

OF RIGHTS AND REMEDIES:
THE CONSTITUTION AS A SWORD

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In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,† the Supreme Court held that a cause of action for damages against federal law enforcement officers who violate the fourth amendment could be inferred directly from constitutional provisions. Through analysis of the reasoning which necessarily underlies such a holding, the author draws several general conclusions about the respective roles of the Court and Congress in creating and restricting remedies effectuating constitutional guarantees. He then applies his analysis to the possibilities for independent judicial creation of an action against governmental units and for legislative replacement of the exclusionary rule with compensatory remedies against the fisc.

THE positive law of the Constitution has largely been created and applied in cases in which the citizen seeks to invoke a constitutional guarantee as a shield to ward off actions undertaken by the government. The sanction most frequently imposed in response to a constitutional violation is the sanction of nullification: the courts decline to convict on a criminal charge,¹ or decline to admit evidence,² or decline to allow the imposition of civil liability.³ Far less frequently has a constitutional right become an ingredient of an affirmative cause of action. In those instances in which courts have allowed the Constitution to be so utilized, moreover, they have almost invariably done so in reliance upon a legislative mandate;⁴ only rarely, by comparison, have plaintiffs come to the bench armed only with a general jurisdictional statute and a constitutional provision seeking to use judicial power to force affirmative action.⁵ But in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁶ the Supreme Court allowed such an action and finally answered the question it had left undecided twenty-five years earlier in *Bell*

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† 403 U.S. 388 (1971).

¹ See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969).

² See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

³ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴ See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

⁵ See the discussion of injunctive relief based directly upon the Constitution, pp. 1542-43 *infra*.

⁶ 403 U.S. 388 (1971).

v. Hood:⁷ whether one whose fourth amendment rights have been violated by a federal officer has a cause of action for money damages based directly upon the amendment. The Court held that, notwithstanding the absence of legislation creating such a cause of action, the offending officer may be liable in a federal action based upon the Constitution itself. It is the purpose of this Article to examine the logic and implications of that decision.⁸

Admittedly, affirmative uses of the Constitution are not necessarily more dramatic or "activist" than defensive ones. Some of the Court's most warmly disputed decisions, after all, have been products of traditionally defensive uses of the Constitution: *Mapp v. Ohio*⁹ and *Miranda v. Arizona*¹⁰ are contemporary examples. Nevertheless, there is truth to Henry Hart's observation that the use of the Constitution as a sword in litigation attacking governmental actions raises questions "which are among the most far-reaching in the whole field of civil and other liberty."¹¹ Injunctions against the acts of government officers involve the courts in controlling and directing the activities of another branch of government. The granting of money damages against the Government, in the absence of legislative authorization, actively involves the judiciary in policy decisions relating to the allocation of limited resources and, in certain instances, will raise serious questions concerning the enforceability of a court's mandate.¹² And the specter of damage actions against individual officers may have a chilling effect on the good faith execution of governmental policy.¹³

⁷ 327 U.S. 678 (1946).

⁸ The most informative discussions in the pre-*Bivens* literature concerning remedial implementation of the Constitution are H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312-40 (1953); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); *Developments in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827 (1957). The writings of Professor Alfred Hill are a special treasure of profound insights whose importance can hardly be overstated. See Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

For commentary on the court of appeals decision in *Bivens*, see 83 HARV. L. REV. 684 (1970); 48 TEXAS L. REV. 219 (1969).

⁹ 367 U.S. 643 (1961).

¹⁰ 384 U.S. 436 (1966).

¹¹ Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 522 (1954).

¹² See *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

¹³ See generally Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965).

Set against the caution dictated by considerations like these is the principle that every right should find vindication in an effective remedy. As Chief Justice Marshall expressed it: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."¹⁴ Once substantive legal norms have been declared to be in the Constitution, there is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and fulfillment to the promise those norms embody.

I. A RIGHT IN SEARCH OF A REMEDY

These rather heady principles took on concrete relevance in the *Bivens* case. According to Webster Bivens' complaint,¹⁵ six agents of the Federal Bureau of Narcotics entered his apartment in the predawn hours without either search or arrest warrants. Roused from his bed, Bivens was arrested, manacled, and searched in the presence of his wife and children. He was then taken to the New York headquarters of the Federal Bureau of Narcotics, where he was interrogated, fingerprinted, photographed, booked, stripped, and searched again. If the allegations were true, both the arrest and the search were illegal under the fourth amendment; had the prosecution at a subsequent trial attempted to introduce into evidence the fruits of the search, then, of course, Bivens could have successfully moved to suppress the evidence.¹⁶ But Bivens was released from the station house, and no charges were ever filed against him.

What remedies were available to Bivens for this abusive exercise of federal authority? Had the illegal arrest and search been conducted by city police or other agents acting under color of state law, Bivens could have brought suit against the agents under the Civil Rights Act of 1871,¹⁷ in which Congress had created a federal damage action for deprivations of federal rights by state officers. Had Bivens been injured by the federal agents in a more ordinary fashion not directly affecting his constitutional rights

¹⁴ *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 163 (1803).

¹⁵ Brief for Petitioner, appendix at 1, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) [hereinafter cited as *Brief for Petitioner*].

¹⁶ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁷ Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970). Indeed, unaided by counsel, Bivens cited section 1983 in his complaint, but its inapplicability was clear since the search and arrest in question took place under federal, rather than state, authority.

— *e.g.*, had the agents negligently run him down at a crosswalk — he might have successfully sought recompense from the United States under a different dispensation from Congress, the Federal Tort Claims Act.¹⁸ But a specific provision of that Act renders it inapplicable to intentional torts such as false arrest and abuse of process,¹⁹ and apparently would have precluded recovery on the facts of Bivens' complaint.²⁰

The one remedy that might have been available to Bivens was an ordinary tort action in state court for trespass or false imprisonment,²¹ but in such a suit the success or failure of his claim for compensation for injuries resulting from invasion by federal officers of his federal constitutional rights would have depended largely upon the vagaries of state tort law.²² In New York, for example, whose law would presumably govern any tort action brought by Bivens, only actual damages are ordinarily recoverable in actions for trespass on real property;²³ damages in such a suit may therefore encompass no more than repayment for a broken doorknob. Punitive damages are recoverable only if the plaintiff proves that the officer acted with actual malice or

¹⁸ 28 U.S.C. §§ 1346, 2671-80 (1970).

¹⁹ 28 U.S.C. § 2680(h) (1970).

²⁰ While there is no express exclusion for illegal searches and seizures, the Torts Claim Act recognizes claims only in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b) (1970). Unlike false arrest, a search in violation of the fourth amendment is not itself a tort. There is a possibility that one in Bivens' position could recover under the Act for the trespass involved. *Cf.* Dalehite v. United States 346 U.S. 15 (1953). *But see* Klein v. United States, 167 F. Supp. 410, 412 (E.D.N.Y. 1958), *aff'd*, 268 F.2d 63 (2d Cir. 1959) (proviso excluding false imprisonment applies to "any claim originating from, incident to or having connection therewith. . .").

²¹ For examples of such actions in New York, the state in which the search and arrest in question took place, see Tierney v. State, 266 App. Div. 434, 42 N.Y.S.2d 877, *aff'd*, 292 N.Y. 523, 54 N.E.2d 207 (1944); Saurel v. Sellick, 244 App. Div. 845, 279 N.Y.S.2d 323 (1935). It is quite possible that such a case would ultimately have been tried in federal court, since it is the existing policy of the Department of Justice to remove all suits against federal officers to the federal courts. Brief for Respondents at 13, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) [hereinafter cited as Brief for Respondents]. 28 U.S.C. § 1442(a) (1970) provides statutory authorization for removal in such cases.

²² See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). Although arguing in *Bivens* against the creation of a federal remedy on grounds that these state remedies would provide an adequate alternative, the Government did of course concede that the law that would be applied to determine whether a cause of action was stated in such a suit would be state law, and state law would control the measure of damages as well. See Brief for Respondents at 35-38.

²³ *MacKenna v. Jay Bern Realty Co.*, 30 App. Div. 2d 679, 291 N.Y.S.2d 953 (1968).

that his conduct was such "as may be deemed to be tantamount to a wanton and willfull or a reckless disregard of plaintiff's rights."²⁴ Since it is "not unreasonable to assume that an officer in honest pursuit of a crime bears no malice toward the search victim,"²⁵ it is unlikely that such a showing will often be made.²⁶

Acting *pro se*, and mistakenly assuming that section 1983 was applicable, Bivens brought suit in federal district court seeking \$15,000 in damages from each of the officers for the "great humiliation, embarrassment, and mental suffering"²⁷ caused him by the arrest and search. On an apparent misreading of *Bell v. Hood*,²⁸ the District Court for the Eastern District of New York dismissed for lack of jurisdiction.²⁹ In the alternative, it dismissed on the merits for failure to state a claim on which relief could be granted and, apparently, on the additional ground that federal officers are immune from suit for actions undertaken in the performance of their official duties.³⁰

Though conceding that it would be "possible" to infer remedies directly from the Constitution, the Court of Appeals for the Second Circuit affirmed.³¹ It declared that "the choice of ways and means to enforce a constitutional right should be left with Congress"³² unless, in the absence of judicial action, the right in question would be so wanting of remedies as to render it a "mere 'form of words.'"³³ A judicially created federal damage action, the court concluded, is not indispensable to the effectuation of the fourth amendment, since injunctive relief, the exclusionary

²⁴ *Id.* at 679, 291 N.Y.S.2d at 954.

²⁵ *Wolf v. Colorado*, 338 U.S. 25, 43 (1949) (Murphy, J., dissenting).

²⁶ Theoretically, the action for false imprisonment should more nearly fit the constitutional violations involved in an illegal arrest than the trespass action fits an illegal search. Again however, limitations on damages in some jurisdictions inhibit the usefulness of this remedy. *See, e.g., Mason v. Wrightson*, 205 Md. 481, 109 A.2d 128 (1954) (nominal damages of one cent awarded for illegal stop and frisk); Foote, *supra* note 22, at 499 ("[s]hould this apparent restriction of the recovery in false imprisonment to 'nominal damages' in the absence of an actual monetary loss become general, false imprisonment will join trespass for illegal search in the graveyard of useless remedies"). *But cf. Tierney v. State*, 266 App. Div. 434, 42 N.Y.S.2d 877, *aff'd*, 292 N.Y. 523, 54 N.E.2d 207 (1944).

²⁷ Brief for Petitioner, appendix at 2.

²⁸ 327 U.S. 678 (1946).

²⁹ *Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics*, 276 F. Supp. 12 (E.D.N.Y. 1967). The Supreme Court stated in *Bell* that "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682.

³⁰ 276 F. Supp. at 16.

³¹ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718 (2d. Cir. 1969).

³² *Id.* at 722.

³³ *Id.* at 723, quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

rule, and state tort actions are generally available to vindicate the interests protected by the amendment.³⁴

II. INFERRING REMEDIES DIRECTLY FROM THE CONSTITUTION: THE INTERACTION OF POSITIVE AND REMEDIAL LAW

The issues which should properly have been considered in Webster Bivens' case were, first, whether the fourth amendment provides a substantive basis for the claim presented; second, whether federal courts have power to infer remedies directly from constitutional provisions; third, if so, what standard should be applied in determining whether to create or recognize a given remedy and whether those standards were met in the instant case. For purposes of analysis, these issues, and the Court's handling of them,³⁵ will be treated separately and in this order.

A. A Preliminary Question on the Purpose of the Fourth Amendment

As a precondition to the creation of any remedy there must, of course, be some provision of positive law to form the underlying substantive predicate for the court's action. Thus, the first task confronting the *Bivens* Court was to address a contention by the Government that the fourth amendment created no federal right independent of state common law. In essence, the Government argued that the reach of the amendment is restricted to its purpose, and that its historical background demonstrates that "*the purpose of the Fourth Amendment was to foreclose the defense of justification in common law actions . . .*"³⁶ For Mr. Justice Brennan, however, and those who joined his opinion, this premise had been implicitly rejected in previous cases. Prior decisions had established that the amendment can be violated by conduct that would not have been condemned by the penal or

³⁴ 409 F.2d at 724.

³⁵ The *Bivens* case drew five opinions from the Justices. Mr. Justice Brennan wrote the opinion of the Court; Mr. Justice Harlan authored a thoughtful concurrence; and the Chief Justice and Justices Black and Blackmun dissented, each with his own opinion.

³⁶ Brief for Respondents at 4 (emphasis added). It is not wholly clear from the Government's argument whether the contention is that the amendment states no right (other than the right of one suing in state court for trespass or false imprisonment to preclude a defense of "official justification"), or whether the argument is simply that the amendment's history forecloses an independent federal damage action remedy. In light of the supporting arguments discussed below, it appears that the former was the Government's claim, and the Court so assumed.

tort law of the relevant state. In *Katz v. United States*,³⁷ for example, the Court noted that "we have expressly held that the Fourth Amendment . . . extends . . . to the recording of oral statements overheard without 'technical trespass under local law.'" ³⁸ But by concluding that such prior fourth amendment decisions must have rested upon the implicit notion that the amendment operates as "an independent limitation upon the exercise of federal power," ³⁹ the *Bivens* Court did not so much refute the Government's historical contention as avoid it.

The historical background consisted principally of English cases which raised the problem of searches in the context of common law actions for trespass, false arrest, false imprisonment, and the like. The notable case of *Entick v. Carrington*⁴⁰ provides a suitable example. Three messengers of the King, acting on a "general warrant," broke into the private dwelling of Entick, the editor and publisher of a newspaper thought to be seditious, ransacked his drawers and closets and seized his private papers and letters. Entick brought an action against the messengers for trespass and illegal entry. The messengers relied upon the general warrant as a justification for the entry and search. The court rejected the defense, holding the general warrant to be a "violation of civil freedom" and contrary to law.⁴¹ The principle established by *Entick* and similar cases was that an unlawful warrant could not serve as a defense to a common law trespass action.⁴²

The purpose of the fourth amendment, in the Government's view, was simply to constitutionalize this principle.⁴³ Under this view, the amendment's sole function would be to insure that common law actions for trespass brought in the state courts could not be successfully defended by claims of official justification if the officer's search was unreasonable or if the warrant relied upon had been issued without probable cause. In support of its argument, the Government made much of the fact that the lower federal courts were not given original jurisdiction over cases arising under the Constitution until 1875.⁴⁴ Since no federal courts could hear cases seeking to enforce the amendment at the time of its adoption, the contemplated method for enforcement, the Government asserted, must have been a state common law action for damages in which the amendment would have operated to pre-

³⁷ 389 U.S. 347 (1967).

³⁸ *Id.* at 353, quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).

³⁹ 403 U.S. at 394.

⁴⁰ 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765).

⁴¹ *Id.* at 809.

⁴² Brief for Respondents at 10.

⁴³ *Id.*

⁴⁴ *Id.* at 11 n.8.

vent defenses such as justification by reason of a general warrant.⁴⁵

This latter argument only quite tenuously supports the Government's restrictive reading of the fourth amendment. While the fact that lower federal courts were not originally vested with jurisdiction over claims arising under the Constitution is indeed supportive of the argument that the framers contemplated that such actions would be brought in state courts, it does not necessarily mean that the actions would have to be based upon state substantive law. If, contrary to the Government's contention, the amendment was intended to create a substantive federal right, then there is no apparent reason why such federally based actions could not be brought in state court.⁴⁶ Furthermore, even if the only *remedial* mechanism which had been contemplated was a state court action based upon state common law, that does not necessarily mean that the *substantive* scope of the amendment was concomitantly limited, but may mean only that the first Congress considered the state tort action to be, at that time, a sufficient remedy, while understanding the substantive federal interests protected by the amendment to be, nevertheless, distinct from state law. The absence of general federal question jurisdiction before 1875 is thus hardly inconsistent with the notion that the fourth amendment created a broad federal right to be free of unreasonable searches.

The Government complemented its argument by reference to the presumed hostility of the states to federal power. Since a principal motivating force behind the adoption of the Bill of Rights was a desire to limit the power of the federal government, it is hardly plausible, the argument goes, to assume that the framers intended to control the relationships of federal officers to citizens of the states "by a new cause of action governed by federal law and administered by federal . . . courts"⁴⁷ rather

⁴⁵ *Id.* at 11.

⁴⁶ Quite arguably, the state courts would be obligated to entertain the claims even though based upon federal constitutional provisions. See *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (state required to provide a remedy for fifth amendment violation); cf. *Testa v. Katt*, 330 U.S. 386 (1947). For an incisive analysis of the question of state obligation for the enforcement of federal substantive rights, see Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 316-17 (1969). Greene posits a case in which a federal statute creates a right in certain individuals for which no federal remedy is provided or inferred by the federal courts. The question whether a state court is required to provide relief in these circumstances, he concludes, "remains unanswered." *Id.* at 317. Where a federal constitutional provision rather than a federal statute provides the basis for the right in question, there is perhaps a stronger case to be made for concluding that a state court is obligated to provide a remedy.

⁴⁷ Brief for Respondents at 12.

than by state law applied by state courts. This argument, however, is no more persuasive than the first. It overlooks the fact that the existence of a federal substantive cause of action in no way forecloses continued access to state tort remedies for those plaintiffs who would favor the state cause of action. Moreover, the Government apparently failed to perceive that the remedy sought in *Bivens* is one that may be enforced in either federal or state courts; nothing in the creation of federal remedies would *necessarily* have contracted the spheres of law-enforcing competence of the states. The federal remedy is independent, not preemptive, of the state common law causes of action.

But the best answer to the Government's general position is the language of the amendment itself: it will hardly bear the strain that the "limited purpose" construction would place upon it. The Government's argument seems to assume an amendment which would read roughly as follows:

In actions at common law for trespass, false imprisonment, or false arrest brought in the courts of the several States against officers of the United States, the defense of official justification shall not be allowed if the search or seizure was unreasonable or, if pursuant to warrant, the warrant was issued without probable cause.

But that is not how the amendment reads. It speaks affirmatively and commands that ⁴⁸

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

This affirmative federal right to be free from unreasonable searches and seizures suggests a corresponding duty upon government officials to refrain from behavior which would impair that right. It therefore requires an exceedingly grudging exercise in construction to read that provision as one whose sole function was to foreclose one kind of defense to a tort action. That it might have been contemplated that the common law tort action would be the principal mode of enforcing the amendment's provisions does not mean that the substantive sweep of the amendment is thereby limited.

*B. The Power to Infer Remedies
Directly from the Constitution*

Once the existence of a federal substantive right is established, it is then necessary to determine whether the Court has power to

⁴⁸ U.S. CONST. amend. IV.

create a damage remedy absent any legislative mandate to do so. The three dissents in the *Bivens* case were premised primarily upon denials that such a power exists. Perhaps the most surprising opinion was that of Mr. Justice Black. As author of the Court's opinion in *Bell v. Hood*,⁴⁹ he was not at all unfriendly to the claim that the Court should recognize a cause of action for damages arising from violations of the fourth amendment. Sustaining federal jurisdiction in *Bell*, and holding that the plaintiff's claim was neither insubstantial nor frivolous, Justice Black had written that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."⁵⁰ A quarter of a century later, however, he came to the conclusion that the adjustment of remedies sought in *Bivens* would be "an exercise of legislative power that the Constitution does not give us."⁵¹ The same conclusion was reached by Mr. Justice Blackmun — the Court was engaged in "judicial legislation"⁵² — and by the Chief Justice — "[l]egislation is the business of Congress."⁵³ None of the three, however, undertook to distinguish the settled practice of granting injunctive relief premised directly upon the Constitution, or to explain why the Court has the power to develop some remedies (such as the exclusionary rule) but not others (such as damages), or to distinguish the judicial power to develop compensatory remedies based on federal statutes⁵⁴ from the lack of power to do so on the basis of constitutional norms.

The source of the Court's power to create remedies will be found, if at all, in the spare language of article III: "The judicial power shall extend to all Cases . . . arising under this Constitution . . ."⁵⁵ A case based directly upon the fourth amendment and seeking to vindicate the substantive rights guaranteed by that provision is almost paradigmatically one "arising under the Constitution." The Court's authority to create a particular

⁴⁹ 327 U.S. 678 (1946).

⁵⁰ *Id.* at 684.

⁵¹ 403 U.S. at 428.

⁵² *Id.* at 430.

⁵³ *Id.* at 412. Justices Black and Blackmun further opined that the Court should refrain from adding "another avalanche of new federal cases," *id.* at 430 (Blackmun, J., dissenting), to courts that are "choked with lawsuits." *Id.* at 428 (Black, J., dissenting). Justice Blackmun added that "I had thought that for the truly aggrieved person other quite adequate remedies have always been available," *id.* at 430, though he did not feel called upon to say what those remedies might be, where they were to be had, why he found them adequate, or even why the adequacy of alternative remedies should be the test.

⁵⁴ See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); see pp. 1549-51 *infra*.

⁵⁵ U.S. CONST. art. III, § 2.

remedy in such a case thus follows if the remedial innovation sought is within the scope of that tightly packed phrase "the judicial power," for it is that power which extends to all cases arising under the Constitution.⁵⁶ Given a common law background in which courts created damage remedies as a matter of course,⁵⁷ it is not unreasonable to presume that the judicial power would encompass such an undertaking on the part of the federal courts, unless there were some contrary indication that the judicial implementation of such a remedy was not to be a part of the article III judicial power.

While with one exception⁵⁸ prior to *Bivens*, the Court has never explicitly exercised the judicial power to create a damage remedy in a case arising under the Constitution,⁵⁹ its power to do so would seem rather easily established. As Mr. Justice Harlan noted in his concurrence,⁶⁰ the Court has assumed the independent power to provide other remedies in order to vindicate constitutional rights in analogous cases,⁶¹ such as the injunction against state officials to restrain them from enforcing unconstitutional statutes.⁶² If a federal court acting under a general grant of jurisdiction may appropriately give equitable relief based upon the Constitution, there is no readily apparent reason why the same Court would not have similar power to grant a remedy

⁵⁶ *Id.*

⁵⁷ See generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); Katz, *supra* note 8, at 18-20.

⁵⁸ The Government conceded in *Bivens* that in *Jacobs v. United States*, 290 U.S. 13 (1933), the Court held that "under the Fifth Amendment a private party had a right of action against the government for just compensation for the taking of his property." Brief for Respondents at 15-16. See also *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923) ("[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute"). *Jacobs* was distinguished by the Government on the ground that the very language of the fifth amendment, in requiring "just compensation," contemplates the payment of money damages and on the additional ground that no other remedy was available to *Jacobs*. See *Developments in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 878-79 (1957).

⁵⁹ See pp. 1544-45 *infra*.

⁶⁰ 403 U.S. at 398.

⁶¹ *Id.* at 404.

⁶² Professor Hart has suggested that such suits were based originally not upon the Constitution, but upon the theory that the state officer as an individual could be restrained from taking action that, in the absence of his official justification, would constitute a trespass under state law. Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 523-24 (1954). In such a case the cause of action would today be based upon state law, even when the case was being heard in federal court as on the basis of diversity. By "almost imperceptible steps," however, such suits came to be recognized as federal in nature, with jurisdiction to issue the injunction premised on the theory that the cause of action was one based upon federal law. *Id.* at 524 & n.124.

at law in cases in which such a remedy might be appropriate for the effectuation of a constitutional guarantee. Moreover, the Court has seen fit to infer actions for money damages from federal regulatory statutes.⁶³ Thus, neither the source of the right (the Constitution) nor the nature of the (rather customary) remedy (money damages) would seem to require that the judiciary await explicit legislative authorization before employing the remedy to vindicate the right. It may well be true that the considerations governing a decision to create a damage remedy will differ from those respecting the granting of injunctive relief; this goes to the appropriateness of the remedy created, however, and not to the Court's remedial power.

C. Standards for Exercising the Remedial Power

Given the existence of judicial power to formulate compensatory remedies directly from the Constitution, there still remains the central and difficult question of articulating standards to govern the Court's discretion in exercising that power. In *Bivens*, the Court proceeded as if that question answered itself, and, although its decision provides the federal courts with a potentially powerful tool, there is very little instruction on how or when it is to be used. For example, to establish that the fourth amendment creates an independent source of positive law, Mr. Justice Brennan observed that state law may neither authorize federal officials to violate the amendment nor limit the extent to which federal authority can be exercised. Then, in a crucial passage,⁶⁴ the Court stated that

[t]he inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action.

. . . That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition.

In these two sentences the Court moved from the premise that the fourth amendment is a source of rights independent of state law to the conclusion that "damages may be obtained" in a federal court action, without advising why the latter inevitably flows from the former. Are all possible judicial remedies automatically available to one who demonstrates a violation of a constitutional right by a particular defendant? Punitive damages? A mandamus compelling the governmental employer to

⁶³ See p. 1550 *infra*.

⁶⁴ 403 U.S. at 395.

demote or dismiss the offending employee? Placing the offending law enforcement unit into receivership? Appointing a master to oversee the operations of the bureau or department involved?⁶⁵ Surely there must be some articulable principle, policy, or standard which would guide the Court's decision to exercise its remedial power and its selection among possible remedies to employ when that power is exercised.

The closest the Court came to articulating a principle to justify its creation of a compensatory remedy for fourth amendment violations was its statement that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."⁶⁶ This assertion may be meant to suggest that the Court's remedial power over constitutionally based claims will be exercised only when the remedy sought has traditionally been available in the federal courts for other constitutionally based actions. However, with respect to the independent *judicial* creation of remedies for invasions of "personal interests in liberty," what emerges from the cases is a sense that the exercise of remedial power to create a damage action directly from the Constitution is virtually unprecedented.⁶⁷ The Court attempted to support its assertion with four voting rights cases involving money damages.⁶⁸ While the cases relied upon have indeed been cited in the literature for something like the conclusion that it is unremarkable for the judiciary to infer a damage remedy directly from constitutional provisions,⁶⁹ they fall far short of establishing such a proposition. In fact, none of the cases will sustain a statement any more expansive than the observation that Congress, in the Civil Rights Act of 1871, provided an action for damages for violation of federal rights by state officers.⁷⁰ Even if the Court's statement is intended to imply that

⁶⁵ See Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143, 150 n.31 (1968).

⁶⁶ 403 U.S. at 395.

⁶⁷ *But see* note 58 *supra*.

⁶⁸ *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900).

⁶⁹ *Cf. Hill, Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1124-25 (1969); 48 TEXAS L. REV. 219, 221 n.16 (1969).

⁷⁰ In *Nixon v. Condon*, 286 U.S. 73 (1932), the lower court opinion, 34 F.2d 464, 465 (W.D. Texas 1939), makes it clear that the suit was explicitly based upon the legislatively created damage action of the Civil Rights Act of 1871 § 1, ch. 22 § 1, 17 Stat. 13 (then codified at R.S. § 1979, now codified at 42 U.S.C. § 1983 (1970)). Similarly, in *Nixon v. Herndon*, 273 U.S. 536 (1927), the plaintiff cited R.S. § 1978, 273 U.S. at 537, but was likely referring to R.S. § 1979, which, as in

the type of remedy chosen must be one that has been "traditionally available" in the federal courts generally,⁷¹ it articulates no clear guidance for determining which traditionally available remedy should be made available for a particular constitutionally based action.

A better guide for the exercise of the power to create constitutionally based remedies might be the cases inferring private rights of action from federal regulatory statutes,⁷² unless reasons could be shown why a different standard should be applied where the Constitution rather than a federal statute provides the substantive predicate for the cause of action. Such cases would provide a source of judicial experience in deciding among remedies which are not congressionally prescribed.⁷³ The Government argued, unsurprisingly, that where a constitutional provision rather than a federal statute was offered as the basis for a cause of action, the Court should be considerably more hesitant to supply a remedy.⁷⁴ The reason offered in support of this distinction was that while Congress is free to revise or displace judicially created remedies that are supplementary to a federal statute, "there would be substantial doubt whether Congress could simply reject a judicially created remedy bottomed on the Constitution; a constitutional amendment might be needed for such an end."⁷⁵ The Government, as well as the court of appeals, therefore concluded that the Court should create a remedy predicated upon the Constitution only when that remedy is "indispensable" to preventing the substantive constitutional provision involved from becoming a "mere form of words."

Open to question, however, is the premise underlying the Government's distinction between statutorily and constitutionally inferred remedies: the assumption that Congress would lack the power to revise or abrogate judicially created constitutional rem-

Condon, provided a legislative basis for the action. Again, in *Swafford v. Templeton*, 185 U.S. 487 (1902), the Court, in a decision similar to that in *Bell v. Hood*, 327 U.S. 678 (1946), *see note 29 supra*, merely held that jurisdiction existed and explicitly stated that "we must not be understood as expressing any opinion as to the sufficiency of the declaration." 185 U.S. at 494. Finally, in *Wiley v. Sinkler*, 179 U.S. 58 (1900), the Court expressly stated that it was "[p]assing by the difficulty of subjecting election officers to an action for damages for refusing a vote which the statute under which they are appointed forbids them to receive," *id.* at 66-67, and rested its dismissal of the action upon the fact that the plaintiff failed to allege that he was registered to vote. *Id.* at 67.

⁷¹ 403 U.S. at 395-96.

⁷² *See* p. 1550 *infra*.

⁷³ *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 289 (1963).

⁷⁴ Brief for Respondents at 21.

⁷⁵ *Id.* at 21, 22.

edies. The question of the power of Congress with respect to constitutional remedies is not easily resolved. The first step must be to isolate the source of congressional power to legislate remedies for federal constitutional cases arising under the Bill of Rights,⁷⁶ and none is immediately apparent. Unlike the thirteenth,⁷⁷ fourteenth,⁷⁸ and fifteenth amendments,⁷⁹ the first eight amendments contain no clause granting to Congress the power to implement their substantive provisions by appropriate legislation. In particular situations, of course, federal legislative authority to create remedies originally, or to revise or abrogate judicially created remedies, may flow from some special authority otherwise being exercised by Congress. In the particular situation presented in *Bivens*, for example, the same legislative powers which enable Congress to provide for the employment of federal officials may give rise to the "necessary and proper" authority to establish the conditions of liability of those employees.⁸⁰ Aside from such particular situations, however, it is difficult to find in the Constitution explicit congressional authority for implementation of the first eight amendments as such.

The power of Congress to implement provisions of the Bill of Rights by creating remedies may be inferred, however, from the judiciary clauses of articles I and III. These articles confer

⁷⁶ The dissenters in *Bivens* were of the view that Congress not only had the power to create remedies, but that legislative responsibility was so substantial that it even precluded any independent judicial role. See 403 U.S. at 411-12 (Burger, C.J., dissenting); *id.* at 428 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

⁷⁷ U.S. CONST. amend. XIII, § 2; see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁷⁸ U.S. CONST. amend. XIV, § 5; see *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁷⁹ U.S. CONST. amend. XV, § 2; see *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁸⁰ It should be noted, however, that Congress, in exercising one of its enumerated powers, may not, of course, develop a statutory scheme which is inconsistent with the Bill of Rights. So, for example, in arguing that the congressional exemption of religious conscientious objectors should be sustained against an establishment clause challenge, Justice White asserted:

Congress has the power "To raise and support Armies" and "To make all Laws which shall be necessary and proper for carrying into Execution" that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore — surely "necessary and proper" — in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause.

Welsh v. United States, 398 U.S. 333, 371 (1970) (dissenting opinion). Thus, the independent sweep of the fourth amendment may place limits on congressional authority to control the liability of federal employees under facts such as those in *Bivens*. See pp. 1547-49 *infra*.

on Congress the power "[t]o constitute Tribunals inferior to the Supreme Court"⁸¹ and to create "such inferior Courts as [it] may from time to time ordain and establish,"⁸² and to the judiciary they grant the power to hear all cases arising under the Constitution.⁸³ Earlier cases have found, in the grants to Congress, general legislative authority to fashion remedial forms for the federal courts. For example, in *Aetna Life Insurance Co. v. Haworth*,⁸⁴ the Court sustained the Federal Declaratory Judgment Act by stating that:⁸⁵

In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. . . . Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict.

Moreover, since Congress has the authority to make all laws necessary and proper for carrying out "all . . . Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof,"⁸⁶ it may legislate to implement not only enumerated congressional powers, but executive and, quite arguably, judicial powers as well. Thus, legislative action creating remedies implementing Bill of Rights provisions may be seen as necessary and proper for the execution of the judicial power over cases arising under the Constitution, as well as for the implementation of congressional powers under articles I and III.

In view of this initial congressional remedial power, the answer to the Government's contention in *Bivens* that Congress is without authority to displace or modify a remedy independently created by the Court to implement constitutional provisions would depend upon the relationship of the remedy created to its substantive constitutional predicate. In its role of supervision over the federal judicial system the Court must, of course, develop procedures and remedial forms which no other source of law provides. Though utilized in constitutional cases, such procedures are not necessarily bound up in any substantive fashion with the constitutional provisions involved but may simply fill procedural

⁸¹ U.S. CONST. art. I, § 8.

⁸² *Id.* art. III, § 1.

⁸³ *Id.* art. III, § 2.

⁸⁴ 300 U.S. 227 (1937).

⁸⁵ *Id.* at 240.

⁸⁶ U.S. CONST. art. I, § 8.

interstices which would otherwise exist. Congress may displace the remedial forms, just as a state court system may choose to follow an alternative procedure, in such cases.⁸⁷ Moreover, even where the Court concludes that a particular remedy is "part and parcel" of the underlying constitutional right,⁸⁸ Congress is not necessarily barred from substituting an alternative remedial scheme, provided it affords comparable vindication of the constitutional provision involved.⁸⁹ On the other hand, if there were ever a case in which it could be established that a particular remedy was "indispensable" in the sense that no other remedial scheme could possibly prevent the substantive constitutional re-

⁸⁷ See generally Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969).

⁸⁸ See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon the encroachment of individual privacy. . ."). It will, of course, often be difficult to distinguish between those mechanisms which are "merely" procedural and those which are constitutionally compelled, for the Court may have no occasion when first establishing a procedural or remedial form to articulate whether it is constitutionally enshrined. See, for example, the subsequent disagreement among the members of the Court with respect to whether the federal exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) had any constitutional basis at all. Compare the views of Mr. Justice Frankfurter:

[The *Weeks* rule] was not derived from the explicit requirements of the Fourth Amendment. . . . The decision was a matter of judicial implication.

Wolf v. Colorado, 338 U.S. 25, 28 (1949), and Mr. Justice Black:

. . . I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.

Id. at 39-40 (concurring opinion), with those of Mr. Justice Rutledge:

I . . . reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment. . . . The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established.

Id. at 48 (dissenting opinion), and Mr. Justice Clark:

[T]he plain and unequivocal language of *Weeks* . . . to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

Mapp v. Ohio, 367 U.S. 643, 649 (1961).

⁸⁹ The Court brushed this question tangentially in *Bivens* in discussing the appropriate standard for judicial creation of remedies:

Finally, we cannot accept respondent's formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

403 U.S. at 397. This somewhat cryptic statement might be read affirmatively, however, to describe the conditions under which the Court should defer to congressional judgment even though a remedy may be substantively bound to constitutional provisions. The ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review.

quirements from becoming a "mere form of words," then, and only then, would Congress be wholly without power to revise or replace that remedy.

Therefore, what is left of the Government's contention that the Court should, with respect to constitutionally based remedies, create only those remedies that are "indispensable" is a normative proposition that the Court should defer in advance to Congress wherever the latter has any discretion to choose among alternative remedial schemes. Certainly, given the wider range of remedial techniques available to the legislature, the Court should often defer to the ability of Congress to effectuate a more precise compromise of competing interests.⁹⁰ But this should be the case only where (1) Congress has provided an alternative remedy considered by Congress to be equally effective in enforcing the Constitution, and (2) the Court concludes that in light of the substitute remedy, the displaced remedy is no longer "necessary" to effectuate the constitutional guarantee. In contrast, where Congress has been silent, there is little reason for the Court to fail to act. Assuming that Congress has the power initially to detail the remedial mechanisms available in the federal courts, then Congress should be free to revise with an adequate alternative any remedy which is not determined by the Court to be indispensable but which is merely selected by the Court as one appropriate method of carrying into effect a substantive constitutional right.

Admittedly, requiring Congress to provide an adequate alternative to nonindispensable judicially created remedies imposes a greater restriction on congressional discretion to modify such remedies when they are bound up with substantive constitutional guarantees than when they are inferred from statutes, which may simply be abrogated by legislative action. But such a restriction on absolute congressional discretion is more appropriate with regard to a constitutional right, and should not prevent the Court from exercising the same range of remedial flexibility where the Constitution provides the underlying substantive law as it exercises in inferring private rights of action from federal statutes. The Court's power to provide remedies not specified in the statutory scheme flows from its duty reasonably to elaborate upon and effectuate the principles and policies established by the statute.⁹¹ Its duty with respect to the Constitution is no less, and, because

⁹⁰ See generally Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, dealing with congressional power to enforce the provisions of the fourteenth amendment.

⁹¹ See H.M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 168-71 (tent. ed. 1958).

not triggered by mere legislative enactment, could not be acquitted absent some restriction on congressional interference. If the Court is restricted in its development of constitutional remedies to only those remedies which are so indispensable that their absence would render the guarantee involved a "mere form of words," then the Court's implementation of the Constitution will be less than that reasonably implicit in the document. As Mr. Justice Harlan noted, it would be anomalous to conclude that the federal courts can create remedies where necessary or appropriate to further statutory policies (albeit subject to congressional veto) while the same courts are left far more dependent upon *initial* action by Congress in vindicating policies "which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will."⁹² Therefore, it would be proper for a Court addressing the question whether to recognize a remedy for the implementation of a constitutional right to apply the same general standard of "necessity or appropriateness" used in creating private rights of action from statutory rules.

The most noteworthy of the remedial cases using a statutory substantive basis is *J.I. Case Co. v. Borak*⁹³ in which a stockholder brought suit for damages sustained as a result of proxy statements alleged to contain false and misleading assertions violative of section 14(a) of the Securities Exchange Act of 1934.⁹⁴ Although the Act made no specific reference to a private right of action, the Court held that an action for damages or rescission could be brought in federal court since, in the Court's view, such an action was "necessary" to effectuate the purposes of the Act.⁹⁵ It is clear that the Act would not have been rendered a "mere form of words" in the absence of the judicially inferred remedy since other remedies were available: proxy statements were examined in advance by the Securities and Exchange Commission and a state created cause of action for damages and rescission was available.⁹⁶ Neither of these remedies was seen as precluding the judicial creation of a further remedy that was necessary to effectuate more fully the legislative purpose, for each of the available remedies suffered from limitations.⁹⁷ In these circumstances, the

⁹² 403 U.S. at 404 (Harlan, J., concurring).

⁹³ 377 U.S. 426 (1964). See generally Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

⁹⁴ 15 U.S.C. § 78n(a) (1970).

⁹⁵ 377 U.S. at 433.

⁹⁶ *Id.* at 432.

⁹⁷ Given the number of proxy statements submitted each month, the Commission's review was necessarily cursory. *Id.* And in order to proceed under the Wisconsin cause of action, plaintiffs were required by state law to provide security for

inference of a federal cause of action for legal and equitable relief was thought to be appropriate, notwithstanding the fact that other means of enforcing the substantive provisions of the statute were available.

Though the process of determining which constitutional remedies are "necessary or appropriate" will inescapably entail a large measure of discretion, it is possible to suggest the contours of an acceptable approach. As a prerequisite to supplying a remedy, the court must first determine that the implicated constitutional provision provides substantive protection to one in the position of the plaintiff. The focus should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought; as in *Borak*, the fact that persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress.

It follows that the reliance of the court of appeals in *Bivens* upon the existence of other remedies available to protect the substance⁹⁸ of the fourth amendment was misplaced. The exclusionary rule or injunctive suit as a method for enforcing the amendment was not available to *Bivens* or to those similarly situated — victims of an isolated search who were not prosecuted.⁹⁹ Moreover, regarding possible state remedies, there may be cases for which no state remedy would be available at all, since conduct lawful under state law if engaged in by a private citizen may nonetheless be a violation of the fourth amendment when undertaken by a federal officer.¹⁰⁰ Even if a state action is possible, the uncertain and varied nature of state tort remedies,¹⁰¹ which are designed to redress different kinds of injuries than those against which the fourth amendment protects, precludes reliance upon state court suits as an adequate compensatory remedy for the harms suffered by those in *Bivens*' position.¹⁰² If, as has been

costs. *Id.* at 435. Thus, while some investors were protected by SEC review, and others had sufficient financial means to be undeterred by the security-for-costs requirement of the state created action, still other investors, such as *Borak*, were left without a fully effective remedy.

⁹⁸ 409 F.2d at 723.

⁹⁹ See pp. 1534-36 *supra*.

¹⁰⁰ See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 391-95 (1971); p. 1538 *supra*.

¹⁰¹ See pp. 1535-36 *supra*.

¹⁰² See *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) ("[i]t would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those

argued, it is enough that a federal court be satisfied that a proposed remedy is an appropriate additional mechanism for fully effectuating a constitutional guarantee, then the fact that a remedy exists under state law that *might* in *some* cases adventitiously afford a quantum of damages adequate to redress the constitutional wrong should not preclude the court from creating the new remedy.¹⁰³ Where, as here, no countervailing state interests are present, at least one argument for the appropriateness of the federally based remedy is simply the desirability of uniformity in the vindication of federal fourth amendment rights.¹⁰⁴

III. LEGISLATIVE AND JUDICIAL COMPETENCE IN THE CREATION OF CONSTITUTIONAL REMEDIES: IMPLEMENTING THE FOURTH AMENDMENT

Two conclusions may be drawn from the preceding analysis in regard to the respective institutional roles of Court and Congress in the implementation of the Constitution. First, both branches are constitutionally empowered, within the limits of their institutional capabilities, to create remedial systems for fully effectuating the substantive protection afforded by the fourth amendment. Second, where the judiciary independently infers remedies directly from constitutional provisions, Congress may

injuries which only a state official can cause and against which the Constitution provides protection").

¹⁰³ It would not appear practical to require that the availability of the federally based remedy depend *in each case* upon the plaintiff's showing that elements of a particular state's trespass or false imprisonment action, or the damage rules or other incidentals governing the action, made it unlikely that the common law recovery would in that instance be adequate to compensate for the constitutional interest infringed. *Cf.* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 292 (1963).

¹⁰⁴ There is the possibility that where state limitations on the definition of the common law torts, or state restrictions on the damages available, or state common law doctrines of official immunity would inhibit the viability of the state tort action in suits against federal officers, the Court could hold that the federal law developed from the fourth amendment must override such state limitations in order to ensure that an effective remedy was available to vindicate the federal constitutional interest. But if federal law came to control any inhibiting aspects of the state common law action, as it now controls the defense of official justification and, perhaps, the scope of immunity for federal officers, *cf.* *Willingham v. Morgan*, 395 U.S. 402 (1969), such an action would have been so nearly "federalized" as to make its state law character a mere formalism. Indeed, it is conceivable that such a state action might become so intimately involved with federal elements that it could be brought originally in federal court under the "arising under" language of 28 U.S.C. 1331(a) (1970), *cf.* *Wheeldin v. Wheeler*, 373 U.S. 647, 659-60 (1963) (Brennan, J., dissenting); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), thus reaching, in a roundabout way, the functional equivalent of the result in *Bivens*.

legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy.¹⁰⁵ Both propositions may be further explored by considering the appropriateness of action by the Court or by Congress in developing different remedial systems than now exist for enforcement of the fourth amendment. Specifically, two issues for further analysis are suggested by the Court's decision in *Bivens*: (1) independent judicial creation of a damage action directly against governmental units for fourth amendment violations as an alternative to judicial restriction of an officer's defenses in actions brought against him; and (2) congressional replacement of the fourth amendment exclusionary rule by an action for damages against the United States. Some tentative conclusions concerning these issues may be formulated by illustratively employing the analysis previously set forth.

*A. Substitute Remedies: Actions Against
the Officer v. Actions Against the Fisc*

It is likely that the Court's action in *Bivens* was based upon a view of the personal rights conferred by the fourth amendment rather than a calculation of the likely impact a damage action against federal officers will have on federal law enforcement practices. The difficulties which inhibit the impact of the analogous remedy under section 1983 of the Civil Rights Act for constitutional violations committed by state officers will to a considerable extent apply as well to the judicially created action against federal officers.¹⁰⁶ The victims of illegal law enforcement practices are often unappealing plaintiffs when viewed by a jury, and even the successful plaintiff will often find himself with a judgment that is uncollectible against an officer of limited means.¹⁰⁷ Moreover, judgments against individual officers, being ad hoc and random in their impact, are unlikely to induce systemic change in law enforcement. But if the fourth amendment is read (as it should be) as conferring upon Webster Bivens a personal right to be free of unwarranted searches and seizures, and if the justice that is due is justice to individuals and not merely justice to formless groupings of the citizenry, then it is nevertheless wrong to turn Bivens away. Whether or not any larger social gain will result from the decision in *Bivens* in terms of the deterrence of unlawful official behavior, the decision has the virtue of estab-

¹⁰⁵ See pp. 1547-50 *supra*.

¹⁰⁶ See generally Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 838 (1964).

¹⁰⁷ See Foote, *supra* note 22, at 499, 500-01.

lishing that the nation's courts are open to claims that an individual's federal constitutional rights have been violated under the authority of the federal government and are ready to find a remedy that will at least provide compensation for the individual wrong that has been done.

With these considerations made explicit, it is highly troubling that Webster Bivens and those similarly situated may, *as a matter of legal policy*, still be prevented from recovering. Even after *Bivens* — and the Court remanded the question even in that case — a damage remedy will not be available to victims of illegal official conduct in those instances in which the officer is shielded from liability by official immunity or good faith defenses.¹⁰⁸ Viewing a damage action against an officer who is not so shielded and an action against the government as alternative methods of providing a compensatory remedy, arguably the Constitution should be read so that the availability of at least one or the other is assured whenever the facts establish that a plaintiff's constitutional rights have been injured, regardless of the state of mind of the officer who committed the acts or the immunities which might shield him from liabilities imposed by similar but nonconstitutional norms. If so, then the judiciary may be faced with deciding between restricting the officer's defenses and creating a cause of action for damages against the government, the doctrine of sovereign immunity notwithstanding.

If the Court is hesitant to pierce the doctrine of sovereign immunity, then the more appropriate choice is the restriction of the officer's defenses. While there are cases following *Barr v. Matteo*¹⁰⁹ which extend the federal executive immunity from suit established in that case to federal law enforcement officers,¹¹⁰ a decision to apply that immunity to federal law enforcement personnel alleged to have violated the fourth amendment would render the decision in *Bivens* an idle sport.¹¹¹ The more appro-

¹⁰⁸ The Supreme Court in *Bivens* declined to pass upon the immunity question, leaving the problem to be confronted by the court of appeals on remand. 403 U.S. at 397-98. On remand, the court of appeals responded by holding that agents of the Federal Bureau of Narcotics and other federal police officers have no immunity against damage actions charging violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 40 U.S.L.W. 2608 (2d Cir. Mar. 8, 1972). The court held further, however, that the agent has a valid defense to such charges if he proves that he acted "in good faith and with a reasonable belief in the validity of the arrest and search . . ." *Id.*

¹⁰⁹ 360 U.S. 564 (1959).

¹¹⁰ *See, e.g., Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). *But cf. Anderson v. Nosser*, 438 F.2d 183, 205 (5th Cir. 1971) (Bell, J., concurring), *rehearing en banc granted*, 438 F.2d 205 (1971).

¹¹¹ A post-*Bivens* decision holding federal law enforcement officials immune from damage action is *Davidson v. Kane*, 337 F. Supp. 922 (E.D. Va. 1972), in

priate analogy for dealing with the immunity-good faith problem is *Pierson v. Ray*,¹¹² a case concerning the immunity and good faith defenses available to state officers sued under section 1983. But even *Pierson* does not provide a fully satisfactory solution. There the Court rejected the argument that police officers, like judges and legislators, should have an absolute immunity from liability under the civil rights statute for action taken within the scope of their official duties. But it nevertheless held that a defendant law enforcement officer could defeat such an action, even where the plaintiff established that his federal rights had been violated, if the officer could establish that he was acting with "good faith and probable cause."¹¹³

This ambiguous phrase papers over the substantial dilemma which confronts a court forced to choose between an approach to good faith which would leave the citizen without adequate redress for injuries caused by unconstitutional applications of governmental power and one which would be unfair to the individual officer and detrimental to effective law enforcement. Given the number of judgments that often ill-trained and ill-advised officers are called upon to make, strong considerations militate against making them liable for "honest" good faith mistakes. The inhibitions on public service that might exist if public officers in law enforcement roles were financially liable for their constitutional mistakes are substantial. On the other hand, to allow the officer to escape liability for all actions undertaken in good faith may

which the plaintiffs brought suit against two airport policemen at Washington National Airport, the F.A.A., and the Washington National Airport Police Force for false arrest, false imprisonment, and in the case of one plaintiff, assault and battery. With respect to the false arrest and imprisonment charges, the federal officers were held immune from suit under *Barr v. Matteo*, 360 U.S. 564 (1959). The *Davidson* court's application of the immunity doctrine would apparently mean that neither Webster Bivens nor anyone else would ever recover under the cause of action created in *Bivens*. See note 155 *infra*.

¹¹² 386 U.S. 547 (1967).

¹¹³ *Id.* at 557. This resolution, as well as that of the *Bivens* court of appeals on remand, see note 108 *supra*, creates two situations in which the citizen harmed by unconstitutional actions of federal officers is left without a compensatory remedy. The first arises from the absolute immunity from suit that may be available to officials operating at a higher level of government than the federal law enforcement agent. Thus, if the director or other high administrator of a federal law enforcement bureau ordered a series of clearly unconstitutional arrests and searches, he would presumably be absolutely immune from a compensation action on the grounds that he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." *Barr v. Matteo*, 360 U.S. 564, 575 (1959); see *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 40 U.S.L.W. 2608 (2d Cir. Mar. 8, 1972). Even where the official operates at a level of government deemed to be "nondiscretionary," no recovery will be available for illegal arrests or searches conducted with a reasonable, good faith belief in their validity. *Id.* at 2609.

leave the victim of an illegal search or arrest without a remedy for the wrong done to him. His injury is not substantially mitigated by the fact that the illegal detention or intrusion resulted from ignorance or inadequate training rather than malice.¹¹⁴

Recognition of congressional power to legislate substitutes for judicially created remedies may simplify the problem somewhat. Any suggestion that the public interest requires placing a zone of protection around an officer with defenses of immunity and good faith might be met with some skepticism in light of the undoubted power of the legislature to resolve such difficulties by exchanging governmental liability for officer liability. It would, therefore, not be irresponsible for a court to restrict the immunity and good faith defenses available to the officer while leaving to Congress the option of removing the officer's liability by waiving the government's sovereign immunity.¹¹⁵ Rather than denying a judicial remedy for constitutional wrongs on the basis of speculative assessments of the remedy's impact on law enforcement practices, it might be preferable for the courts to vindicate the constitutional rights involved while leaving to Congress — with its superior ability to make the careful calculations necessary to adjust competing policy considerations — the determination of the remedial adjustments required to protect law enforcement needs.

But if the cost of avoiding chilling inhibitions on public service should, in fact, fall upon the general public rather than upon the chance victim of official illegality, it might well be preferable for the judiciary itself to consider making a direct assault on the doctrine of sovereign immunity. An action against the treasury has several potential advantages over an action against the officer as a vehicle for redressing constitutional violations: it would provide a suitable recovery for every damage-causing violation of constitutional rights by law enforcement officers without subjecting individual officers to the burden of being personally liable for mistakes of judgment, and it might be more likely than the individual officer action to produce systemic changes.¹¹⁶ Chief Justice Burger suggested in his *Bivens* dissent that such a remedy

¹¹⁴ One example of a case presenting the courts with an unsatisfactory choice between unfairness to the line officer or to the aggrieved citizen is *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968). For a discussion of this problem in the context of section 1983 suits, see Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-38 (1972).

¹¹⁵ Cf. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 227 (1963).

¹¹⁶ There is apparently no empirical evidence, however, which would prove that this would be the case. Cf. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 717 n.145 (1970).

be created,¹¹⁷ but he assumed that action by Congress and the state legislatures would be necessary to do so. After *Bivens*, however, the Court should consider whether an action for money damages against governmental units might be an appropriate additional mechanism for the implementation of the fourth and fourteenth amendments. *Bivens* may be read as resting upon a premise that constitutional rights have a self-executing force that not only permits but requires the courts to recognize remedies appropriate for their vindication.

Under such a view, the failure of Congress to authorize suits against the Treasury may no more bar a judicially created remedy than the failure of Congress to create a cause of action against the officer barred the development of that particular remedy in *Bivens*. In justifying the often criticized¹¹⁸ doctrine of sovereign immunity in *Kawananakoa v. Polyblank*,¹¹⁹ Mr. Justice Holmes stated that "there can be no legal right against the authority that makes the law upon which the right depends."¹²⁰ But in a constitutional case, the right involved does not "depend" upon the government, but rather arises from the basic law which created and seeks to control that government. There is, indeed, language in more recent cases casting doubt upon the notion that sovereign immunity can bar relief appropriate to vindicate constitutional rights. In *Larson v. Domestic and Foreign Commerce Corp.*,¹²¹ the Court added to an expansive reading of the sovereign immunity bar a significant caveat:¹²²

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Govern-

¹¹⁷ 403 U.S. at 423.

¹¹⁸ See, e.g., Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962); Jaffe, *supra* note 115.

¹¹⁹ 205 U.S. 349 (1907).

¹²⁰ *Id.* at 353.

¹²¹ 337 U.S. 682 (1949).

¹²² *Id.* at 704. The relief about which the *Larson* Court was speaking was relief against the officer and not relief against the governmental treasury. Indeed, there are statements in *Larson* which can be read as precluding damage actions against the government in constitutional cases. *Id.* at 691 n.11. The language quoted above nonetheless states, however inadvertently, what ought to be the law in a system predicated upon constitutional judicial review.

An additional obstacle to the creation of money damage actions against the federal government to redress fourth amendment violations is the specific exemption from the Federal Tort Claims Act of the intentional torts of false arrest and false imprisonment. 28 U.S.C. § 2680(h) (1970). An express congressional determination to bar a particular remedy, however, may be vulnerable if Congress has provided no alternative mechanism by which the plaintiff may vindicate the constitutional interests involved and if the remedy foreclosed is necessary for effectuation of those interests. See pp. 1547-49 *supra*.

ment, it is proper that the courts have the power to grant relief against those actions.

In the wake of *Bivens*, the Court should consider not only the appropriateness of creating a damage action against the United States, but the creation as well of a federal damage action against municipalities for the redress of constitutional violations committed by police and other law enforcement officers. The possibility of such an action under section 1983 of the Civil Rights Act¹²³ was severely limited by the Court's decision in *Monroe v. Pape*,¹²⁴ where it was held that a municipal corporation is not a "person" within the meaning of the statute and therefore cannot be sued under it.¹²⁵ While the District of Columbia Court of Appeals has recently found *Monroe* inapplicable where local law provides for municipal liability in tort generally,¹²⁶ the recognition in *Bivens* that legislative dispensations are not a necessary prerequisite to the development of remedies implementing the Constitution may render unnecessary a continuation of the extended

¹²³ 42 U.S.C. § 1983 (1970) provides:

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

(Emphasis added).

¹²⁴ 365 U.S. 167 (1961).

¹²⁵ *Id.* at 191.

¹²⁶ In *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) (Bazelon, J.), *cert. granted*, 404 U.S. 1014 (1972), the court of appeals read the holding of *Monroe* as limited to its facts, which the court described as "a suit for damages against a municipality which has been clothed in immunity by its parent state." *Id.* at 369. Since the evil the Reconstruction Congress sought to avoid in excluding municipalities from the coverage of section 1983 was, in Judge Bazelon's view, the *imposition* of liability upon a municipal government, the reasoning of *Monroe*, he concluded, is inapplicable where local law recognizes municipal liability in tort. *Id.* There are some difficulties, however, with this approach to municipal liability. First, the fact that state law recognizes municipal liability in ordinary negligence cases does not necessarily mean that the state would voluntarily have acceded to liability for constitutional violations by local law enforcement officers; such liability would be imposed by federal law under Judge Bazelon's approach, and that is the evil he suggested Congress sought to avoid in limiting section 1983. Moreover, the *Carter* interpretation of the statute would read "person" to include municipalities if the city from which damages were sought were located in a state that had generally waived local immunity from suit, but would read "person" not to mean municipalities if the parent state retained the general immunity bar. This differential reading of a single statutory word seems very strained. Thus, probably until and unless the Court overrules the aspect of *Monroe* dealing with municipal corporations, section 1983 will not provide a satisfactory basis for suits against government units.

judicial¹²⁷ and scholarly¹²⁸ debate over whether section 1983 provides any basis for recovery against municipalities. The *Bivens* decision leads to the rather striking conclusion that section 1983 may simply be unnecessary: money damages, as well as equitable relief, may be obtained in suits founded directly upon the Constitution.¹²⁹ If it is "appropriate" or "necessary" for the victim of an unconstitutional exercise of official power to have a remedy that will make good the wrong done,¹³⁰ then it seems wholly appropriate to afford a remedy against a local treasury whenever recourse against the officer is denied for reasons having to do with the general public good.¹³¹

*B. Legislative Replacement of the Exclusionary
Rule with an Action Against the Government:
The Chief Justice's Proposal*

The exclusionary rule, once said by the Court to be "the only effective remedy for the protection of rights under the Fourth

¹²⁷ See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1960); *Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Scher v. Board of Educ.*, 424 F.2d 741 (3d Cir. 1970); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Schnell v. Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Deane Hill Country Club, Inc. v. Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Adams v. Park Ridge*, 293 F.2d 585 (7th Cir. 1961).

¹²⁸ See, e.g., *Kates & Kouba*, *supra* note 114; Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142 (1969); Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105 (1971); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).

¹²⁹ This possibility was suggested and, prior to *Bivens*, discounted in Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1506 (1969). More positive suggestions of this possibility were made prior to *Bivens* in Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142, 1169-72 (1969), and in Hill, *Constitutional Remedies*, *supra* note 8, at 1155-58.

¹³⁰ See pp. 1549-51 *supra*.

¹³¹ Of course, if § 1983 were read as embodying a congressional judgment that the remedy of damages against municipalities should not be available, then the limitations of that section would become relevant, under the analysis suggested here, to the Court's consideration of a constitutionally based remedy against municipalities. The legislative history, however, will not bear the interpretation that Congress affirmatively intended to preclude such suits. See the discussion of the legislative history of section 1983 in Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142, 1164-69 (1969).

With respect to suits against the state for constitutional torts, the eleventh amendment would appear to be a barrier to an action against the state treasury. That amendment, however, has been held inapplicable to actions against political subdivisions of a state. See *Hopkins v. Clemson Agric. College*, 221 U.S. 636 (1911).

Amendment,"¹³² has recently been the subject of substantial judicial and scholarly criticism.¹³³ In *Coolidge v. New Hampshire*,¹³⁴ four Justices¹³⁵ indicated that they were willing to reconsider *Mapp v. Ohio*,¹³⁶ which applied the exclusionary rule to state trials, and in *Bivens* the Chief Justice in dissent expressed his distaste for the rule in strong language, calling it "both conceptually sterile and practically ineffective in accomplishing its stated objective."¹³⁷ However, the Chief Justice indicated that in spite of the rule's defects, it should not be eliminated until some "meaningful alternative" is developed,¹³⁸ and it is unlikely that the result in *Bivens* will itself provide the occasion for an independent judicial determination to abandon the exclusionary rule in federal criminal cases. The fact that section 1983 provides a remedy analogous to that created in *Bivens* for illegal searches and arrests committed by state officers did not deter the Court from extending the exclusionary rule to state criminal trials. And there is no more reason for abandoning the federal rule after *Bivens* than there was for declining to create the state rule after *Monroe v. Pape*.¹³⁹

Rather than judicial action eliminating the exclusionary rule, the Chief Justice suggested that the rule be exchanged for a statute which would create a cause of action against the government itself for fourth amendment violations and which would direct that *no* evidence be excluded from a federal criminal trial solely because it had been secured in violation of the fourth amendment.¹⁴⁰ Would such congressional legislation replacing the exclusionary rule with a damage action against the United States be constitutional? Under the analysis suggested here, the answer would depend upon the degree to which the rule was bound up with substantive constitutional guarantees and the degree to which the substitute scheme would provide comparable

¹³² *Linkletter v. Walker*, 381 U.S. 618, 634 (1965).

¹³³ See, e.g., Oaks, *supra* note 116.

¹³⁴ 403 U.S. 443 (1971).

¹³⁵ *Id.* at 490-91 (Harlan, J., concurring); *id.* at 493 (Burger, C.J., dissenting in part and concurring in part); *id.* at 510 (Blackmun, J., dissenting in part and concurring in part); *id.* at 496-500 (Black, J., concurring in part and dissenting in part).

¹³⁶ 367 U.S. 643 (1961).

¹³⁷ 403 U.S. at 415. The Chief Justice had previously expressed his skepticism about the exclusionary rule in Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

¹³⁸ 403 U.S. at 420.

¹³⁹ 365 U.S. 167 (1961) (recognizing federal damage action under § 1983 for constitutional violations by state officers).

¹⁴⁰ 403 U.S. at 422-23.

vindication of the interests protected by the displaced remedy.¹⁴¹

In regard to the relationship between the exclusionary rule and the substantive protection afforded by the fourth amendment, some members of the Court have suggested that the federal exclusionary rule adopted in *Weeks v. United States*¹⁴² should be seen as a nonconstitutional exercise of the Court's supervisory power and thus be subject to legislative abrogation without any consideration of substitute remedies.¹⁴³ This particular dispute, however, would appear to have been resolved by the Court's holding in *Mapp*. By requiring that the rule of exclusion be followed in state criminal cases, the Court was necessarily making a judgment that the rule was constitutionally based. Writing for a plurality of the Court, Mr. Justice Clark argued that "the plain and unequivocal language of *Weeks* . . . to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed."¹⁴⁴

Whether the legislation suggested by the Chief Justice would, if enacted, provide comparable vindication for the interests promoted or protected by the exclusionary rule depends in part upon the functions the rule is thought to serve. If it is assumed that the sole purpose of the exclusionary rule is to deter violations of the fourth amendment, then the dispositive question respecting the constitutionality of the Chief Justice's proposed legislation is simply whether a damage action against the government would provide deterrence against fourth amendment violations of effectiveness comparable to that provided by the exclusion of evidence. Given the limited empirical support for the proposition that the exclusionary rule significantly deters illegal law enforcement practices,¹⁴⁵ it would be difficult for the Court not to defer to a legislative judgment that a damage action against governmental units provided a level of deterrence that was at least comparable to that provided by the suppression doctrine.

However, while it has been argued by the Chief Justice¹⁴⁶ and others¹⁴⁷ that only the deterrence theory is consistent with the decided cases concerning the scope of the exclusionary rule,¹⁴⁸

¹⁴¹ See pp. 1547-49 *supra*.

¹⁴² 232 U.S. 383 (1914).

¹⁴³ See note 88 *supra*.

¹⁴⁴ 367 U.S. at 649.

¹⁴⁵ See generally Oaks, *supra* note 116.

¹⁴⁶ 403 U.S. at 415.

¹⁴⁷ See, e.g., Oaks, *supra* note 116, at 669-71.

¹⁴⁸ Some of the Court's recent rhetoric might arguably appear to support this view. Thus, for example, in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court, emphasizing the deterrence rationale, declined to give retroactive effect to *Mapp*, and thereby left standing convictions based in part on illegally secured evidence. The Court's decision in *Linkletter*, however, was influenced by factors other than

members of the Court, beginning with Justices Holmes and Brandeis dissenting in *Olmstead v. United States*,¹⁴⁹ have also articulated a normative judgment about the rule's relationship to the judicial process and government action generally. The core of this judgment is a sense that if the government is allowed to use the courts to avail itself of the product of its wrongdoing, then the unlawful government conduct becomes less than totally impermissible and is somewhat legitimized.¹⁵⁰ Responding to this argument in his *Bivens* dissent, the Chief Justice denied that fourth amendment violations would be endorsed by permitting the introduction of illegally seized evidence as long as an effective damage remedy against the government was provided.¹⁵¹ But availability of an alternative compensatory remedy only reduces and does not eliminate the legitimizing effect of the official use in court of evidence seized in violation of the fourth amendment.

In essence, by disallowing in all cases the use of the exclusionary rule to suppress evidence gathered in violation of the

the futility of retroactively applying a deterrent. The Court noted, for example, that justified reliance had been placed by state courts on *Wolf v. Colorado*, 338 U.S. 25 (1949) (exclusionary rule held not constitutionally required in state proceedings), and the fact that making the rule of *Mapp* retroactive would "tax the administration of justice to the utmost," 381 U.S. at 637, as the courts attempted to determine "the excludability of evidence long since destroyed, misplaced or deteriorated." *Id.* Thus, for the Court to decline to reopen convictions based upon evidence seized in violation of the fourth amendment is a matter far different from announcing *prospectively* that such evidence will be utilized in future criminal trials.

¹⁴⁹ 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting). See also Pye, *Charles Fahy and the Criminal Law*, 54 GEO. L.J. 1055, 1071-73 (1966).

¹⁵⁰ So, as recently as 1968, the Court, while acknowledging that the "major thrust" of the exclusionary rule is deterrence, stated that

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence

Terry v. Ohio, 392 U.S. 1, 12, 13 (1968).

¹⁵¹ 403 U.S. at 414 ("Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.").

The Chief Justice also discounted the theory that the relationship of the fifth and fourth amendments requires the suppression of evidence seized in violation of the fourth. *Id.* at 414-15. See also *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("[t]he philosophy of [both the fourth and fifth amendments] . . . is . . . [at] the very least that . . . no man is to be convicted on unconstitutional evidence"); *id.* at 661-62 (Black, J., concurring) (exclusionary rule for violations of the fourth amendment is based on the fifth amendment); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (with regard to use of seized papers as evidence, the fourth and fifth amendments "run almost into each other").

fourth amendment, the Chief Justice's proposal would permit the government to buy itself out of having to comply with constitutional commands. To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. In the absence of the exclusionary rule, the law enforcement officer and the public generally are enticed to view the Constitution as Justice Holmes' "bad man" viewed the obligation of contracts.¹⁵² However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way. Under the exclusionary rule a court attempts to maintain the status quo that would have prevailed if the constitutional requirement had been obeyed. But to say that at the government's option certain positive official consequences may be legally sanctioned to follow from unconstitutional conduct effectively removes any *guarantee* which the fourth amendment provides that what is constitutionally required will be constitutionally preserved. The fourth amendment does not grant the government the discretion to decide whether the benefits of infringing the public's right to be protected from unreasonable searches and seizures are worth some expenditure of the public's funds; the language of the amendment is an affirmative command.¹⁵³ It is therefore doubtful that the substitution of a claim against the government for the exclusionary rule in all cases¹⁵⁴ would provide equally effective vindication of the constitutional interests thus protected, and it is therefore doubtful that such a substitution would be constitutionally valid.

¹⁵² Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else").

¹⁵³ See p. 1540 *supra*.

¹⁵⁴ In this context, it is interesting to note that a bill filed to implement the Chief Justice's suggestion does not go as far as his proposal in that it would still leave a court with some discretion as to whether evidence seized or gathered in violation of the fourth amendment could be suppressed. The bill, S. 2657, 92d Cong., 1st Sess. (1971), would provide that "evidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment of the Constitution, unless the court finds, as a matter of law, that such violation was *substantial*" (emphasis added). Among the circumstances enumerated in the bill which the court must consider in determining whether a violation was substantial is the extent to which the violation was willful. Thus, under such a proposal, the Government would not automatically have the power to decide that it was willing to bear the financial costs of a fourth amendment violation in order to reap the possible benefits of an unlawful search or seizure. See 117 CONG. REC. S15,904-05 (daily ed. Oct. 6, 1971) (remarks of Senator Bentsen, the bill's sponsor).

IV. CONCLUSION

While the result in *Bivens* is unlikely to have any dramatic impact on law enforcement practices, the case could be of germinal significance as an assertion of judicial responsibility for the development of remedies implementing the Bill of Rights. The reasoning necessary to reach the *Bivens* result bears important implications for the respective roles of Court and Congress in exercising remedial power to effectuate substantive constitutional guarantees. It has been argued here that the Court should be free to apply the same standard in creating constitutionally based remedies as it does in effectuating federal statutes, and that Congress may modify, within limits, judicially created remedial mechanisms inferred directly from constitutional provisions. This interaction of institutional roles suggests that the judiciary may be free to pierce the sovereign immunity bar which prevents recovery from the Government for fourth amendment violations, and that Congress may be limited in its ability to replace the exclusionary rule with compensatory remedies. In short, once it is admitted that the Constitution may be used as a sword in litigation, the issues raised, unsurprisingly, extend far beyond the specific questions litigated.¹⁵⁵

¹⁵⁵ Another area of potential development, beyond the scope of this Article, is the creation of damage remedies for constitutional violations by federal officers which infringe guarantees other than those embodied in the fourth amendment. An interesting example is provided by the case of *Davidson v. Kane*, 337 F. Supp. 922 (E.D. Va. 1972), where plaintiff sought damages partially on the ground of an alleged assault and battery by two airport policemen at Washington National Airport. See note 111 *supra*. The court dismissed this portion of the complaint, in part by finding no federal cause of action for deprivations of fifth amendment due process—*Bivens* being limited to actions arising from fourth amendment violations. However, it would seem clear that the reasoning of *Bivens* would extend at least to such a closely analogous harm as the infliction, through an assault and battery, of summary punishment by federal officers. One might indeed suggest that, at a minimum, constitutional infringements involving interference with persons or property, where an analogy can easily be drawn to traditional tort concepts and where no effective remedy is available to the plaintiff, are generally appropriate instances for the creation of a federal damage remedy.

Justice Harlan seemed to make a cautious reference to this type of reasoning in his concurring opinion in *Bivens*. He noted that judges are experienced in dealing with the questions of causation and damage in private trespass and false imprisonment cases and should therefore be equipped to deal with similar questions in cases arising under the fourth amendment. He went on to comment that "[t]he same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted." 403 U.S. at 409 & n.9.