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The Demise of the Bivens Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It

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The Demise of the *Bivens* Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It

HENRY ROSE*

A federal statute allows a person whose federal constitutional rights are violated by state actors to sue for damages. There is no analogous federal statute that allows a person whose constitutional rights are violated by federal actors to sue for damages. In 1971, the United States Supreme Court allowed a suit for damages against federal law enforcement officials who allegedly violated Fourth Amendment rights to proceed directly under the Constitution, creating the Bivens remedy.

Beginning in 1983, the Supreme Court reversed course and issued ten consecutive decisions in which it denied a Bivens remedy because no federal statute authorizes suits against federal officials who violate federal constitutional rights. The Supreme Court now considers recognition of a Bivens remedy to be a “disfavored judicial activity.”

It is inequitable for a person whose federal constitutional rights are violated by state actors to be able to sue for damages but not if federal actors violate the same rights. Congress should address this inequity by enacting legislation that authorizes a person whose federal constitutional rights are violated by federal actors to sue for damages.

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A. INTRODUCTION

An inequitable gap exists in the enforcement of federal constitutional rights in the United States. If a person's federal constitutional rights have been violated by state actors, a federal statute¹ allows the person to sue them for damages to compensate for the harm suffered. There is no analogous federal statute that allows a person whose federal constitutional rights have been violated by federal actors to sue them for damages. From 1971 to 1980, the United States Supreme Court allowed persons who alleged that their federal constitutional rights had been violated by federal actors to seek damages directly under the Constitution. However, in ten consecutive decisions since 1983, the Supreme Court has not allowed such suits to proceed, principally because they have not been authorized by Congress. As a result of this series of ten Supreme Court decisions, the right of aggrieved persons to sue for damages to enforce their federal constitutional rights against federal actors who have violated them is severely limited. Congress should enact legislation that allows persons whose federal constitutional rights have been violated by federal actors to sue them for damages. If such legislation is enacted, enforcement of federal constitutional rights will be more comprehensive and equitable.

1. 42 U.S.C. § 1983 (2022).

B. THE SUPREME COURT'S CONSIDERATION OF DAMAGE SUITS AGAINST FEDERAL ACTORS FOR VIOLATING FEDERAL CONSTITUTIONAL RIGHTS

In *Bell v. Hood*,² the plaintiffs sued agents of the Federal Bureau of Investigation (FBI) to recover damages for violating the plaintiffs' rights under the Fourth and Fifth Amendments of the United States Constitution in the way that the FBI agents searched the plaintiffs' homes and arrested them.³ The lower federal courts dismissed the suit for lack of federal jurisdiction because it did not arise under the Constitution or laws of the United States.⁴ On appeal, the United States Supreme Court recognized that it had not previously decided whether federal courts can award damages for violations of the Constitution by federal officers.⁵ Nevertheless, the Supreme Court held that the lower courts had jurisdiction to hear and decide the plaintiffs' claim because this key legal issue would turn on a construction of the Constitution and the laws of the United States.⁶ The issue of whether federal actors could be sued for damages for violating federal constitutional rights did not return to the Supreme Court for twenty-five years.

1. THE RISE OF THE *BIVENS* REMEDY (1971-1980)

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,⁷ Bivens sued the federal defendants seeking damages for violating his Fourth Amendments rights in the way that they searched his home and arrested him.⁸ The lower federal courts dismissed the suit for failing to state a cause of action.⁹ The Supreme Court rejected the defendants' argument that Bivens should only be allowed to pursue his state law tort claims against them, because so limiting his claims would ignore the far greater harm that federal agents who act unconstitutionally cause when they abuse their federal authority.¹⁰ The Court recognized that historically, damages have been the ordinary judicial remedy for an invasion of personal interests in liberty, such as a violation of the Fourth Amendment.¹¹ The Court also found that the case "involves no special factors counseling hesitation in the absence of

2. *Bell v. Hood*, 327 U.S. 678 (1946).

3. *Id.* at 679-80.

4. *Id.* at 680.

5. *Id.* at 684.

6. *Id.* at 684-85.

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

8. *Id.* at 389-90.

9. *Id.* at 390.

10. *Id.* at 390-95.

11. *Id.* at 395-96.

affirmative action by Congress.”¹² The Court held that Bivens was entitled to recover money damages for any injuries he suffered as a result of the defendants’ violation of his Fourth Amendment rights.¹³ As a result of this decision, the *Bivens* remedy was created, allowing persons whose federal constitutional rights are violated by federal actors to recover damages for the harm suffered directly under the constitutional provision that is violated.

In *Davis v. Passman*,¹⁴ the Supreme Court addressed whether Davis, a former female employee of United States Congressman Passman, could recover damages if she could prove that he terminated her employment based on her sex in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁵ The Court found that for Davis, like Bivens, a damage remedy was the only form of judicial relief available to vindicate the alleged violation of her constitutional rights.¹⁶ The Court followed *Bivens* and held that Davis could recover damages if she prevailed on the merits of her case by proving that Passman violated her equal protection rights.¹⁷

In *Carlson v. Green*,¹⁸ the estate of a man who died in federal prison sued prison officials for damages alleging that he died because the prison officials provided medical treatment to him that was so inadequate that it violated the Eighth Amendment’s proscription against the infliction of cruel and unusual punishment.¹⁹ The Supreme Court held that even though the estate had a claim against the federal government under the Federal Tort Claims Act,²⁰ the estate also had a *Bivens* claim for damages for a violation of the prisoner’s Eighth Amendment rights.²¹

2. THE FALL OF THE *BIVENS* REMEDY (1983-2020)

In *Bush v. Lucas*,²² a federal employee of the National Aeronautics and Space Administration (NASA) was demoted to a lower paid position

12. *Bivens*, 403 U.S. at 396-97.

13. *Id.* at 397.

14. *Davis v. Passman*, 442 U.S. 228 (1979).

15. *Id.* at 230-31, 234-35.

16. *Id.* at 245.

17. *Id.* at 248. The Court also found that Davis’ suit against Congressman Passman for his official conduct does raise special concerns involving hesitation in allowing a damage remedy. *Id.* However, the Court concluded that those concerns are coextensive with Passman’s possible defense to Davis’ suit under the Speech and Debate Clause of the Constitution and the Court remanded the case for consideration of this issue. *Davis*, 442 U.S. at 246, 249.

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

19. *Id.* at 16-17.

20. 28 U.S.C. §§ 1346(b), 2671-80 (2021).

21. *Carlson*, 446 U.S. at 18-23.

22. *Bush v. Lucas*, 462 U.S. 367 (1983).

because he made public statements critical of NASA that his supervisor considered to be false.²³ The employee appealed his demotion within the federal civil service system and was reinstated with backpay because his demotion violated his First Amendment free speech rights.²⁴ While his civil service administrative appeals were pending, the employee also sued his supervisor for damages alleging that his First Amendment rights had been violated.²⁵ The Fifth Circuit held that the employee had no claim for damages under the First Amendment because the relationship between the federal government and its civil service employees constituted a special factor precluding such a claim.²⁶ The Supreme Court affirmed, finding that Congress is in a better position than the courts to evaluate the impact of litigation between federal employees about First Amendment rights on the efficiency of the federal civil service.²⁷ Unlike in *Bivens*, *Davis*, and *Carlson*, the Supreme Court declined to allow the federal employee to seek damages directly under the constitutional provision that had been violated because of his available administrative remedies under the federal civil service system.

In *Chappell v. Wallace*,²⁸ enlistees in the United States Navy sued their superior officers for damages, alleging unconstitutional racial discrimination in the manner that they were supervised by them.²⁹ The Supreme Court held that the unique disciplinary structure of the military and Congress' authority over the military system of justice dictate that no *Bivens* remedy be allowed in this case.³⁰ In *United States v. Stanley*,³¹ a member of the U.S. Army was secretly administered doses of lysergic acid diethylamide (LSD) pursuant to an Army study of its effects on humans that caused him to experience hallucinations, incoherence, memory loss, and act violently toward his wife and children.³² Stanley sued unknown individual federal officers alleging that they violated his constitutional rights.³³ The Supreme Court held that no *Bivens* remedy was available for injuries that "arise out of or are in the course of activity incident to [military] service."³⁴

In *Schweiker v. Chilicky*,³⁵ persons who had been terminated from the Social Security Disability Insurance (SSDI) program sued federal officials

23. *Id.* at 369-70.

24. *Id.* at 370-71.

25. *Id.* at 371.

26. *Id.* at 371-72.

27. *Bush*, 462 U.S. at 389-90.

28. *Chappell v. Wallace*, 462 U.S. 296 (1983).

29. *Id.* at 297.

30. *Id.* at 304-05.

31. *United States v. Stanley*, 483 U.S. 669 (1987).

32. *Id.* at 671.

33. *Id.* at 672.

34. *Id.* at 683-84 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

35. *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

who administered the review of their disability status for damages, alleging that the reviews did not comport with due process.³⁶ Social Security reported that in the early 1980s it had wrongfully terminated about 200,000 persons from SSDI and, in response, Congress had unanimously enacted legislation to reform the Continuing Disability Review (CDR) program.³⁷ The Supreme Court concluded that since Congress had not authorized suits for damages in its reform legislation, no claim for damages against the federal officials who administered the CDR in an unconstitutional manner would be allowed.³⁸

In *FDIC v. Meyer*,³⁹ Meyer successfully sued the Federal Savings and Loan Insurance Corporation (FSLIC) for terminating his employment without due process, and a jury awarded him \$130,000.⁴⁰ The Federal Deposit Insurance Corporation (FDIC), the statutory successor of the FSLIC, whose sovereign immunity had been waived by Congress,⁴¹ appealed the damage award and the Supreme Court reversed and held that a *Bivens* remedy is not available against a federal agency, because Congress, not the courts, should determine whether such a significant expansion of federal government liability is appropriate.⁴²

In *Correctional Services Corp. v. Malesko*,⁴³ a federal prisoner with a diagnosed heart condition that limited his ability to climb stairs suffered a heart attack when he was forced by prison officials to climb five flights of stairs.⁴⁴ The prisoner sued the Correctional Services Corporation, which operated the halfway house where the prisoner was injured under a contract with the federal Bureau of Prisons.⁴⁵ The Supreme Court followed *Meyer* and held that the *Bivens* remedy is only available against individual federal officers who violate constitutional rights and is not available against a private entity, like the Correctional Services Corporation.⁴⁶

In *Wilkie v. Robbins*,⁴⁷ a landowner sued officials of the federal Bureau of Land Management for damages alleging that they violated his Fourth and Fifth Amendment rights in their efforts to coerce him into granting the federal government an easement on his land.⁴⁸ Given the factually

36. *Id.* at 418-19.

37. *Id.* at 415-18.

38. *Id.* at 414, 423, 426, 429.

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

40. *Id.* at 473-74.

41. *Id.* at 475, 480-83.

42. *Id.* at 471-72, 486.

43. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

44. *Id.* at 64.

45. *Id.* at 63-64.

46. *Id.* at 70-71, 74.

47. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

48. *Id.* at 547-48.

complex, longstanding nature of the dispute between the parties and the knotty legal standards applicable to the case, the Supreme Court held that Congress should authorize appropriate judicial remedies for this type of dispute and a *Bivens* remedy should not be allowed.⁴⁹

In *Minnecci v. Pollard*,⁵⁰ a prisoner at a federal facility operated by a private company sued, seeking damages from several company employees who the prisoner alleged deprived him of adequate medical care in violation of his Eighth Amendment rights.⁵¹ The Supreme Court held that in a suit by a prisoner against privately employed persons working at a privately operated federal prison alleging Eighth Amendment violations, the prisoner must seek a remedy under state tort law and no *Bivens* remedy would be implied.⁵²

In *Ziglar v. Abbasi*,⁵³ aliens who were not lawfully in the United States and were detained for months after the September 11, 2001, attack in a federal facility under harsh conditions sued three high executive officers in the United States Department of Justice and two wardens at the facility, seeking damages for violations of several federal constitutional rights.⁵⁴ The Supreme Court initially pointed out that *Bivens* was decided before the Supreme Court developed its cautious approach to finding implied causes of action to enforce federal statutes.⁵⁵ Although the Court recognized the validity of its precedents in *Bivens*, *Davis*, and *Carlson*, the Court's notable change in recognizing implied causes of action rendered expanding *Bivens* to new contexts a "disfavored judicial activity."⁵⁶ Moreover, the Court found that separation-of-powers principles dictate that Congress has the superior role in creating new substantive legal liabilities.⁵⁷ The Supreme Court also noted that its prior decisions regarding the *Bivens* remedy indicate that it will not be available where there are special factors counseling hesitation in the absence of affirmative action by Congress.⁵⁸ The Court stated that if a lower court is asked to recognize a *Bivens* remedy, and the case is different in a meaningful way from *Bivens*, *Davis*, and *Carlson*, the lower court must assess whether there are special factors counseling hesita-

49. *Id.* at 561-62.

50. *Minnecci v. Pollard*, 565 U.S. 118 (2012).

51. *Id.* at 120.

52. *Id.* at 125-26, 131.

53. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

54. *Id.* at 1851-54.

55. *Id.* at 1855-58.

56. *Id.* at 1854-57 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

57. *Id.* at 1857 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988) and *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

58. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citing *Carlson v. Green*, 446 U.S. 14, 18 (1980) and *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

tion in the absence of affirmative action by Congress.⁵⁹ The Supreme Court found several factors, that counseled against the Court allowing a *Bivens* remedy against the defendants, relating to the conditions of the plaintiffs' detention—the national security implications of their work and these defendants' need to avoid time-consuming litigation—and denied a *Bivens* remedy against them.⁶⁰ As to one prison warden who allegedly allowed prison guards to abuse the detainees in violation of the Fifth Amendment, the request for a *Bivens* remedy arose in a different context than *Carlson* and, therefore, the request for a *Bivens* remedy against this warden was remanded to the lower courts to perform the special factors analysis.⁶¹

In *Hernandez v. Mesa*,⁶² a fifteen-year-old Mexican national was shot and killed on Mexican soil by a United States border patrol agent who was on United States soil.⁶³ The child's parents sued the border agent for damages alleging that the border agent had violated the child's Fourth and Fifth Amendment rights.⁶⁴ The Supreme Court found that the assertion of a *Bivens* remedy arose in a new context in this case, because it involves a cross-border shooting that implicates the interests and functioning of other branches of government.⁶⁵ The Court also found several special factors that caution against recognizing a *Bivens* remedy: the effect on foreign relations between Mexico and the United States; national security involving United States border security; other federal statutes that create damage remedies for persons injured by United States government officers but exempt such injuries that occur abroad; and separation-of-powers concerns.⁶⁶ Due to these factors, the Court held that Congress should decide whether a damages claim is available in this type of case and declined to recognize a *Bivens* remedy.⁶⁷ Two justices concurred in the majority opinion but also urged that *Bivens* be overruled: asserting that “[t]he analysis underlying *Bivens* cannot be defended.”⁶⁸

59. *Id.* at 1859-60.

60. *Id.* at 1858-63.

61. *Id.* at 1858-59, 1863-65. On remand, the district court undertook the special factors analysis and dismissed the *Bivens* remedy against the warden based on *Ziglar*. *Turkmen v. Ashcroft*, 2018 WL 4026734, at 14 (E.D.N.Y. Aug. 13, 2018).

62. *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

63. *Id.* at 740.

64. *Id.*

65. *Id.* at 743-44.

66. *Id.* at 744-50.

67. *Hernandez*, 140 S. Ct. at 739, 749-50.

68. *Id.* at 750-53 (Thomas, J., concurring, joined by Gorsuch, J.).

3. THE STATUS OF THE *BIVENS* REMEDY

A review of Supreme Court decisions since 1983 involving the *Bivens* remedy indicates that the Supreme Court disfavors its expansion into new contexts beyond *Bivens*, *Davis*, and *Carlson*. In ten consecutive cases since 1983, the Supreme Court has declined to recognize the availability of a *Bivens* remedy. One circuit court judge has described the Fifth Circuit's interpretation of these Supreme Court precedents as rendering the *Bivens* remedy only available in cases that factually match *Bivens*, *Davis*, or *Carlson*.⁶⁹ It is apparent that, under these Supreme Court precedents, few persons whose federal constitutional rights are violated by federal actors will have judicial recourse to seek damages to compensate them for the harm that they suffer due to these violations. These Supreme Court precedents also indicate that a majority of the justices on the Supreme Court since 1983 believe that it is the responsibility of Congress, rather than the courts, to determine whether persons whose federal constitutional rights are violated by federal actors should be allowed to seek damages in suits to enforce their constitutional rights. As a result, Congress should address this gap that has emerged in the enforcement of federal constitutional rights.

C. CONGRESSIONAL AUTHORIZATION OF DAMAGE SUITS FOR VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS BY GOVERNMENT ACTORS

Since 1871, Congress has authorized damage actions against state actors who violate federal constitutional rights via 42 U.S.C. § 1983 and its predecessor laws.⁷⁰ 42 U.S.C. § 1983 has also been interpreted by the Supreme Court to apply to local government actors who, acting under color of state law, violate federal constitutional rights.⁷¹ However, Congress has not enacted a statute analogous to 42 U.S.C. § 1983 that provides a damage remedy for persons whose federal constitutional rights are violated by federal actors.⁷²

Amendments to the Federal Tort Claims Act imply that Congress has recognized the *Bivens* remedy.⁷³ The Supreme Court in *Hernandez* accepted this view, but asserted that these provisions of the Federal Tort Claims Act are “not a license to create a new *Bivens* remedy in a context we have

69. Byrd v. Lamb, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, Circuit Judge, concurring).

70. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017).

71. Monroe v. Pape, 365 U.S. 167, 168-69, 187 (1961).

72. Ziglar, 137 S. Ct. at 1854.

73. James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121-22 (2009) (arguing that in amendments to the Federal Tort Claims Act, Congress implicitly recognized the *Bivens* remedy and its role in holding federal officers accountable for their violations of the federal Constitution).

never before addressed.”⁷⁴ A consistent theme in the Supreme Court’s decisions in the *Bivens* cases since 1983 is that congressional action is necessary if there is to be broader enforcement of federal constitutional rights via damage remedies against federal actors beyond the *Bivens*, *Davis*, and *Carlson* precedents.

D. WHY CONGRESS SHOULD ENACT A SPECIFIC DAMAGES REMEDY WHEN FEDERAL ACTORS VIOLATE FEDERAL CONSTITUTIONAL RIGHTS

1. WHEN A LEGAL WRONG OCCURS A JUDICIAL REMEDY SHOULD BE AVAILABLE TO ADDRESS IT

Since *Marbury v. Madison*,⁷⁵ the American legal system has been committed to providing a judicial remedy to persons who experience a violation of their legal rights.⁷⁶ In *Bivens*, the Supreme Court relied on this principle to hold that damages are available to vindicate a violation of a federal constitutional right by federal actors.⁷⁷ No one disputes that federal actors can, and do violate federal constitutional rights that cause compensable harm to the persons whose rights are violated.⁷⁸

In the context of litigation under 42 U.S.C. § 1983, the basic purpose of a damage award is to compensate persons for the harm caused by the deprivation of their federal constitutional rights. The Court in *Bivens* recognized the primacy of damage awards to vindicate the violation of personal federal constitutional rights.⁷⁹ Punitive damages are also available under 42 U.S.C. § 1983 when a state actor’s conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others.⁸⁰

In *Schweiker v. Chilicky*, the plaintiffs were seeking damages for emotional distress and for loss of food, shelter, and medical benefits caused by the defendants’ termination of their disability benefits in violation of due process.⁸¹ The Supreme Court acknowledged that denying a *Bivens* remedy

74. *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020).

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

76. *Id.* at 163.

77. *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

78. For example, in *Cleavinger v. Saxner*, 474 U.S. 193, 198 (1985), a jury found that the petitioners (federal prison officials) had violated the respondents (two prison inmates) Fifth Amendment due process rights and awarded damages to the respondents to compensate them for these constitutional violations. The Supreme Court remanded the case to determine whether the petitioners were entitled to qualified immunity for their unconstitutional conduct. *Id.* at 206-08.

79. *Bivens*, 403 U.S. at 395-96.

80. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

81. *Schweiker v. Chilicky*, 487 U.S. 412, 417, 419 (1988).

to the plaintiffs would result in many hardships and injuries that would never be adequately compensated.⁸² Nevertheless, the Supreme Court held that since Congress had not authorized a damage remedy for the harm that the plaintiffs suffered at the hands of the federal defendants, none would be available to them.⁸³ For the plaintiffs in *Schweiker*, no damages were available to them even if they could have proven that they suffered substantial harm as a result of the defendants' unconstitutional conduct. In *Schweiker*, like the other nine *Bivens* cases that the Supreme Court has decided since 1983, the Supreme Court severed the link between unconstitutional wrongs and the judicial remedies needed to fully vindicate them.

2. DAMAGE AWARDS DETER UNCONSTITUTIONAL CONDUCT

Damage awards entered against state actors who violate constitutional rights are a formidable deterrent to their commission of future violations of constitutional rights.⁸⁴ However, after the ten consecutive Supreme Court decisions that denied a *Bivens* remedy, “redress for a federal officer’s unconstitutional acts is either extremely limited or wholly nonexistent allowing federal officials to operate in something resembling a Constitution-free zone.”⁸⁵ This “wholesale immunity” that federal actors have for violating constitutional rights may “induce impunity,” resulting in more unconstitutional conduct.⁸⁶ Federal actors should face the same liability for damages as their state actor counterparts when they violate federal constitutional rights. In this way, all government actors would be similarly deterred from violating federal constitutional rights.

3. SUITS SEEKING DAMAGES, LIKE SUITS SEEKING INJUNCTIVE RELIEF, SHOULD BE AVAILABLE AGAINST FEDERAL ACTORS WHO VIOLATE FEDERAL CONSTITUTIONAL RIGHTS

In suits seeking vindication of violations of federal constitutional rights under 42 U.S.C. § 1983, plaintiffs can seek both damages and injunctive relief against state actors.⁸⁷ It is long established that courts have the equitable power to issue injunctions against federal actors who violate fed-

82. *Id.* at 417, 425, 428-29.

83. *Id.* at 414, 423, 426, 429.

84. *Carey v. Phipps*, 435 U.S. 247, 256-57 (1978).

85. *Byrd v. Lamb*, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, Circuit Judge, concurring).

86. *Id.*

87. SCOTT MICHELMAN, CIVIL RIGHTS ENFORCEMENT 31-32 (2020).

eral law.⁸⁸ This precedent supports suits against federal actors that seek to enjoin them from violating the federal Constitution.⁸⁹

The *Bivens* cases that the Supreme Court has decided since 1983 lead to an anomalous result—persons whose federal constitutional rights have been violated by federal actors will not likely have a claim for damages against these federal actors, but they may seek to enjoin them from committing the same constitutional violations in the future. This anomaly is illogical. Persons whose federal constitutional rights are violated by federal actors should have the same rights to seek both damages and injunctive relief as they would have under 42 U.S.C. § 1983 against state actors who violate their federal constitutional rights.

4. THE DENIAL OF THE *BIVENS* REMEDY BY THE SUPREME COURT RETARDS THE DEVELOPMENT OF CONSTITUTIONAL LAW

The protections afforded under the United States Constitution evolve with judicial interpretations of the meaning of its provisions. When the Supreme Court declines to recognize a *Bivens* remedy as it has done consistently since 1983, it loses the opportunity to interpret the constitutional provisions at issue in cases against federal actors.

In *Wilkie*, the Supreme Court declined to recognize a *Bivens* remedy, in part, because the plaintiff's Fourth and Fifth Amendment claims raised "a serious difficulty of devising a workable cause of action" involving the need to develop judicial standards that "would be endlessly knotty to work out."⁹⁰ As a result, the Court concluded that Congress is in a better position to fashion an appropriate remedy, if any, for grievants against federal governmental overreach like the plaintiff.⁹¹ But, it is the role of the judiciary to interpret the Constitution's meaning.⁹² The Court's decision in *Wilkie* was a transfer from the Supreme Court to Congress of a difficult constitutional issue that the Court could have sought to resolve. The result was a lost opportunity for the Supreme Court to develop a deeper understanding of the protections afforded by the Fourth and Fifth Amendments.

5. THE *BIVENS* CASES CREATE AN INEQUITY IN THE ENFORCEMENT OF FEDERAL CONSTITUTIONAL RIGHTS

Due to the Supreme Court's decisions since 1983 involving the *Bivens* remedy, an unacceptable inequity has developed in the enforcement of fed-

88. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

89. MICHELMAN, *supra* note 87, at 99-100.

90. *Wilkie v. Robbins*, 551 U.S. 537, 561-62 (2007).

91. *Id.* at 562.

92. *United States v. Nixon*, 418 U.S. 683, 703 (1974) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

eral constitutional rights. If a person's federal constitutional rights have been violated by state actors, the person can sue these actors under 42 U.S.C. § 1983 for damages to compensate them for the injuries that they have suffered. If a person's federal constitutional rights have been violated by federal actors, the person will only be able to sue the government actors for damages if the Supreme Court's precedents in *Bivens*, *Davis*, or *Carlson* apply to the case. The Supreme Court has strictly limited *Bivens* remedies to these three situations and, as a result, most persons whose constitutional rights are violated by federal actors cannot recover damages to compensate them for the injuries that they have suffered.

The United States Constitution is concerned with limitations on the power of government.⁹³ The United States Supreme Court, in its decisions since 1983 involving the *Bivens* remedy, has turned these limitations on their head. In these decisions that have consistently denied a *Bivens* remedy, the Supreme Court has reduced governmental accountability by restricting the federal constitutional rights that can be enforced by damage awards when they are violated by federal actors. In this line of cases, the Supreme Court has protected the interests of the federal government over the interests of persons whose federal constitutional rights have been violated by federal actors. As a result, enforcement of personal federal constitutional rights has been diminished.

There is an answer to this inequity in the enforcement of federal constitutional rights that the Supreme Court's decisions regarding the *Bivens* remedy have created. The answer is for Congress to enact legislation that allows persons whose federal constitutional rights are violated by federal actors to sue the federal actors for damages to compensate the aggrieved persons for the injuries that they have suffered.

E. LEGISLATIVE SOLUTIONS TO THE GAP IN THE ENFORCEMENT OF FEDERAL CONSTITUTIONAL RIGHTS

Congress has at least three options to address the gap in the enforcement of federal constitutional rights that has resulted from the Supreme Court's *Bivens* decisions:

- Amend 42 U.S.C. § 1983 to allow claims against persons acting under color of federal law who violate federal constitutional rights;
- Enact a freestanding statute that is analogous to 42 U.S.C. § 1983 that allows damage awards against persons acting under color of federal law who violate federal constitutional rights; or

93. Crawford-El v. Britton, 93 F.3d 813, 831 (D.C. Cir. 1996).

- Amend the Federal Tort Claims Act by repealing 28 U.S.C. § 2679(b)(2)(A)⁹⁴ and allowing claims against the United States for violations of federal constitutional rights by persons acting under color of federal law.⁹⁵

The key goal in each of these legislative approaches is to provide that persons whose federal constitutional rights are violated by federal actors will be able to sue for damages to compensate them for the harm that they have suffered. In this way, Congress will address the current inequitable gap that exists in the enforcement of federal constitutional rights.

94. This is a provision of the Federal Tort Claims Act that exempts civil actions brought against employees of the federal government for violations of the Federal Constitution from inclusion in the exclusive remedy provision against the federal government in 28 U.S.C. § 2679(b)(1) (2021).

95. HOWARD M. WASSERMAN, UNDERSTANDING CIVIL RIGHTS LITIGATION 86 (2d ed. 2018).