THE IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER THE IDAHO CONSTITUTION

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I. INTRODUCTION: BIVENS ACTIONS AND THE DISTRICT OF IDAHO

It is well-established that plaintiffs alleging violation of their federal or state constitutional rights may sue for an injunction to halt continuing unconstitutional government action.[1] Whether plaintiffs may seek compensation for injuries already suffered, however, varies by jurisdiction.[2]

1. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

2. *See* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses § 7.07(1)–7.07(2) (4th ed. 2006) (discussing opinions from thirty-eight states).

Suits seeking money damages for constitutional violations are commonly called Bivens actions,[3] after the landmark 1971 case Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.[4] In Bivens, the United States Supreme Court held that the Fourth Amendment could, of its own force, support a cause of action for damages.[5] In the years following Bivens, the Court extended its rationale to claims alleging violations of Fifth and Eighth Amendment rights as well.[6] And while for decades the Court has been disinclined to extend the availability of money damages to enforce other constitutional rights,[7] Bivens actions remain an important pathway for plaintiffs to vindicate their rights under the federal constitution.[8]

In some cases, however, plaintiffs may wish to bring claims to vindicate their rights under state constitutions as well.[9] Claims under state constitutions may be preferable to federal claims for a number of reasons: state constitutions may afford rights not recognized by the federal constitution; they may have more protective interpretations of parallel rights; they may have schemes of immunities and defenses less favorable to defendants; and decisions protecting rights independently derived from state law are not subject to review or reversal by the Supreme Court.[10]

Dozens of states have taken up the issue of implied constitutional damages actions in the nearly fifty years since Bivens was decided, but nothing like a consensus has emerged.[11] In a recent case considering the availability of damages under the Iowa Constitution, the Iowa Supreme Court surveyed other state court opinions on the issue.[12] It found cases from fourteen states allowing money damages,[13] cases from fourteen states disallowing the same,[14] and described the landscape as "nearly equally divided."[15]

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3. Bivens *action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

5. *Id.* at 397.

6. Davis v. Passman, 442 U.S. 228, 230 (1979) (Fifth Amendment); Carlson v. Green, 446 U.S. 14, 17–18 (1980) (Eighth Amendment).

7. *See infra* Part II.b.

8. *See generally* Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Actions, ¶ 14.01 (Matthew Bender & Co. 2019).

9. FRIESEN, *supra* note 2, § 1.03(2).

10. *Id*.

11. *See* FRIESEN, *supra* note 2, § 7.07(1)–7.07(2) (discussing opinions from thirty-eight states).

12. Godfrey v. State, 898 N.W.2d 844, 856–57 (Iowa 2017).

13. *Id.* at 856 n.2.

14. *Id.* at 857 n.3.

15. *Id.* at 856. While the Iowa court's collection of cases is a helpful starting point for the researcher, it is important to note the limitations of its jurisdictional nose-counting. First, sorting jurisdictions into pro- and anti-damages camps oversimplifies the issue: most state opinions do not frame their holdings as whether damages are always or never available, but address whether damages are available for the violation of a particular constitutional provision under a particular set of facts. Thus, allowance or disallowance of a damages remedy may not reflect the availability of damages as a general matter, but rather the peculiarities of the provision at issue. Second, many states cannot tidily be placed on one side of the issue or the other. At least eight states which have found damages unavailable for certain violations have held, or have suggested they would hold, damages available in other circumstances. *See* FRIESEN, *supra* note 2, § 7.07(1)–7.07(2) (providing state-by-state summaries of decisions recognizing or rejecting damage claims under state constitutions). These states are Arizona, Connecticut, Florida, Michigan, New York, North Dakota, Pennsylvania, and Rhode Island. *Id.*

Perhaps this is not a surprising result. For one, Supreme Court jurisprudence in the area has changed dramatically over time and has occasionally taken contradictory positions.[16] But even Bivens itself produced five separate opinions, including three dissents.[17] Accordingly, state courts seeking guidance from federal caselaw will easily find support for a variety of divergent positions.

Like most states,[18] Idaho has no statute explicitly allowing plaintiffs to seek money damages in suits alleging violation of the state constitution. Unlike many states,[19] however, no Idaho appellate court has addressed the issue of whether such actions are implied under the state constitution. Given the silence of the Idaho appellate courts, and the lack of consensus on the issue among the states, one might expect the Federal Court for the District of Idaho to treat the availability of state constitutional damages as an open question. Surprisingly, it has firmly decided, without certifying the question to the Idaho Supreme Court, that Bivens actions are not available under the Idaho Constitution.[20] It has accordingly dismissed plaintiffs' state constitutional claims in more than twenty cases between 2006 and 2019.[21]

The court appears to have first held that no private cause of action arises under the Idaho Constitution in Boren v. City of Nampa.[22] In Boren, the court dismissed a laundry list of claims brought against city officials by pro se litigants involving a zoning dispute.[23] These included a claim that the defendants violated Article I of the Idaho Constitution.[24] The district court acknowledged that the Idaho Supreme Court had been silent on the issue, but held it was "confident" Idaho courts would not recognize such a cause of action.[25]

The source of the court's confidence is unclear: the Boren court cited two cases from outside jurisdictions to support its holding, but it offered no discussion

16. *See infra* Part II.b.

17. *See infra* Part II.a.

18. FRIESEN, *supra* note 2, § 7.01.

19. FRIESEN, *supra* note 2, § 7.07.

20. *See* Boren v. City of Nampa, No. CIV 04-084-S-MHW, 2006 WL 2413840, at *10 (D. Idaho Aug. 18, 2006).

21. *See, e.g.*, Kangas v. Wright, No. 1:15-cv-00577-CWD, 2016 WL 6573943, at *6 (D. Idaho Nov. 4, 2016) (citing five previous cases to support a finding that the District of Idaho "has repeatedly refused to recognize a 'direct cause of action for violations of -the Idaho Constitution[,]'" (quoting Campbell v. City of Boise, No. CV-07-532-S-BLW,

2008 WL 2745121, at *1 (D. Idaho July 11, 2008)). Though opinions frequently do not distinguish between claims for money damages and equitable relief, *see id.*, at least one case has allowed state constitutional claims to proceed where the plaintiff sought an equitable remedy. Hancock v. Idaho Falls Sch. Dist. No. 91, No. CV-04-537-E-BLW, 2006 WL 2095264, at *1–2 (D. Idaho July 27, 2006) (reconsidering summary judgment on a claim under the Idaho Constitution's free speech provision after plaintiff clarified he was seeking equitable relief).

22. *Boren*, 2006 WL 2413840, at * 10.

23. *Id.* at *1–3.

24. *Id.* at *10. Article I sets forth Idaho's Declaration of Rights in twenty-three sections, *see* IDAHO CONST. art. I, but plaintiffs apparently did not allege violation of any section with specificity. *See Boren,* 2006 WL 2413840, at *1.

25. *Boren*, 2006 WL 2413840, at *10.

of those cases nor any analysis of Idaho law.[26] And despite the many constitutional claims dismissed in the District of Idaho since Boren, the court has devoted almost no additional analysis to the question. Even the district court's most substantial treatment of the issue omits discussion of Idaho law.[27]

This Comment argues that the District of Idaho is mistaken—the Idaho Supreme Court, if it were to address the question, would hold that the Idaho Constitution does support a cause of action for damages in some cases. In Part II, I will discuss constitutional tort actions under federal law to enforce the federal Constitution. While the focus of this Comment is the availability of an action for damages under Idaho law to enforce the Idaho Constitution, discussion of Bivens actions in federal courts is important for two reasons. First, the development of federal law in this area highlights many of the same constitutional and policy problems facing state courts when they confront the issue. In particular, it illuminates the tension between assuring the vitality of constitutional rights through meaningful enforcement mechanisms and respecting limits on the power of the judicial branch in a system of divided government.

Second, because state courts considering the availability of Bivens actions under their constitutions frequently analogize to (or distinguish from) federal law on the topic, understanding the development of federal constitutional tort jurisprudence is necessary to contextualize these decisions. In particular, I will show the skepticism that currently defines the federal approach to Bivens actions is based on concerns inapposite in the state court context, generally, and in Idaho, particularly. Thus, while some courts have found the Supreme Court's hostility to Bivens actions persuasive,[28] the line of federal cases limiting Bivens actions should bear little weight, if any, when considering the availability of damages to enforce rights under the Idaho Constitution.

In Part III, I argue that the availability of an implied cause of action under the state constitution is the only position consistent with Idaho law. As already noted, no Idaho appellate court has addressed the issue, but Idaho Supreme Court's recent decision in Tucker v. State[29] indicates how the Court would rule. I will show that Tucker demonstrates the Court rejects "rights essentialism"—a fiction forged in

26. See *id.*

27. *See* Sommer v. Elmore Cty., 903 F. Supp. 2d 1067, 1074–75 (D. Idaho 2012). *Sommer* is the District's only published case addressing implied constitutional damages actions in Idaho and is the only case to devote more than a few sentences to the topic. While *Sommer* does not analyze any Idaho law, it curiously relies on *Katzberg v. Regents of University of California*, 58 P.3d 339 (Cal. 2002), as persuasive authority to deny a private right of action. *Sommer*, 903 F. Supp. 2d at 1074–75. *Katzberg*, however, does not stand for the proposition that damages are generally unavailable under the California Constitution; indeed, California courts explicitly recognize damages are available to enforce some provisions of its Constitution. *See* Hill v. NCAA, 865 P.2d 633, 644 (Cal. 1994) (holding money damages are available for violation of the state constitutional right to privacy). Rather, *Katzberg* established a two-step framework to analyze California constitutional damages claims: in step one, the court looks at the text and history of the state constitution to determine if damages *must* be available; in step two the court determines if damages *should* be available. *Katzberg*, 58 P.3d at 353–55. While the *Katzberg* court found that damages should not have been available to remedy the particular interest at issue in that case (deprivation of a due process liberty interest in future employment), *id.* at 356–57, the opinion simply does not support the proposition for which District of Idaho cited it—that damages *must not* be available in any instance.

28. *See, e.g.*, Cantrell v. Morris, 849 N.E.2d 488, 501–04 (Ind. 2006).

29. Tucker v. State, 394 P.3d 54, 61, 162 Idaho 11, 18 (2017).

response to separation of powers concerns that de-links rights and remedies—in favor of the intuitive position that rights and remedies exist in a 1:1 correlation. Thus, under Idaho law, the courts may not defer to the other branches to enforce constitutional rights.

Finally, in Part IV, I address how Idaho courts should implement Bivens actions in Idaho. I argue Idaho courts must allow a damages remedy where plaintiffs can prove violation of self-executing provisions of the state constitution. I argue further that the state or its political subdivisions are the only proper defendants in an action directly under the Idaho Constitution, and defendants should be held strictly liable where the conduct causing injury is fairly attributable to the government. Lastly, I address the propriety of equitable versus legal relief and the availability of punitive damages.

II. BIVENS V. SIX UNKNOWN AGENTS OF FEDERAL BUREAU OF NARCOTICS AND INHERENT JUDICIAL REMEDIAL AUTHORITY UNDER THE FEDERAL AND STATE CONSTITUTIONS

A. Summary of the opinions in Bivens

Bivens stemmed from a 1965 warrantless raid on the home of Webster Bivens by agents of the Federal Bureau of Narcotics.[30] Bivens was handcuffed in front of his wife and children, and agents threatened to arrest the entire family.[31] They then searched the home from "stem to stern," arrested and interrogated Bivens, and subjected him to a strip search.[32] No incriminating evidence was found, however, and the charges against Bivens were ultimately dismissed.[33]

Bivens claimed the agents' conduct violated his Fourth Amendment rights, was unreasonable, and caused him humiliation, embarrassment, and emotional distress.[34] He sued the agents in federal court seeking $15,000 in damages from each.[35] The government argued that if the plaintiff was to have redress, his cause of action arose under state tort law, not the Constitution.[36] In the government's view, the Fourth Amendment was not an affirmative source of protection, but a mere limit on the agents' ability to defend their conduct as a valid exercise of federal power.[37]

Writing for the majority, Justice Brennan rejected this argument as an "unduly restrictive" interpretation of the Fourth Amendment.[38] Though Congress had never enacted a statute allowing damages as a remedy to enforce the Fourth

30. *Bivens*, 403 U.S. at 389.
31. *Id.*
32. *Id.*
33. *Id.* at 390.
34. *Id.* at 389–90.
35. *Id.* at 390.
36. *Bivens*, 403 U.S. at 390.
37. *Id.* at 390–91.
38. *Id.* at 391.

Amendment, the Court held that Mr. Bivens could nevertheless sue for damages.[39] The Court observed that the Constitution guaranteed an "absolute right to be free from unreasonable searches and seizures," and where that right has been violated, the Court's role was to "be alert to adjust [its] remedies so as to grant the necessary relief."[40]

In taking this pragmatic approach, the Court applied the doctrine of implied causes of action—a doctrine developed in state courts to fill remedial gaps left open when legislatures create statutory rights but are silent as to the means of their enforcement—to secure Constitutional rights.[41] This is implicit in the majority opinion, but is express in Justice Harlan's concurrence.[42] Harlan cited several cases where, in the absence of a legislatively created cause of action, the Court had exercised judicial authority to accord damages when necessary to effectuate "substantive social policy embodied in an act of positive law."[43] He then noted that the Fourth Amendment is such a law, articulating a social policy "aimed predominantly at restraining the Government as an instrument of the popular will."[44] Therefore, since courts are "capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion" of those rights, fashioning a damages remedy was not just permitted, but compelled by judicial duty.[45] As applied to Bivens' case, the necessity of damages was apparent: an injunction could provide no relief because the same harm was unlikely to recur to the plaintiff, and the exclusionary rule could afford no relief because he was never charged with a crime.[46] Thus, as Harlan succinctly put it: "For people in Bivens' shoes, it is damages or nothing."[47]

Three Justices dissented in *Bivens*, and all three decried the majority's recognition of an implied action for damages as an imposition by the Court into the legislative sphere.[48] According to the dissents, the business of determining remedies—whether for common law torts or constitutional torts—belonged solely

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39. *Id.*

40. *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

41. FRIESEN, *supra* note 2, § 7.05(3). As summarized by the RESTATEMENT (SECOND) OF TORTS, the doctrine of implied causes of action provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.
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> Restatement (Second) of Torts § 874A (Am. Law. Inst. 1979).

42. *Bivens*, 403 U.S. at 402 (Harlan, J., concurring).

43. *Id.* at 402 n.4.

44. *Id.* at 404.

45. *Id.* at 409.

46. *Id.* at 409–10.

47 .*Id.* at 410.

48. *See Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting) ("We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested legislative the power."); *Id.* at 429 (Black, J., dissenting) ("The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States."); *Id.* at 430 (Blackmun, J., dissenting) (describing the majority opinion as "judicial legislation").

to Congress.[49] In the words of Justice Black, "the fatal weakness in the [majority's] judgment is that neither Congress nor the State of New York has enacted legislation creating [an action for damages]. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."[50] But perhaps the starkest contrast with the Court's view that it possessed authority to award damages is found in Justice Burger's dissent. Though the bulk of Burger's dissent involves a collateral discussion of the exclusionary rule, his view on inherent judicial authority to award damages was made clear with an approving nod to the words of James Bradley Thayer:

> And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation.[51]

Thus, by this view, the analytical path begins and ends with the question of whether the legislature has approved damages for constitutional violations—only then may damages be awarded.

B. The constriction of federal judicial remedial authority after Bivens

Bivens is still good law, but the Court has recently suggested it would have reached a different result if it were decided today.[52] Indeed, the limited view of judicial remedial authority urged by the *Bivens* dissents has become a dominant theme in federal constitutional tort jurisprudence.[53] Understanding how this shift occurred, and the basis for it, is essential to understanding why the rationale behind *Bivens*—and not the rationale for its later limitation—applies under the Idaho constitution.

The limitation of the *Bivens* holding began with two exceptions suggested by the opinion itself.[54] The majority implied that damages may not be available (1) for constitutional violations where "special factors counsel[ed] hesitation in the absence of affirmative action by Congress[,]" or (2) in situations where Congress obviated the need for damages by designating an alternative, equally effective remedy.[55] Initially, the Court construed these as narrow exceptions to the rule that "victims of a constitutional violation by a federal agent have a right to recover

49. *Id.* at 411–12 (Burger, C.J., dissenting); *Id.* at 427–28 (Black, J., dissenting); *Id.* at 430 (Blackmun, J., dissenting).

50. *Id.* at 428 (Black, J., dissenting).

51. *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting).

52. Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017).

53. See *id.*

54. *See Bivens*, 403 U.S. at 396–97.

55. *Id.*

damages against the official in federal court despite the absence of any statute conferring such a right."[56] For instance, in *Carlson v. Green*, the Court reiterated that Congress could obviate the need for a *Bivens* remedy by providing for alternative recovery, but indicated it would stringently evaluate whether that remedy was "equally effective."[57] In that case, the Court held that availability of a remedy for wrongful death under the Federal Tort Claims Act (FTCA)[58] could not prevent the mother of a deceased federal prisoner from seeking damages for violation of the prisoner's Eighth Amendment rights.[59] Because the FTCA remedy would have a lesser deterrent effect on federal officials, did not permit punitive damages, did not allow a jury trial, and was contingent on the availability of a tort cause of action under state law, the Court found it was less effective than a damages remedy directly under the Eighth Amendment.[60]

Likewise, "special factors" appeared mostly limited to situations where money damages would encroach into a field when there was a clear textual commitment of authority to another branch of government.[61] Thus, the Constitution's grant to Congress of "plenary control over . . . the military establishment" was a special factor counseling against recognition of a *Bivens* remedy where military personnel sued superior officers for constitutional violations.[62] By contrast, the prison guards in *Carlson* were liable in damages because they did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."[63]

However, beginning with *Bush v. Lucas*, the Court greatly expanded the scope of both exceptions by holding that congressional creation of an alternative remedy could itself be a special factor.[64] In *Bush*, a NASA engineer was demoted after making public statements critical of the agency.[65] The engineer appealed his demotion to the Federal Employee Appeals Authority, and after his appeal was denied, sought review by the Civil Service Commission's Appeals Review Board.[66] While that review was pending, the engineer sued for damages resulting from his demotion, alleging it was a violation of his First Amendment rights.[67] His claim was dismissed by the district court and the Supreme Court ultimately affirmed the dismissal.[68] The Court assumed that administrative remedies available to the engineer were less effective than a damages remedy, but held it would not recognize a *Bivens* action because the engineer's claim arose "out of an employment relationship that is governed by comprehensive procedural and

56. Carlson v. Green, 446 U.S. 14, 18 (1980).
57. *Id.* at 18–19.
58. 28 U.S.C. § 1346 (2018).
59. *Carlson*, 446 U.S. at 17–19.
60. *Id.* at 21–23.
61. *Id.* at 19.
62. Chappell v. Wallace, 462 U.S. 296, 301 (1983).
63. *Carlson*, 446 U.S. at 19.
64. *See* Bush v. Lucas, 462 U.S. 367, 388–90 (1983).
65. *Id.* at 369–70.
66. *Id.* at 370–71.
67. *Id.* at 371.
68. *Id.* at 371, 390.

substantive provisions giving meaningful remedies" and the existence of that scheme constituted "special factors counselling hesitation."[69]

Similarly, in *Schweiker v. Chilicky* the Court denied a *Bivens* remedy to disabled persons alleging due process violations after they were improperly denied Social Security benefits.[70] Here, too, the Court found that the existence of a "comprehensive" appeal and remediation scheme was a special factor which precluded the availability of a *Bivens* action.[71] Notably, in *Chilicky* the Court acknowledged that some claimants who were wrongfully denied benefits would not be limited to an alternative remedy, but would have no remedy *at all*.[72] This was because claimants whose benefits were restored lacked standing to challenge the prior denial.[73] Despite the total lack of remedy for these claimants, the Court concluded that the gap was the result of "congressional inaction [that] ha[d] not been inadvertent[,]" and held "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations" it would not recognize a *Bivens* remedy.[74]

The Supreme Court recently described the decision whether to recognize *Bivens* remedies as involving two steps—consideration of the adequacy of alternative remedies, followed by consideration of "special factors."[75] But *Bush* and *Chilicky* show that where mere existence of a remedial scheme is a "special factor," assessing the adequacy of remedies within that scheme will be dispensed with altogether.[76] As Professor Anya Bernstein has observed, since *Bush v. Lucas*:

> special factors analysis has evolved into an inquiry as to whether Congress has indicated that it wishes to reserve decisionmaking about remediation in some area for itself. If Congress has indicated that it has already provided all the remedies it thinks are due, or that it prefers that no remedies at all be provided, courts find that special factors preclude recognizing a constitutional damages remedy.[77]

In other words, special factors analysis has become a species of inter-branch field preemption which swallows questions of adequacy whole: anytime there is indicia of congressional consideration of remedies within an area—by providing a remedy, or even as in *Chilicky*, by not inadvertently *not* providing a remedy—the judiciary will be preempted from exercising its authority. From a functional perspective then, the Court has adopted an interpretation of "special factors" that results in an anomalous situation: while the Constitution's grant of individual rights

69. *Id.* at 368, 377, 388–90.
70. Schweiker v. Chilicky, 487 U.S. 412, 424 (1988).
71. *Id.* at 422.
72. *Id.* at 424–25.
73 *Id*.
74. *Id.* at 423.
75. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
76. *See* Bush v. Lucas, 462 U.S. 367 (1983); *See also* Schweiker v. Chilicky, 487 U.S. 412 (1988).
77. Anya Bernstein, Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?, 45 IND. L. REV. 719, 720–21 (2012).

may be "aimed predominantly at restraining the Government as an instrument of the popular will,"[78] the branches who are to be restrained have near total discretion in their enforcement when money damages are the only meaningful remedy for their violation. Though the Court's constitutional tort jurisprudence began in *Bivens* with a focus on judicial responsibility to provide remedies necessary to effectuate the counter-majoritarian purposes of the Constitution, it now is much nearer to the ideal espoused in Justice Burger's dissent of total deference to the elected branches for the enforcement of individual rights.

C. The rationale for limiting the remedial authority of the federal courts

The limiting of *Bivens* has corresponded with a trend toward limiting the equitable and common-law authority of the federal courts, generally.[79] This has included the repudiation of the federal doctrine of implied causes of action in the statutory context and disavowal of the precedent relied upon by Justice Harlan to support his concurrence in *Bivens*.[80]

This trend has been driven by "a view of the Article III courts as 'federal tribunals,' cabined within the separate domains of the different branches and lacking inherent remedial authority."[81] In the words of Justice Scalia writing for the majority in *Alexander v. Sandoval* in 2001, "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[82] Later in the same term, Justice Scalia criticized *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition[,]" and advocated limiting *Bivens* to "the precise circumstances that [it] involved."[83]

The trend has inspired criticism, as well as cynicism, since the practical consequences of limiting remedial power (i.e., greater difficulty pursuing civil rights claims) have corresponded with the perceived policy preferences of the Justices advancing that limitation.[84] But Scalia's position is certainly not without a basis in history. At the time of the founding, the remedial authority of the federal courts was limited—and complicated—by concerns of federalism:

> A remedial right logically entails a correlative remedial duty on the part of the government, and a remedial duty logically entails remedial power. But the overriding objective of the Bill of Rights

78. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring).

79. See Helen Herschkoff & Stephen Loffredo, State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis, 115 PENN ST. L. REV. 923, 978 (2011).

80. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (discussing the Court's rejection of J.I. Case Co. v. Borak, 377 U.S. 426 (1964)).

81. Herschkoff & Loffredo, *supra* note 79, at 979.

82. *Alexander*, 532 U.S. at 287 (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)); *see also* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

83. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

84. See, e.g., Eric R. Claeys, Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts, 21 CONST. COMMENT. 405 (2004); Nelson Lund, The Rehnquist Court's Pragmatic Approach to Civil Rights, 99 NW. U. L. REV. 249 (2004).

> . . . was to constrain—not to aggrandize—federal power. The Framers understood rights enforcement and remedy provision as the primary realm of state courts. They drafted Article III carefully to circumscribe the jurisdiction of federal courts.[85]

Moreover, Congress did not even provide an avenue for bringing claims under the Constitution until it created federal question jurisdiction by the Act of March 3, 1875.[86] Until this time, state courts were the exclusive venues available to plaintiffs alleging constitutional violations.[87]

Justice Harlan resolved this issue by combining the Founders' entrustment of remediation to the states with the "contemporary modes of jurisprudential thought which appeared to link 'rights' and 'remedies' in a 1:1 correlation" to find a cause of action must be implied.[88] Whether or not, as a general matter, this is within the inherent authority of the federal courts is a complicated question scholars have spent thousands of words attempting to untangle,[89] but the recent attitude of the Supreme Court toward implied causes of action is unmistakable: "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[90]

D. Inapplicability of the rationale to state courts generally, and Idaho particularly

While several state courts have analogized to the federal trend limiting *Bivens* while disallowing damages claims under their constitutions,[91] these decisions rarely note the differences between state and federal schemes of government. State constitutions reflect judgments of their framers with respect to the allocation of powers between branches of government, and these judgments often differ from the allocation of power at the federal level.[92] Some constitutions depart from the federal scheme by express terms, but even where the language of a state provision is substantially similar to a federal provision, it may well have been adopted with a different intent.[93] Additionally, unease at the federal level with allowing an unelected judiciary to expose the public fisc to liability is lessened by the fact that most judges at the state level are elected.[94]

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85. Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1786 (2017).

86. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1135 (1969). Federal question jurisdiction is now codified at 28 U.S.C. § 1331(a). *Id.* at 1114.

87. Hill, *supra* note 86, at 1135.

88. *Bivens*, 403 U.S. at 400 n.3.

89. *See* Hill, *supra* note 86.

90. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

91. *See, e.g.*, Katzberg v. Regents of Univ. of Cal., 58 P.3d 339, 344 (Cal. 2002); Kelley Prop. Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 921 (Conn. 1993); Barrios v. Haskell Cty. Pub. Facilities Auth., 432 P.3d 233, 239 n.24 (Okla. 2018).

92. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1200–01 (1992).

93. Id.

94. *See* Am. Judicature Soc'y, JUDICIAL SELECTION IN THE UNITED STATES (2013), http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

The most important distinction between state and federal courts with regard to *Bivens* actions, however, is the differing scope of jurisdiction in state and federal courts. Judicial implication of damages remedies may pose knotty questions in Article III courts of limited jurisdiction, but it is widely accepted that "state courts remain common-law generalists with equitable and inherent authority to create law, shape policy, and devise remedies."[95] Indeed, Justice Scalia's comments in both *Alexander* and *Malesko* draw a clear distinction between "federal tribunals" and common-law courts.[96] Thus, to the extent the limited jurisdiction of the federal judiciary has underpinned the narrow availability of *Bivens* actions at the federal level, these decisions should have little persuasive weight in the states.

Each of the foregoing distinctions applies in Idaho. The framers of the Idaho Constitution—like much of the territorial population they represented—were motivated by "strongly held beliefs in individualism" and a distrust of government power.[97] Thus when they drafted the Idaho Declaration of Rights, they did so with a keen eye to secure individual liberties, and adopted it as the first article of the constitution.[98] Furthermore, judges in Idaho, including justices of the Supreme Court, are elected officials,[99] obviating the separation of powers concerns that arise at the federal level if unelected judges may enter damages awards against the government in the absence of a legislative appropriation.

Finally, the Idaho Supreme Court has acknowledged its common-law power to find implied causes of action.[100] And though the Court has never applied the doctrine to a constitutional provision, there is no reason to suspect the doctrine should not apply. Idaho has cited section 874A of the Restatement (Second) of Torts in explaining its own doctrine of implied causes of action and the Restatement's comment to that section clarifies that the doctrine applies to constitutional provisions.[101] Furthermore, 874A finds its roots in the English common law—where "the notion that unconstitutional actions by government officials could lead to

95. Herschkoff & Loffredo, *supra* note 79, at 979; *see also* Harry H. Wellington*, The Nature of Judicial Review,* 91 YALE L.J. 486, 493 (1982) (observing that the authority of common law courts is seldom questioned, even when their opinions are controversial or unpopular).

96. *See supra* notes 82–83 and accompanying text.

97. Donald Crowley & Florence Heffron, The Idaho State Constitution: A Reference Guide 4 (1994).

98. *Id.* While the Framers' desire for a limited government could indicate they would have been suspicious of a powerful judiciary, it suggests by the same token they would have desired the judiciary to retain authority to curb abuses of individual rights by other branches. *See* Schuman, *supra* note 93, at 1201 (noting framers of the Montana Constitution distrusted "elitist courts.").

99. *See* IDAHO CONST. art. V, § 6 (Supreme Court justices); IDAHO CONST. art. V, § 11 (district court judges).

100. *See, e.g.*, Clark v. Jones Gledhill Fuhrman Gourley, P.A., 409 P.3d 795, 802, 163 Idaho 215, 222 (2017) (quoting Yoakum v. Hartford Fire Ins. Co., 923 P.2d 416, 421, 129 Idaho 171, 176 (1996)).

101. RESTATEMENT (SECOND) OF TORTS § 874A, cmt. a (AM. LAW INST. 1979). Of course, the power to fashion a remedy does not settle the issue of what remedy is appropriate. Damages as a remedy for constitutional violations (as opposed to prospective injunctive relief), are often treated as an extraordinary form of relief, but at least one court has described this position as "ahistorical" and "upside down." Godfrey v. State, 898 N.W.2d 844, 868 (Iowa 2017). "[I]n the common law regime, remedies at law—or damages—were usually the first choice to remedy a protected right. It is equitable remedies, not damage remedies, which reflected the innovation in the common law." *Id.*

compensatory and exemplary damages was well established"[102]—and thus was presumably incorporated in the common law of Idaho.[103]

III. *TUCKER V. STATE* AND THE IDAHO SUPREME COURT'S REJECTION OF "RIGHTS ESSENTIALISM"

Of course, to say that the decisions limiting *Bivens* actions in federal courts should not be persuasive in Idaho does not establish that Idaho courts must recognize *Bivens* actions. Nonetheless, the recent case *Tucker v. State* indicates *Bivens* actions must be available under Idaho law, at least in certain circumstances.[104]

Tucker's bearing on the issue of implied constitutional damages is profound, but perhaps not immediately apparent. *Tucker* was a class action alleging systemic inadequacy of Idaho's public defense system.[105] The plaintiffs claimed that underfunded offices and excessive caseloads resulted in deprivation of federal and state constitutional guarantees of the right to counsel.[106] Plaintiffs named the State of Idaho, the governor in his official capacity, and the seven members of the Idaho Public Defense Commission as defendants, seeking a declaratory judgment and an injunction requiring the state to bring the system into compliance with constitutional standards.[107]

The state argued sovereign immunity shielded it from suit, but the Court rejected this argument.[108] It held that sovereign immunity, as a creation of the common law, was within the Court's power to modify, and that it would not allow the doctrine to prevent the vindication of state constitutional claims.[109] In so doing, the Court expressly aligned itself with sister states whose high courts have held that allowing sovereign immunity as a defense against constitutional claims would "render constitutional rights meaningless."[110] The idea implicit in *Tucker*—that rights and remedies are logically coterminous—is not new in American law.[111] But,

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102. Godfrey v. State, 898 N.W.2d at 866 (discussing several famous English cases and citing William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013 (1994)).

103. *See* Idaho Code § 73-116 (2019) (first enacted as Idaho Terr. Sess. 1864, p. 527, § 1, adopting English common law as common law of Idaho); IDAHO CONST. art. XXI, § 2 ("All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force[.]"); *see generally*, Louis F. del Duca & Alain A. Levasseur*, Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System,* 58 AM. J. COMP. L. 1, 5 (2010).

104. Tucker v. State, 394 P.3d 54, 162 Idaho 11 (2017).

105. *Id.* at 59, 162 Idaho at 16.

106. *Id.* at 63, 162 Idaho at 20.

107. *Id.* at 59, 162 Idaho at 16.

108. *Id.* at 60–61, 162 Idaho at 17–18.

109. *Id.* at 61, 162 Idaho at 18.

110. *Tucker*, 394 P.3d at 61, 162 Idaho at 18. The sister jurisdictions cited by the Court are Connecticut, Florida, North Carolina, Maryland and Georgia.

111. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

as the Supreme Court's decisions affirming incomplete or non-existent remedies in *Bush* and *Chilicky* demonstrate, neither is it a given. Indeed, the idea that "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence"—is often rejected or overlooked in federal constitutional jurisprudence.[112] Daryl Levinson has called the philosophy undergirding these decisions "rights essentialism," a key feature of which is the de-linking of rights and remedies.[113] Courts adopting a rights essentialist view regard themselves—by virtue of their insulation from politics—as uniquely capable to interpret constitutional rights.[114] Yet because the political branches "possess not only democratic legitimacy but also superior fact-finding and interest-balancing capacities," courts will "defer to the political branches about issues of implementing or enforcing rights."[115]

The differing capacities of the judicial and political branches do suggest deference to the political branches is often appropriate. However, by "depict[ing] causation as running only from rights to remedies," rights essentialism is divorced from practical reality.[116] Moreover, it provides a model of constitutional rights poorly suited to ensure their vindication, as it allows majoritarian pressures to limit remedies for constitutional wrongs.[117] Thus, instead of preserving the legitimacy of government and the appropriate exercise of powers within separate branches, rights essentialism results in the abdication of judicial duty and the de-legitimizing of government as individual rights are subordinated to structural concerns.[118]

Tucker stands as forceful repudiation of rights essentialism, rejecting not just its primary symptom—the de-linking of rights and remedies—but also its primary justification—an unduly restrictive take on the separation of powers doctrine. As an alternative to its sovereign immunity argument, the government in *Tucker* alleged the plaintiffs lacked standing due to separation of powers principles.[119] The court soundly rejected this argument, emphasizing both its constitutional oversight role and its essential duty to ensure remediation of constitutional wrongs:

> Here, Appellants' requested relief does not implicate the separation of powers doctrine. The right to counsel, which Appellants seek to vindicate, *is not entrusted to a particular branch of government. Nor does a particular branch of government merely have discretion to enforce the right to counsel, a fundamental right*.
>
> . . . .
>
> [I]f there be a legislative abdication of its power and duty, the courts will be required to act in the legislature's stead.
>
> . . . .

112. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858–61 (May 1999).

113. Id.

114. Id.

115. *Id.* at 861.

116. *Id.* at 884.

117. *Id.* at 932.

118. Levinson, *supra* note 112, at 933.

119. *Tucker*, 394 P.3d at 61, 162 Idaho at 18.

> It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its *essential obligation to provide a remedy for violation of a fundamental constitutional right*. . . . Merely that it is possible that Idaho's three branches of government may collaborate when deciding how to ensure our public defense system passes constitutional muster does not raise separation of powers concerns.[120]

Hopefully the relevance of *Tucker* to *Bivens* actions in Idaho is now apparent: in a case similar to Webster Bivens' but arising under the state constitution—a case where it is "damages or nothing"—Idaho courts cannot, consistent with *Tucker*, accord the plaintiff nothing. A right without a remedy is no right at all, and the failure of the legislature to provide such a remedy cannot relieve courts of its own "essential obligation" to uphold the state constitution. Consider, for instance, if the state legislature attempted to enact a statute overruling the holding in *Tucker* and reinstating sovereign immunity for state constitutional claims. The effect of such a statute, in the Court's own words, would be to "render constitutional rights meaningless."[121] This, of course, would run contrary to the fundamental premise that "[t]he limitations of the constitution are binding upon the legislature, and cannot be nullified or avoided by the simple device of declaring them inapplicable."[122] If the legislature were to enact such a law, then, the court would be bound by its constitutional oversight duty to void it.[123] Likewise the legislature cannot, by failing to enact a statute permitting the recovery of damages for constitutional violations, deny plaintiffs the ability to vindicate their constitutional rights. As the Iowa Supreme Court noted in a spirited decision affirming *Bivens* actions under that state's constitution: "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country."[124]

IV. IMPLEMENTATION OF BIVENS ACTIONS IN IDAHO

Tucker indicates that a direct cause of action for damages under the Idaho Constitution must be available, at least in some instances. However, implementing *Bivens* actions under the state constitution is an undertaking with potential to raise

120. *Id.* at 72–73, 162 Idaho 29-30 (emphasis added) (quotation marks and citations omitted) (quoting Hurrell-Harring v. New York, 930 N.E.2d 217, 227 (N.Y. Ct. App. 2010)).

121. *Id.* at 61, 162 Idaho at 18.

122. Moyie Springs v. Aurora Mfg. Co., 353 P.2d 767, 774, 82 Idaho 337, 348 (1960).

123. See *id.*

124. Godfrey v. State, 898 N.W.2d 844, 865 (Iowa 2017) (quoting King v. S. Jersey Nat'l Bank, 330 A.2d 1, 10 (N.J. 1974)).

serious concerns among policymakers, the public, and the state judiciary. For policymakers and the public, one concern may be that actions under the state constitution would become a substitute for tort actions against the state or its officials. Such a result could trivialize constitutional rights and expose taxpayers to unbounded liability. For the judiciary, awarding money damages against the state may invite separation of powers criticisms which damage the perceived legitimacy of the courts, even if such awards are within their authority. Similarly, in cases where the plaintiff is politically unpopular and the alleged violator enjoys public support, damage awards may lead judges to be labeled "activists," and even to be unseated.[125]

In light of the foregoing, this Comment recommends a framework that ensures plaintiffs can fully vindicate their rights, yet reasonably limits state liability and respects the proper boundaries of the judicial role. Importantly, this framework does not parrot federal constitutional tort jurisprudence, but affirms the Idaho Constitution as an independently vital founding document. Not only does this comport with the "dignity and status" of Idaho as an independent sovereign,[126] but by not following the federal model of constitutional rights enforcement, the framework proposed here is more straightforward, better suited to the state law context, and, arguably, more principled.[127]

Bivens actions under the state constitution should be implemented by Idaho courts as follows: Where plaintiffs can prove violation of a self-executing provision of the state constitution, the state itself should be held strictly liable when the conduct causing injury is fairly attributable to the government. Equitable relief is preferred, but money damages must be available where equitable remedies would fail to make the plaintiff whole. Finally, where economic value of an injury is incalculable, courts should award only nominal damages unless deterring future violations warrants imposition of punitive damages.

The rest of Part IV will explain how each piece of this framework can guide Idaho courts to fulfill their essential obligation to enforce the state constitution through recognition of *Bivens* actions under the state constitution—without

125. The risk of being unseated as the consequence of an unpopular decision is more than an abstraction in Idaho. In 2000, Idaho Supreme Court Justice Cathy Silak lost her re-election bid as the result of a controversial water rights decision which incensed Idaho's agricultural community. *Justice Faces Unusual Election Challenge*, SPOKESMAN-REVIEW at A7 (Apr. 24, 2000), https://news.google.com/newspapers?nid=0klj8wIChNAC&dat=20000424&printsec=frontpage&hl=en; Mark Warbis, *Newest Idaho Justice Wins Praise at Swearing-in*, SPOKESMAN-REVIEW at B1 (Jan. 3, 2001), https://news.google.com/newspapers?id=dY9XAAAAIBAJ&sjid=T_IDAAAAIBAJ&pg=3195%2C563824.

126. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 287 (1997).

127. As discussed in Part II above, state courts have been inappropriately influenced by constriction of the *Bivens* remedy in federal courts despite the fact that the primary reason for that constriction—a limited view of inherent federal remedial authority—is misplaced in state courts of general jurisdiction. The framework proposed here also avoids problems presented by applying federal jurisprudence interpreting 42 U.S.C. section 1983 to state constitutional claims, an approach taken by several state courts. *See, e.g.*, Kuchcinski v. Box Elder Cty., 2019 UT 21, ¶26 n.33 ("[W]e frequently borrow principles from Section 1983 jurisprudence . . . when determining the contours of liability when [state] constitutional rights have been violated."). An account of the inaptness of Section 1983 jurisprudence to protect state constitutional rights is beyond the scope of this Comment, but for a thoughtful critique see Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877 (2011).

exceeding the proper role of the judiciary and in accord with *Tucker*'s rejection of rights essentialism.

A. The constitutional provision allegedly violated must be self-executing

Sometimes whether a constitutional provision is enforceable in money damages is presented as a question of whether a clause is "self-executing."[128] Precisely speaking, however, whether a provision is "self-executing" involves determining whether a provision is judicially enforceable *in any instance*, without regard to what remedies are appropriate.[129] Nonetheless, since determining whether a provision is judicially enforceable at all is logically prior to whether it may be enforced with a *Bivens* action, courts should begin by considering whether a provision is self-executing.[130]

A self-executing constitutional provision is one that is binding of its own force without requiring legislative action.[131] Thus, a provision which expressly directs the legislature to enact a legislative scheme to implement the provision is not self-executing.[132] Also, a provision may not be self-executing if it "merely indicates principles, without laying down rules by means of which those principles may be given the force of law."[133] By contrast, a provision will be regarded as self-executing if it "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced."[134]

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128. *See, e.g.*, Dorwart v. Caraway, 58 P.3d 128, 156 (Mont. 2002) (Gray, C.J. dissenting) (arguing that state due process clause should not support a cause of action for damages because it is not self-executing); Corum v. Univ. of N.C., 413 S.E.2d 276, 289 (N.C. 1992) (holding the state right to free speech supports a cause of action for damages because it is self-executing).

129. FRIESEN, *supra* note 211, § 7.05, 7-10-7-11.9.

130. Though not implicating self-execution, another textual limitation on the cognizability of constitutional claims bears mention here. Some matters could be so clearly committed by a constitution to the political branches that judicial interference would be impermissible. This has arisen at the federal level in cases involving affairs of the military and national security. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856-57 (2017) (declining to extend Bivens remedies to aliens detained in the aftermath of the September 11th attacks, citing, among other reasons, commitment of national security issues to the executive branch); United States v. Stanley, 483 U.S. 669, 686 (1987) (declining to extend Bivens remedies to plaintiffs to recover for injuries sustained as result of secret administration of LSD as part of an Army experiment). The relevance of this limitation in Idaho is questionable. While it is not inconceivable that a provision such as IDAHO CONST. art. IV, § 4 ("governor shall be commander-in-chief of the military forces of the state") could prevent *Bivens* liability in a particular case, it seems improbable this would arise with any frequency.

131. *Self-executing provision*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("A provision of a constitution which is effective without legislation, no action by the legislature being required to put it in operation.").

132. *See, e.g.*, Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1134, 110 Idaho 691, 696 (1986) (holding that article III, section 1 of the Idaho constitution which grants referendum power is not self-executing because it provides that the power is to be exercised "under such conditions and in such manner as may be provided by acts of the legislature").

133. Haile v. Foote, 409 P.2d 409, 411, 90 Idaho 261, 266 (1965) (quoting Davis v. Burke, 179 U.S. 399 (1900)).

134. *Id.*

The Idaho Supreme Court has only expressly found two provisions of the Idaho Constitution to be self-executing,[135] but it is likely that most of the rights enumerated in the Idaho Declaration of Rights are self-executing.[136] The Court has held that mandatory or prohibitory language in constitutional provisions is presumed to be self-executing,[137] and most of the rights guaranteed by the Idaho Constitution are phrased in such terms. These include the rights to religious liberty[138] and habeas corpus;[139] the rights to reasonable bail and to be free from cruel and unusual punishment;[140] the rights to trial by jury,[141] freedom of speech,[142] and freedom of assembly;[143] the rights to open courts, counsel, and due process;[144] and the right to be free from unreasonable search and seizure.[145] Thus, most of the individual rights guaranteed by the Idaho Constitution satisfy at least the threshold requirement of judicial enforceability.[146]

B. The state or its political subdivisions should be held strictly liable where the conduct causing injury is fairly attributable to the government

"Conceptually the government is the inescapable defendant in a constitutional tort suit; only the government can abridge constitutional rights."[147] Yet, a government can only act through its officers. Thus, implementing *Bivens*

135. The right to a speedy trial guaranteed by article 1, section 13 was found to be self-executing in *Jacobson v. Winter*, 415 P.2d 297, 300, 91 Idaho 11, 14 (1966). The right to justice without prejudice guaranteed by article 1, section 18 was found to be self-executing in *Day v. Day*, 86 P. 531, 523, 12 Idaho 556, 562 (1906).

136. The Idaho Declaration of Rights was adopted as Article I of the Idaho Constitution. *See* Donald Crowley & Florence Heffron, The Idaho State Constitution: A Reference Guide 4 (1994).

137. *See* State v. Vill. of Garden City, 265 P.2d 328, 334, 74 Idaho 513, 526 (1953) (citing Katz v. Herrick, 86 P. 873, 878, 12 Idaho 1, 25 (1906) (Ailshie, J., on rehearing) ("It is quite uniformly held that all negative or prohibitory clauses in mandatory or prohibitive form are of themselves self-operative as to the subject-matter or thing to be prohibited or denied.")).

138. IDAHO CONST. art. I, § 4 ("[N]o person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions . . . .").

139. *Id.* § 5 ("The privilege of the writ of habeas corpus shall not be suspended . . . .").

140. *Id.* § 6 ("Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.").

141. *Id.* § 7 ("The right of trial by jury shall remain inviolate . . . .").

142. *Id.* § 9 ("Every person may freely speak, write and publish on all subjects . . . .").

143. *Id.* § 10 ("The people shall have the right to assemble in a peaceable manner . . . .").

144. IDAHO CONST. art. I, § 13 ("In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.").

145. *Id.* § 17 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . .").

146. *Cf.* Shields v. Gerhart, 658 A.2d 924, 928 (Vt. 1995) (holding a section of the Vermont Constitution substantially similar to Article I, section 1 of the Idaho Constitution is not self-executing).

147. *A Theory of Negligence for Constitutional Torts,* 92 YALE L.J. 683, 697 (1983); *see also* Corum v. Univ. of N.C., 413 S.E.2d 276, 292–93 (N.C. 1992) (holding that state officers may not be held individually liable for state constitutional violations because "'We, the people,' created the Constitution and the government of our State in order to limit our actions as the body politic. The Constitution is intended to protect our rights as individuals from our actions as the government. The Constitution is not intended to protect our rights vis-a-vis other individuals.").

actions raises the question of who may be properly named as defendant—the government, the officer, or both. Additionally, it must be determined what level of culpability is required to expose a party to liability. For the reasons set forth below, the state or its political subdivisions are the only proper defendants in an implied action for damages under the Idaho Constitution and they should be held strictly liable for state constitutional violations.

i. The state or its political subdivisions are the sole proper defendants

Where liability is based upon a judicially created cause of action, only the government can properly be named a defendant. States may apportion risk between the government and its officers for state constitutional violations under a number of different models to advance different policy objectives.[148] For example, a state could seek to maximize deterrence by holding both the government and public officials liable.[149] On the other hand, if a state fears the threat of liability would steer qualified individuals away from public service or interfere with public servants' execution of their duties, it may choose to afford officers immunity.[150] Balancing these policy considerations, however, is the province of the legislature not the courts.[151] Instead, a judicially created remedy should be crafted as narrowly as possible to remedy constitutional injuries, leaving it to the legislature to address any accompanying policy matters. Thus, the state or its political subdivisions should be the defendant in a *Bivens* action under the state constitution, assuring a remedy for every constitutional wrong, but leaving additional matters of risk-sharing and indemnification to the legislature.

It could be argued that the same objective would be achieved by holding only the officer liable for constitutional violations. This is not a tenable position for two reasons. First, holding the officer solely responsible is inconsistent with the purpose of the Idaho Constitution as a constraint ultimately on state power, not on individual conduct. Second, because individuals are much less likely to be able to satisfy a judgment than the state, such a scheme could undermine the full vindication of constitutional rights by providing incomplete or illusory remedies.

ii. Defendants should be subject to strict liability, but only when the conduct causing injury is fairly attributable to the government

The degree of culpability of a party violating the Idaho Constitution should not be an element of *Bivens* actions in Idaho. Culpability standards are a frequent

148. See Gary S. Gildin, Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence, 115 PENN ST. L. REV. 877, 917 (2011).

149. *Id.*

150. *Id.* at 918.

151. Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1136, 110 Idaho 691, 698 (1986) ("[T]he judicial branch of government must respect and defer to the legislature's exclusive policy decisions. Such is the very nature of our tripartite representative form of government.").

feature of constitutional tort law at the federal level and in other states. For example, in Utah plaintiffs must establish they suffered a "flagrant" violation of their state constitutional rights to maintain a private suit for damages,[152] and in federal court public officials are immune from liability so long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[153] Such standards seek to control the extent of liability in light of "the ordinary 'human frailties of forgetfulness, distractibility, [and] misjudgment'"[154] as well as, in the federal context, to allay federalism concerns raised by suits against local governments under federal law.[155]

Culpability as a precondition of liability, however, means constitutional harms caused without the requisite degree of fault must remain unremedied. Yet, the degree of fault of the party causing an injury simply has no bearing on the extent of the injury suffered. Therefore, if rights and remedies exist in a 1:1 correlation, full vindication of state constitutional rights requires strict liability.

At first blush, it might appear that recognition of a *Bivens* action under the Idaho Constitution subject to a strict liability standard would result in a radical transformation of the nature and extent of governmental liability. This concern is perhaps most acute in the context of Idaho's due process clause.[156] The State of Idaho employs more than twenty-five thousand people,[157] and local governments certainly employ many more thousands. If every misstep committed by a public servant in the course of employment—intentional or unintentional, negligent or despite due care—resulted in a constitutional claim whenever it caused a loss of life, liberty, or property, the consequences could be profound.

First, recasting common torts as constitutional claims could allow plaintiffs to skirt the limitations of the Idaho Tort Claims Act. Enacted in 1971, the Idaho Tort Claims Act (ITCA) is a partial abrogation of state sovereign immunity for tort claims.[158] The ITCA allows plaintiffs to sue governmental entities and their employees for money damages for injuries arising from conduct "where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho," subject to some exceptions.[159] Since the ITCA already provides a route for plaintiffs to redress many injuries which may be cognizable as due process claims, it is not clear if the number of suits brought against the government would substantially increase after recognition of a state *Bivens* action. However, because the ITCA also imposes a damage cap to limit the state's liability and requires plaintiffs to follow a number of procedural steps not required in tort claims against private parties,[160] the extent of liability could dramatically expand in the absence of some limiting principle.

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152. Kuchcinski v. Box Elder Cty., 2019 UT 21, ¶23, 450 P.3d 1056, 1064.

153. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

154. *Kuchcinski*, 2019 UT 21, ¶22.

155. Bd. of the Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 415 (1997).

156. Idaho's due process clause is found at IDAHO CONST. art. I, § 13.

157. *Current Employee Counts,* TRANSPARENT IDAHO, https://transparentdata.idaho.gov/transparency#/29329/query=BA3A5343CE498A38739FA4D0938F5C7A&embed=n (last updated Jan. 20, 2020).

158. *See* Idaho Tort Claims Act, IDAHO CODE §§ 6-901–6-929 (2019).

159. *Id.* § 6-903.

160. *Id.* § 6-926 (capping damages at $500,000 per occurrence); *Id.* §§ 6-905 to 6-907 (establishing procedures and time limits for notifying governmental defendants before initiating suit).

Second, state constitutional rights would be trivialized if all common torts by government employees became constitutional claims. Justice Stewart's concurrence in *Parratt v. Taylor*[161] captures this concern. *Parratt* involved a Section 1983 claim by a prisoner against prison officials over the loss of a $23.50 mail-order hobby kit.[162] Though *Parratt* arose under the federal constitution, Justice Stewart's observation about the nature of interests the due process clause protects is apt here:

> It seems to me extremely doubtful that the property loss here, even though presumably caused by the negligence of state agents, is the kind of deprivation of property to which the Fourteenth Amendment is addressed. If it is, then so too would be damages to a person's automobile resulting from a collision with a vehicle negligently operated by a state official. To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution.[163]

In *Daniels v. Williams*, the United States Supreme Court resolved similar concerns by holding that *Bivens* actions may not be based on negligent conduct because "mere negligence could not work a deprivation in the *constitutional* sense."[164] According to the Court, injuries caused by routine negligence are "quite remote" from the ills the due process clause was intended to address: "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person."[165]

The Court's reasoning, however, is flawed and should not be adopted in Idaho. While the *Daniels* rule properly excludes random and unauthorized acts of low-level officials from constitutional significance, it fails to account for the reality that a lack of due care on the part of several officials—or even a single official in a position of authority—may constitute more than a failure to measure up to the conduct of a reasonable person, but a failure to measure up to the conduct of a *reasonable government*.

Instead of *Daniels'* greater-than-negligence culpability requirement, Idaho should adopt a rule that the state or its political subdivisions are strictly liable (to assure full vindication of constitutional rights), but only where the conduct causing violation of the state constitution is fairly attributable to the government (to assure only appropriate claims are cognizable as constitutional issues). Under this scheme, the unauthorized acts of most government employees—whether negligent or intentional—would not amount to constitutional violations because the constitution is intended to constrain the conduct of the government and such

161. Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986).

162. *Id.* at 529.

163. *Id.* at 544–45 (Stewart, J., concurring).

164. 474 U.S. 327, 330 (quoting *Parratt*, 451 U.S. at 548–49 (Powell, J., concurring in the result) (internal punctuation omitted)).

165. *Id.* at 332.

conduct, by its unpredictable and unauthorized nature, will generally not amount to government action.[166] However, where a plaintiff could prove his or her injury was caused by conduct attributable to the government, a cause of action would be available under the constitution.

Conduct fairly attributable to the government would include any intentional act resulting from de jure or de facto policy or procedure, as well as acts or omissions amounting to negligent governance. Under a "negligent government" theory, failure to institute or enforce policies which could reasonably be expected to prevent constitutional violations would expose the government entity to liability in the same manner as affirmative government acts. Thus, for example, unauthorized use of excessive force by a prison guard would not, by itself, be conduct attributable to the government. However, if a plaintiff were able to prove negligent hiring or negligent supervision of the same guard, the government could be held liable.

This rule limits liability on a principled basis, promotes responsible governance, and—because determining fair attributability to the government amounts to little more than a traditional tort law proximate causation analysis—it would likely be easier to apply than the labyrinthine system of qualified immunities employed to limit liability under Section 1983.

C. Equitable relief is preferred, but money damages must be available where equitable remedies would fail to make the plaintiff whole

Though the existence of a right logically requires a remedy,[167] it does not necessarily imply a particular type of remedy. While this Comment focuses on money damages as a remedy for constitutional violations, it does so not because money damages are preferable to equitable relief, but because the authority of courts to award equitable relief is already well established. Indeed, equitable relief should be preferred and money damages should only be available when equitable relief is inadequate to make a plaintiff whole.

Equitable relief should be preferred for at least two reasons. First, though *Tucker* clearly supports that a judgment does not violate separation of powers principles simply because it requires an appropriation of funds,[168] separation of powers concerns should not be taken lightly. A judicial preference for equitable remedies over monetary damages is appropriate to respect the cabined roles of the three branches of state government.[169] Second, in some regards equitable relief is better suited to the vindication of constitutional rights than monetary damages.[170] Prospective injunctive relief will often benefit a much wider segment of the public, not just the plaintiff bringing suit, and it avoids the perception that constitutional

166. This does not mean victims of injuries caused by government employees will necessarily be without a remedy, only that a cause of action does not arise under the state constitution. Plaintiffs injured by government officers will often have recourse under the ITCA, or under 42 U.S.C. section 1983 to the extent the state constitution overlaps with provisions of the federal constitution.

167. *See supra* Part III.

168. Tucker v. State, 394 P.3d 54, 72, 162 Idaho 11, 29 (2017).

169. *See* IDAHO CONST. art. II, § 1.

170. Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42 (1980); *see* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 91-93 (1988).

rights can or should be "monetized."[171] Likewise, monetary awards for past wrongs are unlikely to be as effective as a means to deter officials from future violations than forward-looking relief.[172] Thus, while money damages are essential to assure the vitality of constitutional rights where it is "damages or nothing,"[173] they should only be awarded to the extent that equitable relief would fail to make a plaintiff whole.

D. Where an injury cannot be redressed by equitable relief, but its economic value is imponderable, courts should award only nominal damages unless deterring future violations warrants imposition of punitive damages

Generally, Idaho courts should award only nominal damages if the economic measure of economic harm caused by a violation of the state constitution is speculative or beyond the competence of the courts to assess. In *Bivens*, both the majority and Justice Harlan noted that the plaintiff's injury was of a sort traditionally compensable in damages.[174] "[E]xperience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights."[175] However, some constitutional injuries may not be readily compensable in money damages.[176]

For instance, in the context of procedural due process rights, plaintiffs may be able to present proof of a constitutional violation, but the existence of an economic injury may be only speculative. For example, in a California case, a shellfish producer sought damages alleging that failure of a state agency to process an application prevented it from marketing its product out -of -state violated its due process rights.[177] Though the unconstitutional denial of an administrative hearing could be proved, the court dismissed the claim in part because the plaintiff presented "little or no evidence linking the *absence of a hearing* to the ultimate damages."[178]

In other circumstances, fixing an economic measure of damages may be beyond the traditional competence of the courts. Many constitutional violations—such as infringement of the right to free speech, or to bear arms, or to vote—do not

171. Jackson, *supra* note 1701, at 92–93.

172. *See* Whitman, *supra* note 1701, at 49–50; *see also infra* Part IV.d (regarding money damages as a deterrent for individual officials where, as proposed here, only the state or its political subdivisions may be named defendant).

173. *See supra* notes 46–47 and accompanying text.

174. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395-96 (1971); *Id.* at 408–09 (Harlan, J., concurring).

175. *Id.* at 409 (Harlan, J., concurring).

176. *Cf.* Bivens, 403 U.S. at 409 n.9. (Harlan, J., concurring) ("[T]he appropriateness of money damages may well vary with the nature of the personal interest asserted.").

177. Carlsbad Aquafarm, Inc. v. State Dep't of Health Servs., 100 Cal. Rptr. 2d 87, 89–90 (Ct. App. 2000).

178. *Id.* at 96.

have clear analogs in common law causes of action. Thus, unless the violation leads to concrete consequential damages (e.g., lost wages of a state employee terminated in violation of her free speech rights), fashioning a compensatory damages remedy would involve policy considerations properly delegated to the legislature. Further, as Justice Harlan observed in *Monroe v. Pape*, there are many cases—such as denial of the franchise—where, even if it were possible for the court to calculate the cost of damages, these would be "far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right."[179]

In cases such as these, Idaho courts should vindicate plaintiffs' constitutional rights by awarding nominal damages, in addition to any appropriate equitable relief. By awarding nominal damages, even without proof of an injury or its magnitude, courts can affirm the paramount significance of constitutional rights and "recognize[] the importance to organized society that those rights be scrupulously observed[,]" without giving a windfall to plaintiffs who are unable to prove their damages.[180] Further, while the promise of nominal damages is unlikely to prompt plaintiffs to endure the stress and expense of a lawsuit, the availability of nominal damages may nonetheless encourage plaintiffs to vindicate their rights that otherwise would not be vindicated. First, though some courts have held that an award of actual damages is required to support an award of punitive damages,[181] Idaho follows the rule that nominal damages are sufficient to support a punitive award.[182] Second, a party winning nominal damages may be a "prevailing party" within the meaning of both state and federal fee-shifting statutes,[183] as well as Idaho's rule assigning court and litigation costs.[184] Note however, that courts retain discretion to adjust the amount of awards based on the degree of success obtained; thus if a plaintiff's sole victory in litigation is an award of nominal damages, the amount of fees allowed may be low or none at all.[185]

In some instances, however, compensatory and nominal damages may not be enough for a court to fulfill its imperative to ensure the vitality of state constitutional rights. "When a constitutional violation is involved, more than a mere allocation of risk and compensation is implicated."[186] Rather, punitive damages may sometimes be appropriate for deterrence and to express "sharp social disapproval"

179. Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring), *overruled by* Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658 (1978).

180. Carey v. Piphus, 435 U.S. 247, 266 (1978).

181. *See* Kemner v. Monsanto Co., 576 N.E.2d 1146, 1153 (Ill. App. Ct. 1991).

182. Myers v. Workmen's Auto Ins. Co., 95 P.3d 977, 985, 140 Idaho 495, 503 (2004).

183. Farrar v. Hobby, 506 U.S. 103, 112 (1992) (fees under 42 U.S.C. § 1988); Massey-Ferguson Credit Corp. v. Peterson, 626 P.2d 767, 777, 102 Idaho 111, 121 (1980) (fees under Idaho Code § 12-121); *see also* Hellar v. Cenarrusa, 682 P.2d 524, 531, 106 Idaho 571, 578 (1984) (awarding attorney's fees under the private attorney general doctrine). Recovery of fees under federal law for violation of state constitutional provisions is possible where state law claims (which are often brought parallel with federal claims) are within the supplemental jurisdiction of the federal courts. *See generally* FRIESEN, *supra* note 2, §§ 10.04–10.06. Notably, success on the federal claims to which the state claim is pendant is generally not a requirement for recovery of attorney's fees under section 1988. *Id.*

184. Idaho R. Civ. P. 54.

185. *Farrar*, 506 U.S. at 114; *Massey-Ferguson*, 626 P.2d at 777, 102 Idaho at 121.

186. Godfrey v. State, 898 N.W.2d 844, 877 (Iowa 2017).

when public officials intentionally or recklessly violate constitutional rights.[187] The importance of punitive damages to enforce constitutional rights has been widely recognized,[188] including, notably, by the Supreme Court in *Carlson v. Green*.[189] Though the Supreme Court's posture toward *Bivens* remedies has changed dramatically,[190] it is significant that the unavailability of punitive damages was a factor supporting the Court's holding in *Carlson* that the plaintiff's statutory remedy was not "equally effective" as a *Bivens* remedy.[191]

Nevertheless, punitive damages should only be available in actions directly under the Idaho Constitution where the need to deter officials from unconstitutional conduct is most acute, such as in circumstances where officials are shown to have personal or political incentives to violate or allow violations of the constitution. Limiting the availability of punitive damages in such a way is appropriate because the efficacy of punitive damages in a *Bivens* action as proposed in this Comment—where the government itself is the only proper defendant—is certain to be weaker than where officials bear personal liability, such as in federal *Bivens* actions or Section 1983 lawsuits.[192] Indeed, some courts and commentators have maintained that punitive damages are not appropriate against the government at all because they impose costs on taxpayers, yet without personal liability officials will not be deterred from causing violations.[193] This view ignores, however, that when an official's conduct creates an avoidable economic burden on taxpayers, the official is likely to bear political costs as taxpayers recognize the official's responsibility for squandering limited public resources.[194] Thus, while punitive damages should be available as a remedial tool in *Bivens* actions under the Idaho Constitution, the indirect mode of accountability and concomitantly diminished deterrent effect of punitive damages against the state counsel's sparing and judicious use of the remedy.

187. *Id.* (quoting Thomas J. Madden et al., *Bedtime for* Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 489–90 (1983) (quotation marks omitted)).

188. *See, e.g.*, *Godfrey*, 898 N.W.2d at 877–79 (discussing decisions from federal, state, and British common law courts).

189. 446 U.S. 14, 19 (1980).

190. *See supra* Part II.b.

191. *Carlson*, 446 U.S. at 19.

192. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 860 (2007) (observing that the most effective means to "impress upon an official . . . the magnitude of legal risk inhering in a particular course of action," is to discuss "the possibility of an award of punitive damages, for which they c[an] not be indemnified.").

193. *See Godfrey*, 898 N.W.2d at 894 n.15 (Mansfield, J., dissenting) (quoting 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 611, at 620 (2012)).

194. Rosenthal, *supra* note 193, at 832. Note that the pre-requisite to *Bivens* liability that violations be fairly attributable to the government, *see supra* Part IV.b.2, ensures that, as a practical matter, any successful *Bivens* action under the Idaho Constitution will involve violations proximately caused by the acts or omissions of one or more officials with policy-making authority. Many officials with policy-making authority are elected to their offices or appointed by elected officials, providing a route by which those officials may be held accountable. The likelihood of deterrence in each particular case should be considered, however, before punitive damages are allowed.

V. CONCLUSION

The Idaho Constitution is a source of individual rights independent from the federal constitution, and Idaho courts should recognize a cause of action that accounts for these differences. While the Federal District Court for the District of Idaho has held Bivens actions are not available under the state constitution, it reached this conclusion without analyzing Idaho law and in error. Because Tucker recognizes that state constitutional rights are meaningless without meaningful remedies to enforce them, Bivens actions must be available under Idaho law. Accordingly, this Comment has proposed scheme that allows for the full vindication of Idaho constitutional rights while respecting the limited role of the judiciary.