Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine

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IMPLYING A DAMAGE REMEDY AGAINST MUNICIPALITIES DIRECTLY UNDER THE FOURTEENTH AMENDMENT: CONGRESSIONAL ACTION AS AN OBSTACLE TO EXTENSION OF THE BIVENS DOCTRINE

I. INTRODUCTION

When persons acting under color of state law deprive another of any federally secured right, a federal statute, 42 U.S.C. § 1983,1 affords the victim the right to obtain equitable or compensatory relief. This remedy has been restricted, however, by Supreme Court decisions interpreting the statutory term "person" to preclude municipal liability under the statute.2 The exclusion of municipal defendants from section 1983's remedial scheme limits the protection afforded federal rights. While the Court has upheld the granting of equitable relief against municipalities


   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens 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.


in general federal question actions based directly on the fourteenth amendment, the availability of damages remains uncertain.

Several approaches have been suggested for circumventing the exclusion of municipalities from Section 1983 to provide a damage remedy against them for constitutional violations. Recently, commentators have argued that the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* may allow recovery of damages from a municipality on a claim founded on the fourteenth amendment. In

3. See cases cited note 48 infra.

4. The eleventh amendment precludes the federal courts from assuming jurisdiction over actions against a state. 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 of any Foreign State.

Although the amendment is couched in terms prohibiting actions instituted by citizens of other states, it has been interpreted to reach suits by citizens of the same state. Hans v. Louisiana, 134 U.S. 1 (1890). Thus neither injunctive nor compensatory relief against a state is available in the federal courts for constitutional violations by state officials. The amendment does not, however, prevent federal courts from providing effective relief against the offending official. *Ex parte Young*, 209 U.S. 123 (1908).

The Court has consistently held that the eleventh amendment does not bar an action in the federal courts against a municipality. Edelman v. Jordan, 415 U.S. 645, 667 n.12 (1974). *But see* Washington v. Branitley, 352 F. Supp. 559 (M.D. Fla. 1972). Municipalities are not entitled to the protection of the eleventh amendment because decrees or judgments entered against them do not bind the State and are not satisfied out of state funds. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 930-37 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]. While there is no jurisdictional bar to suits against a municipality, the presence of such a bar to suits against a state might lead one to question the importance of municipal liability in remedying constitutional violations by municipal employees.


Bivens the Supreme Court recognized a federal cause of action for damages against federal agents based directly on the fourth amendment. The lower federal courts have split on the availability of the damage remedy; some have readily accepted the extension of Bivens to fourteenth amendment claims,\(^8\) while others have rejected the remedy because of concern for federalism\(^9\) or the exclusion of municipalities from section 1983.\(^10\) Some courts have expressly declined to decide the question.\(^11\)

Recovery directly from municipalities instead of from individual municipal officers would be advantageous for several reasons. First, suing the municipality eliminates the need to identify the particular individual responsible for the deprivation, a task which may be extremely difficult, for example in the event of group action.\(^12\) Second, municipalities have greater financial resources than individual employees who may often

\(\text{Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976) [hereinafter cited as Note, Damage Remedies]; Hundt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 Nw. U. L. Rev. 770 (1975).}\)


12. See Burton v. Waller, 502 F.2d 1261, 1265, 1271, 1281-82, 1284, 1286 (5th Cir. 1974), cert. denied, 420 U.S. 964 (1975) (burden on plaintiffs to establish which of the sixty-nine defendant policemen had fired the harmful shots); Howell v. Cataldi, 464 F.2d 272, 282-84 (3d Cir. 1972) (directed verdict upheld where plaintiff
be judgment proof. Third, a municipality is less likely to evoke jury sympathy than an individual employee sued for actions taken in attempting to perform his duty. Fourth, the availability of defenses and immunities to municipalities is problematical, while individual defendants in section 1983 damage actions enjoy a well established defense of good faith and even absolute immunity in some circumstances. Finally, municipal liability may result in increased deterrence of constitutional violations on the theory that direct governmental liability will spur internal regulation to eradicate the sources of unconstitutional behavior.

While municipal liability may be desirable, the application of Bivens to the fourteenth amendment context raises serious questions regarding the proper role of the federal judiciary in implementing the Constitution. For the judiciary to imply a cause of action for damages for a violation of a right secured by the Constitution, there must be jurisdiction, a cause of action, judicial power to award damages, and a determination that failed to establish that the defendants were the two policemen who actually administered the beating).

13. See Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966); Kates & Kouba, supra note 5, at 136-37; Comment, Equal Protection, supra note 5, at 1158.
15. See Note, Damage Remedies, supra note 7, at 952-58.
19. The jurisdictional issue poses little difficulty. In actions brought pursuant to section 1983 based on the deprivation of constitutional rights, jurisdiction is provided by 28 U.S.C. § 1343(3), which does not have any minimum amount in controversy requirement. 28 U.S.C. § 1343 (1970) provides in part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The language of section 1343(3) seemingly applies to any action "authorized by law," which should include Bivens-type actions. See Paul v. Dade County, 419
damages are an appropriate form of relief. Consideration of the propriety of damages also entails a more general examination of the relationship between specific remedies and the Constitution. The standards that are to guide the federal courts in assessing a proposed remedy must be clearly articulated so that the importance of considerations such as federalism and conflicting congressional determinations can be properly evaluated. This Comment first examines the Supreme Court's decision in *Bivens*; it discusses the Court's reasoning and the principles that the decision embodies. Next it considers the applicability of the *Bivens* principles to other constitutional provisions including the fourteenth amendment. The Comment then suggests a method for assessing the propriety of implying remedies under the Constitution and applies it to the question of municipal liability under the fourteenth amendment. It argues that the exclusion of municipalities from the coverage of section 1983 constitutes a congressional determination that on balance makes judicial recognition of an independent damage remedy ill advised.

II. A Federal Cause of Action for Damages Under the Fourth Amendment: The Bivens Case

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* the Supreme Court held that the victim of an unconstitu-

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tional search by federal law enforcement officers could recover damages from the officers on a federal claim based directly on the fourth amendment despite the absence of a specific statutorily created cause of action. The federal agents had ransacked Bivens' apartment during a warrantless search, arrested him in front of his family, subjected him to a humiliating personal search and then released him without filing charges. The exclusionary rule, which operates in criminal proceedings to exclude evidence unconstitutionally seized, offered no relief to Bivens because no evidence had been uncovered. Injunctive relief also would have been unavailing since there was no indication that the search was part of a planned pattern of illegal police activity. Thus the only effective remedy for the injury sustained by Bivens was money damages. Recognition in *Bivens* of a damage claim against federal officers was therefore necessary to avoid an inequitable deficiency in the remedial structure of the Constitution.

Justice Brennan began his opinion for the Court by considering whether a federal cause of action may be based on the fourth amendment. The defendants had argued that the right to privacy that Bivens sought to vindicate was a creation of state and not of federal law. Thus, Bivens should have brought a tort suit under state law. When the federal agents raised the defense that they were exercising federal power, Bivens could then use the fourth amendment to demonstrate that their actions exceeded federal power and thus were not legitimized by federal authority. In rejecting this argument, the Court recognized the independent basis of fourth amendment claims.

Justice Brennan invoked two lines of authority to support his conclusion. First, prior decisions of the Court had firmly established that the standards of conduct prescribed by the fourth amendment limited the exercise of federal power in a manner wholly independent of state


23. 403 U.S. at 390.
law. Second, another line of decisions had indicated that federal standards must prevail if state law regulating trespass and the invasion of privacy attempted to allow greater intrusions by federal agents than would be allowable under federal interpretations of the fourth amendment. The same would be true if states attempted to impose more restrictive standards on the exercise of federal authority. From these considerations, the Court concluded that:

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

Having decided that the plaintiff stated a federal cause of action, Justice Brennan turned to a consideration of the power of the federal courts to grant the requested monetary relief. This point did not pose significant difficulties for the Court because it felt that the practice of awarding damages had ample support from the precedents and among the commentators. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." The existence of this judicial power was asserted without explaining either its nature or source. Although the text of the fourth amendment did not expressly provide for its enforcement through money damages, this

24. Among the cases cited by the Court were: Gambino v. United States, 275 U.S. 310 (1927) (New York State police officers enforcing National Prohibition Act acted under color of federal law and were therefore bound by fourth amendment standards); Byars v. United States, 273 U.S. 28 (1927) (evidence obtained from search by federal agent pursuant to a valid state warrant held inadmissible in federal court where search failed to satisfy federal standards); Katz v. United States, 389 U.S. 347 (1967) (standards for electronic surveillance not controlled by local trespass law).


26. The Court here cited In re Neagle, 135 U.S. 1 (1890).

27. 403 U.S. at 395.

28. Among other authorities, the court cited four voting rights cases: Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900). Also cited was Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, (1968). Katz argues that the Constitution created interests in liberty cognizable in law in the same manner as the Magna Carta in England. Just as the Magna Carta became part of the common law, he asserts that the Constitution transformed a political ethic into a recognized legal norm. Tracing the growth of remedies in England to protect these interests in liberty, he argues that the same considerations dictate the creation of adequate remedial mechanisms to guard constitutional interests.

29. 403 U.S. at 395.
remedial power, once asserted, allowed the Court to make good the wrong done.30

The Court’s assertion of the power to award the damages left only the question whether it was appropriate for the Court to exercise the power. In answering affirmatively, the Court first distinguished cases where special factors had caused it to refrain from fashioning a remedy in the absence of congressional guidance.31 Because there were no special factors present counseling hesitation, the question before the Court was straightforward.

Finally, we cannot accept respondents’ formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.32

The Court, reaching back to Marbury v. Madison33 for the notion that the existence of a right implied a remedy, concluded that Bivens could sue for damages on his fourth amendment claim. The criterion for recovery was whether Bivens had actually been injured by reason of a violation of his fourth amendment rights.34

30. 403 U.S. at 396. The Court cited Bell v. Hood, 327 U.S. at 684, for this proposition. The Court in Bell had relied on Dooley v. United States, 182 U.S. 222 (1901), a case brought pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), which provides jurisdiction in the Court of Claims for claims against the United States founded on the Constitution but not sounding in tort. The apparent implication is that the recognition of claims based directly on the Constitution under general federal question jurisdiction enables the federal courts to utilize the judicial power to draft appropriate remedies.

31. The Court cited United States v. Standard Oil Co., 332 U.S. 301 (1947), where it had refused to guard indemnification to the United States for medical expenses incurred in treating a soldier who was struck by a Standard Oil truck. The action was controlled by federal common law, but the Court refused to grant relief because it felt that federal fiscal affairs were particularly within the legislative province. Also cited was Wheeldin v. Wheeler, 373 U.S. 647 (1963), where the Court refused to imply a damage remedy against a congressional employee who exceeded his delegated authority. Because there were no constitutional interests at stake, regulation of congressional subpoena power was solely a matter of congressional concern. These two cases both disclose the judiciary’s reluctance to interfere with areas of particular congressional interest. See generally Note, Remedies for Constitutional Torts: “Special Factors Counselling Hesitation,” 9 Ind. L. Rev. 441 (1976).

32. 403 U.S. at 397.

33. 5 U.S. (1 Cranch) 137 (1803) at 163. It should be noted, however, that the right at issue in Marbury was statutory, not constitutional.

34. The Court left open the issue of defenses or immunities even though this was an alternative ground for the decision in the district court. On remand, the
Thus, while adopting a broad view on the propriety of awarding damages in the case before it, Justice Brennan's opinion contains qualifications that might affect the extension of *Bivens* to other constitutional provisions. The rejection of the necessity test was not absolute, but was accompanied by the cryptic observation that there was no explicit congressional declaration that another remedy, equally effective in its view, must be employed. The implication is that a more stringent standard for the judiciary to follow in fashioning remedies might be required where Congress had designated a different remedial scheme as the exclusive remedy for a particular constitutional provision. Similar treatment might be afforded a congressional remedy that was not expressly designated exclusive. If Congress has grappled with the various competing considerations that affect the choice of remedy, respect for that body's superior fact-finding ability might make judicial addition or substitution of a different remedy inappropriate. On the other hand, there might be situations where a particular remedy may be deemed inseparable from a constitutional provision so that a contrary Congressional determination would be irrelevant or even unconstitutional. The Court's opinion, however, merely raises these possibilities; it does not discuss the content of a necessity test nor does it specify the level of congressional activity which would mandate the higher standard. Nevertheless, the inclusion of these qualifications indicates that a determination of the propriety of a judicial remedy may encompass more than a concern with the existence of an injury.

There are two major faults in Justice Brennan's opinion. First, it inadequately supports the proposition that the fourth amendment may be a source of federal causes of action. Conceding that state law can

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35. One commentator has read this passage to describe the conditions under which the Court should defer to Congressional judgment about remedial provisions. *Dellinger, Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532, 1548 n.89 (1972). He proposes a two pronged test for deciding whether the Court should defer to Congress:

(1) Congress has provided an alternative remedy considered by Congress to be equally effective in enforcing the Constitution, and (2) the Court concludes that in light of the substitute remedy, the displaced remedy is no longer “necessary” to effectuate the constitutional guarantee.

*Id.* at 1549. For a more extensive discussion of the problem of judicial deference to Congress see notes 120-23 and accompanying text *infra*.

36. *Id.* at 1549. *See also Monaghan, The Supreme Court, 1974 Term — Foreword; Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975).

37. *See Dellinger, supra* note 35, at 1548-49.

38. *See notes 95-100 and accompanying text infra*.

neither authorize federal officers to violate the Constitution nor limit the exercise of federal authority, this perception does not necessarily prove that a federal cause of action exists. The problem is not solely a matter of limited state power, but may also depend on other variables such as the framers' intentions or the common law origins of fourth amendment rights. It is necessary to view the Court's conclusion about the interaction of state and constitutional law, however, as a recognition that the Constitution creates rights and obligations independent of all other sources of law. Combining this position with the view expressed in Marbury v. Madison that the existence of a right necessarily implies a remedy for its vindication, the Court concluded that a remedy could be implied directly from the fourth amendment. Thus, while the suggestion that the Constitution has always been viewed as a source of personal rights may have been unwarranted, the thrust of the reasoning is sound.

The other flaw in Justice Brennan's opinion is that it fails to explain the source or scope of the judicial power to imply the damage remedy. The assertion that damages have always been regarded as the ordinary remedy for violations of interests in liberty may be historically accurate, but it discloses little about the nature of the power or its operation. Furthermore, none of the cases cited as precedent for the provision of damages were based solely on the Constitution, but involved statutes as well. As a consequence, the Court's attempt to treat its exercise of the power as a typical instance of a well established practice is ultimately unconvincing. It can be shown that the power exists, but the conclusion seems inescapable that its utilization in this context was virtually unprecedented. Thus, the primary criticism is not that the opinion was wrong, but that attempts to minimize the magnitude of the decision muddled the issues. Given this lack of clarity, Justice Harlan's remarkably lucid concurring opinion is a valuable tool for understanding the principles of Bivens.

Like the majority, Justice Harlan began with a consideration of whether the complaint stated a federal cause of action. He established this

40. It is possible to argue that fourth amendment limitations on the exercise of federal authority are the result of a demand for uniformity in federal law, with the basis of the personal rights itself remaining part of the common law. This common law is necessarily state law by the terms of Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). See Note, Constitutional Tort, supra note 39, at 278.
41. See Katz, supra note 28, at 33-34.
42. 5 U.S. (1 Cranch) 137, 163 (1803).
43. Compare the discussion of these cases in Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1124-25 (1969) with Dellinger, supra note 35, at 1544-45 & n.70. A review of the cases indicates that Dellinger is correct in treating the claims as statutory rather than strictly constitutional.
44. See Dellinger, supra note 35, at 1540-43. Dellinger suggests that the source of judicial authority is the grant of judicial power in article III. Thus, in claiming the authority to create a damage remedy for violations of the fourth amendment, the Court added a new dimension to the meaning of the article III judicial power.
proposition primarily by reference to federal equity practice. In diversity cases, the federal courts seek to approximate the equity practice of the state courts on matters of state law. In nondiversity cases, however, the exercise of federal equitable power depends on the presence of a substantive right derived from federal law. Thus, since the availability in nondiversity actions of equitable relief based directly on the Constitution is firmly established, it necessarily follows that the Constitution must create federally protected interests.

Justice Harlan then cited the prevailing federal practice under various regulatory statutes to explain the Court’s power to provide for damages where Congress had not explicitly authorized it to do so. The Court has frequently implied damage remedies under federal regulatory statutes silent on the subject. Justice Harlan therefore reasoned that nothing about compensatory relief itself precluded the judiciary from fashioning that remedy. He then observed that it would be anomalous if the federal courts were empowered to protect interests created by statute but not those contained in the Constitution. The strength of this comparison, however, is somewhat diluted by the Court’s insistence

45. 403 U.S. at 400.
47. See, e.g., Holmberg v. Armbricht, 327 U.S. 392, 395 (1946); Hart & Wechsler, supra note 4, at 825-32.
49. Harlan also expressed affinity for Professor Katz’s view, supra note 28, at 33-44, that the Constitution is itself the source of the rights asserted. 403 U.S. at 400-01 n.3. But see Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 523-24 (1954).
50. A leading example of this sort of judicial initiative is J.I. Case Co. v. Borak, 377 U.S. 426 (1964), where the Court granted damages to a stockholder claiming violations of the proxy requirements of section 14(a) of the Securities Exchange Act of 1934. Although the statute provided no damage remedy for this particular provision, the Court determined that such relief would further the legislative purposes. See generally, Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

While Borak was ostensibly based on statutory interpretation, the Court’s language suggested that the judiciary enjoyed broad discretion in selecting remedies. More recently, however, the Court has demonstrated an inclination to construe statutes more closely and restrict the implication of damages from regulatory statutes. In Cort v. Ash, 422 U.S. 66 (1975), the Court held that four criteria had to be satisfied before a private cause of action for damages would be implied: (1) the plaintiff had to be one of the intended beneficiaries of the statute, (2) there must be some indication of legislative intent explicit or implicit to create such a remedy, (3) the proposed remedy must be consistent with the underlying purpose of the legislative scheme, and (4) the cause of action must not be one that has been traditionally relegated to state law. This decision does not deny the power asserted in Borak, but it discloses a preference to limit its exercise.
51. See Katz, supra note 28, at 31-33.
when implying damage remedies under regulatory statutes that it is merely determining congressional intent.\textsuperscript{52}

The practice of allowing federal equitable relief against threatened invasions of constitutional interests presented Justice Harlan with a more compelling argument for recognizing the judicial power to imply the damage remedy. Recognition of broad equitable powers enjoyed by the federal courts dates back to the beginning of the Republic.\textsuperscript{53} Equity practice has developed along liberal lines,\textsuperscript{54} yet there has never been any explicit congressional action authorizing the use of equitable remedies to protect constitutional interests. By parity of reasoning, Justice Harlan concluded that because the general federal question jurisdiction allowed a federal court to grant equitable relief in any case within that jurisdiction, the same jurisdictional statute should suffice to permit a federal court to utilize traditional legal remedies. While there are differences between the operation of legal and equitable remedies, Justice Harlan's comparison seems apt. There is but one source — article III — for the judicial power to fashion both legal and equitable remedies.\textsuperscript{55} Once Congress extends jurisdiction over a category of cases, no further authorization is required to invoke the operation of the judicial power. By focusing on the federal courts' power to fashion equitable relief under a grant of article III jurisdiction, Justice Harlan placed consideration of the judicial power over remedies in proper context. The power to award damages derives from the judiciary's control over cases within its jurisdiction, coupled with the fact that damages have historically been an ordinary remedy. Thus, Justice Harlan clarified the constitutional source of the Court's authority to administer remedies, a point which the majority neglected in its discussion of judicial power.

Having determined that the power to grant the damage remedy exists, Justice Harlan next considered the appropriateness of exercising this power. In implying remedies under federal statutes, the Court had

\textsuperscript{52} This is particularly true of the Court's latest foray into this area in \textit{Cort v. Ash}, discussed in note 50 \textit{supra}, which emphasized the statute and its legislative history. This marks a definite retrenchment from the more liberal view espoused in \textit{Borak}.

\textsuperscript{53} The Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93-94, provided that "the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law." This was modified by the Second Congress, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275-76, to provide that the forms and modes of proceedings were to be "according to the principles, rules and usages which belong to courts of equity, . . . as contradistinguished from courts of common law; . . . subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."

\textsuperscript{54} See Hart \& Wechsler, \textit{supra} note 4, at 664-65; Wright, \textit{supra} note 19, at § 61.

employed a "necessary or appropriate" standard. A remedy would be implied if necessary or appropriate to effectuate the congressional policies embodied in the statute. The defendants had argued that when the Constitution is involved a higher standard — "essentiality" — is required because it is uncertain whether Congress has the power to modify judicial choices. Justice Harlan found this contention unconvincing. A stringent standard like "essentiality" was unacceptable given the "particular responsibility" of the federal courts to vindicate the constitutional interests embraced in the fourth amendment and in the Bill of Rights generally, which was designed to protect the individual from legislative majorities. Instead, the question was whether compensatory relief was "necessary" or "appropriate." While these words lack precision, Justice Harlan clearly envisioned a balancing process that would take account of the various policy considerations germane to a decision on the appropriateness of a remedy. The power of the courts implied a duty to make principled choices among traditional judicial remedies.


57. See Dellinger, supra note 35, at 1546-47. When the courts imply remedies under federal statutes, congressional modification is easily accomplished by statutory amendment. Where the Constitution is involved, the question of modification becomes murkier. One possible resolution is suggested by Monaghan, supra note 36, who would classify certain judicial determinations about remedies as constitutional common law. According to his analysis, judicial policy determinations regarding implementation of the Constitution should not be considered binding constitutional determinations, but instead should be used to open a dialogue with Congress in order to arrive at the proper policy choice. The courts should take the initiative, however, so that inertia would be on the side of remedies for constitutional rights. Id. at 26-30. Justice Harlan expressed no view on this question of congressional authority to overturn judicially fashioned remedies. 403 U.S. at 407 n.7.

58. 403 U.S. at 407. With respect to judicial responsibility for vindicating constitutional rights, the addition of general federal question jurisdiction in 1875 was the watershed. As a result of this jurisdictional change, the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928).

59. For instance, how does Justice Harlan's use of "necessity" differ from Justice Brennan's? See notes 91-92 and accompanying text infra.

60. Such balancing of different policy considerations is typical of the Court's conduct in many areas. Monaghan, supra note 36, has suggested that many of the Court's decisions that purport to effectuate the Constitution are best explained as manifestations of constitutional common law. Rather than being authoritative constitutional interpretations, Monaghan assigns such decisions to a sub-strata of substantive, procedural, and remedial rules that draw their inspiration from the Constitution but are not required by it. He suggests that such common law decisions should be clearly identified as such so as to invite congressional participation in the determination of the appropriate policy for implementation of constitutional provisions. Id. at 1-26.

61. 403 U.S. at 408 n.8 (Harlan, J., concurring).
In assessing the appropriateness of according Bivens compensatory relief, Justice Harlan noted that the decision did not depend solely on the deterrent effect of imposing liability, but might instead be based wholly on the need for compensation. Another significant factor was the nature of the plaintiff's injury and its susceptibility to normal legal analysis in terms of causation and measurement of injury; judicial familiarity with the interests protected by the fourth amendment obviated this concern in Bivens, but the interests protected by other constitutional provisions might present difficulties. The desirability of a uniform rule to govern all federal officers was also a favorable factor. The only substantial policy consideration discerned by Justice Harlan that counseled against implication of a damage remedy was the possible strain on judicial resources. Thus, Justice Harlan resolved the problem of appropriateness by balancing the various factors relating to the provision of the remedy. No single factor was determinative, but the clear need for compensation and the absence of significant countervailing considerations mandated the provision of damages. This result parallels the majority's conclusion that the need for compensation was compelling. Justice Harlan's approach is more satisfactory, however, because it recognizes the relevance of factors other than the existence of an injury, thus rendering itself more responsive to the possible complexities of extending Bivens to other constitutional provisions.

III. Extension of Bivens Within the Bill of Rights and to the Fourteenth Amendment

Although the claim in Bivens involved only the fourth amendment, the Court's reasoning and that of Justice Harlan are equally applicable to other provisions within the Bill of Rights. Once the notion that the Constitution creates federally protected interests is accepted, it is easy to conceive of causes of action arising from a federal officer's interference with protected first amendment expression or infliction of cruel and unusual punishment. It is also clear that judicial power to fashion damage remedies extends beyond the fourth amendment. A few courts have read Bivens to be narrowly confined to the fourth amendment, as follows:

62. Id. at 409 n.9.
63. 403 U.S. at 410. Although Harlan discounted the possibility of harm, Justice Black foresaw substantial dangers. 403 U.S. at 428–29 (Black, J., dissenting).
but such an interpretation ignores the reasoning of the majority opinion as well as Justice Harlan’s compelling analysis. The more common view has been to recognize Bivens’s applicability to other interests within the Bill of Rights. Thus, damage actions have been recognized for claims arising under the first, fifth, sixth, and eighth amendments.

Curiously, the analysis in these cases has drawn heavily on the parallel between actions against federal officials under the Bivens doctrine and actions against state officials under section 1983. In considering whether a damage remedy would be appropriate in a particular situation, the courts have emphasized the availability of similar relief against state officials. For example, in Paton v. LaPrade, a case involving an intrusion on first amendment rights by federal agents, the Third Circuit reasoned that:

[b]ecause a Bivens-type cause of action is the federal counterpart to claims under 42 U.S.C. § 1983, we believe that standards for determining injuries developed in § 1983 litigation are applicable in this context.

The analogy seems sensible because the Bill of Rights imposes many of the same constraints on federal agents that the fourteenth amendment, through incorporation, exerts on state officers. Utilization of Bivens with respect to other provisions in the Bill of Rights thus ensures that the victim of unconstitutional conduct has a federal damage remedy available regardless of whether the perpetrator was a federal or state officer. But while the parallel with section 1983 supports the legitimacy of extending Bivens to other constitutional violations by federal officers, it is of little value when the attempt is to apply Bivens to fourteenth amendment

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F.2d 556, 562 n.13 (D.C. Cir. 1975); Cardinale v. Washington Technical Institute, 500 F.2d 791, 796 n.5 (D.C. Cir. 1974); Wahba v. New York University, 492 F.2d 96, 103-04 (2d Cir. 1974).

67. For examples of the influence of Justice Harlan’s concurrence, see Paton v. LaPrade, 524 F.2d 862, 870 (3d Cir. 1975); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974).


72. See, e.g., Paton v. LaPrade, 524 F.2d 862, 871 (3d Cir. 1975).

73. Id.

74. 524 F.2d 862 (3d Cir. 1975).

75. Id. at 871.
claims involving state action. If section 1983 delineates the scope of liability for violations of the fourteenth amendment, it cannot support the implication of additional remedies against municipalities, which are excluded from its coverage.

While the Bill of Rights restrains the conduct of the federal government, the fourteenth amendment is addressed to the states. Both are concerned with individual rights, however, and most of the substantive provisions of the Bill of Rights have been incorporated into the fourteenth amendment through the due process clause. If the Bill of Rights is a source of federally protected interests, the same should be true for the fourteenth amendment. Support for this conclusion can be derived from cases granting relief against unconstitutional taking of property. Thus, it seems clear that the fourteenth amendment may be the source of a federal cause of action.

Judicial power to create a damage remedy under the fourteenth amendment also seems settled after Bivens. Analysis of Bivens discloses that the source of that power is article III. The only limit on the exercise of that power imposed by the text of the Constitution is the requirement that the court have jurisdiction. The general federal question jurisdiction covers fourteenth amendment claims as well as fourth amendment ones. In Bivens, the Court had reasoned that because judicial power to select damage remedies had been established by the experience with regulatory statutes and equitable remedies had already been provided for constitutional interests, nothing in either the nature of the remedy or of the interest to be protected restrained the exercise of the power. This same analysis applies to the fourteenth amendment; there are numerous instances in which equitable relief has been provided to protect fourteenth

78. See notes 48-49 and accompanying text supra.
79. Griggs v. Allegheny County, 369 U.S. 84 (1962); Mosher v. City of Phoenix, 287 U.S. 29 (1932); Chicago B. & O. R.R. v. City of Chicago, 166 U.S. 226 (1897). The case law has paralleled fifth amendment taking cases except jurisdiction is predicated on § 1331 federal question jurisdiction rather than the Tucker Act. See Jacobs v. United States, 290 U.S. 13 (1933). The cases seem to assume that the existence of remedies for the taking clause is self-apparent and so both equitable and compensatory remedies have been provided against municipalities without the detailed scrutiny undertaken by the Court in Bivens. See Sayre v. City of Cleveland, 493 F.2d 64, 69-70 (6th Cir. 1974); Miller v. County of Los Angeles, 341 F.2d 964, 966 (9th Cir. 1965); Foster v. Herly, 330 F.2d 87, 90-91 (6th Cir. 1964); Amen v. City of Dearborn, 363 F. Supp. 1267, 1270 (E.D. Mich. 1973). While many of these cases pre-date Bivens, they are limited authority for the extension of Bivens to fourteenth amendment claims generally because the self-executing nature of the taking clause makes it sui generis among constitutional provisions. See Dellinger, supra note 35, at 1542 & n.58.
80. See note 44 supra.
amendment interests. Even those courts that refuse to apply Bivens to the fourteenth amendment recognize their power to grant the relief, resting their decisions instead on considerations of appropriateness. The crucial factor, therefore, is whether a damage remedy against a municipality founded on the fourteenth amendment is appropriate.

IV. Damage Remedies and the Constitution

In the broad array of situations in which deprivations of constitutional rights may occur, the manner in which different remedies will relate to the constitutional interests involved will vary significantly. A remedy may be absolutely essential in the sense that a denial of the remedy causes a constitutional deprivation. For example, refusal to exclude a confession obtained through official coercion violates a criminal defendant's fifth amendment privilege against self-incrimination. Other remedies seek to deter future deprivations of constitutional rights. Deterrence may be accomplished through injunctive relief, criminal sanctions, exclusionary rules that eliminate incentives for engaging in unconstitutional conduct, or damages. Injunctions and other equitable remedies may also serve to institute broad social changes necessary to secure constitutional rights. Finally, a remedy may simply attempt to compensate the victim for injuries suffered through past deprivations of his constitutional rights. These different levels on which remedies operate to give content to constitutional rights are significant because they provide a general perspective for evaluating a court's selection of a remedy in a particular instance.

Determination of the appropriateness of allowing a remedy obviously involves a complex decision-making process. Variables include the right violated, the remedy requested, the availability of other remedies, and the level of Congressional activity with respect to providing remedies in the area. This difficult task has been further complicated by a tendency to mix labels. In Bivens Justice Brennan disclaimed a standard requiring that a remedy which had not been explicitly rejected by Congress must

83. See cases cited in notes 9–10 supra.
85. E.g., Ex parte Young, 209 U.S. 123 (1908).
86. E.g., Screws v. United States, 325 U.S. 91 (1945).
88. See authorities cited note 18 supra.
89. For example, injunctions have been employed to remedy equal protection violations in school desegregation cases. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
still be "necessary" for the enforcement of a constitutional provision for it to be recognized by the courts.\textsuperscript{91} Justice Harlan, on the other hand, phrased the test as whether compensatory relief was "necessary" or "appropriate," rejecting a more stringent standard of "essentiality."\textsuperscript{92} Both Justices use the word "necessary," but their intentions vary; Justice Brennan's "necessary" seems akin to Justice Harlan's "essentiality," while Justice Harlan's "necessary or appropriate" seems to denote a more flexible, less stringent standard.\textsuperscript{93}

Despite the lack of precision in the labels used, \textit{Bivens} suggests two possible standards for assessing the validity of a judicially fashioned damage remedy against municipalities. If section 1983 is treated as an exclusive congressional remedy, the first test would require the plaintiff to show that a damage remedy against municipalities was essential for enforcing the fourteenth amendment. If section 1983 is taken as not controlling, the other approach would follow Justice Harlan's suggestion and balance the policy considerations favoring recognition of the remedy with opposing factors to determine the appropriateness of the remedy. These approaches will be evaluated with reference to \textit{Bivens} and general principles of judicial involvement in the fashioning of remedies.

Some courts and commentators have read the majority opinion in \textit{Bivens} to hold that once Congress has provided an exclusive remedy for a constitutional provision, the courts should not substitute an alternative unless they deem it to be essential\textsuperscript{94} for the vindication of that in-

\begin{itemize}
\item \textsuperscript{91} See notes 35–38 and accompanying text \textit{supra}.
\item \textsuperscript{92} See notes 58–61 and accompanying text \textit{supra}.
\item \textsuperscript{93} One may contrast this ambiguity with the clarity of Justice Marshall's discussion of the meaning of "necessary and proper" in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat) 316, 413-15 (1819).
\item \textsuperscript{94} The Court's decisions in the criminal procedure area indicate that a remedy is essential where its absence threatens to render illusory the rights guaranteed by a constitutional provision. In \textit{Mapp v. Ohio}, 367 U.S. 643, 655 (1961), the Court determined that application of the exclusionary rule in state criminal trials was necessary to prevent the fourth amendment from becoming a mere "form of words." The exclusionary rule was thus linked to the underlying values of privacy embodied in the fourth amendment. Recent treatment of the exclusionary rule, however, has discounted such claims of the rule's importance and cast doubt on its continued "essentiality" in the constantly shifting landscape of the Constitution. \textit{See} Wolff \textit{v. Rice}, 96 S. Ct. 3037, 3046-49 (1976); \textit{United States v. Calandra}, 414 U.S. 338 (1974).
\end{itemize}

The precise nature of the exclusionary rule has never been satisfactorily established. At times the Court has appeared to view it as merely one remedy among many, Wolff \textit{v. Colorado}, 338 U.S. 25, 28 (1949), while on other occasions it has been linked directly to the Constitution, \textit{Mapp v. Ohio}, 367 U.S. 643, 649 (1961). Those who ascribe constitutional status to the exclusionary rule emphasize its relation to the values of privacy which the fourth amendment embodies and the need to prevent the government from reaping the benefits arising from the unconstitutional conduct of one of its officials. \textit{See} Schrock & Welsh, \textit{Up From Calandra: The Exclusionary Rule as a Constitutional Requirement}, 59 MINN. L. REV. 251, 271-83 (1974). The current movement of the Court seems to be away
This position reflects the view that the Court should not supplant a congressional determination of remedial policy unless the Court's interpretation of the Constitution requires a different choice. In this sense, a finding of essentiality would constitute a "true" constitutional decision binding on the legislature, rather than an instance of constitutional common law. Thus, assuming the remedy already provided by Congress in section 1983 was intended to be exclusive, the stringent essentiality standard for judicially fashioned remedies is arguably applicable to fourteenth amendment claims.

The assumption, however, appears to be unwarranted. In matters of constitutional rights, statutory preclusion of the judiciary from the remedial sphere requires, at least, a showing that Congress actually intended such exclusion. This doctrine, labelled the "policy of clear statement," is not satisfied in the case of section 1983: the statutory language does not disclose any congressional intent to foreclose the judiciary from acting outside the statutory scheme. Thus, a standard that required a showing of essentiality would seem to be inappropriate. Given the from this conception of the exclusionary rule as an essential component of the fourth amendment. Recent cases discuss the rule in terms of its deterrent capabilities, rather than addressing it as a personal constitutional right. See United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338, 348 (1974). If it is true that the exclusionary rule is only a judicially fashioned remedy distinct from any constitutional right, one may question the Court's authority to impose the rule on the states. Monaghan suggests that this paradox can only be explained in terms of the Court's general common law approach to protecting individual constitutional rights. See Monaghan, supra note 36, at 8-10.

95. Clipper v. City of Takoma Park, Civil No. 73-295-B (D. Md., March 25, 1975) at 19, Perry v. Linke, 394 F. Supp. 322 (N.D. Ohio 1974); Dellinger, supra note 35, at 1548-49. Because Justice Brennan's reference to situations where Congress had provided a remedy was phrased as a disclaimer and not as a positive assertion, however, it is impossible to extract with any certainty such a mechanistic test from the language of Bivens. 403 U.S. at 397.

96. See the discussion in notes 57 and 60 on the distinction drawn by Professor Monaghan between "true" constitutional decisions and constitutional common law.


98. See Note, Damage Remedies, supra note 7, at 944.

99. If a court should find that section 1983 fulfills the "clear statement" requirement, however, it is doubtful that the damage remedy would satisfy a standard of essentiality. Damages serve a dual remedial function of providing compensation for injuries inflicted and deterring future wrongful conduct. See Schrock & Welsh, supra note 94, at 314. Damages relate to the operation of the right in the legal system, not to the substantive elements of the right. Unlike the features of the exclusionary rule which bind it to notions of privacy embraced by the fourth amendment, see id. at 271-88, damages remain distinct from the substantive content of the constitutional rights. See generally id. at 314-19. For example, while fourteenth amendment due process requires some kind of hearing in connection with governmental action that inflicts injury, nothing in the fundamental nature of due process requires that damages be provided if a hearing is denied. Thus, the crucial
problems in ascertaining essentiality and the traditional judicial role in protecting individual constitutional rights, a more flexible approach is desirable in the absence of explicit congressional preclusion.100

The balancing test utilized by Justice Harlan to determine the "appropriateness" of a remedy provides this flexibility by considering appropriateness in terms of a whole range of policy considerations. If a remedy satisfies a standard of essentiality, it must be because it is of constitutional stature;101 if all implied remedies must meet this standard, it follows that before it is appropriate for the court to imply a remedy, that remedy must be held to be required by the Constitution. Under a balancing test, judicial decisions on remedies are less august. It has been suggested that they contribute to a body of constitutional common law intended to implement the Constitution, but not required by it.102

Unlike decisions of constitutional stature, this constitutional common law should be subject to congressional review and modification. The development of this common law is characterized by judicial weighing of relevant policy considerations.

Applying Justice Harlan's formula in the context of the fourteenth amendment, a court must balance the need to recover damages from municipalities against any negative ramifications such a remedy would have beyond the remedial sphere. One argument for creating a damage remedy is that section 1983 lacks sufficient deterrent force because its immediate impact is limited to the perpetrator of the unconstitutional action. Consequently, there is no pressure on the governmental entities that confer authority on such persons to institute systemic changes designed to eliminate patterns of unconstitutional behavior.103 Allowing recovery directly from the municipality for the constitutional torts of its employees would change this situation; the treasury would become an advocate for reform. There is no concrete evidence, however, that increased deterrence would actually result from municipal liability.104

nexus between right and remedy that forms the basis of "Mapp-type linkage" is missing.

100. See Hill, supra note 43 at 1153; Monaghan, supra note 36, at 18-19.
101. See Monaghan, supra note 36, at 24 & n.125.
102. As Monaghan persuasively demonstrates, the product of the Court is best described as constitutional common law arising from judicial policy determinations as to the best way to implement the Constitution. It is the only satisfactory explanation of the Court's behavior in many cases. See generally Monaghan, supra note 36, at 1-26.
103. See Williams v. Brown, 398 F. Supp. 155, 159 (N.D. Ill. 1975); K. Davis, ADMINISTRATIVE LAW TREATISE 864 (1970 Supp.). The assumption is that imposing liability on the governmental entity will encourage it to devote greater attention to the training and supervision of its employees. Once the public fisc is brought into play, the municipality will be less willing to tolerate costly misbehavior, and preventive programs will be the probable response. See also Comment, Equal Protection, supra note 5, at 1158-60; Kates & Kouba, supra note 5, at 140-41.
While in *Mapp v. Ohio*\(^{105}\) the Court did not require proof of actual deterrence before applying the exclusionary rule, it has become increasingly hesitant to exercise such intuitive judicial policy making.\(^{106}\)

The limitation of section 1983 actions to "persons" also forms the basis for an attack on the adequacy of the compensation afforded by that section to the victims of unconstitutional conduct. The argument is that the presumed limited financial resources of the average municipal employee tend to make him judgment proof.\(^{107}\) If true, this deficiency would seriously undermine the efficacy of the statutory scheme.\(^{108}\) The weight to be accorded this problem, however, depends on its scope; section 1983 defendants may as a class be judgment proof, or there may be just scattered instances when plaintiffs can not satisfy their judgments. While the assertion of financial inadequacy seems intuitively correct, the lack of empirical data makes precise evaluation impossible.\(^{109}\)

Turning to the other side of the analysis, it is necessary to ascertain if there are any "special factors counseling hesitation."\(^{110}\) One consideration arguing against recognition of a damage remedy against municipalities is federalism. Most of the courts that have refused to extend *Bivens* to cover fourteenth amendment claims identify federalism as a distinguishing characteristic.\(^{111}\) Because *Bivens* only addressed the liability of federal officers under the fourth amendment, considerations of federalism were absent. Where a federal court is asked to award damages against a local governmental entity, however, considerations of federalism are directly at issue. The theory is that our system seeks a wide dispersion of power and that any tendency toward undue concentration of power in the national government is to be resisted.\(^{112}\) Because state courts are obligated to hear

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110. 403 U.S. at 396 (Harlan, J., concurring).
federal claims based on the Constitution, the theory continues, there is little need for a federal damage remedy.\footnote{113}

Moreover, to the extent that the section 1983 remedy proves unsatisfactory, a litigant may resort to state remedies against municipalities. Given the erosion of the doctrine of sovereign immunity, state damage remedies against municipalities have become commonplace.\footnote{114} If pendent party jurisdiction were available, a federal court might entertain both a section 1983 claim against a municipal employee and a related state claim against his municipal employer.\footnote{115} In Aldinger v. Howard,\footnote{116} however, the Supreme Court ruled that pendent party jurisdiction was not available in a section 1983 action to join a municipality sued on a state claim. Recovery on a state cause of action would therefore entail a separate lawsuit. Since maintenance of separate actions would burden a litigant\footnote{117} without significantly advancing the dispersion of power theory of federalism, the existence of state causes of action against municipalities should not impede recognition of a federal claim.

state and federal governments. In Comment, \textit{Theories of Federalism and Civil Rights}, 75 \textit{Yale L.J.} 1007 (1966), the author suggests an alternative theory of federalism, labeled "federalist," in which he argues that the federal government should intervene in state affairs when a certain minimum of political freedom and individual liberty is threatened. \textit{See also} Monaghan, \textit{supra} note 36, at 19.

113. \textit{See} Ward v. Board of County Comm'rs of Love County, 253 U.S. 17 (1920); \textit{Hill, supra} note 43, at 1114–16 & n.29.


115. Generally, a claim is said to be within the pendent jurisdiction of the federal courts when (1) it is joined in the same complaint to another substantial claim that independently meets the statutory requirements for federal jurisdiction and (2) it arises from the same "nucleus of operative fact" as that of the federal claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); C. Wright, A. Miller & E. Cooper, \textit{Federal Practice and Procedure} § 3567, at 443-45 (1975).

Adding a state claim against a municipality to a section 1983 claim against a municipal employee would involve a pendent party as well as a pendent claim. The issue was before the Court in Moor v. County of Alameda, 411 U.S. 693 (1973), in the form of a state claim against the county based on the California Tort Claims Act, but the question was not resolved. Instead, the Court upheld the lower court's exercise of discretion in refusing to accept the pendent claim because of the uncertainty and complexity of state law on municipal liability. \textit{Id.} at 715–17. The Supreme Court returned to the question in Aldinger v. Howard, 96 S. Ct. 2413 (1976), ruling that Congressional exclusion of municipalities from the liability of section 1983 constituted an implied hostility to bringing municipalities back into federal court as defendants on state claims. Pendent party jurisdiction was therefore not available in section 1983 actions brought under the jurisdictional provision of 28 U.S.C. § 1343(3). For an excellent discussion of the law of pendent party jurisdiction in federal question cases as it existed prior to Aldinger, see \textit{Note, Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs — Federal Question and Diversity Cases}, 62 \textit{Va. L. Rev.} 194, 208–17 (1976).


Recognition of federal monetary claims against municipalities may alter the operation of municipal governments, but, to the extent that the changes reflect constitutional values, they should not be objectionable. The municipality has a choice; it can simply pay damages or use its money to institute systematic changes designed to eliminate constitutional deprivations. Furthermore, the availability of equitable relief to enforce the fourteenth amendment contradicts concern over interference with local government. The complex plans imposed by the judiciary in efforts at school desegregation\(^{118}\) demonstrate that federalism can tolerate intervention in local affairs far beyond any threat posed by money damages.

The possibility of conflicting congressional determinations as to the propriety of making municipalities liable for injuries caused by violations of the fourteenth amendment presents a more substantial obstacle to the extension of \textit{Bivens}. While the policy of clear statement\(^{119}\) makes only an explicit determination by Congress dispositive of the question, a less-than-clear statement would also seem to have some lesser weight in Justice Harlan’s balancing process. In our governmental structure, Congress has primary responsibility for the formulation of general social policy; it enacts legislation to achieve a broad spectrum of national objectives, while the Supreme Court is limited to the adjudication of cases and controversies.\(^{120}\) Given this allocation of functions, judicial deference to congressional policy determinations is often desirable.\(^{121}\)


\(^{119}\) See notes 97–99 and accompanying text supra.


\(^{121}\) For example, in Brown v. General Services Administration, 96 S. Ct. 1961 (1976), the Court held that a precisely drawn, detailed statute pre-empted more general judicial remedies. \textit{Id.} at 1968–69. See Yaks v. United States, 321 U.S. 414, 441–42 (1944), which recognized the power of Congress in implementing the Emergency Price Control Act to proscribe the issuance of interlocutory injunctions.

What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. \textit{Id.} at 441–42. Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975). In \textit{Alyeska}, the Court ruled that federal courts could not use their equitable power to award attorney’s fees on a private attorney general theory without express congressional authorization. \textit{Id.} at 254–69. While attorneys’ fees are not truly remedies, they may play an important role in encouraging private parties to vindicate statutory and constitutional interests. See Note, \textit{A Giant Step Backwards: Alyeska Pipeline Service Co. v. Wilderness Society and its Effect on Public Interest Litigation}, 35 Mo. L. Rev. 675, 692–96 (1976). Although the Court’s use of existing statutes on fees to justify its decision is open to criticism, its concerns about the propriety of imposing a judicial solution to a problem beset with complex policy considerations
is better equipped to make determinations on complex matters of "legislative fact" and has a wider range of remedies available to it.\textsuperscript{122} The representative character of Congress also makes it a more appropriate forum for reconciling competing interests.\textsuperscript{123} Where judicial action is directed toward the fashioning of constitutional common law rather than "true" constitutional decisions, deference to the superior policy-making abilities of Congress is particularly appropriate. Before imposing such constraints on judicial action, however, it is necessary to determine whether contrary congressional determinations counseling judicial restraint actually exist.

In the fourteenth amendment context, this entails an examination of section 1983. Enacted pursuant to section five of the fourteenth amendment,\textsuperscript{124} section 1983 provides a right to relief against all persons acting under color of state law who deprive others of constitutional or federal rights. Since section five vests Congress with the authority to pass legislation to enforce the fourteenth amendment, it is arguable that this arrangement favors judicial deference to congressional determinations about the proper remedial approach for realizing the interests of the amendment.\textsuperscript{125} The precise scope of section five has not been clearly delineated, but existing judicial pronouncements indicate that the grant of power is extensive.\textsuperscript{126} Discussing section five in \textit{Ex parte Virginia}\textsuperscript{127} the court noted:

\begin{quote}
All of the amendments derive much of their force from this latter provision. It is not said the \textit{judicial power} of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to \textit{enforce} the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State
\end{quote}


For a discussion of the judiciary's fundamental weakness as a policy making institution and the relevance of that weakness to the constitutional structure of government, see A. Bickel, \textit{The Supreme Court and the Idea of Progress} 175–81 (1970).


\textsuperscript{123} \textit{See} Note, \textit{Damage Remedies, supra} note 7, at 949.

\textsuperscript{124} U.S. Const. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

\textsuperscript{125} \textit{See The Supreme Court, 1972 Term}, 87 Harv. L. Rev. 1, 261 & n.51 (1973).


\textsuperscript{127} 100 U.S. 339, 345–46 (1880).
denial or invasion, if not prohibited, is brought within the domain of congressional power.

Given this explicit textual designation of congressional responsibility for the enforcement of the fourteenth amendment, it would seem that congressional rejection of a proposed remedy deserves additional weight in the balancing process.

These concerns are significant because in Monroe v. Pape,\(^{128}\) a damage action against the city of Chicago and some of its police officers for violations of fourth amendment interests incorporated into the fourteenth amendment, the Court ruled that the term "person" in section 1983 did not include municipalities.\(^{129}\) This conclusion stemmed from a reading of the legislative history that disclosed extreme congressional hostility to the notion of municipal liability. Toward the close of debates on the 1871 civil rights legislation, Senator Sherman introduced an amendment making municipalities strictly liable in damages for injuries suffered by reason of unconstitutional conduct within their boundaries.\(^{130}\) The


\(^{129}\) Id. at 187–92.

\(^{130}\) As originally passed by the Senate, the amendment read:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising any such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish; and execution may be issued on a judgment rendered in such suit, and may be levied upon any property, real or personal, of any person in said county, city, or parish; and the said county, city, or parish may recover the full amount of said judgment, cost, and interest from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction.

Cong. Globe, 42d Cong., 1st Sess. 704 (1871) (emphasis added). An amended version read:

[A]ny payment of any judgment, or part thereof unsatisfied, recorded by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the
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House twice defeated this proposal by resounding margins. From this vote and the accompanying debate, the Monroe court reasoned that Congress could not have meant to include municipalities in the class of "persons" covered by section 1983.131

The Supreme Court reaffirmed this view of the legislative history in Moor v. County of Alameda.132 Moor involved a damage action against a municipality for the unconstitutional conduct of its police. The plaintiffs argued that 42 U.S.C. § 1988133 allowed a federal court to entertain a claim based on state law providing for municipal liability because the exclusion of municipalities from section 1983 made that remedy inadequate. The Court, speaking through Justice Marshall, ruled that section 1988 could not be used to accomplish what Congress refused to do in section 1983.134 Although the opinion may be read narrowly to address only

treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

Id. at 749 (emphasis added).

131. The House's reaction to Senator Sherman's amendment focused on the deleterious impact on local treasuries of such liability and on the feeling that Congress should not interfere with local government to such a great extent. See the remarks of Representative Poland, CONG. GLOBE, 42d Cong., 1st Sess. 800-01 (1871) [hereinafter cited as 42 CONG. GLOBE]; Id. at 795 (remarks of Representative Blair).

The Court concluded:

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.


132. 411 U.S. 693 (1973). See also City of Kenosha v. Bruno, 412 U.S. 507 (1973). The dispute in Bruno arose from the city's denial of liquor license renewals to tavern owners who had permitted nude dancing in their taverns. The owners sought injunctive and declaratory relief under section 1983, claiming that the city's failure to provide adversary hearings prior to the decision not to renew denied them due process. The Court ruled that the meaning of "persons" in section 1983 could not depend on the type of relief sought.


134. 411 U.S. at 710. Similarly, in Aldinger v. Howard, 96 S. Ct. 2413 (1976), the Court ruled that the refusal of Congress to authorize suits against municipalities under section 1983 precluded the exercise of pendent party jurisdiction to reach municipalities sued on state claims. Id. at 2421. See note 141 infra.
the scope of section 1988, the Court relied extensively on the legislative history used by the Monroe Court to explain the scope of section 1983. As Justice Marshall observed:

[T]he very issue here is ultimately what Congress intended federal law to be, and, as petitioners themselves recognized, Congress did not intend, as a matter of federal law, to impose vicarious liability on municipalities for violations of federal civil rights by their employees.

Those who advocate recognition of municipal liability discount legislative history as an interpretive tool, dismissing the device as arbitrary and unreliable. Beyond this general attack, they criticize Monroe's treatment of section 1983's legislative history; their view of the legislative history stresses three aspects of the circumstances prevailing in 1871 that undercut the contemporary validity of the Court's version. First, they observe that sovereign immunity occupied such an established place in the American legal system in 1871 that Congress mistakenly doubted its power to abrogate the doctrine. Second, they contend that because municipalities had not yet begun to assume localized police functions in 1871, Congress felt it would be unreasonable to impose liability upon them for failure to perform law enforcement duties that were not theirs to perform. Third, it is pointed out that the Sherman amendment sought to impose blanket liability for all acts committed within a jurisdiction, especially acts by non-official groups like the Ku Klux Klan; it did not address the respondeat superior variety of liability presented by the current group of cases.

135. Note, Damage Remedies, supra note 7, at 941.

136. 411 U.S. at 710 n.27.

137. See Kates & Kouba, supra note 7, at 135; Note, Developing Governmental Liability, supra note 7, at 1206.

138. See, Comment, State Equal Protection Liability, supra note 5, at 1166-67; Note, Damage Remedies, supra note 7, at 947-48. The argument is that Congressional reluctance to impose liability reflected a desire to avoid interference with the established state law concept of sovereign immunity. To the extent that this doctrine has been eliminated, however, this reason no longer applies and so the supposed hostility to municipal liability should be discounted.

139. See Kates & Kouba, supra note 5, at 134-35; Note, Damage Remedies, supra note 7, at 948. According to this view, the opponents of liability felt that such a measure would force the states to adopt a more structured approach to local law enforcement. They denounced such a result as inconsistent with traditional principles of federalism. Since municipal police departments are now the norm in the United States, it is suggested that such concerns about the possibility of massive structural changes are no longer relevant. Kates & Kouba, supra note 5, at 140-41. Still, because proponents of a damage action based directly on the fourteenth amendment expect that it will change the operating procedures of local governmental units, the contrary view that favors local autonomy remains important.

140. See Kates & Kouba, supra note 5 at 136; Note, Developing Governmental Liability, supra note 5, at 1205-06; Comment, Suing Public Entities, supra note 5, at 118-19; Note, Damage Remedies, supra note 7, at 948. This view seeks to limit the congressional hostility perceived by the Court in Monroe to just that type of
These dissenting views must overcome Supreme Court pronouncements that are clearly to the contrary. Although it is true that legislative history is a malleable device, when the Court repeatedly utilizes such history to explain a statute, the device becomes more rigid.\textsuperscript{141} Consistency in statutory interpretation is desirable unless the Court's view is shown to be factually erroneous. The decision in \textit{Monroe} was the product of an extensive study of the legislative history. The Court was aware of the policy considerations favoring municipal liability and the possibility of congressional misapprehensions about its power to impose liability, yet it found congressional antagonism to be so unmistakable that other interpretations were impossible. Moreover, the congressional debates ranged beyond the question of power and denunciations of strict liability. They expressed concern for the financial strain on municipal treasuries\textsuperscript{142} and the inadvisability of interference with the operation of local governments.\textsuperscript{143} Recent scholarship suggests that exclusion of municipalities represented a deliberate choice by Congress to limit the remedies of the Civil Rights Act of 1871 to individuals rather than governmental entities.\textsuperscript{144} Since there is ample support in the legislative record for the Court's view, it should prevail.

blanket liability contained in the Sherman amendment. Having established that proposition, it can be argued that vicarious liability should be treated like the question of equitable relief; since Congress is silent, there are no barriers to judicial action.

141. The recent decision in \textit{Aldinger v. Howard}, 96 S. Ct. 2413 (1976), is illustrative of the Court's disinclination to freshly scrutinize legislative history that it has reviewed on a previous occasion. In \textit{Aldinger}, the Court ruled that the grant of jurisdiction in section 1343 did not authorize the exercise of pendent party jurisdiction in a section 1983 action to include a municipality sued under state law. See notes 116-17 and accompanying text \textit{supra}. The Court explained this outcome by reference to the established legislative history of congressional hostility to municipal liability. 96 S. Ct. at 2421. It reasoned that the congressional hostility that caused the exclusion of municipalities from the coverage of section 1983 also constituted an implicit refusal to expand federal jurisdiction to reach municipal defendants. \textit{Id.} Although Justice Brennan's dissent contended that the legislative debates disclosed no hostility to the notion of providing a federal forum for state claims, the majority felt that the factor of hostility to municipal liability was dispositive. \textit{Id.} at 2422-30 (Brennan, J., dissenting). Like the decision in \textit{Moor}, which refused to permit the use of the section 1988 portion of the 1871 Civil Rights Act to circumvent section 1983, the Court simply rejected the notion that the jurisdictional provision of the 1871 act could support damage actions against municipalities in defiance of section 1983's legislative history. \textit{Id.} at 2421 & n.12. Because Justice Brennan's legislative history did not question the fundamental premise of congressional hostility to municipal liability, it did not undercut the Court's reasoning. Thus, the \textit{Monroe} legislative history was reaffirmed without new debate.

142. \textit{See} 42 \textit{CONG. GLOBE} at 788-89 (remarks of Representative Kerr); \textit{Id.} at 772 (remarks of Representative Thurman).

143. \textit{Id.} at 763 (remarks of Representative Casserly).

Another argument against viewing section 1983 as a bar to recognizing damages against municipalities directly on the fourteenth amendment is the practice of providing equitable relief under that amendment. In *City of Kenosha v. Bruno* the Supreme Court ruled that municipalities were not persons under section 1983 for purposes of equitable relief as well as for damages. At the same time, it clearly left open the possibility of obtaining equitable relief under the general federal question jurisdiction. Subsequent courts have reasoned that if equitable relief against municipalities survives exclusion from section 1983, the same must be true of damages. That view ignores the substance of the decision in *Bruno*, which rested on the absence of congressional intent to make the meaning of “person” depend on the type of relief sought. This ground for decision is much different from that of *Monroe*, which excluded municipalities from liability under section 1983 because of the evidence of congressional hostility to damages. No similar hostility exists with respect to equitable relief against municipalities. Senator Sherman’s amendment was only concerned with damages and the legislative debates were similarly confined to that form of liability. It has even been argued that this silence reflected a presumption that equitable relief would be available to enforce the fourteenth amendment. Thus, because *Bruno* was decided on the narrow ground that the meaning of “person” should be consistent, it does little to override the clearly expressed congressional hostility to municipal liability in damages.

Finally, some observers argue that the legislative history of section 1983 is irrelevant to considerations of judicial implication of a remedy because contemporary conditions and congressional attitudes are vastly different from those that prevailed in 1871. They also contend that

both the fourteenth amendment and the Civil Rights Act of 1871 in order to discover congressional attitudes toward enforcement of the amendment. He finds a strong presumption in favor of the use of the equitable powers of the federal courts to achieve realization of the rights conferred. *Id.* at 1455–58. With respect to damages, however, the prevailing view was that liability should end with the individual responsible for the unconstitutional intrusion. There was no inclination to impose direct financial burdens on the operation of governmental units, either state or local, at that time. *Id.* at 1459–60, 1467–68. See *42 Cong. Globe* at 459 (remarks of Representative Coburn).

145. See cases cited in note 82 *supra*.
146. 412 U.S. 507 (1973), discussed in note 132 *supra*.
147. Two Justices went even further, stating that a right to recover would clearly exist under the rationale of *Bivens*. 412 U.S. at 516 (Brennan & Marshall, JJ., concurring).
149. 412 U.S. at 513–14.
151. See Note, *Damage Remedies, supra* note 7, at 949.
judicial deference based on the Monroe Court's view of the legislative history conflicts with the development of common law under the fourteenth amendment and that Congress has itself imposed liability on municipalities in some situations. These arguments are not compelling. Congressional pronouncements do not lose force simply because of the passage of time. Moreover, that Congress has imposed some liabilities on municipalities may disclose its preference for a piecemeal approach rather than a program of broad liability. Similarly, constitutional common law should not develop independent of congressional attitudes, but in concert with them. Where Congress has made its preferences known, respect for its enhanced policy-making abilities counsels deference.

CONCLUSION

The question of extending Bivens to fourteenth amendment claims raises important questions about the respective roles of the Court and Congress in implementing the Constitution. Bivens recognized a new dimension in the meaning of article III judicial power, but it also suggested that the exercise of this power might be constrained by contrary congressional action. The possibility of adverse congressional action assumes added significance once it is perceived that a Bivens-type remedy is a product of constitutional common law, not "true" constitutional decision making.

Contrary congressional action exists in the fourteenth amendment context in the form of the legislative history of section 1983. Admittedly, the notion of congressional hostility to municipal liability rests on a negative inference drawn from the legislative history rather than on an explicit declaration in the text of the statute, but the Supreme Court has repeatedly given this interpretation its imprimatur of legitimacy. Given the allocation of responsibility for policy determinations between the legislative and judicial branches and the fourteenth amendment's express provision for congressional enforcement, the limitations on the section 1983 damage remedy deserve significant weight in assessing the propriety of granting a conflicting remedy. Balanced against the limited and speculative nature of municipal contributions to compensation, these fundamental notions of proper judicial function dictate refusal by the courts to fashion a damage remedy against municipalities directly under the fourteenth amendment.

152. See id. at 949-51.
155. See Monaghan, supra note 36, at 26-30 & n.155.
156. In the event that the federal courts decided to accept the extension of Bivens to the fourteenth amendment, difficult problems would remain with respect to defining the scope of the cause of action and the availability of municipal immunity. See generally Note, Damage Remedies, supra note 7, at 952-58.