5.2 Implied Causes of Action

Updated 2013 by Rochelle Bobroff, 2017 by Jeffrey S. Gutman

The concept of a cause of action originated in the common law's forms of proceedings and was not based upon the federal Constitution or statutes. In 1938, the Federal Rules of Civil Procedure were adopted and the forms of proceeding were abolished. The term "cause of action" was intentionally not utilized. Instead, the rules substituted the concept of a "claim." This change was sought, in part, due to the perception that the forms of proceedings were inadequate to provide remedies for violations of substantive rights.[1] Nevertheless, courts continue to require plaintiffs to demonstrate that they are entitled to sue to enforce a specific duty owed by the defendant.[2] Thus, "the plaintiff must demonstrate both that the defendant's conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to judicial relief because of the wrongful conduct."[3]

In the 1960s and early 1970s, the Supreme Court was receptive to implying a cause of action in the federal Constitution as well as federal statutes that lacked a private right of action.[4] While these decisions have not been formally overruled, the Court is now highly reluctant to imply a cause of action for damages in the Constitution. Recently, in a case involving a constitutional claim for damages, the Court stated that "implied causes of action are disfavored."[5] The Court has similarly imposed a nearly impossible standard for implying a cause of action in a federal statute, requiring a plaintiff to supply evidence of congressional intent to confer a right of action from the text and structure of a statute that does not expressly specify access to enforcement in the federal courts.[6] However, if your client's claim is covered by one of the earlier Supreme Court cases holding that a statute contains an implied cause of action, the statute remains enforceable under the previously recognized implied cause of action. The Court is, however, much more willing to permit claims for injunctive and declaratory relief to determine whether state law conflicts with federal law under the Supremacy Clause of the Constitution.[7]

5.2.A. Implied Constitutional Causes of Action for Damages

In 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* the Supreme Court created a federal cause of action against federal officers for damages due to a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures.[8] This cause of action is not based on an express or implied statutory authorization to sue, but rather is grounded in the Constitution. Such an action is often referred to as a "*Bivens* action," a "cause of action arising directly under the Constitution," or a "constitutional tort." This section discusses the circumstances in which a *Bivens* action may be brought.

Bivens actions are not needed when a statute authorizes the relief sought. For example, *Bivens* actions are not necessary to sue for claims under the Tucker Act and the Federal Tort Claims Act, because those statutes authorize damages.[9] In contrast, the Administrative Procedure Act does not authorize damages against persons acting under color of federal law, and therefore, *Bivens* actions are necessary to support a damage claim against individual federal actors for constitutional violations.

Although the Court has not overruled *Bivens*, the Court has refused to extend it. In *Correctional Services Corporation v. Malesko*, the Court expressly limited *Bivens* actions to the narrow range of claims previously recognized.[10] In *Ziglar v. Abbasi*, a 2017 case in which only six justices participated, the Court did the same.[11] It provided a detailed historical look at *Bivens* actions, refined its *Bivens* analysis, and explained why it has limited the *Bivens* remedy. *Abbasi* is essential reading for any lawyer

contemplating a *Bivens* action.

5.2.A.1. Constitutional Torts

A *Bivens* action is a suit for damages against a federal actor who, acting in his or her individual capacity under color of federal law, is alleged to have violated the plaintiff's constitutional rights. The claim is a judicially created mechanism to afford redress to plaintiffs who lack a statutory cause of action or an adequate statutory remedy, or both.[12] The action may be removed to federal court at the discretion of the defendant and administrative remedies need not be exhausted before the claim is brought.[13] Traditionally, the basic elements of a *Bivens* action are the following:

1. the plaintiff has a constitutionally protected right under the Fourth, Fifth, or Eighth Amendments;
2. the defendant, a federal official, violated that right;
3. the plaintiff lacks a statutory cause of action, or an available statutory cause of action does not provide monetary compensation against the defendant;
4. no "special factors" suggest that the court should decline to provide the judicial cause of action and remedy, and
5. no appropriate immunity can be raised by the defendant.[14]

In *Bivens*, the Court implied a damage remedy under the Fourth Amendment against individual federal law enforcement officers who had allegedly arrested Bivens and searched his home without a warrant or probable cause, causing him mental suffering, humiliation, and embarrassment. At that time, the Federal Tort Claims Act did not provide a remedy.[15] The Court created a federal remedy by implication, reasoning that a state court tort claim would not adequately redress the constitutional wrong suffered by Bivens because the state laws of trespass and invasion of privacy were not intended to remedy the harms that result from a federal agent's abuse of authority.[16]

The Court extended the implied cause of action principle to Fifth Amendment claims in *Davis v. Passman*.[17] The female plaintiff alleged that then-Congressman Passman violated her Fifth Amendment right to equal protection by replacing her with a man.[18] Because Congress had excluded congressional employees from the reach of Title VII, the Court held that Davis had no other viable remedy, that a damage remedy was judicially manageable, and that Davis could, therefore, sue directly under the Fifth Amendment.[19]

In both *Bivens* and *Davis*, the plaintiffs had no other available remedy; it was, therefore, a question of "damages or nothing."[20] In each case, this factor weighed heavily in the Court's decision to imply a cause of action. However, the Court subsequently created a *Bivens* action in a case in which the plaintiff clearly had a statutory cause of action and limited remedy under the Federal Tort Claims Act. In *Carlson v. Green*, the Court allowed a *Bivens* action by an asthmatic prisoner under the Eighth Amendment against individual federal prison officials who allegedly failed to give him needed medical attention.[21] The Court decided that a *Bivens* action was available because Congress had explicitly stated its intent to allow both the Federal Tort Claims Act and *Bivens* actions to coexist as complements.[22] *Carlson* marks the high-water mark for the *Bivens* cause of action; the Supreme Court has consistently declined further invitations to extend *Bivens*.

5.2.A.2. The Limitations on Bivens

Although *Bivens*, *Davis*, and *Carlson* initially seemed to suggest that *Bivens* actions for constitutional violations would be broadly available to fill gaps in federal damage remedies, the Court subsequently refused to extend *Bivens* actions beyond the scope of those earlier cases. When Congress provides a

statutory cause of action without expressly indicating its intent to allow *Bivens* actions as well (as was the case in the legislative history examined in *Carlson*), the Court is very unlikely to imply a cause of action.

The Court began to limit *Bivens* in *Bush v. Lucas*, a suit by a NASA employee against his supervisor for damages for emotional distress and mental anguish.[23] The plaintiff alleged that he had been demoted and his salary decreased in retaliation for exercising his First Amendment right to speak on a matter of public concern. Although the employee obtained reinstatement and full back pay through the civil service administrative process, that process did not allow damages for emotional distress or mental anguish. Acknowledging that "existing remedies do not provide complete relief for the plaintiff," the Court nevertheless refused to create a *Bivens* action.[24] The Court concluded that the policy question of whether an employee should be permitted to recover damages from an employer was more appropriately left to Congress.[25] Because Congress did not provide for individual liability within the existing "elaborate" and "comprehensive" remedial civil service scheme, or elsewhere, the Court refused to create an implied right of action. The Court stated:

> When Congress provides an alternative remedy, it may, of course, indicate its intent—by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself—that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any "special factors counseling hesitation" before authorizing a new kind of federal litigation.[26]

Bush treated the existence of a congressionally designed remedial scheme as a "special factor counseling hesitation" in the Court's analysis of whether to imply a constitutional cause of action. This suggests that the more comprehensive the remedial scheme, the less willing the Court is to imply a *Bivens* action. Thus, the Court declined to imply a right of action in *Chappell v. Wallace*, a case seeking damages from superior military officers for violating a constitutional right to be free from racial discrimination.[27] The Court deemed the existence of a separate, congressionally enacted, "comprehensive internal justice system to regulate military life" and "the unique disciplinary structure of the Military Establishment," to be "special factors" weighing against an implied right of action.[28] In *United States v. Stanley*, this unwillingness to create a *Bivens* action based on "special factors" was broadened to include any claims that "arise out of or are in the course of activity incident to service."[29]

In 1988, the Court confirmed that it would not create a *Bivens* remedy when Congress provided other meaningful remedies unless Congress explicitly preserved a *Bivens* remedy. In *Schweiker v. Chilicky*, the Court refused to imply a cause of action under the Due Process Clause of the Fifth Amendment in favor of social security disability recipients whose benefits had been terminated in a continuing disability review.[30] The plaintiffs sued federal and state officials responsible for the review. The plaintiffs alleged that the officials terminated the recipients in clear violation of the procedural requirements of the Fifth Amendment, a determination of impropriety that Congress apparently agreed with in its enactment of legislation to stop the terminations.[31] However, in language that reinforced the presumption against *Bivens* actions unless Congress clearly provides for them, the Court stated:

> In sum, the concept of "special factors counseling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.[32]

In 2001, the Supreme Court decided *Correctional Services Corporation v. Malesko*, which, again, demonstrated the Court's refusal to extend *Bivens*.33 In *Malesko*, the Court used strong language to reject a *Bivens* suit by a federal inmate against a private corporation that operated a halfway house under contract with the federal Bureau of Prisons. The Court referred to *Bivens* as a "limited holding" and noted that the *Bivens* Court's exercise of its authority to imply a constitutional tort had relied heavily on *J.I. Case Company v. Borak*,34 a case it had since "abandoned."35 The Court noted that, in the decades subsequent to *Bivens,* the Court had extended its holding only twice and that it had otherwise "consistently refused to extend *Bivens* liability to any new context or new category of defendants."36

This language could be considered dicta because *Malesko* went on to emphasize that the defendant was a private corporation, for which *Bivens* actions were inapplicable. The Court compared the *Malesko* case to *Federal Deposit Insurance Corporation v. Meyer*, where it had refused to extend *Bivens* to permit suits against a federal agency whose sovereign immunity Congress had waived.37 In *Meyer*, the Court reasoned that a damages suit against a federal entity would not advance the core purpose of the *Bivens* remedy, which was to deter individual federal officers from committing constitutional violations.38 Similarly, the *Malesko* Court held that a *Bivens* action against a private entity would also lack deterrent effect for individual violations of the Constitution. Moreover, federal prisoners housed in private facilities enjoyed possible alternative remedies (such as state tort remedies) unavailable to inmates in government facilities. The Court asserted that a *Bivens* remedy had "never [been] considered a proper vehicle for altering an entity's policy" rather, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."39

Thus, the Court had several bases for distinguishing the *Malesko* facts from the *Bivens* situation and could have reached its conclusion without using any of the strong limiting language quoted above. The Court's decision to go out of its way to cabin the *Bivens* remedy within very narrow parameters signaled a refusal to extend *Bivens* to new constitutional claims. Indeed, the Court recently reaffirmed *Malesko* in a case seeking to imply and Eighth Amendment Bivens claim against a private correctional facility in *Minneci v. Pollard*.40 In *Minneci*, the Court found that the state tort law supplied a remedy for a prisoner alleging inadequate medical care and treatment and rejected the argument that the Court should look only to federal law, rather than the "vagaries" of state law to determine whether an adequate alternative remedy exists.41

Similarly, in *Wilkie v. Robbins* the Court rejected a *Bivens* claim raising Fourth and Fifth Amendment violations by a ranch owner against federal officers who allegedly coerced an easement across his property.42 For the *Wilkie* Court, the existence of "alternative, existing process[es]" for protecting the infringed-upon interests of the ranch owner, counseled against inferring constitutional causes of action under either amendment.43 Furthermore, the Court held that "special factors" weighed against authorizing a *Bivens* action, specifically the complexity of the allegations.44 As a result, a *Bivens* claim in this case was not a "workable cause of action."45

In *Ziglar v. Abbasi*, the Court acknowledged that, if it were deciding *Bivens*, *Davis,* and *Carlson* now, separation of powers principles and its new approach to implying (or not implying) causes of action might well have caused it to decide those cases differently.46 However, it regarded *Bivens* as "a fixed principle in the law" and, as such, supported by "powerful reasons" to remain a viable doctrine.47

Abbasi involved Fourth and Fifth Amendment claims by post-September 11 detainees in the Administrative Maximum Special Housing Unit against Department of Justice officials and prison wardens. They challenged the conditions of their incarceration; claimed that those conditions were the result of equal protection violations based on race, religion, or national origin; and alleged that the wardens permitted guards to abuse them.

Abbasi set forth a test that asks first whether the *Bivens* claim is a new one that is "different in a meaningful way" from *Bivens*, *Davis*, and *Carlson*.48 By listing examples of such differences, the Court made it quite clear that they can be very narrow:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.49

The Court had little difficulty concluding that these detention policy claims by "illegal aliens" in the wake of a terrorist attack were very different than the claims made in *Bivens*, *Davis*, and *Carlson* even though two of them involved Fourth and Fifth Amendment violations.50 The Court turned second to whether there were any "special factors counselling hesitation" to the courts implying a damages action in the new context. The general inquiry is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."51 So framed, the answer is almost invariably no.

In *Abbasi*, the Court cautioned that it is not appropriate to use *Bivens* cases to change government policy. Thus, cases that involve discovery into the discussion, deliberation, and formulation of policy divert the time and attention of officials from their Executive Branch duties. Here, that special factor applied with greater force because the policies at issue fell within the national security realm.

The Court placed great emphasis on the failure of Congress to enact an statutory remedy but did examine whether that absence was inadvertent. The Court observed that Congress has been actively engaged in studying the terrorist attacks and, in particular, asked the Department of Justice Inspector General to report on conditions of the prison at issue. The failure of Congress to legislate under such circumstances led the Court to conclude that the absence of a remedy was not inadvertent.

The Court, as it had done previously, inquired whether other remedies existed. In *Abbasi*, the Court viewed the possibility of seeking injunctive or habeas relief as "faster and more direct."52 The Court said that "when alternative methods of relief are available, a *Bivens* remedy usually is not."53 Each of the special factors were found to weigh strongly against implying a *Bivens* remedy, and the Court dismissed the detention claims while remanding the abuse claims for a special factor analysis after determining that those claims were closer to those in *Carlson* but far enough to warrant such review.54

The Court has also clearly assumed, without so holding, the viability of *Bivens* claims under the First Amendment.55 The Court applied this assumption in *Hartman v. Moore*, where it held that a *Bivens* plaintiff who claimed that government employees violated his First Amendment rights by participating in a retaliatory criminal prosecution, must plead and prove the absence of probable cause underlying the criminal case.56 More recently, the Court repeated this assumption in *Ashcroft v. Iqbal*, stating that it was “assum[ing], without deciding, that [a] First Amendment claim is actionable under *Bivens*.”57 Thus, it remains possible to seek relief under *Bivens* for violations of the First Amendment as well.58

5.2.B. Implied Private Statutory Causes of Action

As discussed earlier in this Chapter, many federal statutes expressly provide a right for injured individuals to sue to enforce the law. When an express right specific to a particular statute is unavailable, advocates must determine whether a claim may be brought under the general authority of statutes such as the Administrative Procedure Act or 42 U.S.C. § 1983. Those statutes, of course, have their limitations, including a failure to extend to private parties who are not state actors. Consequently,

advocates may need to inquire whether a private right of action may be implied in a particular federal statute. As explained below, beginning in the mid-1970s, the Supreme Court sharply constricted the availability of implied private rights of action for federal statutes and further restricted the enforceability of federal regulations in the 2001 case of *Alexander v. Sandoval*.59

5.2.B.1. Limitation of an Implied Private Right of Action to Enforce Federal Statutes

In the late 1960s, the Supreme Court held that private individuals could enforce federal anti-discrimination statutes to remedy explicit racial discrimination, based on an implied statutory cause of action.60 These decisions focused on the need to provide a remedy to correct racial injustice when a federal statute establishes the right to be free from racial discrimination.

In 1975, in *Cort v. Ash*, the Court, however, unanimously limited the use of implied statutory causes of action.61 In an opinion by Justice Brennan, the Court set forth a four-prong test for finding an implied cause of action. The test asks whether 1) the plaintiff is in the class for whose *especial* benefit the statute was enacted; 2) there is any indication of legislative intent, explicit or implicit, either to deny or to create a private right to enforce; 3) a private right to enforce would be consistent with the underlying purpose of the statute; and 4) the cause of action is traditionally in the purview of state law, such that a federal right to enforce would be inappropriate.62 The holding of the case was that there was no implied cause of action in the Federal Election Campaign Act for stockholders to obtain damages from corporate directors, because none of the four factors were met.

In *Cannon v. University of Chicago*, decided in 1979, the plaintiff alleged that she was denied admission to medical school based on her gender, in violation of Title IX of the Education Amendments of 1972. The Court found that Title IX met all four of the *Cort v. Ash* prongs.63 With regard to legislative intent, the Court reasoned that in drafting Title IX, Congress relied upon the Court's cases from the late 1960s which had implied a cause of action in statutes designed to remedy racial discrimination, such as the Voting Rights Act. Title IX was also modeled on Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by recipients of federal funds, and had been found enforceable under an implied private right of action by numerous courts of appeals.64 Therefore, the Court concluded that Congress had intended Title IX to be privately enforceable. The Court also stated that it was "decidedly receptive" to an implied cause of action that was helpful to the statutory purpose.65 However, the Court cautioned Congress against future reliance on the implied cause of action cases from the 1960s. Justice Stevens, writing the majority opinion, stated, "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."66

The availability of an implied private right of action was sharply narrowed in two cases decided just a few months later. Without rejecting the four-part test, the Court interpreted the test as being most heavily focused on the second prong: evidence of congressional intent to create a private right.67 The Court looked for specific statutory language establishing a right to sue and to obtain damages.68 Since the statutes examined did not contain an express private right of action, there was no such language, leading the Court to conclude that the statutes did not contain an implied right of action. While citing *Cannon* with favor, the Court explicitly rejected the emphasis in *Cannon* and other prior cases on implying a private right in order to effectuate the purpose of the statute.69

In 1982, Justice Stevens authored an opinion finding an implied statutory right of action to enforce the Commodity Exchange Act.70 Stevens asserted that in earlier times, the common law supplied a remedy for an individual injured by the breach of a duty. Yet, he explained, the Court unanimously modified its approach in *Cort v. Ash*, due to the "increased complexity of federal legislation and the increased volume of federal litigation." Presently, the Court requires "more careful scrutiny of legislative intent"

to imply a private right of action.[71] Because the Commodity Exchange Act was amended in 1974, before the change in the Court's approach in the 1975 *Cort v. Ash* case, the majority found that "Congress intended to preserve the preexisting remedy" of an implied right of action. The Court concluded that the provision of new remedies in 1974 was "intended to supplement rather than supplant the implied judicial remedy."[72] The Court specifically rejected the argument that the implication of a right of action violates separation of powers, noting that judicial implication of a right turns on congressional intent.[73]

A year later, the Court was asked to decide upon the standard of proof needed to prevail in a Title VI case, specifically whether proof of discriminatory intent was required to obtain compensatory relief.[74] The Court splintered, producing six separate opinions. Nevertheless, seven Justices accepted that, under the reasoning of *Cannon*, there was an implied private right of action to enforce Title VI.[75]

The Court has never overruled *Cannon* or cases based on it. As a result, claims under Title VI and Title IX remain enforceable under an implied private right of action. The Rehabilitation Act adopts the remedies of Title VI, and thereby also utilizes an implied private right of action.[76]

Nevertheless, for statutes enacted after Congress was notified that the Court expected it to "specify" a cause of action, the Court has refused to permit enforcement of rights through an implied statutory cause of action.[77] Lower court cases finding an implied private right of action in such statutes are therefore extremely vulnerable to challenge. For instance, the Fifth Circuit held in 1981 that language in the Housing and Community Development Act similar to the language of Title IX is enforceable under a private right of action.[78] That holding was explicitly rejected by several other courts, including the First Circuit.[79]

Thus, by 2000, numerous cases held there was no implied private right of action to enforce federal statutes, other than Title IX, Title VI, and the Rehabilitation Act, for which an exception had been carved out by the Supreme Court. Even before *Alexander v. Sandoval* greatly limited private enforcement of regulations, scholars proclaimed that obtaining relief for violations of rights in federal statutes under an implied private right of action was "foreclosed."[80]

5.2.B.2. The Conflation of the Implied Private Right of Action with the Express Right of Action in Section 1983

In *Wright v. City of Roanoke Redevelopment and Housing Authority*,[81] Justice O'Connor wrote a dissent on behalf of four Justices which introduced the idea that the *Cort v. Ash* test for an implied right of action should be utilized in determining whether a plaintiff may access the express right of action in 42 U.S.C. § 1983. She suggested that each specific provision of the statute, not the statute as a whole, be carefully scrutinized to "determine congressional intent to create enforceable rights."[82] This analysis imports into the § 1983 analysis the second prong of the *Cort v. Ash* test—a search for legislative intent to create a private right of action in a statute devoid of any express right to sue in federal court.

To the contrary, Justice Brennan subsequently argued in another 5-to-4 decision regarding § 1983 that an implied private right of action is completely different from the utilization of the express right of action in § 1983.[83] Rather, he asserted that the Section 1983 remedy is available unless there is clear evidence of legislative intent to take away this express right of action. However, after Justice Brennan left the Court, Justice O'Connor's vision became law. In *Gonzaga University v. Doe*, the Court held that evidence of congressional intent to create enforceable rights is a prerequisite to utilization of § 1983.[84] *Gonzaga* explicitly blurs the distinction between an implied right of action and the express right of action in § 1983.[85]

5.2.B.3. Sandoval Limits Enforceability of Federal Regulations

Alexander v. Sandoval involved a challenge to the Alabama Department of Safety's refusal to administer its driver's examination in a language other than English.[86] The plaintiff was a Mexican immigrant who did not have the English skills necessary to take a written examination. She sued, arguing that the driver's license rule violated the regulations implementing Title VI of the Civil Rights Act of 1964. Section 601 of Title VI forbids discrimination based on race or national origin in any program or activity receiving federal funds. Section 602 of the statute authorizes the federal government to promulgate regulations to implement Section 601. The regulations interpret national origin discrimination to include actions that did not intend to discriminate but had that effect because of factors having a disparate impact, such as an individual's limited ability to speak English.

The Supreme Court in *Sandoval* found it "beyond dispute that private individuals may sue to enforce [Section] 601" of Title VI utilizing an implied private right of action.[87] However, the Court interpreted Section 601 as applying only to intentional discrimination. The Court limited *Cannon* to its facts, in which intentional discrimination was alleged to violate Section 601. The "disparate impact" regulations were found to be beyond the scope of Section 601's prohibition on intentional discrimination, and therefore not enforceable under Section 601. The Court stated, "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."[88]

The Court further rejected the plaintiffs' claim that Section 602, which authorizes regulations to implement Section 601, was enforceable utilizing an implied private right of action.[89] In analyzing the implied right of action issue, the Court found the existence or absence of "rights-creating language" to be critical to the inquiry.[90] *Sandoval* suggests that congressional intent to create private remedies is the determinative issue; that is, does the statute "display[] an intent to create not just a private right but also a private remedy?"[91] Congressional intent is to be determined almost exclusively based on the text and structure of the statute. The Court expressed disdain for inferring remedies necessary to effectuate congressional purpose.[92] The Court made clear that the statute's text and structure must evince a "congressional intent to create new rights."[93]

In future cases involving regulations, advocates are best advised to seek enforcement of a statute, rather than regulations promulgated pursuant to the statute. In *Jackson v. Birmingham Board of Education*, for example, the Supreme Court reversed the Eleventh Circuit's holding that *Sandoval* precluded enforcement of a Title IX regulation prohibiting retaliation.[94] The Court held that *Sandoval* was irrelevant because such retaliation is prohibited by the statute's text.[95]

Courts of appeal interpreting *Sandoval*, in conjunction with *Gonzaga*, have reversed their prior caselaw and have held that "regulations *alone* cannot create rights enforceable through either an implied right of action or [Section] 1983."[96] Nevertheless, if a right is conferred through the statute, then the regulations are relevant to the scope of the right conferred by Congress.[97]

Even for statutes with a private right of action, however, *Sandoval* places limits on the enforceability of accompanying regulations. Refusing to enforce a regulation under the Americans with Disabilities Act, the Ninth Circuit stated that pursuant to *Sandoval*: "those regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action; regulations that do not encapsulate the statutory right and corresponding remedy are not privately enforceable."[98] Therefore, only regulations within the clear mandate of a statute with an express right of action remain enforceable and are not impacted by *Sandoval*.[99]

5.2.C. The Preemption Claim

Following the Court's limitations on implied rights of action under federal statutes and regulations in *Cort v. Ash* and its progeny and *Alexander v. Sandoval* (discussed *supra*, 5.2.B) and narrowed interpretation of Section 1983 in *Gonzaga University v. Doe* (discussed in Chapter 5.1.A), advocates have explored the use of preemption doctrine to enjoin state or local actions that conflict with federal statutes or regulations that do not contain an explicit right of action and that do not create rights enforceable under Section 1983.[100]

The notion is that preemption doctrine arises from the Supremacy Clause of the Constitution.[101] If state statutes or actions are "inconsistent with an act of Congress, they are void, so far as that inconsistency extends."[102] A suit to enforce this preemption concept requires a cause of action. It was thought that such a cause of action could be implied from the Supremacy Clause itself.[103]

The Supreme Court's recent decision in *Armstrong v. Exceptional Child Center, Incorporated*[104] put an end to that idea. In *Armstrong*, providers of Medicaid-covered habilitation services sued officials in Idaho's Department of Health and Welfare on the ground that Idaho's Medicaid plan reimburses them at rates lower than required by a federal statute.[105] Suing directly under the Supremacy Clause, the plaintiffs asked a federal court to enjoin the state plan.

Both the majority and the dissent agreed that the Supremacy Clause does not create a cause of action.[106] In response to the argument that the Court had frequently enjoined state actors violating federal law, the Court responded that, because it had done the same with respect to federal actors, the Supremacy Clause cannot serve as the explanation.[107] Instead, the Supremacy Clause merely provides a rule of decision in cases correctly raising preemption claims, instructing courts on what to do when state and federal law clash.

How, then, are Supremacy Clause claims properly brought before the court? While not identifying a basis for such a cause of action, the Court held that federal courts have equitable power "to enjoin unlawful executive action."[108] That power, however, does not exist when Congress forecloses its use. In *Armstrong*, the majority and dissent quarreled over whether Congress did so, the majority holding that Congress foreclosed a court in equity from enjoining the state to extend Medicaid payment relief as requested by the health care providers. It offered two reasons. First, Congress' only statutory remedy for a state violation of federal Medicaid requirements was to authorize HHS to withhold federal funds. Second, while acknowledging that the withhold provision might not, *by itself*, preclude equitable relief, it did so when combined with what the Court found to be the broad and "judicially unadministrable" text of the Medicaid Act payment provision.[109]

Together, the Court reasoned, these factors reflected Congress' implicit intent to preclude health care providers' private enforcement of the Medicaid Act's payment provision. In so deciding, the majority rejected the dissent's view that congressional intent to foreclose private enforcement would need to be reflected affirmatively, rather than by implication, in the statute, because Congress was aware of the Court's long-standing practice of enjoining preempted state action and legislated against that background principle.[110]

Armstrong does not preclude preemption arguments, but it does preclude preemption claims based solely on the Supremacy Clause. Such arguments must be tied to another cause of action, such as those involving the court's equitable power to enjoin state laws and acts that conflict with federal law.[111] However, that law can serve as a basis for such injunctive relief only when Congress has not precluded private enforcement. While *Armstrong* provides some guidance on when this may be so, and appears to draw from some of the prongs of *Gonzaga* analysis, future cases will explore these contours.

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- 1. Anthony J. Belia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 784, 793, 797 (2004).
- 2. Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 Loy. J. Pub. Int. L. 27, 32 (2009).
- 3. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 Geo. L. J. 2513, 2520-21 (1998).
- 4. *See, e.g., J.I. Case Company v. Borak*, 377 U.S. 426 (1964).
- 5. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1948 (2009).
- 6. Bobroff, *Section 1983 and Preemption, supra* note 2.
- 7. *Verizon Maryland, Incorporated v. Public Service Commission*, 535 U.S. 635 (2002).
- 8. The term "*Bivens* action" refers to the case in which the Supreme Court first held that the federal courts could create such a cause of action. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
- 9. These statutes are discussed in Chapters 2.5.C. and 2.5.D. of this MANUAL.
- 10. *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001).
- 11. *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017).
- 12. Procedurally, reasoning by analogy from § 1983 actions, all courts considering the issue have held that state personal injury statutes of limitation should govern *Bivens*. *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996); *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1009 n.11 (9th Cir. 2002); *King v. One Unknown Federal Corrections Officer*, 201 F.3d 910, 913 (7th Cir. 2000); *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647, 653 (2d Cir. 1998); *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995); *Napier v. Thirty or More Unidentified Federal Agents, Employees, or Officers*, 855 F.2d 1080, 1088 n.3 (3d Cir. 1988). Additionally, there is currently no express or implied statutory authorization for an award of attorney's fees to prevailing plaintiffs in *Bivens* actions and the Supreme Court has expressly declined to rule on the question. *Bush v. Lucas*, 462 U.S. 367, 372 n.9 (1983).
- 13. 28 U.S.C. § 1442(a)(1); *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992).
- 14. The determination that a plaintiff has a *Bivens* cause of action does not necessarily mean that the plaintiff may recover damages in the case. The additional, and distinct, question of whether the defendants are entitled to absolute or qualified immunity must also be adjudicated. Government officials performing discretionary functions are generally granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity analysis is the same under either a *Bivens* or a § 1983 cause of action. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989); *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986). For a discussion of the circumstances in which government officials sued in their individual capacities are entitled to either absolute or qualified immunity, see Chapters 8.2.A. and 8.2.B. of this MANUAL.
- 15. The Federal Tort Claims Act was amended in 1974 to provide a remedy for intentional torts committed by federal law enforcement officials. *See* 28 U.S.C. § 2680(h).
- 16. *Bivens*, 403 U.S. at 391-92, 394-95.
- 17. *Davis v. Passman*, 442 U.S. 228 (1979).
- 18. *Id.* at 230-31 n.3.
- 19. *Id.* at 245, 247.

- 20. *Id.* at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).
- 21. *Carlson v. Green*, 446 U.S. 14 (1980). In *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), the Supreme Court distinguished *Carlson* and held that 42 U.S.C. § 233(a), a provision in the Public Health Service Act, precludes *Bivens* claims against individual Public Health Service employees and instead requires that the United States be substituted and a case brought under the Federal Tort Claims Act.
- 22. *Id.* at 19-20. The Supreme Court relied on language in the Senate Report on the 1974 Federal Tort Claims Act Amendments, showing that "Congress views [the Act] and *Bivens* as parallel, complementary causes of action." The Court also noted that in several respects the *Bivens* remedy was more effective. Unlike a Federal Tort Claims Act suit, a *Bivens* suit allows recovery against individual officers (thus more effectively deterring unconstitutional conduct), allows punitive damages, can be tried before a jury, and is not dependent on "the vagaries" of state tort statutes and doctrines. *Id.* at 19-23. The 1988 Amendment to the Federal Tort Claim Act's exclusivity-of-remedy provision, 28 U.S.C. § 2679(b)(1)-(2), made clear that Congress had maintained its position that the Act is not the exclusive remedy for a constitutional tort, and thus that Congress declined to overturn *Bivens*, *Davis*, and *Carlson*.
- 23. *Bush v. Lucas*, 462 U.S. 367 (1983).
- 24. *Id*. at 388.
- 25. The Court deferred to Congress' greater familiarity with the appropriate remedial scheme as reflected in the long history of legislative management of the civil service system. The Supreme Court took a hands-off approach, even though Congress had not stated that it considered the statutory civil service remedies to be exclusive, and even though the Court assumed that a *Bivens* action would provide greater relief. *See Bush*, 462 U.S. at 378.
- 26. *Id*.
- 27. *Chappell v. Wallace*, 462 U.S. 296 (1983).
- 28. *Id.* at 302, 304.
- 29. *United States v. Stanley*, 483 U.S. 669, 684 (1987) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).
- 30. *Schweiker v. Chilicky*, 487 U.S. 412, 423-29 (1988).
- 31. *Id*. at 415-16 ("Finding that benefits were too often being improperly terminated by state agencies, only to be reinstated by a federal administrative law judge (ALJ), Congress enacted temporary emergency legislation in 1983.").
- 32. *Id.* at 423.
- 33. *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).
- 34. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).
- 35. *Malesko*, 534 U.S. at 67 n.3 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).
- 36. *Id.* at 68, 70.
- 37. *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994).
- 38. *Id*. at 484-85.
- 39. *Id.* at 474.
- 40. *Minneci v. Pollard*, 132 S. Ct. 617 (2012).
- 41. *Id.* at 624.
- 42. *Wilkie v. Robbins*, 551 U.S. 537, 541, 548 (2007).
- 43. *Id*. at 551-54.
- 44. *Id*. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367 , 378 (1983).
- 45. *Id*. at 562.

- 46. *Abbasi*, 137 S. Ct. 1843.
- 47. *Id.*
- 48. *Id.*
- 49. *Id.*
- 50. *Id.*
- 51. *Id.*
- 52. *Id.*
- 53. *Id.*
- 54. In light of *Abbasi*, the Court remanded *Hernandez v. Mesa*, No. 15-118 (U.S. June 26, 2017), a case in which the appellate court avoided the *Bivens* claim by holding, possibly incorrectly, that an officer who shot a Mexican youth at the border was entitled to qualified immunity.
- 55. The Court first assumed a *Bivens* claim under the First Amendment in *Bush*, 462 U.S. at 372-73.
- 56. *Hartman v. Moore*, 547 U.S. 250 (2006).
- 57. *Ashcroft v. Iqbal* , 556 U.S. 662, 129 S. Ct. 1937, 1948 (2009).
- 58. *See, e.g., Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (allegation that Federal Bureau of Investigation agents impermissibly curbed plaintiff's protected speech claim, properly cognizable as a *Bivens*-type action under the First Amendment); *Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986) (reversing dismissal of *Bivens* claim by federal employee who allegedly suffered harassment by supervisors for exercising his First Amendment rights; and distinguishing *Bush* on grounds that remedial scheme is less comprehensive than that of the Civil Service Reform Act, and remedies are less meaningful).
- 59. *Alexander v. Sandoval*, 532 U.S. 275 (2001).
- 60. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238 (1969); *Allen v. State Board of Elections*, 393 U.S. 544, 556-57 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414-415, and 414 n.13 (1969).
- 61. *Cort v. Ash*, 422 U.S. 66 (1975).
- 62. *Id*. at 78.
- 63. *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).
- 64. *Id*. at 696-68.
- 65. *Id*. at 703.
- 66. *Id*. at 717.
- 67. *Transamerica Mortgage Advisors, Incorporated v. Lewis*, 444 U.S. 11, 24 (1979); *Touche Ross and Company v. Redington*, 442 U.S. 560, 575-76 (1979).
- 68. *Transamerica*, 444 U.S. at 24.
- 69. *Id*. at 15-16. The dissent argued on behalf of four Justices that "courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose." *Id*. at 30 (White, J. dissenting). But the majority clearly rejected the dissent's approach of focusing on overall congressional purpose.
- 70. *Merrill Lynch, Pierce, Fenner and Smith v. Curran*, 456 U.S. 353 (1982).
- 71. *Id.* at 377.
- 72. *Id.* at 384-85. *See also Herman and MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (express remedy does not preclude enforcement of another statute which had previously been held enforceable under an implied private right of action).
- 73. *Id.* at 375-76.

- 74. *Guardians Association v. Civil Service Commission,* 463 U.S. 582 (1983).
- 75. *Id.* at 607, n.27.
- 76. Rehabilitation Act, 29 U.S.C. § 794a(a)(2). *See Lane v. Peña*, 518 U.S. 187, 191-92 (1996).
- 77. *See Virginia Bankshares, Incorporated v. Sandberg,* 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals Incorporated v. Thompson,* 478 U.S. 804, 812, n. 9 (1986) (collecting cases).
- 78. *Montgomery Improvement Association v. U.S. Department of Housing and Urban Development,* 645 F.2d 291, 295 (5th Cir. 1981).
- 79. *Latinos Unidos de Chelsea En Accion (Lucha) v. Secretary of Housing and Urban Development*, 799 F.2d 774, 795 (1st Cir. 1986).
- 80. Lisa E. Key, *Private Enforcement of Federal Funding Conditions under 1983: the Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 286 (1996). *See also* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 Wash. L. Rev. 67, 91 (2001).
- 81. *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).
- 82. *Id*. at 433 (O'Connor, J. dissenting). Prior to Justice O'Connor's *Wright* dissent, Justices Powell and Rehnquist had objected to enforcement of civil rights and safety net statutes under § 1983 on policy grounds, arguing that these cases were an undue burden on the state. Bobroff, *Section 1983 and Preemption, supra* note 2, at 39-42.
- 83. *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 508 n.9 (1990).
- 84. *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (finding no right to suit under § 1983 where plaintiff alleged a violation of the Federal Educational Right to Privacy Act, the federal statute protecting the privacy of educational records).
- 85. *Id.* at 284-85.
- 86. *Alexander v. Sandoval*, 532 U.S. 275 (2001).
- 87. *Id.* at 280.
- 88. *Id*. at 291.
- 89. *Id*. at 290-91.
- 90. *Id.* at 288.
- 91. *Id*. at 286.
- 92. *Id*. at 287-88.
- 93. *Id*. at 289.
- 94. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2004).
- 95. *Id*. at 178. *Cf. Rolland v. Romney*, 318 F.3d 42, 52-53 (1st Cir. 2003) (relying on same *Alexander v. Sandoval*, 532 U.S. 275 (2001) language and finding private right of action under § 1983 to enforce regulations interpreting the Nursing Home Reform Amendments, 42 U.S.C. § 1396r, based on "rights-creating language" contained in statute).
- 96. *Price v. City of Stockton,* 390 F.3d 1105, 1112 n.6 (9th Cir. 2004); *see Johnson v. City of Detroit,* 446 F.3d 614, 629 (6th Cir. 2006); *Save Our Valley v. Sound Transit,* 335 F.3d 932, 943 (9th Cir. 2003). *See also South Camden Citizens in Action v. New Jersey Department of Environmental Protection,* 274 F.3d 771, 784 (3d Cir. 2001) (finding disparate impact regulation unenforceable under § 1983 based on *Sandoval;* decided before *Gonzaga).* Two circuits had held that regulations alone could not be enforced under § 1983 prior to *Sandoval. Harris v. James,* 127 F.3d 993, 1008 (11th Cir. 1997); *Smith v. Kirk,* 821 F.2d 980, 984 (4th Cir. 1987).
- 97. *Shakhnes v. Proud*, 689 F.3d 244, 251 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1808 (2013); *Price*, 390 F.3d at 1112 n.6.
- 98. *Lonberg v. City of Riverside*, 571 F.3d 846, 851 (9th Cir. 2009).

- 99. *Ability Center of Greater Toledo v. Sandusky*, 385 F.3d 901, 906 (6th Cir. 2004) ("if the regulation simply effectuates the express mandates of the controlling statute, then the regulation may be enforced via the private cause of action available under that statute"); *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2003) (distinguishing *Sandoval* on this basis and permitting enforcement of Americans with Disabilities Act regulations and guidelines through a private action).
- 100. *See generally*, Bobroff, *Section 1983 and Preemption*, *supra* note 2.
- 101. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. " U.S. Const. art. VI.
- 102. *Gibbons v. Ogden*, 22 U.S. 1, 31 (1824).
- 103. Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System, 903 (5th ed. 2003); 13D Charles Alan Wright, et al., Federal Practice & Procedure § 3566 (3d ed. 2009) (concluding that "the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws").
- 104. *Armstrong v. Exceptional Child Center, Incorporated*, 135 S. Ct. 1378 (2015).
- 105. 42 U.S.C. § 1396a(a)(30)(A) (2014).
- 106. *Armstrong*, 135 S. Ct. at 1383; *id*. at 1391 (Sotomayor, J., dissenting).
- 107. *Id.* at 1384.
- 108. *Id.* at 1385. As the dissent explained, the "most famous exposition" of that power is *Ex parte Young*, 209 U.S. 123 (1908). *Armstrong*, 135 S. Ct. at 1390 (Sotomayor, J., dissenting).
- 109. *Id.* (citing *Gonzaga University v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment)).
- 110. *Id.* at 1386-87.
- 111. While the Court in *Armstrong* did not address whether there would be federal jurisdiction over such claims, *Shaw v. Delta Air Lines, Incorporated*, 463 U.S. 85, 96 n.14 (1983), would suggest there is.

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