RUNNING FROM THE LAW: FEDERAL CONTRACTORS ESCAPE BIVENS LIABILITY

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INTRODUCTION

On Monday, October 1, 2001, the Supreme Court’s Term began with the arguments in Correctional Services Corp. v. Malesko. In Malesko, a prisoner argued that he should have a Bivens cause of action for the violation of his constitutional rights against a private correctional facility that contracted with the federal government’s Bureau of Prisons. In a 5-4 opinion authored by Chief Justice Rehnquist and handed down on November 27, 2001, the Supreme Court refused to allow the prisoner to bring a constitutional cause of action against the private contractor engaging in federal action.

The Malesko opinion is of interest in part because the privatization of prisons has incited controversy over whether private institutions should fulfill roles traditionally performed by the state or federal government. The restrictions on parole, three-strikes-and-you’re-out legislation, and mandatory minimum sentences have kept prisons at or above maximum capacity. As a result of the demand for prison space, the private correctional industry has experienced dramatic growth. The nation’s privatized prisons now generate revenue in excess of one billion dollars a year.

The attempts to “farm out” prisons has fostered a heated debate between proponents and opponents of privatization. Proponents contend that private contractors deliver goods more efficiently than government workers and that contractors exert beneficial competitive

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1 J.D. Candidate, 2002, University of Pennsylvania Law School; B.S., 1995, Cornell University. All my thanks to my mother, Patricia Ray de Pastore; my father, Mario Pastore; and my brother, Mateo Pastore, for their love, support, and jokes.
3 See Suzanne Smalley, A Stir over Private Pens, NAT’L J., May 1, 1999, at 1168, 1169 (reporting that tough-on-crime laws have contributed to 1.8 million people being incarcerated in the United States as of 1998, more than double the prison population in 1985).
4 See id. at 1169 (citing an increase in private prison beds from 44,000 in 1996 to 121,000 in 1999 and an increase of revenues from $650 million in 1996 to more than $1 billion in 1997).
pressures on government, citing anywhere from a two to twenty-eight percent savings over government-run facilities. Opponents of privatization point to violations of constitutional rights in private facilities. For example, at the Corrections Corporation of America facility in Youngstown, Ohio, inmates received a $1.65 million settlement for inadequate medical care and abuses by private corrections officers.

In fact, petitioners in Malesko, Correctional Services Corporation, had previously been known as Esmor Correctional Services, Inc., which ran an Immigration and Naturalization Service detention center in Elizabeth, New Jersey. The INS closed that facility in June of 1995 after aliens held there rioted to protest the corporation’s “abus[ive] and inhumane treatment.”

Malesko is also of note because it indicates a refusal by the Court to imply the constitutional cause of action against anyone but federal officers. Traditionally, the Bivens cause of action has only been available to plaintiffs seeking damages from individual officers. However, the circuit courts had split on the issue, with the D.C. Circuit precluding plaintiffs from suing private corporations under Bivens and the Second and Sixth Circuits allowing the suits. The possibility that private corporate entities might be held liable had weighty implications, given that private contractors, not just private prisons, would have generally been liable under the Second and Sixth Circuits’ analyses. This might have resulted in private contractors being held responsible for enormous damage liability—liability that governments often avoided under the guise of sovereign immunity or

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6 See Smalley, supra note 2, at 1170 (citing a study by the Reason Public Policy Institute, but also noting a survey commissioned by the Justice Department that found that the most detailed studies indicated the smallest cost savings from privatization).
7 Id. at 1168 (recounting settlement of class action lawsuit brought by inmates against the Northeast Ohio Correctional Center, a private prison owned by the Corrections Corporation of America).
9 See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (“In Bell v. Hood, 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.”).
10 See Kaffman v. Anglo-American Sch. of Sofia, 28 F.3d 1223 (D.C. Cir. 1994) (holding that former employees could not sue under Bivens a school originally established by the State Department because it was not a state actor).
12 See Hammons v. Norfolk S. Corp., 156 F.3d 701 (6th Cir. 1998) (holding that a railway company could be sued under Bivens for the violation of an employee’s Fourth Amendment rights).
punitive damages case law. However, the Court has precluded liability of federal contractors under a Bivens cause of action and held that state law causes of action are sufficient to vindicate plaintiffs' grievances, be they of a constitutional nature or not.

Part I of this Case Note will explain the traditional liability of federal agents under Bivens and its progeny. Part II will outline the split between the circuits. Part III will discuss the Malesko Court's rationale and offer analysis of that rationale. Part IV will argue that private corporations should be subject to Bivens claims, following the traditional approach to liability that provides for parallel state and federal causes of action for violations of constitutional rights. Finally, Part V concludes that as the parallel cause of action against state actors would allow for the liability of contractors for prison services, so, too, should the cause of action against federal actors.

I. LIABILITY UNDER BIVENS

A. The Court Holds the Federal Constitution Provides a Free-Standing Cause of Action, Regardless of State Law Causes of Action

The landmark case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics promised the vindication of constitutional rights through the federal courts. Webster Bivens alleged the warrantless search of his apartment and his subsequent arrest by federal agents violated his Fourth Amendment right to be free of unreasonable searches and seizures. As all charges against Bivens were dropped, he could not seek recourse by moving to exclude evidence in a criminal trial or requesting an injunction against future intrusions. The district court dismissed Bivens' suit for money damages against the federal agents who effectuated the search and arrest for failure to state a cause of action. The Supreme Court granted certiorari and reversed.

Justice Brennan, writing for the majority, acknowledged that although the Fourth Amendment does not provide for an award of money damages, the federal courts can use any available remedy where legal rights have been invaded and a statute provides for a general right to sue. Essentially, Brennan concluded that a cause of

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13 See infra Part IV.
16 Bivens, 403 U.S. at 389.
17 Id. at 410 (Harlan, J., concurring) ("Assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant.").
18 Id. at 390.
19 Id. at 396.
action against federal agents in their personal capacities may be inferred from the Constitution,\(^2\) despite the lack of explicit statutory authorization.\(^2\) A remedy is to be inferred unless "special factors counselling hesitation" exist or where there is an equally effective remedy provided by Congress.\(^2\) Justice Harlan, in his concurrence, argued that the federal question statute, 28 U.S.C. § 1331, granted the courts the jurisdiction and therefore the power to grant relief.\(^2\) Harlan argued that the "power to award damages obviously exists, since the Court awards damages in statutory cases, and that if the Court can effectuate statutory rights, it can certainly effectuate constitutional rights," which are meant to control the majoritarian nature of democracy.\(^2\)

The need for a Bivens remedy is compelling. Justice Harlan's concurring opinion raised a stark reality: "[S]ome form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court."\(^2\) For plaintiffs like Bivens—against whom the criminal charges had been dropped—there will be no other recourse. The Bivens remedy is seen as important precisely because "it is damages or nothing."\(^2\)

In addition, a federal government agent's violation of a citizen's constitutional rights is particularly troubling. Professor Schuck notes:

As the Supreme Court observed in Bivens: "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority

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\(^2\) The Court has elsewhere explained the distinction between suits against officials in their personal and official capacities:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent".... Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.


\(^2\) See Bivens, 403 U.S. at 397.

\(^2\) The Bivens Court held:

The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress.... 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.

\(^2\) Id. at 396-97.

\(^2\) Id. at 405 (Harlan, J. concurring).


\(^5\) Bivens, 403 U.S. at 409-10 (Harlan, J., concurring).

\(^6\) Id. at 410.
other than his own." When officials err or misbehave, they risk grievous injury to individuals and to the integrity of public authority. The implications of Bivens in addressing these violations are weighty: Bivens contained two crucial insights in the realm of constitutional enforcement. It recognized that the judicial branch can enforce the Constitution without congressional action. It also recognized that the Constitution should be enforceable on its own terms, not because of its congruence with state law or common law protections. That is, a federal cause of action should be available for federal constitutional violations.

But Bivens is perhaps most striking because of its holding that violations of the Federal Constitution are punishable in and of themselves, regardless of the availability of state law causes of action. Indeed, Justice Brennan specifically rejected the Department of Justice's argument that Bivens could obtain damages only in state court. He noted: "Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law." The Supreme Court had already held that the Fourth Amendment is not tied to local trespass laws. In fact, state laws might be hostile to the Fourth Amendment. Therefore, in spite of state law causes of action, the Court found a free-standing cause of action for the violation of rights ensured by the Federal Constitution.

In the years since the opinion was issued, Bivens has gained scholarly support. Granted, eminent scholars have argued that limiting damages for violations of constitutional rights fosters the development of constitutional rights, by shifting the focus from reparation to reform. Those same scholars recognize, however, that the proposition that governments acting unconstitutionally must make their victims whole has gained nearly universal assent.

28 Bandes, supra note 24, at 291.
29 Bivens, 403 U.S. at 390.
30 Id. at 392.
32 See Bivens, 403 U.S. at 394.
34 See, e.g., John C. Jeffries, The Right-Remedy Gap in Constitutional Law, 109 YALE L.J. 87, 102 (1999) (arguing that Brown would never have been decided if school districts had been subject to money damages and that constitutional rights would have stagnated).
35 See id. at 101-02.
B. Bivens' Progeny

In the years following Bivens, the Court took first an expansive approach to the cause of action, but then narrowed its availability. Davis v. Passman was a Bivens action brought by a former employee against Congressman Otto Passman; the employee alleged she was fired because of her sex, in violation of the Fifth Amendment's equal protection component. The Court, per Justice Brennan, held that a Bivens remedy was available to Ms. Davis. Although he acknowledged that many rights are enforced through statutory schemes, he rejected the notion that Congress must identify appropriate constitutional causes of action: "The Constitution, on the other hand, does not 'partake of the prolixity of the legal code'... And in 'its great outlines,' the judiciary is clearly discernable as the primary means through which these rights may be enforced." Justice Powell's dissent stressed that when the judiciary is asked to infer a private right of action directly from the Constitution it should exercise "principled discretion." The factors Powell lists as weighing against granting a Bivens cause of action in this case, however, seem to turn on his objection to a congressman being held liable under Bivens. He cited the congressman's need to rely on his staff and the Title VII mandate that federal employees resort only to that cause of action for remedies.

In Carlson v. Green, the Court again found a Bivens remedy where a prisoner had been denied medical treatment, in violation of the Eighth Amendment's ban on cruel and unusual punishment. The remedy was only unavailable where either the defendant could show "special factors counselling hesitation," or that "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery under the Constitution and viewed as equally effective." The Court found no "special factors counselling hesitation" and despite the availability of relief under the Federal Tort Claims Act, the Court granted the cause of action. The FTCA was held not to meet the equally effective alternative requirement because there was no indication in the legislative text or history to suggest that Congress intended the FTCA to constitute a substitute remedy. Interestingly, the Court seemed to apply a clear statement rule mimicking that of later cases such as Atascadero and Tafflin. Although Jus-

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36 442 U.S. 228 (1979).
37 Davis, 442 U.S. at 241 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).
38 Id. at 254 (Powell, J., dissenting).
39 446 U.S. 14 (1980).
40 Carlson, 446 U.S. at 18-19.
After the strongly pro-plaintiff opinions of Davis and Carlson, the Court, on several occasions, has refused to imply a Bivens remedy. Several of these cases were based on the provision of alternative congressional remedies. Justice Stevens authored the opinion in Bush v. Lucas, which held that a federal employee did not have a Bivens cause of action for a violation of his First Amendment rights. The elaborate remedial system, the Civil Service Commission's Appeals Review Board, had already reinstated the plaintiff, Mr. Bush, and had awarded him backpay. Although the Court found the remedial system was not on par with the Bivens remedy because it did not provide for emotional and dignitary harms, it held that the system was not to be augmented by a Bivens remedy. “[W]e decline ‘to create a new substantive legal liability without legislative aid and as at the common law’ ... because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.”

C. Federal Agencies Are Deemed Not Liable Under Bivens

A 1994 Supreme Court decision also limited the scope of Bivens remedies by refusing to hold federal agencies liable for violations of constitutional rights. In FDIC v. Meyer, an employee of a failed savings and loan brought a Bivens action against the Federal Savings and Loan Insurance Corporation (later taken over by the FDIC) alleging that his termination violated his Fifth Amendment procedural due process rights. Although a federal agency would usually be protected from suit by sovereign immunity, Congress had waived the FDIC's sovereign immunity. Nevertheless, the Supreme Court concluded that the liability of federal agencies would impose a potentially enormous drain on the public Treasury and, therefore, constituted a special factor counselling hesitation. Most importantly, Justice Thomas reasoned, Bivens was based on the concession that the federal government itself was immune from suit. Justice Thomas
drew from Harlan’s concurrence in Bivens: “However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.”

Justice Thomas noted that “[i]n essence, Meyer asks us to imply a damages action based on a decision that presumed the absence of that very action.”

The Court also reasoned that if federal agencies were held liable, plaintiffs could circumvent federal agents’ qualified immunity defense, which would eviscerate the Bivens remedy. Justice Thomas further argued that the purpose of the Bivens remedy is to deter the officer. If the qualified immunity defense can be avoided by suing the agency as opposed to the officer, however, officers would no longer be subject to suit and “the deterrent effects of the Bivens remedy would be lost.” Finally, considering the implication of an enormous financial burden for the federal government, the court refused to hold agencies liable without congressional legislation.

The Meyer rationale as to federal agencies does not come close to implying that a Bivens claim should not exist against a private corporation engaged in state action. First, the liability of a private corporation that has contracted with the state would not impose a drain on the public Treasury. Second, a direct remedy against a private corporation cannot be said to constitute a suit against the government, whereas if an agency established by the federal government is sued, the sovereign is, in essence, being haled into court. In addition, although some might argue that plaintiffs will sue the corporation to avoid suing the employee and therefore decrease the deterrence value of the traditional Bivens remedy, a suit against a corporation might well provide more deterrence than a suit against an employee, who is himself two steps from “judgment proof” status. The need for deterrence of the officer in the traditional Bivens realm results precisely from the sovereign’s immunity. Because the sovereign has no impetus to deter the officer from unconstitutional acts, but citizens retain the protections of the Constitution, the Court has created a remedy which forces the employee to check his own actions. Where the employer is not immune, the employee can be deterred both by his own fear of suit and, perhaps more effectively, by the training and disciplinary procedures provided by an employer seeking to avoid

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50 Meyer, 510 U.S. at 485.
51 See Anderson v. Creighton, 483 U.S. 635 (1987) (holding that an officer is entitled to qualified immunity if a reasonable officer could have believed the act complained of was lawful in light of clearly established law at the time of the alleged violation).
52 Meyer, 510 U.S. at 485.
53 Id.
suit. Finally, as there is no implication of an enormous drain on the Federal Treasury, the Court is not circumscribed by **Meyer**'s requirement that it await congressional legislation.

Despite the Supreme Court's refusal in **Meyer** to subject federal agencies to **Bivens** liability, the growth of the private prison industry—and the general increase in privatization of government functions—raised the possibility of an expansion of **Bivens** defendants to include private corporations. If governmental functions are increasingly handled by private corporations, the possibility that those corporations might violate citizens' constitutional rights increases, as does the need for damage actions against those corporations. If the split in the circuits had been resolved so that private corporations were liable, the **Bivens** cause of action would have mirrored the § 1983 cause of action more closely than it does now under **Malesko**.

II. THE SPLIT IN THE CIRCUITS

Prior to **Meyer**, "no circuit court ever held that private entities were not subject to **Bivens** claims." The Ninth Circuit held that a private corporation employed by the Department of the Navy to provide security services would be liable under **Bivens** if it engaged in federal action. The First Circuit acknowledged that private entities may be subject to **Bivens** claims but refused to hold that a legal assistance corporation engaged in federal action. In other words, the First Circuit in **Gerena** accepted that a **Bivens** action could be maintained against a private corporation, but refused to find that Puerto Rico Legal Services had acted under the guise of the federal government, as required by the state action doctrine. Likewise, in **Dobyns v. E-Systems, Inc.**, a **Bivens** claim was allowed to stand against a private contractor that supplied personnel, materials, transportation and services to the federal government.

Despite the fact that no court before **Meyer** ever precluded a **Bivens** suit against a private corporation and that **Meyer** itself only addresses the issue of federal agency liability and never reaches the liability of private corporations, the Court of Appeals for the D.C. Circuit held that **Meyer** prohibits **Bivens** claims against private corporations acting under color of federal law.

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57 See Gerena v. P.R. Legal Servs., Inc., 697 F.2d 447 (1st Cir. 1983).
58 See id. See also infra Part IV.E.
59 Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982).
60 See Kauffman v. Anglo-American Sch. of Sofia, 28 F.3d 1223 (D.C. Cir. 1994).
A. The Kauffman Court Precludes Bivens Claims Against Private Corporations Acting Under Color of Federal Law

In 1994, the D.C. Circuit dismissed the Bivens claims against the Anglo-American School of Sofia brought by former employees. The school was initially established in 1967 by the U.S. Department of State to provide schooling for the children of American and British diplomats residing in Sofia, Bulgaria. Although the school's amended charter characterized the school as a private and independent organization, the American and British ambassadors to Bulgaria each appointed three members to the school's seven member governing board. Those members, appointed by the American ambassador, were employees of the United States Department of State. In addition, the school received part of its funding from the State Department. Park Dean Kauffman, the director of the school, and Gaila Kauffman, a staff teacher, had contracted to work for the school until June 15, 1991, but Mr. Kauffman was fired in June of 1989. The Kauffmans' amended complaint alleged that the "[s]chool is controlled by the U.S. Government" and by firing Mr. Kauffman, it violated his First and Fifth Amendment rights.

The D.C. Circuit acknowledged that in order for a Bivens action to lie against the school, the school must be considered a federal actor:

Even if the school is a federal actor, however, it is not a federal agency: it is plainly a different sort of entity than the FSLIC, the agency at issue in Ayer. Still, the differences between a federal agency and an artificial person that is a federal actor seem to weaken, rather than strengthen, the case for a Bivens remedy.

According to Judge Williams, "the Kauffmans enjoy a constitutional claim only to the extent that the School's decision to terminate Mr. Kauffman's employment can be analogized to the decision of a federal agency." The court admitted the circuit had once allowed a Bivens action to be brought against a private corporation whose agents had taken actions at the behest of, and in conjunction with, the federal government. However, the court held that the Reuber analysis could not survive Meyer. Reuber's guiding principle was that "when a defendant is sufficiently connected to the government that his acts are subject to constitutional constraints, the availability of the Bivens remedy should not turn on the defendant's nominal status as 'pri-
The court contended that its decision that the school could not be subject to a *Bivens* claim "affords the Kauffmans precisely the same *Bivens* remedies that they would have if the School were really a federal agency . . . ." The majority conceded the *Meyer* argument that the deterrent purpose of *Bivens* would be undermined in actions against private parties held little weight in the instant case since the circuit court had afforded private entities the same qualified immunity their agents received. Nevertheless, the court stressed the *Meyer* "premise" that individual agents are not deterred by the possibility of suit against their employers and utilized the decrease in deterrence of individual agents to preclude suit against private agencies. In addition, the D.C. Circuit cited the *Meyer* concern that "the potentially large financial drain on the government constituted a 'special factor' counseling hesitation against the judicial creation" of the proposed damages remedy. If the school—which was created to serve the governmental interest of providing diplomats' children with an education and is partially funded by the government—were held liable, the government would have to choose between allowing its interests to suffer from decreased funding or being forced to make up the difference created by the liability. The court stated: "[D]iversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." In addition, the *Kauffman* court cited the Supreme Court's reluctance to expand the availability of the *Bivens* remedy noted in both *Meyer* and in *Schweiker v. Chilicky*.

The D.C. Circuit's final analysis seemingly glossed over the well-established doctrine of state action, which allows suits under the Constitution only against the State and individuals who have acted under the auspices of the State. The court found "it is axiomatic that a *Bivens* action can be brought only against one who is engaged in governmental . . . action . . . ." The *Kauffman* court offered no analysis.

67 Id. at 1226-27.
68 Id. at 1227.
69 See Reuber, 750 F.2d at 1057 n.25; *Kauffman*, 28 F.3d at 1063-64 (Bork, J., concurring).
70 *Kauffman*, 28 F.3d at 1227.
71 Id. at 1227.
72 See id.
73 Id. at 1227-28.
75 See infra Part III.C.
76 *Kauffman*, 28 F.3d at 1228 (citing Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984)).
of why the Supreme Court has held private individuals liable where they have engaged in state action.

Chief Judge Mikva dissented in Kauffman, citing circuit precedent that allowed plaintiffs to bring Bivens actions against private state actors. Mikva objected to the overruling of Reuber and argued that Reuber in fact furthered the purposes of Bivens by providing "a damages remedy to those aggrieved by unconstitutional actions." Reuber rested on the Bivens proposition that the Constitution implies a damages remedy, to which the courts must defer, unless Congress has provided an equally effective remedy or there are special circumstances counseling hesitation. Unless Meyer "tacitly overruled or fatally undermined" the cases supporting liability of private state actors, the circuit had no authority to overrule Reuber. Instead, Meyer only ruled on the liability of federal agencies for constitutional violations and made no reference to private actors engaged in federal action. "In Meyer, the Supreme Court emphatically noted the complete absence of circuit court precedent for applying Bivens to a federal agency; indeed, the Court based its decision in large part on the novelty of such a remedy." Whereas Meyer did not require the Supreme Court to overrule numerous circuits, the Kauffman majority overruled itself and disregarded the precedent of several other circuits. Moreover, the differences between suits against federal agencies and those against private actors engaged in federal action counsel against barring Bivens actions against private actors. The Meyer court particularly stressed that the deterrent effect of Bivens would be undermined if suits were allowed against federal agencies and plaintiffs could avoid the qualified immunity defense asserted by individual officials. Chief Judge Mikva questioned whether that deterrence rationale could be extended to cases involving private entities and reasoned that it was far less compelling, as the Reuber court had extended the same qualified immunity to the private entity as its employees enjoyed.

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77 Id. at 1229 (Mikva, C.J., dissenting) (citing Reuber, 750 F.2d at 1039).
78 Id. at 1229 (Mikva, C.J., dissenting).
79 Id.
80 See id. at 1230 (citing Brewster v. Commissioner, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979), which explained that "future panels are bound to follow precedent set by previous panels until the en banc court or Supreme Court overrules that precedent").
82 Kauffman, 28 F.3d at 1230 (Mikva, C.J., dissenting).
83 Id. at 1229-30.
84 Id. at 1230.
85 Id. The Supreme Court, however, has rejected the extension of qualified immunity to employees of private corporations that contract with the government. See Richardson v. McKnight, 521 U.S. 999 (1997) (holding that private prison guards do not enjoy the qualified immunity of their state employed counterparts).
The Chief Judge also disagreed that *Meyer* implied that *any* weakening of the deterrent effect would be sufficient to deny a *Bivens* remedy.\(^{86}\) In addition, although the *Meyer* majority cited the burden on the Federal Treasury as rationale for its refusal to hold federal agencies liable, those same concerns do not apply equally to private entities.\(^{87}\) Mikva explained: "Private state actors often are government-controlled only for a limited purpose, so there is no reason to think the losses would come out of the Federal Treasury in the ordinary case."\(^{88}\) Because the government rarely indemnifies private contractors and money damages therefore would not be coming from the Federal Treasury, the *Bivens* action should be allowed.

**B. The Hammons Court Holds That Bivens Actions Do Lie Against Private Contractors Engaged in Federal Action**

The Sixth Circuit refused to follow the D.C. Circuit and find that *Meyer* precludes *Bivens* actions against private corporations that engage in state action. In *Hammons v. Norfolk Southern Corp.*,\(^{89}\) the defendant corporation tested the plaintiff for illegal drugs, pursuant to the company’s policy and a mandate by the Federal Railroad Administration’s Control of Alcohol and Drug Use Regulations.\(^{90}\) The plaintiff tested positive for marijuana and was placed on probation.\(^{91}\) A year and a half later he tested positive for cocaine and was terminated. Hammons filed an action against his former employer claiming the company violated his "Fourth Amendment right to be free of unreasonable searches and seizures."\(^{92}\) The court of appeals assumed, in order to reach the issue of whether a private entity could be sued under *Bivens*, that sufficient federal action had been alleged.\(^{93}\) The Sixth Circuit rejected the district court’s holding that *Meyer* proved dispositive on the issue of private *Bivens* liability and reasoned that the Supreme Court’s rationale for precluding *Bivens* actions against federal agencies does not apply to private corporations.\(^{94}\) Judge Clay acknowledged the deterrence rationale cited by Justice Thomas in *Meyer*, but recounted the various policy goals underlying the *Bivens* decision, including the history of the federal courts and their role in

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86 Kauffman, 28 F.3d at 1230-31.
87 Id. at 1231.
88 Id.
89 156 F.3d 701 (6th Cir. 1998).
90 Id. at 702.
91 Id.
92 Id. at 703.
93 The court noted, however, that it passed "no judgment as to whether federal action is involved in the instant case." Id. at 705 n.8.
94 Id. at 705.
securing constitutional rights.\textsuperscript{55} "[W]here federally protected rights have been invaded, it has been the role from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Judge Clay also pointed to the \textit{Bivens} Court's citation of the traditional availability of damages for the invasion of a personal interest in liberty, and the idea expressed in \textit{Marbury v. Madison}, and noted in \textit{Bivens}, that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."\textsuperscript{97}

After citing the several goals of the \textit{Bivens} Court, the Sixth Circuit elected to grant greater weight to what it considered the "primary goal" of \textit{Bivens}: "[T]o provide a remedy for victims of constitutional violations by federal agents where no other remedy exists, regardless of whether the official would be deterred in the future from engaging in such conduct."\textsuperscript{98} The court acknowledged the benefit of deterring the individual wrongdoer, but invoked Justice Harlan's concurrence in \textit{Bivens}, in which he opined that even if there were no deterrent effect on individual officers, the plaintiff should be entitled to damages.\textsuperscript{99}

The Sixth Circuit also refused to apply the \textit{Meyer} rationale for preventing \textit{Bivens} claims against federal agencies—the potentially large fiscal burden on the Treasury—to situations involving private corporations.\textsuperscript{100} Where the federal purse is not involved, defendants cannot claim that the preclusion of a remedy is necessary to prevent a strain on the Treasury.

Finally, the \textit{Hammons} court analogized the liability of private corporations under § 1983 to their proposed liability under \textit{Bivens}. As actions brought under \textit{Bivens} and § 1983 raise the identical concerns of vindicating rights secured by the Constitution, the Supreme Court has granted the same immunity to federal officials from \textit{Bivens} actions as that granted to state officials from § 1983 actions.\textsuperscript{101} As a general matter, § 1983 standards of liability parallel \textit{Bivens} standards of liability.\textsuperscript{102} Since it is well established that corporations which engage in

\begin{footnotes}
\item[55] Id.
\item[96] See id. (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (internal citation omitted)).
\item[97] See Hammons, 156 F.3d at 706 (quoting Bivens, 403 U.S. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803))).
\item[98] Hammons, 156 F.3d at 706.
\item[99] See id. at 706 (citing Bivens, 403 U.S. at 407-08 (Harlan, J., concurring)).
\item[100] See Hammons, 156 F.3d at 706 ("Allowing a Bivens claim against a private corporation does not implicate 'federal fiscal policy' . . . .").
\item[101] See Butz v. Economou, 438 U.S. 478 (1978) (holding that federal officials are only entitled to the absolute or qualified immunity that state officials receive under § 1983).\textsuperscript{102} See infra Part IV.
\end{footnotes}
state action can be sued under § 1983. Judge Clay could find no valid reason to preclude the liability of corporations engaged in federal action from Bivens suits in the Hammons case. From a victim's perspective, there is no effective difference between whether one's rights are violated by a municipal officer, a federal agent, or the employee of a private corporation completing the tasks required by a government contract. The liability should therefore be the same for each official.

1. District Court Subsequently Restrictions Hammons' "Under Color of Federal Law"

One district court offered a more narrow definition of Hammons' construction of action under color of federal law. In Yeager v. General Motors Corp., a white male applicant who was not selected for an apprenticeship program with General Motors ("GM") alleged that the company's affirmative action program violated his Title VII and Fifth Amendment rights. The district court granted the defendant's motion for summary judgment on the issue of a Fifth Amendment violation, holding that GM's actions did not constitute action under color of federal law. GM initially established its affirmative action program in response to a conciliation agreement with the Equal Employment Opportunity Commission, but the agreement lapsed in 1988, prior to the events of which the plaintiff complained. Since GM extended the affirmative action program after its termination in compliance with Executive Order 11246, which requires government contractors to establish affirmative action programs, the plaintiff argued that defendant was acting under color of federal law. The plaintiff cited Hammons as weight that regulations which force a corporation to act in an enforcement capacity for the federal government confer federal action. The district court, however, differentiated the Hammons regulations, which forced the corporation to test its employees for drug use, and GM's affirmative action program: "[T]he Executive Order upon which GM's plan is premised is to be

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104 This analysis does not square with that of Richardson v. McKnight, 521 U.S. 399 (1997), where the Court held that private prison guards are not entitled to the qualified immunity that public officers receive. See infra Part IV.D.
106 Id. at 798.
107 Id. at 803.
108 Id. at 802.
109 Id.
complied with voluntarily."110 As it was unnecessary for GM to contract with the federal government, it was free to choose whether to implement the affirmative action program.111 Since GM was not forced to comply with a government mandate, it was not acting under color of federal law and its Fifth Amendment claim failed.

C. The Second Circuit Opinion That Private Corporations Are Liable Under Bivens

The Second Circuit weighed in on the issue of private contractor liability in Bivens actions and issued the opinion that was reversed by the Supreme Court. In Malesko v. Correctional Services Corp.,112 Judge Sotomayor, joined by Judge Pooler, ruled that a private prison corporation acting under color of federal law was liable under Bivens.113 In 1992, John Malesko was convicted of federal securities fraud and sentenced to eighteen months imprisonment. During his incarceration, Malesko was diagnosed with a heart condition and prescribed medication.114 He was subsequently transferred to a halfway house, which was operated on behalf of the Bureau of Prisons ("BOP") by Correctional Services Corporation ("CSC"), a private corporation that contracted with BOP. A CSC policy at the halfway house prohibited inmates from using the elevator unless they lived on the sixth floor or above.115 Nevertheless, Malesko claimed, CSC staff allowed him to use the elevator because they were aware of his heart condition. On March 28, 1994, a CSC employee, Jorge Urena, prevented Malesko from using the elevator to reach his fifth-floor room, despite Malesko's objection that his condition made using the stairs dangerous. While climbing the stairs, Malesko suffered a heart attack, fell, and injured himself.116 In addition, Malesko claimed that CSC had failed to provide him with medication once his supply had run out.117 Malesko brought a Bivens action against both CSC and Urena. The claim against Urena was ultimately dismissed as time-barred,118 but the claim against CSC, however, raised an issue of first impression in the Second Circuit.119

110 See id. (citing McLaughlin v. Great Lakes Dredge & Dock Co., 495 F. Supp. 857 (N.D. Ohio 1980), as support for holding that defendant's implementation of plan to comply with Executive Order 11246 was voluntary).
112 229 F.3d 374 (2d Cir. 2000).
113 Id. 229 F.3d at 377-78.
114 Id. at 376.
115 Id.
116 Id.
117 Id.
118 Id. at 384.
119 Id. at 377.
The district court had reasoned that *FDIC v. Meyer* precluded a *Bivens* claim against anyone but an individual. Judge Sotomayor rejected that interpretation of *Meyer*. Instead, she reiterated the rationale of *Meyer*: first, part of the *Bivens* rationale for the liability of individual agents was to compensate for a lack of direct action against the government; second, sanctioning suits against agencies would undermine the deterrent effect of the *Bivens* remedy; and, finally, to put an enormous financial burden on the government required congressional legislation. Judge Sotomayor recounted the *Kauffman* reasoning: "Because a private entity must act under color of federal law in order to be subject to *Bivens*, such an entity is 'equivalent' to a federal agency and, under *Meyer*, must be treated as 'if [it] were really a federal agency.'" The *Malesko* court held, however, that *Meyer* was not dispositive because private entities acting on behalf of the federal government are not the equivalent of federal agencies. The Second Circuit had already determined that Blue Cross, in processing Medicare claims, had acted as an agent of the federal government, not as a federal agency. Judge Sotomayor found no reason to treat CSC differently than other private corporations acting on behalf of the federal government.

Judge Sotomayor acknowledged the *Kauffman* majority's concern that employees of private entities would not be deterred from unconstitutional conduct because the entities would be sued. Nevertheless, she found the availability of *Bivens* liability warranted, notwithstanding the lack of a substantial deterrent effect, in an effort to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations. The court acknowledged that a plaintiff might sue an offending corporation instead of the employee, but sensibly responded that if such an employer faced liability it would be motivated to prevent its employees from acting unlawfully.

The *Malesko* court also addressed the concern that judgments for violations of constitutional rights by private entities would affect the Treasury because the costs would ultimately be passed on to the gov-

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121 *See Malesko*, 229 F.3d at 381.
122 *Id.* at 378.
123 *Id.* at 379 (quoting *Kauffman v. Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994)).
124 *Malesko*, 229 F.3d at 380.
125 *See Cohen v. Empire Blue Cross*, 176 F.3d 35 (2d Cir. 1999) (holding a private corporation, not funded by the United States and in which the United States has no proprietary interest, may act as an agent for the government, but is not an institutional arm of the government).
126 *See Malesko*, 229 F.3d at 380.
127 *See id.*
128 *Id.*
The court conceded that the cost of a judgment might be passed on to the government but did not find the argument compelling because it did not "believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in Meyer was concerned would result from imposing Bivens liability directly upon federal agencies."\(^{129}\)

In addition, Judge Sotomayor focused on the incongruence of the Kauffman court's refusal to hold private corporations liable despite their actions under color of federal law since the Supreme Court, in Lugar v. Edmondson Oil Co., had clearly held that private corporations engaging in state action may be held liable under § 1983.\(^{131}\) Since the courts have treated Bivens and § 1983 actions analogously for most purposes, she concluded, there is no reason to draw a distinction for purposes of private corporations. In the context of these cases, the Supreme Court heard Correctional Services Corp. v. Malesko.

### III. THE SUPREME COURT REFUSES TO ALLOW BIVENS ACTIONS AGAINST PRIVATE CONTRACTORS ENGAGING IN STATE ACTION

#### A. The Majority Opinion in Malesko

Chief Justice Rehnquist's opinion for the majority in Malesko identifies the authority to imply a constitutional tort as originating from "our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'"\(^{129}\) The Bivens decision was based in large part on the Court's previous willingness in J.I. Case v. Borak\(^{133}\) to imply a private right of action from a statute that did not explicitly grant one. However, Rehnquist notes that the Court had since "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one."\(^{134}\) Although previously the Court recognized Bivens claims for violations of the Due Process Clause of the Fifth Amendment\(^{135}\) and the Cruel and Unusual Punishment Clause of the Eighth Amendment,\(^{136}\) the Chief Justice characterizes these holdings as "refus[ing] to extend Bivens liability to any new context or new category of defendants."\(^{137}\) For example, the Court in Bush v. Lucas\(^{138}\) denied a federal employee a Bivens remedy

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\(^{129}\) See id.

\(^{130}\) Id.

\(^{131}\) See id. at 381 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982)).


\(^{133}\) 377 U.S. 426 (1964).

\(^{134}\) Malesko, 122 S. Ct. at 519 n.3.

\(^{135}\) Davis v. Passman, 442 U.S. 228 (1979).

\(^{136}\) Carlson v. Green, 446 U.S. 14 (1980).

\(^{137}\) Malesko, 122 S. Ct. at 520.

against government officials for First Amendment violations, despite
the fact that the plaintiff was not able to fully vindicate his constitu-
tional rights and received only reinstatement and backpay under the
elaborate Civil Service remedial system. Rehnquist notes:

[W]e held that administrative review mechanisms crafted by Congress
provided meaningful redress and thereby foreclosed the need to fashion
a new, judicially crafted cause of action. . . . We further recognized Con-
gress’ institutional competence in crafting appropriate relief for ag-
grieved federal employees as a “special factor counseling hesitation in the
creation of a new remedy.”139

Chief Justice Rehnquist also cites Schweiker v. Chilicky as support
for the Court’s reluctance to extend Bivens to new contexts: “So long
as the plaintiff had an avenue for some redress, bedrock principles of
separation of powers foreclosed judicial imposition of a new substan-
tive liability.”140 Rehnquist then cites Meyer for the proposition that
the Court refused to allow Bivens actions against federal agencies be-
cause Bivens is meant to deter the officer, not the agency.141 If plain-
tiffs could get more damages from agencies and therefore decide not
to sue individual officers, the deterrent force of Bivens would be lost.
In Meyer, the Court also found that the potential for large govern-
ment liability constituted a special factor counseling hesitation. As
the Court has been so unwilling to expand Bivens liability in cases like
Meyer, Rehnquist reasons, the Court must refuse to extend it here.

In addition to the Court’s general refusals to build on the Bivens
doctrine, Rehnquist states that extending Bivens here would not be
consistent with its purpose:

The purpose of Bivens is to deter individual federal officers from commit-
ting constitutional violations. Meyer made clear that the threat of litiga-
tion and liability will adequately deter federal officers for Bivens purposes
no matter that they may enjoy qualified immunity . . . . Meyer also made
clear that the threat of suit against an individual’s employer was not the
kind of deterrence contemplated by Bivens.142

Similarly, with a corporate defendant, “claimants will focus their col-
lection efforts on it, and not on the individual directly responsible for
the alleged injury.”143 Following Meyer’s logic, Rehnquist concludes, a
Bivens cause of action against a private contractor cannot be implied.

Rehnquist rejects Malesko’s argument that implying a suit against
a private corporation would serve the deterrence rationale because corpo-
ations respond to market pressures and do not take constitu-
tional violations into consideration. If private corporations are held

139 Malesko, 122 S. Ct at 520 (citing Bush, 462 U.S. at 380).
140 Id. at 520 (citing Schweiker v. Chilicky, 487 U.S. 412, 421 (1988)).
141 Id. at 520-21.
142 Id. at 521.
143 Id.
liable, they will be deterred from committing constitutional violations. While Rehnquist recognizes that this may be true, he con-
cludes that “it has no relevance to Bivens, which is concerned solely with deterring the unconstitutional acts of individual officers. If de-
terring the conduct of a policy-making entity was the purpose of Bi-
vens, then Meyer would have implied a damages remedy against the
Federal Deposit Insurance Corporation.”

The creation of a Bivens cause of action against private contractors
is also foreclosed, Rehnquist reasons, because it would create a dis-
crepancy between the rights of federal prisoners housed in official
Bureau of Prisons facilities and those housed in private facilities. If
the Court held for Malesko, prisoners in traditional facilities could
not sue the government because of sovereign immunity, whereas
those housed at contractor sites could sue the contractors. Only
Congress can decide whether to impose “asymmetrical” costs on pri-
vate contractors but not on the government.

Another factor, according to the majority, was that Malesko had
other effective remedies, namely state tort actions. Although “for
Bivens it [was] damages or nothing,” Malesko did not face the same
dilemma. Webster Bivens’ state claims for intentional tort could be
defeated if he had allowed the officers entrance to his home and, as
the Bivens Court pointed out, citizens are not likely to refuse govern-
ment officers access to their homes. In contrast, Malesko had origi-
nally pleaded a claim of negligence, which would not require a show-
ing similar to that of Bivens. As a result, Malesko’s state tort action
would not be foreclosed and, according to the majority, a constitu-
tional tort remedy is not necessary.

B. Justice Stevens’ Dissent

In his dissent, Justice Stevens argues that the Court may have re-
fused to extend the Bivens remedy to “every conceivable” situation, as
evidenced by Meyer, Bush, Chappell, and Chilicky, but had never “quali-
ified [its] holding that Eighth Amendment violations are actionable
under Bivens . . . . Nor [has it] ever suggested that a category of fed-
eral agents can commit Eighth Amendment violations with impunity.” Here, Stevens reasons, the Court was only asked to determine
whether certain classes of federal agents should be held liable under
the Constitution, not whether Bivens should be dramatically ex-

144 Id. at 522 (emphasis added).
145 Id.
146 Id.
147 Id. at 522-23.
148 Id. at 524 (Stevens, J., dissenting).
Meyer does not support the Malesko holding because Meyer only differentiated between federal agents and an agency of the United States. Agencies of the United States are more like the sovereign than federal agents and agency liability could subject the federal government to enormous damages judgments. Furthermore, Meyer claimed a violation of the Fifth Amendment’s Due Process Clause while the Court had acknowledged a Bivens action may not always be appropriate under the Due Process Clause. In contrast, “[t]he Court incorrectly assumes that we are being asked ‘to imply a new constitutional tort’ . . . . The tort here is, however, well established; the only question is whether a remedy in damages is available against a limited class of tortfeasors.”

Stevens begins his assault on the majority by challenging its contention that because plaintiffs have alternative remedies, Bivens actions should not be available against private contractors. In fact, Stevens points out, although Bivens may not have had an action against the federal government under state tort law, he might well have had a claim against the officer himself under state tort law. Similarly, in Carlson the Court allowed liability even though the plaintiffs had recourse under the Federal Tort Claims Act. In relying on alternative remedies, not only will the Court undermine the uniformity of federal law but it will chip away at the “protection of the full scope of constitutional rights.” Although state tort law may have parallel causes of action to the Eighth Amendment’s prohibition on cruel and unusual punishment, causes of action that mimic the Equal Protection or Due Process Clauses may not exist under state tort law.

Stevens then takes issue with the majority’s contention that allowing a cause of action against federal actors will not serve the deterrent goals of Bivens. As previously recognized by the Court in Richardson, private prisons are subject to market pressure, unlike government prisons, and therefore the private contractor is distinguishable from the federal agency.

Stevens also points to the incongruity of denying relief against federal contractors. Instead of producing asymmetry in litigation, as the majority contends, federal contractor liability would mean that prisoners in both government and private facilities would be precluded from suing the government, but instead would be able to sue...
the primary federal agent—the government agent or the corporation acting as agent.\textsuperscript{156} Indeed, under \textit{Malesko}, an asymmetry will be produced between state prisoners housed in private facilities who can sue the contractors and federal prisoners housed in private facilities who cannot sue the private corporation.\textsuperscript{157} Stevens acknowledges that the Court has never expressly stated that \textit{Bivens} and § 1983 should be interchangeable, but there are “sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors ‘would be incongruous and confusing.’”\textsuperscript{158} Indeed, even \textit{Meyer} served that parallelism since a § 1983 claimant would not be able to bring suit against a state agency, as the federal agency could not be sued.

Finally, Stevens voices his concern that the majority is merely expressing its opposition to \textit{Bivens} by holding to its most conservative interpretation. According to Justice Stevens, the Court should not be swayed in its adjudication of an individual case by its “predisposition” for several reasons.\textsuperscript{159} First, Congress has never sought to outlaw the \textit{Bivens} remedy and has therefore effectively ratified it. Second:

> [A] rule that has been such a well-recognized part of our law for over 30 years should be accorded full respect by the Members of this Court, whether or not they would have endorsed that rule when it was first announced. For our primary duty is to apply and enforce settled law, not to revise that law to accord with our own notions of sound policy.\textsuperscript{160}

\textbf{C. Analysis of Malesko}

Admittedly, the \textit{Bivens} premise that authority to create federal common law can be inferred from the federal question statute\textsuperscript{161} is subject to challenge. After all, diversity jurisdiction does not grant the courts sufficient power to fashion federal common law, at least since the demise of \textit{Swift v. Tyson}.\textsuperscript{162} However, it is arguable that \textit{Bivens’} strength stems from its ability to enforce constitutional rights. The Supreme Court said in \textit{United States v. Standard Oil Co.}.\textsuperscript{163}

We would not deny the Government’s basic premise of the law’s capacity for growth, or that it must include the creative work of judges . . . . But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state

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\textsuperscript{156} \textit{Malesko}, 122 S. Ct. at 527 (Stevens, J., dissenting).

\textsuperscript{157} \textit{Id.} at 527 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37).

\textsuperscript{158} \textit{Id.} (citing Butz v. Economou, 438 U.S. 478, 499 (1978)).

\textsuperscript{159} \textit{Id.} at 527-28 (Stevens, J., dissenting).

\textsuperscript{160} \textit{Id.} at 528.


\textsuperscript{163} 332 U.S. 301 (1947).
\end{flushright}
courts, particularly in the freedom to create new common-law liabilities, as Erie R. Co. v. Tompkins itself witnesses. 164

Whereas Standard Oil precluded the recognition of a right of action by the United States for the loss of a soldier’s services, it specifically stated that the prohibition on creating new causes of action is limited to non-constitutional situations. Of course, critics might argue that Standard Oil must be construed to limit the power to create new substantive constitutional rights, such as the right recognized in Shaw v. Reno, 165 rather than the creation of a cause of action. However, recognizing a Bivens cause of action is essentially the recognition of a substantive constitutional right and therefore should be allowed under the Standard Oil analysis.

The Malesko opinion is vulnerable to challenge on other grounds. First, although the Chief Justice may be correct that the Court has retreated from its former willingness to imply rights of action from statutes that do not explicitly create those rights, that does not automatically signify that the Court should be equally unwilling to recognize constitutional causes of action. Whereas it can be argued that already existing statutes without explicit private causes of action represent Congress’ wish that no private cause of action exist, the Bivens opinion has shown Congress that statutory authority is not necessary for private constitutional causes of action. Of course, Malesko could galvanize the legislative branch to enact a statutory cause of action against federal contractors, but the question remains whether congressional action is truly necessary when constitutional claims are at stake. Bivens can be seen as advancing the idea that constitutional rights are so important that statutory authorization for their enforcement is unnecessary.

Second, although Chief Justice Rehnquist cites Bush v. Lucas and Schweiker v. Chilicky for the proposition that the Court has refused to extend Bivens to new contexts, 166 those cases are distinguishable from Malesko. In both Bush and Schweiker, the Court did not allow a Bivens action because Congress had already imposed vast regulations, the Social Security Act and the Civil Service Commission’s Appeal Board Review. 167 In Malesko there was no congressional scheme to provide an alternative remedy. Instead, Rehnquist relies merely on the availability of a state law cause of action as rebutting the need for a constitutional cause of action.

164 Standard Oil, 332 U.S. at 313 (emphasis added).
165 509 U.S. 630 (1993) (recognizing an “expressive harm” to citizens of voting districts where race was the predominant factor in districting).
Third, the Malesko Court used Meyer to show that Bivens actions are not available where officers would not be deterred. However, Harlan’s concurrence in Bivens does not support this argument:

I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

The Malesko majority ignores Harlan’s statements, which suggest that the purpose of Bivens is not mere deterrence, but the recognition of constitutional causes of action. Instead, the Court disallows the even stronger deterrent—the training and discipline that would be provided by employers if they were found proper Bivens defendants—because it purportedly would not deter the employee. The Malesko Court characterizes Bivens as solely concerned with deterring the conduct of individual officers, yet it ignores the fact that the Bivens Court could only address federal officers’ liability because suit against the federal government was prohibited. Indeed, the federal government, like the state governments, is immune from suit, unlike other entities. Granting federal contractors what is essentially the equivalent of sovereign immunity is questionable logic. Furthermore, Rehnquist’s assertion that Meyer precludes creation of a remedy against federal contractors is weakened by the fact that Meyer was also specifically premised on the notion that impact on the Federal Treasury constituted a special factor counseling hesitation. Here, there is no indication that the liability of private contractors will impact the Federal Treasury.

Fourth, the argument that to create liability against federal contractors, and not the Bureau of Prisons, would foment asymmetry is not convincing. Asymmetrical costs are imposed on private state contractors, who can be held liable for constitutional violations, whereas the state government cannot be subject to liability as a result of the Eleventh Amendment.

Rehnquist’s final argument that Malesko has other effective state tort remedies is successfully refuted by Justice Stevens, who points out

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168 Malesko, 122 S. Ct. at 521.
that Bivens may have had state law tort remedies against the federal officer in his personal capacity.\textsuperscript{171} This raises the larger question of whether violations of the Constitution require judicially-created causes of action, regardless of the availability of state law remedies, in order to ensure the enforcement of the Constitution and the Supremacy Clause.\textsuperscript{172}

These arguments are better understood in the larger context of \textit{Bivens} and § 1983 doctrine. The following Section explains the relation between these causes of actions and proposes that to ensure comparable treatment for constitutional violations, private contractors engaging in federal action should be liable under \textit{Bivens}.

IV. THE PARALLEL NATURE OF \textit{BIVENS} ACTIONS AND § 1983 ACTIONS IN PROVIDING RELIEF FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

A. Cross-Over Between Immunity Defenses in \textit{Bivens} and § 1983 Actions

The cause of action for vindicating constitutional rights depends on what type of actor has violated those rights—state or federal. Section 1983 of Title 42 of the United States Code has traditionally been used against those who have acted under color of state law; actors must wield a badge of power provided by the state.\textsuperscript{173} As a result of the § 1983 requirement that actors have acted under color of state law, suits for violations of constitutional rights by federal agents cannot be brought under § 1983, but must be brought under \textit{Bivens}. It is generally recognized that § 1983 provides a damages remedy against state and local violators of constitutional rights and that "\textit{Bivens creates a parallel claim against federal defendants."}\textsuperscript{174}

The rationale for offering parallel remedies to victims of constitutional violations by federal actors, as well as state actors, is found in the interpretation of immunity and damages jurisprudence. The Supreme Court specifically addressed the issue of the interchangeability of § 1983 immunity law with \textit{Bivens} jurisprudence in \textit{Butz v. Economou}.\textsuperscript{175}

[Without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the

\textsuperscript{171} \textit{Malesko}, 122 S. Ct. at 525-26.
\textsuperscript{172} U.S. CONST. art. VI.
\textsuperscript{174} Jeffries, \textit{supra} note 34, at 89.
\textsuperscript{175} 438 U.S. 478 (1978).
Constitution against federal officials . . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.176

A system that monitors the actions of private corporations engaging in state action more closely than those acting under color of federal law should be subject to the same criticism. The Supreme Court refused to distinguish between § 1983 and Bivens based on § 1983’s statutory origins:

[T]he Government’s analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has “in large part been of judicial making.”177

Despite the lack of reference in § 1983 to immunities, the Court has consistently interpreted and announced immunities from § 1983 liability.178 The Court also noted in Butz, “The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.”179 If the federal courts can determine the level of immunity from a Bivens suit, surely they can determine whether a federal contractor is liable to suit under Bivens, as they have specifically addressed that issue in reference to § 1983.

B. Cross-Over Between the Availability of Damages in Bivens and § 1983 Actions

The law governing damages also suggests that § 1983 and Bivens remedies should mimic one another. The Court has recognized a need for consistency in assigning remedies:

[I]n Carlson v. Green, we stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones.180

The willingness of the Court to allow cross-pollination between the causes of action supports the possibility of a federal action against government contractors, where one is allowed at the state level.

176 Butz, 438 U.S. at 504.
177 Id. at 501-02 (citation omitted).
178 See id. at 502-03 (noting that the Court has announced what it has deemed the appropriate type of immunity from § 1983 in a variety of contexts).
179 Id. at 503.
C. Development of § 1983

Although Bivens and § 1983 have parallel applications, the Bivens cause of action originated a full one hundred years after the creation of the statutory right of action in § 1983. To explain why a Bivens action should exist where a § 1983 action exists, a short history of the development of § 1983 is necessary.

Congress adopted the Ku Klux Klan Act of 1871—now codified as 42 U.S.C. § 1983—in response to white southerners' continued resistance to emancipation and Reconstruction.\(^\text{181}\) The statute provides for a cause of action against any person acting under color of law who deprives an individual of rights, privileges or immunities guaranteed by the Constitution and laws of the United States.\(^\text{182}\) Section 1983 lay dormant until 1961—nearly a century after its passage—when the Supreme Court held that individual police officers could be held personally liable under § 1983 for violations of rights secured by the Constitution.\(^\text{183}\) Over a vigorous dissent by Justice Frankfurter, the Court held that individual officers could be held liable, regardless of the availability of a state law remedy, and despite the fact that the officer may have violated established state law.\(^\text{184}\) The Bivens cause of action against federal agents mimics that provided by § 1983 against state agents.

1. Municipalities Are Held Liable Under § 1983

Section 1983 gained even more power in 1978 when the Supreme Court, in Monell v. Department of Social Services, ruled that municipalities were "persons" for purposes of § 1983 and could therefore be

\(^\text{181}\) In Monroe v. Pape, the Court discussed the history of the Act:
This Act of April 20, 1871 . . . was passed by a Congress that had the Klan "particularly in mind." The debates are replete with references to the lawless conditions existing in the South in 1871 . . . . It was not the unavailability of state remedies but the failure of certain States to enforce laws with an equal hand that furnished the powerful momentum behind this "force bill."
365 U.S. 167, 174-75 (1961) (internal citation omitted).

\(^\text{182}\) 42 U.S.C. § 1983 provides in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


\(^\text{184}\) The Monroe Court explained:
It was argued there, as it is here, that "under color of" state law included only action taken by officials pursuant to state law. We rejected that view . . . . We conclude that the meaning given "under color of" law in the Classic case and in the Screws and Williams cases was the correct one; and we adhere to it.
Id. at 184-87 (internal citation omitted).
sued for the violations of rights secured by the Constitution.\textsuperscript{185} Although Monell opened the door to a class of previously barred lawsuits, its force was blunted by the requirement that the violation have resulted from a policy or custom of the municipality.\textsuperscript{186} In effect, municipalities are not liable on a respondeat superior basis for the actions of its employees.\textsuperscript{187} Nevertheless, the strength of § 1983 is undeniable and has been decried by Justices of the Supreme Court.\textsuperscript{188}

Monell seems particularly pertinent here because Justice Brennan's decision to hold municipalities liable, and reject their claims of Eleventh Amendment state sovereign immunity, rested on the similarities between corporations and municipalities. "[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."\textsuperscript{189} As early as 1869, the Letson principle\textsuperscript{190} was "automatically and without discussion extended to municipal corporations."\textsuperscript{191} As a result, [C]ounties, cities and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States.\textsuperscript{192}

Although a county engages in state action, it is not protected from suit by the Eleventh Amendment.\textsuperscript{193} Given that municipalities are held liable because of their likeness to corporations (albeit those engaged in state action), it would follow that corporations engaged in federal action should be subject to the parallel federal cause of action for violations of constitutional rights. The extension of the Bivens claim to private corporations, however, would necessarily require that

\textsuperscript{186} See id. at 692 ("The ... language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights.").
\textsuperscript{187} The Monell majority concluded:

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

\textit{Id.} at 694.
\textsuperscript{189} See Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("Monroe changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law.").
\textsuperscript{188} Monell, 436 U.S. at 687.
\textsuperscript{190} See Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (holding that a corporation is as liable as a "natural" person for purposes of suit).
\textsuperscript{191} Monell, 436 U.S. at 688 (emphasis added).
\textsuperscript{192} Id. at 688 n.50 (quoting Globe 752 (statement of Rep. Shellabarger)).
those corporations benefit from the Monell policy requirement, otherwise the new cause of action would not be parallel to the § 1983 cause of action.

Indeed, the extension of the Monell policy requirement to the Bivens cause of action is evident in the Hammons court's requirements: "If it can be shown that the corporate policy at issue has violated Hammons' constitutional rights under the Fourth Amendment, and that the policy is attributable to the federal government, Hammons is entitled to relief."194

2. The Strength of § 1983 Is Undercut by Eleventh Amendment Immunity

Despite § 1983's ability to reach individual officers, municipalities, and school boards, state liability presents a greater hurdle. State prisoners may sue state corrections officers personally under § 1983 for both compensatory and punitive damages; however, these suits often yield little monetary relief.195 Juries may react poorly to inmates and undercompensate plaintiffs with strong suits against individual officers.196 The possibility of insufficient compensation in suits against individual officers and the search for "deep pockets" has led plaintiffs away from suits against individual officers.197 These risks also explain the interest in the liability of private contractors.

Although a prospective plaintiff might think of the state as a potential remunerator, state prisoners in state-run facilities are barred from suing the offending state for monetary damages by the Eleventh Amendment.198 Although the language of the Eleventh Amendment indicates that states can invoke immunity from suits by citizens of other states and foreign citizens, the Supreme Court has interpreted

195 One commentator has argued:
    Governmental (municipal) liability in a section 1983 action is significant for a number of reasons. First, it provides a deep pocket. This is important not only so that there will be funds to pay off a successful plaintiff but because it also likely creates more successful plaintiffs by alleviating the reluctance of judges and juries to hold an individual employee liable for carrying out his governmental duties.
196 See, e.g., Smith v. Wade, 461 U.S. 30, 33 (1983) (awarding $25,000 in compensatory and $5,000 in punitive damages for an inmate who was assaulted and raped in jail).
198 U.S. CONST. amend. XI ("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").
the immunity to extend to suits by citizens against their own states.\textsuperscript{199} In lieu of damages, plaintiffs alleging violations of rights secured by the Constitution may only seek injunctive relief by suing the responsible state official in his official capacity under the *Ex parte Young* fiction. The *Ex parte Young* principle draws on the common law tradition that "the king can do no wrong."\textsuperscript{201} Therefore, if a state official violates the Constitution he is no longer acting under the protection of the state and may therefore be enjoined from engaging in the illegal conduct—hence the characterization of the holding as a fiction.\textsuperscript{202}

State sovereign immunity is a parallel concept to that of federal sovereign immunity, which Justice Thomas has characterized as the rationale behind the creation of *Bivens* liability. As Justice Harlan noted in his *Bivens* concurrence, "However desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit."\textsuperscript{203} Although some commentators contend that the jurisprudence of federal sovereign immunity was not sufficiently developed to provide a basis for denying direct federal liability,\textsuperscript{204} besides asserting federal sovereign immunity in *Bivens*, the Supreme Court has consistently upheld the immunity of the federal government.\textsuperscript{205} Once again, the jurisprudence of sovereignty in the state and federal areas mimic one another, despite the seeming incongruence of the liability of municipalities, which the Supreme Court held are not states for Eleventh Amendment purposes.\textsuperscript{206}

\textsuperscript{199} See *Hans v. Louisiana*, 134 U.S. 1 (1890).

\textsuperscript{200} 209 U.S. 123 (1908).

\textsuperscript{201} *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.").


\textsuperscript{204} Criticizing the Courts' reasoning in *Bivens*, Rosen writes:

\textbf{[T]he Court ruled, without discussion, that the damages to which the victim was entitled could be garnered only from the individual federal officer who committed the violation. Although nowhere mentioned in the majority opinion, the Court apparently assumed that the United States had sovereign immunity from a claim for damages based upon the Constitution.}

Rosen, supra note 195, at 341.

\textsuperscript{205} See, e.g., *Alden v. Maine*, 527 U.S. at 709 ("[B]ecause the Federal Government retains its own immunity from suit in state and federal court, this Court is reluctant to conclude that States are not entitled to a reciprocal privilege.").

\textsuperscript{206} See *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 n.54 ("Our holding today is, of course, limited to local governments units which are not considered part of the State for Eleventh Amendment purposes.").
D. A Wrinkle in the Parallelism Between the § 1983 Liability of State
Employees and Private Employees

In 1997, the Supreme Court held that prison guards, employed by
private prisons that have contracted with the state, cannot claim
qualified immunity when they are sued under § 1983. Justice
Breyer examined the common law when § 1983 was enacted in 1871
and found that private prison operators did not enjoy such immu-
nity. In addition, "the most important special government immu-
nity-producing concern—unwarranted timidity—is less likely pres-
ent...when a private company subject to competitive market
pressures operates a prison." In contrast, Justice Scalia stressed the
need to adhere to a functionalist approach—an approach which
grants immunities based on the function of the actor. Hence, the
private prison guard should be treated as a public prison guard since
that is his function. Indeed, a Justice at the Malesko oral argument
posited that McKnight had specifically rejected parallelism.

Richardson did not reject parallelism so much as it rejected strict
functionalism. If the Malesko Court had adhered to the strict func-
tionalist argument, the private prison corporation would not be liable
as would be performing the same function as the state would per-
form. This approach would deny the importance of the Eleventh
Amendment doctrine, which approves immunity only for the state
and arms of the state, precisely because the state is sovereign and
should not be impugned in court without its consent. Nowhere has
Eleventh Amendment doctrine hinted that its protection can be en-
joyed by a private corporation that merely engages in state action.
The power of the Eleventh Amendment lies precisely and solely be-
cause the state is sovereign.

E. The State Action Doctrine

Private entities that have won contracts with the states may also be
sued by prisoners for violations of rights secured by the Constitution
pursuant to § 1983, assuming there is state action and the entity is
not an "arm of the state" and thereby imbued with Eleventh Amend-

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207 See Richardson v. McKnight, 521 U.S. 399 (1997).
208 See id. at 404.
209 Id. at 409.
210 See id. at 416 (Scalia, J., dissenting).
1182728, at *36 (Oct. 1, 2001) ("We rejected parallelism in Richardson. Parallelism—symmetry
is very difficult to achieve in this area as of this point, no matter what we do.").
ment sovereign immunity. The state action requirement was first articulated in *The Civil Rights Cases*, where the Supreme Court held that the Fourteenth Amendment only protected against state "aggression," not violations of rights by private parties. As a result, the Supreme Court has developed a body of law that requires a state to be involved with an alleged violation of rights protected by the Constitution.

The Supreme Court's interpretation of the state action doctrine provides strong support for the extension of liability to private contractors that engage in federal action. The Second and Sixth Circuits' assertions that corporations engaging in federal action should be liable, as are those engaging in state action, rely primarily on the Supreme Court's decision in *Lugar v. Edmondson Oil Co.* In *Lugar*, the respondent sought a pre-judgment attachment of the petitioner's property in Virginia state court on the belief that he might attempt to dispose of his property in order to defeat his creditors. The clerk of the court reviewed the ex parte petition and issued an attachment, which was executed by the Sheriff. The trial court, however, dismissed the attachment for Edmondson's failure to establish the statutory grounds for attachment. Lugar subsequently brought suit under § 1983, not against the Sheriff, but against Edmondson for a violation of his rights protected by the Due Process Clause.

Another Supreme Court holding, *West v. Atkins*, addresses the liability of contractors of prison services even more directly. Inmate Quincy West brought suit against a private physician under § 1983 alleging the doctor violated his Eighth Amendment right to be free from cruel and unusual punishment when he refused to schedule surgery to repair West's torn Achilles tendon. The physician was

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213 See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) (holding that bi-state railroad does not enjoy "arm of the state" status or Eleventh Amendment immunity as the state treasury was not at risk).
219 See id. at 925.
220 Id. at 941.
222 *West*, 487 U.S. at 44.
under contract with North Carolina to provide orthopedic services at
a state prison hospital, and West was barred by state law from seeking
a physician of his own choosing. Justice Blackmun delivered the
opinion of the Court and held that the physician's action was fairly
attributable to the State precisely because the State employed him.
Justice Blackmun distinguished Polk County v. Dodson, which held
that a public defender was not engaged in state action, by contrasting
the adversarial relationship between the public defender and the State
with the cooperative relationship between the doctor and the State.
"In contrast to the public defender, Doctor Atkins' professional and
ethical obligation to make independent medical judgments did not
set him in conflict with the State and other prison authorities.
Because it has been established that states have a constitutional obligation
under the Eighth Amendment to provide adequate medical care
to inmates, the Court refused to allow North Carolina to contract
out of its constitutional obligations.

Most important in the state action requirement relating to prisoners is the "public function test." Under this test, a private party acts
under color of law when it performs a function or power "traditionally exclusively reserved to the State." One district court has noted,
"In the context of privately run prisons, courts have applied the public function test and found that private contractors who run prisons have acted under color of state law for purposes of § 1983. The Sixth Circuit held that a private corporation that incarcerated inmates was acting under color of state law. A Florida district court held a private contractor that had contracted to run a Florida county jail was a state actor for purposes of § 1983. In New Jersey, a district
court ruled that "if a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine."
CONCLUSION

The Supreme Court has treated § 1983 and Bivens actions as analogous in the context of both immunity and damages law. Given the consistent exchange of remedies and defenses in developing the applicable law governing constitutional torts, corporate entities engaging in federal action should be liable for constitutional violations as are their counterparts engaging in state action. The extension of § 1983 state action principles to Bivens suits will no doubt increase the possibility of recovery for Bivens plaintiffs and serve the original purpose of Bivens, which, in the words of the distinguished Justice Harlan,233 was the remedy of constitutional violations.