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WAS *BIVENS* NECESSARY?

Ann Woolhandler & Michael G. Collins***

Introduction

The propriety of *Bivens*[1] actions is part of the debate about federal common law.[2] For some judges and scholars, implied actions are a particularly reprobated form of federal common law.[3] Justice Alito's opinion for the Court in *Hernández v. Mesa* treated *Bivens* and its progeny as "products of an era when the Court routinely inferred 'causes of action'" under statutes and then "extended th[e] practice [to] the Constitution."[4] Both implied statutory and constitutional actions, he stated, are in tension with the Constitution's "separation of legislative and judicial power."[5] And he rejected arguments that the historical availability of common-law claims against federal officers in federal courts supported Hernández's claim, because those cases preceded *Erie Railroad Co. v. Tompkins*'s admonition that "[t]here is no

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

2 *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 910–11 (1986) (including both constitutional and statutory implied actions in her discussion of federal common law).

3 *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (*Bivens* is "a relic of the heady days in which this Court assumed common-law powers to create causes of action" by constitutional implication); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 49–50 (1985) (criticizing both statutory and constitutional implied actions); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761, 797 (1989) (particularly criticizing implied statutory actions).

4 140 S. Ct. 735, 741 (2020) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).

5 *Id.* at 741.

federal general common law."[6] He also suggested that if *Bivens* were decided today, the Court would be unlikely to reach the same result.[7]

The beginning premise for critiques of federal common law is that federal common lawmaking often involves policymaking discretion more properly exercised by the states or Congress.[8] Were courts more constrained by custom, precedent, and the general principles of common law, then federal common law arguably would be of less concern.[9] But because precedent is easily malleable, it provides little constraint on courts using federal common law to implement their own policy choices.[10]

Some federal common-law skeptics have provided criteria for keeping federal common law in check.[11] Although not specifically addressing *Bivens* actions, Professor Nelson has argued that when engaged in federal common lawmaking, federal courts should see themselves as more tied to custom, general principles of the common law, and precedent, rather than seeing themselves as engaged in a freewheeling search for the best policy.[12] This methodology makes federal common law less subject to criticism as usurping

6 304 U.S. 64, 78 (1938), *quoted in Hernández*, 140 S. Ct. at 742.

7 *Hernández*, 140 S. Ct. at 742–43 (noting the Court had observed that if "'the Court's three *Bivens* cases [had] been . . . decided today,' it is doubtful that we would have reached the same result" (alteration in original) (quoting *Ziglar*, 137 S. Ct. at 1856)).

8 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, *in* THE TANNER LECTURES ON HUMAN VALUES 85–86 (1995) (noting judicial lawmaking is problematic for separation of powers and democracy); *see also* Merrill, *supra* note 3, at 12–13, 24–25 (arguing that principles of federalism and electoral accountability should constrain federal common lawmaking); Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 17–18, 24 (2015) (discussing Justice Scalia's and others' views).

9 Nelson, *supra* note 8, at 9.

10 Scalia, *supra* note 8, at 82, 113 (attributing the problem in part to law school training, which leads judges to ask what the result should be and then distinguish contrary cases).

11 *See* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 720 (2008) (arguing that federal common lawmaking should be tied to sources listed under the Supremacy Clause; the constitutional structure is created by the constitutional text and allows for some federal common-law role); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001) (arguing the sources of law listed in the Supremacy Clause are exclusive and that the limitations help to preserve federalism); *id.* at 1423 (indicating that the Court's once-expansive approach to implied statutory actions "arguably allowed federal courts to evade federal lawmaking procedures meant to safeguard federalism").

12 Nelson, *supra* note 8, at 9 (arguing there is a difference between making law out of whole cloth and a common-law method that looks to "widespread customs, traditional principles of common law, or the collective thrust of precedents from across the fifty states"); *cf.* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1132 (1978) (indicating that ordinary common law is thought justifiable because it is confined to precedent and principled development). Under Professor Nelson's view, the courts would not need to claim they were interpreting the specific language of constitutional and statutory texts, and federal common law could also extend into areas where state law could not operate of its own force. Nelson, *supra* note 8, at 35, 42.

the lawmaking roles of other government actors. Professor Merrill has argued that federal common law needs to be specifically intended by the framers of a constitutional or statutory provision,[13] or necessary to "preserve or effectuate some other federal policy that can be derived from the specific intentions" of the framers of a constitutional or statutory provision.[14] He argued that *Bivens* was illegitimate under his criteria.[15]

For those with more capacious views of federal common law, *Bivens* is not hard to defend. Some such scholars argue that federal common law is appropriate so long as the court can "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule,"[16] or to a federal interest, in order to justify federal common law.[17] Indeed, Judge Friendly suggested that federal courts could appropriately make federal common law in areas of federal concern where a uniform rule was desirable,[18] and suggested that tort suits against federal officers was such an area.[19] And even some jurists who criticize implied statutory actions have argued that federal courts should be able to imply rights of action to implement the Constitution.[20]

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13 Merrill, *supra* note 3, at 23–24, 47. Professor Merrill would require that the specific intention be derived from "conventional textual interpretation." *Id.* at 47.

14 *See id.* Professor Merrill would also allow federal common law where there was a delegation to the courts to make law. *Id.* He argues that there was a delegation to engage in substantive constitutional interpretation, and that such lawmaking need not necessarily adhere to conventional textualist interpretation or specific intention. *Id.* at 62. It might be possible to argue for a delegation to the courts to provide adequate remedies for constitutional violations, but Professor Merrill does not do so. *Id.* at 50 & n.213.

15 *See id.* at 51. Specific intentions seem to include intentions that courts would have some powers to confect remedies. *Id.* at 62 ("The pervasive influence of the common law, broadly defined, suggests that the framers anticipated that federal courts would perform a common law function in giving effect to the constitutional language.").

16 *See, e.g.*, Field, *supra* note 2, at 887 ("[T]he only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.").

17 *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 833 (1989) (indicating it is appropriate for the federal courts to make federal common law when doing so would advance the national interest).

18 Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (indicating that the development of uniform federal common law was appropriate in areas of federal concern).

19 *Id.* at 412 (suggesting that both the right to relief as well as defenses might properly be the subject of federal common law).

20 *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting) ("And this Court's traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action. Moreover, the implication of remedies to enforce constitutional provisions does not interfere with the legislative process in the way that the implication of remedies from statutes can."); Redish, *supra* note 3, at 796–97 (reasoning that the Constitution was meant to be judicially enforceable, and the Court's role in our constitutional system makes providing remedies appropriate); *see also* Stephen I. Vladeck, Bivens *Remedies and the Myth of the*

This Essay, by contrast, will address the extent to which *Bivens* actions might be justified even under the more restrictive views of the federal courts' common-law powers. We particularly look to actions such as *Bivens* itself: damages actions for a trespassory harm that cannot be justified given constitutional limitations.[21] Under restrictive criteria, one might ask if the framers of the Constitution or relevant statutes contemplated the trespass action as a vehicle for enforcement of constitutional prohibitions.[22] This inquiry overlaps with whether the remedy is supported by common-law methodology and precedent.[23] We also proceed to ask if the remedy is constitutionally necessary. This can be divided into two questions: (1) whether this trespass-type remedy is constitutionally necessary?;[24] and (2) whether the federal form of the remedy is constitutionally necessary?[25] We conclude that the *Bivens* decision itself may have been justified under these criteria, although other decisions implying constitutional actions may not be.[26]

"Heady Days," 8 U. ST. THOMAS L.J. 513, 521 (2011) (noting the clear distinction between providing remedies Congress did not provide to enforce statutory rights and providing remedies for constitutional violations).

21 We are not treating the relevant category as damages actions generally. *Cf.* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1159 (1969) ("There is surface appeal in the notion that the framers of the Constitution did not contemplate that every trespass by a government officer would be a constitutional case—yet it is such a case, insofar as the Constitution supplies the controlling behavioral standard (as well as judicial power to prescribe the defenses of the federal officer).").

22 *See* Merrill, *supra* note 3, at 23–24 (stating that "it should not be regarded as a usurpation for the courts to interpret the Constitution to reach results that the framers sought to constitutionalize").

23 *See* Nelson, *supra* note 8, at 9. *But cf.* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 939 (2019) ("First, we should substantially jettison the ordinary, private-law tort system as an anchor for thinking about constitutional remedies, including damages and injunctions."). Some might argue that the fact that a particular remedy was in contemplation of the Framers and that the remedy was supported by common-law methodology might be enough to support a federal common-law remedy. This history might also support the proposition that the Framers and Congress delegated power to prescribe constitutional remedies. *Cf.* Redish, *supra* note 3, at 797 (assuming that the courts would have power to issue at least injunctions, and where necessary, damages to enforce the Constitution). *But cf. supra* note 14.

24 Again, this inquiry might suffice for some critics of federal common law. *See, e.g.*, Schrock & Welsh, *supra* note 12, at 1136–39 (apparently treating a damages action as inhering in the Fourth Amendment and as necessary to keep the right from being a "mere form of words" for Bivens, without looking to other remedies).

25 *See* Merrill, *supra* note 3, at 51 ("If existing state and federal remedies are adequate to preserve a specifically intended federal right, then there is no justification for creating additional federal remedies."); *id.* at 57 (indicating some judgment may be required to determine the necessity of preemptive—that is, nondelegated—lawmaking).

26 One of us, Professor Collins, is unsure whether the federal form of the remedy was constitutionally necessary in *Bivens*.

I. EXPECTATIONS, COMMON-LAW METHODOLOGY

This Part is primarily addressed to the Framers' expectations regarding remedies for constitutional violations and precedent. While this Part provides some evidence that certain remedies may have been thought necessary to enforce the Constitution, Part II discusses the question of necessity separately.

Certain premises enjoy widespread agreement among federal common-law proponents and critics alike. The Constitution is meant to apply as law.[27] This entails that a federal court—when presented with a case or controversy—may properly engage in constitutional interpretation to decide the dispute before it.[28] When would the federal courts have occasion to apply the Constitution and provide such interpretation? The constitutional text generally does not specify remedies or create causes of action.[29] The Framers' expectation then would be that the Constitution would apply as law in actions that otherwise came before the courts. Those cases would include government enforcement actions where the defendant raised a constitutional defense, as well as common-law trespass actions in which the Constitution would negate a defendant's plea of legal justification.[30] Trespass refers to intentional invasions of person or property, such as arresting persons or seizing goods. It should be noted that, like defenses to enforcement actions, trespass actions are in a sense defensive. They address intentional deprivations of interests in liberty and property that an officer has effected, but without the officer's invoking judicial process as in enforcement actions.

If trespass actions were contemplated as a vehicle to enforce the Constitution, one might also suppose that equity actions to enjoin imminent or ongoing trespasses were in contemplation, if a court were properly exercising equitable powers.[31] Often anticipating official action, such injunctions are also in a sense, a defensive remedy, similar to defenses to enforcement actions and trespass suits. Indeed, modern federal common-law skeptics accept most injunction actions to enforce constitutional norms, while often

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27 *See, e.g.*, Redish, *supra* note 3, at 797 (stating that most agree that the Constitution was not meant to be merely advisory).

28 We put aside disputes about the proper methodologies for interpretation.

29 *Cf.* Fallon, *supra* note 23, at 941 (noting, however, the Constitution's references to habeas and just compensation).

30 *See* Fallon, *supra* note 23, at 935 ("Judge-made tort law that furnishes remedies for official wrongdoing, including constitutional violations, is as old as the Constitution itself."); Merrill, *supra* note 3, at 63 (in support of his argument that the Framers delegated some substantive lawmaking power to the courts, indicating that defenses to enforcement actions and trespass actions would be means to enforce the First and Fourth Amendments).

31 *See* Fallon, *supra* note 23, at 942 ("The Framers assumed the existence of a going regime of common law and equitable remedies through which government officials could be held accountable for unlawful conduct, including constitutional violations." (citing Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991))).

treating damages actions as questionable.[32] Historically, however, trespass actions and actions to enjoin trespasses were two sides of the same coin.[33] If the officer had committed a trespass, he could be individually liable for his own wrongs and would not enjoy the protections of sovereign immunity. The availability of a trespass or other common-law action for which he could be individually liable would also support an injunction claim against the officer as an individual when a trespass was threatened or ongoing, or when damages were otherwise inadequate.[34] Whether the action was for damages for a past trespass or to enjoin a future or ongoing trespass, the Constitution could negate the officer's claimed justification of exercising valid authority.

In *Osborn v. Bank of the United States*, for example, the theoretical individual liability of Ohio Auditor Ralph Osborn in an action at law for trespass, or

32 *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856, 1858 (2017) (assuming a baseline of injunctive remedies in considering whether to imply a damages remedy); John F. Preis, *In Defense of Implied Injunction Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) (indicating that injunctive actions, as opposed to damages actions, to enforce the Constitution generally are not thought to require congressional authorization). *But cf.* John Harrison, *Ex parte* Young, 60 STAN. L. REV. 989, 990–91 (2008) (treating *Young* as authorizing antisuit injunctions that raised federal defenses to enforcement actions, but not necessarily as authorizing constitutionally based actions in other circumstances); *id.* at 1008 (seeming to see injunctions against trespasses as appropriate equity claims). Some commentators treat the Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), as undermining the presumption of injunctive relief, *see* Fallon, *supra* note 23, at 986, but the case involved a statutory claim that a state payment schedule violated the Medicaid law, and the Court found the statute did not contemplate the remedy. *See id.* at 986–87 (stating that *Armstrong* was correctly decided on its facts); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), *discussed in* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 931–32 (7th ed. 2015) (indicating that the parts of Justice Kennedy's opinion that treated *Ex parte Young* remedies as largely discretionary were joined only by Chief Justice Rehnquist).

33 *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989) (arguing for damages actions from the proposition that injunctions were generally available only when damages were inadequate); Preis, *supra* note 32, at 12 (indicating that English equity more or less followed the common law in enjoining trespasses); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 419–20 (1987) (discussing the symmetry of damages and injunctive relief). *But cf.* Preis, *supra* note 32, at 6 (arguing that equity and law were not in all cases so tightly bound, thus indicating that injunctions as to constitutional violations should not be subject to the limitations imposed on damages actions).

34 *See, e.g.*, *In re* Tyler, 149 U.S. 164, 191 (1893) (upholding contempt sanction against sheriff who, in violation of a federal injunction obtained by the railroad's receiver, did not release railroad property that the sheriff held for nonpayment of state taxes); *id.* at 188 ("It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the Constitution of the United States." (first citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); then citing Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855); then citing Allen v. Balt. & Ohio R.R. Co., 114 U.S. 311 (1885); then citing *In re* Ayers, 123 U.S. 443 (1887); and then citing Shelton v. Platt, 139 U.S. 591 (1891))).

for money had and received from the Bank, supported the injunction against him. "[T]he appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury," said Chief Justice Marshall.[35] "It being admitted," he continued, "that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him?"[36] Similarly, in a later case approving an injunction against state officers' sale of property to which the plaintiff claimed title, the Court stated that where state officials "commit acts of wrong and injury" to the plaintiff's property, then a suit is available against the individual officers "whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury."[37]

Federal court jurisdiction in *Osborn* was based on the Court's interpretation of a congressional statute authorizing the Bank to sue and be sued in "any Circuit Court of the United States."[38] But both before and after the 1875 advent of general federal question jurisdiction, the Court often upheld such damages and injunctive remedies when diversity of citizenship was present, and gave a capacious view of the diversity jurisdiction to accommodate cases raising federal constitutional issues against state and local officials.[39] The federal courts also regularly entertained trespass and related common-law actions against federal officers, either as a matter of original jurisdiction, for example under admiralty or diversity jurisdiction,[40] or under provisions for removal from state courts of suits against specific categories of federal officers.[41] Although actions for injunctions against federal officers were

35 *Osborn*, 22 U.S. (9 Wheat.) at 843.

36 *Id.*; *see also id.* at 839 ("The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law.").

37 Pennoyer v. McConnaughy, 140 U.S. 1, 10 (1891), *paraphrased in Tyler*, 149 U.S. at 190.

38 *See Osborn*, 22 U.S. (9 Wheat.) at 817.

39 Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 84–111 (1997).

40 *See, e.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115, 130, 137 (1851) (reviewing an action brought in a lower federal court, holding the officer liable in trespass for seizure from the plaintiff merchant in Mexico during the Mexican War); Wise v. Withers, 7 U.S. (3 Cranch) 331, 331, 335 (1806) (reviewing trespass action from the Circuit Court for the District of Columbia against collector of military fines for seizure under order of an invalid court martial); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 122–25 (1804) (under admiralty jurisdiction, holding captain liable for a good faith seizure without probable cause).

41 *See, e.g.*, Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 150–51, 154 (1836) (removed action in assumpsit to recover excess duties paid with notice to the collector of claimed illegality).

scarce,[42] the Court on occasion entertained ejectment suits as to real property claims,[43] as well as mandamus actions that compelled action from the federal official.[44]

In addition to diversity, admiralty, and removal as vehicles for lower federal courts to hear cases against federal officers, Congress had provided for jurisdiction for actions "arising under" some specific laws prior to 1875. While some such provisions supported lower federal court jurisdiction for fairly explicit statutory claims, others were typically used for state-law or general-law actions with a federal ingredient in them.[45] For example, Congress provided in 1833 "[t]hat the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law."[46] Plaintiffs without diversity or the amount in controversy could thereafter bring assumpsit actions against federal revenue officers for taxes paid under protest.[47] Assumpsit actions were a substitute for refusing payment and suffering a forcible seizure, which could thereafter occasion a trespass suit. In the federal court assumpsit suits, plaintiffs typically alleged the demand for payment, that the demand was unjustified, and that the plaintiff paid under protest against the legality of the demand.[48] The officers' want of

42 Noble v. Union River Logging R.R. Co., 147 U.S. 165, 166–67, 177 (1893) (approving injunction against Secretary of Interior's revocation of a grant of public lands by his predecessor).

43 Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 369–70, 382 (1867) (basis for jurisdiction unclear; reviewing an action from a lower federal court, and rejecting on the merits the plaintiff's action for possession of land held by federal officer); Meigs v. M'Clung's Lessee, 13 U.S. (9 Cranch) 11, 11, 18 (1815) (affirming the lower federal court's grant of ejectment against federal officers as to land on which a United States garrison was located); *see also* United States v. Lee, 106 U.S. 196, 197, 204, 223 (1882) (approving relief in a removed ejectment action); Brown v. Huger, 62 U.S. (21 How.) 305, 308, 316, 322 (1858) (reviewing an ejectment action removed from the state court against a federal officer, denying relief because the Court determined that the plaintiff had junior title).

44 Mandamus compelled an officer to perform a plain official duty, often created by a statute. *See, e.g.*, United States v. Schurz, 102 U.S. 378, 379–80, 405 (1880) (approving mandamus to compel the Secretary of the Interior to deliver a land patent); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 609, 626 (1838) (compelling the Postmaster General to credit plaintiffs' accounts as directed by Congress). *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (discussing mandamus). Mandamus was also based on the concept that an officer might at least theoretically be individually liable for damages. *See, e.g.*, *Kendall*, 37 U.S. (12 Pet.) at 609, 614. Both ejectment and mandamus were actions at law but operated similarly to prospective injunctions.

45 Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2158–59 (2009).

46 Act of Mar. 2, 1833, ch. 57, § 2, 4 Stat. 632, 632.

47 *See* Woolhandler & Collins, *supra* note 45, at 2161 n.55 (citing cases).

48 *Id.* at 2162. An 1864 provision largely displaced the arising under assumpsit actions against customs collectors, but a provision in effect from 1864 to 1866 provided for cases "arising under" internal revenue laws and the courts under that act allowed assumpsits against such collectors. *See id.* at 2163–64. Plaintiffs later used the 1875 general federal

justification under federal law in these cases appears to have been part of the plaintiff's complaint.[49]

Overall, these developments are consistent with the supposition that the Constitution would be enforced as law in the courts, and with the expectation that traditional common-law trespass actions and related equity actions would be among the actions in which the Constitution would be enforced. They are also consistent with common-law methodology and precedent. For the most part, the remedies we have focused on are "defensive"—that is, actions addressing intentional deprivations of traditional interests in property and person[50] that an officer might effect without invoking judicial process.

We do not mean to suggest that these suits were "implied" federal constitutional or statutory rights of action. Rather they were garden-variety common-law actions that could be traced to either general or state law, and were brought under a number of jurisdictional provisions including diversity, admiralty, federal officer removal, and provisions for cases "arising under" specific federal statutes. But we suggest that the Framers' expectations and the precedent for the availability of these remedies provide at least some support for the Court's later countenancing of trespass-type actions to enforce the Constitution under federal common law and general federal question jurisdiction.[51]

II. The Necessity of Damages Remedies

In this Part we address whether some of the common-law remedies just discussed could be viewed as constitutionally necessary. Of course, the ordinary trespass action or injunctive action that was brought in a lower federal court would not generally have occasioned a pronouncement by the Court that a particular type of claim was constitutionally required. But one can, to an extent, test the Court's notions of constitutional necessity of damages actions in the lower federal courts by looking at cases it heard on direct review from the state courts. The Court did not purport to exercise general common-law powers in reviewing decisions from state courts, but rather was limited to reviewing denials of federal rights in accordance with the restrictions in section 25 of the 1789 Judiciary Act.[52] Stated differently, on direct

question provision to support assumpsit actions against internal revenue officers. *See id.* at 2164 n.72; *cf.* Teal v. Felton, 53 U.S. (12 How.) 284, 287, 292–93 (1852) (approving state court jurisdiction over a trover action against a postal official on the ground that state courts had concurrent jurisdiction of suits arising under federal law). An 1845 act provided for jurisdiction over cases "arising under" the postal laws. Act of Mar. 3, 1845, ch. 43, § 20, 5 Stat. 732, 739.

49 Woolhandler & Collins, *supra* note 45, at 2162.

50 Habeas corpus was available against federal officers with respect to alleged unjustified detention. *See* Fallon et al., *supra* note 32, 1195–97.

51 *Cf.* Nichol, *supra* note 33, at 1135 (common-law methodology supports *Bivens* actions).

52 Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

review the Court largely took state causes of action as it found them.[53] When the Court, due to constitutional concerns, nevertheless stepped in on direct review to require state courts to entertain a certain cause of action similar to that which the federal courts would have supplied in cases originating in the lower federal courts, it suggests that the Court saw the cause of action as constitutionally necessary in both contexts.[54]

That the Court saw some trespass-type actions as constitutionally necessary is illustrated by the *Virginia Coupon Cases*.[55] The state of Virginia, in restructuring its debt, offered holders of certain state bonds a lesser amount of new bonds.[56] An inducement for accepting the new bonds was that the interest coupons on them could be used to pay state taxes—thus seeming to give bondholders a means of enforcing the state's obligation to provide interest without the difficulties of suing the state. The state, however, later forbade its tax collectors from accepting the coupons, and even abrogated the preexisting trespass action against the collectors who forcibly collected the taxes after tender of the coupons.[57]

In one of those cases, *Poindexter v. Greenhow*, a taxpayer sued in trespass in state court after the collector seized his property for nonpayment of taxes after the taxpayer tendered his coupons.[58] The officer defended based on the state laws that prohibited his accepting the coupons and that also abrogated the trespass action against the collector.[59] On direct review, the Supreme Court treated the abrogation of the trespass action as itself a violation of the Contract Clause, such that it could ignore the repeal.[60] But the Court also indicated that in all events the state must make the trespass remedy available, apart from its having been a remedy at the time of contracting: "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."[61]

The Court simultaneously approved lower federal court actions for cognate relief: a federal question damages action against the collector for seizing

53 *See* Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 FLA. L. REV. 73, 88 (2020) (indicating that the Supreme Court was reluctant to find it had appellate jurisdiction when state courts denied a plaintiff relief on the ground of lack of jurisdiction or lack of a cause of action).

54 *Cf.* Hill, *supra* note 21, at 1114, 1116 (arguing that, given that state courts must exercise their ordinary jurisdiction to vindicate federal rights, it follows that the federal courts must do so as well).

55 114 U.S. 269 (1885).

56 *Id.*

57 Poindexter v. Greenhow, 114 U.S. 270, 277 (1885).

58 *Id.* at 273–74.

59 *Id.*

60 *Id.* at 303–04. The Court, however, had allowed the abrogation of certain other remedies such as mandamus that existed at the time of the contract. *See, e.g.*, Antoni v. Greenhow, 107 U.S. 769, 780–782 (1883).

61 *Poindexter*, 114 U.S. at 303.

property after tender of the coupons[62] and a diversity action to enjoin the tax collectors from seizing property for nonpayment of taxes after tender of the coupons.[63] In the latter action, the Court suggested that jurisdiction under the 1875 federal question statute would also have been available.[64] Given the determination, on direct review, that the trespass action was required, all of the actions seemed to be grounded in a sense of constitutional necessity.

There are later examples of the Court requiring, on direct review, that state courts supply both monetary and injunctive remedies, and these were not limited to Contract Clause cases where state-law remedies existing at the time of contracting might be read into the contract. The Court, for example, required monetary remedies in state courts for the collection of taxes alleged to violate rights vested under the Fifth Amendment,[65] as well as rights under the Equal Protection Clause[66] and the Commerce Clause,[67] and also required an injunctive action to address an oil inspection fee alleged to violate the Commerce Clause.[68] The line of modern cases associated with *Parratt v. Taylor*[69] indicates that the Due Process Clause requires states to supply damages remedies for certain intentional trespasses even if they do not violate specific constitutional provisions.[70] And as to more specific constitutional prohibitions, the federal courts have often found it easier to supply remedies themselves rather than to force unwanted causes of action on the states.[71]

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62 White v. Greenhow, 114 U.S. 307, 308 (1885) (reinstating the trespass action). The Court rejected an action under the 1871 Civil Rights Act (now 42 U.S.C § 1983) on the ground that Contract Clause rights were not rights "secured by the Constitution" within the meaning of that Act. Carter v. Greenhow, 114 U.S. 317, 321–23 (1885), *discussed in* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1518–19 (1989).

63 Allen v. Balt. & Ohio R.R. Co., 114 U.S. 311, 311–13, 317 (1885).

64 *See id.* at 316.

65 Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 20, 24 (1920).

66 Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446–47 (1923).

67 McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 22 (1990). The Court frequently treated the obligation as arising from the Due Process Clause. *See* Woolhandler & Collins, *supra* note 53, at 107 & n.201.

68 Gen. Oil Co. v. Crain, 209 U.S. 211, 212, 216, 231 (1908); *see also* Vladeck, *supra* note 20, at 522–23 (indicating that tax remedies, habeas, and injunctive actions are better lenses than implied statutory actions for evaluating *Bivens* actions).

69 451 U.S. 527 (1981).

70 *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 614 (2005) (indicating that due process protects a right to redress, particularly for intentional misconduct protecting traditional interests in property and physical liberty). In referring to the *Parratt* line of cases as requiring remedies for certain intentional torts, we do not mean to include negligence claims such as those at issue in *Parratt*. *See* Daniels v. Williams, 474 U.S. 327, 328, 336 (1986) (indicating that a negligently caused injury is not a deprivation of life, liberty, or property for which the state must provide remedies).

71 *See* Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 55 (1968) (suggesting that it may be preferable for the federal courts to supply a remedy rather than forcing the states to do so); Woolhandler &

III. WAS THE PRE-*BIVENS* FEDERAL QUESTION ACTION STATUTORILY AUTHORIZED AND/OR CONSTITUTIONALLY NECESSARY?

In this Part, we examine the propriety of the Court's countenancing of federal question jurisdiction over what we argue are required remedies. In the late nineteenth century in *Scott v. Donald*, South Carolina merchants brought an action in federal court against South Carolina officials for damages and an action for an injunction to stop further trespasses, claiming that the state law that authorized the seizures violated the Commerce Clause.[72] The Court held that federal question jurisdiction was appropriate in both cases.[73] The Court in *Scott* likely did not see itself as implying federal causes of action but rather as entertaining state- or general-law actions with a federal ingredient apparently included as part of the plaintiff's complaint.[74]

A. The Irrelevance of "General Law" Versus "State Law" to the Necessity of the Action.

Part III analyzes *Scott v. Donald* under the assumption that the underlying trespass action was a state-law claim. Justice Alito in *Hernández* wrote off cases of trespass actions against federal officers that the petitioners cited as merely reflecting the pre-*Erie* general common law.[75] While *Scott* involved cases against state and not federal officers, it sheds light on whether older

Collins, *supra* note 53, at 109 ("Outside of the tax and related contexts . . . the federal courts have generally supplied constitutional remedies through their own causes of action where remedies may be shaped to take account of . . . competing interests.").

72 165 U.S. 58, 59, 62, 91 (1897) (damages for seizure of liquor); Scott v. Donald, 165 U.S. 107, 110 (1897) (injunction).

73 *Scott*, 165 U.S. at 72–73; *Scott*, 165 U.S. at 113–15.

74 *See Scott*, 165 U.S. at 78–80 (describing allegations that would support possible exemplary damages so that the amount in controversy for subject-matter jurisdiction would be enough: "After alleging that the plaintiff, in importing for his own use the articles mentioned, were in the exercise of his legal rights guaranteed by the Constitution of the United States, it is averred, in the several declarations, that the defendants were notified that any seizure of said goods, under any pretence of authority, would be a grievous trespass and in disregard of constitutional rights, for which they would be held responsible . . . ."); Donald v. Scott, 67 F. 854, 855 (C.C.D.S.C. 1895) (indicating that the plaintiff's bill (complaint) "avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the interstate commerce law as established by the constitution and laws of the United States, and is null and void"); *id.* at 856 (rejecting the defendants' argument that the case did not arise under federal law: "These questions made in the bill are federal questions."); *id.* at 855 (stating that the plaintiff was a South Carolina citizen); *Scott*, 165 U.S. at 117 (affirming the circuit court decision in *Donald v. Scott*).

75 Hernández v. Mesa,140 S. Ct. 735, 742 (2020) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)). *But cf.* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 541 (2013) ("[T]he federal courts' pre-*Erie* approach could easily and properly have been retained and recharacterized in post-*Erie* terms as the application of a federal common law of remedies for constitutional violations."). The petitioners in *Hernández* cited a number of the cases such as those

precedents for federal question actions raising constitutional claims against officers reflect legitimate exercises of judicial power. If one adopts a skeptical view of general law as does Justice Alito, how much difference would it have made to the result in *Scott v. Donald*? To comply with post-*Erie* suppositions, one would now have to assume that the underlying trespass action was state law, not general law. If the result would be no different under (post-*Erie*) state or (pre-*Erie*) general law, then such trespass suits should remain useful precedent for a federal question trespass action to enforce the Constitution against federal officers.

Consider first what would have happened if the State of South Carolina purported not to allow a trespass action against its constables in the circumstances of *Scott*. If the action arose in state court, the Supreme Court on direct review could require the state to maintain such a state-law trespass action as a matter of federal constitutional law. *Poindexter v. Greenhow* and later cases indicate that the state would have been required to provide the remedy.[76] The action in *Scott*, however, was brought in federal court, and under federal question jurisdiction. But even if one sees the underlying trespass action as based in state law, the Court could disregard a state's attempt to abrogate the trespass remedy, thereby treating the state-law trespass action as constitutionally necessary.[77]

* * *

That, however, would—for a federal common-law skeptic—raise the question of how the required state-law trespass action arose under federal law.[78] In other words, a remedy such as damages or injunctions may be constitutionally necessary to address certain trespassory harms. But the remedy need not necessarily take the form that the Court gives it—in this case allowing the Constitution to be alleged in the complaint and allowing original federal court jurisdiction. And although *Scott* preceded the Court's well-pleaded complaint decision in *Louisville & Nashville Railroad Co. v. Mottley*,[79] the Court already employed such a rule by the time of *Scott*—and *Scott* seemed to satisfy it.[80]

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listed *supra* notes 40–41; *see also* Brief for the Petitioners at 8, 11–12, Hernández v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3714475, at *8, *11–12.

76 Similarly, a federal diversity court could have entertained the claim.

77 *See* Hill, *supra* note 21, at 1111 ("If . . . damages and possibly other legal remedies must be sought under state law, the outcome probably is not materially different from what the outcome would be if the right were deemed to arise under the Constitution, apart from the issue of the federal question jurisdiction of the federal district courts.").

78 *See* Merrill, *supra* note 3, at 51 (indicating there is no justification for new remedies "[i]f existing state and federal remedies are adequate"). *But cf.* Schrock & Welsh, *supra* note 12, at 1136 (not addressing possible state-law-based remedies in finding the *Bivens* remedy appropriate).

79 211 U.S. 149 (1908).

80 *See id.* at 154 (citing prior cases applying the well-pleaded complaint rule to cases filed originally in federal court); Metcalf v. Watertown, 128 U.S. 586 (1888). The Court would later read the 1887 revisions to the removal provisions as also requiring that the

Perhaps this feature of pleading in *Scott* would be acceptable to the skeptic if the state itself allowed the plaintiff to plead the officer's alleged lack of justification in the complaint. The Court, however, in these pre-*Erie* cases made no such inquiry. And if the state did not allow such pleading, then arguably the Supreme Court's allowing federal question jurisdiction would run afoul of federalism. And the alternative route for legitimacy—Congress's approving such a change—was arguably unavailable as well. Thus, separation of powers was also offended.

B. Statutory Authorization in the 1875 Act Apart from Constitutional Necessity?

But it seems at least possible that Congress intended the 1875 "arising under" jurisdiction to encompass federal question actions such as those in *Scott*. As noted above, in cases against federal officers prior to 1875, "arising under" jurisdictional provisions in early federal statutes apparently authorized claims of traditional common-law actions for monetary relief that pleaded the lack of official justification in the complaint.[81] Indeed, some might go further to argue that the 1875 Act generally authorized the Court to confect constitutionally necessary or appropriate remedies.[82] If the 1875 provision for original federal question jurisdiction can properly be interpreted to encompass jurisdiction over the trespass action in *Scott*, then neither federalism nor separation of powers is offended.[83]

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federal question appear on the face of the plaintiff's well-pleaded complaint. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461 (1894).

81 *See supra* text accompanying notes 45–49; *cf.* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 & nn.32–34 (1986) (indicating that some proponents of the 1875 jurisdictional provision believed they were extending jurisdiction to the full extent allowed by Article III and citing authority). The Act was one of several provisions expanding federal jurisdiction, including the provision for habeas for persons held "in violation of the constitution." *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. The modern habeas provisions are codified at 28 U.S.C. §§ 2241(c)(3), 2254(a) (2018). The removal provision of the 1875 Act seems also to have contemplated federal defense removal. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471.

82 Professor Fallon has suggested that the 1875 Act might be read in light of a more general interpretive presumption, that

> when Congress vests the federal courts with federal question jurisdiction, they should be presumed to have common-law-making powers to recognize causes of action that are necessary or appropriate to protect constitutional rights. Congress could legislate to override that presumption—but its attempted override would then be subject to as-applied challenges in particular cases.

He notes that this presumption would help explain the general lack of objection to injunctions against constitutional violations. Email from Richard Fallon, Professor of L., Harvard L. Sch., to authors (Dec. 19, 2020, 5:45 PM) (on file with authors).

83 This interpretation is supported by older "arising under" claims against federal officers both before and after the 1875 Act, *see supra* text accompanying notes 45–49, and by the interpretation of the act in the *Virginia Coupon Cases*, as well as in injunction claims under the federal question statute. *See supra* notes 55–63 and accompanying text.

C. Constitutional Necessity for Treating the Action as Arising Under Federal Law?

Of course a skeptic might discount the congressional intent argument, perhaps arguing that jurisdictional provisions should not generally be read as providing causes of action.[84] But the actions in *Scott* were state- or general-law actions for trespass damages and to enjoin a trespass where the lack of justification was pleaded in the complaint.

In addition, the skeptic might argue that the Court's countenancing a federal question version of the state-law trespass action under the 1875 Act itself needed to be necessary. And such a showing of necessity could be difficult, given that lower federal court jurisdiction is rarely constitutionally required in light of Congress's control of such jurisdiction.[85] If state courts might already supply needed remedies, or the Supreme Court could compel them to, perhaps any showing of absolute necessity for the federal question action would fail.[86]

Scott v. Donald, however, involved both a damages claim and an injunctive claim brought under the federal question statute.[87] And as a general matter, federal common-law skeptics are not apt to question the propriety of federal question jurisdiction over actions to enjoin trespasses alleged to violate the Constitution—actions in which the plaintiff pleads the lack of justification in the complaint. They presumably see such actions as within the Framers' contemplation with respect to the Constitution or the federal question statute, or as required to implement the Constitution.[88]

The injunctive actions and the trespass actions, however, were merely different versions of the same underlying protection against unjustified invasions of property. If one is as strict with injunction actions as with damages,

84 *Cf.* Merrill, *supra* note 3, at 42 (stating that a jurisdictional grant generally is not sufficient as a grant of delegated lawmaking power to courts); Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1432 (2017) (same).

85 It is common to discuss duties on the federal courts to supply constitutionally necessary remedies, so long as they have jurisdiction. True, Professor Hart's *Dialogue* indicates that state courts are the ultimate guarantors of constitutional rights. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). But a large part of the *Dialogue* addresses how federal courts should use and have used their remaining jurisdiction to resist congressional jurisdiction stripping, with the state courts presented as a last line of defense. *See generally id.*; Woolhandler & Collins, *supra* note 53, at 118.

86 In addition, diversity jurisdiction would have continued its historic role in providing damages and injunctive relief in constitutional cases.

87 *Cf.* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 301 (1995) (noting that § 1331 is generally seen as adequate to support equitable relief without other explicit congressional authorization, and that injunctions are generally only available when remedies at law are inadequate); Nichol, *supra* note 33, at 1136 (arguing that damages should not be treated differently from injunctive relief with respect to the Constitution and the federal question statute, 28 U.S.C. § 1331 (2018)).

88 *See* Fallon, *supra* note 23, at 987–88 (arguing that *Bivens* remedies are supported by analogy to *Ex parte Young*, the exclusionary rule, and requirements that state courts entertain damages remedies).

then perhaps the Court should not have allowed a federal question injunctive action in *Scott*, at least without exploring how state courts required such actions to be pleaded—assuming we are analyzing *Scott* under post-*Erie* suppositions.[89] The Court might also need to ask whether state injunctive remedies were adequate, or whether direct review might suffice.[90] In the area of injunctive relief, however, the skeptics do not seem to require a showing of strict necessity in the sense that the constitutional right would otherwise be "a mere 'form of words.'"[91] Whatever their requirement of necessity consists in, they take as a given that a federal court injunctive remedy in many circumstances meets it without regard to state-court remedies or pleading requirements.

Perhaps the skeptic would urge that injunctions are somehow a more obligatory remedy than damages.[92] Both damages and injunctions, however, may be constitutionally required remedies although perhaps not equally so in all cases.[93] Injunctions may be more time sensitive than damages actions, thus perhaps making an original federal forum more important. But state

89 *Cf.* Harrison, *supra* note 32, at 1010, 1015 (arguing that *Ex parte Young* involved a claim for an antisuit injunction wherein a plaintiff could allege in the complaint a defense to an action at law). Professor Harrison does not specify the source of the antisuit equity action but has stated he now thinks it is federal equity. Letter from John Harrison, Professor of L., Univ. of Va. Sch. of L., to authors (Dec. 29, 2020) (on file with authors).

90 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400, 404 (1971) (Harlan, J., concurring) (pointing out that injunction actions indicated that the right to be free from unreasonable searches and seizures was federal); *cf. In re* Tyler, 149 U.S.164, 189 (1893) ("Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, but all this is nothing to the purpose. The legislature of a State cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a State does not involve a question of power."); Hill, *supra* note 21, at 1140 (indicating that post-*Erie*, "if the view is taken that the right to an injunction in a case like *Ex parte Young* is given not by the Constitution but by equity conceived of as an independent substantive system, the question that inevitably arises is whether it is federal equity or state equity. If state equity, then a federal injunction can not issue in a case like *Ex parte Young* unless the state would give it, which is obviously not the law.").

91 *Bivens*, 403 U.S. at 399 (Harlan, J., concurring) (quoting from an opinion below and stating that this was essentially the government's position); Merrill, *supra* note 3, at 52 (favoring this formulation).

92 *See supra* text accompanying note 31.

93 For example, tax remedies in modern practice are generally by way of postexaction monetary remedies rather than injunctions. *See* Woolhandler & Collins, *supra* note 53, at 112. So, too, inverse condemnation actions have often displaced injunctions with respect to takings. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 98–99, 133–34 (1999) (discussing displacement of injunctions by permanent damages remedies); *cf.* Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1405 (1964) (noting but disagreeing with the argument that state court actions at law against federal officials are less intrusive than equity actions); Katz, *supra* note 71, at 43 (arguing that damages and injunctive actions should be treated similarly).

court hurdles and delays to damages relief may also significantly undermine the necessary remedy.

Finally, one could argue that the Rules of Decision Act ("RDA")—whose interpretation was at issue in *Erie*—was particularly directed to legal, not equitable, actions, and that one should read *Erie*'s interpretation of the RDA with respect to actions at law back into cases like *Scott*.[94] Thus, one might argue that Congress's grant of equity jurisdiction, including in the 1875 Act,[95] delegated to the federal courts more authority to adjust equity pleading requirements and remedies.[96] But the above analysis looks at the equity actions in *Scott* from the modern skeptic's view.[97] Under that view the federal courts generally have no more authority to deviate from state-law defaults when the action is in law than when it is in equity.[98] If a federal question version of the equity action such as in *Scott* is legitimate because it is necessary (even if not in a "mere form of words" sense), that would lend support to the argument that a federal question damages action was necessary as well.

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This Essay thus far has looked at the Court's use of damages and injunctive actions as ways to enforce the Constitution in the context of trespassory harms. The Constitution's strictures were meant to apply as law in cases

94 *See* Hill, *supra* note 21, at 1129 (indicating that the plaintiff's bill in equity, because it had to allege the inadequacy of the remedy at law, would tell the "entire story"); Merrill, *supra* note 3, at 28, 31 (relying generally on the RDA to support his views); Redish, *supra* note 3, at 766 (relying on the RDA to support his skeptical view of implied statutory actions).

95 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (stating "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States").

96 *See* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 253–54 (2010) (arguing that federal judges exercised greater freedom in applying nonstate law in equity than in actions at law, including as to procedures, remedial laws, and sometimes as to primary rights); Preis, *supra* note 32, at 23–24 (arguing that Congress gave federal courts more power to fashion equity actions). The Court seemed to exercise a similar freedom in customizing actions to accommodate federal constitutional issues, whether the case was one in equity or at law. *See generally* Woolhandler, *supra* note 39.

97 This is true even though they do not seem to question *Ex parte Young* style injunctions.

98 *See* Merrill, *supra* note 3, at 29 (arguing that the fact that the RDA did not cover equity should not be seen as license for the federal courts to expand their powers); *id.* (acknowledging that the federal courts in equity felt relatively free to draw on English rules of decision, but also noting that the Court in *Erie* indicated that the default to state law would apply even without statutory authority); *id.* at 29 n.128 (also relying on *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)); *id.* at 50 (indicating that the analysis of the propriety of federal common law should not change whether the relief is for damages or an injunction). The RDA moreover is not now limited to actions at law. Act of June 25, 1948, ch. 646, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (2018)).

properly before the courts, and the Framers contemplated legal enforceability through general or state-law trespass actions. Injunctions against imminent or ongoing trespasses provided a similar remedy to damages actions, and both types of actions could be seen as constitutionally necessary. The tradition of such actions was supported by a methodology that relies on precedent and common-law suppositions.

To respond to the criticism that older federal court damages actions merely reflected pre-*Erie* general common law, Section III.B analyzed *Scott v. Donald* in light of post-*Erie* assumptions by treating the underlying trespass action as deriving from state law rather than general law. But because the underlying actions for trespass and to enjoin a trespass that could not be justified given constitutional limitations were—we have argued—necessary remedies, treating the issue as one of state law as opposed to general law would not have changed the result in these cases; the actions would still have been available. The question then was whether treating the federal issue as part of the plaintiff's complaint, which gave lower federal court jurisdiction apart from diversity, could be justified by congressional intent or necessity. Viewing the constitutional issues as part of the complaint for both damages and injunctive actions against governmental actors may have comported with framers' expectations for the 1875 Act. And both types of action would meet a constitutional necessity test that includes some practical judgment as to whether leaving the administration of remedies to the state courts would significantly undermine the constitutional right.

IV. Going Beyond Trespass

The above argument has relied upon the traditional link between trespass and injunctive actions in cases raising constitutional questions. This link would be weakened as the Court allowed more injunctions that were not addressed to imminent trespasses. In *Ex parte Young*,[99] for example, the Court allowed an injunction against court-based enforcement of an unconstitutional rate regulation, that the Court analogized to a trespass.[100] Other cases allowed injunctions against unconstitutional actions that would not lead to either physical trespass or to enforcement actions against the plaintiff for violations of the challenged law. For example, in *Pierce v. Society of Sisters*, the Court allowed private schools to challenge a state law that imposed penalties on parents who did not send their children to public schools.[101]

99 209 U.S. 123 (1908).

100 *Id.* at 166–67; *see* Fallon, *supra* note 23, at 972 (seeing *Ex parte Young*, 209 U.S. 123 (1908), and *General Oil Co. v. Crain*, 209 U.S. 211 (1908), as marking a move "from damages to equitable remedies as the more indispensable safeguard of constitutional rights"); Preis, *supra* note 32, at 32 (tracing use of equity for constitutional cases to the *Lochner* era).

101 268 U.S. 510, 530–32, 536 (1925); *see also* Truax v. Raich, 239 U.S. 33, 35–36, 39 (1915) (allowing an injunctive action by an employee against the enforcement of a state law that penalized employers who did not employ at least eighty percent qualified voters or native born Americans); Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 832–36 (2016) (discussing expansion of individuals' ability to chal-

There was, moreover, no pretense during the *Lochner*[102] era or thereafter that every unconstitutional regulatory scheme that could occasion an injunction could also occasion a claim for damages.[103] Damages often would have been either inadequate, or beyond the means of any individual official defendant, particularly in cases challenging broad regulatory schemes.[104] Injuries not involving direct trespasses, moreover, did not carry with them the same pedigree as the trespass action for damages.

Although far outstripped by federal question injunctive actions, federal question damages actions did not entirely disappear.[105] Some federal question damages actions proceeded against state and local officials under the federal question statute,[106] but § 1983 actions would eventually supersede them. A few federal question damages actions also proceeded against federal officers,[107] but federal officer removal provisions made the question of federal question suits against federal officers less pressing.[108]

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lenge government action without showing invasions of traditional interests in individual liberty or property).

102 Lochner v. New York, 198 U.S. 45 (1905).

103 *See* Hill, *supra* note 21, at 1137 ("Thus, despite the many instances, of which *Ex parte Young* is such a conspicuous example, in which officers have been the subject of equitable relief in connection with the administration of unconstitutional regulatory statutes, it does not seem to have been seriously suggested that, absent malice, such officers were personally liable for the damages that must often have been suffered by reason of their official conduct.").

104 *See* Collins, *supra* note 62, at 1530–31.

105 *See, e.g.*, Patton v. Brady, 184 U.S. 608, 611–12, 614 (1902) (allowing a federal question assumpsit action against a federal official who enforced an unconstitutional tax); Collins, *supra* note 62, at 1521–23, 1521 nn.157–58 (citing cases).

106 *See* Collins, *supra* note 62, at 1521–22 nn.158–59 (citing voting cases); *see also* Jacobs v. United States, 290 U.S. 13, 15–16 (1933) (in an action under the Tucker Act, indicating that the right to just compensation arose from the Fifth Amendment and did not require statutory authorization); Foster v. City of Detroit, 405 F.2d 138, 140 (6th Cir. 1968) (successful § 1331 claim under the Fifth Amendment for losses from a discontinued eminent domain proceeding); Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 389 F. Supp. 486 (N.D. Cal. 1975) (successful §1331 action under the Fifth Amendment for inverse condemnation).

107 *See, e.g.*, Spreckels Sugar Refin. Co. v. McClain, 192 U.S. 397, 406–07 (1904) (stating that the suit against the internal revenue collector to recover duties paid under protest arose under federal law); *id.* ("It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its Statement of Demand, has its sanction in that instrument, if it be true, as alleged, that the act of 1898, under which the defendant proceeded, when collecting the taxes in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue."); Iron Gate Bank v. Brady, 184 U.S. 665, 666–67 (1902) (tort action under the federal question statute for enforcing unconstitutional federal tax). While these cases were prior to *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908), the well-pleaded complaint rule did not originate in that case. *See supra* note 80 and accompanying text.

108 The removal provisions became universal with the 1948 revisions. See 28 U.S.C. § 1442(a)(1), *discussed in* FALLON ET AL., *supra* note 32, at 853–54.

When the Supreme Court faced tort claims against federal officers in which the plaintiff claimed original federal question jurisdiction, the results were inconclusive. *Bell v. Hood* presented a traditional trespass claim where the lack of justification due to constitutional constraints was alleged as part of the complaint.[109] The Court held that a case seeking damages for FBI agents' alleged Fourth and Fifth Amendment violations should not be dismissed for want of subject-matter jurisdiction under the federal question statute.[110] The actions, however, were dismissed on remand, for failure to state a claim.[111] Other tort actions against federal officers in which the Court indicated that the actions did not arise under federal law did not present instances of constitutionally necessary relief under traditional or current standards.[112] *Barr v. Matteo*[113] and *Howard v. Lyons*[114] both involved defamation claims, and the Court treated the defenses—but not the underlying tort claims—as grounded in federal law in rejecting the claims. It reached a similar result in *Wheeldin v. Wheeler*, where petitioner unsuccessfully sought damages for a congressional staffer's issuance of an allegedly unlawful subpoena.[115]

Reinforcing the increased asymmetry between the availability of injunctions and damages were officer damages immunities. Immunity doctrine reflects that countervailing interests, such as concerns for overdeterrence and fairness to individual officers, may overcome the deterrent and compensatory purposes of damages relief. The tradition of absolute immunity for judges and legislators indicates that countervailing interests may totally defeat claims for damages within certain categories of cases.[116]

V. EVALUATING *BIVENS*

Bivens involved trespassory injuries that could not be justified given constitutional limitations similar to those in *Scott v. Donald*. Justice Brennan's opinion in *Bivens* did not much advert to the Framers' intent that the Constitution be judicially enforceable, that trespass actions would be available to enforce it, nor to precedent supporting such actions. For some, those factors might arguably sustain the *Bivens* decision even apart from arguments of necessity.

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109 327 U.S. 678, 679 (1946).

110 *Id.* at 684–85.

111 Bell v. Hood, 71 F. Supp. 813, 821 (S.D. Cal. 1947), *discussed in* Katz, *supra* note 71, at 2.

112 *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Gregory C. Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1813 (2021) (approving the exclusion of defamation claims from the Federal Tort Claims Act).

113 360 U.S. 564, 568, 574 (1959).

114 360 U.S. 593, 594, 597 (1959).

115 373 U.S. 647, 648 (1963); *id.* at 650 (in reasoning that the claim itself was not federal, stating that "the facts alleged do not establish a violation of the Fourth Amendment").

116 State and federal legislators are generally immune from injunctive relief as well.

A. Necessity of a Damages Remedy in Bivens?

But this Essay also asks if (1) a damages remedy was constitutionally necessary, and (2) whether the particular federal version of the remedy in *Bivens* was statutorily authorized or constitutionally necessary. First, was a damages action a less necessary remedy (apart from its particular federal form) in *Bivens* than in *Scott*? As discussed above, the wider availability of injunctions for ongoing and threatened violations, as well as the growth of individual officer damages immunities, may have led jurists to see damages as a less insistent remedy. Indeed, the government's argument in *Bivens* relied heavily on the exclusionary rule[117] to argue that a damages remedy was unnecessary.[118]

But accepting the importance of injunctive-type relief, including the exclusionary rule, for promoting the rule of law does not mean that damages remedies are never constitutionally required. Professors Fallon and Meltzer famously said that a principle of "effective individual remediation" is not unqualified, and may operate more as to some types of violations than others.[119] But "an overall structure of remedies [must be] adequate" to keep government officials "generally within the bounds of law."[120] This systemic framework may encompass some hard-edged requirements of damages remedies in some types of cases, particularly for clear violations of certain constitutional rights.[121] For example, if the Fourth Amendment were enforced only via the exclusionary rule without a possibility of damages for clear violations, officials could engage in illegal searches and seizures so long as they did not intend to prosecute the particular object of the search and seizure.[122]

B. Statutory Authorization and/or Constitutional Necessity of a Federal Damages Remedy?

To say that a damages remedy is constitutionally necessary does not require that remedy must take the form of a federal action (or an action

117 Brief for the Respondents at 24–25, 33, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900, at *24–25, *33; *see also id.* at 40 (arguing that a remedy should be implied only if it is "absolutely necessary"); *id.* at 24 (arguing that a remedy should not be implied "unless [it] is vital to protect constitutional rights").

118 *See id.* at 24.

119 Fallon & Meltzer, *supra* note 31, at 1789.

120 *Id.* at 1790 & n.317.

121 *See* Fallon, *supra* note 23, at 984 (stating it is "fallacious to think that the availability of remedies . . . including the traditional tort remedies of damages and injunctions, is always a matter of constitutional indifference"); *id.* at 988 (in applying *Bivens*, the Court should acknowledge that "judge-crafted remedies for constitutional violations are not only historically pedigreed, but sometimes constitutionally necessary to promote rule-of-law values").

122 *Cf.* Tanzin v. Tanvir, 141 S. Ct. 486, 492 (2020) (holding that damages were available against individual federal officers as "appropriate relief" under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(c) (2018), reasoning inter alia that damages were "the *only* form of relief that can remedy some RFRA violations").

against the individual officer as opposed to the government). Although no Federal Tort Claims Act claim against the government was then available for intentional torts, the existing baseline of remedies at the time of *Bivens* included state-law tort actions as well as the exclusionary rule.[123] And in addition to arguing that the exclusionary rule provided a significant and perhaps sufficient remedy, the government argued that "state law adequately compensates the victim of an unlawful search or seizure for his injuries,"[124] and devoted several pages in its brief to New York tort law.[125] One could therefore see the argument in *Bivens* as less about whether a damages remedy might be constitutionally required, and more about whether the particular federal form of the action was appropriate.

1. Authorization in the 1875 Act Apart from Necessity?

As discussed above, the 1875 jurisdictional provision can be read as authorizing federal jurisdiction over a trespass action with the constitutional issue pleaded in the complaint.[126] *Bivens*, like *Scott*, can be justified by this reading.[127] To be sure, *Bivens* differed from *Scott* in that the Court in *Bivens* treated the action as derived from the Constitution as opposed to a common-law action (whether general or state law) with a federal ingredient in the complaint. For some, the move to treating the action as derived from the Fourth Amendment may be objectionable. The duty not to trespass, they might argue, does not take its origins directly from the Constitution but from state law. The Constitution generally limits government power rather than creating freestanding judicially enforceable duties, and thus negates a defense of justification rather than providing the source of the action.

It is possible, however, to argue that the Fourth Amendment creates tort-like duties.[128] What is more, there is no inherent illogic in restating the ele-

123 Brief for the Respondents, *supra* note 117, at 25, 33–34; *see also Bivens*, 403 U.S. at 390 ("Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents."); *see also Bivens*, 403 U.S. at 400 (Harlan, J., concurring) ("I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy.").

124 Brief for the Respondents, *supra* note 117, at 6 (summary of argument).

125 *Id.* at 35–38 (detailing New York tort law). The government's focus on the exclusionary rule was grounded in the argument that damages remedies were generally ineffective at deterring unconstitutional behavior; *see infra* notes 133–34 and accompanying text.

126 *See supra* notes 81–83; *cf.* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–22 (2009) (arguing that Congress has approved *Bivens* in subsequent legislation).

127 As noted *supra* note 82, the 1875 Act could be read as providing a broader grant of common-law powers to the courts to confect constitutionally necessary and appropriate remedies.

128 *See* Harrison, *supra* note 32, at 1021 ("The Fourth and Eighth Amendments, which after *Bivens* give rise to damages actions, are among the Constitution's closest analogs to the law of tort.").

ments of a *Bivens* claim as a duty not to trespass where the defendant lacks legal justification due to constitutional constraints.[129] Treating the lack of constitutional power as central to the complaint, moreover, was already prevalent in injunctive suits,[130] and it is doubtful that treating the actions as state-law claims with a federal ingredient would have changed the overall result.[131] Treating the actions as constitutionally based rather than as state-law based thus would seem generally consistent with the argument that Congress intended the 1875 Act to allow pleading an officer's want of power in the complaint. And as noted above, *Bivens* skeptics are willing to allow for federal common law where specifically statutorily authorized, without a showing of constitutional necessity.[132]

2. Constitutional Necessity of a Federal *Bivens* Action?

Putting aside the statutory argument, the question becomes whether the particular federalized form of relief prescribed by the Court in *Bivens*—a federal cause of action under the Constitution—should be seen as necessary. After all, to say that a damages remedy is constitutionally required does not necessarily require that the action be treated as a federal constitutionally based action.

It is noteworthy that the government, despite arguing in one section of its brief that state remedies were adequate to compensate the plaintiff,[133] also took the position that state-law remedies were ineffective as a general matter, especially when it came to deterrence of misconduct.[134] The plaintiffs also viewed state tort remedies as inadequate.[135] Thus both the govern-

129 Nor is it odd for defenses to become elements of a claim as a matter of constitutional necessity, as is true, for example, in public figure defamation claims.

130 *See* Fallon, *supra* note 23, at 936 (noting that Congress and the Court developed a scheme of constitutional remedies that differed from the scheme of liability for private wrongs). *See generally* Ann Woolhandler & Michael G. Collins, *Overcoming Sovereign Immunity: Causes of Action for Enforcing the Constitution*, *in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 165 (Karen Orren & John W. Compton eds., 2018) (discussing move from more common-law based to more constitutionally based claims).

131 The Westfall Act now precludes using a state-law action. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended 28 U.S.C. §§ 2679(b), (d) (2018)).

132 *See supra* text accompanying notes 13–15.

133 *See* Brief for the Respondents, *supra* note 117, at 38 ("Accordingly, had petitioner brought his action in a New York court on the theories of trespass, false imprisonment, battery, and mental distress, he would have had the benefit of a body of state law that permits substantial recovery.").

134 *See id.* at 26–28. The government's statement of its argument suggested that perhaps it saw the damages remedy as inadequate for deterrence but adequate for compensation. *See id.* at 5–6. *But cf. id.* at 28 (discussing low recoveries in damages actions). Or perhaps the government was arguing that there were no legal deficiencies in New York law, *see supra* note 125, even if plaintiffs faced many other obstacles to recovery.

135 *See* Brief for Petitioner at 11, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116899, at *11; Brief for the Respondents, *supra* note 117, at 25, 32.

ment and Bivens relied on the Court's characterization of tort remedies as futile in *Mapp v. Ohio*.[136] Both parties also relied on various sources that had concluded that existing tort remedies for Fourth Amendment violations were ineffective, due to factors such as lack of sympathy for plaintiffs and the reluctance of judges and juries to impose damages on law enforcement officers.[137]

The plaintiff argued that the futility of state tort remedies supported implying a Fourth Amendment cause of action,[138] while the government argued that "[a]lthough state tort law may not effectively control police practices, a federal damage remedy would fare no better because the factors that render state law ineffective would apply equally to a federal remedy."[139] The Court should imply a remedy, argued the government, only where "absolutely necessary."[140] It continued, "And when, as here, the remedy itself would be ineffective as a deterrent device, and suffer the same difficulties as

136 *See* Mapp v. Ohio, 367 U.S. 643, 652 (1961) (characterizing state tort remedies for the protection of privacy as "worthless and futile"), *quoted in* Brief for Petitioner, *supra* note 135, at 11; *see also* Brief for the Respondents, *supra* note 117, at 25 (referring to the futility of other remedies as a reason for the exclusionary rule in *Mapp*).

137 *See* Brief for the Respondents, *supra* note 117, at 27–29. The government brief quoted in its text:

> For one thing the average citizen is not willing to take the financial risk and trouble attendant upon litigation. Days may be lost from work, heavy expenses may be incurred in an unsuccessful suit and the recovery may be quite small. . . . Attorneys may discourage suits of this nature because they are unremunerative and because of a belief that the judges are prejudiced in favor of police officers . . . . (quoting Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1209 (1952)).

Both parties cited, inter alia, an influential article by Caleb Foote. *See generally* Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955) (contending generally that current tort remedies were inadequate but expressing some hope for further developments under § 1983 and also arguing for other reforms), *cited in* Brief for Petitioner, *supra* note 135, at 11 (citing Foote's article for the proposition that the trespass remedy had become "completely impotent"); Brief for the Respondents, *supra* note 117, at 26, 29–30, 34 (arguing that problems Caleb Foote enumerated would be present in a Fourth Amendment action). Caleb Foote cited to factors such as jury reluctance to award damages, limitations on damages, immunities, and evidentiary rules. *See* Foote, *supra*, at 500–06. The government also suggested that the existing damages remedy under § 1983 was ineffective. *See* Brief for the Respondents, *supra* note 117, at 26–27.

138 Brief for Petitioner, *supra* note 135, at 11.

139 Brief for the Respondents, *supra* note 117, at 5; *see also id.* at 26–27 (arguing that "the use of 42 U.S.C. § 1983 to redress unlawful searches by state police apparently has been minimal" (footnote omitted)); *cf. Bivens*, 403 U.S at 421 (Burger, C.J., dissenting) ("Private damage actions against individual police officers concededly have not adequately met this requirement [for a workable remedy], and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective."). Chief Justice Burger's dissent primarily recommended a legislative replacement of the exclusionary rule. *See id.* at 411–24.

140 Brief for the Respondents, *supra* note 117, at 40.

comparable existing remedies, there is no necessity."[141] Both parties, then, argued that existing damages were less than efficacious.

One could nevertheless argue that the *Bivens* remedy was less necessary than the federalized tort and injunctive actions in *Scott*. The reason would be that the tort actions against federal officials at the time of *Bivens* would universally be tried in federal courts, due to removal. Thus, the parties would not have to run the gauntlet of state court. True, so long as the action were styled as one of state law, the federal court might end up contending with some state-law issues.[142] But the lower federal courts could presumably police state-law-based contractions of liability to assure consistency with constitutionally necessary remedies,[143] at least if the federal courts understood that state-law-based claims were constitutionally required.[144]

Proponents of a broader view of federal common law might point out that if the *Bivens* action was unnecessary because the federal courts could infuse the state-law action with federal requirements, then preserving the form of a state-law tort action would be a trivial homage to the federalism-based default to state law.[145] State law at the time of *Bivens* could still operate of its own force as to individual officer liability, but the room for its independent operation was narrow.[146] A cause of action for damages was

141 *Id.*

142 *See* Hill, *supra* note 21, at 1145 (stating that if "compensatory relief is an integral aspect of the constitutional right to be free from unreasonable searches and seizures . . . [then] there can be no plenary state control over significant incidents of the right, such as the defense of privilege, measure of damages, and the like, notwithstanding the possible allowance of some state rules as a matter of comity"); *id.* at 1155, 1160–61 (not necessarily taking the position that damages were constitutionally required); *id.* at 1151, 1161 (not necessarily taking the position that the action should be treated as a federal cause of action, entitled to federal question jurisdiction); *cf.* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1535 (1972) (arguing that the success of a state-law tort action would have largely depended on the vagaries of state law).

143 At the time, the federal courts in hearing suits against federal officers were still working through whether the broad immunities in cases such as *Barr v. Matteo*, 360 U.S. 564 (1959), would be applicable in federal officer suits. *See, e.g.*, Kelley v. Dunne, 344 F.2d 129, 133 (1st Cir. 1965) (holding that such broad immunity did not apply with respect to removed suit against postal inspectors involving a warrantless search and seizure). The parties briefed the immunity issue in *Bivens*, but the Court remanded rather than deciding that issue. *Bivens*, 403 U.S. at 398.

144 *See infra* text accompanying notes 159–160 (indicating that state law under the FTCA, which now allows recovery against the United States for intentional torts, may still deny damages even when they would be available under *Bivens*).

145 *Cf.* Bandes, *supra* note 87, at 336–37 (arguing that the Constitution should be enforceable irrespective of congruence with state or common law); Fallon, *supra* note 23, at 981 (suggesting that basing liability on the Constitution rather than state law is preferable, and that the FTCA should be amended to allow suits against the federal government for constitutional violations, and that such suits should not be based on state law); Katz, *supra* note 71, at 55–58 (arguing against using state law as the basis for damages actions against federal officials for constitutional violations).

146 *See* Hill, *supra* note 21, at 1127 (in discussing the Second Circuit decision in *Bivens*, observing that "even if rights against the officer for unconstitutional behavior are deemed

constitutionally required in a case of trespassory harms like *Bivens*,[147] and the extent of allowable defenses was already federal.[148] Given the constitutional content of the action, a *Bivens* defender could say that the Court was not stepping on congressional prerogatives by providing the remedy without more explicit congressional authorization. Nor was the allocation of jurisdiction between state and federal courts changed given that the actions would already be tried in federal court.[149]

In summary, the constitutional action in *Bivens* was supported by expectations that the Constitution would provide law for courts to apply, that trespass actions would be a form of action in which the Constitution would apply, and that trespass actions were constitutionally necessary to address certain constitutional violations. The 1875 Judiciary Act supported treating such claims as arising under federal law in both the injunction and damages settings. Nevertheless, a *Bivens* critic might still claim that implying a constitutional action was unnecessary given that federal courts could assure that, in administering the state-law action, constitutional requirements would have to be met.

VI. OTHER ACTIONS

Some of the arguable justifications for *Bivens* even under a fairly strict view of federal common law, however, do not necessarily carry over to the wide variety of constitutional damages claims that litigants brought thereafter. The availability of injunctive relief for nontrespassory harms does not always carry a presumption of damages. In addition, immunity-like concerns could in some instances totally outweigh the need for a damages remedy—as one sees in the traditional absolute damages immunities for judges, legislators, and prosecutors.[150] And even where damages might presumptively be a required remedy, a *Bivens* action may not be necessary in light of other reme-

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to arise under state law in the sense in which that term is commonly used, the infusion of federal law is very substantial, and severely limits the competence of the state").

147 A remedy's being constitutionally necessary does not necessarily mean the duty must be federal, as is evident in the *Parratt* line of cases. *See supra* text accompanying notes 69–70. On the other hand, when the federal courts themselves enforce such constitutionally necessary remedies, they tend to federalize them. That is, the implications in the *Parratt* line are that if the state fails to provide remedies for certain intentional torts, a § 1983 action would be available.

148 *Cf.* Merrill, *supra* note 3, at 18 (stating that the federalism principle as a restraint on federal common law "is applicable only when federal law interferes with actual state interests").

149 *See* Vázquez & Vladeck, *supra* note 75, at 513 (noting that recognizing a federal cause of action does not increase the federal judicial workload, and the federal action is "easier . . . to administer, and . . . could be tailored more closely to the policies underlying the relevant constitutional provisions").

150 *See* Fallon, *supra* note 23, at 964–65 (stating that such absolute immunity is equivalent to saying there is no cause of action).

dies addressing wrongs of federal officers—remedies over which lower federal courts could exercise adequate supervision.[151]

In *Davis v. Passman*, for example, the Court implied a damages remedy against a Congressman for sex discrimination in employment.[152] The action was not supported by historically available remedies,[153] and the separation of powers concerns animating legislative immunity arguably extended to congressmen's staffing decisions.[154] Similarly in *Schweiker v. Chilicky*, where the Court did not imply a *Bivens* action, there was little support in tradition or constitutional necessity for a damages remedy for alleged procedural due process violations in the adjudication of statutory claims for a government benefit.[155] And administrative remedies, in which there would be full compensation for lost benefits with federal court review, were overall adequate to supply procedural due process and keep officers in check.[156]

Other claims have at least stronger presumptive entitlements to damages remedies under our analysis. For example, *Bivens* actions for use of excessive force by federal law enforcement and corrections officers would seem to supply necessary remedies, especially now that state-law remedies against the officers as individuals are no longer available under the Westfall Act.[157] The Federal Tort Claims Act (FTCA), however, possibly supplies sufficient remedies against the United States in many settings, given its current inclusion of intentional torts as to corrections and law enforcement officers.[158] Indeed, that inclusion arguably makes the Fourth Amendment suit in *Bivens* less necessary today, although the federal courts in FTCA suits may allow for state law[159] and discretionary immunity defenses that are unavailable in *Bivens*

151 *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 388 (1983) (holding that civil service remedies obviated the need for a *Bivens* claim for federal employees alleging retaliation for First Amendment activity).

152 442 U.S. 228 (1979).

153 *But cf.* Fallon, *supra* note 23, at 966 (arguing that equal protection violations have strong claims to remediation).

154 Congress later extended statutory remedies for discrimination to congressional employees. *See* FALLON ET AL., *supra* note 32, at 771 n.3.

155 487 U.S. 412 (1988).

156 *Id.* at 429.

157 Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 2679(b), (d) (2018)).

158 28 U.S.C. § 1346(b). The Act was amended to add intentional torts in 1974. *See* FALLON ET AL., *supra* note 32, at 771.

159 *See, e.g.*, King v. United States, 917 F.3d 409, 419 (6th Cir. 2019) (indicating that the district court had found recovery would be unavailable under Michigan qualified immunity for government employee intentional torts, but factual issues existed precluding summary judgment as to immunity defenses regarding the Fourth Amendment claims), *rev'd sub nom.* Brownback v. King, 141 S. Ct. 740, 750 (2021) (holding that the district court's dismissal of the plaintiff's FTCA claim was on the merits and could bar the plaintiff's *Bivens* claim under 28 U.S.C. § 2676); *see also id.* at 748 n.7 ("We express no view on the availability of state-law immunities in this context."). The district court in *King* indicated that the Michigan state law would require subjective bad faith to overcome qualified immunity in the case. *See* King v. United States, No. 16-CV-343, 2017 U.S. Dist. LEXIS 215640, at *41 (W.D.

actions.[160] The claims in *Hernández* involved excessive force, and alternative remedies were obscure at best.[161] No FTCA action was available because the injury occurred outside of the United States. To be sure, the prospect of opening up *Bivens* remedies as to injuries outside the United States as in *Hernández* raises significant concerns. But even a federal common-law skeptic should have recognized the strength of a claim for a damages remedy in that case before looking to whether special factors should foreclose the remedy.[162]

CONCLUSION

This Essay has considered the propriety of the *Bivens* decision under a fairly restrictive view of the propriety of federal common law. We have looked to whether the Framers of the Constitution and relevant statutes contemplated the trespass action as a vehicle for enforcement of constitutional prohibitions, whether the remedy is supported by common-law methodology and precedent, whether the trespass remedy is constitutionally necessary, and whether the federal form of the action is constitutionally necessary. We have argued that *Bivens* was supported by the Framers' expectations that trespass actions against officials would be a means of implementing the Constitution. Common law and precedent also support the availability of a trespass action and treating it as constitutionally necessary. There is ample support, then, for treating such an action for a constitutionally unjustifiable trespass as supported by Framers' intentions, precedent, and constitutional necessity.

Of course, the question remains as to whether the action should be treated as arising under federal law for purposes of the federal question jurisdictional statute. The 1875 federal question statute arguably authorized the pleading of the constitutional issue in officer trespass cases as part of the complaint, and such statutory authorization supports treating the action as arising under federal law, quite apart from any issue of constitutional necessity. If, however, one requires necessity for recognition of a federally created cause of action, there is an argument that necessity cannot be shown, given

Mich., Aug. 24, 2017); *see also* Kreines v. United States, 959 F.2d 834, 838 (9th Cir. 1992) (reasoning that the rejection of the plaintiff's FTCA claims upon a finding of due care by the officers was not inconsistent with finding liability under *Bivens* for a Fourth Amendment violation); *id.* at 839 ("In the context of the Fourth Amendment, the constitutional criteria for lawful conduct are distinct from those imposed by state tort law.").

160 *See, e.g.*, Simmons v. Himmelreich, 136 S. Ct. 1843 (2016) (FTCA claim was dismissed because discretionary immunity would bar the negligence claim for officers' decision as to where to house an inmate who was beaten by another prisoner, but a *Bivens* claim could go forward); *see also* Sisk, *supra* note 112, at 1828–32 (recommending revisions to the FTCA to better remedy constitutional violations, and discussing problems with the discretionary functions exception).

161 Hernández v. Mesa, 140 S. Ct. 735, 745 (2020) (discussing diplomatic efforts); *id.* at 748 (discussing that state-law actions against individual were unavailable due to the Westfall Act, and that the FTCA excluded claims if the injuries occurred abroad).

162 *Cf.* Pfander & Baltmanis, *supra* note 126, at 121 (arguing that the Court should presume that *Bivens* remedies are available before looking to special factors).

that the Supreme Court, as a matter of federal constitutional law, could have required state-law actions, and the federal courts would have heard such actions against federal officers by removal. But given that the underlying trespass action is constitutionally necessary and would already have a federal forum, it is difficult to say that *Bivens* itself significantly trenched on federalism or separation of powers.