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NOTES

CONSTITUTIONAL MASS TORTS:
SOVEREIGN IMMUNITY AND THE HUMAN RADIATION EXPERIMENTS

Nestor M. Davidson

INTRODUCTION: A PECULIAR SOVEREIGNTY

On April 10, 1945, a few months before the first atomic bomb test at Trinity, New Mexico, doctors at a hospital near the Manhattan Project installation at Oak Ridge, Tennessee injected the victim of a car accident with plutonium. Project staff neither informed the patient of the nature of the experiment nor sought his consent. Federal officials, concerned about the exposure of workers to radioactive materials, had ordered tests on the effects of such materials on human metabolism. So began a nearly thirty-year program of similar experiments sponsored by a number of federal agencies, all shrouded in absolute secrecy. The tests, which would eventually be carried out on more than 16,000 subjects, are known today as the Human Radiation Experiments (HRE).

The public first learned of the nature and extent of the experimentation in 1993. Almost immediately, victims and their descendants began

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1. Herbert Marks, Dean Acheson's representative to a board appointed by President Truman to devise civilian controls over atomic energy, observed, after a visit to the Los Alamos, New Mexico facility of the Manhattan Project, that the nation's early atomic program "was a separate state, with its own airplanes and its own factories and its thousands of secrets. It had a peculiar sovereignty, one that could bring about the end, peacefully or violently, of all other sovereignties." Richard Rhodes, Dark Sun: The Making of the Hydrogen Bomb 231 (1995).


4. See AEC Information Report, supra note 3, at 2. The initial decision to begin the experiments was made by the medical staff of the Manhattan Project, but the management of the experiments later grew into a sizeable bureaucracy. See infra text accompanying notes 134-141.


7. In November, 1993, the Albuquerque Tribune published the results of a six-year long investigation of plutonium experiments. The story received attention by several national news sources, and shortly thereafter came to the attention of Secretary of Energy
These plaintiffs allege that the HRE violated a number of constitutional protections, notably the substantive due process right to bodily autonomy, but also the right to equal protection, and in cases involving prisoners, the prohibition against cruel and unusual punishment. While they have been able to sue individual federal officials for damages under the constitutional tort theory of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, plaintiffs have been precluded from asserting constitutional claims against the one entity that appears most responsible for the injuries they suffered: the United States government. The common law doctrine of sovereign immunity protects the government from suit unless it has given its consent to be sued.


8. See, e.g., Shattuck v. MIT, No. 95-12605GAO (D. Mass. filed Dec. 18, 1995) (suit arising out of experiments on children in Massachusetts); Bibeau v. Pacific Northwest Research Found., No. 95-06410-HO (D. Or. filed Dec. 4, 1995) (suit arising out of tests done on Oregon state prisoners); Heinrich v. Sweet, No. CV95-3845 (E.D.N.Y. filed Sept. 21, 1995) (suit arising out of experiments conducted on patients at the Massachusetts General Hospital and other hospitals); Mousso v. University of Rochester, No. 95-CV-6288T (W.D.N.Y. filed June 16, 1995) (suit arising out of tests at the University of Rochester). The plaintiffs in these suits are also seeking damages against private institutions, as well as state and local officials who may have been involved in the experiments. One HRE case has produced a reported opinion. Judge Beckwith of the Southern District of Ohio ruled in In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995), that plaintiffs, cancer patients whom government and private actors allegedly subjected to radiation experiments under the guise of treatment, had sufficient constitutional claims against individual officials for violations of the substantive due process right of bodily autonomy, the right to access to courts, procedural due process, and equal protection to survive motions to dismiss on qualified immunity grounds. See infra text accompanying notes 142–158, 161–173. The decision is currently pending on appeal before the Sixth Circuit Court of Appeals.


10. 403 U.S. 388 (1971). In Bivens, the Supreme Court held that the Constitution provides a cause of action for damages against individual federal officials in the absence of congressional action. See id. at 397.

11. See Nancy Hogan, Shielded From Liability: Despite Admissions That It Used Unwitting Citizens In Nuclear Tests, A Maze of Laws May Shelter the Government from Ever Answering Their Claims in Court, A.B.A. J., May 1994, at 56. None of the plaintiffs in cases arising out of the HRE appear to have asserted claims directly against the federal government for constitutional violations.
and Congress has not waived the sovereign immunity of the United States for damage suits to remedy constitutional violations.

Scholars have argued that where the federal government has violated the Constitution, the Supreme Court should abrogate sovereign immunity in the absence of congressional action and create a damage remedy directly against the federal government. In the generation since Bivens, however, no court has adopted these scholars' proposals, and sovereign immunity continues to block damage actions against the federal government when past constitutional violations are alleged. A number of incidents of wide-scale abuse of fundamental rights by the federal government have become public since Bivens was decided, but the victims of these excesses have been left to seek redress for constitutional violations through the political process.


13. Sovereign immunity has its greatest force in the modern context where a plaintiff seeks damages after discovering that a constitutional violation has occurred. See Pullman Constr. Indus. v. United States, 25 F.3d 1166, 1168 (1994) ("The only portion of the United States' original immunity from suit that Congress continues to assert is a right not to pay damages."). A number of avenues exist, of course, to challenge the constitutionality of legislation prior to or during enforcement, see, e.g., United States v. Lopez, 115 S. Ct. 1624 (1995) (striking down Gun-Free School Zones Act of 1990, 18 U.S.C. § 922 (1994), for exceeding congressional power), and executive action, see, e.g., Administrative Procedure Act, 5 U.S.C. § 702 (1994) (waiving federal sovereign immunity for relief other than damage actions).

14. In addition to the HRE, government actions that have emerged in the past 25 years include, among others, military LSD experiments, see United States v. Stanley, 483 U.S. 669 (1987), open-air biological warfare experiments, see Nevin v. United States, 696 F.2d 1229 (9th Cir.), cert. denied, 464 U.S. 815 (1983), and domestic spying on political activists, see Don Edwards, Reordering the Priorities of the FBI in Light of the End of the Cold War, 65 St. John's L. Rev. 59, 60 (1991) (discussing FBI investigations of thousands of activists).

15. If the history of Bivens actions is any indication, plaintiffs have little prospect of relief against the officials who operated the HRE. See Perry M. Rosen, The Bivens Constitutional Tort: An Unfulfilled Promise, 67 N.C. L. Rev. 337, 348 (1989) ("Of the some 12,000 Bivens suits filed [as of 1989], only thirty have resulted in judgments on behalf of plaintiffs... and only four judgments have actually been paid by the individual federal defendants."). The overwhelming majority of Bivens actions are defeated by a combination of narrow interpretations of constitutional violations which give rise to damages, procedural hurdles, the qualified immunity of many officials, and defendants' limited resources. See infra text accompanying notes 47–70. Additionally, plaintiffs in cases arising out of the HRE face the difficulty of piecing together the facts of incidents that occurred decades earlier under a veil of secrecy. See infra text accompanying notes 198–201.
This Note will argue that while the general reluctance of the Court to abrogate sovereign immunity is founded on sound policy considerations, that reluctance is inappropriate when the federal government undertakes a policy that constitutes a mass and systematic violation of constitutional rights. Where it is clear that the normal oversight mechanisms of the political process have failed, and certain threshold conditions are met, the Court should create a cause of action against the government.

Part I of this Note explains why the present system does not allow individuals to recover damages against the federal government for violations of the Constitution. It first describes the doctrine of constitutional torts and its limitations. It then discusses sovereign immunity, and explains that Congress has retained sovereign immunity for constitutional torts. It concludes with a discussion of the Supreme Court’s policy arguments for not creating a cause of action against the government for constitutional violations.

Part II explores the Human Radiation Experiments as a case study in the remedial gaps created by the current scope of *Bivens* and sovereign immunity. It discusses the particular constitutional torts arising out of the HRE. It then attempts to demonstrate that the HRE as a whole represents a type of constitutional violation that is different in kind, not just in degree, from typical *Bivens* cases. It concludes that this category of cases can be better analogized to the law of torts governing large-scale injuries, labeling it “constitutional mass torts.”

Finally, Part III argues for judicial abrogation of sovereign immunity for these constitutional mass torts. It notes that the political branches have not acted to provide a remedy for HRE victims, leaving it to the courts to vindicate their rights. Next, it discusses the power of the Supreme Court to alter the current regime of sovereign immunity. Finally, building on the case study and responding to concerns discussed in Part I, the Note concludes with a series of threshold criteria which, if met, can guide the Court to limited, but necessary, action.

**I. CONSTITUTIONAL TORTS AND SOVEREIGN IMMUNITY**

The Supreme Court first recognized a cause of action for damages against federal officials under the Constitution in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. Despite this decision, plaintiffs in *Bivens* suits have been prevented from recovering against officials under this cause of action by a series of substantive and procedural hurdles, and some have thus sought a remedy against the

16. This Note proposes certain criteria that limit the range of possible claims in which a cause of action against the government should be allowed. See infra Part III.C.
18. See infra text accompanying notes 47–70.
government as a whole for constitutional violations.\textsuperscript{19} Sovereign immunity, however, prevents aggrieved plaintiffs from recovering against the United States.\textsuperscript{20} The Supreme Court has been unwilling to abrogate sovereign immunity for constitutional violations in the absence of a waiver by Congress, citing concerns about protecting the incentive that \textit{Bivens} liability creates for individual officials and respecting the role of Congress as the appropriate institution for creating new liability for the federal government.\textsuperscript{21}

\textbf{A. Constitutional Torts: Liability of Government Officials for Violations of the Constitution}

This section lays out the Supreme Court's jurisprudence of damage remedies for constitutional violations. Beginning with \textit{Bivens}, it explains the rationale of the Court in creating the cause of action, and the ways in which it has developed by analogy to traditional common law torts. This section then explains that the combination of an interpretation that limits the situations in which the violation of constitutional protections will yield a damage remedy and a series of procedural hurdles has prevented most potential \textit{Bivens} plaintiffs from recovering.

\textit{1. Bivens: A Cause of Action Under the Constitution.} — In \textit{Bivens}, the Court for the first time found a remedy in damages directly under the Constitution in the absence of explicit statutory authority.\textsuperscript{22} On the

\begin{quote}
\begin{footnotesize}
\item[19.] See, e.g., FDIC v. Meyer, 114 S. Ct. 996 (1994); Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987); Clemente v. United States, 766 F.2d 1358, 1363 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).
\item[20.] Congress has waived the sovereign immunity of the United States for most common law actions, but not for constitutional torts. See infra text accompanying notes 95-120.
\item[21.] See infra text accompanying notes 121-132.
\end{footnotesize}
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The first indication from the Supreme Court that it could create such a remedy came decades earlier, in \textit{Bell v. Hood}, 327 U.S. 678 (1946), a case involving alleged violations of the Fourth and Fifth Amendments by agents of the Federal Bureau of Investigation. There, the Court stated 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." Id. at 684. The Court in \textit{Bell}, however, did not exercise the power it discussed, holding only that the district court had improperly dismissed plaintiff's complaint for lack of jurisdiction, and remanding to determine whether the Fourth and Fifth Amendments had been violated, and, if so, whether damages were the proper remedy. See id. at 684-85. See generally Alfred Hill, Constitutional Remedies, 69 Colum.
morning of November 26, 1965, six federal narcotics officers entered Webster Bivens's apartment and arrested him for alleged narcotics violations. They manacled him in front of his wife and children, threatened to arrest his entire family, took him to a federal courthouse, and interrogated him. Bivens was released without being charged. Had the Bureau of Narcotics tried to prosecute Bivens, Fourth Amendment doctrine likely would have made any evidence gathered pursuant to the agents' search inadmissible. Because no prosecution went forward, Bivens sought the only available remedy: damages.

When the case reached the Supreme Court, the Court, citing Marbury v. Madison for the proposition that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” found a cause of action against the federal narcotics officers directly under the Fourth Amendment. The Court reviewed the long-standing power of the federal courts to create legal remedies, and noted that damages have tradition-


The Court moved a step closer to Bivens in Monroe v. Pape, 365 U.S. 167, 172 (1961), when for the first time it interpreted the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1958) (amended 1979 to encompass the District of Columbia), to provide damages for constitutional violations by state officials. Section 1983 currently provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 party injured in an action at law, suit in equity, or other proper proceeding for redress.


23. See Bivens, 403 U.S. at 389.
24. See id.
25. See id. at 391-92. The Fourth Amendment prohibits unreasonable searches and seizures. See U.S. Const. amend. IV. Bivens alleged that the arrest and search of his home was done without a warrant, and that the arrest was made with unreasonable force and without probable cause. See Bivens, 403 U.S. at 389. The Court has long adhered to a rule whereby evidence, no matter how probative, is excluded from criminal cases when obtained in violation of the Fourth Amendment. See Weeks v. United States, 232 U.S. 383, 392-93, 398 (1914).

26. 5 U.S. (1 Cranch) 137 (1803).
27. Id. at 163. The argument that every injury deserves a remedy is itself a subject of considerable debate. See, e.g., Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. Cal. L. Rev. 735, 759-67 (1992) (describing the inadequate fit between federal rights and judicially-created remedies).
28. See Bivens, 403 U.S. at 397.
29. See id. at 395-96. Bivens has sparked a debate in the literature about the nature of the Court's invocation of the federal judicial power to craft remedies in the absence of a congressional mandate. One commentator has argued that Bivens represents
ally been regarded as the ordinary remedy for an invasion of personal liberty interests. The Court concluded by alluding to two potential means of defeating a constitutional cause of action. The Court implied it would not create a cause of action if presented with "special factors couns­elling hesitation in the absence of affirmative action by Congress," or if there were an alternative remedy available which was "equally effective in the view of Congress."

Justice Harlan, in concurrence, elaborated on the rationale for the Court's decision to create a new cause of action. For Justice Harlan, the question concerned the necessity, and not merely the advisability, of creating a remedy. As he stated,

it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any

"subconstitutional" decisionmaking that derives its power from the traditional ability of federal courts to create interstitial remedies in federal statutory schemes. See Henry P. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 23–24 (1975). Other scholars have argued, however, that Bivens was decided under the traditional power of the Court to interpret the Constitution. See Thomas S. Schroek & Robert C. Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1135–38 (1978); see also Bandes, supra note 12, at 329–30 (discussing this debate among scholars and supporting the claim that the Bivens exercise of judicial power was constitutional interpretation, not constitutional common law). The Court, in the degree of deference it has given to implied congressional intent in the development of Bivens remedies, has leaned more towards Professor Monaghan's view of the doctrine. See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (finding that the remedial scheme created in the Social Security administrative system obviates the need for a cause of action under the Constitution).

30. See Bivens, 403 U.S. at 395. In other words, where rights have been invaded, for example by the violation of a federal statute, federal courts have traditionally provided the victim of that violation a remedy in damages. See id. at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)); see also Katz, supra note 22, at 39–44 (discussing the long history of legal remedies for government violations of rights). Indeed, there has traditionally been a strong preference for legal over equitable remedies as the classic requirement for the exercise of a court's equity jurisdiction is the absence or unavailability of an adequate remedy at law indicated. See Maurice Rosenberg et al., Elements of Civil Procedure 97 (5th ed. 1990).

31. Bivens, 403 U.S. at 396. The Court in Bivens noted the absence of such "special factors"—specifically that the case did not involve a question of "federal fiscal policy"—but did not elaborate on what else might qualify as a special factor. See id. The Court has subsequently relied heavily on this exception to decline to create remedies in potential Bivens cases. See infra text accompanying notes 47–58.

32. Bivens, 403 U.S. at 397.

33. Justice Harlan's concurrence is frequently cited for propositions related to the reasoning of Bivens. See, e.g., Davis v. Passman, 442 U.S. 228, 248 (1979) (citing Justice Harlan's concurrence in noting the importance of providing remedies despite limited judicial resources); Butz v. Economou, 438 U.S. 478, 504 (1978) (citing Justice Harlan's concurrence for the proposition that a Bivens-type action could be vital to remedy constitutional violations).
court. . . . For people in Bivens' shoes, it is damages or nothing.34

Concerns about creating a cause of action when Congress had not acted were mitigated by the judiciary's "particular responsibility to assure the vindication of constitutional interests."35 Justice Harlan argued that the Bill of Rights was meant to protect individuals in the face of popular will; if the popular will, as expressed in Congress, failed to provide an avenue for vindicating constitutional rights, it was appropriate for the judiciary to craft a remedy.36

2. The Development of Constitutional Torts by Analogy to Traditional Common Law Torts. — When the Court concluded that a damage remedy was the appropriate relief to grant Webster Bivens, it built upon the foundation of common law torts to define the scope of the constitutional action. Ever since, traditional tort law has infused the law of constitutional violations in areas ranging from the question of whether to create liability for a particular constitutional provision to the scope of the relief to be granted if a cause of action is found.37 In his concurrence in Bivens, Justice Harlan noted that it was within the sphere of judicial competence to create remedies for violations of the Fourth Amendment.38 "[T]he experience of judges in dealing with private trespass and false imprisonment claims," Justice Harlan argued, "supports the conclusion that courts of law are capable of making the types of judgment concerning causation

34. Bivens, 403 U.S. at 409-10 (Harlan, J., concurring). Commentators have drawn on Justice Harlan's statement to support arguments that sovereign immunity should be abrogated for constitutional torts. See Davis, supra note 12, at 186; Dellinger, supra note 12, at 1550. Justice Harlan's concurrence is laconic about sovereign immunity, simply stating that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit." Bivens, 403 U.S. at 410 (Harlan, J., concurring). The Supreme Court did not directly comment again on the issue of the judiciary creating liability against the United States in the context of constitutional torts until its decision in FDIC v. Meyer, 114 S. Ct. 996 (1994). See infra text accompanying notes 121-132.

35. Bivens, 403 U.S. at 407 (Harlan, J., concurring).

36. See id. Justice Black, in his dissent in Bivens, warned of the potential for flooding the federal docket with frivolous lawsuits. See id. at 428-29 (Black, J., dissenting).

37. While courts have drawn from common law torts to define certain elements of constitutional torts, the standards applied in constitutional torts are not coterminous with state tort law. For example, the care required for prison medical care providers under the Eighth Amendment is not defined by traditional negligence. See Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Charles F. Abernathy, Section 1983 and Constitutional Torts, 77 Geo. L.J. 1441, 1460-63 (1989). Even in the Eighth Amendment context, however, courts still use traditional tort language to describe a § 1983 injury. See id. at 1463.

For an excellent discussion of the development of judicial conceptions of constitutional torts, see generally Christina B. Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225 (1986) (discussing judicial language developed in the context of constitutional tort cases involving individual defendants that has been unadaptable to suits involving institutional defendants under § 1983).

38. See Bivens, 403 U.S. at 408 (Harlan, J., concurring).
and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights."

The valuation of damages is an illustrative example of an element of a constitutional tort that derives from common law torts. In Carey v. Piphus, the Supreme Court decided that students denied procedural due process while being suspended were only entitled to recover "nominal damages not to exceed one dollar." The Court quoted a torts treatise for the proposition that damages should only compensate persons for actual injuries, not for the mere deprivation of rights. Carey, then, tied the remedy for a deprivation of constitutional rights to the same questions of valuation that arise in the context of personal injury and similar traditional actions, despite the clear conceptual difference in the types of harm represented by each violation.

On a practical level, the types of claims that predominate in constitutional torts litigation have helped link the emergence of this doctrine to traditional individual to individual torts. The overwhelming majority of constitutional tort claims arise out of "street-level" contact with low and mid-level officials carrying out governmental programs in the day-to-day course of business. It is natural in that environment for courts to have drawn on the elements of traditional private liability to define the nature of the relevant injury in constitutional torts.

3. The Retreat from Judicial Action After Bivens. — Courts have defined the elements of constitutional torts, then, have squarely within the traditional understanding of common law torts. As will be seen, however, tort law itself has undergone significant changes as it has faced liability generated by institutional actors. The significance of the connection between common law torts and constitutional torts will be explored in Part

39. Id. at 409 (Harlan, J., concurring). Justice Harlan then noted in a footnote that arguments from judicial competence would vary with the nature of the constitutionally protected interest. See id. at n.9 (Harlan, J., concurring). In other words, causes of action arising from some constitutional provisions would more closely mirror the types of claims with which judges were familiar from the common law context than those arising from others.

40. See Davis, supra note 12, at 286–92.


42. See id. at 255 (quoting 2 Fowler V. Harper & Fleming James, Jr., Law of Torts § 25.1, at 1299 (1956)).

43. In the case of traditional torts, the harm to be compensated for is actual injury, while in the case of constitutional torts, the injury derives from governmental abuse of power that may or may not have concrete consequences for the victim. See Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 808–10 (1986) (holding that damages based on abstract "importance" or "value" of constitutional rights are not a permissible element of compensatory damages in constitutional tort actions).

44. See Schuck, supra note 22, at 60–61 (describing the work environment in which most government tort liability is generated).

45. See Whitman, supra note 37, at 225.

46. See infra text accompanying notes 178–188.
II, but it is important first to understand the limitations of the *Bivens* cause of action.

*Bivens* held out the brief promise of a new jurisprudence of constitutional remedies. At first, the Supreme Court and various circuit courts found the principle of *Bivens* applicable to other provisions of the Bill of Rights. Soon, however, the Court began narrowing the scope of possible *Bivens* actions, giving greater weight to the two grounds available for defeating such claims, special factors counselling hesitation and adequate alternative remedies, increasingly emphasizing deference to legislative and executive prerogatives.

In *Chappell v. Wallace*, the Court refused to find a cause of action for enlisted military personnel alleging unconstitutional racial discrimination on the grounds that both the conditions of military service and the constitutional grant of authority to Congress over the military justice system constituted "special factors" sufficient to defeat the claim. Even an implied desire by Congress to preempt constitutional remedies was found to overcome a plaintiff's potential *Bivens* claim. In *Bush v. Lucas*, the Court declined to find a cause of action under the First Amendment for a federal employee who alleged that he had been demoted for making public statements critical of his agency. The Court found that the administrative remedy Congress had created for employment disputes was a sufficient "special factor" to defeat the cause of action, despite the fact that existing remedies did not provide as complete a level of relief as

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47. See, e.g., Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (First Amendment); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976) (Sixth Amendment); see also Travis, supra note 12, at 598 n.7 (noting extensions of *Bivens*).

48. See supra notes 31-32 and accompanying text.


50. 462 U.S. 296 (1983). In *Chappell*, five Navy enlisted men brought a suit against their commanding officers alleging constitutional violations. See id. at 297.


52. See *Chappell*, 462 U.S. at 300-05; see also United States v. Stanley, 483 U.S. 669, 680-81 (1987) (finding no *Bivens* action allowable by military personnel whenever an injury arises out of activity "incident to service").

53. 462 U.S. 367, 389-90 (1983). William C. Bush, an aerospace engineer at NASA's George C. Marshall Space Flight Center, was demoted for publicly criticizing the agency. Bush failed to find a remedy through the administrative civil service system, so he asserted a *Bivens* claim. See id. at 369-72.

54. Id. at 375.
a Bivens suit. Finally, in Schweiker v. Chilicky, recipients of Social Security benefits sought damages against federal officials under the Fifth Amendment's Due Process Clause alleging improper termination of benefits. The Court declined to find a Bivens remedy on the ground that the Social Security disability system represented a complex series of policy compromises with which the Court was hesitant to tamper.

All told, Bivens now applies in a relatively narrow band of cases in which Congress has provided no remedy, or has no constitutional grant of specific authority sufficient to signal the need for particular judicial deference.

4. Hurdles Facing Bivens Plaintiffs. — Beyond the substantive limits imposed on Bivens by the Court's recent cases restricting the doctrine's application, plaintiffs seeking to recover damages from federal officials for violations of the Constitution face the challenges of official immunity, a range of procedural hurdles, and the limited financial resources of most defendants.

a. Official Immunity. — The Court checks the potential drain on the resources of Bivens defendants and on the government by allowing officials two types of immunity. Some federal officials enjoy absolute immunity for their actions, but the majority enjoy only "qualified" immunity. In Butz v. Economou, a case involving a suit against the Secretary of Agriculture, the Court in defining this qualified immunity held that fed-

55. See id. at 388.
57. See id. at 428-29.
58. Even where a cause of action can be found under the Constitution, the scope of Bivens liability is carefully circumscribed. In Bivens cases, for example, respondeat superior liability is not available, so that a plaintiff cannot sue supervisors or other responsible individuals for the wrongdoing of their subordinates. See, e.g., Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991) (finding that "respondeat superior is inapplicable to Bivens actions"); Sportique Fashions, Inc. v. Sullivan, 597 F.2d 664, 666 (9th Cir. 1979) (noting that subordinate employees should be considered fellow servants of the United States); Black v. United States, 534 F.2d 524, 527-28 (2d Cir. 1976) (holding that the general doctrine of respondeat superior is not sufficient to make out a Bivens claim).
59. In Bivens itself, the Court remanded on the question of the scope of the immunity of the six narcotics agents who had violated the plaintiff's constitutional rights. The Second Circuit found no absolute immunity, but allowed the officials immunity to the degree that they acted in good faith. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1347-48 (2d Cir. 1972).
61. For common law tort actions against government employees acting within the scope of their employment, Congress mandated under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended in 28 U.S.C. §§ 2671, 2674, 2679 (1994)), that the United States be substituted as a defendant, and no personal liability allowed. See infra notes 117-118 and accompanying text. Qualified immunity as the Supreme Court has defined it, then, currently only applies to liability arising from constitutional torts.
eral officials would be shielded from personal liability unless they violated a constitutional provision whose meaning they knew or reasonably should have known was clearly established at the time of the violation. Lower courts, applying the subjective element of this test, allowed plaintiffs to question officials about intent and state of mind. As a consequence, in Harlow v. Fitzgerald, the Court held that the qualified immunity defense would turn solely on an "objective" examination of what a reasonable official would have known at the time of the violation, and that such an inquiry should occur prior to any discovery, allowing courts to dismiss cases before exposing government officials to the burdens of preparing for trial. In both Butz and Harlow the Court was concerned with the potential burden on official action. The Court in Butz argued that there is a great need "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

b. Procedural Obstacles to Recovery Under Bivens. — Courts presented with Bivens suits construe jurisdiction, venue, and other preliminary litigation issues in favor of government officials, creating additional burdens for plaintiffs. Furthermore, any determination that a Bivens action survives a motion to dismiss is appealable on an interlocutory basis, and given the concern that the functioning of government should not be overly burdened by the threat of personal liability for government officials, courts regularly stay all discovery until such appeals are concluded, further delaying any recovery.

62. 438 U.S. 478, 506-07 (1978). Qualified immunity of federal officials applies to the same extent as that accorded state officials in the § 1983 context. See id. at 507 (finding that federal executive officers are only entitled to the qualified immunity specified for state officials in Scheuer v. Rhodes, 416 U.S. 292 (1974)).

63. 457 U.S. 800, 818 (1982); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

64. Another rationale underlying the Court's qualified immunity doctrine for officials accused of committing constitutional torts is the need to provide a predictable standard for evaluating potential liability. See John E. Nordin II, The Constitutional Liability of Federal Employees: Bivens Claims, 41 Fed. B. News & J. 342, 342 (discussing the qualified immunity objective test).

65. Butz, 438 U.S. at 506. Similarly, in Harlow, the Court raised the pleading standard out of concern for the costs of subjecting officials to trial, including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Harlow, 457 U.S. at 816.


68. See Nordin, supra note 64, at 344 (discussing the practice of courts in Bivens cases to address immunity questions before any discovery commences); Rosen, supra note 15, at 356-57. If a Bivens claim moves beyond the qualified immunity stage, discovery can be complicated by the fact that some federal agencies limit disclosure of documents or information in cases in which the United States is not a party. See Nordin, supra note 64, at 344.
c. Limited Resources of Federal Officials. — A final hurdle remains for plaintiffs seeking recovery for constitutional violations by federal officials. Most suits against government employees are against lower and mid-level officials. Federal officials, particularly career employees, are not likely to have the personal financial resources to warrant the cost and difficulty of litigating claims against them. This is not to say that all federal employees lack financial resources, but rather that those who implement policies or act in ways that violate the Constitution are not the best situated to redress any resulting injuries.

In sum, the Court created a right of action in Bivens that has been circumscribed both by the level of deference given to Congress and the procedural hurdles created by the reluctance of courts to burden the executive.

B. The Doctrinal Framework of Federal Sovereign Immunity

Given the limitations of the Bivens cause of action, it might seem natural to seek a damage remedy against the government, rather than against a particular official. Sovereign immunity, however, prevents such a remedy. Sovereign immunity, simply put, is the common law doctrine that a government cannot be sued absent consent. This section explores the roots of sovereign immunity, and its nature as a common law rather than constitutional doctrine.

1. The Development of Federal Sovereign Immunity. — The early history of sovereign immunity in the United States reveals little about why the doctrine is so firmly rooted today. The issue was not debated at the Con-

69. See Schuck, supra note 22, at 60–61.
70. See George A. Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1175 (1977) (noting that “officials often lack the means to satisfy judgments rendered against them”). The salaries of career civil service employees are governed by the Office of Personnel Management’s (OPM) General Schedule, which sets salaries based on “grade” (level of position) and “step” (level of tenure). The annual income of an employee earning at the highest grade of the schedule, GS-15, and the highest level of experience, level 10, is currently $88,326. See 60 Fed. Reg. 7336 (1995) (laying out OPM’s general pay schedule).
71. In England, by 1789, the proposition that the sovereign could not be sued without consent had been slowly developing for centuries. While the doctrine stood as a nominal bar to suits against the government, a number of legal fictions blunted its consequences. See Paul M. Bator et al., Hart and Wechsler’s The Federal Courts and the Federal System 1108 (3d ed. 1988) [hereinafter Hart & Wechsler] (“Many scholars have argued that the doctrine of sovereign immunity, as it had evolved in England prior to 1789, was less about whether the Crown or its agents could be sued than about how.”). The primary effect of the doctrine was to channel forms of pleading, not to deny relief. For an excellent overview of the development of sovereign immunity, see Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).
stitutional Convention, and little is known about how the immunity doctrine was treated in the colonial courts. The Constitution is silent on the issue, although Article III allows jurisdiction to be granted for "Controversies to which the United States shall be a Party," at least implying an ability to render the United States amenable to suit. Furthermore, there is some ambiguous evidence that the Framers intended to abolish sovereign immunity, at least for the states. Evidence from the state ratifying conventions and the Judiciary Act of 1789, which implemented Article III, is equally equivocal about reigning sentiment.

Sovereign immunity was first addressed by the Supreme Court in 1793, in *Chisholm v. Georgia*. Faced with the question of whether Article III allowed jurisdiction in a suit against a state, four of the five Justices on the Court found Georgia amenable to suit in its sovereign capacity, absent consent, indicating a sharp break with traditional monarchist conceptions of sovereignty. In 1794, Congress, reacting to the widespread

72. See Schuck, supra note 22, at 36. Professor Amar asserts that sovereign immunity, and the vesting of discretion to waive the doctrine in Congress, is inconsistent with the founders' understanding of popular sovereignty. He argues that the "single idea" of popular sovereignty "informs every article of the Federalist Constitution, from the Preamble to Article VII." See Amar, supra note 12, at 1439. To Amar, the Constitution reflected a conscious decision to reject the English conception of sovereignty as King-in-Parliament, and was instead modeled on the corporate examples of the early colonial compacts and state constitutions. Amar finds support for this concept of popular sovereignty in Madison's Federalist No. 46:

> The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .

Id. at 1449–50 (quoting The Federalist No. 46 (James Madison)).

73. See Schuck, supra note 22, at 36.


75. But see Hart & Wechsler, supra note 71, at 1109 n.2 (noting that the Supreme Court, in the "discredited" decision in Williams v. United States, 289 U.S. 553 (1933), held that the language only applied to the United States as a plaintiff). See generally id. at 1109 (discussing the history of the amenability of the United States to suit).

76. See Schuck, supra note 22, at 44.

77. See id.

78. 2 U.S. (2 Dall.) 419 (1793).

79. Chief Justice Jay noted the distinction between England's feudal system and the fledgling American system of popular sovereignty. He concluded that such feudal notions as not being able to subject the sovereign to suit in his own court did not "obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty." Id. at 471–72; see also Schuck, supra note 22, at 45 (discussing the concept of popular sovereignty expounded in the opinions of Chief Justice Jay and Justice Wilson).
fear of the vulnerability of states to suits for debt, proposed the Eleventh Amendment to the Constitution, which sought to withdraw from the federal courts jurisdiction over suits against a state by citizens of another state.\footnote{80}

\textit{Chisholm} and the Eleventh Amendment, ratified in 1798, left open the question of the sovereign immunity of the United States, but the Court never engaged in a serious debate about the issue. Beginning with Chief Justice Marshall’s dictum in \textit{Cohens v. Virginia} that “no suit can be commenced or prosecuted against the United States,”\footnote{81} the Court recognized and defended federal sovereign immunity.\footnote{82} By 1882, Justice Miller was able to write, in \textit{United States v. Lee}, that “the principle that the United States cannot be lawfully sued without its consent in any case... is conceded to be the established law of this country.”\footnote{83} By the end of the nineteenth century, then, the Supreme Court had taken a doctrine of sovereignty developed in England to protect the monarch, and, with little explanation, made it a prerogative of Congress.\footnote{84}

Chief Justice Jay, however, distinguished between state sovereign immunity and federal sovereign immunity on the ground that an Article III court had the aid of the federal executive when challenging the former, but not when challenging the latter. See \textit{Chisholm}, 2 U.S. (2 Dall.) at 478. As Professor Schuck has pointed out, Chief Justice Jay’s argument would have undermined every decision asserting judicial authority against a coordinate branch, from \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803) to \textit{United States v. Nixon}, 418 U.S. 688 (1974). See Schuck, supra note 22, at 36.

\footnote{80} The amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State.” U.S. Const. amend. XI. The Supreme Court has not, however, read the Eleventh Amendment to stand as an absolute bar to actions for injunctive relief. In a series of decisions culminating in \textit{Ex Parte Young}, 209 U.S. 123 (1908), the Court held that state officials were amenable to suit in federal court, even when those officials were acting under the cloak of state authority, as long as the state was not being sued in its own name. See \textit{Lee}, 106 U.S. at 196–55; Schuck, supra note 22, at 45–46.

\footnote{81} 19 U.S. (6 Wheat.) 264, 411–12 (1821).

\footnote{82} The first case squarely decided on the ground of federal sovereign immunity did not come until 1846, in \textit{United States v. McLemore}, 45 U.S. (4 How.) 286 (1846). There, the Court rejected a bill in equity to enjoin enforcement of a judgment at law in favor of the federal government. See Hart & Wechsler, supra note 71, at 1109.


\footnote{84} In order to provide a mechanism for policing the excesses of the government despite sovereign immunity, courts in the United States, like their English counterparts, developed a complex jurisprudence of officer suits. In \textit{Lee}, for example, the Court allowed an ejectment action by a titleholder against two federal officials who had charged of the Arlington, Virginia estate of General Robert E. Lee’s wife, which the United States government had purchased after an alleged failure to pay a tax assessment. See \textit{Lee}, 106 U.S. at 197; Jaffe, supra note 71, at 23. The Court allowed the action, even though it affected property in the possession of the federal government. See \textit{Lee}, 106 U.S. at 223.
2. The Common Law Origins of Sovereign Immunity. — As the development of sovereign immunity in the United States indicates, the doctrine has a common law, rather than constitutional, foundation. Although some members of the Supreme Court have stated that sovereign immunity can be found in the Constitution, nothing about the immunity of the government to suit appears in the text of the Constitution. The Court has generally made no pretense of finding a constitutional basis for sovereign immunity, but has instead invoked its long tradition.

Justice Holmes rationalized the doctrine of sovereign immunity on the "logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends." While this may be true of federal statutory causes of action, the Constitution is the "authority that makes the law" in constitutional torts.

85. See Travis, supra note 12, at 617–21 (discussing the nature of sovereign immunity). Understanding sovereign immunity as a common law and not a constitutional doctrine is significant in the context of its potential judicial abrogation. See infra text accompanying notes 216–231.

The Supreme Court is currently engaged in a similar, although not directly analogous, debate about the nature of sovereign immunity in the context of state sovereignty under the Eleventh Amendment. Recently, in Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), the Court, by a 5–4 majority, found that Congress' commerce power was not sufficient to abrogate state sovereign immunity in an Article III court. See id. at 1131–32. Justice Souter's dissent, however, forcefully argued, among other things, that constitutionalizing state sovereign immunity in federal court under an atextual reading of the Eleventh Amendment represents a fundamental misunderstanding of the nature of sovereign immunity as a common-law doctrine. See id. at 1159–65 (Souter, J., dissenting). As discussed above, the amenability of the United States to suit absent consent in an Article III court, under the general jurisdictional grant to hear constitutional claims contained in 28 U.S.C. § 1331 (1994), presents a distinct question from the amenability of states to suit in federal court. See supra note 79. But the debate evinced by Seminole Tribe can give insight into the active and ongoing nature of this controversy.

86. See e.g., Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1945) (arguing that sovereign immunity is "embodied in the Constitution"); cf. Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (arguing that the Constitution did not repeal sovereign immunity).

87. See Alaska v. United States, 64 F.3d 1352, 1354 n.3 (9th Cir. 1995) ("Federal sovereign immunity derives from public law, but it is not explicit in either the Constitution or statutes.").

88. See, e.g., Nevada v. Hall, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries.").

89. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.). This rationale has been extended in some cases to an assertion that sovereign immunity is a question of an affirmative grant of jurisdiction. Absent consent to be sued, this rationale holds, there is no jurisdiction. See, e.g., United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 514 (1940). But see Pullman Constr. Indus. v. United States, 25 F.3d 1166, 1169 (7th Cir. 1994) (finding that federal sovereign immunity is not jurisdictional, but rather better thought of as "a right to prevail at trial").
claims, not Congress.\textsuperscript{90} In other words, the source of the authority of Congress and the executive to act is the Constitution, and, since \textit{Marbury v. Madison},\textsuperscript{91} the Court has had the power and the duty to review those actions—legislation or execution of the law—through the lens of the Constitution. Admittedly, the long tradition of reviewing acts of Congress and the actions of the executive for unconstitutionality in the course of deciding cases and controversies does not necessarily lead to the conclusion that the Court has the power to invoke the Constitution to overcome sovereign immunity. As the cases leading up to \textit{Bivens}, and \textit{Bivens} itself, made clear, however, the “judicial power” in Article III includes the traditional powers of courts to find remedies for cognizable violations of rights.\textsuperscript{92} \textit{Marbury} rationalized judicial review by arguing that a court reviewing two sources of law, a statute and the Constitution, was bound to hold the one up against the other and resolve any conflict in favor of the higher authority, the Constitution.\textsuperscript{93} While it is less traditional to undertake this comparison in the context of questions of allowing damages, if the only bar to a court finding a remedy against the government is a common law doctrine, sovereign immunity, then \textit{Marbury} would indicate that constitutional necessity should take precedence.\textsuperscript{94}

3. Congressional Retention of Sovereign Immunity for Constitutional Torts. — Over the past two hundred years Congress has waived the sovereign immunity of the United States in a haphazard manner.\textsuperscript{95} It has waived sovereign immunity for most common law actions\textsuperscript{96} while stressing a con-

\textsuperscript{90} See U.S. Const. art. VI. ("This Constitution ... shall be the supreme Law of the Land"); see also Jaffe, supra note 71, at 4–5 (critiquing Justice Holmes's view of sovereign immunity on the ground that the concept of a unitary sovereign that informed the development of sovereign immunity in England does not translate to the United States).

\textsuperscript{91} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{92} See supra text accompanying notes 22, 26–36.

\textsuperscript{93} See \textit{Marbury}, 5 U.S. (1 Cranch) at 176–77. A court would be faced with the same conflict, for example, when reviewing an administrative regulation in light of the agency’s organic statute. Any conflict between the two would have to be resolved in favor of the higher source of authority, the statute. See \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 842–43 (1984).

\textsuperscript{94} One could argue that because sovereign immunity was understood to be an element of the judicial power at the time of the drafting of the Constitution, any limitations on that power would have been incorporated. The opinions of the majority of Justices in \textit{Chisholm}, however, belie this contention. See supra notes 78–80 and accompanying text. Cf. \textit{Seminole Tribe v. Florida}, 116 S. Ct. 1114, 1163 (1996) (Souter, J., dissenting) (noting the “widespread agreement [among the Framers] that ratification would not itself entail a general reception of the common law of England”).

\textsuperscript{95} Professor Schuck describes remedies Congress has allowed against the United States as “a jerry-built structure, a patchwork, a doctrinal stew.” Schuck, supra note 22, at 51.

\textsuperscript{96} Beyond the general waivers of sovereign immunity contained in the legislation discussed in this section, namely, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1994), and the Tucker Act, 28 U.S.C. §§ 1346(a), 1491(a)(1) (1994), Congress has specifically waived sovereign immunity for federal agencies in two important ways. First, Congress amended the Administrative Procedure Act in 1976 to waive sovereign immunity for suits against agencies for relief other than monetary damages. See 5 U.S.C.
cern for preserving policymaking discretion and the ability of the executive to vigorously implement the law. Despite ambiguous statutory language that could have allowed actions against the federal government for constitutional violations, courts have consistently interpreted waivers of sovereign immunity to foreclose this option.

a. The Court of Claims and the Tucker Act. — Congress began waiving federal sovereign immunity in 1855 with the establishment of the Court of Claims, which was empowered to hear government contract cases. In 1887, the Tucker Act expanded the jurisdiction of the Court of Claims to include, with some exceptions, all "claims founded upon the Constitution of the United States or any law of Congress." The Tucker 

§ 702 (1994). This waiver only applies to injunctions blocking unconstitutional acts before or while they occur; it is of no avail to a plaintiff seeking damages for constitutional violations after the fact.

Second, Congress has included in many statutes that establish agencies a "sue-and-be-sued" clause which the Court regularly interprets to effect a broad waiver of sovereign immunity. In Federal Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940), for example, the Court held that "such waivers by Congress . . . should be liberally construed." The Supreme Court still adheres to the Burr holding, despite the narrowness of the Court's approach to other waivers of sovereign immunity. See, e.g., FDIC v. Meyer, 114 S. Ct. 996, 1003 (1994). See generally John C. Nagle, Waiving Sovereign Immunity in an Age of Clear Statement Rules, 1995 Wis. L. Rev. 771 (1995) (critiquing the Supreme Court's strong "clear statement rule" for waivers of sovereign immunity). This broad waiver, however, has not been found to afford a plaintiff a remedy in damages against the agency for constitutional violations. The Court in Meyer, despite finding that the sue-and-be-sued clause at issue waived sovereign immunity for constitutional torts, held that the waiver was not sufficient to create a cause of action. Instead, it found that a cause of action would require a separate judicial fiat. See Meyer, 114 S. Ct. at 1005. For a discussion of Meyer, and its significance in providing the Court's rationale for not creating causes of action against the federal government, see infra text accompanying notes 121-132.


97. See infra text accompanying notes 105-110.

98. Moreover, the Court consistently interprets waivers of immunity in favor of the sovereign. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed. . . . [T]he Government's consent to be sued must be construed strictly in favor of the sovereign.") (internal quotation marks and citations omitted). The interpretation of sue-and-be-sued clauses is a notable exception to this basic canon of construction. See supra note 96.


Act, however, conferred no substantive rights, but merely waived the sov-
ereign immunity of the United States where such a right could be found.
In order to gain relief under the Tucker Act, a plaintiff must "demo-
strate that the source of the substantive law . . . 'can fairly be interpreted
as mandating compensation by the Federal Government for the damage
sustained.' "102 While constitutional claims under the Just Compensation
Clause of the Fifth Amendment have satisfied this requirement,103 lower
courts have rejected Tucker Act jurisdiction for violations of other consti-
tutional provisions.104

b. The Federal Tort Claims Act. — Well into the twentieth century,
damages for tort claims against the United States were only available
through private acts enacted by Congress. In 1946, Congress passed the
Federal Tort Claims Act (FTCA),105 which waived sovereign immunity for
most common law torts. Congress, seeking to protect the ability of the
Executive to act, carved out an exception for "discretionary func-
tion[s]."106 The Court has interpreted this exception broadly to avoid

Testan, 424 U.S. 392, 400 (1976)).
103. See, e.g., United States v. Causby, 328 U.S. 256 (1946).
104. See Hart & Wechsler, supra note 71, at 1146 (citing Featheringill v. United
States, 217 Ct. Cl. 24, 33 (1978) (First Amendment) and Hohri v. United States, 782 F.2d
227, 244-45 (D.C. Cir. 1986) (Fourth Amendment, Fifth Amendment Due Process, Sixth
Amendment's counsel and fair trial provisions, and Eighth Amendment's Cruel and
Unusual Punishment Clause)).
105. Federal Tort Claims Act, ch. 753, tit. 4, 60 Stat. 812, 842-47 (1946) (current
version at 28 U.S.C. §§ 1346(b), 2671-2680 (1994)).
106. 28 U.S.C. § 2680(a) (1994) (providing that there is no waiver of sovereign im-

munity for any "claim . . . based upon the exercise or performance or the failure to
exercise or perform a discretionary function or duty on the part of a federal agency or an
employee of the Government, whether or not the discretion involved be abused"). See
generally William P. Kratzke, The Supreme Court's Recent Overhaul of the Discretionary
Function Exception to the Federal Tort Claims Act, 7 Admin. L.J. 1 (1993) (surveying the
evolution of the judiciary's interpretation of 28 U.S.C. § 2680(a)).

In the FTCA, Congress retained sovereign immunity in a few other specified instances.
First, sovereign immunity was not waived for liability arising out of the intentional torts of
assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,
libel, slander, misrepresentation, deceit, or interference with contract. See 28 U.S.C.
§ 2680(h). In 1974, with the Intentional Tort Amendments Act, Pub. L. No. 93-253, § 2
tion for suits arising out of the acts of federal investigative or law enforcement officers. See
generally Jack Boger et al., The Federal Tort Claims Act Intentional Torts Amendment:
An Interpretative Analysis, 54 N.C. L. Rev. 497 (1976) (discussing the history and practical
consequences of the Intentional Torts Amendment). Second, Congress has retained
sovereign immunity in eleven narrow areas. See 28 U.S.C. § 2680(b) (loss, miscarriage,
or negligent transmission of letters or postal matter); (c) (tax or customs duty collection); (d)
(certain admiralty claims); (e) (administering the Trading with the Enemy Act of 1917);
(f) (for quarantines); (i) (fiscal operation of the Treasury or the regulation of the
monetary system); (j) (combatant activities of the military or naval forces, or the Coast
Guard, during time of war); (k) (claim arising in a foreign country); (l) (Tennessee Valley
Authority); (m) (Panama Canal Company); and (n) (activities of a federal local bank, a
federal intermediate credit bank, or a bank for cooperatives).
allowing tort suits to be the vehicle for testing the consequences of policymaking.107 The federal government will be immune from liability in tort if the contested act "involves an element of judgment or choice"108 based on considerations of public policy.109 This immunity applies to the discretionary acts of even the lowest-level official.110

Courts have generally rejected arguments for recognizing a remedy for constitutional torts under the FTCA. The Supreme Court in FDIC v. Meyer111 held that the reference to "the law of the place" in the FTCA's jurisdictional provision112 only encompasses violations that arise out of state law.113 As the Ninth Circuit explained in Pereira v. United States Postal Service, the FTCA only waives sovereign immunity for tortious conduct "if

107. See United States v. Gaubert, 499 U.S. 315, 324 (1991) (finding that if a regulation mandates a particular course of action, and the relevant federal official follows that course of action, the government will not be liable in tort for promulgating such regulation); Berkovitz v. United States, 486 U.S. 531, 538–39, 544 (1988) (finding that the government could only be liable in tort for actions arising out of consequences of policymaking where federal officials deviate from mandated procedure); United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984) (noting that purpose of discretionary function exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort").
109. See Gaubert, 499 U.S. at 323; Berkovitz, 486 U.S. at 537. The Court in Gaubert explained the distinction between discretionary functions immune from tort liability and discretionary functions for which the Federal Tort Claims Act allow relief with a hypothetical involving the negligent driving of a car by a government agent. Even though driving a car requires the "constant exercise of discretion," that discretion is not grounded in policy, and thus any negligence that derives from the actions of that agent creates liability. See Gaubert, 499 U.S. at 325 n.7.
110. See Varig Airlines, 467 U.S. at 813.
111. 114 S. Ct. 996 (1994).
113. See Meyer, 114 S. Ct. at 1001–02. At issue in Meyer was whether the FTCA—and its enumerated exceptions—was the exclusive remedy for alleged constitutional violations, or whether the plaintiff could sue the FSLIC (the predecessor agency to the FDIC) under the agency's own sue-and-be-sued clause. See id. In other words, the plaintiff was seeking to avail himself of the broader waiver provision of the sue-and-be-sued clause, rather than relying on the narrow constructions of the FTCA. The FTCA is the exclusive remedy for all claims which are "cognizable" under its waiver of sovereign immunity, 28 U.S.C. § 1346 (1994). This means that any suit found to be cognizable under the statute must be against the government as a whole and not against the particular agency. Congress so mandated in order to place the tort liability of those agencies with sue-and-be-sued clauses on the same footing as those without. See Meyer, 114 S. Ct. at 1000 (citing Loeffler v. Frank, 486 U.S. 549, 562 (1988)). Claims to be cognizable under the FTCA must arise "under 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). Because a private person could not be liable for a violation of the Constitution, and because the "law of the place" refers to state substantive law, the Court found that a constitutional tort is not cognizable under the FTCA. The Supreme Court thus held that the sue-and-be-sued clause was not supplanted by the FTCA, allowed the plaintiff to sue the FSLIC directly under the agency's sue-and-be-sued waiver of sovereign immunity. See 114 S. Ct. at 1002–03 (citing Federal Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940)).
such torts committed in the employ of a private person would have given rise to liability under state law." Because constitutional torts are based on the federal Constitution, they are not cognizable under state law.

Congress did not address governmental liability for constitutional violations at the time of the passage of the FTCA, and congressional attempts to waive sovereign immunity for constitutional torts since the Court created the cause of action in *Bivens* have failed. When Congress recently amended the FTCA to substitute the United States as a defendant in certain tort actions, it stated that the substitution "does not extend or apply to civil action against an employee of the Government which is brought for a violation of the Constitution of the United States." It has been argued that the exclusion of constitutional torts was merely a political accommodation, but the fact remains that at-

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114. 964 F.2d 873, 876 (9th Cir. 1992).

115. Professor Davis has argued, on the other hand, that the term "law of the place" should include the federal Constitution, as the Supremacy Clause declares the Constitution to be "the supreme Law of the Land," equally applicable in state as in federal court. See Davis, supra note 12, at 49 (citing U.S. Const. art. VI).

116. In *Dalehite v. United States*, 346 U.S. 15, 27 (1953), the Court quoted FTCA legislative history for the proposition that it was "not 'intended that the constitutionality of legislation [or] the legality of regulations . . . be tested through the medium of a damage suit for tort.' " The Court cited this legislative history to underscore the fear that policy choices would be challenged under the guise of a tort action. The concept of the constitutional tort could not have been considered by Congress when it passed the FTCA in 1946, as the earliest opinion recognizing a damage remedy under the Constitution was not handed down until a decade and a half later, in *Monroe v. Pape*, 365 U.S. 167 (1961). See supra note 22.


118. 28 U.S.C. § 2679(b)(2)(A) (1994). Congress was responding to the Supreme Court's 1988 decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that a federal employee enjoys personal immunity from state law tort actions only where the act allegedly causing harm was discretionary and within the line of duty. See id. at 300. The 1988 Act restored what Congress perceived to be the status quo prior to *Westfall*. See Clark Byse, Recent Developments in Federal Administrative Law: Damage Actions Against the Government or Government Employees, 4 Admin. L.J. 275, 282-84 (1990) (describing *Westfall* and the congressional response to the decision).

119. Byse argues that the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, in considering the bill to overturn *Westfall*, made a political decision to avoid disputes between the Justice Department and civil liberties organizations. See Byse, supra note 118, at 286-87. In order to avoid this political quagmire, the then-chairperson of the Subcommittee, Representative Barney Frank, D-Mass., sought a bill that would specifically exclude constitutional torts. The Committee's decision to avoid constitutional torts, then, was not a question of a deliberated choice to retain sovereign immunity for constitutional violations, but rather a reflection of legislative expediency. One could infer congressional intent to preclude constitutional torts from an affirmative act by Congress to bar such an action, but the inability to muster a majority to overcome the default presumption is not dispositive.

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tempts to bring constitutional violations within the ambit of the FTCA have been unsuccessful.\textsuperscript{120}

C. \textit{Supreme Court Arguments in Defense of Sovereign Immunity for Constitutional Torts}

Given the limits of \textit{Bivens} and the failure of Congress to waive the sovereign immunity of the federal government for constitutional torts, plaintiffs have turned to the courts to create a cause of action against the government.\textsuperscript{121} Courts have rejected this possibility, but have been terse in explaining the policies underlying their restraint. The Supreme Court rarely discusses its rationale for protecting the prerogative of Congress in deciding when to allow a suit against the federal government. Rather, the Court adheres to a few simple canons of interpretation.\textsuperscript{122} In \textit{FDIC v. Meyer}, however, the Court for the first time addressed a constitutional claim seeking a damage remedy against the United States, and the reasons it gave for not creating a cause of action provide insight into its unwillingness to challenge sovereign immunity.\textsuperscript{123}

The plaintiff in \textit{Meyer} alleged that his employment had been terminated without due process of law and sought damages under the Fifth

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{120}] In 1982, the Administrative Conference of the United States recommended that Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by Federal executive branch officers and employees while acting within the scope of their office or employment. Administrative Conference of the United States, \textit{Federal Officials' Liability for Constitutional Violations} (recommendation no. 82-6), 1 C.F.R. § 305.82-6 (1989); Byse, supra note 118, at 284. Despite this recommendation, and the volume of academic literature supporting the removal of sovereign immunity for constitutional violations, Congress has failed to act. See Thomas J. Madden et al., \textit{Bedtime for Bivens}: Substituting the United States as Defendant in Constitutional Tort Suits, 20 Harv. J. on Legis. 469 (1983) (considering congressional attempts to amend the FICA to allow for constitutional tort claims against the federal government).
\item[\textsuperscript{121}] See supra note 19 for examples of such cases.
\item[\textsuperscript{122}] See supra note 98 and accompanying text.
\item[\textsuperscript{123}] 114 S. Ct. 996 (1994). \textit{Meyer} involved two inquiries by the Court: first, did the agency's sue-and-be-sued clause waive sovereign immunity for constitutional torts, and, if so, should there be a cause of action against the agency for constitutional violations? Having answered the first question in the affirmative, the next question became one entirely at the discretion of the Court. In other words, sovereign immunity had been waived, and the only question was whether it was appropriate for the Court, as it had done against individual officers in \textit{Bivens}, to create a cause of action. The Court decided not to create a cause of action, thereby reinstating the immunity it had just decided had been waived. See id. at 1005. So, while the Court did not face the question of whether to abrogate sovereign immunity directly, in deciding to forego the opportunity to create a cause of action for a constitutional violation, it laid out a concise argument for leaving questions of liability to Congress. In essence the Court restated the modern law of sovereign immunity, and the policy arguments the Court articulated for judicial restraint bear directly on the debate over judicially abrogating sovereign immunity. See infra Part III.
\end{enumerate}
\end{footnotesize}
Amendment. Justice Thomas, writing for a unanimous Court, relied on two policy arguments to defeat such a cause of action. First, he argued that creating a remedy against the United States "would mean the evisceration of the Bivens remedy" because such a cause of action would undermine the incentive for an aggrieved plaintiff to sue the offending official. The Court reasoned that any remedy against the United States would instead create an incentive to reach the deep pockets of the federal government. Federal officials would then essentially have nothing to fear in terms of personal liability. The deterrent effects of Bivens would thus be undermined.

Next, the Court found the potential expense of liability a "special factor[] counselling hesitation." If we were to recognize a direct action for damages against federal agencies," the Court argued, "we would be creating a potentially enormous financial burden for the Federal Government," both in terms of actual liability and in the cost of defending such claims. The Court concluded by stating that it was the exclusive province of Congress to decide whether to embark on such a potentially significant expansion of governmental liability. The Court noted that Congress had tried several times to create such a cause of action, but

124. See Meyer, 114 S. Ct. at 999. The plaintiff in Meyer argued for a cause of action against the government for actions arising out of the supervision of the Fidelity Savings and Loan Association, a California-chartered thrift institution. See id. The plaintiff, a senior Fidelity officer, was terminated pursuant to an FSLIC policy of removing the senior management of savings and loan institutions placed into receivership under federal law. See id.

125. Id. at 1005.

126. See id.

127. This rationale can be questioned on the practical ground that enterprise liability may have a greater deterrent effect than individual liability, even for government entities. See Schuck, supra note 22, at 102–06 (arguing that expanded governmental liability would increase general deterrence by focusing incentives on the location best able to respond to them). Furthermore, the Court’s argument in Meyer about individual deterrence seriously misstates the purpose of Bivens, which focused on compensation more than the deterrent effects of personal liability. See Bandes, supra note 12, at 340–41 & n.244. Moreover, the current structure of liability for officials but immunity for the government for constitutional violations has other negative consequences. Professors Davis and Pierce note that sympathy for the plight of public employees leads to narrow interpretations of constitutional provisions, and leads juries to resolve close factual suits in favor of the defendant. See Peter L. Strauss et al., Gellhorn & Byse’s Administrative Law: Cases and Comments 1280 (9th ed. 1995) [hereinafter Gellhorn & Byse] (citing Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 19.2, at 205–06 (1994)).


129. Id. at 1006.

130. See id.; see also Jaffee v. United States, 663 F.2d 1226, 1228 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982) ("Any decision on whether claims of the plaintiffs should be converted to a cause of action, however, should be reserved for Congress to make in these special circumstances. It is that body which must weigh the competing priorities and policy judgments to determine whether a cause of action should be created.").
failed. Viewing this in terms of constitutional separation of powers, the Supreme Court can be seen as arguing that questions of the scope of liability are reserved for the accountable branch, and not for unaccountable, unelected judges.

II. THE HUMAN RADIATION EXPERIMENTS AS CONSTITUTIONAL MASS TORTS

The Human Radiation Experiments provide insights into the problems created by sovereign immunity. This Part first examines the history of the HRE, and the variety of ways in which the program violated fundamental rights. It then distinguishes these violations from most constitutional torts by analogizing the HRE to mass torts, thus focusing on the responsibility of the government as a whole.

A. The History of the Human Radiation Experiments

The Human Radiation Experiments began in 1944 as an effort by the Manhattan Project, the federal government's World War II program to build an atomic weapon, to understand the effects of radioactive materials on workers. Since the 1920s, the scientific community had recognized radium as a dangerous substance, understood to be responsible for the high incidence of bone disease observed among radium dial painters. It was unclear whether the materials the Manhattan Project


133. Determining whether these constitutional violations give rise to damage claims is no easy inquiry. As Professor Davis has noted, the question of which violations of the Constitution merit a damage remedy "has no single answer, for it is governed by no single principle." See Davis, supra note 12, at 219. The bulk of constitutional tort claims arise under § 1983, and not under Bivens, and the inconsistency of the doctrine may be attributable to the vast array of situations in which § 1983 claims are filed. See id. at 213–14. For an in-depth discussion of human radiation experimentation as constitutional tort, see Leonard W. Schroeter, Human Experimentation, the Hanford Nuclear Site, and Judgment at Nuremberg, 31 Gonz. L. Rev. 147 (1995/96).

134. See generally Richard Rhodes, The Making of the Atomic Bomb (1986). In 1942, the Manhattan Engineering District was created to develop the atomic bomb, with facilities at Oak Ridge, Tennessee, Hanford, Washington, and Los Alamos, New Mexico, where the weapon was eventually built. University of Rochester radiologist Stafford Warren was appointed medical director of the Manhattan Project, and it was the medical team that first made plans for human radiation testing. See Advisory Comm. Final Report, supra note 3, at 25–26.


136. See id. at 23. Painters of watch-dials used radium for its phosphorescence. Typically, as they painted, they dabbed their brushes on their tongues. After many developed blood disease and painful deterioration of the jaw, the danger of radioactive materials became widely known. See id.
was using would have similar effects, and so the Project's medical team made plans to inject plutonium, polonium, uranium, and possibly other radioactive materials into human subjects.\textsuperfootnote{137}

After World War II, control of the nation's nuclear program shifted to the civilian Atomic Energy Commission (AEC), established in 1946 by the McMahon Act.\textsuperscript{138} The AEC established a Division of Biology and Medicine, which had responsibility for biomedical research involving atomic energy.\textsuperscript{139} The AEC sponsored a great variety of experiments well into the 1970s, and a large, secret bureaucracy grew up around the evaluation of the effects of radiation on human beings.\textsuperscript{140} This bureaucracy continued in one form or another for almost four decades, until 1974.\textsuperscript{141}

The facts alleged in recently filed cases illustrate the scope and nature of the experiments. In \textit{In re Cincinnati Radiation Litigation}, the plaintiffs allege that from 1960 to 1972 experiments were conducted under the auspices of the Department of Defense Atomic Support Agency at two hospitals in Cincinnati, Ohio.\textsuperscript{142} Defendants exposed the subjects—ordinary patients—to total or partial body irradiation in order "to develop a baseline for determining how much radiation exposure was too much, . . . to determine how shielding could decrease the deleterious effect of the radiation," and to determine what effect radiation had on "cognitive or other functions mediated through the central nervous system."\textsuperscript{143} Each subject, although suffering from cancer, was deemed to be in good clinical condition.\textsuperscript{144} Plaintiffs further allege that subjects were selected because they were indigent, poorly educated or of below-average intelligence, and that the majority were African-American.\textsuperscript{145} Patients were told they were receiving treatment, but the primary effects of the exposure appear to have been seriously shortened life expectancy, bone marrow failure or suppression, nausea, vomiting, burns on the subjects' bod-

\textsuperscript{137} See id. at 28.
\textsuperscript{139} See Advisory Comm. Final Report, supra note 3, at 30. The AEC also created an Advisory Committee for Biology and Medicine, reporting directly to the chairman. See id. 140. See id. at 32–33.
\textsuperscript{141} In 1974, the U.S. Department of Health, Education and Welfare issued rules for the protection of human subjects of federally sponsored research. See id. at 5. The Advisory Committee on Human Radiation Experiments limited its inquiry, then, to incidents that occurred between 1944 and 1974, and this Note assumes that the bulk of the experimentation occurred during that period of time. For a discussion of the size and scope of the Human Radiation Experiments, see infra text accompanying notes 191–197.
\textsuperscript{142} 874 F. Supp. 796, 803 (S.D. Ohio 1995). The case was initially decided on motions to dismiss, see id. at 801, and as such, the factual allegations of the plaintiff were assumed to be true. See Fed. R. Civ. P. 12(b)(6).
\textsuperscript{143} \textit{In re Cincinnati Radiation Litig.}, 874 F. Supp. at 803 (quoting a report prepared by one of the defendants).
\textsuperscript{144} See id.
\textsuperscript{145} See id.
ies, severe and permanent pain, and emotional distress. No consent was garnered from any subject for the first five years of the trial, and thereafter consent was sought without giving the subjects information about the real risks involved.

In *Shattuck v. MIT*, former involuntary residents at the Walter E. Fernald State School in Waltham, Massachusetts allege that they were the victims of experiments in the 1940s and 1950s using radioactive isotopes fed to them without their knowledge. The victims, retarded minors in the care of the state, were recruited to participate in the experiments under the guise of a "Science Club" and were told that they were advancing the cause of science without being told the particulars of the experiment. Scientists enticed the subjects into the experiments with rewards like Mickey Mouse watches, Christmas parties, and trips to baseball games. The AEC allegedly allowed additional doses of radioactive material to be administered to more severely handicapped children, those deemed "mentally deficient."

Finally, in *Bibeau v. Pacific Northwest Research Foundation*, former inmates at the Oregon State Penitentiary in Salem, Oregon allege that from 1963 to 1973, officials working under the auspices of the AEC subjected them to X-ray irradiation of the testes and follow-up invasive surgery. The tests were meant to investigate the effects of ionizing radiation on spermatogenesis in employees of nuclear weapons facilities after an accident in April 1962 at the Hanford Nuclear Reservation in Richland, Washington. The government was also concerned about the effects of ionizing radiation on astronauts and/or pilots of a proposed nuclear-powered airplane.

B. Violations of the Constitution by the Human Radiation Experiments

Plaintiffs in these cases assert a number of constitutional claims, particularly arising out of due process, equal protection, and the right under the Eighth Amendment of prisoners to be free of cruel and unusual pun-
ishment. The alleged facts of the particular cases yield slightly different constitutional analyses, but several themes are consistent. Plaintiffs assert that the government cannot constitutionally use unconsenting civilians as guinea pigs. Moreover, the fact that victims may have been drawn from vulnerable populations like state prisoners and indigent or minority hospital patients raises equal protection concerns. Finally, plaintiffs have raised a number of procedural due process claims arising from the secrecy surrounding the projects, and the fact that such secrecy denied them the right to pursue state law claims. Together these constitutional claims represent assertions that federal officials overstepped the bounds of their limited authority and used victims as means to ends without their full knowledge or consent.

The claims addressed by the court in *In re Cincinnati Radiation Litigation* are illustrative. First, and most compellingly, the Court

157. See, e.g., Shattuck Class Action Complaint, supra note 149, at 1–2, 4 (describing plaintiffs as “human guinea pigs in a series of dangerous, coercive, painful and unproven experiments” and asserting that the “defendants’ actions were in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution”).

158. See Bibeau Class Action Complaint, supra note 154, at 5–6 (asserting that all victims in one class were prisoners and wards of the State of Oregon).

159. See *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 828 (S.D. Ohio 1995) (discussing assertion of plaintiffs that subjects of radiation experiments were intentionally drawn from African-American patients).

160. See, e.g., Bibeau Class Action Complaint, supra note 154, at 33–34 (alleging that the defendants, by concealing and/or destroying information, deprived plaintiffs of their property rights without due process and their right of access to the courts).


162. These claims were analyzed in the process of determining whether defendants could assert qualified immunity as a defense to § 1983 and Bivens charges. Finding their actions clearly unconstitutional, the court held that the defendants could not assert qualified immunity. See id. at 814. The court further relied on the argument that an official can only garner immunity for acting within the scope of delegated authority, and found that “instigation of and participation in the Human Radiation Experiments were acts far beyond the scope of their delegated powers.” Id.

Judge Beckwith also discussed the relevance of the Nuremberg Code to the asserted immunity of the defendants. See id. at 820. The Nuremberg Code, established in the Medical Case at Nuremberg, United States v. Brandt, 1 Trials of War Criminals Before the Nuremberg Military Tribunals 1, Vol. 2 at 181–82 (1947), contained ten principles to guide medical experimentation, the first of which was that the “voluntary consent of the human subject is absolutely essential.” Id. Judge Beckwith’s opinion relied on Justice O’Connor’s partial dissent in United States v. Stanley, 483 U.S. 669, 683 (1987), a case involving LSD experiments conducted by the Army on unwitting enlisted men. There, the plaintiff’s claim was barred by the fact that it had occurred in the course of military service. Judge Beckwith reasoned that because the victims of the Cincinnati radiation experiments were not in the military (and because *Stanley* had been a 5-4 decision), Justice O’Connor’s partial dissent should control. See *In re Cincinnati Radiation Litig.*, 874 F. Supp. at 821 n.23. Justice O’Connor had written:

The United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War and the standards that the Nuremberg Military Tribunals developed to judge the behavior of the defendants stated that the “voluntary
found that the plaintiffs had sufficiently alleged a violation of the substantive due process right to bodily integrity to survive a qualified immunity defense.\textsuperscript{163} In answer to the defendants’ argument that the subjects had been voluntary patients, the court countered that many of the patients, as indigents, had access only to the hospital where the experiments were taking place and were never informed of the nature of the experiments or their attendant risks.\textsuperscript{164} Finally, the court discussed the long line of cases finding a liberty interest in refusing state-sponsored invasive medical procedures.\textsuperscript{165} The court had little difficulty in finding a violation of the plaintiffs’ liberty interest, with no state interest sufficiently compelling to overcome the claim.\textsuperscript{166}

Next the Court addressed the alleged denial of the right to access to courts.\textsuperscript{167} Defendants, by intentionally concealing the true nature and risks of the experiments, and keeping them secret until press reports released more than twenty years after their completion, “substantially compromised” any potential state law claims arising out of them.\textsuperscript{168} For the

\begin{quote}
consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts.” . . . If this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution’s promise of due process of law guarantees this much.
\end{quote}

\textit{Stanley}, 483 U.S. at 710 (O’Connor, J., concurring in part and dissenting in part) (quoting the Medical Case at Nuernberg, United States v. Brandt, supra).

For Judge Beckwith, the Nuremberg Code’s mandate of consent for experimentation, if not controlling precedent in the United States, at least indicated that the defendants should have understood that their actions were unacceptable by prevailing standards of official conduct. See \textit{In re Cincinnati Radiation Litig.}, 874 F. Supp. at 821–22. For a discussion of the history and development of the Nuremberg Code, see generally The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation (George J. Annas & Michael A. Grodin eds., 1992). For a discussion of the role of the Nuremberg Code in the courts of the United States, see George J. Annas, Mengele’s Birthmark: The Nuremberg Code in United States Courts, 7 J. Contemp. Health L. & Pol’y 17 (1991).


164. See \textit{In re Cincinnati Radiation Litig.}, 874 F. Supp. at 811–12.

165. See id. at 812 (citing cases).

166. The court compared unconsented-to nontherapeutic radiation experiments to various liberty interest claims that had failed because sufficiently compelling state interests justified the procedures, and found no such sufficient countervailing state interest in this case. See id. at 813 (citing “compulsory vaccinations, compelled blood tests, and extractions of contraband . . . from the rectal cavity” as physical invasions that have been upheld on a showing of “clear necessity, procedural regularity, and minimal pain”).

167. See id. at 822–25 (citing Chambers v. Baltimore, 207 U.S. 142, 148 (1907) (discussing right to access to courts under Article IV of the Constitution and the Fourteenth Amendment) and Wolff v. McDonald, 418 U.S. 539 (1974) (discussing right to access to court found in the Due Process Clause of the Fourteenth Amendment)).

168. Id. at 823–24.

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court, this was sufficient to support a cause of action. The plaintiffs also asserted a related procedural due process claim, under the theory that the concealment of the experiments impaired their ability to pursue a wrongful death claim under Ohio law, which requires that such claims be commenced within two years after the decedent’s death. Again, the court found merit in their claim, noting that the Supreme Court has affirmed that “a cause of action is a species of property protected by the . . . Due Process Clause.”

Finally, the plaintiffs asserted an equal protection claim, pointing to the fact that the majority of subjects were African-American. The court found that the allegations were sufficient to survive a motion to dismiss, although it noted that there were significant factual issues in contention about the defendants’ knowledge and intent with regard to the recruitment of subjects.

HRE cases that have not yet proceeded to trial present other constitutional claims. The plaintiffs in Bibeau, prisoners whose testes were exposed to radiation, assert a claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment. In Mousso v. University of Rochester, plaintiffs, subjects of plutonium injections at the University of Rochester, assert a creative claim for violation of the Fourth Amendment’s proscription against unreasonable searches and seizures, and a more traditional claim for violation of the right to privacy. It is unclear how these claims will fare in court. On a fundamental level, however, the practice of secretly experimenting on unconsenting subjects represents governmental action that violates the Constitution.

C. Defining Constitutional Mass Torts

If, as just explored, the Human Radiation Experiments are constitutional torts, they can reveal much about the limitations of the current regime of sovereign immunity for such violations. Typical Bivens claims arise out of the individual actions of federal officials, and therefore resemble traditional common law torts. Governmental activity like the
HRE, however, calls for a type of liability that is closer to that imposed in mass tort situations. Individual officers have the ability to hide behind the facade of a massive bureaucracy and to shield their actions from disclosure for decades. In such a situation, courts should focus on the institutional responsibility of the government as a whole, and not on the actions of the particular officers who implemented the policy. This section will discuss the shift in the law of torts from liability that derives from individual action to liability that arises from the actions of large institutions, and argue that a policy such as the HRE produces constitutional torts that are much more akin to mass torts and as such are appropriately resolved by the imposition of institutional liability. This section will consider the development of the law of mass torts as a species of liability distinct from traditional common law torts. It will then lay out the salient characteristics of the HRE as a constitutional mass tort.

1. Torts and Mass Torts. — Paradigmatic tort cases involve individual plaintiffs suing individual defendants, seeking compensation for the invasion of their rights. In the last several decades, courts have been increasingly confronted with injuries that arise out of institutional conduct affecting vast numbers of plaintiffs, in actions that are described as “mass torts.” Mass torts arise frequently in product liability cases, and the exposure of large populations to toxic substances is increasingly a source of liability. Courts have struggled to meet the traditional tort goal of compensation in situations where causation is unclear and the relationship between the plaintiff and the defendant hard to demonstrate. Some cases present issues of indeterminate defendants, where it is difficult, if not impossible, to determine which of the wrongdoers before the court caused the specific harm to the plaintiff, even when the nature of the harm is clear. Conversely, mass torts sometimes involve indeterminate plaintiffs, where it is unclear exactly who in a population has been

178. Traditional tort law encompasses both intentional violations of the rights of another as well as harm arising out of negligence. The elements of a common law tort include a duty—e.g., the duty of care—that is breached, causing injury where the causal link between that violation and the injury is legally cognizable. See Restatement (Second) of Torts §§ 8A, 9, 281, 282, 430, 431 (1965); Richard A. Epstein, Cases and Materials on Torts, 731-71 (5th ed. 1990).


182. See Weinstein, supra note 179, at 18-19.

injured by the actions of the defendants, even when it is clear that the defendants have caused harm.\textsuperscript{184}

Courts faced with mass torts have significantly altered traditional conceptions of tort liability with theories such as enterprise and market share liability, which focus on the role that institutions play in creating wide-scale injuries.\textsuperscript{185} Instead of inquiring into whether the plaintiff's injuries are directly attributable to a given defendant, courts look to the role the defendant played in marketing a product and exposing consumers to its risks.\textsuperscript{186} Moreover, courts faced with mass torts relax traditional notions of causation, which require the plaintiff to prove that the particular defendant was more likely than not to have caused the particular injury. In mass tort cases, which often arise out of exposure to toxic or carcinogenic substances,\textsuperscript{187} injuries may manifest themselves years or decades after exposure, and can often be difficult to disaggregate from the background incidence of the disease without exposure.\textsuperscript{188}

2. Defining Characteristics of the Human Radiation Experiments as Constitutional Mass Tort. — Unlike most constitutional torts, which fit neatly within the framework of traditional individual-to-individual liability,\textsuperscript{189} the Human Radiation Experiments present claims that more closely resemble mass torts. Consequently, the institutional focus that has developed in mass tort law provides a useful way of analyzing the salient characteristics of these "constitutional mass torts."\textsuperscript{190}

First, and foremost, the HRE was initiated and maintained as part of a long-standing and far-reaching policy of government-sponsored experimentation on human beings, and was not the product of the individual action of a single official.\textsuperscript{191} The initial decision to begin experimenta-

\textsuperscript{184} See id.
\textsuperscript{185} See Weinstein, supra note 179, at 148–54.
\textsuperscript{188} This is not true in those cases where exposure leaves a "signature" illness, like mesothelioma, which arises out of exposure to asbestos. See In re Joint E. & S. Dist. Asbestos Litig., 827 F. Supp. 1014, 1026 (S.D.N.Y. 1993). Even in those cases, however, victims may have suffered multiple exposures or been at risk for other reasons, such as smoking.
\textsuperscript{189} See supra text accompanying notes 37–45.
\textsuperscript{190} The term "constitutional mass torts" used in this Note is not meant to imply a direct parallel to the law of mass torts in terms of issues such as the exact scope of enterprise liability or theories of compensable injuries, e.g., increased risk of disease or diminution in quality of life, that have arisen out of mass tort litigation. See Weinstein, supra note 179, at 152–54. Rather, the analogy to mass torts primarily serves to shift the focus of the debate about sovereign liability from individual wrongdoers to institutional actions, in the same way that the traditional focus of the law of torts has shifted for mass torts.
\textsuperscript{191} See Advisory Comm. Final Report, supra note 3, at 22–42.
tion was made by the advisory board to the Manhattan Project after consultation with scientists, military officials, and doctors. After the completion of the Manhattan Project, the experiments were continued by the newly formed Atomic Energy Commission, which eventually became the Department of Energy. Other experiments involved the Department of Defense and the predecessor to the Department of Health and Human Services, and may have implicated the National Aeronautics and Space Administration and the Central Intelligence Agency.

Not only was the program large in terms of the number of agencies involved, it was also long-lasting, continuing for thirty years and spanning six presidential administrations. Moreover, the experiments were not restricted to one facility. Instead, they took place at universities and hospitals all over the country, including the Universities of Rochester, Chicago and California, and the Massachusetts Institute of Technology. More than 2000 human radiation experiments were conducted at Veterans' Administration facilities, in conjunction with neighboring medical schools. In terms of the magnitude of the violation, the HRE were truly mass in scale.

Next, the HRE were conducted in total secrecy. As a matter of national security, all information about the enterprise was classified, and even congressional attempts to secure the release of data proved fruitless. In fact, when the first experiments were conducted using plutonium, the word plutonium itself was still classified. The total secrecy surrounding the project effectively prevented any public discourse about the policy and circumvented the normal machinery of political accountability. Moreover, this secrecy operated to complicate the identification of causal links between individual plaintiffs and particular responsible of-

192. See supra note 137 and accompanying text.
194. See id.
195. See Exec. Order No. 12,891, 3 C.F.R. 847 (1995) (creating the Human Radiation Interagency Working Group, which includes the Secretaries of Energy, Defense, Health and Human Services, and Veterans Affairs, the Attorney General, the Administrator of NASA, the Director of the CIA, and the Director of the Office of Management and Budget).
197. See id. at 32.
199. See Schroeter, supra note 133, at 158.
200. This secrecy, beyond the practical difficulties created for plaintiffs, indicates a significant breakdown in the normal mechanisms of accountability underlying rationales for judicial restraint. See infra text accompanying notes 266–278.
ficials, in much the same way that indeterminacy in mass tort cases makes traditional causal connections difficult.\footnote{201}

Finally, the type of policy at issue involved complex technical and scientific issues, not easily analogized to common law torts.\footnote{202} In some cases, where records have not been destroyed or lost or the victims are otherwise easily identifiable, it is possible to trace the wrongdoing to an individual doctor or official.\footnote{203} Nevertheless, there are instances in the HRE, such as open air releases of radiation,\footnote{204} in which the kinds of difficult questions of latency and multiple causation that drive the modern law of substantive liability in the context of mass torts will predominate.\footnote{205} Moreover, the clandestine nature of the program, and the fact that it was kept hidden for so long, contribute to the difficulty of linking individual victims to individual wrongdoers. This indeterminacy strains the analogy between traditional tort liability that underlies most \textit{Bivens} cases and the constitutional violations represented by the HRE. In sum, all of these characteristics underscore the fact that the HRE represented institutional action, carried out over the span of decades, with the

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\footnote{201}{Judge Weinstein offers an evaluative scheme of mass torts based on three axes: the clarity of the causal connection between the plaintiff and the defendant, whether the incident was part of a single event or multiple events, and whether the injuries were proximate in time and place. See Weinstein, supra note 179, at 15--19. The federal government's secrecy arguably shifted how one would characterize the HRE on two of Judge Weinstein's three axes, in that it obscured the identity of some defendants and hid the proximity of the injuries for decades. Both of these shifts complicate the judicial task of determining liability.}

\footnote{202}{At the same time, however, some individual experiments do parallel certain traditional torts. Certainly the act of an individual scientist injecting plutonium into an individual subject without consent has an element of the traditional tort of battery. Mass torts, however, can arise out of the aggregation of what would otherwise be individual torts. See, e.g., In re Fed. Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.) (mass tort case arising from collapse of a skywalk in a Kansas City hotel), vacated, remanded, 680 F.2d 1175, cert. denied, 459 U.S. 988 (1982). In other words, in the common law context, what is different about a mass tort can simply be a factor of scale.}

\footnote{204}{It should also be noted that the \textit{FTCA} does not waive the sovereign immunity of the federal government for many intentional torts, including battery. See supra note 106. It is for this reason that it is important to consider the constitutional violations, and not just the traditional torts, that arose out of the HRE. As a matter of practice, the Court will strive to avoid constitutional questions if an issue before it can be resolved in any other way. See, e.g., United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994) (noting the canon of construction that statutes will be construed to avoid constitutional questions); Rust v. Sullivan, 500 U.S. 173, 190--91 (1991) (same). In instances where the actions of government officials can be characterized as common law torts and violations of the constitution, this traditional canon would tie the vindication of all tort-like constitutional protections to the scope of the parallel common law action.}

\footnote{205}{For a discussion of issues of technical complexity and the related concerns of latency and multiple causation, see Weinstein, supra note 179, at 18--19.}
full resources of the federal government. In the context of such a policy, sovereign immunity should be reexamined.

III. Proposal: Judicial Abrogation of Sovereign Immunity for Constitutional Mass Torts

The Human Radiation Experiments illustrate the limits created by Congress’s retention of sovereign immunity for constitutional torts and the Court’s reluctance to create a cause of action against the federal government in such cases. Courts presented with arguments for abrogating sovereign immunity refuse to open the lid of a potential Pandora’s box of liability, but in so doing bar recovery in those cases where it is truly appropriate. In most Bivens actions, where individual officers violate the rights of a few victims, such caution has merit. Constitutional mass torts, however, as exemplified by the HRE, present claims in which the rationales that underlie judicial restraint are less compelling. This Part will discuss the necessity of judicial action in the absence of a response by the political branches to constitutional violations. It will then discuss the power of the court to create a remedy in this context. Finally, it will lay out criteria based on the facts of the HRE to define a distinct and narrow category of cases in which the Court can create an exception to its all-or-nothing approach to sovereign immunity.

A. The Absence of a Remedy from the Political Process

Congress has the power to compensate the victims of the Human Radiation Experiments, as it has done for the victims of some mass torts,206 or it could waive sovereign immunity in this instance and allow suits against the United States to go forward.207 The HRE, however, have not yet generated widespread calls for congressional action;208 this may be attributable to the fact that the experiments occurred decades ago and

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206. See id. at 123 (listing government programs for black lung, atomic energy, and vaccines). But see id. at 163 (arguing that an administrative remedy for mass torts, in the absence of a strong independent bar and bench, often deteriorates due to lack of funds or capture by specific economic interests). It should be noted that the Price-Anderson Act, 42 U.S.C. § 2210 (1994), the government’s atomic energy compensation plan, is at issue in some of the suits arising out of the HRE. The Price-Anderson Act indemnifies contractors for “nuclear incidents.” 42 U.S.C. § 2210(d) (1994). Claims that the Price-Anderson Act should apply to the BE were rejected by Judge Beckwith in In re Cincinnati Radiation Litig., 874 F. Supp. at 890–92. Congress has acted in the realm of open-air nuclear testing to provide some administrative remedy. See 42 U.S.C. § 2212 (1994).

207. Congress, for example, waived the sovereign immunity of the United States for constitutional violations arising out of certain categories of intentional torts committed by federal investigative or law enforcement officials. See 28 U.S.C. § 2680(h) (1994).

208. As of yet, only one bill has been submitted on the Human Radiation Experiments, and it does not have bipartisan support. On October 11, 1995, Representative Martin Frost, D-Tex., submitted H.R. 2465, the Radiation Experimentation Compensation Act of 1995, that would compensate fewer than fifty victims, with $50,000 and an official apology. See H.R. 2465, 104th Cong., 1st Sess. §§ 2(c), 3(e), 4(a) (1995). It is possible that as victims and their advocates become more organized, more political
involved victims who may not yet realize that they were subjected to experimentation, or may have since died.\textsuperscript{209}

In approaching claims for recognizing a \textit{Bivens} cause of action, the Court gives great weight to the existence and adequacy of remedial schemes created by the political branches.\textsuperscript{210} This deference is animated by concern that judicially-created remedies might interfere with spheres of congressional authority and existing, carefully crafted, remedial schemes.\textsuperscript{211} In the context of judicial abrogation of sovereign immunity, the fact that the political branches have not provided a remedy supports judicial intervention, and allays concerns about interfering with existing remedial schemes.\textsuperscript{212} If Congress or the executive branch responds to the constitutional violations arising from the HRE, the need for judicial abrogation of sovereign immunity would be obviated. As it stands, however, if the Court chooses to defer to the silence of the political branches, the victims of the HRE will be left with no remedy against the government.\textsuperscript{213}

On a more fundamental level, relying on the political branches for a remedy when constitutional torts have occurred leaves decisions about the vindication of rights entirely to the very institutions that might have violated them. The political process does yield remedies,\textsuperscript{214} and where the political process is functioning, such remedies will obviate the need for judicial action. But the fact that remedies are sometimes provided is not dispositive in those instances in which a remedy is not provided. As

\textsuperscript{209} See supra text accompanying notes 198–201.
\textsuperscript{210} See supra text accompanying notes 47–58.
\textsuperscript{211} See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 428–29 (1988) (refusing to find a cause of action because of existing remedial scheme). The \textit{Bivens} "special factors," as they have been applied in cases like \textit{Schweiker}, might not translate directly into conditions that should defeat the creation of a cause of action against the government, but they provide a strong indication of the motivation of the Court in deferring to Congress.
\textsuperscript{212} When the Advisory Committee on the Human Radiation Experiments issued its final report, President Clinton appeared on national television to apologize to the victims on behalf of the United States government. He also pledged that a remedy would be forthcoming. See Gary Lee, Clinton Apologizes for U.S. Radiation Tests, Praises Panel Report, Wash. Post, Oct. 4, 1995, at A8. So far, however, no remedy has been offered. The Task Force on Radiation and Human Rights, an advocacy organization representing HRE victims, recently reported to Congress that the Clinton Administration "is not prepared to even implement the Advisory Committee's meager recommendations." Human Radiation Experiments: Hearings Before the Senate Comm. on Governmental Affairs, Mar. 12, 1996, 104th Cong., 2d Sess. (1996); Fed. Documents Clearing House, Inc., available in LEXIS, NEWS Library, CURNEWS File (statement of Task Force on Radiation and Human Rights).
\textsuperscript{213} In addition to their suits against individual officers, plaintiffs in HRE cases are also suing private institutions who implemented government contracts. See supra note 8.
\textsuperscript{214} For example, after the Supreme Court decided that the FTCA did not waive sovereign immunity for the policy choice that gave rise to the accidental leveling of a small city in Texas, see Dalehite v. United States, 346 U.S. 15 (1953), Congress did pass a statute providing compensation. See Texas City Disaster Act, ch. 864, 69 Stat. 707 (1955).
Justice Harlan argued in *Bivens*, where it falls to the Court to stand between the failure of the political branches to vindicate constitutional rights and leaving the victims of such violations without a remedy, the Court should act.\(^{215}\)

### B. The Power of the Court to Modify Sovereign Immunity in the Absence of Congressional Authorization

While there is an academic consensus that the Court has the power to abrogate sovereign immunity, no federal court has exercised this power.\(^{216}\) There are several questions raised by the assertion that the Court can provide a remedy in damages for constitutional violations: does the Court have the power to create a cause of action; does the Court have the power to abrogate sovereign immunity; and, finally, can the Court enforce any order for damages against a coordinate branch in the absence of prior consent?

The initial question of the power of the Court to infer a cause of action from the substantive protections of the Constitution arguably was settled in *Bivens*.\(^{217}\) Although the Court did not create a cause of action against the government, its holding that the Constitution can afford a remedy in the absence of a statutory cause of action should apply regardless of whether the defendant is the government or a government official.

The judicial power to abrogate sovereign immunity, given the tenacity of the doctrine, presents a more difficult question. It is perhaps too simple to note that sovereign immunity is a common law doctrine, not based on the text of the Constitution, and that constitutional authority should be supreme over the common law.\(^{218}\) While the text of the Constitution may not mandate sovereign immunity, other constitutional doctrines support it. The separation of powers doctrine, for example, cautions that the Court should intrude as minimally as possible on the coequal branches of the federal government.\(^{219}\) Ultimately, however, the dispositive question is whether the Court is solely constrained by tradi-

\(^{215}\) See supra text accompanying notes 33–36.

\(^{216}\) See Bandes, supra note 12, at 399–322. Professor Davis notes that between 1957 and 1976, 29 states judicially abrogated state sovereign immunity for tort liability, strongly suggesting that it is within the common law powers of a court to find exceptions to the common law doctrine. See Davis, supra note 12, at 7–9 (citing as examples Lipman v. Brisbane Elementary Sch. Dist., 359 P.2d 465 (Cal. 1961); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)).

\(^{217}\) See supra text accompanying notes 22–36.

\(^{218}\) See supra text accompanying notes 85–94; see also Dellinger, supra note 12, at 1556–57 (stating that courts are required to recognize remedies for federal violations of constitutional rights despite the absence of a congressionally created cause of action).

\(^{219}\) See Krent, supra note 132, at 1534–35. It has been argued that a damage remedy is less intrusive than normal forms of injunctive relief. See Schuck, supra note 22, at 14–16. Certainly the traditional preference for legal remedies over equitable remedies, see supra note 30, underscores the concept that providing damages interferes less with the parties before the court.
Stare decisis is, of course, a strong factor weighing against judicial action. The Supreme Court regularly construes sovereign immunity in favor of the sovereign, and such consistency from the Court might reasonably create the expectation in the political branches that the doctrine will not suddenly, and significantly, shift. Moreover, as a practical matter, the current sentiment of the Court is decidedly protective of the doctrine. Stare decisis, however, is not absolute, and should not control in sufficiently compelling circumstances.

Finally, the Court's reluctance to create liability can be viewed as a question of the power of the judiciary to enforce remedies against coordinate branches. Setting aside for the moment the question of what concerns should motivate the Court to overcome its prudential restraint, an argument can be made that Congress should satisfy a Court-created damage remedy against the United States if imposed to vindicate constitutional rights. The Constitution mandates that no federal funds be expended without explicit legislative authority. In certain circum-


221. See supra note 98.


224. See infra Part III.C.

225. Scholars have noted that the Appropriations Clause gives Congress the authority to resist judicial mandates. See Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1351 n.34 (1988) (citing Reeside v. Walker, 52 U.S. (11 How.) 272, 290–91 (1850) and National Ass'n of Regional Councils v. Costle, 564 F.2d 583, 589 (D.C. Cir. 1977) for the proposition that "a court has no more constitutional authority than does the President to mandate withdrawal from the Treasury"). It can be argued, however, that the Appropriations Clause is not an absolute grant of power to Congress to control expenditures, and Congress must comport with other constitutional mandates in any refusal to appropriate.

226. See U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); Stith, supra note 225, at 1348 (discussing the Appropriations Clause). But see Travis, supra note 12, at 658. Travis cites Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (plurality opinion), for the proposition that
stances, however, the Constitution compels congressional spending, and if the Court were to impose damages, under the authority of the Constitution, for a constitutional violation, Congress would have less latitude to resist.\textsuperscript{227} It is debatable whether the Constitution’s grant of the judicial power in Article III should preempt the spending power granted to Congress if the two conflict, but at least in such a situation Congress would be required to resist explicitly a constitutional edict.\textsuperscript{228}

The Court has never imposed a remedy on the United States in the absence of congressional authorization because the traditional view of sovereign immunity has allowed the Court to avoid the conflict. But if the Article III judicial power includes the power to create damage remedies,\textsuperscript{229} then theoretically any remedy created to vindicate constitutional rights would obligate Congress to comply. Congress could refuse to act, and the Court would have no recourse to compel it to do so,\textsuperscript{230} but in such a case it would be clear that Congress was acting contrary to the mandate of a constitutional decision. This is certainly a risk whenever the Court orders the United States to fulfill any of its statutory or common law obligations, but the fear of such defiance should not prevent the contemplation of a remedy.\textsuperscript{231}

the Appropriations Clause is not an absolute limit on the federal judicial power. The Supreme Court concluded in \textit{Glidden} that “if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States.” 370 U.S. at 570. Certainly, as the Court discussed in FDIC v. Meyer, 114 S. Ct. 996, 1005–06 (1994), the potential liability of the United States is a strong factor counselling hesitation, but it is not a constitutional bar to the creation of a remedy.

\textsuperscript{227} See Stith, supra note 225, at 1350–51 (noting that Congress must provide public funds for constitutionally mandated activities and the independent constitutional activity of the President). An example of this is found in the constitutional imperative that the President “receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected.” U.S. Const. art. II, § 1, cl. 7. The Constitution, then, does not allow Congress to refuse to appropriate funds for the President’s salary.

\textsuperscript{228} The Court has long had the power to mandamus officers to make direct payments from government funds, as long as the fiction was maintained that the suit was against the officer for the injunction, rather than against the government in its sovereign capacity. See Jaffe, supra note 71, at 32. There is also an old tradition of suits by taxpayers to force the return of excessive payments. See, e.g., Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836).


\textsuperscript{231} See Schuck, supra note 22, at 36 (noting that in many instances, beginning with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court successfully has ordered coordinate branches to comply with its exercise of the judicial power). It is beyond the scope of this Note to more fully elaborate on the theoretical foundations of the power of an Article III court to abrogate sovereign immunity. While this assertion is, admittedly, not settled by current jurisprudence, convincing arguments have been made elsewhere for this power. See Bandes, supra note 12, at 299–302. The remainder of the discussion in this
C. Parameters of Judicial Abrogation of Sovereign Immunity

Some commentators have advocated abrogating sovereign immunity across the board.232 If sovereign immunity were eliminated for all constitutional torts, or for those constitutional torts that involve official policy,233 the reservation of policymaking discretion crafted by Congress and endorsed by the Supreme Court could be eviscerated. The Court’s articulation of the need to avoid the perils of second-guessing the political process is grounded in a healthy understanding of its limited role in a tripartite system.234 The Court’s all-or-nothing approach, however, forecloses an independent judicial response to egregious abuses of power like the HRE. A balance must be struck enabling the Court to move away from its current position of uncritically protecting sovereign immunity without sacrificing the respect for coordinate branches that underlies the doctrine in the bulk of cases. Constitutional mass torts present a narrow category of claims that are compelling enough for judicial abrogation, but defined clearly enough to avoid the constitutionalization of all policy disputes.

Experimenting on unwitting subjects in the HRE was clearly unconstitutional at the time, and was conducted in secret on an institutional level across the broad spectrum of government.235 When considered in light of the rationales the Court has given for not creating a cause of action against the United States, these characteristics present a compelling argument in favor of abrogating sovereign immunity. This section will discuss considerations that should serve as limiting principles to en-

Note, then, will proceed under the assumption that the choice courts make not to create a cause of action against the government for constitutional violations is not constitutionally mandated.

232. See, e.g., Bandes, supra note 12, at 345–46. Bandes argues for what she calls a “self-executing” Constitution, whereby the question of individual rights of action for constitutional violations would be disconnected from the consent of the political branches. Her argument has force, but sweeps quite broadly. She advocates, for example, judicial review of the adequacy of remedies provided by the political branches. Given the extreme caution of the Court in treading on the prerogatives of the political branches and given the legitimate fear of constitutionalizing policy disputes, it is more appropriate to propose judicial intervention in a narrow category of cases where the balance between the duty of the Court to provide substantive meaning to constitutional protections outweighs the need to respect coordinate branches that underlies current sovereign immunity doctrine.

233. See, e.g., Travis, supra note 12, at 667 (“[T]he Court’s ‘responsibility to assure the vindication of constitutional interests’ is even greater when the injury is caused by unconstitutional government action.” (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring))). For further discussion, see infra note 243. By contrast, a constitutional tort that did not involve policy would arise from the actions of individual officials acting on their own initiative. Where, for example, a federal agent decides to search a criminal suspect’s home without a proper warrant, such search might violate the Fourth Amendment, but not necessarily indicate any larger policy of warrantless searches.

234. See Krent, supra note 132, at 1534–41.

235. See supra text accompanying notes 157–176, 191–205.
sure that the remedy, once created, does not expand beyond its necessary boundaries.

1. Constitutional Violations Versus Policy or Actions that Generate Common Law Torts. — The presence of a constitutional, as opposed to a common law, violation is essential for the Court to consider abrogating sovereign immunity. The retention of sovereign immunity in the discretionary function exception to the Federal Torts Claim Act properly ensures that the propriety of typical governmental policymaking will not be reviewed by the judiciary under the "reasonableness" inquiry applied in common law tort claims. Government must be afforded a certain latitude in its policymaking and implementation, and courts are properly cautious in treading on this allocation of power.

This rationale is less compelling in the context of violations of the Constitution. Traditional tort liability is concerned primarily with compensation and deterrence, while constitutional tort liability is also concerned with reinforcing constitutional norms, protecting the rule of law, bolstering governmental legitimacy, and protecting the individual from the excesses of the will of the majority. The Court has stated that

237. See, e.g., United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, C.J.) (presenting a formula for a reasonableness test as the function of the variables of the probability of risk, the gravity of the resulting injury, and the burden of adequate precaution).
238. The Court in the context of § 1983 actions has had to reconcile the availability of a damage remedy for deprivations of property and liberty with the possibility that such a remedy would transform every common law tort committed by a state or municipal official acting under the color of law into a constitutional tort. See Hart & Wechsler, supra note 71, at 1268. To forestall this possibility, the Court has used § 1983 cases to sharply limit the constitutional definition of liberty and property, and to find a scienter element in constitutional torts cases. See id. at 1268-70. Certainly one negative consequence of a cause of action under the Constitution is the risk that courts will interpret the scope of constitutional protections narrowly in order to avoid liability. One response to this problem in the context of potential judicial abrogation of sovereign immunity would be to only allow damages where the constitutional provision at issue was clearly defined at the time of the wrongdoing. See infra text accompanying notes 254-259.

Some have argued that constitutional torts are a more grievous wrong than common law torts. See Byse, supra note 118, at 285 (citing the House Judiciary Committee Report to the Federal Employees Liability Reform and Tort Compensation Act of 1988, H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988)). At the least, they should be viewed as a different species of liability.

239. See, e.g., Justice Harlan's concurrence in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, in which he wrote that "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities." 403 U.S. 388, 407 (1971) (Harlan, J., concurring). As the court noted in In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995), [g]overnment actors in cases such as this violate a different kind of duty from that owed by a private tort defendant. Individuals in our society are largely left free to pursue their own ends without regard for others, save a general duty not to harm others by negligent conduct. . . . The relationship between government and the individual is fundamentally different. In a free society, government is neither an autonomous actor nor a master to whom the people must acquiesce. The
it should be for Congress to decide when to create liability, but the gen-
eral role of the Court in protecting constitutional rights seems to contra-
dict that rationale.240 Violations of constitutional rights involve abuse of
power, not mere unreasonableness.241 Liability as an incentive mecha-
nism is a legitimate tool for policing abuse of power;242 and the Court
should not continue to reject its use.

2. Enterprise Versus Individual Wrongdoing. — The Court should only
consider abrogating sovereign immunity in those contexts where the vio-
lation has occurred within the scope of official policymaking and imple-
mentation.243 There are two arguments for this limitation. First, as

function of government is to serve the people and to enhance the quality of life.
The broad purpose of all constitutional limits on government power is to ensure
that government does not stray from that role or abuse its power.
Id. at 817.

240. See Bandes, supra note 12, at 311 ("The use of the Constitution as a sword; the
willingness to enforce limits, which is the animating principle behind Bivens, rests on the
notion of positive checks on government espoused in Marbury.").

241. Cf. Daniels v. Williams, 474 U.S. 327 (1986), in which the Supreme Court held
that there was no deprivation of due process arising out of the negligence of a prison
official. Justice Rehnquist, writing for the Court, stated that only conscious process could
merit constitutional protection, and the negligent actions of officials, by definition, fall
outside the scope of the Due Process Clause. "Far from an abuse of power," the Court
noted, "lack of due care suggests no more than a failure to measure up to the conduct of a
reasonable person." Id. at 332.

242. See Schuck, supra note 22, at 100–18.

243. The Supreme Court has addressed liability arising out of policymaking, and the
inadequacy of respondeat superior liability, in the context of municipal liability under
§ 1983. In Monell v. Department of Social Services, the Court found that as a matter of
congressional intent municipalities could be liable only for constitutional torts arising
"pursuant to official municipal policy of some nature." 436 U.S. 658, 691 (1978). In
explicitly precluding liability through respondeat superior, the Court looked to the
language of the statute, and even more importantly to policy concerns arising out of any
broader conception of governmental liability. Specifically, the Court raised the concern
that the employee-employer relationship alone appeared insufficient to attach vicarious
liability in the context of constitutional violations. See id. at 692. The policy must cause
the injury, not the actions of an employee. See id. As noted, courts have also precluded
respondeat superior liability in Bivens cases. See supra note 58.

The definition of what constitutes "policy" generated much litigation following Monell.
Five paradigms of policy that generate liability have emerged: actions by a legislative body,
actions by boards and agencies with delegated legislative authority, actions by those with
final authority for making a decision, a governmental policy of inadequate training or
supervision, and a "custom." See Gellhorn & Byse, supra note 127, at 1303–05 (quoting
Erwin Chemerinsky, Federal Jurisdiction § 8.5, at 447–54 (2d ed. 1994)).

Travis argues that the Court should abrogate sovereign immunity for all
unconstitutional policymaking, along the lines that the Court adopted for municipal
liability in Monell. See Travis, supra note 12, at 626–37. Rejecting governmental liability
arising through respondeat superior from individual officials’ wrongdoing in favor of the
kind of enterprise liability for policymaking described in Monell is an important narrowing
criteria in the decision to abrogate sovereign immunity. Using policymaking, however, as
the sole criterion for judicial abrogation, as Travis urges, would sweep too broadly. There
are a number of grounds on which a piece of legislation or an administrative action can be
found unconstitutional, from defects in procedural due process, see, e.g., Goldberg v.
Bivens and its progeny made clear, a cause of action under the Constitution should only be recognized when absolutely necessary. Given their scope and complexity, constitutional mass torts are less likely to yield remedies through individual suits against individual officers than typical Bivens cases, which involve the kind of individual interaction characteristic of traditional torts. What is “mass” about cases like the HRE is not simply that the rights of so many individuals were violated—although this certainly makes the necessity of judicial response in the absence of a congressional remedy more compelling—but also that an undertaking the size of the HRE allows responsible officials to hide behind the facade of a massive governmental bureaucracy.

Second, the Supreme Court is concerned about preserving the incentive effects of suits against individual officers. In cases like the HRE, where policy was crafted at a high level of authority and implemented on a wide scale, such deterrence has to take place at an institutional level. Most Bivens actions arise in the context of individual federal employees and officers who overreach the scope of their delegated authority. When looking to the values of protecting constitutional integrity, there is much less incentive for the Court to impose a remedy against the government where it can be found that the wrongdoing occurred as the result of an isolated incident or by the hand of an individual tortfeasor. The Court should be concerned most about those situations in which a clearly adopted policy or custom works to violate constitutional rights, and the more widely adopted the policy, the greater the

Kelly, 397 U.S. 254 (1970) (holding that a state that terminates public assistance benefits without a hearing denies the recipient procedural due process), to overreaching of congressional power, see, e.g., United States v. Lopez, 115 S. Ct. 1624 (1995) (invalidating Gun-Free School Zones Act of 1990, 18 U.S.C. § 922 (1994), as exceeding congressional power under the Commerce Clause). Any court should be wary of creating a damage remedy against a coordinate branch without a clearer sense of which violations of the Constitution might merit judicial action. See Davis, supra note 12, at 71 (“Almost every business in the country was adversely affected in some way by the National Industrial Recovery Act the Court held unconstitutional in A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935); should the United States have had to pay damages to every such business?”).

244. See supra text accompanying notes 22–36.
245. See supra text accompanying notes 39–45.
246. See supra text accompanying notes 191–197.
247. See supra text accompanying notes 125–127.
248. Cf. Rosen, supra note 15, at 347 (“Bivens cases most often involve a government employee just doing his job.”).
249. This is not to say that Congress should not consider transferring the liability of an officer who violates the Constitution to the United States as a means of better ensuring compensation for constitutional violations. Whether any aggrieved plaintiff would pursue a claim against an official when they could recover against the state, however, is debatable, and in such a situation, administrative or legislative remedies against the offending official might be necessary to ensure deterrence. See Madden et al., supra note 120, at 486–89 (arguing for administrative remedies against officials in the event that sovereign immunity were waived for constitutional torts).
incentive to act. Focusing on abrogating sovereign immunity only where policy is concerned ensures that, on a practical level, incentive effects are properly targeted at the institutional mechanisms that can prevent abuse. In other words, if the government is liable, those in control of policy—either in Congress or in the executive branch—will have a much greater incentive to ensure that the entity for which they are responsible minimizes the potential for abuse.250

Finally, limiting abrogation of sovereign immunity to liability arising from policymaking better reflects the role of the Court in upholding the structural protections of the Constitution.251 Unlike private institutions, public entities must balance more than risk of harm into any analysis of the costs and benefits of a course of action. A governmental actor must also consider the values and policy choices that its actions represent,252 notably whether those actions comport with constitutional protections for individual rights. If judicial abrogation of sovereign immunity is to bolster this element of official action, it must occur within the context of policymaking. On the other hand, when an individual officer acts unconstitutionally without the backing of an official policy, any court response directed at the agency or the government as a whole is less likely to provide proper incentives to prevent such acts.253

3. Clear Constitutional Violations. — The decision to experiment on unconsenting subjects in the HRE transgressed clear constitutional prohibitions, and the impropriety of the policy could not have been in doubt at the time.254 This suggests another important limiting factor.

250. See Bandes, supra note 12, at 341–42 (quoting Owen v. City of Independence, 445 U.S. 622, 652 (1980), for the proposition that damages might encourage policymakers "to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights... [particularly] in preventing those 'systemic' injuries that result... from the interactive behavior of several governmental officials, each of whom may be acting in good faith").

251. Structural protections are those inherent in the limitations to federal power contained in the "structural Constitution"—that part of the Constitution that outlines the institutional powers of government, rather than enumerated individual rights. Madison, before turning to the Bill of Rights, argued that the structure of government itself would be a vital check on the potential for tyranny. See The Federalist No. 51 (James Madison) (arguing that separation of powers in the Constitution would force the natural ambition of the branches to serve as a check against domination); cf. Charles Black, Structure and Relationship in Constitutional Law 11–32 (1969) (arguing that courts should be sensitive to interpretations of the Constitution that arise from inferences drawn from the structure of government).

252. See Schuck, supra note 22, at 101–02 (arguing that shifting the cost of public tort remedies from individual officers to the government as a whole would reinforce the moral underpinnings of the substantive rules governing official conduct).

253. See Bermann, supra note 70, at 1178, 1184 (discussing Carter v. Carlson, 447 F.2d 358, 367 (D.C. Cir. 1971), where the court noted that "if the threat of personal liability did not impair the officers' performance of duty, the threat of governmental liability could not do so").

254. See In re Cincinnati Radiation Litig., 874 F. Supp. 796, 815 (S.D. Ohio 1995) (finding that "a reasonable government official must have known that by instigating and
The Court should only act in those cases where liability arises out of clearly understood constitutional principles. A suit for damages is not the venue for the Court to articulate constitutional doctrine for the first time. Limiting causes of action to clear constitutional violations responds to the Court's concern about creating potentially vast liability. As the context of suits against officers has shown, the qualified immunity standard disposes of the bulk of cases filed each year at the procedural stage of a motion to dismiss. Only acting where the violation is clear will limit the number of constitutional claims courts have to decide, and ensure that only claims arising from the most egregious violations survive the pleading stage. Courts have recognized in other contexts that it is fundamentally unfair to impose liability in the absence of a clear indication of the normative bounds within which parties are supposed to act, and the same insight should apply when the Court contemplates creating new sources of liability for the federal government.

A simple way for the Court to approach this criterion would be to retain the analysis that now guides the question of qualified immunity in Bivens actions. The approach adopted in Harlow v. Fitzgerald, for example, would require a court to inquire whether the policymakers involved in crafting a constitutional mass tort objectively should have known that their actions would have violated the Constitution. If a court determined that the strictures of the constitutional provision allegedly violated were sufficiently clear that a reasonable official would have been aware participating in the experimental administration of high doses of radiation on unwitting subjects, he would have been acting in violation of [constitutional] rights.

It appears that at least some of the officials involved admitted their awareness of the nature of their wrongdoing at the time. A 1950 confidential memorandum from Joseph G. Hamilton, a Berkeley radiation biologist working on the HRE, expressed the feeling that future generations would view the tests as "a little bit of Buchenwald," referring to the Nazi concentration camp where experiments were undertaken on Jewish prisoners. See Lynn Ludlow, Secret Plutonium Experiments, S.F. Examiner, Aug. 20, 1995, at C14.

For a discussion of the law of biomedical research and legal restraints imposed on that research, see generally Jesse A. Goldner, An Overview of Legal Controls on Human Experimentation and the Regulatory Implications of Taking Professor Katz Seriously, 38 St. Louis U. L.J. 63 (1993).

255. Cf. Rosen, supra note 15, at 853 (noting that the Supreme Court has "warned the lower courts to apply the Federal Rules of Civil Procedure firmly, so as to ensure that insubstantial Bivens suits were dismissed at the initial stages of the litigation").

256. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (arguing that qualified immunity "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

257. In the context of administrative actions, courts have held that under the Due Process Clause, new substantive liability should only cut off the rights of a party where adequate notice has been given. See General Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (refusing, under the Due Process Clause, to allow the agency to impose a fine where the regulatory provision on which it was relying was ambiguous).


259. See supra text accompanying notes 63-64.
that the policy at issue was unconstitutional, the cause of action would be allowed.

4. Secret Policy Versus Policy Amenable to Political Discourse. — The overriding policy rationale for the current regime of sovereign and official immunity is the protection of policymaking discretion.\textsuperscript{260} In most cases, political checks remain on the exercise of power by the legislature and the executive in the absence of judicial remedies.\textsuperscript{261} Policymaking and executive action that occur in secret, however, are not subject to such political checks. The HRE is illustrative.\textsuperscript{262} From the inception of the program in 1944, through 1993, when the Secretary of Energy decided to reveal the experiments,\textsuperscript{263} the political process could not function in any kind of meaningful way to correct the abuses inherent in the program. Moreover, none of its victims knew about the program or the source of the injuries they had received, and even the normal congressional oversight mechanism failed.\textsuperscript{264} The political dynamic facing victims seeking redress from Congress decades after their injuries occurred is vastly different from the kind of vigorous public debate that ideally checks the exercise of power.\textsuperscript{265}

When a given policy is undertaken in secret, behind the shield of national security, it should merit greater scrutiny by the Court.\textsuperscript{266} The

\textsuperscript{260} See supra Part I.B.

\textsuperscript{261} See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (Holmes, J.) (limiting the right to due process where political checks exist on governmental power); see also Krent, supra note 132, at 1539–58 (arguing that Congress has retained sovereign immunity to safeguard national policymaking which is checked by the political process).

\textsuperscript{262} It is not without irony that a section of the Department of Energy report on the Human Radiation Experiments is entitled “Information as an Engine for Democratic Government.” See DOE Roadmap, supra note 2, at 10.

\textsuperscript{263} See Hilts, supra note 7, at A19.

\textsuperscript{264} Congressman Markey, for example, faced stonewalling by the Department of Energy, and was not able to secure the information needed to expose the experiments in 1986, when he wrote the first report on the HRE. See supra note 198.

\textsuperscript{265} As a practical matter, this concern will most often be presented in the context of national security matters. For the bulk of daily governmental activity, the Freedom of Information Act, 5 U.S.C. § 552 (1994), requires disclosure.

\textsuperscript{266} See Thomas I. Emerson, Introduction, Symposium: National Security and Civil Liberties, 69 Cornell L. Rev. 685, 686 (1984) (arguing that secrecy under the veil of national security deprives citizens of the ability to make informed judgments, and that “the watch-dog institutions of the society—the courts, legislative committees, internal mechanisms for supervision—are unable to perform the crucial task of oversight”). James Madison warned that a “popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” Letter from James Madison to W. T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910); see Patricia M. Wald, Two Unsolved Constitutional Problems, 49 U. Pitt. L. Rev. 753, 760–61 (1988) (“In an age when it can be argued that just about every sliver of information has some connection with intelligence and national security, too much judicial deference may be as great a danger to popular government as too little.”).
Court should be most vigilant in policing the excesses of coordinate branches when there is no mechanism for political accountability and the political process cannot work. In practice, however, courts generally defer to the political branches in matters of national security. Under the political question doctrine, the Court refrains from deciding questions that involve foreign affairs or similarly sensitive prerogatives; national security rationales presented by the executive fall within the ambit of this deference. The national security rationale has been successfully used to prevent judicial review of the classification of information, restrictions on travel abroad and curtailment of the right to political association.

The Court's deference in matters of national security is not without exception. In *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure), the Court struck down President Truman's attempt to direct the Commerce Department to seize domestic steel mills facing labor unrest during the Korean War. Despite the pressing military need, the Court refused

267. See John H. Ely, Democracy and Distrust 101-04 (1980) (arguing for judicial intervention where the political "market" is systematically malfunctioning).


269. See Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing the political question doctrine and noting six rationales for judicial restraint); Louis Henkin, Is There A "Political Question" Doctrine?, 85 Yale L.J. 597, 622-23 (1976) (arguing that when courts invoke the political question doctrine in foreign affairs, they are essentially validating the constitutionality of the action of the political branch); see also Harold H. Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255, 1305-17 (1988) (arguing that one reason the President has great latitude in foreign affairs is the "astonishing regularity" with which the Court rules for the President, and noting that "congeries of lower federal court cases ... have refused to hear challenges to the legality of the Vietnam War and to various aspects of the Reagan Administration's support for the contras").

270. See Robert P. Deyling, Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act, 37 Vill. L. Rev. 67, 67 (1992) (noting that since the enactment of the 1974 amendments to the Freedom of Information Act allowing de novo judicial review of agency classification claims, "courts have ruled on hundreds of cases involving classified information, affirming the government's decision to withhold the requested information in nearly every case").

271. See Haig v. Agee, 453 U.S. 280, 306 (1981) (sustaining the application of a State Department regulation allowing the revocation of a passport if the passport holder was deemed a threat to national security).


274. See id. at 587-89.

275. The government argued that the President's action was "necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production." Id. at 582.
to allow the President to operate under the constitutional grant of power as Commander-in-Chief outside the zone of hostilities without express congressional approval.\textsuperscript{276} In \textit{Steel Seizure}, the Court asserted a role, at least in the domestic arena, in ensuring that the executive acts within constitutional bounds. This suggests that, despite the invocation of national security, the Court will intervene if a coordinate branch clearly lacks constitutional authority.\textsuperscript{277} If the impetus for the Court to interfere with the national security prerogatives of the executive is a question of the degree of the violation involved, cases like the HRE should fall on the \textit{Steel Seizure} side of the Court's precedence, given the nature and extent of the executive wrongdoing at issue.\textsuperscript{278}

Where these criteria are met, as in the HRE, the Court should find a remedy against the United States under the Constitution in the absence of congressional action. Some fear a massive surge in suits if the Court creates a damage remedy against the United States for constitutional violations like the HRE.\textsuperscript{279} Prudential judicial control over the scope of damages awarded and the contexts in which they would be granted, however, is a better way to control the scope of liability than a simple rule of sovereign immunity. Since the Court is interpreting the Constitution to create a damage remedy, it could tailor the remedy to balance compensa-

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\item \textsuperscript{276} See id. at 587-89.
\item \textsuperscript{277} See also United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972) (rejecting government arguments that Fourth Amendment protections did not apply in domestic security investigations); New York Times Co. v. United States (Pentagon Papers), 403 U.S. 713, 714 (1971) (refusing to uphold prior restraint on the publication of a secret history of the Vietnam War, despite claims of national security); cf. Webster v. Doe, 486 U.S. 592, 603 (1988) (reaffirming that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear") (citing Johnson v. Robison, 415 U.S. 361 (1974) and Weinberger v. Salfi, 422 U.S. 749 (1975)).
\item \textsuperscript{278} See supra text accompanying notes 191-205.
\item \textsuperscript{279} Kenneth R. Feinberg, a member of the Advisory Committee on Human Radiation Experiments, has argued that the "mere possibility of compensation breeds a proliferation of grievances—real and imagined." Kenneth R. Feinberg, Radiation and Responsibility, Wash. Post, Oct. 19, 1995, at A23. In response to the potential for such an onslaught of claims, Feinberg notes that the Committee sharply limited recommended compensation—and limited the number of individuals to whom it felt the government should apologize—because "legitimate outrage over random, unauthorized radiation experiments should not automatically lead to an open-ended run on the federal Treasury." Id. The Advisory Committee recommended that only a handful of victims receive compensation and a few hundred receive formal apologies from the United States. See Advisory Comm. Final Report, supra note 3, at 801-02. The Committee determined compensation based on two primary factors: the level of physical injury and the degree to which "hard evidence" of the government willfully promoting experimentation without consent or hindering the disclosure of the nature of such experiments was available. See Feinberg, supra, at A23. It is unclear how the Committee was able to find that the bulk of the experimentation was done in secret without adequate requirements for disclosure and still conclude that so few victims deserve compensation and an apology. See Advisory Comm. Final Report, supra note 3, at 792-95.
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tion with the need to protect the public fisc.\textsuperscript{280} Moreover, the Court retains a number of threshold justiciability requirements—notably standing—that could be employed to limit the pool of potential claimants to those who were able to demonstrate an actual injury, fairly traceable to the government’s actions.\textsuperscript{281} The criteria for finding a constitutional mass tort provide one limiting factor to the fear of a flood of litigation, and the Court’s ability to control the federal docket through the requirements of justiciability and by defining the scope of the remedy provides another.\textsuperscript{282}

\section*{Conclusion}

Just as courts struggled to adapt traditional notions of tort liability to the new context of mass torts, they should recognize that in the context of constitutional torts there are situations where the paradigm of an individual officer violating the constitutional rights of an individual does not apply. In those cases, courts must move beyond current limits on constitutional liability. When the violation of individual rights arises out of longstanding, clearly-defined policy, backed by the vast resources of the federal government, in an environment cut off from the normal mechanisms of political oversight, courts should create a cause of action against

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\item[\textsuperscript{280}] Nothing in the argument above should be read to undermine congressional power to act within the scope of its delegated authority to provide an alternative remedy that it considers equally effective to protect constitutional rights. See Dellinger, supra note 12, at 1546–49. Any congressional decision that effectively extended immunity would then be subject to bicameralism and presentment, see U.S. Const., art. I, § 7, in a way that the “decision” by silence not to waive sovereign immunity for constitutional violations is not. Congressional action appropriately rests on popular political will. The Court, however, has been extremely careful to ensure that Congress will not affect the rights of individuals outside the legislative branch without the protection of bicameralism and presentment, see INS v. Chadha, 462 U.S. 919 (1983), and it has been equally careful to construe congressional delegation to agencies narrowly so as to avoid unconstitutionality. See Kent v. Dulles, 357 U.S. 116 (1958).

\item[\textsuperscript{281}] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (laying out the constitutional minima of standing to sue in federal court as injury-in-fact, fairly traceable to the action of the defendant, redressable by a favorable decision). The Court’s redressability requirement would be met in any damages action.

This raises an additional difficulty for constitutional mass torts like the HRE. One characteristic of a constitutional mass tort is the difficulty of connecting individual plaintiffs with those officers most directly involved in the decision to experiment. See supra text accompanying notes 191–205. Courts, when examining the justiciability of any individual plaintiff’s claim, then, may have difficulty with the causation element of standing, and would have to approach this requirement with a certain degree of flexibility.

\item[\textsuperscript{282}] If a glut of constitutional claims exists that could meet the constitutional minima of justiciability and would be successful but for sovereign immunity, such a surfeit of grievances would appear to be an argument in favor of creating a remedy rather than perpetuating the remedy’s absence. Moreover, as the experience with \textit{Bivens} demonstrates, the Court has not allowed the possibility of personal liability under the Constitution to be abused. See supra note 15. There is no reason to believe that the Court could not exercise similar restraint in crafting a remedy against the United States, and ensure that meritless claims be weeded out at the earliest stage of pleading.
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the government. The question in a constitutional mass tort situation is not whether an individual official will be deterred, but whether the institution as a whole has mechanisms in place to ensure that wide-scale deprivations of constitutional rights do not occur.

Limiting the remedy to constitutional mass torts ensures the creation of a narrow exception to the current doctrine of sovereign immunity, not a wholesale abandonment of a generally workable regime. The Court believes that Congress, and by extension the political process, should be responsible for deciding questions of the allocation of the financial burden generated by governmental wrongdoing. Where the conditions described in this Note are met, however, the political process has broken down and there is little chance that a plaintiff will gain a meaningful remedy from the political branches. Judicial abrogation of sovereign immunity in that case should allow the Court to provide a remedy for an egregious breakdown of traditional constitutional protections without overreaching its position in the constitutional system or undermining the general protections it has built for vigorous governance. Despite the Court's recent pronouncement that the logic of *Bivens* does not support a remedy directly against the government, when the federal government does fundamental violence to the liberties of the citizens of the United States, the Constitution, and the judiciary's duty to uphold it, must overcome judicial caution.