BALANCING THE SEPARATION OF POWERS AND RIGHT-REMEDY PRINCIPLES IN *MINNECI V. POLLARD*, 132 S. CT. 617 (2012)

In the 1972 case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that the courts had power to create damage remedies for violations of constitutional rights by those acting pursuant to federal law.[1] The Court failed, however, to issue specific instructions regarding the use and applicability of this newly spawned "*Bivens* remedy."[2] In the thirty-five years following its holding in *Bivens*, the Court extended the new remedy only twice.[3] Then, in *Wilkie v. Robbins*,[4] the Court established two hurdles that must be overcome before applying *Bivens*. First, *Bivens* does not apply when alternative remedies provide a "convincing reason" to refrain from extending the doctrine.[5] Second, courts must determine whether "special factors counseling hesitation" bar creation of a remedy.[6] By substantially narrowing *Bivens*, *Wilkie* signaled a growing reluctance by the Court to create unrestricted remedies of its own accord.

Last Term, in *Minneci v. Pollard*,[7] the Supreme Court further narrowed *Bivens*, holding that employees of private prisons who are found guilty of constitutional violations are not subject to damage claims under the Eighth Amendment because there

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1. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

2. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1543 (1972) ("[A]lthough [*Bivens*] provides the federal courts with a potentially powerful tool, there is very little instruction on how or when it is to be used.").

3. *See* Carlson v. Green, 446 U.S. 14, 23 (1980) (*Bivens* applicable to Eighth Amendment claims against government employees); Davis v. Passman, 442 U.S. 228, 248–49 (1979) (*Bivens* applicable to Fifth Amendment claims against government officials). Thereafter, the Court denied *Bivens* claims on numerous occasions. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (no *Bivens* actions against private firms); Bush v. Lucas, 462 U.S. 367, 390 (1983) (*Bivens* inapplicable in the presence of legislative remedies).

4. 551 U.S. 537 (2007).

5. *Id.* at 550.

6. *Id.*

7. 132 S. Ct. 617 (2012).

are alternative state remedies for such violations.[8] By stringently interpreting the previously ambiguous first step of *Wilkie* but nevertheless preserving the *Bivens* remedy for use in cases where no alternative relief exists, the Court largely validated deep-seated separation of powers concerns expressed in prior precedent while simultaneously making a pragmatic effort to uphold Chief Justice Marshall's belief that a right must always entail a remedy.[9]

The facts of *Minneci* are as follows. In 2001 and 2002, Richard Pollard was a prisoner at a federal prison operated by the Wackenhut Corrections Corporation.[10] During his imprisonment, Pollard slipped and fell on a cart left in a doorway, seriously injuring his elbows.[11] According to Pollard, prison employees forced him to dress in a jumpsuit and wear uncomfortable arm restraints when traveling to an orthopedist for treatment, causing him serious pain.[12] The employees later failed to follow the orthopedist's instructions to place Pollard's left arm in a splint, refused to make alternative arrangements when he was unable to feed or bathe himself, provided him with insufficient medicine, and forced him to return to work before his injuries had healed.[13] Pollard subsequently brought suit against several prison employees,[14] alleging Eighth Amendment violations and seeking damages under *Bivens*.[15] The district court, adopting the recommendation of a magistrate judge assigned to the case, found that no *Bivens* claim was available against employees of a privately operated prison because Pollard could have sought alternative tort remedies and

8. *Id.* at 626.

9. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.").

10. *Minneci*, 132 S. Ct. at 620. Pollard included the GEO Group and eight individuals in his original complaint, but the district court dismissed the company after *Malesko* held that a *Bivens* remedy did not apply against privately managed prisons. On appeal, the Ninth Circuit reversed the district court and held that Pollard could state a claim under *Bivens* for violation of his Eighth Amendment rights. However, the Ninth Circuit did affirm the district court's dismissal of Pollard's claims against the GEO Group. *See* Pollard v. GEO Group, Inc., 607 F.3d 583, 586 n.5, 603 (9th Cir. 2010).

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

12. *Id.*

13. *Id.* at 620–21.

14. *Id.*

15. *Id.* at 620.

because the prison employees were not acting "under color of federal law."[16]

Pollard appealed to the Ninth Circuit, which reversed.[17] The court noted that the Supreme Court had never previously addressed whether a *state* remedy might preclude *Bivens* actions, but concluded that the *Wilkie* test favored extending *Bivens* in this case.[18] Looking to the first prong of the *Wilkie* test, the court held that Pollard's ability to seek tort remedies did not provide a "convincing reason" to stay a *Bivens* remedy.[19] The court adduced two reasons for this conclusion. First, because the available relief was a state remedy, a judicially crafted remedy would not implicate separation of powers concerns.[20] Second, allowing state tort remedies to displace *Bivens* actions would frustrate the goal of providing uniform remedies for constitutional violations because there are differences among the states' tort remedies, including the presence or absence of caps on non-economic damages and differing statutes of limitations.[21] With respect to the second prong of the *Wilkie* test, the court found no "special factors" counseling against extension of *Bivens*.[22]

The Supreme Court reversed and remanded.[23] Writing for the Court,[24] Justice Breyer found that Pollard could not assert a

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16. Pollard v. GEO Group, Inc., 607 F.3d 583, 586 fn.5, 603 (9th Cir. 2010).

17. *Id.* at 603.

18. *Id.* at 589, 603. As a threshold question, the court determined that GEO employees act "under color of federal law," a prerequisite for *Bivens* liability. *Id.* Pollard did not contest this aspect of the holding on appeal. *See Minneci*, 132 S. Ct. at 627 n.* (Ginsburg, J., dissenting).

19. *Pollard*, 607 F.3d at 596. The dissent, as well as the Fourth and Eleventh Circuits in similar cases, argued that the availability of an alternative remedy was a "convincing reason" for not extending *Bivens* based on *Malesko*'s observation that the Supreme Court had previously afforded relief only when a plaintiff "lacked any alternative remedy." *See id.* at 604 (Restani, J., dissenting) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001)); Alba v. Montford, 517 F.3d 1249, 1254 (11th Cir. 2008); Holly v. Scott, 434 F.3d 287, 295 (4th Cir. 2006). The majority rejected this approach as inconsistent with *Wilkie*'s "convincing reason" standard. *See Pollard*, 607 F.3d at 595–96.

20. *Pollard*, 607 F.3d at 596.

21. *Id.* at 596–97.

22. *Id.* at 597–603. The court concluded as follows regarding three "special factors": (1) creating the cause of action is not infeasible; (2) a *Bivens* remedy would help deter individual actors from committing constitutional violations; and (3) any resultant asymmetric liability for private and public actors is insufficient to warrant refusal of a remedy. *Id.* The dissent disputed each of these contentions. *See id.* at 608–11 (Restani, J., dissenting).

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

Bivens claim, "primarily because Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law."[25] The Court found that the existence of this state remedy constituted a "convincing reason" to refrain from extending *Bivens*.[26] In support of this conclusion, Breyer examined and dismissed four arguments advanced by Pollard.[27] First, the Court rejected Pollard's contention that its holding in *Carlson v. Green*, a 1980 decision that extended a *Bivens* remedy for claims against employees of public prisons,[28] controlled the case.[29] The Court distinguished *Carlson* on the grounds that employees of public prisons, unlike employees of private prisons, are typically immune from tort claims.[30] The Court also noted that it had previously rejected a similar suggestion by Justice Stevens in his dissenting opinion in *Malesko*,[31] a 2001 decision in which the Court held that a prisoner could not bring a *Bivens* claim against a private prison because alternative state remedies existed.[32] Second, the Court found that *Malesko* foreclosed Pollard's contention that *Carlson* required federal, rather than state, remedies for constitutional violations.[33] According to the majority, state tort law could adequately deter constitutional violations and compensate victims, and thus a federal remedy may not always be necessary.[34] Third, the Court argued that in Pollard's particular case, tort remedies were well-suited to protect the constitutional interests in question.[35] It noted that California's tort law, which "basically reflects general principles of tort law . . . in . . . every

24. Justice Breyer was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, Sotomayor, and Kagan. *Id.* at 619.

25. *Id.* at 623.

26. *Id.* Having dismissed the case under the first prong of the *Wilkie* test, the Court declined to consider the second prong.

27. *Id.* at 623–25.

28. *See* Carlson v. Green, 446 U.S. 14, 23 (1980).

29. *Minneci*, 132 S. Ct. at 623.

30. *Id.*

31. *Id.* at 623–24 (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001)).

32. *Malesko*, 534 U.S. at 74.

33. *Minneci*, 132 S. Ct. at 624 (citing *Malesko*, 534 U.S. at 72–73). Like the dissent in *Pollard* and the courts in *Alba* and *Holly*, the majority noted *Malesko*'s observation that a *Bivens* remedy had been afforded only where the plaintiff "lacked any alternative remedy." *Id.* (quoting *Malesko*, 534 U.S. at 70).

34. *Id.*

35. *Id.*

State," extended to private jailers and had in fact been so applied on previous occasions.[36] In the majority's view, tort remedies "need not be perfectly congruent" with *Bivens* liability, so long as they similarly deter Eighth Amendment violations and similarly compensate victims.[37] Finally, the Court deferred to a later date Pollard's concern that state tort law might not cover certain Eighth Amendment claims, because it was "certain enough about the shape of present law as applied to the kind of case before us."[38]

Justice Scalia concurred in the judgment.[39] Nonetheless, although Scalia agreed with the refusal to extend *Bivens* based on the facts of the case, he would have the Court eliminate the *Bivens* remedy entirely.[40] For Scalia, *Bivens* was no more than "a relic of the heady days in which this Court assumed common-law powers to create causes of action."[41]

Justice Ginsburg dissented.[42] She asserted that a prisoner in a private prison should not be precluded from bringing claims against employees that a prisoner in a public prison could bring.[43] She noted that constitutional violations should be "compensable according to uniform rules of federal law"[44] and found the "vagaries" of state tort law inadequate for this purpose.[45] Ginsburg further commented that, unlike in *Malesko*, which involved a case against a private prison rather than a person, extending a *Bivens* remedy in this case *would* further the "core premise" of *Bivens* by deterring *individuals* from violating the Eighth Amendment.[46]

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36. *Id.* (citing Lawson v. Superior Ct., 103 Cal. Rptr. 3d 834, 849–50, 855 (Ct. App. 2010); Giraldo v. California Dept. of Corr. & Rehab., 85 Cal. Rptr. 3d 371, 387 (Ct. App. 2008)).

37. *Id.* at 625.

38. *Id.* at 626.

39. *Id.* (Scalia, J., concurring). Justice Scalia was joined by Justice Thomas. *Id.*

40. *Id.*

41. *Id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

42. *Id.* (Ginsburg, J., dissenting).

43. *Id.* at 627. Ginsburg premised this contention, in part, on *Malesko*'s dissent, which she joined. *See Malesko*, 534 U.S. at 75–83 (Stevens, J., dissenting).

44. *Minneci*, 132 S. Ct. at 627 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring)).

45. *Id.* (quoting Carlson v. Green, 446 U.S. 14, 23 (1980)).

46. *Id.* (citing *Malesko*, 534 U.S. at 71–73).

The Court's decision in *Minneci* is neither radical nor unexpected, and instead quietly validates a longstanding reluctance to imply causes of action for damages in the face of separation of powers concerns.[47] More surprising is the Court's preservation of the remedy at all, albeit in rare instances. This decision represents an unwillingness to wholly disregard Chief Justice Marshall's fear of creating rights without remedies, even when doing so would arguably prove more faithful to the separation of powers doctrine.

The Court's extension of a federal remedy in *Bivens* marked the first time the judiciary exercised authority to create damage remedies for violations arising under the Constitution.[48] Three dissenting justices raised concerns regarding the validity of this power, implying that it amounted to legislation.[49] These concerns were subsequently echoed in the concurring and dissenting opinions of *Davis v. Passman* and *Carlson*, which extended *Bivens* remedies in 1979 and 1980, respectively.[50]

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47. Numerous justifications underlie the concerns. This Comment will not weigh the merits of those concerns; it seeks only to establish that they featured prominently in the Court's decisions.

48. *See* Dellinger, *supra* note 2, at 1544 ("[W]ith 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."). This observation excludes cases arising under the Fifth Amendment relating to "just compensation" for takings of property. *See id.* at 1542 n.58.

49. *See Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting) ("We would more surely preserve the important values of the doctrine of separation of powers . . . by recommending a solution to the Congress . . . ."); *id.* at 428–29 (Black, J., dissenting) ("Congress . . . has [not] enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."); *id.* at 430 (Blackmun, J., dissenting) ("[I]t is the Congress and not this Court that should act.").

50. *See Carlson*, 446 U.S. at 29 (Powell, J., concurring) ("[T]he Court's willingness to infer federal causes of action . . . denigrates the doctrine of separation of powers."); *id.* at 53–54 (Rehnquist, J., dissenting) ("[It] is wholly at odds with . . . the constitutional notion of separation of powers to conclude that because Congress failed to indicate that it did not intend the cause of action . . . it intended for this Court to exercise free rein in fashioning additional rules for recovery of damages . . . ."); Davis v. Passman, 442 U.S. 228, 252 (1979) (Powell, J., dissenting) ("In the present case . . . principles of comity and separation of powers should require a federal court to stay its hand.").

Since *Carlson*, the Court has consistently sought to limit the application of *Bivens*,[51] in large part due to doubts about the Court's authority to create a cause of action for damages.[52] In *Malesko* and *Wilkie*, which were decided in 2001 and 2007, respectively, the Court was particularly concerned with the separation of powers principle.[53] The dissent in *Malesko* suspected that the "driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself."[54] *Wilkie*, though less overtly skeptical, inspired Professor Tribe to remark that "the *Bivens* doctrine . . . is on life support with little prospect of recovery."[55]

But, Professor Tribe's comments notwithstanding, *Wilkie* was not an unequivocal deathblow. As previously discussed, *Wilkie* established two hurdles that must be overcome before a *Bivens* remedy is extended: (1) alternative remedies must not provide a "convincing reason" to stay the Judiciary's hand; and (2) the case must be mostly free from "special factors counseling hesitation."[56] The Court, however, set an ambiguous and seemingly low bar for overcoming the first factor. Because the claimant in *Wilkie* had alternative state and administrative remedies available to him,[57] the Court could conceivably have denied him *Bivens* relief at *Wilkie* step one. Instead, the Court found that these remedies constituted neither a convincing reason to sup-

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51. *See Minneci*, 132 S. Ct. at 622 ("Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action.").

52. *See* Ryan D. Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 472–73 (2006) ("[The Court's] steadfast refusal over more than two decades to extend the doctrine . . . undoubtedly reflects the separation of powers concerns that motivated the original dissenters.").

53. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." (citing Schweiker v. Chilicky, 487 U.S. 412, 425–27 (1988))); Wilkie v. Robbins, 551 U.S. 537, 562 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983))).

54. *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting).

55. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26 (2006–2007).

56. *See Wilkie*, 551 U.S. at 550.

57. *See id.* at 549 (considering whether to issue a *Bivens* remedy "in addition to the discrete administrative and judicial remedies available").

port, nor a convincing reason to oppose, the extension of *Bivens* relief[58] and continued to the second prong of the test, at which point it decided not to extend a *Bivens* remedy.[59]

Five years after the decision in *Wilkie*, the Court in *Minneci* gave teeth to the first prong of the *Wilkie* test by holding *Bivens* inapplicable when the conduct in question typically falls within state tort law.[60] Thus, whereas *Wilkie* leaves open the question of whether alternative state remedies bar the extension of *Bivens* relief, *Minneci* answers that question by barring *Bivens* relief *unless there is no alternative state remedy*.[61] Put another way, while *Wilkie* assumes that congressional inaction—that is, failure to create federal relief via statute—might sometimes suggest congressional intent to allow federal relief for constitutional violations even in the presence of state remedies, *Minneci* assumes that congressional inaction is intended to deny such relief unless no state remedy exists. Thus, by setting a stringent standard for the first prong of *Wilkie*, the Court's decision in *Minneci* acted as a strong affirmation of the long line of cases seeking to undermine *Bivens*, at least in part, based on the idea that the Court lacks the authority to create damage claims.

But despite the serious narrowing of the *Bivens* remedy, the Court declined to extinguish it entirely. This reluctance may seem paradoxical given the growing body of precedent stacked against *Bivens*, but it can best be explained by the pragmatic notion, though certainly not uniformly held among members of the Court,[62] that the violation of a right must entail a remedy.[63]

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58. *See id.* at 554 ("This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it. . . . It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim.").

59. *Id.* ("This, then, is a case for *Bivens* step two . . . .").

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

61. *See id.*

62. *See, e.g.*, *id.* (Scalia, J., concurring) ("Even if the narrowest rationale of *Bivens* did apply here, I would decline to extend its holding.").

63. This notion was expressed in *Bivens* itself, and it did not go unnoticed by the Court in *Minneci*. *See id.* at 621 ("'[W]here federally protected rights have been invaded,' courts can 'adjust their remedies so as to grant the necessary relief.'" (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971))). Of course, the Court in *Wilkie* did note in passing that courts may deny a *Bivens* claim "even in the absence of an alternative." *Wilkie*, 551 U.S. at 550. This dictum does not, however, suggest intent to contravene the right-remedy principle because the *Wilkie* Court was almost certainly only referring to

This notion is termed pragmatic because, unlike the separation of powers doctrine,[64] the right-remedy principle finds little support in the Constitution.[65] In fact, the principle itself may conflict with a formalist conception of the separation of powers, since "liberty was originally to be protected through structural arrangements, not a system of rights and remedies."[66] By preserving *Bivens*, the Court essentially asserted that the separation of powers must yield to the right-remedy principle when no alternative remedies exist. This is consistent with past jurisprudence upholding the right-remedy principle in other contexts.[67]

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an absence of *federal* remedies, not remedies altogether. This much is evidenced by the fact that the Court in *Wilkie* based the consideration of alternatives on *Bush*, *see id.* (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)), a 1983 decision that disallowed a *Bivens* claim in the presence of statutory alternatives and never addressed claimants lacking *any* alternatives, *see Bush*, 462 U.S. at 388. Furthermore, because *Wilkie* itself addressed a case in which the claimant had alternative state and administrative remedies available, *Wilkie*, 551 U.S. at 553, this suggests that the Court did not believe it was stripping the claimant of all means of redress. In any event, the fact that the *Minneci* Court conditioned its holding on an "alternative existing process capable of protecting the constitutional interests at stake," *Minneci*, 132 S. Ct. at 623, suggests that it had the right-remedy principle in mind.

64. *See, e.g.*, John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1683 (2009) (describing the separation of powers as an "animating feature[]" and "essential structural choice[]" of the Constitution).

65. *See id.* at 1692 ("[T]he right-remedy principle . . . can be found nowhere in the text, structure, or history of the Constitution."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991) ("Notwithstanding *Marbury*'s contrary intimations, the structure . . . that existed at the time of the Constitution's framing and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests.").

66. Preis, *supra* note 64, at 1692; *see also*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 69 (1999) (describing sovereign immunity, which must be waived by Congress, as "diametrically opposed to the remediation principle associated with *Marbury*"). Some disagree with the idea that the two principles are incompatible. For example, Professors Fallon and Meltzer, despite acknowledging that the right-remedy principle is not constitutionally compelled, argue that constitutional remedies can support the separation of powers principle by providing redress when government actors overstep their authority. *See* Fallon & Meltzer, *supra* note 65, at 1787–91. Nonetheless, to the extent that the Judiciary must overstep its judicial role to provide redress when actors for other branches of government overstep their proper roles, it serves only to exacerbate that which it seeks to alleviate. Thus, the criticism appears to assume its conclusion, namely, that constitutional remedies do not violate the separation of powers.

67. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n.25, 124–25 (1984) (suit against government official allowed even though suit against government barred, despite inherent "fiction" in distinction); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 24 (1920) (state court must fashion constitutional remedy

Viewed in this light, the Court's refusal to do away with *Bivens* entirely demonstrates its belief that individuals must have recourse to remedies for constitutional violations to preserve the integrity of the rights guaranteed to them by the Constitution.[68]

Ultimately, by barring *Bivens* claims when state remedies are available, *Minneci* implicitly shut the door to the damages-by-implication doctrine that *Bivens* opened. Nevertheless, its failure to bolt that door leaves formalists wary of intruders to the separation of powers doctrine and pragmatists hopeful that the right-remedy principle may someday make an unexpected house-call.

Zach Howe

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even though state law does not confer such authority); *Ex parte* Young, 209 U.S. 123, 155–56 (1908) (federal injunction based on Constitution appropriate even though not prescribed by statute); Gen. Oil Co. v. Crain, 209 U.S. 211, 225–27 (1908) (same).

68. The *adequacy* of alternative remedies is an altogether different question. Professor Tribe argues that denying *Bivens* remedies leads to insufficient protection of rights. *See* Tribe, *supra* note 55, at 62–72. Professor Pillard, in contrast, suggests that *Bivens* may have reduced the adequacy of redress for constitutional violations by "reliev[ing] pressure that otherwise might have prompted Congress to authorize damages for constitutional violations." Pillard, *supra* note 66, at 97. *Minneci* took a middling position, concluding that state tort law provides "roughly similar compensation" for Eighth Amendment claims. Minneci v. Pollard, 132 S. Ct. 617, 625 (2012). This Comment does not attempt to resolve this important debate herein but notes simply that the right-remedy principle does not necessarily require perfect remedies.