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Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation

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Widely noted for the pleading revolution it furthers at the district court level,[1] the Supreme Court's decision in *Ashcroft v. Iqbal*[2] also makes important changes in the way federal appellate courts will resolve the qualified immunity issues that arise in the course of *Bivens*

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1. For a modest sampling of the voluminous literature, *see* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. (forthcoming 2010); Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473 (2010); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009).

2. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

litigation.[3] In brief, *Iqbal* confirms that qualified immunity—something that the Court regarded as self-evidently an affirmative defense only a generation ago[4]—will be treated as a matter on which the plaintiff bears the burden of relatively specific pleading.[5] This secures the government officer's right to invoke qualified immunity by way of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[6] What's more, *Iqbal* adopts a broad interpretation of the collateral order doctrine that will allow the government to seek immediate appellate review of virtually any rejected qualified immunity defense at the pleading stage.[7] While the Court had previously applied the collateral order doctrine to orders rejecting claims of qualified immunity,[8] the *Iqbal* decision extends the doctrine to fact-bound determinations about the sufficiency of allegations of fact that might be regarded as dubious candidates for interlocutory review.[9]

One more change in the Court's qualified immunity jurisprudence will tend to amplify the impact of the *Iqbal* decision. Earlier in the same Term in which it decided *Iqbal*, the Court changed the decision rule that governs the order in which the lower federal courts pass on constitutional issues in the course of resolving qualified immunity claims. Under the old rule of *Saucier v. Katz*,[10] courts confronting qualified immunity issues were obliged to reach the constitutional question and only then to decide if the right in question was clearly enough established to overcome the official's qualified immunity.[11] Critics of the *Saucier* approach identified such concerns as the problem of advisory opinions, the difficulty of addressing some novel constitutional issues, and the potentially awkward posture of cases awaiting further review at the

3. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a federal right of action for individuals who claim that federal officers violated their constitutional rights). For an account of the circumstances that gave rise to the litigation and to the factors that informed its resolution on appeal, see James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics in* FEDERAL COURTS STORIES 275 (Judith Resnik & Vicki C. Jackson eds., 2009).

4. *See*, *e.g.*, Gomez v. Toledo, 446 U.S. 635 (1980).

5. *See Iqbal*, 129 S. Ct. at 1948-51.

6. *See* FED. R. CIV. P. 12(b)(6) (authorizing motion by defendant to dismiss on the ground that the complaint fails to state a claim upon which relief may be granted).

7. *See* Mark R. Brown, *Qualified Immunity and Interlocutory Fact Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010).

8. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

9. *See Iqbal*, 129 S. Ct. at 1946-47 (distinguishing Johnson v. Jones, 515 U.S. 304 (1995)).

10. Saucier v. Katz, 533 U.S. 194 (2001).

11. *Id.*

Supreme Court.[12] In response, the Court overturned *Saucier* in *Pearson v. Callahan*,[13] substituting a regime of judicial discretion for the old mandatory decision order.[14] Today, federal courts need not pass on the constitutional issue; they can simply decide that the right, if any, was not clearly established.[15]

Together, these changes represent a remarkable exercise of judicial creativity in re-fashioning the system by which plaintiffs pursue constitutional tort claims. In the course of a generation, the Court has transformed the test for qualified immunity from one that turns on the official's subjective good faith to an objective test that focuses on the clarity of the constitutional right at issue.[16] Along with this change, the Court has altered the nature of qualified immunity, from an affirmative defense that focuses on the official's conduct and mindset to a requirement of constitutional clarity that has become an element of the plaintiff's affirmative claim for relief.[17] With the Court's expansion of interlocutory appellate review, it has now assured that all such issues will be addressed by the appellate courts sooner rather than later. One can see the conclusion of this transformative series of decisions in the Court's description of the issue in *Iqbal*: did the plaintiff plead sufficient factual matter that, if taken as true, "states a claim that [government officials] deprived him of his clearly established constitutional rights."[18] *Iqbal* ensures that the appellate court will pass on this question at an early stage in the process.

This collection of evolving judge-made rules contrasts with two related bodies of law in which the Court has expressed reluctance to fashion federal common law. Consider first the attitude toward the recognition of rights of action under *Bivens*. In a series of cases

12. For a summary of these difficulties, *see* Pearson v. Callahan, 129 S. Ct. 808 (2009).

13. Pearson v. Callahan, 129 S. Ct. 808 (2009).

14. *Id.* at 818.

15. For a criticism, see John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts* (unpublished draft on file with author and available through SSRN) (arguing that *Saucier* plays a valuable role in ensuring development of constitutional law in areas where few alternative forms of constitutional litigation exist).

16. *Compare* Pierson v. Ray, 386 U.S. 547 (1967) (defining the officer's immunity to include an element of subjective good faith) *with* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (articulating an objective immunity standard that turns on the clarity with which the constitutional right had been recognized at the time of the officer's action).

17. On the treatment of official immunity as an affirmative defense, see Gomez v. Toledo, 446 U.S. 635 (1980). *Cf.* Hartman v. Moore, 547 U.S. 250 (2006) (assigning to the plaintiff in a malicious prosecution claim the burden of pleading and proving that the defendant acted without probable cause). For an account of the Court's modification of qualified immunity, see Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991).

18. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

stretching back several years, the Court has taken a narrow view of the availability of constitutional tort claims against federal officers, citing a range of special factors that counsel hesitation in the judicial recognition of such proceedings.[19] Most recently, in *Wilkie v. Robbins*,[20] the Court declined to recognize an action for government retaliation against an individual who stood on his Fifth Amendment rights in fending off the Interior Department's request for an easement across his land.[21] The Court's reluctance to fashion new rights of action echoes through its decision in *Ashcroft v. Iqbal*; indeed, the Court there simply assumed without deciding that the plaintiff's claim for discriminatory detention and treatment on religious and ethnic grounds stated a claim under the First and Fifth Amendments.[22]

The same diffidence informs the Court's attitude (at least outside the qualified immunity context) toward the collateral order doctrine. The doctrine arose in the 1950s as an exception to the final judgment rule[23] and was adapted to provide for interlocutory review of qualified immunity defenses to constitutional tort claims. In *Mohawk Industries, Inc. v. Carpenter*,[24] the Court suggested that a more restrictive approach was generally appropriate.[25] In the course of refusing to allow interlocutory review of an order adverse to a party's invocation of the attorney-client privilege, the Court suggested that its reluctance to recognize judge-made exceptions to finality flowed in part from the fact that Congress had authorized the "bench and bar" to collaborate, through the rule-making process, in fashioning exceptions to the final judgment rule.[26] Justice Thomas made the same point more emphatically in his *Mohawk* concurrence; he argued that the Court should categorically decline to recognize any new collateral orders but should leave that task to the rule-making process.[27]

19. For accounts of these developments, viewed from different perspectives, *see* John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663 (2009); George D. Brown, *"Counter-Counter-Terrorism via Lawsuit"—The Bivens Impasse*, 82 S. CAL. L. REV. 841 (2009). For an evaluation of *Iqbal*'s importance in national security litigation, *see* Steven I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010).

20. Wilkie v. Robbins, 551 U.S. 537 (2007)

21. *See id.*

22. *See Iqbal*, 129 S. Ct. at 1944-47.

23. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). For an assessment, *see* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 90 (1975).

24. Mohawk Industries, Inc., v. Carpenter, 130 S. Ct. 599 (2009).

25. *Id.*

26. *Id.* at 609.

27. *Id*. at 610 (Thomas, J., concurring).

In this essay, I explore the tensions revealed by the juxtaposition of these lines of cases. As *Iqbal* confirms, the Court has displayed a remarkable willingness to re-fashion the rules of qualified immunity and interlocutory review without awaiting legislative guidance. Yet the Court has largely declined to extend the *Bivens* doctrine. After sketching these doctrinal realities in part I, part II traces their application in the *Iqbal* decision. Part III examines some possible justifications for the Court's on-again, off-again attitude toward the legitimacy of judge-made law. Three concerns likely brook large in the Court's thinking: a concern with the docket implications of expanding access to the *Bivens* remedy, a perception that the claims in question mostly lack support on the merits, and a perception that Congress has a uniquely important role to play in judging the desirability of expanded access to the federal courts. The essay evaluates these justifications and explores the puzzles they present for the preservation of a workable body of government accountability law.

I. THREE DOCTRINES IN SEARCH OF A CONSISTENT JUDICIAL ROLE

Many scholars have remarked on the Supreme Court's reluctance in recent years to recognize new rights of action under the *Bivens* doctrine.[28] The *Bivens* Court itself, of course, was tackling a Fourth Amendment claim and had no occasion to address the enforcement of other constitutional rights. Since then, the Court has recognized rights of action to enforce the equal protection component of due process and to challenge cruel and unusual punishment.[29] It also seemed to confirm that individuals could seek damages against government officials who retaliated against them for exercising their constitutional right to freedom of speech.[30] More recently, however, the Court has persistently declined to authorize new actions under *Bivens*. In *Correctional Services Inc. v. Malesko*,[31] for example, the Court turned back a claim against a

28. *See, e.g.*, James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006-2007 CATO SUP. CT. REV. 23 (2007). *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841-45 (6th ed. 2009) [hereinafter HART & WECHSLER].

29. *See* Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

30. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (assuming the viability of a whistleblower's claim of unconstitutional retaliation); *cf.* Hartmann v. Moore, 547 U.S. 250, 256 (2006) (specifying that, in a retaliation claim against postal officials, the plaintiff must plead and prove that the officials acted to initiate criminal proceedings without probable cause).

31. Correctional Services Inc. v. Malesko, 534 U.S. 61 (2001).

privately-run correctional facility and in *Wilkie v. Robbins*[32] the Court rejected a Fifth Amendment property-based retaliation claim.[33] Recent decisions display a growing judicial suspicion of the *Bivens* decision itself, and an accompanying reluctance to recognize federal rights of action to enforce other constitutional rights.[34]

The judicial passivity in the latest *Bivens* cases contrasts sharply with the Court's creative refinement of the (judge-made) doctrine of qualified immunity.[35] Although the origins of qualified immunity have never been adequately explored or explained,[36] the doctrine bears some evidence of having developed from the nineteenth-century application of common law privileges to suits seeking to impose defamation liability on government officials.[37] During the twentieth century, the Court expanded these common law privileges, applying them first to other tort claims against government officials and then to constitutional tort claims brought under the authority of the *Bivens* doctrine. The evolution of the doctrine reveals a striking willingness on the part of the Court to re-shape immunity law in response to a judicial assessment of how to balance the interests of victims in effective redress and those of government workers in freedom from the burden of litigation.[38]

32. Wilkie v. Robbins, 551 U.S. 537 (2007).

33. *See, e.g.*, *Malesko*, 534 U.S. 61 (questioning the propriety of the Court's role in fashioning rights of action to enforce the Constitution); *Wilkie, 551 U.S. 537* (concluding that the right of action in question was a matter for legislative, not judicial creation).

34. *See Wilkie* 551 U.S. at 568, (2007) (Thomas, J., concurring); *Malesko*, 534 U.S. at 75 (2001) (Scalia, J., concurring).

35. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002).

36. The absolute immunity doctrine, which the Court has extended to government officers performing legislative and judicial work, derives from common law principles. *See* Butz v. Economou, 438 U.S. 478 (1978) (summarizing the history of the doctrine). In contrast, qualified immunity did not apply to government officials at common law. Instead, the courts in the early nineteenth century applied a relatively strict rule of common law liability and refused to accord government officials a defense for having acted in good faith or in compliance with the instructions of a superior. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). For an account of the *Little v. Barrem*e litigation and the way congressional indemnity practices informed the courts' refusal to recognize qualified immunity defenses, *see* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. (forthcoming 2010) (unpublished article on file with author).

37. Thus, in *Spalding v. Vilas*, 161 U.S. 483 (1896), the Court held that the postmaster general was entitled to claim a privilege from defamation liability for injurious statements made in the course of his duties. Later cases, including *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), and *Barr v. Mateo*, 360 U.S. 564 (1959), also look to common law privileges in defining federal official immunity from suit.

38. For examples of the Court's attempts to strike this balance, *see* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Procunier v. Navarette, 434 U.S. 555 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); Butz v. Economou, 438 U.S. 478 (1978). *See* part II.

One can see just how creative the Court has been by comparing its approach to that of the courts (state and federal) that addressed official liability in the nineteenth century. In that era, suits against government officers provided the only mechanism for vindicating the rights of individuals in their interactions with the government; sovereign immunity blocked suits against the government itself.[39] But the government worked around sovereign immunity with a division of labor between the branches: courts were charged with deciding the legality of government activity in suits brought against officials; successful suits produced judgments running against the official; and the officials (or their victims) sought compensation from Congress through the passage of private appropriations bills.[40] A recent study of the nineteenth century reveals that federal government officers filed dozens of petitions for private bill relief and secured indemnity in roughly two-thirds of the cases after persuading Congress that they were acting in the scope of their employment and in accordance with their instructions.[41]

The practice of judicial assessment of legality and legislative assessment of scope of employment issues meant that the courts routinely rejected arguments for qualified or good faith immunity. In the famous early case of *Little v. Barreme*,[42] an action for damages brought against a naval officer of the United States, Chief Justice Marshall described the Court's refusal to recognize the officer's immunity from the strict liability regime of the common law:

> I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.[43]

Marshall's ultimate view, as shaped by his colleagues, may well have reflected the Court's perception that Congress bore responsibility for

39. For a valuable discussion of the role of the appropriations power of the general assembly and its relationship to sovereign immunity, *see* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009). *See also* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

40. For examples of such legislation, see note 44 *infra*.

41. *See* Pfander & Hunt, *supra* note 36, Appendix.

42. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

43. *Id.* at 179 (1804).

indemnifying Captain Little, thus ensuring the compensation of the victim of unlawful government conduct and the protection of an officer who had acted in compliance with official instructions. Little was among the first federal officers to seek indemnity, and he did so successfully, securing a private bill that paid the judgment against him.[44]

Other courts in the nineteenth century shared the view that officers who committed common law trespasses, strictly construed, were to be held accountable, subject to the possibility that Congress would pass indemnifying legislation if they were acting within the scope of their employment. For example, in a suit for a wrongful seizure against a federal government tax collector, Joshua Sands, the New York state court rejected the officer's good faith defense.[45] As the court explained, the judicial role was simply to "pronounce the law as we find it" and leave "cases of hardship, where any exist, to legislative provision."[46] Similarly, a federal postal official named Nathaniel Mitchell was held strictly liable by the state court in Maine for causing the arrest of a subordinate official on the reasonable, but mistaken, belief that the official had stolen a package from the mail.[47] On review of the jury's verdict before entry of judgment, Mitchell argued that he had probable cause and had acted without malice.[48] The court rejected this argument: the prosecution resulted from the defendant's act in response to the missing package, not from any suspicious conduct on the part of the subordinate.[49] As the court explained, it was proper for the jury to hold Mitchell accountable on these facts for malicious conduct.[50] Otherwise the victim would have no remedy "for losses and expenses growing out of the charge, to say nothing of personal suffering and lacerated feelings."[51] Both Sands and Mitchell successfully petitioned Congress for the adoption of a private bill of indemnity.[52]

One finds in the nineteenth century model a rather modest conception of the judicial function that contrasts sharply with the view of

44. *See* An Act for the Relief of George Little, ch. 4th, 6 Stat. 63 (Feb. 17, 1807). Little's application for a private bill followed an earlier, and similarly successful, petition by Captain Murray. *See* An Act for the Relief of Alexander Murray, Cong. 8th, Sess. 2d, ch. 12, 6 Stat. 56 (Jan. 31, 1805) (indemnifying Murray for liability imposed against him in Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

45. *See* Imlay v. Sands, 1 Cai 566 (N.Y. Sup. 1804).

46. *Id.* at 567.

47. *See* Merriam v. Mitchell, 13 Me. 439 (Me. 1836).

48. *Id.* at 446.

49. *See id.* at 457 ("We cannot but regard it as too much to hold this to have been probable cause, to justify a prosecution against an innocent and unoffending man, who had given no color for suspicion against him.").

50. *Id.* at 458.

51. *Id.*

52. *See* Pfander & Hunt, *supra* note 36, Appendix.

today. Nineteenth century courts passed solely on the issue of legality and left the task of determining issues of good faith, immunity, and indemnity to the legislative branch. The task of balancing the interest of the victim in vindication of his rights and that of the officer in securing protection against liability for actions in the course of employment fell to Congress. Today, by contrast, the Court has explicitly taken on the task of attempting to calibrate the incentives of federal officers who face personal liability. Thus, while the Court has acknowledged the importance of compensating victims and deterring government wrongdoing,[53] it has also sought to minimize what it has called the "social costs" associated with official liability. These costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[54] In addition, the Court has expressed concern that the threat of liability "'will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[55] Nineteenth century courts (and the members of Congress who adopted the pay and incentive packages for government officers and the private indemnity bills that protected them from liability) would have viewed this task of ensuring official zeal in the face of personal liability as a matter for legislative rather than judicial determination.

Even if one were to accept (in contrast to nineteenth century observers) that courts have a role to play, the Court's refinement of immunity law in the last generation represents a remarkable example of judicial creativity. In the space of only fifteen years, the Court moved from an immunity defense tailored to the specific claim to one that applied to all federal officials without regard to the duties of their office or the nature of the underlying claim. Thus, in the pre-*Bivens* case of *Pierson v. Ray*, the Court extended an immunity defense to an officer sued for claims comparable to false arrest, reasoning that the law should not impose liability where the police officer acted in good faith and with probable cause.[56] By the time of *Procunier v. Navarette*, the Court had grown impatient with immunity defenses tailored to the specific tort at issue and announced, over Justice Stevens's dissent, a more uniform

53. *Id.* at 819.

54. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

55. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Butz v. Economou, 438 U.S. 478, 506 (1977) (noting the importance of encouraging "the vigorous exercise of official authority").

56. *See* Pierson v. Ray, 386 U.S. 547, 556-57 (1967) (analogizing claim to one for false arrest and drawing on common law defenses of good faith and probable cause to define the official's immunity). The Maine Supreme Court's decision in *Merriam v. Mitchell*, casts some doubt on the accuracy of the Court's reconstruction of common law norms.

standard.[57] Notably, the *Procunier* decision introduces the idea that the immunity defense may depend on the clarity of the law the official allegedly violated. The Court completed its transformation of immunity law in *Harlow v. Fitzgerald*, defining immunity entirely by reference to the existence of a clearly established constitutional right and abstracting away from any inquiry into the official's mental state or into the common law's handling of analogous legal claims or defenses.[58]

Apart from cutting itself loose from older norms, the Court explicitly framed its new qualified immunity standard with a view toward facilitating the government official's motion for summary judgment. Under the old approach, disputes over immunity often necessitated a jury trial to resolve the subjective good faith of the officer as a matter of fact. The *Harlow* Court shifted from a subjective to an objective inquiry, transforming the issue of immunity into a matter of law to facilitate summary judgment.[59] This change in immunity law also worked a fundamental alteration in the burden of pleading constitutional torts. As late as 1980, two years before the *Harlow* decision, the Court continued to view qualified immunity as an affirmative defense. Thus, in *Gomez v. Toledo*, the Court ruled unanimously that the plaintiff had no obligation to allege that the defendant was motivated by bad faith.[60] The *Harlow* Court purported to leave this burden undisturbed.[61] But shortly after *Harlow* came down, the lower federal courts began to insist that the

57. *See* Procunier v. Navarette, 434 U.S. 555, 565 (1978) (defining official immunity as depending both on the clarity of the law and any malicious intent on the part of the defendant). Cf. *Procunier*, 434 U.S. at 568-69 (Stevens, J., dissenting) (accusing the majority of adopting a single uniform standard of immunity that applies without regard to the particular nature of the claim and office).

58. *See Harlow*, 457 U.S. at 818 (extending immunity to officials so long as they do not violate clearly established federal law); *see* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000), for a critique of the one-size-fits-all standard of qualified immunity.

59. *See Harlow*, 457 U.S. at 818 (emphasizing the need for an objective standard to facilitate summary adjudication of insubstantial claims).

60. *See* Gomez v. Toledo, 446 U.S. 635, 641 (1980). The Court relied on familiar considerations in allocating the burden of pleading to the defendant. Thus, the Court noted that it had never indicated that qualified immunity was relevant to the "existence of plaintiff's cause of action." *Id*. at 640. Moreover, the Court relied on the fact that the defendant would ordinarily have better access to information about his own mental state. *Id.* at 641. Of course, once *Harlow* switched to a subjective standard based on the clarity of the right involved, the defendant's informational advantage disappeared.

61. *See* Harlow, 457 U.S. at 819 (reciting that qualified or good faith immunity is an "affirmative defense that must be pleaded by a defendant official"); *cf.* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (continuing to characterize qualified immunity as an affirmative defense that the defendant must raise in the pleadings).

plaintiff furnish allegations detailed enough to support a conclusion that the government official violated clearly established norms.[62]

This lower court shift toward placing the burden of more specific pleading on the plaintiff led the Court to grant review in a case that presented the issue.[63] In *Siegert v. Gilley*, the lower court had refused to allow the plaintiff to take limited discovery into the official's mental state based on allegations that the official acted with malice.[64] After granting certiorari on the complaint's sufficiency, the Court sidestepped the pleading question by concluding that the law did not establish a liberty interest in one's reputation with the clarity necessary to overcome the officer's immunity defense to a *Bivens* action.[65] In a brief concurring opinion, Justice Kennedy addressed the pleading question. Foreshadowing his conclusion eighteen years later for the majority in *Iqbal*, Justice Kennedy concluded that the claimant had failed to "alleg[e] facts from which malice could be inferred with other than the most conclusory allegations."[66] Both the majority and the concurring opinions thus regarded qualified immunity as an issue on which the plaintiff bore the burden of pleading and an issue ripe for consideration on the government's motion to dismiss.

One final refinement of immunity law began in the 1980s and figured in the Court's approach to *Iqbal*. In 1985, the Court ruled that government officials could seek interlocutory appellate review of non-final decisions rejecting motions to dismiss on qualified immunity grounds. Although such orders were not technically final,[67] the Court found in *Mitchell v. Forsyth* that they satisfied the terms of the collateral order doctrine.[68] The decision was, to say the least, something of a departure from established doctrine. The collateral order doctrine applies when the district court conclusively resolves an important issue, separate

62. *See* Anderson v. Creighton, 483 U.S. 635 (1987) (approving lower court decisions that require an evaluation of qualified immunity in the context of the particular factual setting in which the officer acted). For an account, *see* Brown, *supra* note 7, at 1319.

63. *See generally* Siegert v. Gilley, 500 U.S. 226 (1991) (collecting lower court authority).

64. *See id*. The plaintiff's allegations of malice apparently met the standard of Rule 9 of the Federal Rules of Civil Procedure, but the lower court found that a more demanding pleading standard was required to overcome qualified immunity.

65. *Id.* at 233-34 (rejecting the complaint's sufficiency after concluding that the reputational claim was legally unsound).

66. *Id*. at 236 (Kennedy, J., concurring).

67. *See* Caitlin v. United States, 324 U.S. 229 (1945) for the classic definition of technical finality as an order that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

68. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985) (extending government officers a right to interlocutory appellate review of decisions that reject a qualified immunity defense).

from the merits, that cannot be effectively reviewed after a final judgment. Decisions rejecting a qualified immunity defense may well satisfy the conclusive and importance prongs of the analysis, but they can scarcely be regarded as separate from the merits and they do not evade review. After all, following the Court's refinement of qualified immunity law in *Harlow*, the existence of the immunity depends almost entirely on the merits of the plaintiff's constitutional claim. Only claims to vindicate clearly established rights may proceed to judgment. Immunity issues thus overlap with the merits to a substantial degree. They also present questions of law that an appellate court can review after a final judgment. The Court worked around these doctrinal rough patches by re-conceptualizing qualified immunity for purposes of review in the federal system as a right not to stand trial;[69] so viewed, the right was portrayed as one that could not be effectively vindicated without review of the immunity issue during the pre-trial phase of the litigation.[70]

II. EXPLORING THE *IQBAL* COURT'S VIEW OF THE JUDICIAL ROLE

Supreme Court decisions frequently make new law. But the opinion in *Iqbal* stands out both for the striking ambition of its judicial lawmaking in some areas and for the sheer modesty of its conception of the judicial role in other areas. Justice Kennedy's opinion in *Iqbal* drew on all three elements of the Court's evolving *Bivens* jurisprudence. For starters, Justice Kennedy delivered on his promise in *Siefert* to re-work the rules of pleading in constitutional tort cases; his opinion in *Iqbal* requires specific, non-conclusory allegations of misconduct to overcome a government official's qualified immunity. In addition to holding that more detail was required, Justice Kennedy confirmed that the burden of pleading fell on the plaintiff; his opinion asks if the allegations in the complaint were sufficient to state a claim that the defendants had violated "clearly established constitutional rights."[71] Finally, Justice Kennedy confirmed that the sufficiency of the complaint's allegations were a proper subject for immediate appellate review under *Mitchell v. Forsyth*.

69. One might assume, based on this conception of qualified immunity as an immunity from trial, that the state courts would owe a similar obligation to provide interlocutory review of rejected qualified immunity claims. But the Court did not agree. *See* Johnson v. Frankell, 520 U.S. 911, 913 (1997) (rejecting the argument that state courts must make available interlocutory review of rejected claims of qualified immunity in the context of a section 1983 claim against state officials). Because the federal government removes *Bivens* actions to federal court as a matter of course, the state courts would predictably have little opportunity to evaluate the need for interlocutory review of a rejected qualified immunity defense by a federal officer.

70. *See Mitchell*, 472 U.S. at 530.

71. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

A. The Bivens *Issue*

Juxtaposed against these assertions of a vigorous lawmaking role, Justice Kennedy's refusal to recognize the existence of a right of action under *Bivens* seems hard to explain. Previous decisions had made clear that equal protection violations on the part of officials of the federal government give rise to *Bivens* claims;[72] the plaintiffs in *Iqbal* alleged that they were targeted for detention under harsh conditions on the basis of their race, ethnicity, and religious affiliation in violation of both the First and Fifth Amendments. The Court disposed of the issue by assuming the viability of the religious discrimination claim.[73] But the Court pointed out that it had never found an implied damages remedy under the Free Exercise Clause of the First Amendment and observed that it had even declined to extend *Bivens* to a claim "sounding in the First Amendment."[74] After making these observations, the Court expressed a willingness to assume that the claim was actionable under *Bivens*.

What accounts for the Court's refusal to address and confirm the existence of a *Bivens* action for allegations that an immigration detainee was deliberately mistreated on the basis of his religious affiliation? One might assume from the Court's citation of authority that the possible existence of alternative remedies was a factor in the decision. After all, the case to which the Court pointed as illustrating its refusal to extend a right to sue for First Amendment violations (*Bush v. Lucas*) was one in which the Court relied heavily on the existence of alternative remedies as special factors counseling hesitation in the recognition of a *Bivens* remedy.[75] But in *Iqbal*, the Court did not point to any relevant source of alternative remedies and one cannot say with confidence that any such remedies existed. The plaintiff had been released from detention and could not secure relief through the invocation of a habeas corpus remedy; in any case, the plaintiffs were not challenging the fact or duration of their confinement so the habeas remedy was inapposite.[76] Common law avenues of relief against federal officials were curtailed with the

72. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 244 (1979).

73. *Iqbal*, 129 S. Ct. at 1948.

74. *Id*. (citing Bush v. Lucas, 462 U.S. 367 (1983)).

75. *See Bush*, 462 U.S. at 381-89 (detailing the rise of civil service remedies for federal government employees).

76. The Court has long held that habeas relief applies to petitions that challenge the fact or duration of confinement. *See* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (foreclosing state prisoner reliance on 1983 suits to challenge the fact or duration of confinement). The federal courts have generally adopted the same distinction in coordinating habeas and other remedies available to federal prisoners. *See, e.g.*, Walker v. O'Brien, 216 F.3d 626, 639 (7th Cir. 2000) (holding that the PLRA does not apply to habeas petitions).

adoption of the Westfall Act.[77] Remedies may have been available against the government under the FTCA for intentional torts, but the Court has refused to treat the possible existence of an FTCA claim as displacing the *Bivens* remedy.[78] The complaint had also alleged claims under the Religious Freedom Restoration Act, a possible source of *Bivens*-displacing federal law. But the lower court had rejected the RFRA claims and the Court did not have any occasion to address that statute's applicability to federal government officials.[79]

Without any obvious alternative remedies available, the Court's failure to recognize a *Bivens* action may instead reflect genuine doubts as to the right of individuals to pursue a damages claim for intentional, religiously-based mistreatment at the hands of the federal government. That's an unsettling possibility. Lower courts have consistently viewed free exercise claims as stating a valid basis for relief under *Bivens*[80] and section 1983.[81] As a consequence, free exercise litigation in the lower courts focuses not on the existence of a right to sue under *Bivens*, but on the degree to which government activity appears to interfere with the practice of religion and the clarity of the legal framework at issue for

77. The Westfall Act affords federal officials absolute immunity from liability on common law claims, so long as the government certifies that the officials were acting within the course and scope of their employment. *See generally* Pfander & Baltmanis, *supra* note 28, at 133-34 (describing the process of certification and the transformation of claims into actions against the federal government under the FTCA).

78. *See* Carlson v. Green, 446 U.S. 14, 23 (1980) (treating the FTCA remedy as supplementary to, rather than preemptive of, the right of action for cruel treatment by federal prisoners); *see generally* Pfander & Baltmanis, *supra* note 28, at 121 (describing Congress's decision in the 1974 amendments to the FTCA to provide additional remedies for the federal government's intentional torts and its decision to preserve the Bivens remedy for constitutional violations).

79. *See* Iqbal v. Ashcroft, 490 F.3d 143, 151 (2d Cir. 2007) (recounting the district court's dismissal of the RFRA claims on the theory that the liability of federal government officials under the statute was not clearly enough established to overcome their immunity); *see also* Rasul v. Meyers, 563 F.3d 527, 533 (D.C. Cir. 2009) (expressing doubt that military detention officers are persons within the meaning of the RFRA). Finally, *see Iqbal*, 490 F.3d at 160, for the lower court's rejection of the argument that the post-9/11 setting established special factors counseling hesitation in the recognition of a *Bivens* action.

80. *See, e.g.*, Resnick v. Adams, 317 F.3d 1056 (9th Cir. 2003) (assuming the viability of a Bivens free exercise claim relating to the provision of kosher food); Weinberger v. Grimes, No. 07-6461, 2009 WL 331632 (6th Cir. 2009) (assuming viability of Bivens claim and evaluating prison officials' accommodations); *cf.* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2008) (raising doubts as to application of free exercise claims by non-resident aliens housed at Guantanamo Bay).

81. *See, e.g.*, Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525 (8th Cir. 2010) (free exercise claim was clearly established such that official defense of qualified immunity was unavailable); Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009) (sustaining 1983 claim that warden had substantially burdened prisoner's exercise of religion by failing to accommodate dietary restrictions).

qualified immunity purposes. In prison litigation, for example, cases often turn on the degree to which prison officials have complied with their obligation to accommodate the religious practices of the inmate population.[82] Rejection of a *Bivens*-based right to sue would deprive inmates of their ability to secure a judicial evaluation of their religious freedom claims.[83]

Apart from the unsettling possibility that the Court contemplates the rejection of a *Bivens* action to enforce free exercise rights, its decision to assume but not decide the issue poses a problem for the sound administration of justice. It makes little sense to specify pleading rules for a claim that the Court does not regard as viable. The whole point of a motion to dismiss under Rule 12(b)(6) is to determine if the facts alleged show an entitlement to relief. Courts must find or make the law and then ask if the facts suffice to make out a claim under that law. Not surprisingly, then, the last time the Court addressed the elements of a plaintiff's claim for relief under *Bivens*, it first confirmed the viability of the claim and only then focused on the pleading requirements.[84] In other words, the existence of a right to sue was seen as an essential precursor to the Court's discussion of the elements of the claim. The *Iqbal* Court alters this order of decision, assuming the existence of a *Bivens* action and then extending *Twombly*'s more demanding plausibility pleading requirements to the *Bivens* context.[85] After *Iqbal*, insufficiently detailed

82. *See Resnick*, 317 F.3d at 1061-63; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 352 (1987); Abdur-Rahman v. Michigan Dep't of Corr., 65 F.3d 489, 491 (6th Cir. 1995).

83. Much of the legislation adopted in the past several years has assumed the existence of a *Bivens* action for individuals housed in federal facilities or prisons. Both the Prison Litigation Reform Act of 1995 (PLRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) qualify to some extent the right of inmates of federal prisons to pursue *Bivens* claims. Among the claims that Congress subjected to the restrictions of the PRLA were those for the free exercise of religion. The legislation thus confirms and qualifies the *Bivens* action to some extent and provides scant support for a judicial decision to eliminate the availability of judicial oversight altogether.

84. *See* Hartman v. Moore, 547 U.S. 250, 256 (2006) (squarely holding that the plaintiff could pursue a *Bivens* action for wrongful prosecution in retaliation for the exercise of rights under the First Amendment).

85. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (extending the *Twombly* plausibility standard to all complaints under the Federal Rules). The Court's new pleading requirements thus apply to all *Bivens* claims, including those for race-based discrimination, that turn on a showing of intentionally or purposefully discriminatory conduct. We thus have an approach to the *Bivens* question that parallels, to some extent, the way the Court now structures the analysis of qualified immunity. Under *Pearson v. Callahan*, 129 S. Ct. 808 (2009), federal courts need not pass on the existence of a constitutional right before deciding that the right in question was not clearly enough established to overcome the official's qualified immunity. Similarly, *Iqbal* invites the federal courts to evaluate the sufficiency of a complaint without necessarily concluding that the law recognizes a right of action for the constitutional claim at issue.

allegations may derail many a *Bivens* claim without necessitating any determination of the viability of the action itself.

B. The Collateral Review Issue

The prospect that factual sufficiency issues may crowd out evaluations of applicable law helps to frame the question of whether the Court should have extended the collateral order doctrine to authorize interlocutory review of the sufficiency of Iqbal's complaint. As noted above, the Court had applied the doctrine to qualified immunity decisions in *Mitchell v. Forsyth*, but later decisions cast doubt on the extension of *Mitchell* to factually rich questions.[86] In *Johnson v. Jones*, Justice Breyer wrote for a unanimous Court in concluding that an immediate appeal was not available from an order denying an official's immunity-based summary judgment motion. Unlike the order in *Mitchell*, which involved an interpretation of law and its application to an agreed-upon set of facts, the order in *Johnson* was based on a trial judge's finding that there was sufficient factual matter in the summary judgment record to create a genuine issue for the jury to resolve. To such an order, the *Johnson* Court found that the collateral review doctrine did not apply: it was too fact-bound, unlike the legal question addressed in *Mitchell*; it was not really separate from the merits in the sense that the same sort of issues could well arise after the trial; and, it presented issues of factual detail that the district court was better suited to address than the appellate court.[87]

The order on review in *Iqbal* occupies a space mid-way between the orders in *Mitchell* and *Johnson*. Deciding on the sufficiency of the complaint in *Iqbal* requires a court both to define the parameters of clearly established law (*Mitchell*) and to parse the record to ascertain if the allegations contain the requisite level of factual detail to bring that legal principle into play (*Johnson*). The case thus required the appellate court to do more than find the law; under the new pleading standard applied in *Iqbal*, the court must evaluate the allegations in the complaint to determine if they provide "plausible," non-conclusory, factual support for the plaintiff's theory of liability.[88] This task of closely parsing allegations normally falls to the district court, and it can involve precisely the sort of fact-based inquiry that the *Johnson* Court found to

86. Compare Mitchell v. Forsyth, 472 U.S. 511 (1985) (allowing interlocutory review of qualified immunity defense) with Johnson v. Jones, 515 U.S. 304 (1995) (rejecting interlocutory review of the factual record underlying a motion for summary judgment on qualified immunity grounds).

87. *See Johnson*, 515 U.S. at .319-20.

88. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948-51 (2009).

be inconsistent with the appellate court's comparative advantage in finding the law. *Iqbal* will require both the district court and the appellate court to review the factual sufficiency of every *Bivens* complaint: a decision granting dismissal of the complaint on a 12(b)(6) motion would be a final order, entitling the plaintiff to seek review, and the denial of a 12(b)(6) motion would trigger *Iqbal*'s collateral order holding, thereby enabling the defendant to seek review.[89]

One can certainly question the wisdom of bringing immediate appellate oversight to bear on the factual sufficiency of every *Bivens* complaint. Indeed, it seems likely that a post-*Iqbal* concern with factual sufficiency will prompt plaintiffs to file ever more detailed complaints as they attempt to anticipate and head-off qualified immunity arguments.[90] Moreover, it seems likely that the government will counter these relatively more detailed allegations with affidavits and other evidence aimed at contesting the allegations in the complaint. Under the Federal Rules of Civil Procedure, the inclusion of such affidavits can trigger a transformation of the motion to dismiss into one for summary judgment, with an accompanying right to take tailored discovery, if necessary, to enable the non-moving party, typically the plaintiff, to establish an issue of fact.[91] Depending on the district court's response to the inclusion of affidavits, the government's motion to dismiss might evolve into an evaluation of the existence of a genuine issue of fact. The rationale of the *Johnson* Court's refusal to involve the appellate courts squarely applies to the pre-trial review of such factual issues.

Apart from leading to appellate review of factually dense complaints and affidavits, the Court's embrace of interlocutory review in *Iqbal* seems hard to square with the ethos of restraint in *Mohawk Industries, Inc. v. Carpenter*.[92] There, the Court confronted an application for collateral review of an order adverse to a party's claim of attorney-client privilege. The opinion for the Court by Justice Sotomayor patiently explained why collateral order review was

89. *See, e.g.*, al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

90. The complaint in *Iqbal* itself included 24 separate counts against a variety of federal government officials.

91. FED.R.CIV.P. 12(d) provides that if the district court allows the defendant to introduce affidavits bearing on an issue of fact in the complaint, the court should transform the motion into one under FED. R. CIV. P. 56 for summary judgment and allow the parties to take any discovery needed to resolve such a motion. As long as some uncertainty surrounds the applicable legal standard, it probably makes sense to view factual issues as proper subjects for appellate review alongside interlocutory review of the issue of what the law clearly establishes. But if the government were to agree that the law was clear, one could fairly doubt the propriety of interlocutory review based solely on the government's contention that the factual allegations were insufficiently detailed to raise an inference that the officer committed the offense in question.

92. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009).

unnecessary in light of the other modes of securing review available to the party in question.[93] More interesting for present purposes, the Court also suggested that it would no longer adopt judge-made expansions of the collateral order doctrine.[94] In particular, the Court pointed to the adoption of legislative changes to the rules enabling act that empower the judiciary to promulgate rules of appellate finality and interlocutory review through the rule-making process.[95] The Court expressed support for reliance on a rule-making process that it described as drawing on the "collective experience of bench and bar" in the promulgation of "measured, practical" solutions.[96] Further avenues of interlocutory review were thus to be "furnished, if at all, through rulemaking, with the opportunity for full airing it provides."[97]

Justice Thomas also embraced rulemaking in his concurrence, arguing that the Court had erred in conducting a collateral order analysis.[98] In Justice Thomas's view, the Court should have simply remitted the parties to the rulemaking process, without holding open the possibility that they might secure a judge-made rule of interlocutory review.[99] Justice Thomas cited the *Iqbal* decision, which preceded *Mohawk* by a scant seven months, to illustrate his point.[100] The apparent purpose of the citation was to draw attention to language in *Iqbal* that acknowledged a certain lack of principle in the Court's application of the collateral order doctrine.[101] There was more than a little irony in the reference, given that Justice Thomas had joined an *Iqbal* majority that expanded the collateral order doctrine and significantly re-worked the rules governing the required particularity of factual allegations.[102]

93. *See id*. at 606-09.

94. *See id*. at 609.

95. *See id.* (citing 28 U.S.C. § 2072(c) (2006), which authorizes the judiciary to define finality by rule, and 28 U.S.C. § 1292(e), which authorizes the rule makers to adopt rules for interlocutory review in addition to those set forth in the statute).

96. *Id*.

97. *Id*.

98. *See id*. at 610 (Thomas, J., concurring).

99. *See id*. at 610.

100. *See id*. at 611 (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1946 (2009)).

101. *See id*. (citing *Iqbal*, 129 S. Ct. at 1946 (explaining that the doctrine may have "expanded beyond the limits dictated by its internal logic" and the strict requirements of prior decisions)).

102. I credit Professor Stephen Burbank for pointing out this irony to me. Thus, *Iqbal* makes clear that the Court's new judge-made plausibility pleading rules apply to all litigation in federal court, not just to suits brought to enforce the antitrust laws. Moreover, *Iqbal* confirms that the new dispensation applies even to cases in which the plaintiff seeks to pursue the sort of intent-based discrimination claims on which the Federal Rules of Civil Procedure seemingly demand only the barest of notice pleading. As critics have noted, repeatedly and at some length, this change in the rules of pleading by top-down judicial fiat seems hard to square with the bottom-up approach to pleading institutionalized in the Rules Advisory process. Under that regime, the committee on

Neither aspect of the decision demonstrates notable deference to the rule-making process.

III. EXPLAINING THE *IQBAL* COURT'S APPROACH

What then accounts for the Court's Janus-faced attitude to the business of judicial lawmaking? On the one hand, the Court embraced judge-made law with gusto in adapting the rules of qualified immunity and in crafting pleading rules and extensions of the collateral order doctrine. On the other hand, the Court has expressed a grave reluctance to recognize what it chooses to characterize as new rights of action under *Bivens* to enforce the Constitution. While the Court speaks of the necessity of deference to the legislative branch and rulemaking process in the *Bivens* context, its own dispositions reveal no consistent practice of deference.

In attempting to account for the disparity in the Court's approach, I resist the answer of judicial attitudes or politics. To be sure, we have known since the dawn of legal realism that a judge's priors inform her approach to legal questions and may influence the outcomes of cases, especially in situations where the doctrine creates space for the play of judicial discretion. We have, moreover, a growing body of evidence that the attitudes of the Justices of the Supreme Court bear strongly on the outcome of cases.[103] But judges nonetheless act within a world framed by judicial tradition and hedged about by precedents that shape the range of decisional options available in any particular case. Traditions and precedents change over time, but these considerations narrow the degrees of decisional freedom. This part of the article explores the factors that likely frame the Court's view of the *Bivens* action and the doctrine of qualified immunity.

A. Discounting the Bivens *Action*

Several factors have combined to persuade the Court that the *Bivens* decision should not be readily extended beyond the boundaries within which it currently operates. First, at least two Justices believe that *Bivens* was wrong in 1971 to fashion a judge-made right of action instead of deferring to Congress.[104] Second, members of the Court may view the

Civil Rules of the Judicial Conference develops the rules of practice and procedure in consultation with the bar and promulgates rules that take effect if the Court and Congress do not object.

103. For a summary of the attitudinalist literature, *see* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 262-63, 270-80 (2005).

104. *See* Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

Bivens action as primarily a vehicle for the assertion of claims of dubious merit by pro se prison litigants who have nothing better to do.[105] Third, and relatedly, the Court may fear the docket implications of recognizing the existence of a *Bivens* action.[106] Finally, the Court may assume that other remedies exist for most constitutional torts, thus making the recognition of a *Bivens* action less important.[107]

In evaluating the strength of these implicit explanations for *Bivens* skepticism, we can begin with questions of the legitimacy of judge-made rights of action. In other work, I have argued that the issue of legitimacy must take account not only of the legislative framework in place in 1971 but also of the range of legislation since adopted that seems to presume the viability of a *Bivens* action.[108] Thus, with the adoption of amendments to the Federal Tort Claims Act (FTCA) in 1974 and 1988, Congress took pains to preserve the *Bivens* action.[109] The preservation of *Bivens* was noted in the Court's decision in *Carlson v. Green*,[110] commenting on the adoption of the 1974 amendments.[111] Congress made the preservation explicit in 1988, declaring that suits against government officers were generally foreclosed, except suits for "violations of the Constitution."[112] This explicit preservation of the *Bivens* remedy deserves greater attention in debates over the action's legitimacy.

In addition, Congress has essentially eliminated the common law remedies that were routinely available to litigants in the pre-*Bivens* world

105. One finds an early version of this view in Justice Black's dissenting opinion in *Bivens* itself. *See* Pfander, *supra* note 3, at 288-89 (recounting Justice Black's concern for the assertion of potentially groundless claims against well-meaning federal officers).

106. Docket concerns invariably brook large in the decision about whether to authorize a federal right of action.

107. *See, e.g.*, *Wilkie*, 551 U.S. at 550-51 (treating the possible availability of state common law remedies as a relevant factor in the *Bivens* calculus).

108. For an overview of the legislation, *see* Pfander & Baltmanis, *supra* note 23, at 131-38.

109. The FTCA became law in 1946, imposing liability on the federal government on a respondeat superior theory for the negligent acts of federal employees. *See* 60 Stat. 842 (1946). The key to its liability scheme lies in the provision that authorizes jurisdiction over claims against the federal government for injuries caused by the "negligent or wrongful act or omission of an employee of the Government." 28 U.S.C. § 1346(b) (2006). The FTCA has been twice amended. The first amendment to the FTCA occurred in 1974 to impose liability on the government for certain specified intentional torts. *See* Pub. L. No. 93-253, 88 Stat. 50. The Act was amended again in 1988 to immunize federal officers from common law liability. *See* Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563, 4564-65 (1988) (codified at 28 U.S.C. 2679(b)(2)(B) (2006)).

110. Carlson v. Green, 446 U.S. 14 (1980).

111. *Id.* at 16-18.

112. Westfall Act, Section 5, 28 U.S.C § 1346(b) (1997) (permitting a suit against federal officers for "violation of the Constitution").

as a way to contest the legality of federal government conduct.[113] One can thus fairly question both the presumption that *Bivens* lacks legislative support and the claim that alternative remedies in tort provide an assurance of remediation. The Westfall Act immunizes federal officers from all liability on state common law theories of liability for action taken within the scope of official duties.[114] Individuals can recover for common law torts only where the claim falls within the scope of the FTCA's waiver of government immunity from suit.[115] In many instances, the Westfall Act may block the suit against the officer without necessarily subjecting the government to liability in the officer's stead.[116] With this discontinuity, one should not assume, as the Court apparently did in *Wilkie v. Robbins*,[117] that state common law theories of liability translate seamlessly into liability under the FTCA. While certain of these claims might be reformulated and asserted against the federal government under the FTCA, there is no assurance that the FTCA, with its various exceptions, provides a remedy for the breach of common law duties.

The assumption that *Bivens* claims typically lack merit and therefore constitute a burden on the federal judiciary has been persuasively refuted by Professor Alex Reinert.[118] In an empirical evaluation of *Bivens* litigation, Professor Reinert has reckoned that something on the order of 30% of *Bivens* claims succeed, either through settlement or a merits disposition.[119] This finding contrasts with the widely held view that frivolous *Bivens* claims, like those under section 1983, have multiplied over the past generation to a degree that threatens to overwhelm the federal judiciary.[120] While theories of government accountability must take account of the burden that civil rights litigation

113. Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563, 4564-65 (1988) (codified at 28 U.S.C. § 2679(b)(2)(B) (2006)).

114. *Id.*

115. *See* Osborn v. Haley, 549 U.S. 225 (2007) (describing the process by which the attorney general's scope-of-employment certification transforms common law action into one against the United States under the FTCA).

116. For example, no exception appears in the Westfall Act to preserve the liability of officers for torts they commit outside the United States, despite the fact that the FTCA forecloses liability for torts that occur overseas. *See* United States v. Smith, 507 U.S. 197, 201 (1991).

117. 551 U.S. 537 (2007).

118. *See* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 841 (2010) (describing an overall success rate of 30% in cases that survive initial screening and in which an answer or motion is filed).

119. *Id*. at 841.

120. *Id*. at 828 n.95 (collecting authorities).

casts on the federal judiciary, in the case of *Bivens* litigation, it appears that the tipping point has not yet been reached.

Public perceptions of prison litigation may inform *Bivens* skepticism to some degree. In the popular mind, prisoners sue to secure recognition of obscure religious practices and to contest prison life as cruel and unusual punishment.[121] These perceptions doubtless influenced the adoption of the Prison Litigation Reform Act of 1995 (PLRA),[122] legislation that restricts in a variety of important ways the ability of state and federal prisoners to mount federal court challenges to the conditions of their confinement. Several provisions of the Act in particular apply to *Bivens* and section 1983 litigation. First, the statute considerably strengthens the exhaustion rule, requiring prisoners to file their claims with prison grievance systems before initiating federal litigation.[123] Second, the statute establishes an initial screening process that requires the district court to evaluate the complaint before calling on the government to respond.[124] Third, the statute prevents prisoners from recovering for mental or emotional injuries unless they have suffered a physical injury.[125] Fourth, the statute requires prisoners to pay the filing fee from their prison accounts, thus qualifying the prisoner's right to

121. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 917 n.145 (2009) (providing an account of the way critics urged reform of prison litigation through the misleading characterization of prisoner claims).

122. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

123. *See* 42 U.S.C. § 1997e (2006). The PLRA's mandatory exhaustion requirement replaced the discretionary approach of prior law and eliminated the old notion that exhaustion was to be excused where the administrative remedy could prove futile or where the agency in question lacked the power to order the relief sought by the prospective litigant. As the Supreme Court has observed, the PLRA's exhaustion requirement seeks to "reduce the quantity and improve the quality of prisoner suits." Porter v. Nussle, 534 U.S. 516, 516 (2002). To that end, the Court has taken a fairly strict view of the requirement. In its most recent decision, the Court refused to excuse the prisoner's failure to comply with the institutional filing deadline for an internal grievance. *See* Woodford v. Ngo, 548 U.S. 81 (2006).

124. *See* 28 U.S.C. § 1915A (2006).

125. *See* 28 U.S.C. § 1346 (b)(2) (2006) (declaring that "no person convicted of a felony who is incarcerated while awaiting sentencing . . . may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). Some courts have read the provision broadly to apply to suits seeking compensation for the invasion of intangible constitutional rights. *See, e.g.*, Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (action for violation of inmate's religious freedom was one for mental or emotional injury and thus was barred in the absence of physical injury). Other courts have viewed an alleged deprivation of constitutional rights as actionable in its own right, quite apart from any resulting emotional or mental distress. *See, e.g.*, Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) (permitting inmate to sue for violation of First Amendment rights aside from any emotional injury he may have sustained).

proceed *in forma pauperis*.[126] Finally, the statute imposes a three-strikes provision that forecloses a prisoner with a record of three prior groundless claims from bringing an IFP suit.[127]

The PLRA, perhaps especially its filing fee provision, has been effective in reducing the number of prison petitions in the federal courts.[128] It has also been controversial, leading critics to ask if Congress went too far in limiting access to the federal judiciary.[129] Critics worry about the application of the three-strikes provision, fearing that it will disable prisoners from bringing meritorious claims. Critics have also questioned the application of the physical injury requirement to constitutional claims, including claims for violation of religious freedom. Finally, critics have expressed concern that the broad exhaustion rule forecloses litigation of meritorious claims by pro se litigants who may have little knowledge of the particular deadlines they must meet under the prison grievance system. The American Bar Association has joined these critics in calling for reform of the PLRA along the lines suggested in the Prison Abuse Remedies Act. The PARA would roll back some elements of the PLRA to secure the prisoner's day in court.[130]

The Court's skepticism toward prisoner claims in general and the free exercise claim in *Iqbal* in particular, may reflect a perception that Congress has taken steps to curtail prisoner litigation, thus signaling a desire to restrict access to a *Bivens* remedy. *Bivens*, after all, provides the primary vehicle for the assertion of prison claims by federal prisoners.[131] (Federal habeas tests only the fact or duration of custody, rather than the treatment of prisoners by guards and wardens.) Among

126. *See* 28 U.S.C. § 1915(b) (2006). The PLRA mandates that prisoners pay a portion of the filing fees associated with their litigation. In particular, the PLRA imposes an obligation that inmates draw on funds held in their prison accounts to pay the fees, often on an installment basis.

127. The PLRA imposes a three-strikes rule, under which inmates can be forbidden from filing suit *in forma pauperis* (IFP) where they have had three prior lawsuits dismissed as frivolous, malicious, or for failure to state a cognizable claim. *See* 28 U.S.C. § 1915(g) (2006). As a practical matter, the three-strikes provision means that prisoners subject to the rule must pay the entire filing fee up front, or their action may not proceed. The provision includes an exception for suits involving inmates in imminent danger of serious physical injury.

128. *See* Margo Schlanger, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, *passim* (2008).

129. *Id*. at 142-43.

130. For a summary of the criticisms, and the ABA's support for the Prison Abuse Remedies Act, see Schlanger, *supra* note 128, at 141.

131. For state prisoners, of course, section 1983 provides the counterpart to *Bivens*. *See* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (reaffirming the viability of section 1983 as vehicle for assertion of Eighth Amendment claims by a state prisoner who alleged that prison guards used excessive force to subdue him).

the first *Bivens* actions recognized was that for a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[132] In addition, free exercise claims in the prison setting arise with some frequency and often implicate the PLRA's physical injury requirement. Congressional concern with prisoner claims may tend to encourage the Court in its reluctance to recognize what it regards as new rights of action in the prison setting.

But one can fairly ask if the congressional signals in the PLRA warrant an attitude of judicial hostility to *Bivens* claims in the prison context. While the cruel and unusual punishment clause addresses itself to the conditions of prison confinement, one has difficulty identifying other constitutional rights that apply with special force to the prison setting. Certainly the free exercise clause, though implicated in a wide range of prison lawsuits, applies to governmental interference with the profession of faith in other, non-prison settings. A decision to deny a *Bivens* remedy could foreclose free exercise claims both in and out of the prison setting. Skepticism about prison claims in particular should not drive the Court to curtail constitutional litigation more broadly.

More fundamentally, the adoption of the PLRA can be viewed as altering the Court's role. In *Wilkie v. Robbins*,[133] its most recent discussion, the Court defined its role in deciding whether to recognize a new *Bivens* action as a two-step process. First, the Court must consider if the existence of an alternative remedy provides a reason for the judiciary to refrain "from providing a new and freestanding remedy in damages."[134] Second, a court conducting a *Bivens* inquiry must exercise the sort of judgment required of a common law tribunal and pay attention to any "special factors counseling hesitation" before recognizing a "new kind of federal litigation."[135] Normally, as in *Bivens* itself, the Court conducts this inquiry with scant legislative guidance, a factor that encourages a certain skepticism on the part of judges who view the task of creating a new right of action as a matter for legislative rather than judicial creativity. In the case of free exercise claims under the PLRA, however, the Court does not lack for congressional guidance. Congress enacted the PLRA on the assumption that *Bivens* suits were available to enforce prisoner rights to the free exercise of religion; by the time of the adoption of the PLRA, the lower federal courts had recognized that such claims were viable under both section 1983 and *Bivens*.[136] By

132. *See* Carlson v. Green, 446 U.S. 14 (1980).
133. 551 U.S. 537, 537 (2006).
134. *Id.* at 550.
135. *Id.* at 550 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).
136. *See, e.g.*, Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (recognizing Bivens action for interference with free exercise of religion); Lowrance v. Coughlin, 862 F.

acknowledging the existence of the *Bivens* action and taking steps to curtail the features of prison litigation that it viewed as excessive, Congress took upon itself the task of striking a balance between the interests in suppressing frivolous litigation and preserving government accountability.

The congressional response to the Court's analysis of prison exhaustion schemes nicely illustrates the point. In *McCarthy v. Madigan*,[137] a *Bivens* action for deliberate indifference brought under the Eighth Amendment, the federal government argued that the petitioner was required to exhaust the federal prison grievance system before instituting suit in federal court.[138] The Court (without dissent) reaffirmed the vitality of the *Bivens* action in the prison setting and concluded that the grievance system was inapplicable, in part because it provided no mechanism for an award of money damages.[139] The Court (also without dissent) rejected the argument that the grievance system should be regarded as an adequate alternative remedy, sufficient to displace the *Bivens* scheme.[140] In responding to this holding in the PLRA, Congress did not foreclose the assertion of prison claims under *Bivens* but rather made clear that a new, more demanding exhaustion requirement would apply.[141] In short, Congress confirmed and moderated the conclusion in *McCarthy*, rather than overthrowing the *Bivens* remedy.

Because Congress assumed the viability of a *Bivens* action, and imposed restrictions aimed at limiting its perceived excesses in the prison context, it may have altered the judicial role. The federal courts no longer face the relatively unguided common law right-of-action calculus described in *Wilkie v. Robbins*. A *Bivens* action to enforce free exercise claims would not create a "new kind of federal litigation," but would

Supp. 1090 (S.D.N.Y. 1994) (section 1983 claim for retaliation against inmate for the exercise of religious rights); Scarpino v. Grossheim, 852 F. Supp. 798 (S.D. Iowa 1994). Other cases recognize the viability of a free exercise claim, before ultimately rejecting the claim on the merits. *See, e.g.*, Mumin v. Phelps, 857 F.2d 1055, 1056 (5th Cir. 1987); Garza v. Carlson 877 F.2d 14 (8th Cir. 1989) (recognizing prisoner's right to practice religion but concluding that the prison policy reasonably accommodated those rights); *Cf.* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (recognizing that prisoners retained their free exercise rights while in prison but concluding that the rights were properly viewed less as absolutes than as interests to be considered in light of legitimate penological considerations).

137. McCarthy v. Madigan, 503 U.S. 140 (1992).

138. *See id.* at 142.

139. *Id*. at 152 (reaffirming *Bivens* and *Carlson*); *id*. at 154-55 (rejecting exhaustion argument due in part to the absence of a monetary remedy).

140. *Id*. at 151-52.

141. *See* Porter v. Nussle, 534 U.S. 516, (2002) (holding that PLRA's exhaustion requirement applies to "any suit" brought by prisoners); Booth v. Churner, 532 U.S. 731 (2001) (holding that the exhaustion requirement applies to claims for monetary damages even where the grievance process affords no such remedies).

simply confirm the existence of a right of action that Congress has acknowledged and trimmed back to its own specifications for use in a system of litigation designed to ensure prison accountability. The litigation has already arrived on the dockets of the federal courts.[142] Formal recognition of a *Bivens* action would add no new category of claims to the federal workload but would simply confirm the status quo as modified by Congress. Rejection of the action, by contrast, would likely interfere with the congressional balance, foreclosing claims that Congress simply meant to screen or qualify to ensure their viability.

The free exercise claim in *Iqbal* thus presents an interpretive problem quite different from those in such earlier *Bivens*-restrictive cases as *Bush v. Lucas*[143] and *Schweiker v. Chilicky*.[144] In *Bush*, an aerospace engineer claimed that federal employees had retaliated against him in the workplace to punish him for the exercise of free speech rights.[145] Having successfully pursued remedies under a federal workplace protection statute, the employee sought additional remedies on a *Bivens* theory.[146] As the case came to the Court, then, the employee was inviting the creation of "a new kind of federal litigation" in a field where Congress had been quite active in balancing competing policies and providing tailored relief.[147] Similarly, in *Schweiker*, the Court confronted a claim that the procedures used to process a Social Security disability claim violated due process.[148] Again emphasizing the degree to which Congress had taken the matter in hand, the Court refused to recognize a *Bivens* action. As the Court explained, when the "design of [the] Government program" suggests that Congress had provided appropriate remedies for the claims at issue, "we have not created *additional Bivens* remedies."[149] Both cases thus involved an attempt to introduce a new theory of constitutional litigation into an area where Congress had supplied "comprehensive procedural and substantive provisions giving meaningful remedies against the United States."[150]

In the case of prisoner claims, the posture of deference to the PLRA's federal regulatory scheme would require the Court to confirm the existence of a *Bivens* action. If the Court were to curtail the right to

142. *See* John Boston, *The Prison Litigation Reform Act* at 161-63 (2008) (unpublished manuscript on file with author) (collecting examples of religious liberty litigation brought by prisoners).
143. Bush v. Lucas, 462 U.S. 367 (1983).
144. Schweiker v. Chilicky, 487 U.S. 412 (1988).
145. *Bush*, 462 U.S. at 369-70.
146. *Id.* at 374.
147. *Id.* at 378.
148. *Schweiker*, 487 U.S. at 417-18.
149. *Id.* at 423.
150. *Id*. at 422 (quoting *Bush*, 462 U.S. at 368).

sue for such religious freedom claims, it would represent a sizable judicial disruption of the balance Congress struck. Somewhat counter-intuitively, therefore, the PLRA confirms rather than displaces the *Bivens* action in the prison context.[151]

B. Bivens *Skepticism and Qualified Immunity Enthusiasm*

If some traditional justifications for *Bivens* skepticism do not appear well grounded, one can also raise questions about the Court's expansion of qualified immunity. After *Bivens* came down in 1971, the Court began to re-fashion the rules of qualified immunity to create nationally uniform rules that turn less on the official's duties and mental state and more on the state of the law.[152] The avowed justification for the change was to strike an appropriate balance between the interests of the victims of government misconduct and those of government officials.[153] While the Court has expressed ongoing reluctance to perform the "legislative" function of recognizing an implied right of action, it has not voiced similar doubts about the wisdom of (or its capacity to formulate) a judge-made body of qualified immunity law.

While we have grown accustomed to its role, the Court's willingness to take the lead in calibrating official immunity looks a good deal more adventuresome when viewed from the perspective of the early nineteenth century. Back then, the courts simply applied common law precepts in determining official liability; it was for Congress to create any appropriate immunity through the adoption of statutory limits on

151. One might argue that the provisions of the PLRA do not apply to the claim asserted by Iqbal and thus provide little support for the existence of a *Bivens* action. Iqbal brought suit after he had served his time and gained release from custody. As a result, the PLRA apparently does not apply to him. He's no longer a "prisoner" within the meaning of the Act and no longer subject to the various restrictions the Act imposes. Yet there's a strong argument that the purpose of the PLRA was to mimic the market conditions that Iqbal faced and that typically govern the initiation of litigation by individuals outside of prison. The market often ensures that litigants who file suit through attorneys make credible commitments about the validity of the claims they assert. Litigants can proceed, in most instances, only by persuading an attorney to take their case. Contingent fee lawyers, and lawyers working for public interest firms, will accept such representation only where they calculate that the prospects for success justify the investment of costs and fees associated with the litigation. Prisoners, by contrast, faced few such constraints before the adoption of the PLRA; they could file pro se actions on an IFP basis without posting a filing fee. The PLRA seeks to require prisoners to make credible commitments, both by paying the filing fee from their prison account and by submitting to an initial screening of their complaint. The combined effect of these limits provides assurances of the viability of prisoner claims that may, to some extent, seek to duplicate those afforded by the market.

152. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

153. *See* Butz v. Economou, 438 U.S. 478 (1978) (describing this balancing approach).

common law liability.[154] Similarly, Congress took it upon itself to ensure that officers did not bear the ultimate liability for actions taken in the course of their employment. It did so by adopting a series of private bills, appropriating money from the treasury to indemnify the officials for any losses suffered due to action taken in accordance with their instructions.[155] Finally, Congress sought to ensure the proper balance between respect for private rights and official zeal by creating incentives in the officer's compensation package. Some officers were put on salary; others earned fees and commissions for work well done.[156] In this world, courts simply applied the law. Congress was obliged to calibrate pay and indemnity assurances sufficient to attract able candidates to offices that entailed risks of personal liability.

The nineteenth century alternative does not necessarily cast doubt on the Court's modern role or on its willingness to fashion qualified immunity law. But it does reveal that there's nothing inherent in the Court's current allocation lawmaking competence. Today, as we have seen, the Court emphasizes the *legislative* role in fashioning rights of action and the *judicial* role in the development of immunity rules. In the nineteenth century, the roles were reversed. Courts took the lead in developing and extending common law rights of action and Congress balanced the threat of liability and the need for official zeal in the course of adopting immunity statutes and applying indemnity rules. One advantage of the nineteenth century approach was that it enabled Congress to tailor incentives to the particulars of an officer's duties.

A variety of factors contributed to the change from the nineteenth to the twentieth century model of government accountability. But two appear particularly significant. First, Congress came to recognize that it lacked the institutional resources to address the petitions for private relief that flowed into its halls from individuals with money claims against the government. The sheer burden of processing petitions led Congress to create the Court of Claims in 1855, as an alternative institution for claims on the fisc.[157] Similarly, among the factors that led in 1946 to the adoption of the FTCA was the perception that Congress was drowning in

154. *See, e.g.*, Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era*, 1801-1829, 116 YALE L.J. 1636, 1679-80 (2007) (describing the efforts of the Jefferson administration to secure immunizing legislation and Congress's reluctance to enact it).

155. *See supra* note 44 (collecting examples).

156. *See* Pfander & Hunt, *supra* note 36, (describing the combination of fees, salaries, and forfeiture commissions that Congress used in fashioning employment compensation for federal officers).

157. *See* Floyd Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative to a Judicial Model of Payment*, 45 LA. L. REV. 626, 651-52 (1985).

petitions from individuals who sought compensation for the tortious conduct of government officials.[158] The solution, adopted as part of post-war legislative reorganization, was to create tort liability running against the government for actions taken by government officials in the scope of employment, and thus to transfer the good faith and course of employment issues to the courts for resolution.[159] With this shift, Congress not only waived its immunity from suit but also put the federal courts into the business of evaluating course-of-employment issues that had long been the province of the legislature.

Second, the Supreme Court's decision in *Erie R. Co. v. Tompkins* eliminated the body of general federal common law on which the federal courts had drawn in its leading official liability cases.[160] By making it clear that the law to be applied was state law (except where the Constitution, laws, and treaties of the United States otherwise require or provide), *Erie* created the very real possibility that in tort suits aimed at enforcing constitutional rights, both the right to sue the federal official and the incidents of official liability would be governed by state law.[161] Counsel in the *Bivens* case drew the Court's attention to *Erie*'s lesson: without a federal right of action, the rights of individuals would depend on state law and could vary throughout the country in accordance with local definitions of the common law, local conceptions of the proper measure of damages, and perhaps local defenses created for police officers.[162]

The decision to recognize a *Bivens* action seems to have compelled the federal courts to develop a matching set of immunity principles. On remand in *Bivens* itself, the government officials argued that they should be accorded an absolute immunity from suit as federal drug enforcement officers acting in the scope of their employment. The Second Circuit

158. *See Federal Tort Claims Act: Hearings on H.R. 5373 and H.R. 6463 Before the Committee on the Judiciary*, 77th Cong., 50 (1942) (reporting Department of Justice estimate that passage of the FTCA would reduce the number of private claim bills in Congress by 40%).

159. *See* Federal Torts Claims Act, 28 U.S.C. § 1346 (2006).

160. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). For early cases in which suits against government officials played a prominent role, see Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (holding that a suit against the collector of Ohio taxes was not one against the state); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (upholding imposition of substantial liability on naval captain who seized a Danish vessel in the good faith belief that it was violating the American non-intercourse act with France).

161. Notably, the *Bivens* decision came down in 1971, nearly forty years ago but only thirty-three years after the *Erie* decision was announced. Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

162. *See* Pfander, *supra* note 3, at 284 (describing the argument against leaving the measure of liability to the "vicissitudes of state law").

rejected this argument as one that would effectively nullify the newly-recognized *Bivens* liability.[163] In the struggle to provide some content to official immunity, lower court divisions attracted Supreme Court attention. The shifting pattern of official immunity, from the inquiry into the officer's good faith that was announced in 1967 (pre-*Bivens*) to one that uniformly defined immunity by reference to federal law in 1982, doubtless reflects the switch to a federal liability rule.[164] It would be awkward to conclude that state law immunity rules vitiate a liability grounded in supreme federal law. Thus, the pressure for a uniform federal standard that led in part to the recognition of *Bivens* liability also produced a federal immunity rule. Victims and government officials alike can make a strong claim for a consistent federal standard.

Viewed from this perspective, the Court's regime of qualified immunity appears to follow derivatively from its recognition of a federal right of action under *Bivens*. But the need for a uniform standard does not necessarily entail federal judicial control of the content of the standard or the adoption of the *Harlow* rule. Had the Court sought congressional guidance, it could have specified a no-immunity baseline, thus imposing liability on officers for any constitutional violations they commit (in keeping with the strictures of the nineteenth century). Congress might have responded by waiving its sovereign immunity from suit for constitutional torts, by setting forth a more protective official immunity standard, or by establishing a more reliable way to indemnify officers from personal liability. By assigning immunity issues to the legislature, the Court might thus have preserved the nineteenth century allocation of functions, with the definition of liability retained as a judicial responsibility and the regulation of immunity and indemnity left to Congress.

Yet the dynamic quality of federal constitutional law made the choice of strict official liability an unattractive baseline. Indeed, one can perhaps best understand the "clear law" standard in *Harlow* as a reflection of the evolving nature of constitutional norms.[165] Even government officials striving in good faith to conform their actions to the law cannot always anticipate the twists and turns of constitutional law. The perceived unfairness of holding officers accountable for legal assessments they could not anticipate helps to drive official immunity law. Notably, however, the same uncertainty attended actions taken by government officials in the nineteenth century. Captain Little and

163. *See* Bivens, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

164. *See supra* notes 56-66 and accompanying text.

165. *See* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1820-24 (1991).

revenue collector Sands both had arguments for the legality of their actions. They were, nonetheless, held strictly accountable to the victims of their enforcement activities and expected to secure indemnity from Congress.[166]

IV. CONCLUSION

In the end, then, one has difficulty accounting for qualified immunity jurisprudence other than as an effort on the Court's part to strike its own balance between the interests of victims and the government. Such a balance-striking effort bears more than a passing resemblance to much that goes on in the world of constitutional litigation, including the judgment entailed in recognizing a *Bivens* right of action. It's difficult, at least for me, to see the two crucial elements of constitutional tort liability, the right of action and the immunity defense, as different in kind for judicial lawmaking purposes. As a matter of history, the Court appears to have taken up the task of re-shaping qualified immunity shortly after its recognition of the Bivens action. Indeed, the Court's own decisions make clear that these nominally separate questions blend in practice into a single inquiry into the content of "clearly established" law. That was, after all, the question that the *Iqbal* Court set out to resolve in evaluating the sufficiency of the complaint.

166. *See supra* notes 42-55 and accompanying text.