

THE NINTH CAUSE: USING THE NINTH AMENDMENT AS A CAUSE OF ACTION TO CURE INCONGRUENCE IN CURRENT CIVIL RIGHTS LITIGATION LAW

DEREK WARDEN[†]

| | |
|---|-----|
| ABSTRACT | 404 |
| I. INTRODUCTION | 405 |
| II. BACKGROUND ON CIVIL RIGHTS LITIGATION | 408 |
| <i>A. Lawsuits against the Federal Government</i> | 408 |
| 1. <i>Brief Historical Introduction</i> | 408 |
| 2. <i>The Doctrine as It Stands Now</i> | 410 |
| <i>B. Lawsuits against State and Local Actors</i> | 410 |
| 1. <i>History—Early Stages of § 1983, Pape, and the Explosion of Civil Rights Cases</i> | 410 |
| 2. <i>The Doctrine as it Stands Now</i> | 413 |
| III. CONFLICTS, INCONGRUENCIES, AND NEEDLESS OVERLAP..... | 416 |
| <i>A. Between Bivens and § 1983 Damages</i> | 416 |
| <i>B. Between Bivens and Itself</i> | 417 |
| <i>C. Bivens and Prior § 1331 Cases for Damages</i> | 418 |
| <i>D. Bivens and Current § 1331 Cases for Injunctive Relief</i> | 419 |
| <i>E. Ex Parte Young and Current § 1983 Ideas</i> | 419 |
| <i>F. Ex Parte Young and § 1331 Federal Injunctive Relief Cases</i> | 420 |
| IV. RESOLUTION OF THE CONFLICTS | 422 |
| <i>A. History of the Ninth Amendment</i> | 422 |

[†] Attorney, Burns Charest LLP in New Orleans. B.A., 2013, Louisiana Tech University; J.D. & D.C.L., 2016, Pro Bono Service Award, Public Interest Law Society Summer Fellowship, Equal Justice America Summer Fellowship, Chancellor's Scholar Award Recipient, CALI Award in Excellence in Evidence, Louisiana State University Paul M. Hebert Law Center. While at Paul M. Hebert Law Center I served as Graduate Editor to the Journal of Civil Law Studies and held a Research Assistant Position with Professor Margaret Thomas. During my legal education, I had the opportunity to serve as a clerk for various civil rights and public interest firms including Southeast Louisiana Legal Services, the Advocacy Center of Louisiana, the Public Defender in the Third Judicial District of Louisiana, the Promise of Justice Initiative, and the Bio Ethics Defense Fund. After law school, I obtained a fellowship through AmeriCorps in partnership with the Federal Department of Justice and Equal Justice Works. The host of that fellowship was the Advocacy Center of Louisiana. As a fellow, I primarily worked on ADA and § 1983 class actions. In October 2018, I accepted a position on the Board of Directors for the Advocacy Center of Louisiana. I would like to thank all the editors at *Wayne Law Review* for the wonderful work on this Article. This Article is dedicated in memory of my recently departed colleague and friend at the Advocacy Center, David Gallegos. His help and encouragement in my first year as a civil rights attorney will never be forgotten.

| | |
|---|-----|
| <i>B. Ninth Amendment Doctrine As It Stands Now—and the Cause of Action</i> | 425 |
| <i>C. Consequences</i> | 427 |
| 1. <i>Between Bivens and § 1983 Damages</i> | 427 |
| 2. <i>Between Bivens and Itself</i> | 428 |
| 3. <i>Bivens and Prior § 1331 Cases for Damages</i> | 428 |
| 4. <i>Bivens and Current § 1331 Cases for injunctive relief</i> | 429 |
| 5. <i>Ex Parte Young and Current § 1983 Ideas</i> | 429 |
| 6. <i>Ex Parte Young and § 1331 Federal Injunctive Relief Cases</i> | 429 |
| V. CONCLUSION | 430 |

ABSTRACT

Many scholars have observed inconsistencies and absurdities within civil rights litigation doctrine. For example, when plaintiffs wish to sue federal actors, they resort to an implied cause of action for damages directly from the relevant provision of the Constitution, usually the Fourth or the Eighth Amendments. However, the courts have found that the right to sue federal actors for injunctive relief is essentially founded on 28 U.S.C. § 1331, which is a jurisdictional statute and not directly from the Constitution itself. Further still, modern litigants in civil rights cases who wish to sue for relief against state and local violations of constitutional rights must resort to a federal statutory cause of action (there is no similar statute found for violations from federal actors). Additionally, the famed *Ex parte Young* doctrine, a "legal fiction" under the Eleventh Amendment, allows suits against state actors for injunctive relief and is said to be implied directly from the Constitution, much like how the federal-damages counterpart is also implied from the Constitution. These are merely a few of the many incongruencies that have sprung up around civil rights litigation law.

While many have observed these inconsistencies, those who attempt to resolve them do so by justifying each with near back bending legal reasoning. This Article takes a very different approach. This Article builds on the theory of the Ninth Amendment that I proposed in *Secundum Civilis*. In so doing, this Article shows that the Ninth Amendment should be viewed as a cause of action—or rather as requiring a cause of action. It shows that when Congress passes legislation for the enforcement of constitutional rights, it is merely fulfilling its Ninth Amendment obligation. Moreover, this Article argues when Congress has not so acted, that the courts are required by the

Ninth Amendment to allow such lawsuits as if such legislation were passed.

This Article sets forth several inconsistencies. However, full discussion of each inconsistency is left for various future articles.

I. INTRODUCTION

The Aristotle quote made famous by the movie *Legally Blonde*¹ states, “law is reason, free from passion.”² In the realm of civil rights litigation, almost every case is filled to the brim with passion, yet the law surrounding how to bring a valid claim appears totally irrational.

In civil rights cases, individuals often sue government actors for violations of their most basic rights.³ They claim that their very health was put in danger.⁴ They claim that their body parts have been taken.⁵ Many people fight for retribution for government conduct that killed their relatives.⁶ In many cases, the fundamental rights of free speech,⁷ free exercise of religion,⁸ and freedom from unreasonable searches and seizures⁹ have been violated. To be sure, almost any type of constitutional claim can be brought under the famous civil rights

1. *LEGALLY BLONDE* (Metro-Goldwyn-Mayer 2001).

2. ARISTOTLE, *THE POLITICS OF ARISTOTLE: A TREATISE ON GOVERNMENT* 173 (William Ellis trans., The Floating Press 2009) (translating as “law is reason without desire”).

3. Indeed, the seminal statute for the protection of civil rights expressly allows for civil rights claimants to assert claims for “deprivation of any rights, privileges, or immunities secured by the Constitution . . .” 42 U.S.C.A. § 1983 (West 2018).

4. *See Brown v. Plata*, 563 U.S. 493 (2011) (arguing rights of plaintiffs in prison class action to humane treatment and adequate health were denied).

5. *See Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002) (claiming a constitutional right not to have next of kin’s body parts removed by coroner without consent).

6. *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Waybright v. Frederick Cty. Dep’t of Fire & Rescue Servs.*, 475 F. Supp. 2d 542 (D. Md. 2007); *Becerra v. Unified Gov’t*, 272 F. Supp. 2d 1223 (D. Kan. 2003); *Levy v. City of Hollywood*, 90 F. Supp. 2d 1344 (S.D. Fla. 2000).

7. *Burnside v. Kaelin*, 773 F.3d 624 (5th Cir. 2014); *McFall v. Bednar*, 407 F.3d 1081 (10th Cir. 2005); *Burhans v. Cty. of San Diego*, 108 F.3d 1384 (9th Cir. 1997); *Shumate v. Bd. of Educ. of Jackson Cty.*, 478 F.2d 233 (4th Cir. 1973).

8. *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986); *Mount Elliott Cemetery Ass’n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999); *Raines v. Goedde*, 972 F.2d 348 (6th Cir. 1992).

9. *See Carney v. Jelsema*, 955 F.2d 44 (6th Cir. 1992) (noting the ability to use § 1983 to enforce Fourth Amendment rights); *Gordon v. Seaside*, 962 F.2d 13 (9th Cir. 1992).

enforcement statute, 42 U.S.C. § 1983, including protections under the “dormant commerce clause.”¹⁰

At the same time, to win a case against a government official, claimants work around a cornucopia of immunities,¹¹ unnecessary pleading requirements,¹² fast approaching statutes of limitations,¹³ and seemingly arbitrary standing rules that serve only to hinder protections for persons whose rights may be violated in the future.¹⁴

Additionally, the rules become ever more complex and contradictory when considering (1) what type of government (or government actor) is being sued;¹⁵ (2) which statute authorizes the action;¹⁶ (3) if there is no

10. See *Dennis v. Higgins*, 498 U.S. 439 (1991) (holding that suits for violation of commerce clause may be brought under 42 U.S.C. § 1983 against state and local actors).

11. *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (holding that prosecutors have absolute immunity from claims based on § 1983 for damages when such claims deal with the “judicial process”); accord *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (discussing absolute legislative immunity and holding it extends to even ‘legislative functions’ of local governments); *Brisco v. LaHue*, 460 U.S. 325 (1983) (finding witnesses, even police officers, are absolutely immune from suit under § 1983 for statements made while testifying, even if such statements were false and caused a constitutional violation); *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding that judge was immune from suit under § 1983 even when he had ordered that a woman be sterilized against her will); *Imbler v. Pachtman*, 424 U.S. 409 (1976); see also *Butz v. Economou*, 438 U.S. 478, 504 (1978) (extending these immunities to federal officials under *Bivens* and stating “[it would be] untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and [*Bivens*] suits brought directly under the Constitution against federal officers.”). To be sure, many have questioned whether it was even appropriate for the Court to find the existence of these “absolute immunities”; many more have openly criticized the doctrines for various other reasons. See John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013) (criticizing the nature and scope of legislative, judicial, and prosecutorial immunities).

12. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding the pleading test of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) applied outside of antitrust cases); JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW, GEORGE A. RUTHERGLEN, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 118–19 (3d ed. 2013) (detailing why these cases present special problems for civil rights plaintiffs).

13. See *Wilson v. Garcia*, 471 U.S. 261 (1985) (holding that civil rights claims under § 1983 are bound by the state statute of limitations for personal injury actions).

14. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding an African-American male did not have standing to seek an injunction against the use of choke holds). This opinion has been thoroughly attacked but not overruled. See, e.g., Laura E. Little, *It's About Time: Unraveling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933 (1993).

15. These complexities arise when considering suits against state actors, local actors, the federal government or federal actors. These complexities are set forth below.

16. There are many cases where there is no statute on point, or not statute used. As will be discussed below in more detail, this situation does not always present a problem.

statute, whether there is an implied authorization;¹⁷ and (4) what sort of relief is available to the plaintiff under each theory.¹⁸

The doctrines developed to address these considerations are in a horrendous state. The Court *implied* a right to damages against federal officials for violations of some parts of the Constitution¹⁹ but not others.²⁰ Further still, the Tenth Circuit implied the right of persons to sue for injunctive relief against federal actors through a federal jurisdictional statute.²¹ Moreover, courts have found that the right of plaintiffs to sue for damages and injunctive relief for violations of constitutional rights by state and local actors is based on a federal statute specifically authorizing such actions.²² However, a preeminent civil rights case created an exception to the Eleventh Amendment, which allowed suits for injunctive relief against state actors based on an “implied” cause of action.²³

With the general complexities in full view, it is appropriate to give a brief road map on how this Article will unfold. Part II will give a background on civil rights litigation by focusing on two subparts. Subpart A will detail the development of lawsuits against federal actors for violations of constitutional rights. Subpart B will discuss the doctrines associated with litigating the Constitution against state and

17. As discussed later, there are doctrines that allow for suits even where there is no statute authorizing it. *See, e.g., Ex parte Young*, 209 U.S. 123 (1907); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The fact that neither of these two cases and doctrines required a statutory cause of action presents several incongruities for civil rights litigation.

18. For example, in *Bivens* cases, only damages are available. Under 28 U.S.C. § 1331 or *Ex parte Young*, ostensibly, now, only injunctive relief is available; 42 U.S.C. § 1983 allows for both equitable and legal relief. *See* 28 U.S.C.A. § 1331 (West 2018); 28 U.S.C.A. § 1983 (West 2018); *Ex parte Young*, 209 U.S. 123 (1907).

19. *See Bivens*, 403 U.S. 388.

20. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Bush v. Lucas*, 462 U.S. 367 (1983) (emphasis added).

21. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005) (“Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required . . . [A] litigant having no other statutory authority for judicial review may unabashedly point to Section 1331 as the basis for injunctive relief against agency officers”) (internal citations and alterations omitted).

22. 42 U.S.C.A. § 1983 (West 2018).

23. *Ex parte Young*, 209 U.S. 123 (1908); *see also* JEFFRIES ET AL., *supra* note 12, at 418 (“ . . . [T]he complainants in *Ex Parte Young* sued to prevent violation of their constitutional rights without the aid of any statute specifically authorizing such an action. Where did the cause of action come from? Though the answer to this question is not entirely clear, *Ex Parte Young* has come to be cited for the proposition that a cause of action for equitable relief to prevent violation of constitutional rights exists independent of explicit congressional authorization.”).

local actors and governments. Part III will briefly discuss how these doctrines cause confusion, conflict, derision, and are largely unnecessary. Part IV will proceed in three subparts. Subpart A will discuss the history of the Ninth Amendment and the legal doctrines that have been developed under it. Subpart B will set forth the brief argument that the Ninth Amendment should be understood as a cause of action, by reference to my article in *Secundum Civilis*. Subpart C will briefly discuss the consequences of viewing the Ninth Amendment by reference to exactly how such a view will cure the discussed inconsistencies and incongruencies.

II. BACKGROUND ON CIVIL RIGHTS LITIGATION

A. Lawsuits against the Federal Government

1. Brief historical introduction

For much of our nation's history, federal courts rarely adjudicated cases involving violations by federal actors of federally protected rights.²⁴ Indeed, prior to the civil war, the Supreme Court of the United States only declared two federal statutes unconstitutional. Famously, those were in *Marbury v. Madison*²⁵ and *Dred Scott v. Sandford*.²⁶

Additionally, and practically, the federal government was very weak; most interactions between individuals and the government came in the form of interactions with state and local officials; thus the occasions for federal officers to violate protected rights were relatively rare.²⁷ It was not until after the Civil War that a plethora of cases began to arise that afforded remedies to individuals for violations of constitutionally protected rights.²⁸ Even after the advent of such changes in the legal landscape, when individuals claimed harms by federal officers, the aggrieved party could only resort to state law.²⁹

24. Indeed, for much of the early part of our nation's history there was no general federal question jurisdiction statute that would ostensibly have allowed the federal courts (other than the Supreme Court) to pass judgment on such actions. See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 16 (2003).

25. 5 U.S. 137 (1803).

26. 60 U.S. 393 (1857).

27. See generally JEFFRIES ET AL., *supra* note 12.

28. Unfortunately, these cases often dealt with litigants challenging federal powers that were enforcing the rights of freed slaves. See, e.g., *United States v. Stanley* (Civil Rights Cases), 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876).

29. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.").

Soon, however, plaintiffs began bringing and winning claims based on (1) implied causes of action under specific constitutional provisions,³⁰ (2) claims for damages under the federal question jurisdiction statute,³¹ and (3) claims for injunctive relief under the federal question jurisdiction statute.³²

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³³ the Supreme Court ruled that there was an implied cause of action for violations of the Fourth Amendment.³⁴ In effect, the Court contributed to the notion that this provision should be a “self-executing” constitutional provision.³⁵ The Supreme Court on two occasions expanded *Bivens* to other areas of the Constitution.³⁶ However, the promise of *Bivens* was short lived.³⁷ Courts have all but abandoned *Bivens*.³⁸ Now the Court only expands upon *Bivens* when (1) doing so serves an interest in deterring officer misconduct³⁹ and (2) extraordinary circumstances exist such that a damages action under *Bivens* is the only remedy available to the plaintiff.⁴⁰ If there is another avenue for

30. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

31. It is peculiar to note that, prior to *Bivens*, individuals brought these types of claims and won. The courts have appeared to forget about these cases. Michael G. Collins, ‘Economic Rights,’ *Implied Constitutional Acts, and the Scope of 1983*, 77 GEO. L. J. 1493, 1496 (1989) (collecting and discussing cases wherein plaintiffs recovered damages from federal officials—in federal courts—by using the federal questions jurisdiction statute 28 U.S.C. § 1331).

32. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

33. 403 U.S. 388 (1971).

34. *Id.*

35. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

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

37. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Bush v. Lucas*, 462 U.S. 367 (1983); see also JEFFRIES ET AL., *supra* note 12, at 26 (“Subsequent decisions have turned against extending *Bivens*. The grounds for doing so seem to have advanced from the exceptional circumstances identified in [Green] to broader hostility to *Bivens* itself.”).

38. Cornelia T. L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L. J. 65 (1999) (noting the remarkably low number of successful *Bivens* action).

39. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

40. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.”).

protecting the claimant's rights, courts will often find that the Constitution does not imply a cause of action against federal officers.⁴¹

Importantly for this article, courts applying *Bivens* appear to have forgotten the former rule of allowing damages actions under 28 U.S.C. § 1331.⁴² However, § 1331 is still used to seek injunctive relief against federal officers.⁴³

2. *The Doctrine as It Stands Now*

When a plaintiff alleges a violation of constitutional rights by federal officers or entities, that plaintiff may seek injunctive relief against the official or entity under § 1331.⁴⁴

Additionally, plaintiffs who are aggrieved by federal misconduct may seek damages against the federal actor, not the federal agency, under the *Bivens* doctrine.⁴⁵ However, should another remedy be available to the plaintiff or should the court decide that such an action would likely not serve a "deterrent interest," then the plaintiff will not be able to bring an action for damages under *Bivens*.⁴⁶

B. *Lawsuits against State and Local Actors*

1. *History—Early Stages of § 1983, Pape, and the Explosion of Civil Rights Cases*

When lawyers and scholars think about civil rights litigation they often envision § 1983 as always being an effective statute.⁴⁷ Few can imagine a time when federal law did not protect the right of persons to

41. See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988). For additional reading, see *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In that case, the Court set forth a detailed history and reflection on *Bivens*. *Id.*

42. See *Collins*, *supra* note 31 and accompanying text.

43. *Simmatt v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005) ("Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required... [A] litigant having no other statutory authority for judicial review may unabashedly point to Section 1331 as the basis for injunctive relief against agency officers.") (internal citations and alterations omitted).

44. *Id.*

45. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

46. See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

47. Not only was § 1983 not always effective, but it did not gain true significance until *Monroe v. Pape*, 365 U.S. 167 (1961). Indeed, between 1871 and 1920, prior to *Monroe*, roughly 20 cases were brought asserting § 1983. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L. J. 361, 363 (1951).

sue for a deprivation of a constitutional right.⁴⁸ However, for much of our nation's history, the federal government and federal courts allowed the states to cure violations of fundamental rights.⁴⁹

There were many reasons for this near total absence of federal court enforcement of constitutional provisions against state and local actors. Primary among those reasons was that, for much of nation's history, the Bill of Rights did not apply to state or local governments.⁵⁰ Immediately

48. We should not judge past generations by our standards. At one point, there were different notions and types of rights found in the Constitution. *See generally* Collins, *supra* note 31. The author points to that distinction as one reason why federal law so rarely protected constitutional rights. *Id.*

49. Indeed, many of the rights that we hold "fundamental" today were not protected against state action by the Constitution until well after the Civil War. *See* JEFFRIES ET AL., *supra* note 12, at 12 ([T]he provisions of the Bill of rights that have given rise to the greatest number of § 1983 actions . . . were not applied to the states until well into the twentieth century. . . . Indeed, it is probably not a coincidence that the Monroe remedy was first recognized by the Supreme Court in the early 1960s, a period during which constitutional rights were being greatly enlarged.").

50. *Id.* Moreover, these rights were slowly over decades "incorporated" by the Fourteenth Amendment's Due Process Clause. *See, e.g.,* McDonald v. City of Chicago, 561 U.S. 742 (2010) (incorporating the right to keep and bear arms); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating double jeopardy protection); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the right to a jury trial in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (incorporating the compulsory process right); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating the right to a speedy trial); Griffin v. California, 380 U.S. 609 (1965) (incorporating the Fifth Amendment's privilege against self-incrimination); Turner v. Louisiana, 379 U.S. 466 (1965) (incorporating the right to an impartial jury); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending Powell v. Alabama, 287 U.S. 45 (1932) to more criminal cases); Robinson v. California, 370 U.S. 660 (1962) (incorporating "cruel and unusual punishment" clause against the states); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment prohibition against unreasonable search and seizure); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the prohibition against unreasonable search and seizure); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the right to a public trial and notice of charges); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (incorporating the establishment clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the establishment clause); Cantwell v. Connecticut, 310 U.S. 296, 300-03 (1940) (incorporating the right to free exercise); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (incorporating the right to petition); Bridges v. California, 314 U.S. 252 (1937) (incorporating the right to petition); DeJonge v. Oregon, 299 U.S. 353 (1937) (incorporating the right to assembly and petition); Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 262 (1934) (incorporating free exercise); Powell v. Alabama, 287 U.S. 45 (1932) (incorporating the right to counsel in criminal cases); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (incorporating free press); Stromberg v. California, 283 U.S. 359 (1931) (incorporating the right to free speech); Fiske v. Kansas, 274 U.S. 380 (1927) (incorporating the right to free speech); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the right to free speech); Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897) (incorporating the just compensation clause). Note, there is some

after the Civil War and the adoption of the Fourteenth Amendment, few litigants actually used § 1983.⁵¹ It was not until the path-making *Monroe v. Pape*⁵² that the statute was held to apply to state and local conduct that also violated state law.⁵³ In any event, litigation against states dramatically increased after *Pape*.⁵⁴

Prior to the passage of § 1983 and its development in *Pape*, individuals relied upon various other legal avenues to protect their rights. Legal trickery developed to get around rules that served to protect government actors. For example, in *Chisolm v. Georgia*,⁵⁵ the Supreme Court ruled that an individual could sue a state in a contract dispute.⁵⁶ This led to widespread dissatisfaction.⁵⁷ Individuals were afraid that such litigation would put too much strain on the state treasuries.⁵⁸ To address this problem, the country adopted the Eleventh Amendment, which by its express terms only prohibited the states from being sued by citizens of another state.⁵⁹ Nevertheless, the Supreme Court ruled that the Amendment also protected states from suits by citizens of that state.⁶⁰

disagreement as to whether *Chicago, B & Q. R. Co.* is the case that actually incorporated the clause against the states. Some provisions are still not held against the states, such as the Seventh Amendment. See *Minneapolis & S. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916); see also *McDonald v. Chicago*, 561 U.S. 742, 765 n.13 (2010) ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict[]), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."). However, the Second Circuit, as a matter of first impression did incorporate the Third Amendment against the states. See *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

51. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, *supra* note 47, at 363.

52. 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

53. *Id.*; see also JEFFRIES ET AL., *supra* note 12, at 9 ("*Monroe* did not overrule precedent, but it did overturn a longstanding assumption that § 1983 reached only misconduct either officially authorized or so widely tolerated as to amount to 'custom or usage.'").

54. JEFFRIES ET AL., *supra* note 12, at 14 ("In the year of the *Monroe* decision, fewer than 300 suits were brought in federal court under all civil rights acts. Ten years later, that figure had risen to 8,267, including 3,129 civil rights actions filed by prisoners.").

55. 2 U.S. 419 (1793).

56. *Id.*

57. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (1922).

58. *Id.*

59. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

60. *Hans v. Louisiana*, 133 U.S. 529 (1890).

Additionally, the Supreme Court ruled that the Amendment, or rather the general sovereign immunity theory often called “Eleventh Amendment immunity,” also prohibited lawsuits against state officials for federal law violations in state courts.⁶¹ This doctrine applies both to cases seeking damages and those seeking injunctive relief.⁶² To circumvent this immunity, litigants in *Ex parte Young*⁶³ argued and won on the theory that a person may sue a state official in his official capacity for injunctive relief. Oddly enough, the case had nothing to do with § 1983 and was won on the grounds of an implied cause of action.⁶⁴

2. The Doctrine as it Stands Now

Litigants bringing federal constitutional claims against state actors use § 1983.⁶⁵ In order to win a claim under § 1983, a plaintiff must prove three matters: (1) the government actor qualifies as a “person;”⁶⁶ (2) the

61. *Alden v. Maine*, 527 U.S. 706 (1999). Additionally, the law under § 1983 was brought to the Eleventh Amendment rule in *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989) (holding that neither states nor their officials in their official capacities, when sued for damages, are persons for purposes of § 1983).

62. *Ford v. Reynolds*, 316 F.3d 351,354–355 (2d Cir. 2003) (noting the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908) only applies to injunctive relief against a state official and not the state itself and that money damages against the state directly or state official in official-capacity suits are banned).

63. 209 U.S. 123 (1908).

64. JEFFRIES ET AL., *supra* note 12, at 418 (“... [T]he complainants in *Ex Parte Young* sued to prevent violation of their constitutional rights without the aid of any statute specifically authorizing such an action. Where did the cause of action come from? Though the answer to this question is not entirely clear, *Ex Parte Young* has come to be cited for the proposition that a cause of action for equitable relief to prevent violation of constitutional rights exists independent of explicit congressional authorization.”).

65. 42 U.S.C.A § 1983 (West 2018) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

66. These can be actual people or localities as well. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

government actor was acting "under color of law,"⁶⁷ and (3) the government actor deprived the plaintiff of a right secured by the Constitution of the United States or by federal statute.⁶⁸

States are not persons for purposes of § 1983.⁶⁹ However, state actors are persons for both injunctive relief and damages.⁷⁰ To sue a state actor for damages, the actor must be named in his individual capacity.⁷¹ State actors sued in their official capacities are not persons for purposes of damages under § 1983.⁷² To sue a state actor for injunctive relief through § 1983, the actor must be sued in his official capacity.⁷³ Suing a state actor in his official capacity for damages or a state directly under § 1983 is inappropriate and would run afoul of the Eleventh Amendment.⁷⁴ Additionally, § 1983 applies to all state actors as "persons" including, district attorneys,⁷⁵ judges,⁷⁶ legislators,⁷⁷ state police officers,⁷⁸ and executives.⁷⁹

67. This can include acting against state law, if the person so acting is a state official acting with authority from his or her position. *See* *Monroe v. Pape*, 365 U.S. 1 (1965).

68. § 1983 expressly includes "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C.A. § 1983 (West 2018). There is a separate doctrine dealing with enforcing federal statutes under § 1983, which is outside the scope of this paper.

69. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).

70. 491 U.S. at 71; 42 U.S.C.A. § 1983.

71. *See* *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

72. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997); *Hafer v. Melo*, 502 U.S. 21, 27 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007); *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901 (9th Cir. 2003); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

73. *Will*, 491 U.S. at 71 n.10; *Flint*, 488 F.3d at 825; *Doe*, 131 F.3d at 839; *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1992).

74. *See* *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989), *superseded by statute on other grounds*, *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

75. *See* *Van De Kamp v. Goldstein*, 555 U.S. 335 (2009) (recognizing absolute immunity for prosecutor under facts of the case, while also recognizing that § 1983 applies to prosecutors); *see also* *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

76. *See* *Forrester v. White*, 484 U.S. 219 (1988).

77. *JEFFRIES ET AL.*, *supra* note 12, at 47 (noting that absolute immunity applies to legislative functions, though, outside the legislative function legislators may be liable under 1983).

78. *See* *Monroe v. Pape*, 365 U.S. 167 (1961).

79. This is especially true for the doctrine of *Ex parte Young*. As usual, claimants sue a state Attorney General pursuant to the "fictional exception to the Eleventh Amendment in *Ex Parte Young*" to enjoin the enforcement of an unconstitutional statute. *See* *JEFFRIES ET AL.*, *supra* note 12, at 418.

However, depending on the government actor involved, various immunities may apply.⁸⁰ The most common of these is qualified immunity.⁸¹ Nevertheless, these immunities largely apply only when the government actor is being sued in his individual capacity.⁸² Sovereign immunity is generally the only immunity that applies when the defendant is being sued for injunctive relief and damages.⁸³ Nevertheless, Congress may abrogate state sovereign immunity.⁸⁴ Furthermore, states may waive their immunity in exchange for receipt of federal funds.⁸⁵ States may

80. JEFFRIES ET AL., *supra* note 12 and accompanying text.

81. See *Pearson v. Callahan*, 555 U.S. 223 (2009). I cite this case for a few reasons. First, it offers the reader a fairly thorough discussion about qualified immunity. Second, it is perhaps the most consequential qualified immunity decisions of our lifetime. As the case points out, to beat a claim of qualified immunity, one must show (1) that the government conduct violated a constitutional right and (2) that such a constitutional right was clearly established at the time of the violation such that a reasonable officer should have known his or her conduct violated the Constitution. Prior to *Pearson*, courts were supposed to consider the two in that order: first decide the constitutional question, then decide if there were clearly established violation of law. See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999). *Pearson* destroyed that two-step process and allowed courts to simply consider whether the right was “clearly established” without first reaching the constitutional question. *Pearson*, 555 U.S. at 245. In effect, this creates a loop. Courts will avoid ruling on the constitutional issues; thus, novel issues will never violate a “clearly established” law and officers are continuously able to claim qualified immunity in those cases because courts will avoid the constitutional issue. See *id.* at 243–45. I suggest that people meeting this type of loop look elsewhere for authority of clearly established constitutional rights. For example, claimants may compare § 1983 cases to the abrogation of sovereign immunity in Title II of the Americans with Disabilities Act cases. However, the interplay between those two statutes is left for a more detailed discussion in a later article.

82. As noted below, people sue state actors under § 1983 for damages in their individual capacities and their official capacities for injunctive relief. Defenses such as qualified immunity do not apply in injunctive relief cases. *Horne v. Coughlin*, 191 F.3d 244, 250 (2d Cir. 1997).

83. However, litigants are usually able to get around the sovereign immunity bar to bringing a § 1983 action for injunctive relief by resorting to the *Ex parte Young* doctrine. Additionally, legislative immunity also applies in the injunctive relief situation, however, that is rarely of any consequence. I use the word “generally” here since technically legislative immunity also applies in injunctive relief cases. *Star Distribs., Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980). However, that issue does not seem to arise as frequently as the sovereign immunity issue.

84. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

85. *Douglas v. CA. Dep’t of Youth Auth.*, 271 F.3d 812, 817–818 (9th Cir. 2001) (“States are protected by the Eleventh Amendment from suits brought by citizens in federal court.”). *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *College Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999). There are only three exceptions to this general rule. First, a state may waive its Eleventh Amendment defense. *College Sav. Bank*, 527 U.S. at 670 (citing *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883)). Second, Congress may abrogate the States’ sovereign immunity by acting pursuant to a grant of constitutional authority. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62,

voluntarily waive it without force or for money.⁸⁶ However, § 1983 has been held to not be a valid abrogation of state sovereign immunity.⁸⁷ Additionally, for purposes of § 1983, the state is “not a person” as noted above.⁸⁸

Thus, to assert a constitutional claim against the state, a litigant must either name the state actor in his official capacity for injunctive relief under § 1983 or in his individual capacity for damages under § 1983. Asserting an “implied” right to sue under the Constitution against a state is inappropriate.⁸⁹ On the other hand, under the doctrine created for § 1983, local entities are considered “persons” for purposes of § 1983,⁹⁰ as are local government actors.⁹¹

Having concluded setting forth the general doctrinal framework for civil rights cases against both the federal and state governments as those doctrines are relevant to this article, the next part will discuss the theoretical conflicts that arise from the above described rules.

III. CONFLICTS, INCONGRUENCIES, AND NEEDLESS OVERLAP

A. *Between Bivens and § 1983 damages*

It is undisputed that *Bivens*⁹² authorized damages actions against federal actors specifically from the Fourth Amendment.⁹³ Many § 1983 cases deal with the Fourth Amendment as an excessive force matter.⁹⁴

80 (2000). Third, under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar a “suit against a state official when that suit seeks . . . prospective injunctive relief.”).

86. As the state of Louisiana has done for suits against the state in at least state court. LA. CONST. art. XII, § 10.

87. *Quern v. Jordan*, 440 U.S. 332 (1979).

88. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989).

89. I say that this is inappropriate because that is simply not how, in practice, the matter is handled. As explained below, there is strong support for the notion that there are, in fact, implied causes of action for violations of constitutional rights by state and local actors. For example, as discussed below, the case of *Ex parte Young*, 209 U.S. 123 (1907), stands for such a proposition. Of course, modern litigants simply use the language of 42 U.S.C.A. § 1983 (West 2018) for the cause of action and rely on *Ex parte Young* only for its exception to the Eleventh Amendment’s sovereign immunity problems.

90. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). It should also be noted, here, that local actors and entities are not protected by sovereign immunity. *Lincoln Cty. v. Luning*, 133 U.S. 529 (1890).

91. *Monell*, 436 U.S. at 691 n.55.

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

93. *Id.*

94. Admittedly this is technically the Fourteenth Amendment, however, the Court has been explicit in stating that the right held against the state is the same as held against the federal government. *See, e.g., Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

Therefore, it would at least appear logical that the Constitution should also imply a cause of action for constitutional violations when state and local actors are the ones who perpetrate those violations.⁹⁵ Of course, one could say that *Bivens* was decided on deterrence grounds and that there is no deterrence requirement in § 1983. But this retort is of no moment. Even if one were to accept that *Bivens* was only founded on deterrence, then the Constitution should still imply a cause of action against state actors when there is a deterrence interest.⁹⁶

Thus, there is incongruity in this way. If the constitution implies a cause of action against federal actors for violations of some constitutional rights, then it should also imply those causes of action against state or local actors, since the right of action held against the state is the same as it is held against the federal government.⁹⁷

B. Between Bivens and Itself

While *Bivens* itself held that there was an implied cause of action for violations of a federal constitutional right,⁹⁸ later courts took a narrower view of the case and found it to be limited to the Fourth Amendment (and a few other provisions) and to those cases where there was no other remedial scheme available.⁹⁹ In effect, the Court said that if there is another congressional statute on point, then the Constitution will not imply a cause of action.¹⁰⁰

The above rule presents a powerful constitutional conundrum. The Court is in no unclear terms stating: where Congress has passed a statute,

Thus, it would follow that if the Constitution implied a cause of action for damages against the federal government, it would do so for the states even though the latter is technically only bound because of “substantive due process.” *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925).

95. I am not the first to suggest this, of course. *See* Michael G. Collins, “*Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*,” 77 GEO. L. J. 1493, 1529–1530 (1989).

96. Some have taken issue with the very notion that *Bivens* should be viewed as having a deterrence component. However, neither this article nor my argument turns on *Bivens* having a deterrence component.

97. At least this is the typical rule for all times when a provision of the Bill of Rights is held against the States through the Fourteenth Amendment’s Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

98. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397–98 (1971).

99. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

100. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Bush v. Lucas*, 462 U.S. 367 (1983).

a right found in the Constitution is no longer effective.¹⁰¹ Thus, this limitation rule surrounding *Bivens* actions effectively lets Congress circumvent and “overrule,” for lack of a better word, a constitutional rule found by the courts.¹⁰² Thus, the limitation on *Bivens* appears to be in conflict with the rule that constitutional decisions cannot be overruled by congressional legislation.¹⁰³

C. Bivens and Prior §1331 Cases for Damages

Before *Bivens*, plaintiffs brought and won cases arguing that the federal question jurisdiction statute allowed them to sue federal officers for damages.¹⁰⁴ *Bivens* says nothing about these cases and neither does any subsequent Supreme Court case dealing with *Bivens*.¹⁰⁵ Taken at face value, the doctrines surrounding *Bivens* have only limited it when considering it as an implied cause of action from the text of the Constitution.¹⁰⁶ Ostensibly, this limitation would not apply to cases arguing for damages under § 1331, because in that instance the claimant would be arguing for damages under a federal statute.¹⁰⁷

101. The right to sue for the violation of a constitutional right, implied from the very text of the Constitution, is not effective where Congress has passed a law—or at least that is how the *Bivens* doctrine has evolved. See *Ziglar*, 137 S. Ct. at 1857–58.

102. Of course, Congress is typically regarded as not having the power to overrule a constitutional ruling. Indeed, Justice Scalia recognized this type of contradiction in his concurrence in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (Scalia, J., concurring) (“There is even greater reason to abandon [*Bivens*] in the constitutional field, since an “implication” imagined in the Constitution can presumably not even be repudiated by Congress.”).

103. *Id.*

104. See *Collins*, *supra* note 31.

105. Naturally, then, it would appear that these cases are still alive and well as precedent for plaintiffs.

106. I note that the *Bivens* “implied cause of action” appears to be different than both “implying” causes of action in statutes and allowing § 1983 to serve as a cause of action for violation of a statutory right. For a further discussion on implied causes of action in federal statutes and the history of such implied causes of action, see Roger J. Brunelle, *Implying Private Causes of Action From Federal Statutes*, 17 B.C.L. REV. 53 (1975). However, that article was written well before the courts began a tirade of sorts limiting “implied rights of action.” See e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001). A modern summary of these “causes of action” and the related complexities can be found in John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2016).

107. See 28 U.S.C.A. § 1331 (West 2018); see also *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

D. Bivens and Current § 1331 Cases for Injunctive Relief

Bivens was concerned with implying a cause of action for damages directly from the Constitution.¹⁰⁸ Modern cases seeking injunctive relief have essentially implied a cause of action from the federal question jurisdiction statute.¹⁰⁹ This, in effect, allows a more intrusive cause of action than one for damages,¹¹⁰ found in a statute that is further from granting a cause of action than is the Constitution itself.¹¹¹

Thus, the inconsistency can be seen from an *a fortiori* standpoint—if the courts are going to limit the application of *Bivens*, then it should also similarly limit the application of § 1331 for implied injunctive relief cases.

E. Ex Parte Young and Current § 1983 Ideas

The famed doctrine of *Ex parte Young*¹¹² is often stated as allowing lawsuits for injunctive relief against state actors for violations of constitutionally protected rights (or federal statutory rights), when officials are named in their official capacities.¹¹³ This is because the state actor is “stripped of his sovereignty,” when he acts in violation of federal law.¹¹⁴

However, there is one aspect of *Ex parte Young* that is not often discussed. The case simply had nothing to do with § 1983.¹¹⁵ Thus, it

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

109. *Simmat*, 413 F.3d at 1232. The federal statute is 28 U.S.C.A. § 1331 (West 2018).

110. Gene R. Nichol, *Bivens, Chilick, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989) (discussing the notion that injunctive relief may be more intrusive).

111. Indeed, substantive statutory law or constitutional law usually “imply” causes of action more often than jurisdictional statutes. Additionally, constitutional rights are indeed rights—and, as the traditional rule goes, where there is a right there is a remedy.

112. 209 U.S. 123 (1908).

113. *Id.*

114. This already strange result is the product of what is often regarded as “the fiction of *Ex Parte Young*.” See, e.g., *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 736 n. 7 (5th Cir. 2016); *Kentucky Press Ass’n, Inc. v. Kentucky*, 454 F.3d 505, 508 (6th Cir. 2006); *Koslow v. Pennsylvania*, 302 F.3d 161, 168 (3d Cir. 2002); *Mo. Child Care Ass’n v. Cross*, 294 F.3d 1034, 1040 (8th Cir. 2002); *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001); *Lawson v. Shelby Cty.*, 211 F.3d 331, 335 (6th Cir. 2000); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999); *Reyes v. Sazan*, 168 F.3d 158, 162 (5th Cir. 1999); *Spicer v. Hilton*, 618 F.2d 232, 237 (3d Cir. 1980); *Aldens, Inc. v. Packel*, 524 F.2d 38, 50 (3d Cir. 1975).

115. Indeed, one could dig into every brief filed in the case and see no mention of 42 U.S.C. § 1983. One may speculate as to why this is. However, one explanation is that § 1983 was relatively unknown and had been interpreted narrowly until the Supreme

would appear that *Ex Parte Young* stands for the proposition that there is an implied cause of action¹¹⁶—at least for injunctive relief—against state and local actors for violations of constitutional law, both for constitutional rights and other provisions of constitutional law, such as the dormant commerce clause, since the case also dealt with the commerce clause.¹¹⁷

Therefore, *Ex parte Young* renders a large portion of § 1983 law totally redundant—that portion of § 1983 that allows for injunctive relief against state or local actors.¹¹⁸

F. Ex parte Young and § 1331 Federal Injunctive Relief Cases

The implied cause of action for injunctive relief found, used, and approved in *Ex parte Young* allowed the plaintiff to enforce the

Court expanded the statute's application in *Monroe v. Pape*, 365 U.S. 167 (1961). A full discussion about why the plaintiffs did not rely on § 1983 is left for a possible later article.

116. See JEFFRIES ET AL., *supra* note 12, at 418 (“...[T]he complainants in *Ex Parte Young* sued to prevent violation of their constitutional rights without the aid of any statute specifically authorizing such an action. Where did the cause of action come from? Though the answer to this question is not entirely clear, *Ex Parte Young* has come to be cited for the proposition that a cause of action for equitable relief to prevent violation of constitutional rights exists independent of explicit congressional authorization.”). I cite this full text once more for one simple reason—Jeffries summarizes the oddity of *Ex parte Young* better than almost any case. However, there are cases that expressly mention this “from the constitution alone” sort of cause of action. As one court stated,

the Supreme Court has long recognized a federal cause of action for allegations that a state officer's enforcement of state law would violate federal rights. While the Court did not identify a specific federal cause of action in *Ex parte Young* itself, the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.

Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 56–57 (1st Cir. 2005) (internal citations, omissions, and alterations omitted); *accord Burgio & Campofelice, Inc. v. New York State DOL*, 107 F.3d 1000, 1006 (2d Cir. 1997).

117. *Ex parte Young*, 209 U.S. 123, 145 (1908) (“Still another Federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.”).

118. Additionally, there is no indication that the implied cause of action in *Ex parte Young* was limited to injunctive relief cases. See generally *id.* Therefore, one may also argue that the implied cause of action extends to damages actions; it is simply limited by the Eleventh Amendment law. Thus, there could also be an implied cause of action for damages, sans § 1983, though it may still be limited to (1) individual capacity suits against state actors and (2) both official capacity suits and individual capacity suits against local actors and entities.

Fourteenth Amendment's Due Process Clause.¹¹⁹ Thus, there is an implied cause of action to enforce almost every provision of the Bill of Rights. This is so, because almost every provision of the Bill of Rights is applied to the states as part of the Fourteenth Amendment's Due Process Clause.¹²⁰ Furthermore, considering that the rights are the same when held against the States as they are held against the federal government,¹²¹ it would follow that for almost every violation of the Bill of Rights, there is an implied cause of action for injunctive relief against the relevant state official in his official capacity.

If this is so, then the implied right of action under § 1331 is entirely redundant, since *Ex parte Young* stands for the proposition that the Constitution, not a federal statute, implies the right to sue for an injunction.

Nevertheless, there is a flip side to this argument. Seeing that § 1331 is necessary for the courts to have jurisdiction,¹²² it would need to exist for a plaintiff to be able to bring the action in federal district court in the first place. Thus, one could argue that § 1331 is not a redundant provision, but rather the implied cause of action from *Ex parte Young* is the redundant concept.¹²³

119. See *Ex parte Young*, 209 U.S. 123, 144 (1908) ("The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken *without due process of law*. . .") (emphasis added).

120. See JEFFRIES ET AL., *supra* note 12, at 12.

121. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) ("Instead, the Court decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'").

122. 28 U.S.C.A. § 1331 (West 2018) states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

123. Technically, § 1331 is not necessary for the existence of *Ex parte Young*'s implied cause of action. Ostensibly, the implied cause of action could still apply in state court. See *Ex parte Young*, 209 U.S. 123 (1908). Additionally, some argue that *Ex parte Young* "as a cause of action" is founded on the Supremacy Clause, and, thus, it may be different than implying causes of action against the federal government. See Clark, *supra* note 24. However, such a distinction is unnecessary. Just as federal law is supreme to the states, constitutional law is supreme over the federal government and its actors. See *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819); *Marbury v. Madison*, 5 U.S. 137, 176 (1803). However, a full discussion of this difference and its implications is left for a later article.

Additionally, it could very well be argued that the Ninth Amendment could also serve as a jurisdictional statute—the lack of jurisdiction to protect rights, necessarily disparages them and allows them to be denied. Here, too, a full discussion is left for a later article.

IV. RESOLUTION OF THE CONFLICTS

A. History of the Ninth Amendment

The Constitution of the United States was not the first governing document for the republic.¹²⁴ Prior to the adoption of our Constitution, the Articles of Confederation governed our country.¹²⁵ When it became apparent that the convention delegates had exceeded their supposed command of merely curing defects in the Articles of Confederation and, instead, had drafted an entirely new Constitution,¹²⁶ the country largely divided itself into two factions.¹²⁷ The first were the federalists who put forth their ideas in support of the Constitution in several newspaper

124. For a full discussion on the Articles of Confederation, I direct the reader to the following sources: Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L. J. 142 (1978); Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397 (2017); William F. Swindler, *Our First Constitution: The Articles of Confederation*, 67 A.B.A. J. 166, 262 (1981); MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016); Douglas S. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249 (1997).

125. See generally Swindler, *supra* note 124.

126. See Maggs, *supra* note 124, at 417. As Professor Maggs states:

Perhaps the greatest achievement of Congress under the Articles of Confederation was its recognition that problems existed and its willingness to promote and accept reform. On February 21, 1787, Congress approved the calling of a convention to discuss and propose amendments to the Articles of Confederation. The Convention quickly got away from this initial goal. Instead of just drafting amendments to the Articles of Confederation, the assembly proposed a new Constitution. The Convention decided that the Constitution would go into effect if conventions in nine states ratified it. In this way, they bypassed the Confederation Congress and did not allow the state legislatures to vote on the Constitution. The Convention also sidestepped the requirement that any amendments to the Articles of Confederation had to be approved by all of the states. While this step has provoked considerable academic discussion, it was largely overlooked as a serious issue. James Madison dismissed any concern in Federalist No. 40, saying this about critics who might insist on a unanimous ratification: "Let them declare, whether it was of most importance to the happiness of the people of America, that the Articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the Articles of Confederation preserved." Madison and the other Framers must have remembered the delay and hardship caused by requiring all of the states to ratify the Articles of Confederation.

Id. (internal citations omitted).

127. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1823 (2010).

articles.¹²⁸ These supported a strong federal constitution.¹²⁹ Opposed to them were the anti-federalists, who likewise published their views widely, and were criticized centralized power.¹³⁰

One primary point of contention among the country at the time was the proposed Bill of Rights.¹³¹ Many wanted the Bill in order to curtail assertions of power by the federal government.¹³² Federalists were opposed to a Bill on the grounds that should a Bill of Rights exist, then one could construe that listing as saying that all other rights not mentioned are perfectly capable of being violated.¹³³ Stated another way, opponents of the Bill did not want a court to say, “[b]ecause these rights are written, they are the only ones protected.”¹³⁴

128. For a more thorough discussion on the federalists and the federalist papers I direct the reader to the following sources.: Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007); Richard A. Epstein, *The Federalist Papers: From Practical Politics to High Principle*, 16 HARV. J. L. & PUB. POL’Y 13 (1993); Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 HARV. J.L. & PUB. POL’Y 7 (1993).

129. See Maggs, *supra* note 128.

130. For a more thorough discussion on the anti-federalists and their writings, see CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); STEVEN R. BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* (1979); JACKSON T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788* (1961); ROBERT A. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787–1788* (1966); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969); Cecelia M. Kenyon, *Men of Little Faith: The Anti-federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955); Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067 (2012).

131. For a fuller discussion of the Bill of Rights, the fight to adopt them, and whether not such a Bill was actually necessary, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131 (1992); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); William J. Brennan Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1 (1991); Charles F. Hobson, *James Madison, the Bill of Rights, and the Problem of the States*, 31 WM. & MARY L. REV. 267 (1990).

132. However, some have charged that this concern was only a minor reason for adoption of the Bill of Rights. See Hobson, *supra* note 131, at 268 (“The original Bill of Rights arose less from a concern to protect individual liberty against governmental power than from a desire to promote political harmony. Its adoption was largely a historical accident, an unintended consequence of the debate over the ratification of the Constitution. The demand for a bill of rights by Anti-federalist opponents of the Constitution was but one part-and not the most important part-of a larger campaign to dilute if not abolish some of the substantive powers of the federal government. To them the essential purpose of a bill of rights was to protect state rights, not individual rights.”).

133. 1 ANNALS OF CONG. 439 (1789).

134. Ultimately, having a Bill of Rights has proven to be a very useful tool to protect individual rights. Additionally, had there not been a bill of rights, a situation could have

To cure these worries, many people supported the addition of another provision, the Ninth Amendment.¹³⁵ As it is written today, the Ninth Amendment states, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."¹³⁶ Nowhere is this desire to cure worries more apparent than in Madison's statements to the House of Representatives:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.¹³⁷

The Ninth Amendment, though it had been so radically important to the adoption of the Bill of Rights slipped into relative obscurity,¹³⁸ often being called "the forgotten Ninth Amendment."¹³⁹ It was not until the Court's opinion in *Griswold v. Connecticut*,¹⁴⁰ in which the Court relied

arisen where Congress, through enforcement of its commerce power would have been able to prevent the transportation of newspapers across state lines—thus simultaneously preventing freedom of the press and speech. U.S. CONST. art. I, § 8, cl 3. However, a possible counter argument to this would be that preventing such transportation is such an affront to traditional individual freedoms that were our Constitution to allow Congress to do it, such a power should have been more express in the Constitution. In other words, even absent a written Bill of Rights, and because our Federal Government is one of enumerated powers, some rights may be so fundamental that the power to abolish them altogether would have needed to be expressly written. I believe such an argument is a better support for holding the Equal Protection Clause against the federal government than the current reverse incorporation doctrine. However, I leave a full discussion of that theory for a later article.

135. See RANDY E. BARNETT, *RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989).

136. U.S. CONST. amend. IX.

137. 1 ANNALS OF CONG. 439 (1789).

138. Only a handful of cases exist from the Supreme Court dealing with the Ninth Amendment. See, e.g., *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 143-44 (1939); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 300-11 (1936); see also *Loan Ass'n v. Topeka*, 87 U.S. 655, 662-23 (1875); *Calder v. Bull*, 3 U.S. 386, 388 (1789).

139. *Griswold v. Connecticut*, 381 U.S. 479, 490 n.6 (1965) (Goldberg, J., concurring).

140. 381 U.S. 479 (1965)

on the Ninth Amendment to decide the case,¹⁴¹ that the Amendment gained any practical usefulness.

B. Ninth Amendment Doctrine As It Stands Now—and the Cause of Action

As noted above, the Ninth Amendment is referred to as “the forgotten Ninth Amendment.”¹⁴² While scholars have, for years, expressed hopes for a Ninth Amendment with a substantive rights protection component,¹⁴³ courts have not adopted such an interpretation.¹⁴⁴ The doctrine of the Ninth Amendment can be summarized, as “the Ninth Amendment is not an independent source of individual rights; rather, it provides a ‘rule of construction.’”¹⁴⁵ In other words, one should not interpret the listing of the Bill of Rights as meaning that other rights are not protected.¹⁴⁶ Even in *Griswold*, the court did not expressly state that the Ninth Amendment alone protected un-enumerated individual rights; rather, Justice Douglas, writing for the Court, and Justice Goldberg, in concurrence, relied on the Ninth for the proposition that there are other rights not listed in the Bill.¹⁴⁷

Relying on *Griswold* and on the scholarship related thereto, others have argued a method of viewing the Ninth as a “rule of construction” that leads to the protection of other rights. For example, in *Secundum Civilis*,¹⁴⁸ I showed how *Griswold* and the Ninth could be read to require that the civil law method of interpretation should be used in discovering unwritten rights—by reading multiple provisions of the law together.

141. *Id.*

142. *Id.* at 490 n.6.

143. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 34–41 (1980); Charles L. Black, Jr., *Decision According to Law*, 6 AM. B. FOUND. RES. J. 861 (1981) reviewed in William Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L. J. 207 (1981) (book review). For a full discussion of the history and text of the Ninth Amendment and for a collection of articles arguing for a substantive rights protections component, see BARNETT, *supra* note 135.

144. As Justice Scalia once stated, “the [Ninth Amendment’s] refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.” *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (dissenting from the substantive due process recognized right to direct and control upbringing of children).

145. *Jenkins v. Comm’r*, 483 F.3d 90, 92 (2d Cir. 2007).

146. *Froehlich v. Wisc. Dep’t of Corrs.*, 196 F.3d 800, 801 (7th Cir. 1999).

147. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *id.* at 488, 491–92 (Goldberg, J., concurring).

148. Derek Warden, *Secundum Civilis: The Constitution as an Enlightenment Code*, 8 J. CIV. L. STUD. (2015).

While, under that view, the Ninth Amendment does not itself protect unwritten rights, it requires a method of analysis that ultimately does.

Moreover, and more importantly to this article, *Secundum Civilis* showed two matters involving the Ninth Amendment. First, as noted, one should read the rights listed in the Bill of Rights to discover others not expressly written in the Constitution.¹⁴⁹ Second the Ninth Amendment, ought to, at times, be read to its “inverse.”¹⁵⁰ An action that offended the provisions when properly read together would be a constitutional violation.¹⁵¹ While I reserve a full discussion of the civilian method on the Ninth Amendment for another article,¹⁵² the second recognition in *Secundum Civilis* mentioned above is relevant here. The Ninth Amendment says one cannot read the Bill to deny or disparage other rights retained by the people.¹⁵³ Logically, then, one cannot read the Bill in such a way as to deny the rights that are mentioned in the Constitution.

This type of argument is further support using standing interpretative methods. From the standing doctrine,¹⁵⁴ one cannot read the Bill of Rights to “deny or disparage” others retained by the people—*a fortiori*, then, the Ninth Amendment prohibits one from reading the Bill of Rights in such a way as to deny or disparage the rights actually listed and protected by the Constitution.¹⁵⁵

Therefore, either reading the strict words of the Ninth Amendment and its doctrine *a fortiori* or by reading the Ninth to its inverse, as mentioned in *Secundum Civilis*, one result is clear: if one were to identify a rule or idea that risked denying or disparaging a constitutional right, that rule or idea would be in violation of a requirement found in the Ninth Amendment.¹⁵⁶ A court ruling that there was no cause of action to vindicate the violation of a constitutional rights would both “deny and disparage” the constitutional right. In other words, the court would be saying, “because there is no cause of action listed in the constitution,

149. *Id.* at 616.

150. *Id.* at 646 (discussing this type of method as reading to its “negative”).

151. *Id.* at 616.

152. I set forth several consequences from using the Roman Civilian legal method in *Secundum Civilis*. *Id.* at 647–52.

153. U.S. CONST. amend. IX.

154. *See* U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that to have standing a plaintiff must have suffered an injury of fact fairly traceable to the acts of the defendant and not the result of the independent action of some third party).

155. U.S. CONST. amend IX.

156. Such an interpretation may also run afoul of the civil method of determining other protected rights. However, that method is both too lengthy for this Article and unnecessary to prove the point. I will save a thorough development of suing the civilian method on constitutional law and constitutional enforcement laws for later articles.

then there is no cause of action to protect any right—whether directly mentioned in the constitution or those not enumerated.” One may ask oneself “what sort of right would it be if there were no way to vindicate it?”

Therefore, because finding that there is no cause of action discoverable in the Bill of Rights or the Constitution would disparage the rights mentioned (and also those not mentioned), such an interpretation is in violation of the Ninth Amendment. The Ninth Amendment, therefore, requires a constitutional cause of action for the protection of constitutional rights.¹⁵⁷ This is further supported by the traditional view, prominent at the time of the Framing that where there is a right, there is a remedy.¹⁵⁸

Thus, the Ninth Amendment requires a cause of action to exist for the violation of constitutional rights. This requirement is fulfilled in two ways. First, Congress can pass a statute that grants the cause of action; such as it did with § 1983. Second, the courts, in the absence of congressional legislation, must allow lawsuits to proceed under a general constitutional cause of action; such as they did with *Bivens* for damages and *Ex parte Young* for injunctive relief.

C. Consequences

A finding that the Ninth Amendment is (or requires) a constitutional cause of action would have numerous potential consequences. The primary of these consequences to be considered here is that such a finding would cure many of the incongruencies that modern civil rights litigation law contains as mentioned above in Part II.

1. Between *Bivens* and § 1983 damages

Viewing the Ninth Amendment as a constitutional cause of action would cure the incongruity between *Bivens* and § 1983 damages cases. Instead of having to ask why the Constitution implies damages actions the federal government and not the states, one would simply be able to resort to the Ninth Amendment for both. § 1983 is simply Congress

157. Then, the Ninth Amendment can be said to be the cause of action itself. At the very least, discovering that the Ninth Amendment requires a cause of action (even if that cause of action is not construed as being in the Ninth Amendment itself but just required by it to be read into every clause of the Constitution) could support calling such a rule the “Ninth Amendment Cause of Action.”

158. For a very good discussion on this topic, see John C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979).

abiding by its Ninth Amendment obligation. *Bivens* is simply the Courts abiding by their Ninth Amendment Obligation.

It is of no moment that the Ninth Amendment is in the federal Bill of Rights and that the Fourteenth Amendment applies that Bill to the states; the Ninth Amendment would be a cause of action for all rights protected by the Constitution since its text explicitly states "the Constitution" as a whole and not just the listing in the Bill. Thus, it would even apply to the rights held incorporated through the Fourteenth Amendment.¹⁵⁹

2. *Between Bivens and Itself*

Using the Ninth Amendment as a cause of action would cure the incongruence of *Bivens* itself. Because constitutional rights have a higher place in our society than statutory law, any interpretation that puts them on the equal footing—and especially one that subjugated the constitutional role to the statutory one—would certainly be deemed as having "disparage[d]" that constitutional right. Such disparagement could be seen by the fact that the Court has often brought down the constitutional rule from its place on high and put it beneath the statutory rule. This is so, because, as noted above—where another statutory path exists for redress, there is no *Bivens* path to gain redress.

The Ninth Amendment would cure this absurdity and incongruency because again, the Ninth Amendment requires courts to allow these lawsuits only where there is no federal statute that allows for them. Thus, if there are other legal paths to protect the constitutional rights, then Congress has lived up to its Ninth Amendment obligation, and the Courts need not allow the lawsuit to proceed directly under the Constitution.

3. *Bivens and Prior § 1331 Cases for Damages*

Because using the Ninth Amendment as a cause of action would eliminate the need to find a cause of action implied in the Constitution or in a federal jurisdictional statute, courts could simply allow § 1331 to be a jurisdictional statute. This would also allow *Bivens* to go by the way side. As such, the two would no longer be in conflict and courts would

159. The full Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." I mention the same matter in *Secundum Civilis*. See Warden, *supra* note 148, at 616, ("To briefly summarize the argument, the Ninth Amendment declares, [t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The most important fact about this Amendment is that it says the Constitution. It does not say "these last eight Amendments." Thus, it refers to every right listed in the Constitution.") (internal citations and quotations omitted).

never have to justify why damages under § 1331 were abandoned after *Bivens*.

4. *Bivens* and Current § 1331 Cases for injunctive relief

As explained above, if the courts are going to imply limitations on *Bivens*, they should also apply similar limitations on the implied cause of action found under § 1331. However, no courts appear willing to do this. Therefore, there is conflict.

Viewing the Ninth Amendment as a cause of action (or requiring that one exist for all constitutional violation) would eliminate this conflict as both doctrines would be unnecessary and courts would not have to strain to justify either.

5. *Ex Parte Young* and Current § 1983 Ideas

Viewing the Ninth Amendment as a cause of action (or requiring that one exist either by statute or simply from the constitution itself) would cure the incongruence formed from *Ex parte Young* and § 1983.

This is so because as has been stated above the Ninth Amendment requires a cause of action. That requirement may be filled by congressional legislation or by simple constitutional processes in the absence of congressional action. Thus, in so far as § 1983 applies to the states, it should simply be viewed as Congress doing what it is required to do. The doctrine espoused in *Ex parte Young* was only necessary when the courts had narrowly interpreted § 1983. Thus, the courts could be said to have unknowingly fulfilled their constitutional Ninth Amendment obligation by allow the cause of action to exist absent such cause of action being granted by Congress.

6. *Ex Parte Young* and § 1331 Federal Injunctive Relief Cases

Because § 1983 is just Congress abiding by its constitutional requirement to have the cause of action; and the courts, viewing the Ninth Amendment as cause of action, are just abiding by their constitutional requirement to allow causes of action in the absence of congressional legislation, as it did in *Ex Parte Young*¹⁶⁰—because of all

160. At the time of *Ex parte Young*, 209 U.S. 123 (1908), 42 U.S.C.A. § 1983 (West 2018) was indeed a statute. However, as described above, the interpretation of the statute was so narrow that it was hardly ever used. Thus, should the courts return to a narrow interpretation of § 1983 then the Ninth Amendment could be used to fill whatever gaps are left behind.

this, § 1331 could simply return to being a jurisdictional statute and no longer create legal problems.

V. CONCLUSION

Civil rights litigation law is filled with incongruencies and seeming contradictions. This article has merely listed a few. In so doing, it also identified a theory that would allow courts to cure those incongruencies. By viewing the Ninth Amendment as requiring a cause of action—either in its creation by Congress or in the courts finding one in our general constitutional structure in the absence of legislation—courts may move away from the doctrines that cause such incongruencies.