cir. 1986), *vacated in part*, 809 F.2d 1 (D.C. Cir. 1986), *aff'd en banc*, 859 F.2d 223 (1988), *rev'd in part by* Hubbard v. EPA, 949 F.2d 453 (1992); Kotarski v. Cooper, 799 F.2d 1342, 1347-48, 1349 (9th Cir. 1986), *vacated*, 487 U.S. 1212 (1988); *cf.* Carlson v. Green, 446 U.S. at 19-21 (suggesting that when Congress creates a remedial scheme that parallels a constitutional cause of action, courts will presume that Congress intended to maintain the *Bivens* claim as well).

73. The Court simply concluded, over a vigorous dissent, that Congress was unwilling to augment the congressional remedies provided to address constitutional claims such as Chilicky's. 487 U.S. at 431-32 (Brennan, J., dissenting). Justice Brennan argued that although in appropriate circumstances the Court should defer to Congress' decision to substitute alternative relief for a judicially created remedy, *Chilicky* did not represent such a situation. He stressed that the Court should not interpret unexplained congressional inaction as a congressional intention to foreclose additional remedies. *Id.* at 440. Justice Brennan noted that the majority cited only one remark of a single congressman to support its assertion that Congress intended the statutory remedy to be the sole, exclusive one. In addition, he noted that this congressman was actually protesting the 1984 Reform Act's failure to mandate the reexamination of the eligibility of those whose benefits had been terminated under the new standard of proof, not its omission of reference to constitutional violations committed during the termination process. *Id.* at 439-40.

74. *Chilicky*, 487 U.S. at 426-27 (quoting *Bush*, 462 U.S. at 390).

75. On this basis, the Court in *Chilicky* found that the plaintiffs' claims were indistinguishable from those brought by the plaintiff in *Bush*. The Court found that in both *Bush* and *Chilicky*, Congress had provided meaningful remedies and safeguards, but not "complete relief." *Chilicky*, 487 U.S. at 425.

In dissent, Justice Brennan distinguished *Bush* on the adequacy of the congressional remedy. He stressed that the administrative scheme in *Bush* allowed employees to raise constitutional challenges in their appeals. However, in *Chilicky*, the recipients were unable to challenge the agency's actions on constitutional grounds. *Id.* at 437 (Brennan, J., dissenting). Moreover, he argued that *Bush* should control only when "Congress is far more capable of addressing the special problems that arise in those relations than are courts." *Id.* at 442. Thus, he found that *Bush* did not govern because "social welfare is hardly an area in which the courts are largely incompetent to act." *Id.* at 443. Justice Brennan further argued that in enacting the remedial scheme at issue in *Bush*, Congress clearly considered the need to protect individual employees' constitutional rights and to provide meaningful remedies, unlike the situation in *Chilicky*. *See id.* at 437-38.

that it intended to displace a *Bivens* remedy. Even in *Bush*, the Court did not simply note that a federal program involving congressional expertise was involved. Instead, it examined the purpose and the context of the legislation to determine whether Congress had chosen to preclude a *Bivens* remedy. For example, the *Bush* Court emphasized that Congress had struggled with the First Amendment rights of civil servants for almost 100 years.[76] The Court found that Congress had given "repeated consideration [to] the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal work force."[77] Furthermore, the Court noted that Congress had provided "an elaborate remedial system"[78] for civil servants injured by wrongful personnel actions, and expressly indicated that it understood that these remedies "would put the employee 'in the same position he would have been in had the unjustified or erroneous personnel action not taken place.' "[79]

Had the Court applied this type of analysis in *Chilicky*, it would have found a very different level of congressional consideration. Nothing in the legislative record or in the legislation itself showed that Congress had considered the possibility or need for providing a consequential damages remedy for persons whose benefits were terminated before 1983.[80]

II. THE CONSTITUTIONAL MOORINGS OF THE *BIVENS* REMEDY

To evaluate the Court's change in emphasis from compensating individuals for constitutional violations by federal officials to stressing deference to Congress, the theoretical moorings of the *Bivens* remedy must first be addressed. The propriety of the Court's more recent automatic preemption test depends largely on how the source of the *Bivens* remedy is viewed. In *Bivens*, the Supreme Court never explained the source of the right to infer a damage remedy to compensate for the violation of an individual's Fourth Amendment rights.[81] As a result, debate has

76. *Bush*, 462 U.S. at 380-89.

77. *Id.* at 385.

78. *Id.* at 388.

79. *Id.* (quoting S. REP. No. 1062, 89th Cong., 2d Sess. 1 (1966), *reprinted in* 1966 U.S.C C.A.N. 2097).

80 *See* 42 U.S.C. § 423(f)-(g) (1988); 130 CONG. REC. 25,975-26,000, 26,127-46 (1984); 130 CONG. REC. 13,206-47 (1984); 130 CONG. REC. 6346-49, 6576-613 (1984); Note, *supra* note 72, at 285 n.62 (citing legislative history).

81. In *Bivens*, the Supreme Court noted that it was allowing redress "through a particular remedial mechanism normally available in the federal courts." 403 U.S. at 397; *see supra* note 11

emerged on whether the *Bivens* remedy is constitutionally required or whether it is simply federal common law.

If the *Bivens* remedy is constitutionally required, then the Court's current approach is clearly wrong: the Court has refused to infer a *Bivens* remedy when congressional remedies are inadequate.[82] If, however, the *Bivens* remedy is merely a way to fill in the gaps in a federal remedial scheme, then the Court's total deference to Congress is valid. After all, Congress should control its own remedies.

An intermediate position also exists. This Article takes the source of the *Bivens* remedy to be the Court's power to issue federal common law, but suggests that selecting a remedy goes beyond the mere gap filling that is typical of federal common law. The rights at issue are constitutional, not statutory or common law rights. When constitutional rights are involved, courts should take, and historically have taken, far greater care to ensure that Congress intended to preempt judicial remedies.

The source of the *Bivens* remedy has been the subject of a substantial amount of commentary. This section will only briefly summarize the different views. Commentators have focused less attention on the role courts should play if one assumes (as do a majority of commentators and the current Supreme Court) that the remedy is not constitutionally required.[83]

A. Viewing Constitutional Damage Remedies As Constitutionally Required

Some commentators read the holding in *Bivens* as constitutionally mandated because it gives a plaintiff what the Constitution demands.[84]

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and accompanying text. But the Court has never definitively stated whether the Constitution requires a damage remedy, or an alternative effective remedy, to protect an individual's constitutional rights. Indeed, in *Bush*, the Court explicitly left the question open. 462 U.S. at 378 n.14. The recent denials of *Bivens* remedies do not appear to contest the judiciary's authority to fashion constitutional damages remedies, however. As Justice Stevens wrote in *Bush*, "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation." *Id.* at 378. Thus, it appears that the Court accepts that it has concurrent power with Congress to establish remedies for constitutional violations by federal officials.

82. *See Bush*, 462 U.S. at 372-73.

83. This issue is discussed in section III.

84. *See, e.g.*, Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978). *See also* Nichol, *supra* note 9, at 1121 (arguing that *Bivens* remedies form an indispensable component of constitutional oversight).

In *Bivens*, the Court held that it could infer this type of remedy whether or not the Constitution required the remedy. 403 U.S. at 397. *But cf.* McCarthy v. Madigan, 112 S. Ct. 1081, 1092 (1992)

For instance, Professor Dellinger describes *Bivens* as "resting upon a premise that constitutional rights have a self-executing force that not only permits but requires the courts to recognize remedies appropriate for their vindication."[85] Other commentators who view *Bivens* as constitutionally required argue that individuals need to be able to vindicate their constitutional rights effectively.[86]

To state that a *Bivens* remedy is derived directly from the Constitution does not mean that Congress has no legitimate role in remedying constitutional violations.[87] Congress would have the authority, under this view, to provide a remedial scheme as an alternative to the *Bivens* remedy, as long as it afforded "comparable vindication" of the constitutional provision involved.[88] In that instance, it would be incumbent upon the courts to ensure that the alternative congressional remedy was constitutionally adequate.[89] But, if the Court found that a particular remedy was "indispensable"—that is, no other remedial scheme could prevent the constitutional provision from becoming a "mere form of words"—then, under Professor Dellinger's view, Congress would be powerless to replace or revise that remedy.[90]

The current Supreme Court appears to reject a pure constitutional

(Rehnquist, C.J., concurring) (contending that because the Bureau of Prison's administrative remedy furnished an ineffective remedy for prisoner's *Bivens* claim, the Court should not impose an exhaustion requirement).

85. Dellinger, *supra* note 9, at 1557.

86. Schrock & Welsh, *supra* note 84, at 1135-38.

87. The contrary view is difficult to pursue since the *Bivens* decisions have acknowledged a significant role for congressional oversight. In recognizing a *Bivens* action under the Fifth Amendment in Davis v. Passman, the Court stressed that there was "no *explicit* congressional declaration . . . [that the plaintiff] may not recover." 442 U.S. at 246-47 (quoting *Bivens*, 403 U.S. at 397). In Bush v Lucas, the Court found that "[w]hen Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised." 462 U.S. at 378.

88 Dellinger, *supra* note 9, at 1547-49.

89. *Id.*; Steinman, *supra* note 9, at 281-85; *see* Nichol, *supra* note 9, at 1143-45. *See supra* note 9 and accompanying text.

90. Dellinger, *supra* note 9, at 1547-49. The problem with Professor Dellinger's interpretation of *Bivens* is that it suggests that the Constitution requires a remedy for every right that it guarantees. *See, e.g.*, Davis v. Passman, 442 U.S. at 241-42, 248; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968); Note, *supra* note 72. Immunity protection and jurisdictional barriers make that premise difficult to defend. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 954-55 (1988); Nichol, *supra* note 9, at 1142. The Supreme Court has explicitly left the question open. *See Bush*, 462 U.S. at 378 n.14; *cf.* Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that Director of CIA's decision to discharge an employee

reading of *Bivens*. Indeed, no other interpretation could explain the Court's failure to review the adequacy of congressional remedies and its focus on the mere presence of congressional remedies as foreclosing judicial action.

The lower courts have clearly received the Court's signal. Before *Chilicky*, appellate courts frequently held that the availability of *Bivens* remedies turned on the adequacy of the congressional remedial scheme. When the scheme was found to provide adequate remedies, damages were denied.[91] But when the scheme was found to lack adequate remedies, courts would infer a damages remedy.[92]

Now the lower courts generally interpret *Chilicky* as a directive not to analyze the adequacy of statutory remedies. Indeed, lower courts now view the meaningfulness of plaintiffs' remedies as irrelevant to the issue of whether a *Bivens* remedy is available to redress violations of constitutional rights.[93] As one lower court has stated, "the clear purpose of

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under the National Security Act is not judicially reviewable, although a constitutional claim challenging the validity of the decision is judicially reviewable).

91. *See, e.g.*, Pinar v. Dole, 747 F.2d 899, 910 (4th Cir. 1984) (explaining that judicially created remedies are not available to employee when Congress has provided adequate legislative remedies), *cert. denied*, 471 U.S. 1016 (1985); Carroll v. United States, 721 F.2d 155, 156 (5th Cir. 1983) (on rehearing) (precluding nonstatutory damage remedies when administrative remedies were available and adequate), *cert. denied*, 467 U.S. 1241 (1984); Watson v. United States Dep't of Hous. and Urban Dev., 576 F. Supp. 580, 586 (N.D. Ill. 1983) (addressing adequacy of administrative remedies available to transferred federal employees).

92. *See, e.g.*, McIntosh v. Weinberger, 810 F.2d 1411, 1434-36 (8th Cir. 1987) (employee subjected to minor personnel action could sue supervisor for damages), *vacated sub nom.* Turner v. McIntosh, 487 U.S. 1212 (1988); Kotarski v. Cooper, 799 F.2d 1342, 1348-49 (9th Cir. 1986) (probationary employee could sue supervisor for damages), *vacated*, 487 U.S. 1212 (1988).

93. *See, e.g.*, Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) (*Bivens* remedy for civilian naval employee who claimed that his termination violated the First Amendment and the right to privacy precluded by remedies provided by the Civil Service Reform Act ("CSRA")); Lombardi v. SBA, 889 F.2d 959, 961-62 (10th Cir. 1989) (Small Business Administration intern's *Bivens* claim regarding his termination precluded by the CSRA); Feit v. Ward, 886 F.2d 848, 854 (7th Cir. 1989) (*Bivens* remedy for seasonal forestry technician who claimed that his termination violated the First Amendment precluded by the CSRA); Volk v. Hobson, 866 F.2d 1398, 1402-03 (Fed. Cir.) (*Bivens* remedy for discharged Bureau of Indian Affairs educator precluded by statutory scheme), *cert. denied*, 490 U.S. 1092 (1989); McIntosh v. Turner, 861 F.2d 524, 526 (8th Cir. 1988) (*Bivens* remedy for federal employee claiming Fifth Amendment due process violation for promotion discrimination precluded by the CSRA); Spagnola v. Mathis, 859 F.2d 223, 226-28 (D.C. Cir. 1988) (*Bivens* remedy for federal employee claiming First Amendment violation precluded by the CSRA), *rev'd in part by* Hubbard v. EPA, 949 F.2d 453 (1991).

Some courts deny *Bivens* remedies, but continue to examine the adequacy of the remedial scheme. *See, e.g.*, Pereira v. United States Postal Serv., 964 F.2d 873, 875 (9th Cir. 1992) (denying *Bivens* remedy for damages sought from supervisors in their individual capacity where "Congress has established a comprehensive remedial scheme for the claims of Postal employees"); Ramirez v. Cheney,

Chilicky and the related cases is to virtually prohibit intrusion by the courts into the statutory scheme established by Congress."[94]

B. Viewing Constitutional Damage Remedies As Federal Common Law

Most commentators contend that the Constitution does not require the *Bivens* remedy, but rather that it is a creature of federal common law.[95]

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961 F.2d 216 (9th Cir. 1992) (precluding *Bivens* remedy where CSRA of 1978 contained comprehensive remedial provisions); Jones v. Tennessee Valley Auth., 948 F.2d 258 (6th Cir. 1991) (dismissing *Bivens* claims because Congress had provided adequate administrative remedies under the CSRA and Energy Reorganization Act); Berry v. Hollander, 925 F.2d 311, 315 (9th Cir. 1991) (Veterans Administration ("VA") pathologist who claimed violations of his First and Fifth Amendment rights against the VA has adequate remedies under statutory scheme); Hilst v. Bowen, 874 F.2d 725, 727-28 (10th Cir. 1989) (physician suspended from the Medicare reimbursement program had adequate administrative remedy); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1248 (10th Cir. 1989) (association alleging that penalty assessments violated both the Fifth Amendment's due process clause and the Internal Revenue Code ("IRC") has adequate recourse under the IRC).

A few courts since *Chilicky* have held that a *Bivens* remedy is available even when a remedial scheme exists. Krueger v. Lyng, 927 F.2d 1050, 1056 (8th Cir. 1991) (employee of the county office of the U.S. Agricultural Stabilization and Conservation Service was not a federal employee with benefit of CSRA remedies; Congress' failure to provide constitutional tort remedy for First Amendment violations was inadvertent); Dunbar Corp. v. Lindsey, 905 F.2d 754, 760-63 (4th Cir. 1990) (comprehensive remedial system did not exist to address plaintiff's claim of due process violation of his possessory interest in land, except possibly FTCA; following *Carlson*, plaintiffs may pursue *Bivens* remedy); Ysasi v. Rivkind, 856 F.2d 1520, 1526-28 (Fed. Cir. 1988) (remanding case where plaintiff sought *Bivens* remedy after Immigration and Naturalization Service ("INS") seized plaintiff's truck to determine whether INS agent improperly foreclosed plaintiff's remedies to retrieve truck); Rauccio v. Frank, 750 F. Supp. 566, 571 (D. Conn. 1990) (*Bivens* remedy potentially available to a demoted and then terminated Postal Service worker who claimed that defendants prevented him from pursuing remedies under the CSRA); Garcia v. Williams, 704 F. Supp. 984, 990-91 (N.D. Cal. 1988) (*Bivens* remedy potentially available to federal district judge's former secretary who alleged that her termination involved sexual harassment, but her allegation was insufficient to state a claim; Congress did not carefully examine judiciary personnel relations); Willson v. Cagle, 711 F. Supp. 1521, 1525 (N.D. Cal. 1988) (*Bivens* remedy potentially available to demonstrators who were injured when military train struck them; defendant's decisions regarding train is not subject to administrative or judicial review), *aff'd*, 900 F.2d 263 (9th Cir. 1990); *compare* National Commodity & Barter Ass'n v. Gibbs, 886 F.2d at 1248, in which the court held that although the plaintiff may not seek a *Bivens* remedy to redress Fifth Amendment due process claim regarding penalty assessments under the Internal Revenue Code, the plaintiff may seek a *Bivens* remedy to redress First and Fourth Amendment claims. "[W]hile the comprehensive scheme of the Internal Revenue Code should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the [F]irst and [F]ourth [A]mendments, may be superior to the need to protect the integrity of the internal revenue system." *Id.*

94. Lombardi v. SBA, 889 F.2d at 961-62.

95. *See, e.g.*, Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172-73 (1986); Henry P. Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975); *see also* Martha A. Field, *Sources of Law:*

Although *Erie Railroad Co. v. Tompkins* purported to put to rest the notion of general federal common law,[96] the contemporary view is that special circumstances exist in which federal common law is appropriate.[97] As the Supreme Court explained, federal common law has been created in areas "concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases."[98] Under the modern view, these special areas are considered linked by a uniquely federal interest[99] and the need for federal law to protect that interest.[100] Federal courts need to supply the law when Congress has not done so, even though Congress clearly has the power to do so.[101] The source of federal common law often is contained in a federal statute that addresses a federal issue, but does so incompletely. Courts in these circumstances create federal common law to fill in the legislative gaps.[102]

The Scope of Federal Common Law, 99 HARV. L. REV. 881, 888-90 (1986) (describing expansive approach to federal common law, including practice of not differentiating between federal common law and constitutional common law); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 48-49 (1985) (discussing statement that federal courts may decide implied remedies "in the manner of 'a common law tribunal' " (quoting *Bush*, 462 U.S. at 378)). *But see* Nichol, *supra* note 9, at 1121, 1123 (*Bivens* remedy is an indispensable component of constitutional oversight; federal tribunals do not exercise a general power to create common law).

96. 304 U.S. 64 (1938) (declaring that there is no federal general common law).

97. *See* Field, *supra* note 95, at 885 (rejecting the general view of enclaves, favoring instead a generalized approach to federal common law).

98. Texas Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981) (footnotes omitted), *quoted in* Boyle v. United Technologies Corp., 487 U.S. 500, 518 (1987) (Brennan, J., dissenting).

99. Courts frequently develop federal common law in areas where the direct interests of the United States are implicated. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 80-81 (2d ed. 1990). The leading case in this area is Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), where the Court created federal common law to resolve a dispute over a stolen federal check between the United States and a bank. *Id.* at 366-67. *Clearfield Trust* has been read for the proposition that federal courts may fashion common law incident to federal programs. *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 593-94 (1973).

100. *See* Boyle v. United Technologies Corp., 487 U.S. at 518. *See generally* REDISH, *supra* note 99, at 80, 84-85.

101. Field, *supra* note 95, at 886.

102. *See, e.g.*, DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158-61 (1982) (statute of limitations for employee's suit for breach of collective bargaining agreement); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (statute of limitations for action brought under Outer Continental Shelf Lands Act); Clearfield Trust Co. v. United States, 318 U.S. at 367 ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."); Henry J. Friendly, *The Gap in Lawmaking - Judges Who Can't and Legislatures Who Won't*, 63 COLUM. L. REV. 787 (1963); Merrill, *supra* note 95, at 33. The Court, however, has established federal common law without basing it on a federal enactment. *See, e.g.*, Banco Nacional

If the *Bivens* doctrine is an instance of this "gap filling," then the recent *Bivens* cases correctly refuse to infer a damage remedy when Congress has enacted a remedial scheme that is intended to fill in the gaps.[103] The Constitution allocates primary responsibility to Congress, not the courts, to create and shape the contours of federal law. Accordingly, courts should exercise great caution in creating or retaining a federal common law remedy in an area in which Congress has legislated.

An example of this caution appears in *City of Milwaukee v. Illinois*,[104] in which the Court faced the question of what to do when Congress had addressed a question previously governed by federal common law. Specifically, the issue was whether the Federal Water Pollution Control Act Amendments of 1972[105] displaced the federal common law action for nuisance caused by interstate water pollution that the Court previously had recognized.[106] In resolving the question, the Court distinguished the test for determining whether federal law preempted state law. The latter test requires evidence of a clear and manifest purpose that reflects "due regard for the . . . principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy."[107] The Court found that the same concerns were not involved in the federal common law situation. Instead, the question whether federal statutory law displaced federal common law simply involved an examination of the scope of the legislation to determine whether the scheme established by Congress addressed the problem formerly governed by federal common law.[108]

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de Cuba v. Sabbatino, 376 U.S. 398, 423-27 (1964) (scope of act of state doctrine must be determined according to federal law).

103. *See Chilicky*, 487 U.S. at 423 (deferring to Congress in light of indications that "congressional inaction has not been inadvertent" and that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations"); *Bush*, 462 U.S. at 386 (refusing to allow a *Bivens* remedy since a "comprehensive" remedial scheme already existed).

104. 451 U.S. 304 (1981).

105. Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. § 1311-1328 (1988))

106. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

107. City of Milwaukee v. Illinois, 451 U.S. at 316 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

108. *Id.* at 315 n.8. As the Court stated:

> Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding pre-emption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. Simply because [the Court] used the term "pre-emption," usually employed in determining if federal law displaces state law, is no reason to assume the analysis used to decide the usual federal-state questions is appropriate here.

In contrast to the federal common law at issue in *City of Milwaukee*, the source of the *Bivens* remedy lies in the Constitution, not a statute. Therefore, Professor Monaghan views the *Bivens* doctrine as an example of constitutional common law.[109] Under his view, the Court does not only issue constitutional law or federal common law,[110] but also creates a "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."[111] Professor Monaghan regards constitutional common law as a variation of federal common law, with Congress acting as a subsequent reviser rather than an initial lawmaker.[112] For him, the Constitution is as much a source of judicial lawmaking as statutes.[113] Accordingly, under the Bill of Rights, the Court has created "a sizable body of constitutionally inspired implementing rules whose only sources are constitutional provisions framed as limitations on government."[114]

Id. at 317 n.9. The dissent acknowledged that preemption of state law did not present the same concerns as preemption of federal common law. *Id.* at 333 n.2 (Blackmun, J., dissenting). Justice Blackmun suggested, however, that although Congress had addressed a question previously governed by federal common law, the federal statutory law should not "automatically displace" the federal common law. *Id.* at 333-34 & n.2. In federal-state preemption cases, the approach is often "all or nothing," because states could frustrate national purposes. *Id.* at 333 n.2. But where federal interests alone are at issue, the federal courts' participation may be necessary and even *desirable* to effectuate fully congressional policies. *Id.* As the dissent stated, "[t]he whole concept of interstitial federal lawmaking suggests a cooperative interaction between courts and Congress that is less attainable where federal-state questions are involved." *Id.*

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), seemed to follow Justice Blackmun's City of Milwaukee v. Illinois dissent. In *County of Oneida*, the Oneida Indian Nation alleged that its ancestors had conveyed tribal land to New York State under a 1795 agreement that violated the Nonintercourse Act of 1793 and therefore the transaction was void. *See* Nonintercourse Act of 1793, ch. 19, § 8, 1 Stat. 330 (current version at 25 U.S.C. § 177 (1988)). The Act provided that no person or entity could purchase Indian land without the federal government's approval. The Court found that the Oneida Indian Nation's federal common law right to sue to enforce their aboriginal land rights was not preempted by the Nonintercourse Act. 470 U.S. at 240. The Court found it significant that the Act had not established a comprehensive remedial plan for dealing with violations of Indian property rights. *Id.* at 237.

109. Monaghan, *supra* note 95, at 23-24. Similarly, despite his view that a *Bivens* remedy is not constitutionally required, Justice Rehnquist nonetheless regards the *Bivens* doctrine as "constitutional common law." Carlson v. Green, 446 U.S. at 53 (Rehnquist, J., dissenting).

110. Monaghan, *supra* note 95, at 2-3.

111. *Id.*

112. *Id.* at 10-11.

113. *Id.* at 13.

114. *Id.* at 19. Professor Monaghan cites the protection that the Court established in Miranda v. Arizona, 384 U.S. 436 (1966), as an example of constitutional common law. *Miranda* requires police officers to give a warning that lists certain constitutional rights to criminal suspects at the time of arrest. *Id.* *See* Monaghan, *supra* note 95, at 20-26.

Assuming that the *Bivens* line falls within this higher category of federal common law, the critical issue becomes whether the Court should be less willing to find a *Bivens* remedy preempted when Congress has legislated in the field. The Court has long exercised a role in protecting constitutional rights and civil liberties.[115] In light of that role, the Court traditionally has eschewed construing legislation in a manner that would leave constitutional rights inadequately protected.

In a classic example, *Kent v. Dulles*,[116] the Supreme Court considered whether, under the federal immigration statutes,[117] the Secretary of State could deny passports to two citizens who refused to disclose whether they had ever been Communists.[118] The Court refused to construe the legislation as delegating this power to the Secretary of State. Because the passport denial would have curtailed a constitutionally protected activity—the right to travel freely—the Court interpreted the legislation narrowly.[119] In so holding, the Court announced a test that has become known as the clear statement rule:

> [W]e deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress [by federal legislation] had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.[120]

The Court uses the clear statement rule as a model to ensure that an individual's constitutional rights are not deprived of adequate protection except by deliberate congressional design. As Justice Scalia recently stated, the rule is designed to guarantee that "extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied."[121] For example, the Court has utilized the clear statement rule to ensure that constitutional rights granted the states under the Eleventh Amendment have not

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115. *See infra* notes 127-29 and accompanying text.

116. 357 U.S. 116 (1958).

117. Act of July 3, 1926, ch. 772, § 1, 44 Stat. 887 (amended 1978), 22 U.S.C. § 211a (1952), and Immigration and Nationality Act of 1952, (originally enacted as Act of June 27, 1952 ch. 477, 66 Stat. 163). *See* 8 U.S.C. § 1101-1185 (Supp. II 1990).

118. 357 U.S. at 118-20.

119. *Id.* at 129.

120. *Id.* at 130.

121. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2633 (1992) (Scalia, J., concurring in part, dissenting in part).

been abrogated inadvertently. Congress may override the immunity granted the states from suits for damages in federal court, provided that its intent is "unmistakably clear."[122]

The Court has also applied the clear statement rule to determine whether congressional legislation precludes judicial review of agency actions. The Court begins with a presumption that Congress intended judicial review of agency actions.[123] To overcome this presumption, the Court requires "clear and convincing" evidence of congressional intent to preclude judicial review.[124] In requiring such a showing, the Court preserves its role as protector of individual rights against arbitrary and capricious agency action.[125]

Courts also invoke the clear statement rule to avoid a constitutional

122. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (clear statement required before Congress can abrogate state sovereign immunity under § 5 of the Fourteenth Amendment); *see* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-8 (1989) (clear statement required before States can be held liable for monetary damages under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") when Congress acts pursuant to the Commerce Clause); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (clear statement required to compel states to entertain damage suits against themselves in state court); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (clear statement needed for waiver of Eleventh Amendment sovereign immunity); *cf.* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981) (*Pennhurst I*) (clear statement required before Congress can compel states to comply with Handicap Assistance Act pursuant to § 5 of the Fourteenth Amendment).

123. *See, e.g.*, Traynor v. Turnage, 485 U.S. 535, 542 (1988) (allowing judicial review of a VA regulation that classified alcoholism); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) (permitting judicial review of regulations that set the level of Medicare reimbursement); Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984) (recognizing the presumption favoring judicial review of administrative action; presumption overcome where individual consumers challenged the Secretary of Agriculture's orders setting the price of reconstituted milk); Abbott Lab. v. Gardner, 387 U.S. 136, 140-42 (1967) (permitting judicial review of the Food and Drug Administration's regulations on prescription drug labelling).

124. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) (requiring heightened showing of clear congressional intent to preclude judicial review of constitutional claims arising out of CIA employment termination decisions); Traynor v. Turnage, 485 U.S. at 542; Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 671; Block v. Community Nutrition Inst., 467 U.S. at 350-52; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (permitting judicial review of the Secretary of Transportation's authorization of the use of federal funds in the absence of " 'clear and convincing . . . legislative intent' to restrict access to judicial review"); Abbott Lab. v. Gardner, 387 U.S. at 141; Rusk v. Cort, 369 U.S. 376, 379-80 (1962) (holding that a person outside the United States who has been denied citizenship is entitled to judicial review of the Secretary of State's actions when no "clear and convincing evidence" exists that Congress intended to make the "broadly remedial provisions of the Administrative Procedure Act" unavailable).

125. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670-71; Abbott Lab. v. Gardner, 387 U.S. at 141; S. REP. NO. 754, 79th Cong., 1st Sess. 26 (1945) (expressing concern that withdrawal of judicial review would function as a "blank check[] drawn to the credit of some administrative officer or board"); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*,

confrontation in the federal-state preemption area. As the Article discusses in the next section, application of the clear statement test in the federal-state preemption area provides a useful model for resolving issues in the *Bivens* area.

III. PREEMPTION ANALYSIS IN THE FEDERAL-STATE AREA

A. Introduction

The issue whether courts may imply a damages remedy when a congressional remedial scheme already exists is similar to the task that courts face in the federal-state preemption area, especially in cases in which courts decide whether federal legislation precludes state common law remedies. Both areas involve the allocation of governmental authority: when the legitimate exercise of power to declare remedies by one governmental body (the federal court in one instance, a state court in the other) must give way to the exercise of power by another governmental body, Congress. Moreover, in reconciling the competing remedies, the critical issue in both areas is the same: did Congress intend that its legislation would occupy the entire field of remedies within that area? It appears, therefore, that the courts should approach the preemption issues in both areas consistently in the absence of a persuasive reason for inconsistent treatment.

This does not suggest, however, that preemption by congressional legislation of state law remedies encompasses the same concerns as preemption of *Bivens* remedies. State-federal preemption raises federalism issues, whereas preemption of *Bivens* remedies involves separation-of-power issues. Under the constitutional scheme of federalism, states retain all governmental power except where the Constitution explicitly provides otherwise.[126] This framework of a federal government with limited, enumerated powers supports a judicial approach that places the burden on Congress to state clearly when it wishes to preempt or displace state authority. On the other hand, Congress is the presumptive policymaker in our tripartite federal system, with the Court's principal job being that of interpreter—not creator—of federal law. Due to the judiciary's limited role, it is at least arguable that the Court should be reluctant

74 MINN. L. REV. 689, 731, 742 (1990); *see also* Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1988).

126 U.S. CONST. amend. X.

to infer a damage remedy, particularly when Congress has legislated in the area.

But judicial reticence is not the norm in the constitutional rights area. The Court historically has played an active role in protecting individual rights, and is especially watchful of majoritarian action of the legislature.[127] In exercising that role, the Court has quite willingly designed remedies to redress constitutional wrongdoing.[128] Noted commentators have suggested that the Supreme Court has even developed a presumption that when constitutional rights are violated, the federal courts should fashion whatever remedy is needed to rectify the damage.[129] In *Bivens*, the Court adhered to this presumption, noting that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[130] To comport with this history, the Court should engage in at least as demanding an inquiry when it determines whether Congress intended to preempt the judiciary from implying a *Bivens* remedy as it does when it evaluates Congress' intent to preempt the states from creating a common-law right.

B. The Clear Statement Test

The critical question in the preemption analysis is whether Congress

127. United States v. Eichman, 496 U.S. 310, 318 (1990) (holding federal statute prohibiting flag burning unconstitutional; "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment"); *Bivens*, 403 U.S. at 407 (Harlan, J., concurring) (judiciary has special responsibility to protect individuals' constitutional interests against the popular sentiment as expressed through legislature); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting that a more thorough judicial inquiry may be appropriate to protect minorities' political rights); Monaghan, *supra* note 95, at 18-19. *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

128. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (upholding the use of busing to dismantle a segregated school system); Miranda v. Arizona, 384 U.S. 436, 466 (1966) (requiring exclusion of evidence obtained in violation of the Fifth and Six Amendments); Mapp v. Ohio, 367 U.S. 643 (1961) (requiring the exclusion of evidence obtained in violation of the Fourth Amendment); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ([Our government] "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *cf.* Ward v. Board of Comm'rs, 253 U.S. 17, 24 (1920) (compelling state courts to provide constitutional remedy even when state law conferred no such authority). *See generally* Nichol, *supra* note 9, at 1138-40.

129. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485-86 (1987); Fallon, *supra* note 90, at 955; Hill, *supra* note 90; Katz, *supra* note 90.

130. *Bivens*, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

intended to supersede state law.[131] To answer that question, the Court assumes that Congress does not intend to encroach unnecessarily on state sovereignty,[132] especially in matters within the traditional state police powers and matters of only "peripheral" concern to federal law.[133] Therefore, a presumption exists that Congress does not intend to preempt state law, notwithstanding its power to do so under the Supremacy Clause.[134] Legislative evidence illustrating that "that was the clear and manifest purpose of Congress" is necessary to overcome the presumption.[135]

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131. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986); Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1983) ("In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue.").

132. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

133. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959)). As Justice Frankfurter explained in *Garmon*:

> [D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

134. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The doctrine of preemption is derived from this mandate. As first stated by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824):

> The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Id. at 210-11. *See also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) (preemption doctrine is rooted in the Supremacy Clause of the Constitution).

135. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("This assumption provides assurance that 'the federal-state balance,' will not be disturbed unintentionally by Congress or unnecessarily by the courts." (quoting United States v. Bass, 404 U.S. 336, 349 (1971))); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (2d ed. 1988).

The States' significant influence in the federal political process strengthens the protection that the clear statement test gives to federalism. States' influence in the federal political process ensures that Congress will not unduly burden state sovereignty or preempt state legislation until it considers state interests. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In *Garcia*, the

The clear statement rule has figured most prominently in cases in which the Court has attempted to determine whether Congress intended to occupy an entire field, to the exclusion of the states.[136] This question is quite similar to that faced in recent *Bivens* cases, where the Court attempted to determine whether Congress intended to occupy a field of

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Court held that Congress could enforce minimum wage and overtime provisions of the Fair Labor Standards Act against a city transit system pursuant to the Commerce Clause. *See id.* at 554-55. The Court stated that state sovereignty is "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552; *see* TRIBE, *supra* at 480. Professor Tribe argued that the presumption against preemption (through requiring clear congressional intent) conforms with the spirit of *Garcia*. *Id.* "The Court [in *Garcia*] evidently envisions that the constitutional procedure for lawmaking will result in a sound balance between state sovereignty and national interests." *Id.*

Prior to *Garcia*, the Court envisioned a more active role for the courts in interpreting the Tenth Amendment as a limit on congressional power to interfere with state legislation. National League of Cities v. Usery, 426 U.S. 833, 842 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1989). The majority in *Garcia* believed that federalism was adequately protected through the political branches, through representation of the states in the Senate and through the states' role in electing the President. 469 U.S. at 551 & n.11 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)). The dissent agreed that Congress served an important role in preserving federalism, but argued that judicial review was increasingly important because the Senate had become less responsive to states' interests. The Senate was less responsive because of the rise of national interest groups and the adoption of the Seventeenth Amendment, providing for election of senators directly by the constituents instead of by state legislatures. *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting).

136. Preemption also occurs where Congress expressly preempts state legislation and where state legislation conflicts with federal legislation. Recent preemption cases usually describe the categories of preemption as follows:

> It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. . . . Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted); *see, e.g.*, Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 712-13 (1985) (reciting typical preemption formulations).

The "express" and the "actual conflict" bases for preemption are not analogous, however, to the problem faced in the recent *Bivens* cases. In these cases, the congressional remedial schemes neither expressly preclude the judicial creation of damage remedies, nor directly conflict with a judicially-created *Bivens* remedy.

remedies to the exclusion of judicially created causes of action for damages.

In determining whether Congress has manifested a clear intent "to occupy a field," courts examine two principal factors. First, courts analyze the pervasiveness of the federal regulatory scheme. Second, courts consider the strength of the federal interest in the area.

1. Federal Occupation of the Field

Under the first factor, the less pervasive the federal scheme, the less likely a court will find preemption—because to do so would create a regulatory gap.[137] For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[138] the Court examined whether the 1954 Atomic Energy Act preempted California's authority to condition the construction of a nuclear facility on the state's finding that adequate disposal was available for nuclear waste. Although the Court found that the federal government had occupied the field of nuclear safety, it upheld the state statute. It concluded that the purpose of the California statute was to promote economic efficiency, not nuclear safety.[139] Therefore, the Court held that the state statute was not preempted because "[i]t is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make . . . judgments" about such economic matters as need, reliability, and the consequences of shutdowns due to waste disposal problems.[140] Thus, because Congress did not intend to regulate the economic aspects of nuclear power nationally, the states were not precluded from regulating the economic concerns

137. *See* TRIBE, *supra* note 135, § 6-27, at 497.

138. 461 U.S. 190 (1983).

139. *Id.* at 207.

140. *Id.* at 207-08. The Supreme Court also unanimously rejected the preemption claim that California's moratorium on construction of new nuclear plants directly conflicted with the Act's purpose of developing the commercial use of nuclear power. *Id.* at 220. The Court found that Congress did not intend to promote nuclear power "at all costs" and concluded that "Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id.* at 222-23. Thus, the Court gave no preemptive effect to a generalized, abstract congressional goal—promoting nuclear power—where Congress failed to state explicitly an intent to prohibit states from slowing down the use of nuclear power. *Cf.* Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 721 (1985) (in spite of the "federal goal of maintaining an adequate supply of plasma," federal safety regulations governing blood donations were "merely . . . minimum safety standards," and did not preempt stricter local ordinances).

locally.[141]

2. *Strength of Federal Interest*

The second factor courts have examined to determine a congressional intent to preempt is the nature of the subject matter of the regulatory scheme. This approach characterizes subject areas as either inherently national or inherently local. Absent clear congressional intent, the Court presumes that areas that the states traditionally have regulated are not preempted.[142] This overriding presumption is most notable with respect to state common law,[143] which is often the result of generations of judicial development,[144] and which concerns areas "traditionally regarded as properly within the scope of state superintendence."[145]

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141. TRIBE, *supra* note 135, § 6-27, at 498. On the other hand, federal regulation may be so pervasive that it supports the conclusion that Congress intended to occupy the field. *Id.*; *see, e.g.*, Amalgamated Assoc. of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 296 (1971) (wrongful discharge actions precluded by pervasiveness of federal regulation in labor relations area). A similar analysis is used when determining whether a cause of action exists against state officials to vindicate statutory rights under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). The Supreme Court indicated it would apply a "comprehensiveness test," precluding the § 1983 cause of action from remedying the violation of a statute already containing comprehensive remedial provisions. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (suggesting that a § 1983 cause of action may be precluded because of the remedial scheme within the Developmentally Disabled Assistance and Bill of Rights Act of 1975); *cf.* City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (federal common law action for nuisance precluded by the 1972 amendments to the Federal Water Pollution Control Act).

142. Hillsborough County v. Automated Medical Labs., 471 U.S. at 715 (deferring to state regulation of health and safety); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1977).

143. Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (overriding the presumption that "Congress did not intend to displace state law").

144. *See, e.g.*, Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1296 (8th Cir. 1980).

145. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 144 (1963); *see Pacific Gas & Elec. Co.*, 461 U.S. at 206. "Congress legislated here in a field which the States have traditionally occupied . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. at 230); City of Milwaukee v. Illinois, 451 U.S. at 316-17 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

Cases involving labor law demonstrate this point well. Generally, state laws conflicting with the National Labor Relations Act ("NLRA") are preempted because labor relations are considered a federal concern. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239-45 (1959). But the Supreme Court has recognized exceptions for activities in which states have a "compelling . . . interest", *id.* at 247, or which concern matters "so deeply rooted in local feeling and responsibil-

For example, in *Silkwood v. Kerr-McGee Corp.*,[146] the Court considered whether a state law award of punitive damages for radiation injuries suffered by an employee of a nuclear plant contravened congressional intent to delegate nuclear safety regulation to the federal government. Despite the sweeping language in *Pacific Gas & Electric Co.*[147] that the federal government had occupied the field of nuclear safety,[148] the Court in *Silkwood* upheld the punitive damages remedy. Finding no preemption, the Court was influenced by the fact that punitive damages "have long been part of traditional state tort law."[149]

This presumption against preemption of state common-law causes of action appears stronger when preemption would deny a plaintiff an adequate remedy for violation of his or her state-created rights.[150] For ex-

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ity that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244.

Thus, for example, the Court in the labor law area has tailored exceptions to the general preemption doctrine for certain defamation actions, Old Dominion Branch Number 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 270-73 (1974) (citing Linn v. Plant Guard Workers, 383 U.S. 53, 64 (1966)) (allowing state defamation actions when published statements are made with knowledge of their falsity or reckless disregard for their truth), for actions involving intentional infliction of emotional distress, Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977), for trespass actions, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), and for "conduct marked by violence and imminent threats to the public order," *Garmon*, 359 U.S. at 247. In these types of cases, the Supreme Court has found that the conduct addressed by the state law was: (1) beyond the intended scope of the NLRA, and therefore only peripherally related to congressional purposes; (2) of deep concern of the States; and (3) of little risk to interference with the Act. *See, e.g., Farmer*, 430 U.S. at 298.

146. 464 U.S. 238 (1984).

147. 461 U.S. 190 (1983).

148. *Id.* at 205. The Court found that "Congress . . . intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." *Id.* Therefore, it concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.* at 212. The Court thus inferred that the states could not impose their own more stringent safety regulations on nuclear power plants.

149. 464 U.S. at 255.

150. *See* Cipollone v. Liggett Group, 112 S. Ct. 2608, 2630 (1992) (Blackmun, J., concurring in part, and dissenting in part) (traditional hesitation to find preemption where federal law provides no comparable remedy); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (refusing to preempt property owner's tort remedies, despite defendant's compliance with Clean Water Act, in order not to leave property owners remediless); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (rejecting preemption of a claim for unlawful conveyance of tribal land where to hold otherwise would leave claimants remediless); *Silkwood*, 464 U.S. at 263 (Blackmun, J., dissenting) ("it is inconceivable that Congress intended to leave victims with no remedy at all"); United Constr. Workers v. Laburnum Constr. Co., 347 U.S. 656, 663-64 (1954) (declining to preempt state law tort claims in heavily regulated labor relations field because to do so would deprive plaintiff of property without recourse or compensation); Abbot v. American Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988)

ample, in *Silkwood*,[151] the Court analyzed the legislative history of the Atomic Energy Act and found no indication that Congress had considered precluding state law remedies for accidents in nuclear plants. In so concluding, the Court emphasized that

> [t]his silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.[152]

Similarly, in *English v. General Electric Co.*,[153] the Court considered whether an employee's state law claim for intentional infliction of emotional distress was preempted by section 210(a) of the Energy Reorganization Act of 1974.[154] The employee, a laboratory technician at a nuclear facility operated by General Electric, had complained about several perceived violations of nuclear-safety standards at the facility.[155] When General Electric subsequently discharged her, she filed a complaint with the Secretary of Labor, alleging that General Electric's actions violated the Energy Reorganization Act.[156] The Secretary dismissed her complaint as untimely.[157] She then filed a diversity action seeking compensatory and punitive damages, asserting, among other things, a state common-law claim for intentional infliction of emotional distress. General Electric argued that all state law remedies for conduct covered by section 210(a) of the 1974 Act were preempted because Congress intended to give the federal government exclusive regulatory jurisdiction in the field of nuclear safety.

(state regulation of vaccine manufacture not preempted by National Childhood Vaccine Injury Act of 1986), *cert. denied*, 488 U.S. 908 (1988); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in compensating injury victims"); *cf.* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-47 (1959) (preempting state law claims, but emphasizing the availability of an alternate remedy under NLRA). *See generally* Old Dominion Branch Number 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. at 271 (finding that field was preempted by federal statute determined, in part, by the remedies available thereunder).

151. 464 U.S. 238 (1984).

152. *Id.* at 251.

153. 496 U.S. 72 (1990).

154. Pub. L. No. 93-438, § 210, 92 Stat. 2951 (codified as amended at 42 U.S.C. § 5851(a) (1988)).

155. 496 U.S. at 74-75.

156. Section 210(a) of the Energy Reorganization Act provides that it is unlawful for a nuclear industry employer to retaliate against an employee for reporting safety violations. *See* 42 U.S.C. § 585(a) (1988).

157. 496 U.S. at 76.

Although the lower courts agreed with General Electric's argument,[158] the Supreme Court reversed. Regarding the occupation-of-the-field issue, the Supreme Court relied on its holding in *Pacific Gas & Electric Co.*[159] to find that Congress had preempted the field of nuclear safety.[160] But the court found no " 'clear and manifest' intent . . . to pre-empt all state tort laws that *traditionally* have been available to those persons who . . . allege outrageous conduct at the hands of an employer."[161] Because that conclusion would also include preemption of state *criminal* law, to

158 *Id.* at 77-78. The district court found that three provisions of § 210 evidenced a congressional intent to foreclose broader state remedies: (1) a provision barring recovery to an employee who deliberately violated the Energy Reorganization Act or the Atomic Energy Act; (2) the absence of a provision authorizing the award of punitive or exemplary damages; and (3) a statute of limitations provision for filing and resolving a complaint. *Id.*

159. 461 U.S. 190 (1983).

160 *English*, 496 U.S. at 82-83. When the Court examined whether an actual conflict existed, it noted that "the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210, does not by itself imply pre-emption of state remedies." *Id.* at 87. The Court examined the three provisions that the district court relied upon to demonstrate an actual conflict and found that the lower court read the provisions too broadly. *See supra* note 158. In particular, the Court found that § 210(g), which precludes relief for employer retaliation where an employee has deliberately violated the Energy Reorganization Act, did not reflect a congressional desire to preclude all relief, including state law remedies, for "whistleblowers" who deliberately violate nuclear safety requirements. Further, the Court found that the absence of a general authorization to award exemplary damages in § 210 did not imply a congressional intent to bar state action that permits such an award. Finally, the expeditious statute of limitations for § 210 claims did not imply that whistleblowers could not recover under any other law after the time for filing under § 210 had expired. *Id.* at 88-90. Consequently, the Court found that the claim for intentional infliction of emotional distress did not directly conflict with § 210.

The Court faced a similar preemption question under the antitrust laws in California v. ARC America Corp., 490 U.S. 93 (1989). Four states brought suit in federal courts seeking treble damages under § 4 of the Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a) (1988)), for an alleged conspiracy to fix prices of cement in violation of § 1 of the Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1988)). The states also sought to recover under their respective state antitrust laws. 490 U.S. at 98. Although the Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), precluded their federal claims, since they were indirect—rather than direct—purchasers of cement, state law would allow indirect purchasers to recover for all overcharges that direct purchasers passed on to them. 490 U.S. at 98. The issue before the Supreme Court was whether the *Illinois Brick* rule preempted indirect purchasers from recovering under state statutes. The Court emphasized that "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *Id.* at 105. It found that the state statutes did not conflict directly with federal law both because *Illinois Brick* did not attempt to define the interrelationship between the federal and state law, *id.*, and because the state statutes did not interfere with the federal purposes identified in *Illinois Brick*. *Id.*

See also Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707 (1985) (since FDA did not expressly preempt local regulation of blood banks, the Court was reluctant to do so).

161. *English*, 496 U.S. at 83.

the extent it would apply to retaliatory conduct, the Court stated that it "simply [could] not believe that Congress intended that result."[162] Instead, the Court found that the principal purpose of section 210 was to protect employees—not nuclear safety. Therefore, section 210 claims were not included in the preempted field.[163] Further, although the state tort remedy could affect decisions regarding nuclear safety, it would not have a "direct and substantial effect" on those decisions.[164]

This presumption against finding preemption when it would deny the plaintiff an adequate remedy was demonstrated most recently in *Cipollone v. Liggett Group, Inc.*[165] The Court in *Cipollone* dealt with the meaning of express preemption provisions, and did not address the issue of implied preemption. The Court used the presumption against preemption of state police powers, however, to construe narrowly the preemption clauses at issue, and thus to hold intact several common law damage claims.

In *Cipollone*, the issue presented to the Supreme Court was whether a federal statute enacted in 1969, which required placement of a warning label regarding the health hazards of smoking on every package of cigarettes sold in the United States,[166] or its 1965 predecessor, preempted state common law claims against cigarette manufacturers.[167] The Court

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162. *Id.*

163. *Id.*

164. *Id.* at 85. In this regard, the Court engaged in a lengthy discussion of the *Silkwood* case. It concluded that it would be "odd, if not irrational, to conclude that Congress intended to include tort actions stemming from retaliation against whistleblowers in the pre-empted field but intended not to include tort actions stemming from radiation damage suffered as a result of actual safety violations." *Id.* at 86.

If the subject matter is more national in scope, however, a finding of preemption is more likely. *See, e.g.*, North Dakota v. United States, 460 U.S. 300, 309 (1983) (migratory bird protection); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 839 (1982) (Indian tribal affairs); Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. at 193 (regulation of labor-management relations); Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (state alien registration law preempted because of paramount federal interest in foreign affairs).

165. 112 S. Ct. 2608 (1992).

166. The 1969 law required the following warning:

> Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88 (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)). Congress amended the Act in 1984, requiring manufacturers to use four more explicit warnings on a rotating basis. *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)).

167. The plaintiff had alleged that cigarette manufacturers were responsible for the 1984 death of his mother, who had smoked since 1942. The plaintiff claimed that "they breached express warranties contained in their advertising, . . . failed to warn consumers about the hazards of smoking,

found that the express preemption clauses in the 1965 and 1969 Acts controlled the preemptive scope of each Act.[168] Because the preemption clause in the 1965 Act governed only state warning requirements, the Court found no conflict between that provision and the state common law damages actions. Accordingly, the Court held that the provisions of the 1965 Act preempted "only positive enactments by legislatures or administrative agencies that mandate particular warning labels," and not state law damages actions.[169]

Addressing the 1969 Act, the Court found that the plain language of its preemption provisions was much broader than the 1965 version because it barred more than "statements" and included "requirement[s] or prohibition[s] . . . imposed under [s]tate law."[170] The 1969 Act also extended beyond "statements in advertising" to "advertising or promotion" of cigarettes.[171] Therefore, the Court rejected the plaintiff's argument that the "requirement or prohibition" language also limited the 1969 Act's preemptive scope to positive enactments by state legislatures or agencies.[172]

At the same time, however, the Court found that the preemption section of the 1969 Act did not generally preempt all common law actions. Instead, the Court examined each of the plaintiff's common law claims

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fraudulently misrepresented those hazards to consumers, and . . . conspired to deprive the public of medical and scientific information about smoking." 112 S. Ct. at 2613.

168. Section 5 of the 1965 Act provided:

> (A) ADDITIONAL STATEMENTS ON PACKAGES.
> No statement relating to smoking and health, other than the statement required by section 4 of this title, shall be required on any cigarette package.
> (B) ADVERTISING STATEMENTS.
> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)). Section 5(b) of the 1969 Act provided:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id. *See* 112 S. Ct. at 2616-17.

169. *Id.* at 2618-19. The Court supported its interpretation by noting the regulatory activity of the states and federal agencies undertaken in response to the Surgeon General's report regarding the hazards of smoking. The Court found that the regulatory context of the 1965 Act suggested that Congress intended to prevent a multiplicity of regulations regarding the labeling of cigarette packages. *Id.*

170. *Id.* at 2619.

171 *Id.* at 2620-21.

172. *Id.*

to determine whether the legal duty it imposed "constitute[d] a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.' " Under this analysis, the Court concluded that the 1969 Act did not preempt all of the common law damages actions.[173] In reaching this result, the Court expressly relied on the "presumption against pre-emption of state police power regulations."[174]

C. *Applying the Clear Statement Test to* Bivens *Cases*

Applying the state-federal preemption framework to *Bivens* cases would require a clear and manifest congressional intent to preempt a *Bivens* remedy. A *Bivens* remedy would not be precluded unless Congress explicitly intended to occupy the field of remedies. The *Bivens* case itself comes close to endorsing the state-federal preemption model. According to the Court, legislative action in an area should preclude a judicially inferred constitutional damages remedy only when that was Congress' express intention. As the Court stated, "we have here no explicit congressional declaration that persons [so] injured . . . may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[175] Under *Bivens*, where Congress has not legislated in the field, no preemption of the *Bivens* remedy in that area can occur. Likewise, in *Carlson v. Green*, the Court essentially applied the traditional clear statement test. It rejected

173. *Id.* at 2621-25. More specifically, the Court found that both common law failure to warn claims based on inadequate warning and fraudulent misrepresentation claims based on advertising that allegedly neutralized the effect of the federal warnings were preempted, whereas actions based on express warranty, intentional fraud and misrepresentation, and conspiracy were not preempted. *Id.*

174. *Id.* at 2618. Concurring in part and dissenting in part, Justice Blackmun agreed that the 1965 Act did not preempt common law damages actions, but disagreed that the 1969 Act preempted even some of those actions because neither Act contained "the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims." *Id.* at 2625. According to Justice Blackmun, the legislative history of the Acts did not indicate that Congress intended to leave plaintiffs injured by cigarette manufacturers' actions without access to alternative remedies. *Id.* at 2630. Therefore, finding preemption would violate the Court's traditional hesitation "to find preemption where federal law provides no comparable remedy," especially because Congress had not "eased the bite" of preemption by establishing a comprehensive federal civil enforcement scheme. *Id.* Justice Blackmun could not accept that "Congress, without any mention of State common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct." *Id.*

175. 403 U.S. at 397.

the argument that the 1974 amendments to the FTCA preempted a *Bivens* remedy because Congress did not explicitly declare that the FTCA was intended as a substitute for a *Bivens* remedy. As the Court stated:

> [p]etitioners point to nothing in the . . . (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations. . . . [O]ur inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy.[176]

The legislative comments accompanying the 1974 amendment easily answered the question: Congress explicitly stated that it intended parallel and complementary *Bivens* and FTCA remedies.[177] Further, because a *Bivens* remedy was more effective than the FTCA remedy,[178] the Court presumed that Congress had intended that both remedies be available to the plaintiff. As the Court stated, "[p]lainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."[179]

This analysis is analogous to that found in the field occupation cases. For example, in *Carlson*, the Court began by examining federal regulation in the area. The Court found that the federal regulation was not pervasive and that there was room for supplementation; therefore, it decided to allow the *Bivens* claim. The inference in *Carlson* is the same one found in *Pacific Gas & Electric Co.*: the Court wanted to avoid a "regulatory vacuum."[180]

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176. Carlson v. Green, 446 U.S. at 19 & n.5.

177. *See supra* note 32.

178. *See supra* notes 34-37 and accompanying text.

179. Carlson v. Green, 446 U.S. at 23.

180. Some argue that the *result* in *Carlson* was incorrect. *Cf.* Nichol, *supra* note 9, at 1128 (asserting that Court did not need to provide remedy because Congress had provided an acceptable remedy). The critical point, however, is that the *analysis* was appropriate.

Professor Nichol argued that the special factors analysis has become a broad policy determination that provides little guidance to the lower courts. The same criticism could be applied to the clear statement rule since the Court has the option to construe a statute broadly or narrowly. *Compare* Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962), *overruled on other grounds by* Swift & Co. v. Wickham, 382 U.S. 111 (1965) (federal Bankruptcy Act did not prevent Utah from suspending a driver's license of a debtor who failed to pay discharged judgment debts resulting from an auto injury) *with* Perez v. Campbell, 402 U.S. 637, 644-48 (1971) (similar license provision did conflict with Bankruptcy Act). The Court can also give varying importance to remarks in committee reports or floor debates. This broad discretion is not absolute, however. It is narrowed by factors that the Court uses in assessing preemption issues. These factors include: (1) the need for national uniformity in a given federal regulatory scheme; (2) the relation of the federal scheme to a particular consti-

Since *Carlson*, however, the Court has gradually abandoned the use of the clear statement test when deciding whether to infer a *Bivens* remedy when Congress has acted in the area. As previously discussed, the more recent *Bivens* cases use the "special factors" exception in deferring to a congressional remedy, instead of requiring a clear statement of congressional intent to preempt the field.

Applying the clear statement rule would not require the Court to abandon its current *Bivens* test—whether congressional inaction in providing a remedy to redress constitutional rights was purposeful or inadvertent. Rather, applying the clear statement test would simply mean that the Court's analysis of congressional intent would be more rigorous. Nor would application of the federal-state preemption model to *Bivens* cases compel the Court to infer a *Bivens* remedy simply because the congressional remedy did not afford the victim complete relief, an approach the current Court is unwilling to adopt.[181] Instead, the Court would look to the breadth of the congressional remedy as one factor by which to gauge congressional intent to occupy the field. By finding preemption of *Bivens* remedies only if Congress had clearly and explicitly occupied the field, the Court would respect the separation of powers, while at the same time preserve its judicial responsibility to safeguard individual rights.[182]

In *Bush v. Lucas*, for example, the Court made an appropriate start with a clear statement approach. It looked to the purpose and context of the federal legislation to discern congressional intent.[183] The Court assumed that the civil service remedies available to the plaintiff would be less effective than a *Bivens* remedy and that they would not fully compensate him.[184] Next, the Court noted that Congress had not expressly

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tutionally dedicated federal power, such as the war power; and (3) the relation of the state statute to an area traditionally regulated by the states, such as health and safety laws. *See generally* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 382-84 (1978). These factors reflect traditional federalism principles which govern the relationship between federal and state governments.

Similarly, the clear statement test as applied to the *Bivens* doctrine would also grant broad discretion to the courts to interpret statutes and legislative histories. The Court's responsibility to safeguard individual liberties and its respect for the role of the legislative branch would encourage the Court to narrow this discretion, however.

181. *See supra* notes 47-48, 71 and accompanying text.

182. The Court has never addressed, nor do I address, the issue of the Court's role if Congress intentionally removed the availability of a *Bivens* remedy. Application of the clear statement test at least would ensure that such removal would be the result of a deliberate policy choice.

183. 462 U.S. at 378. Indeed, the Court stated that "[w]hen Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised." *Id.*

184. *Id.* at 372.

precluded the creation of *Bivens* remedies.[185] The Court then examined the remedial scheme available to civil servants and found it was an "elaborate, comprehensive scheme"[186] that would encompass First Amendment claims such as those raised by the plaintiff.[187] Under the civil servant remedial scheme, which Congress had "constructed step-by-step, with careful attention to conflicting policy considerations"[188] over the course of nearly 100 years, prevailing employees were entitled to full back pay, retroactive promotions, seniority, pay raises, and accumulated leave.[189] The Court found that Congress expressly "intended [to] put the employee 'in the same position he would have been in had the unjustified or erroneous personnel action not taken place.' "[190]

Courts apply precisely this analysis in federal-state occupation-of-the-field cases. In those cases, courts are primarily concerned with whether foreclosing the availability of the state remedy would leave the plaintiff in a "regulatory vacuum." Justice Marshall's concurrence in *Bush* stressed this point. He found it essential that Congress had "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, . . . and that affords a remedy that is substantially as effective as a damages action."[191]

Ultimately, however, the Court in *Bush* forclosed the individual damages remedy out of deference to congressional expertise in federal programs. This rationale is analogous to a finding in the federal-state occupation-of-the-field cases that certain subjects are inherently national while others are inherently local, and that certain areas of law lie more appropriately within congressional expertise.[192] Yet, this approach may swallow the *Bivens* doctrine because almost every *Bivens* claim that involves a congressional remedial scheme arises in an area that could be classified as emerging out of a federal program, and therefore, could be characterized as one within congressional expertise.[193]

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185. *Id.* at 373.

186. *Id.* at 385.

187. *Id.* at 386.

188. *Id.* at 388.

189. *Id.* at 386, 388.

190. *Id.* at 388 (quoting S. REP. No. 1062, 89th Cong., 2d Sess., 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2097).

191. Bush v. Lucas, 462 U.S. at 390 (Marshall, J., concurring) (emphasis added) (citations omitted).

192. *See supra* note 53.

193. *See supra* notes 51-55 and accompanying text. The same problem arises in the Court's

Schweiker v. Chilicky was the final step in the wrong direction. Making no pretense of searching for congressional intent, the Court deferred to the congressional remedial scheme merely because Congress had already created a remedy to deal with the wrongful termination of disability benefits in an area in which Congress arguably enjoyed special expertise that the Court lacked. In so doing, the Court developed its new, almost nonexistent, "inadvertency" test for determining congressional intent.

Justice Brennan, in dissent, advocated a stronger test:

> I agree that in appropriate circumstances we should defer to a congressional decision to substitute alternative relief for a judicially created remedy. Neither the design of Title II's administrative review process, however, nor the debate surrounding its reform contains any suggestion that Congress meant to preclude recognition of a *Bivens* action for persons whose constitutional rights are violated by those charged with administering the program, or that Congress viewed this process as an adequate substitute remedy for such violations. Indeed, Congress never mentioned, let alone debated, the desirability of providing a statutory remedy for such constitutional wrongs. Because I believe legislators of "normal sensibilities" would not wish to leave such traumatic injuries unrecompensed, I find it inconceivable that Congress meant by mere silence to bar all redress for such injuries.[194]

Justice Brennan's dissent is a model application of the clear statement test used in the *Bivens* case. He noted the inadequacy of relief provided

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approach in Chappell v. Wallace. There, the Court was not concerned that Congress had failed to provide a damages remedy for claims by military personnel that constitutional rights had been violated by superior officers. It decided to stay its hand and not imply a *Bivens* remedy merely because of the Constitution's grant to Congress of exclusive power over the military. *Chappell*, 462 U.S. at 302. In fact, the Court specifically declined to search for congressional intent, contrasting its approach in Chappell v. Wallace to that taken in Feres v. United States. *Chappell*, 462 U.S. at 299; *see* Feres v. United States, 340 U.S. 135 (1950) (holding that Congress did not intend to extend FTCA remedies to tort claims brought against the government by members of the Armed Forces). But even in *Chappell*, the Court noted that Congress, in the exercise of its "plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life . . . . The resulting system provides for the review and remedy of complaints and grievances such as [the equal protection claim] presented by respondents." *Chappell*, 462 U.S. at 302. The system permitted military personnel to raise constitutional challenges in administrative proceedings and authorized recovery of consequential damages, including retroactive promotions. *Id.* at 303. Thus, in both *Bush v. Lucas* and *Chappell v. Wallace*, the relief provided, although incomplete, was significant, and could have been used as a factor in a clear statement analysis.

194. Schweiker v. Chilicky, 487 U.S. at 431-32 (Brennan, J., dissenting). He also noted that "[i]naction . . . is a notoriously poor indication of congressional intent." *Id.* at 440.

by the social security system.[195] He then analyzed the legislative history of the Act and found only a single remark of a legislator that indicated that Congress intended to preempt the field.[196] Moreover, Justice Brennan stated that "social welfare is hardly an area in which the courts are largely incompetent to act."[197]

This is precisely the analysis found in *Silkwood* and *English*. In both cases, the Court refused to use inaction as a signal of congressional intent, especially considering the unavailability of judicial remedies for violation of state-created rights.

CONCLUSION

Denying a *Bivens* remedy may leave a victim of constitutional wrongdoing without a judicial remedy. It would seem that Congress would not lightly intend a result of such significance. Yet, under the automatic preemption test espoused in recent cases, the Court attributes precisely this intent to Congress merely because Congress has enacted a remedial scheme in the area affected by the alleged wrongdoing—even if the congressional scheme provides no redress to the specific victim before the Court. In so readily finding a *Bivens* remedy preempted, the Court has ignored the presumption in favor of remedies for constitutional wrongs, and has abandoned its traditional, rigorous approach for determining whether Congress intended to preempt non-congressional remedies.

The "clear statement" test would cause both Congress and the Court to adopt a more principled approach to the *Bivens* area. Knowing that only a clear statement of its intent would preclude a judicially inferred damage remedy, Congress would be more likely to expressly debate the issue, which should result in a more reasoned policy choice. Moreover, the clear statement test would restore the presumption that constitutional wrongs should be remedied, at least in the absence of strong evidence that Congress deliberately intended to preclude the remedy. In serving these purposes, the test would improve communications between the judicial and legislative branches, with the Court clearly setting forth the presumptions that it would follow, and Congress, aware of the presumptions, responding with a clear signal of its intent.[198]

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195 *Id.* at 437. Recipients were unable to challenge the agency's actions on constitutional grounds. *See supra* note 66.

196 *See supra* note 73.

197 *Id.* at 443.

198 *Cf.* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S.

Requiring a clear congressional statement would not place an unreasonable burden on either the judicial or legislative branch. Congress has shown that it is capable of being explicit in the *Bivens* area when it desires.[199] And the Court has developed a substantial body of law, in various contexts, on administering the clear statement test.

The analysis the Court uses to determine whether Congress intended to preempt common law remedies provides an appropriate model for application of the clear statement test. Congress has the power under the Supremacy Clause to preempt state remedies if it chooses. But that power has not translated into a judicial presumption that, just because Congress has legislated in an area, it must have intended to preempt. Rather, to prevent erosion of state common law remedies where that is not Congress' explicit intent, the Court has used the clear statement rule to create the opposite presumption—that Congress has not intended to preempt state remedies, especially where federal law provides an inadequate remedy.

Likewise, merely because Congress is the principal creator of federal policy, the Court should not presume that any time Congress has legislated in an area, it must have intended to preempt a *Bivens* remedy. Such a presumption provides less protection to remedies for constitutional wrongs than to remedies for common law wrongs—a result that is out of

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CAL. L. REV. 735, 770, 779 (*Bivens* doctrine is well-suited to foster dialogue between the Court and Congress on rights and remedies); Monaghan, *supra* note 95, at 27-29 (constitutional common law promotes the Court's dialogue with Congress on the issue of remedies for constitutional rights violations and "provides the Court with a means for involving Congress in the continuing process of defining the content and consequences of individual liberties").

199. This point is well illustrated by the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (1988), which Congress enacted in response to Westfall v. Erwin, 484 U.S. 292 (1988). In *Westfall*, the Supreme Court held that federal employees did not enjoy absolute immunity from common law tort actions for official conduct. *Id.* at 299. The Court also invited Congress to provide guidance on the absolute immunity question. *Id.* at 300.

In response, Congress amended the Federal Tort Claims Act to make the FTCA the exclusive remedy for tort actions against federal employees. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563 (1988) (codified at 28 U.S.C. § 2679(b) (1988)). An important exception, however, is for constitutional torts. *See* 28 U.S.C. § 2679(b)(2)(A) (1988). Reluctant to completely eliminate actions for *Bivens* remedies, Congress acknowledged the need for "special attention" to the "serious intrusion of the rights of an individual," and recognized "the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights." H.R. REP. No. 700, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949-50.

place in our system of governance. In the constitutional, as much as the common law area, protection of remedies should be the norm and preclusion of those remedies the exception.