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Cases and Materials

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INTRODUCTION

This Supplement covers legal developments that have occurred since the Casebook was published. Highlights include:

- An important recent case limiting the power of courts to create *Bivens* remedies, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

- A recent case about congressional control of standing, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

- A new section on legislative standing, which includes *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

- An expanded note on prejudice and harmless error in habeas cases, inspired by *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

There are also other updates of materials throughout the Casebook.

This Supplement, like the Casebook it accompanies, is based on careful curation of material. The reader will not find herein a summary of every Federal Courts case and law review article since the Casebook appeared. My guiding principle has been to include only such material as I might have included in the Casebook itself were I preparing the Casebook today.

I thank Kathryn Thornton and Lisa Ann Johnson for research assistance.

J.S.
August 2017

Chapter 2: Justiciability

2.C. STANDING TO SUE

2.C.4. Congressional control over standing

Add just before the Problems on p. 97:

SPOKEO, INC. v. ROBINS, 136 S. Ct. 1540 (2016): The case concerned the Fair Credit Reporting Act of 1970 (FCRA or Act), which, among other things, requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports and to "notify providers and users of consumer information of their responsibilities under the Act." The Act provides that any person who willfully fails to comply with the Act with respect to any individual shall be liable to that individual for actual damages suffered or for statutory damages of from $100 to $1000.

Defendant Spokeo operates an online "people search engine." A user of Spokeo's service can input any person's name and learn information about that person, which Spokeo provides after searching databases. Plaintiff Robins discovered that some information Spokeo was providing about him online was inaccurate—Spokeo was incorrectly stating his age, wealth, education level, marital status, and employment status. He claimed that Spokeo was covered by the FCRA and had violated it. He brought a class action against Spokeo seeking the maximum allowable statutory damages for each similarly situated class member. The defendant argued that the plaintiff lacked standing because he could not show that any inaccurate information posted about him had caused him an actual injury (such as actual harm to his employment prospects). The district court agreed and dismissed for lack of standing. The Ninth Circuit reversed, holding that the FCRA gave Robins a statutory right that was allegedly violated in an individual, particularized way, which was all that was needed for standing.

The Supreme Court granted certiorari. After reciting the usual standing formulas, the Court said:

> To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." . . . For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." . . . The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.
>
> Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be "concrete." Under the Ninth Circuit's analysis, however, that independent requirement was elided. . . . [T]he Ninth Circuit concluded that Robins' complaint alleges "concrete, de facto" injuries for essentially two reasons. . . . First, the court noted

that Robins "alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people." . . . Second, the court wrote that "Robins's personal interests in the handling of his credit information are *individualized rather than collective*." . . . Both of these observations concern particularization, not concreteness. We have made it clear time and time again that an injury in fact must be both concrete *and* particularized. . . .

A "concrete" injury must be "de facto"; that is, it must actually exist. *See* Black's Law Dictionary 479 (9th ed. 2009). When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract." Webster's Third New International Dictionary 472 (1971) . . . . Concreteness, therefore, is quite different from particularization. . . .

"Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. *See*, *e.g., Pleasant Grove City v. Summum,* 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993) (free exercise).

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. . . . In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* [*v. Defenders of Wildlife*] that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S., at 578. Similarly, Justice Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.,* at 580 (opinion concurring in part and concurring in judgment).

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. . . .

This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. *See*, *e.g., Clapper v. Amnesty*

Int'l USA, 568 U.S. ——, 133 S. Ct. 1138. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. See, *e.g.,* Restatement (First) of Torts §§ 569 (libel), 570 (slander *per se*) (1938). Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified. See *Federal Election Comm'n v. Akins,* 524 U.S. 11, 20–25 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III). . . .

In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. We take no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.

The Court vacated the Ninth Circuit's decision and remanded for further proceedings. Justice Thomas, concurring, offered these thoughts:

Standing doctrine limits the "judicial power" to " 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' " . . . To understand the limits that standing imposes on "the judicial Power," therefore, we must "refer directly to the traditional, fundamental limitations upon the powers of common-law courts." . . . These limitations preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature. This concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party.

Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to

adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more. . . . "Private rights" have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. . . . In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy. . . . Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right. . . .

Common-law courts, however, have required a further showing of injury for violations of "public rights"—rights that involve duties owed "to the whole community, considered as a community, in its social aggregate capacity." . . . Such rights include "free navigation of waterways, passage on public highways, and general compliance with regulatory law." . . . Generally, only the government had the authority to vindicate a harm borne by the public at large, such as the violation of the criminal laws. . . . Even in limited cases where private plaintiffs could bring a claim for the violation of public rights, they had to allege that the violation caused them "some extraordinary damage, beyond the rest of the [community]." . . .

These differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine and explain the Court's description of the injury-in-fact requirement. . . . The injury-in-fact requirement often stymies a private plaintiff's attempt to vindicate the infringement of *public* rights. The Court has said time and again that, when a plaintiff seeks to vindicate a public right, the plaintiff must allege that he has suffered a "concrete" injury particular to himself. . . . This requirement applies with special force when a plaintiff files suit to require an executive agency to "follow the law"; at that point, the citizen must prove that he "has sustained or is immediately in danger of sustaining a direct injury as a result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public." . . .

But the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the "injury-in-fact" requirement. See, *e.g., Carey v. Piphus,* 435 U.S. 247, 266 (1978) (holding that nominal damages are appropriate when a plaintiff's constitutional rights have been infringed but he cannot show further injury). . . .

The separation-of-powers concerns underlying our public-rights

> decisions are not implicated when private individuals sue to redress violations of their own private rights. But, when they are implicated, standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action. . . . And by limiting Congress' ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion. . . . But where one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual. . . .
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> When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts' power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. . . . A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. See *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373–374 (1982) . . . . A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population. . . . Thus, Congress cannot authorize private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him. . . .

Justice Thomas concluded that the plaintiff had no standing to sue Spokeo for "violation of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm," but that the plaintiff could arguably establish a private cause of action to vindicate the violation of Spokeo's statutory duty to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

Justice Ginsburg, joined by Justice Sotomayor, dissented. She said she agreed with much of the Court's opinion, but believed that a remand was unnecessary as the Court should hold that Robins's allegations were sufficient to show a "concrete" injury because he was not complaining of a bare procedural violation, but of misinformation that caused harm to his employment prospects.

Notes and Questions

1. Previous cases had long held that a plaintiff's injury must be "concrete and particularized." Is the Court correct to treat these as two separate requirements? In what kind of case might a plaintiff's injury be "particularized" but not "concrete," as these terms are explained in the Court's opinion?

2. Recall that early standing cases (such as *Tennessee Electric Power*, Casebook p. 56) required plaintiff to show an invasion of a legal right. *ADAPSO* (Casebook p. 58) introduced the "injury in fact" test. *Havens Realty* (Casebook p. 84) suggested that satisfaction of either test would suffice for standing. Does *Spokeo* now show that the injury in fact test has wholly supplanted the legal rights test?

3. The Court says that a plaintiff does not "automatically" satisfy the injury-in-fact test whenever the plaintiff suffers a violation of a statutory right conferred by Congress, but that Congress's judgment "play[s an] important role[]." What are the implications for Congress's power to confer standing?

4. The issue in *Spokeo* has enormous potential importance. Innumerable statutes provide for "statutory damages" in cases where a plaintiff cannot prove harm beyond the violation of a statutory right. For example, a copyright holder is entitled to statutory damages for copyright infringement even if she cannot show actual damages (which might occur, for example, if a defendant made infringing copies of the plaintiff's copyrighted work but never distributed them). 17 U.S.C. § 504(c). Provision for such statutory damages goes back to the Copyright Act of 1790. *See* 1 Stat. 124, 125. As is mentioned in the opinions, many common law actions are (and historically were) also permitted even in a case where the plaintiff cannot prove actual damages. Are these statutory and common law actions still secure after the *Spokeo* opinion? If so, what distinguishes these permitted actions from actions that the *Spokeo* opinion would forbid? Is Justice Thomas's opinion helpful on this point?

5. The Court suggests that a "risk of real harm" can suffice for standing. If a defendant takes action that increases the risk that a plaintiff will suffer harm, should that be enough? Does the level of risk matter? Bear this issue in mind when reading the next section.

2.C.5. Requirements of Standing Doctrine—Standing to Seek Particular Remedies; Standing and Probabilistic Injuries

Add a footnote at the end of note 3, p. 103:

The stringency of the rule of *Summers* was potentially undermined by *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). In that case, the plaintiff organization challenged the constitutionality of certain legislative districts in Alabama, particularly the "majority-minority" districts, and its standing turned on whether it had members who lived in the challenged districts. The plaintiff had not identified specific members who lived in those districts; the only record evidence on this point were statements that the plaintiff organization "ha[d] members in almost every county in Alabama," was a "statewide political caucus founded in 1960," and had the purpose of "endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people." The Supreme Court held that these statements were sufficient to "support an inference" that the plaintiff had members in all

of the State's majority-minority districts. Is this holding consistent with *Summers*?

The case may, however, have turned on a peculiar feature: The defendants had not challenged the plaintiff's standing on this point; rather, the district court raised the issue sua sponte in its decision. Thus, the plaintiff organization did not have clear advance notice that it needed to submit evidence that it had members who lived in the challenged districts. The Supreme Court held that, in the circumstances, the district court was required to give the plaintiff an opportunity to submit further evidence supporting its standing, and it ordered the district court to consider the plaintiff's standing further on remand. So it is not clear whether *Alabama* would really override *Summers* in a case in which a defendant clearly challenged a plaintiff organization's standing.

p. 107: Add just before problems:

By contrast, in the recent case of *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the Supreme Court held that plaintiffs whose lawsuit was extinguished by an allegedly illegal bankruptcy court judgment had standing to challenge the judgment even though their lawsuit might in the end prove worthless. The Court said that "the mere *possibility* of failure does not eliminate the value of the claim or petitioners' injury in being unable to bring it." Is this decision consistent with *Clapper*? Why were these plaintiffs not required to show that they had "certainly" lost something of value?

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p. 107: Add new section 2.C.5B before section 2.C.6:

5B. Specialized Standing Doctrines: Standing of Government Officials or Bodies

In separation of powers cases, a party claims that some statute or action is unconstitutional because it intrudes on the powers of some government official or body. However, the party making this claim is rarely the government official or body whose powers have been allegedly usurped. Rather, the claim is made by a private party injured by the allegedly unconstitutional action. For example, in *INS v. Chadha,* 462 U.S. 919 (1983), the Supreme Court held that Congress could not reserve a "legislative veto" over the Attorney General's decisions to suspend the deportation of aliens. But the case was not brought to court by the Attorney General. It was brought by Chadha, a private individual who suffered from the allegedly unconstitutional invasion of the Attorney General's powers when the House of Representatives vetoed the Attorney General's suspension of his deportation. Would it make more sense in these cases to allow suit by the government official or body who alleged that his (or its) powers were being infringed?

RAINES v. BYRD
521 U.S. 811 (1997)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

. . . [In 1996, Congress passed the Line Item Veto Act, which, among other things,

authorized the President to "cancel" certain spending items contained in spending bills he signed into law. The Constitution permits the President to sign or veto a whole bill, but the Act permitted the President to cancel individual spending items within a bill. If the President canceled a spending item, the money in the item would be rescinded and not spent. The Act provided that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution." Immediately after the act was passed and before the President had exercised any power under the act, six members of Congress brought such a suit. They alleged that the Act "unconstitutionally expands the President's power" and "violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of federal law." They alleged that the Act injured them "directly and concretely ... in their official capacities" by altering the legal and practical effect of all votes they would subsequently cast on spending bills, by divesting them of their constitutional role in the repeal of legislation, and by altering the balance of powers between the Legislative and Executive branches. The district court denied the defendants' motion to dismiss for lack of standing and granted summary judgment to the plaintiffs. The defendants appealed to the Supreme Court.]

. . . To meet the standing requirements of Article III, "[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984) (emphasis added). For our purposes, the italicized words in this quotation from *Allen* are the key ones. We have consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged injury suffered is particularized as to him. . . .

We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is ... concrete and particularized. . . ., and that the dispute is "traditionally thought to be capable of resolution through the judicial process." . . .

We have always insisted on strict compliance with this jurisdictional standing requirement. . . . And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. . . . In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere,[3] we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and

[3] It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979). We acknowledge, though, that Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit. . . .

otherwise judicially cognizable.

We have never had occasion to rule on the question of legislative standing presented here. In *Powell v. McCormack,* 395 U.S. 486, 496, 512–514 (1969), we held that a Member of Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy. But *Powell* does not help appellees. First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. . . . Second, appellees do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them.* Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. . . . The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power. . . .

The one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury is *Coleman v. Miller,* 307 U.S. 433 (1939). Appellees, relying heavily on this case, claim that they, like the state legislators in *Coleman,* "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," *id.,* at 438, sufficient to establish standing. In *Coleman,* 20 of Kansas' 40 State Senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. With the vote deadlocked 20 to 20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The 20 State Senators who had voted against the amendment, joined by a 21st State Senator and three State House Members, filed an action in the Kansas Supreme Court seeking a writ of mandamus that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their mandamus action, but ruled against them on the merits. See *id.,* at 436–437.

This Court affirmed. By a vote of 5–4, we held that the members of the legislature had standing. In explaining our holding, we repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been *overridden* and *virtually held for naught* although if they are right in their contentions *their votes would have been sufficient to defeat ratification.* We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.,* at 438 (emphasis added). . . .

It is obvious, then, that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

It should be equally obvious that appellees' claim does not fall within our holding in *Coleman,* as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process. *Coleman* thus provides little meaningful precedent for appellees' argument.

Nevertheless, appellees rely heavily on our statement in *Coleman* that the Kansas senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Appellees claim that this statement applies to them because their votes on future appropriations bills (assuming a majority of Congress does not decide to exempt those bills from the Act) will be less "effective" than before, and that the "meaning" and "integrity" of their vote has changed. . . . The argument goes as follows. Before the Act, Members of Congress could be sure that when they voted for, and Congress passed, an appropriations bill that included funds for Project X, one of two things would happen: (i) the bill would become law and all of the projects listed in the bill would go into effect, or (ii) the bill would not become law and none of the projects listed in the bill would go into effect. Either way, a vote for the appropriations bill meant a vote for a package of projects that were inextricably linked. After the Act, however, a vote for an appropriations bill that includes Project X means something different. Now, in addition to the two possibilities listed above, there is a third option: The bill will become law and then the President will "cancel" Project X.

Even taking appellees at their word about the change in the "meaning" and "effectiveness" of their vote for appropriations bills which are subject to the Act, we think their argument pulls *Coleman* too far from its moorings. Appellees' use of the word "effectiveness" to link their argument to *Coleman* stretches the word far beyond the sense in which the *Coleman* opinion used it. There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman.* We are unwilling to take that step.

Not only do appellees lack support from precedent, but historical practice appears to cut against them as well. It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power. The Tenure of Office Act, passed by Congress over the veto of President Andrew Johnson in 1867, was a thorn in the side of succeeding Presidents until it was finally repealed at the behest of President Grover Cleveland in 1887. . . . It provided that an

official whose appointment to an Executive Branch office required confirmation by the Senate could not be removed without the consent of the Senate. . . . In 1868, Johnson removed his Secretary of War, Edwin M. Stanton. Within a week, the House of Representatives impeached Johnson. . . . One of the principal charges against him was that his removal of Stanton violated the Tenure of Office Act. . . . At the conclusion of his trial before the Senate, Johnson was acquitted by one vote. . . . Surely Johnson had a stronger claim of diminution of his official power as a result of the Tenure of Office Act than do the appellees in the present case. Indeed, if their claim were sustained, it would appear that President Johnson would have had standing to challenge the Tenure of Office Act before he ever thought about firing a cabinet member, simply on the grounds that it altered the calculus by which he would nominate someone to his cabinet. Yet if the federal courts had entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867, they would have been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress.

Succeeding Presidents—Ulysses S. Grant and Grover Cleveland—urged Congress to repeal the Tenure of Office Act, and Cleveland's plea was finally heeded in 1887. . . . It occurred to neither of these Presidents that they might challenge the Act in an Article III court. Eventually, in a suit brought by a plaintiff with traditional Article III standing, this Court did have the opportunity to pass on the constitutionality of the provision contained in the Tenure of Office Act. A sort of mini-Tenure of Office Act covering only the Post Office Department had been enacted in 1872, . . . and it remained on the books after the Tenure of Office Act's repeal in 1887. In the last days of the Woodrow Wilson administration, Albert Burleson, Wilson's Postmaster General, came to believe that Frank Myers, the Postmaster in Portland, Oregon, had committed fraud in the course of his official duties. When Myers refused to resign, Burleson, acting at the direction of the President, removed him. Myers sued in the Court of Claims to recover lost salary. In *Myers v. United States,* 272 U.S. 52 (1926), more than half a century after Johnson's impeachment, this Court held that Congress could not require senatorial consent to the removal of a Postmaster who had been appointed by the President with the consent of the Senate. *Id.,* at 106–107. In the course of its opinion, the Court expressed the view that the original Tenure of Office Act was unconstitutional. *Id.,* at 176. . . .

If the appellees in the present case have standing, presumably President Wilson, or Presidents Grant and Cleveland before him, would likewise have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress. Similarly, in *INS v. Chadha,* 462 U.S. 919, the Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. By parity of reasoning, President Gerald Ford could have sued to challenge the appointment provisions of the Federal Election Campaign Act which were struck down in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*), and a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case,* 279 U.S. 655 (1929).

There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. . . . But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts, well

expressed by Justice Powell in his concurring opinion in *United States v. Richardson,* 418 U.S. 166 (1974):

> "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison,* 1 Cranch 137 (1803),] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Id.,* at 192.

IV

In sum, appellees have alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. . . . We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

We therefore hold that these individual members of Congress do not have a sufficient "personal stake" in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing. The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in the judgment.

. . . Under our precedents, it is fairly debatable whether [the plaintiffs'] injury is sufficiently "personal" and "concrete" to satisfy the requirements of Article III. . . . [Justice Souter discussed arguments for and against standing based on "official" injury; he noted precedents such as *Coleman* which supported it and precedents that cut the other way.]

Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements. . . . While "our constitutional structure [does not] requir[e] ... that the Judicial Branch shrink from a confrontation with the other two coequal branches," . . . we have cautioned that respect for the separation of powers requires the Judicial Branch to exercise restraint in

deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a "last resort." . . . The counsel of restraint in this case begins with the fact that a dispute involving only officials, and the official interests of those, who serve in the branches of the National Government lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement. . . . [T]he contest here . . . is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch, . . . by embroiling the federal courts in a power contest nearly at the height of its political tension.

While it is true that a suit challenging the constitutionality of this Act brought by a party from outside the Federal Government would also involve the Court in resolving the dispute over the allocation of power between the political branches, it would expose the Judicial Branch to a lesser risk. Deciding a suit to vindicate an interest outside the Government raises no specter of judicial readiness to enlist on one side of a political tug-of-war, since "the propriety of such action by a federal court has been recognized since *Marbury v. Madison,* 1 Cranch 137 (1803)." . . . And just as the presence of a party beyond the Government places the Judiciary at some remove from the political forces, the need to await injury to such a plaintiff allows the courts some greater separation in the time between the political resolution and the judicial review.

> "[B]y connecting the censureship of the laws with the private interests of members of the community, ... the legislation is protected from wanton assailants, and from the daily aggressions of party-spirit." 1 A. de Tocqueville, Democracy in America 105 (Schoken ed.1961).

The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us. The parties agree, and I see no reason to question, that if the President "cancels" a conventional spending . . . provision pursuant to the Act, the putative beneficiaries of that provision will likely suffer a cognizable injury and thereby have standing under Article III. . . . While the Court has declined to lower standing requirements simply because no one would otherwise be able to litigate a claim, . . . the certainty of a plaintiff who obviously would have standing to bring a suit to court after the politics had at least subsided from a full boil is a good reason to resolve doubts about standing against the plaintiff invoking an official interest. . . .

I therefore conclude that appellees' alleged injuries are insufficiently personal and concrete to satisfy Article III standing requirements of personal and concrete harm. Since this would be so in any suit under the conditions here, I accordingly find no cognizable injury to appellees.

JUSTICE STEVENS, dissenting.

The Line Item Veto Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature. If the procedure is valid, it will deny every Senator and every Representative any opportunity to vote for or against the truncated measure that

survives the exercise of the President's cancellation authority. Because the opportunity to cast such votes is a right guaranteed by the text of the Constitution, I think it clear that the persons who are deprived of that right by the Act have standing to challenge its constitutionality. Moreover, because the impairment of that constitutional right has an immediate impact on their official powers, in my judgment they need not wait until after the President has exercised his cancellation authority to bring suit. Finally, the same reason that the appellees have standing provides a sufficient basis for concluding that the statute is unconstitutional. . . .

[T]he Line Item Veto Act establishes a mechanism by which bills passed by both Houses of Congress will eventually produce laws that have not passed either House of Congress and that have not been voted on by any Senator or Representative. . . . Assuming for the moment that this procedure is constitutionally permissible, and that the President will from time to time exercise the power to cancel portions of a just-enacted law, it follows that the statute deprives every Senator and every Representative of the right to vote for or against measures that may become law. . . . In my judgment, the deprivation of this right—essential to the legislator's office—constitutes a sufficient injury to provide every Member of Congress with standing to challenge the constitutionality of the statute. If the dilution of an individual voter's power to elect representatives provides that voter with standing—as it surely does, see, *e.g., Baker v. Carr,* 369 U.S. 186, 204–208 (1962)—the deprivation of the right possessed by each Senator and Representative to vote for or against the precise text of any bill before it becomes law must also be a sufficient injury to create Article III standing for them. . . .[3]

Moreover, the appellees convincingly explain how the immediate, constant threat of the partial veto power has a palpable effect on their current legislative choices. . . . Because the Act has this immediate and important impact on the powers of Members of Congress, and on the manner in which they undertake their legislative responsibilities, they need not await an exercise of the President's cancellation authority to institute the litigation that the statute itself authorizes. . . .

I would affirm the judgment of the District Court.

[The dissenting opinion of Justice Breyer is omitted. Justice Breyer argued that the plaintiffs' claim to standing was at least as strong as that of the plaintiffs in *Coleman*.]

Notes and Questions

1. Subsequent to the Court's decision, President Clinton exercised the power under the Line Item Veto Act to cancel certain provisions of bills he had signed into law. Parties suffering economic injury as a result of the cancellations brought suit. The

[3] The majority's reference to the absence of any similar suit in earlier disputes between Congress and the President . . . does not strike me as particularly relevant. First, the fact that others did not choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so. Second, because Congress did not authorize declaratory judgment actions until the federal Declaratory Judgment Act of 1934, 48 Stat. 955, the fact that President Johnson did not bring such an action in 1868 is not entirely surprising.

Supreme Court held that these parties had standing and that the Line Item Veto Act was unconstitutional because under it, "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. . . . There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). These were the same arguments the plaintiffs had made on the merits in *Raines*.

2. If the constitutional flaw in the Line Item Veto Act was that it allowed the President to exercise powers that properly belong to Congress, who would be a better advocate against the act than a member of Congress? In separation of powers cases, why does our legal system prefer a suit by an injured private party arguing that a statute unconstitutionally impinges on the powers of government officials to a suit by the government officials themselves making the same argument? Is this preference purely a matter of historical tradition or is there some important policy reason for it? Does either the Court's opinion or Justice Souter's opinion provide a satisfactory answer?

3. Justice Souter observed that if the Court dismissed the suit brought by members of Congress challenging the Line Item Veto Act, a proper suit brought by injured private parties challenging the act would undoubtedly come along soon (as in fact it did). Is this a good argument for dismissing the suit by members of Congress? Or is it an argument that the Court might as well decide that suit on the merits? What is gained by waiting for the second suit?

4. What was the significance of the fact that the plaintiffs in *Raines* sued as soon as the Line Item Veto Act took effect, before the President had exercised any power pursuant to the act? Suppose the President actually canceled a spending item in a particular bill, and individual members of Congress who had voted for the bill brought suit. Would they have standing?

5. The Court said that it attached "some importance" to the fact that the suit was brought by individual members of Congress and was not approved by either house of Congress. Would the case be different if either the House or the Senate, rather than individual members, challenged the statute? Consider the next case.

ARIZONA STATE LEGISLATURE v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION

135 S. Ct. 2652 (2015)

JUSTICE GINSBURG delivered the opinion of the Court.

. . . [The people of the state of Arizona, by direct popular initiative, adopted a law ("Proposition 106") that stripped the Arizona State Legislature of the power to create legislative districts for state and federal elections and vested that power in a new state administrative agency, the Arizona Independent Redistricting Commission (AIRC or Commission). The purpose of the new law was to depoliticize the drawing of legislative districts and reduce gerrymandering. Pursuant to the new law, the Commission created congressional districts to be used in Arizona's 2012 congressional elections. The

Arizona State Legislature brought suit in federal court challenging the Commission's districts. The legislature claimed that giving the Commission power to draw the districts violated the federal Constitution's Elections Clause, which provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." U.S. Const., art. I, § 4, cl. 1 (emphasis added). The Commission moved to dismiss for lack of standing. The three-judge federal district court denied that motion, but, on the merits, granted the Commission's motion to dismiss for failure to state a claim. The plaintiff appealed to the Supreme Court.]

. . . We turn first to the threshold question: Does the Arizona Legislature have standing to bring this suit? Trained on "whether the plaintiff is [a] proper party to bring [a particular lawsuit,]" standing is "[o]ne element" of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines v. Byrd,* 521 U.S. 811, 818 (1997). "To qualify as a party with standing to litigate," the Arizona Legislature "must show, first and foremost," injury in the form of " 'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 64 (1997) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). The Legislature's injury also must be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it "primary responsibility" for redistricting. . . . Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature's action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, . . . one must not "confus[e] weakness on the merits with absence of Article III standing." . . .

Raines v. Byrd, 521 U.S. 811 (1997), does not aid AIRC's argument that there is no standing here. In *Raines,* this Court held that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act. . . . The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers' votes. . . . The "institutional injury" at issue, we reasoned, scarcely zeroed in on any individual Member. . . . "[W]idely dispersed," the alleged injury "necessarily [impacted] all Members of Congress and both Houses ... equally." . . . None of the plaintiffs, therefore, could tenably claim a "personal stake" in the suit. . . .

In concluding that the individual Members lacked standing, the Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress." . . . "[I]ndeed," the Court observed, "both houses actively oppose[d] their suit." . . . Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers. . . . That "different ...

circumstanc[e]," . . . was not *sub judice* in *Raines*.[10]

Closer to the mark is this Court's decision in *Coleman v. Miller,* 307 U.S. 433 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." . . . We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. . . . *Coleman,* as we later explained in *Raines,* stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[12] . . . Our conclusion that the Arizona Legislature has standing fits that bill. Proposition 106 . . . would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. . . .

This dispute, in short, "will be resolved ... in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." . . . Accordingly, we proceed to the merits.

. . . [On the merits, the Court held that the Arizona law did not violate the federal Constitution.]

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

Affirmed.

[The dissenting opinion of Chief Justice Roberts, which discussed only the merits, is omitted.]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I do not believe that the question the Court answers is properly before us. Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute "cases" or "controversies" committed to our resolution by Art. III, § 2, of the Constitution.

What those who framed and ratified the Constitution had in mind when they entrusted the "judicial Power" to a separate and coequal branch of the Federal

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[10] *Massachusetts v. Mellon,* 262 U.S. 447 (1923), featured in Justice Scalia's dissent, . . . bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated the Tenth Amendment. . . . If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." . . . As *parens patriae,* the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." . . .

[12] The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd,* 521 U.S. 811, 819–820 (1997).

Government was the judicial power they were familiar with—that traditionally exercised by English and American courts. The "cases" and "controversies" that those courts entertained did not include suits between units of government regarding their legitimate powers. The job of the courts was, in Chief Justice Marshall's words, "solely, to decide on the rights of individuals," *Marbury v. Madison,* 1 Cranch 137, 170 (1803). . . .

Th[e] doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable "realistic appreciation of the consequences of judicial action." . . . To the contrary. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752 (1984). It keeps us minding our own business.

We consult history and judicial tradition to determine whether a given " 'disput[e is] appropriately resolved through the judicial process.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal quotation marks omitted). What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers. Nearly every separation-of-powers case presents questions like the ones in this case. But we have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm. That is why, for example, it took this Court over 50 years to rule upon the constitutionality of the Tenure of Office Act, passed in 1867. If the law of standing had been otherwise, "presumably President Wilson, or Presidents Grant and Cleveland before him, would ... have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress." *Raines v. Byrd,* 521 U.S. 811, 828 (1997).

We do not have to look far back in the United States Reports to find other separation-of-powers cases which, if the Arizona Legislature's theory of standing is correct, took an awfully circuitous route to get here. In *Zivotofsky v. Kerry,* 135 S. Ct. 2076 (2015) [which concerned a federal statute providing that U.S. citizens born in Jerusalem could demand that their passports list "Israel" as their place of birth, contrary to the Executive branch's desire not to take a position on Jerusalem's disputed status], the President could have sued for an injunction against Congress's attempted "direct usurpation" of his constitutionally-conferred authority to pronounce on foreign relations. Or in *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932 (2015) [which concerned the power of bankruptcy courts to consider certain claims even though bankruptcy courts are not Article III courts], a Federal District Judge could have sought a declaratory judgment that a bankruptcy court's adjudicating a *Stern* claim improperly usurped his constitutionally conferred authority to decide cases and controversies. Or in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014) [which concerned the President's ability to decide when the Senate is in recess, thus allowing the President to make a recess appointment], the Senate could have sued the President, claiming a direct usurpation of its prerogative to advise on and consent to Presidential appointments. Each of these cases involved the allocation of power to one or more branches of a government; and we surely would have dismissed suits arising in the hypothesized fashions.

We have affirmatively rejected arguments for jurisdiction in cases like this one.

For example, in *Raines,* 521 U.S., at 829–830, we refused to allow Members of Congress to challenge the Line Item Veto Act, which they claimed " 'unconstitutionally expand[ed] the President's power' " and " 'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.' " *Id*., at 816. In *Massachusetts v. Mellon,* 262 U.S. 447, 479–480 (1923), we refused to allow a State to pursue its claim that a conditional congressional appropriation "constitute[d] an effective means of inducing the States to yield a portion of their sovereign rights." (And *Mellon* involved a contention that *one* government infringed upon *another* government's power—far closer to the traditional party-versus-party lawsuit than is an intragovernmental dispute.) We put it plainly: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States," *id.,* at 483—and because the State could not show a discrete harm except the alleged usurpation of its powers, we refused to allow the State's appeal.

The sole precedent the Court relies upon is *Coleman v. Miller,* 307 U.S. 433 (1939). . . . *Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes.

Coleman was a peculiar case that may well stand for nothing. . . . [Justice Scalia argued that the unusual lineup of the opinions in *Coleman* left unclear how many Justices actually voted to find that the plaintiffs had standing.] And even under the most generous assumptions, since the Court's judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction . . . —*Coleman*'s discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

The Court asserts, quoting *Raines,* 521 U.S., at 819–820, that the Court's standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." . . . The cases cited to support this dictum fail to do so; they are merely cases where a determination of unconstitutionality is avoided by applying what there is no reason to believe is anything other than *normal* standing requirements. It seems to me utterly implausible that the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the President, and not when they were treading upon the powers of state legislatures and executives. Quite to the contrary, I think they would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.

I would dismiss this case for want of jurisdiction. . . .

[The dissenting opinion of Justice Thomas is omitted.]

Notes and Questions

1. Is this case properly distinguishable from *Raines v. Byrd*? If so, what is the distinction?

2. If the Court had determined that the Arizona State Legislature lacked standing

to bring this case, would there have been some other party that could have properly challenged Arizona's Proposition 106 as violative of the federal Constitution's Elections Clause? If so, would it have been better for the Court to insist that that other party bring its case?

3. Is this case narrow and limited, or does it open up whole new vistas of standing? After this case, can a house of Congress sue the President or an executive official for taking action that allegedly usurps the powers of Congress? At least one district court thinks so. *See United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (determining that the House of Representatives has standing to challenge executive branch expenditures of funds allegedly not appropriated by Congress). Could the President, similarly, sue to challenge a statute that allegedly infringes his powers? Could a judge sue about a statute that allegedly infringes judicial powers?

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6. Zone of Interests

Add new note on p. 112:

4. In *Bank of America Corp. v. Miami*, 137 S. Ct. 1296 (2017), the Supreme Court confirmed what it had said in *Lexmark*, *supra*: that the "zone of interests" test is tied to the particular statute under which a plaintiff sues; that the question is whether the statute grants the cause of action that the plaintiff asserts; that the Court presumes that a statute ordinarily "provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked,' " and that the question is to be resolved using traditional tools of statutory construction.

The case provides another example of how the zone of interests test works outside the APA context. The plaintiff was the city of Miami, which claimed that the defendant banks discriminatorily made loans on less favorable term to African-American and Latino borrowers than to white, non-Latino customers, in alleged violation of the Fair Housing Act (FHA). The banks' practices allegedly harmed the city by leading to foreclosures, vacancies, and urban blight in Miami's minority communities, which reduced the city's tax revenues and compelled it to spend additional funds on city services in the affected areas. The Court determined that these alleged injuries were within the "zone of interests" of the FHA, even though the banks' alleged discriminatory practices were not directed against the city itself. The Court noted that the FHA allowed any person "aggrieved" by a violation of the Act to bring suit, and that prior cases such as *Havens Realty* (Casebook p. 84) had given a broad construction to this provision, including allowing suit by FHA plaintiffs alleging indirect financial injuries. The Court also held, however, that an FHA plaintiff must show that its injuries are *proximately* caused by the defendant's violation of the statute and it remanded for further investigation of whether Miami's injuries met this test.

Does this decision properly interpret the FHA? If Miami can sue for financial damages it suffered because banks discriminated against individual borrowers, could a

plumber sue a bank for damages suffered when one of the bank's borrowers failed to pay the plumber, because the borrower was forced into bankruptcy by unfavorable mortgage terms?

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7. Third-Party Standing

Add a paragraph "d" to note 2 on pp. 136-37:

d. A person claiming U.S. citizenship through his father had standing to challenge the constitutionality of a statute providing different rules for the ability of unwed fathers and unwed mothers to pass U.S. citizenship to their children. The Court summed up the exception to the rule against asserting rights of third parties as applying where "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (internal quotation omitted; brackets in original). The Court said that the plaintiff could assert his father's Equal Protection rights as the "close relationship" test was satisfied and the father's death years before the litigation began constituted a "hindrance" to his ability to assert his rights himself.

2.D MOOTNESS

Add a new note 5 on p. 167:

5. Can the defendant in a class action moot the case by offering to pay the full amount of the named plaintiff's claim before a class is certified? In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court said no: if the named plaintiff rejects the offer, his claim against the defendant remains live. However, the Court left open the possibility that the defendant could moot the case by *actually paying* the amount into an account payable to the named plaintiff. Should such payment moot the case? What would motivate the defendant to make such payment?

Chapter 3: Congressional Control of Jurisdiction

3.A. JURISDICTION STRIPPING

Add at end of note 1, p. 227:

See also Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (upholding a statute that, like the statute at issue in *Robertson*, "direct[ed] courts to apply newly enacted, outcome-altering legislation in pending civil cases," including a particular case identified by docket number).

3.B. NON-ARTICLE III TRIBUNALS

Add to note 2, p. 285:

The Supreme Court subsequently decided that if the parties consent, a bankruptcy court may resolve a claim that *Stern v. Marshall* would otherwise forbid it to hear. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). The Court reached this conclusion by applying the *CFTC v. Schor* multi-factor balancing test. While recognizing that, under *Schor*, party consent cannot cure a violation of Article III's structural protection of the separation of powers, the Court held that party consent, along with consideration of the other *Schor* factors, showed that no violation of Article III had occurred. *Stern*, the Court said, was premised on lack of consent. Three Justices dissented.

Sharif addressed a specific issue but still left unsettled the fundamental tension between the *Schor* balancing approach and the *Northern Pipeline* / *Granfinanciera* / *Stern* categorical approach.

Chapter 4: The Law Applied in Federal Courts

C. RIGHTS OF ACTION

On p. 453, add after the citation to *Stoneridge Inv. Partners*:

Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (confirming that the judicial task in statutory right of action cases is "limited solely to determining whether Congress intended to create the private right of action asserted").

Chapter 5: Federal Jurisdiction

A. FEDERAL QUESTION JURISDICTION

1. The Constitutional "Arising Under" Provision

Add to note 7 on p. 469:

But in *Lightfoot v. Cendant Mortgage Corp*., 137 S. Ct. 553 (2017), the Supreme Court unanimously held that the federal charter of the Federal National Mortgage Association ("Fannie Mae"), which authorizes it "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U.S.C. § 1723a(a), does *not* automatically confer federal jurisdiction over any case to which Fannie Mae is a party. Although the statute "specifically mentions the federal courts," and therefore appears to satisfy the *Red Cross* standard, the Court observed that *Red Cross* held only that a statute satisfying that standard "may" be read to create automatic

federal jurisdiction. The key words in Fannie Mae's charter were "in any court of competent jurisdiction." These words, the Court held, indicate that a court in which Fannie Mae sues or is sued must have some other basis of subject-matter jurisdiction.

Can the Court's intricate interpretive rules about the jurisdictional effect of federal corporate charters be justified as an interpretation of likely congressional intent? Can they be justified as providing the best reading of statutory text, regardless of what was intended?

B. DIVERSITY JURISDICTION

2. Requirements for Diversity Jurisdiction.

b. Determining Citizenship.

Add at the bottom of p. 525, after the citation to *Carden*:

See also Americold Realty Trust v. Conagra Foods, Inc., 136 S. Ct. 1012 (2016) (applying a similar rule to an unincorporated "real estate investment trust").

Chapter 7: State Sovereign Immunity

D. METHODS OF AVOIDING STATE SOVEREIGN IMMUNITY

In note 3 on pp. 662-663, replace the last two paragraphs with the following:

How can one determine whether a plaintiff seeks "damages from the public treasury," barred under *Edelman v. Jordan*, or "individual and personal liability," permitted under *Hafer v. Melo*? The Supreme Court addressed this question in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). In that case, the plaintiff sued the defendant in state court on a simple tort claim arising out of a car accident. The defendant asserted that at the time of the accident he was driving as part of his work as an employee of the Mohegan Tribe of Indians of Connecticut. He asserted that the suit was therefore barred by tribal sovereign immunity (which is similar to state sovereign immunity), especially because, if he were found liable, he would be entitled to indemnification from the tribe under tribal law, and the judgment would therefore come of out tribal funds.

The Supreme Court rejected the defendant's claim of immunity. It said:

> Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. . . . If, for example, an action is in essence against a State even if the State is not a

named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. . . . Similarly, lawsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity. . . .

The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. . . . This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. . . . The real party in interest is the government entity, not the named official. *See Edelman v. Jordan*, 415 U.S. 651, 663–665 (1974). "Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law." *Hafer*, 502 U.S., at 25 (emphasis added) . . . "[O]fficers sued in their personal capacity come to court as individuals," Hafer, 502 U.S., at 27, and the real party in interest is the individual, not the sovereign.

The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. . . . An officer in an individual-capacity action, on the other hand, may be able to assert personal immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. . . . But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability." *Hafer*, 502 U.S., at 30–31 (internal quotation marks omitted).

. . . It is apparent that these general principles foreclose Clarke's sovereign immunity defense in this case. This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." . . . We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

The Court also held that this result was not changed by the fact that tribal law would entitle the defendant to indemnification in the event he were found liable. The Court said:

[A]n indemnification provision cannot, as a matter of law, extend

> sovereign immunity to individual employees who would otherwise not fall under its protective cloak. . . . The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab. . . . The Tribe's indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing.

Note, however, that a suit against a state official, even if not barred by sovereign immunity, may have to contend with the separate doctrine of *official* immunity, which is covered in Chapter 8.

F. CONGRESSIONAL ABROGATION OF STATE SOVEREIGN IMMUNITY

Add to note 3, pp. 686-87:

However, the Court cited *Seminole Tribe* in denying an *Ex parte Young* remedy to health care providers seeking to enforce a provision of the Medicaid statute in *Armstrong v. Exceptional Child Center, Inc*., 135 S. Ct. 1378 (2015). Under the Medicaid statute, Congress provides federal funds to states that agree to spend the funds in accordance with statutorily imposed conditions, one of which was that state payments to health care providers must be "consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Plaintiffs were health care providers who alleged that Idaho was not meeting this condition. Even though the plaintiffs sought only equitable relief, the Supreme Court held that the Medicaid statute implicitly barred an *Ex parte Young* remedy. The Court gave two reasons: First, the Medicaid statute provided its own remedy for a state's failure to comply with its requirements, namely that the federal Secretary of Health and Human Services should withhold Medicaid funding from that state. Second, the condition plaintiffs sought to enforce was "judicially unadministrable." Congress, the Court held, wanted the Secretary, not courts, to make the complex judgments necessary to enforce the statutory condition. Four Justices dissented.

Chapter 8: Official Suits and Official Immunity

A. CAUSES OF ACTION

1. Against Federal Officers

Insert on p. 727, at the end of this section:

ZIGLAR v. ABBASI
137 S. Ct. 1843 (2017)

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV-B.

. . . [As the FBI investigated the terrorist attacks of September 11, 2001, it encountered numerous aliens who were illegally present in the United States. The FBI designated some of these aliens as being "of interest" to the September 11 investigation. Plaintiffs were among the aliens so designated, and they were subjected to a "hold-until-cleared policy." Plaintiffs alleged that they were held in harsh conditions at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Among other things, plaintiffs alleged they were held in tiny cells for 23 hours a day with the lights on continuously, that the guards slammed them into walls, twisted their arms, wrists, and fingers, and broke their bones, that they were frequently strip-searched, and that these harsh conditions continued even after the government learned that the plaintiffs had nothing to do with the terrorist attacks. Plaintiffs were subsequently removed from the United States. Plaintiffs sued on their own behalf and on behalf of a putative class. They sued the former Attorney General, FBI Director, and INS Commissioner (the "Executive Officials") and the MDC's Warden and Associate Warden (the "Wardens"). All of the defendants were federal officials.]

Seeking to invoke the Court's decision in *Bivens,* respondents [plaintiffs] brought four claims under the Constitution itself. First, respondents alleged that petitioners [defendants] detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

Respondents also brought a claim under 42 U.S.C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. Respondents alleged that petitioners conspired with one another to hold respondents in harsh conditions because of their actual or apparent race, religion, or national origin.

. . . The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. [On interlocutory appeal, the] Court of Appeals affirmed in most respects as to the Wardens . . . . As to the Executive

Officials, however, the Court of Appeals reversed, reinstating respondents' claims. . . . This Court granted certiorari. . . .

II

The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at Rev. Stat. § 1979, 42 U.S.C. § 1983.[*] It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens,* Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens*. The Court held that, even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. . . .

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis v. Passman,* 442 U.S. 228 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. . . . And in *Carlson v. Green,* 446 U.S. 14 (1980), a prisoner's estate sued federal jailers for failing to treat the prisoner's asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. . . . These three cases—*Bivens, Davis,* and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B

To understand *Bivens* and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. . . . [T]he Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose, *J.I. Case Co. v. Borak,* 377 U.S. 426, 433 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. . . .

These statutory decisions were in place when *Bivens* recognized an implied cause of action to remedy a constitutional violation. Against that background, the *Bivens* decision held that courts must "adjust their remedies so as to grant the necessary relief"

[*] [This statute is discussed in detail in Part 8.A.2 of the Casebook. –Ed.]

when "federally protected rights have been invaded." . . . In light of this interpretive framework, there was a possibility that "the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983." . . .

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens,* and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. . . . [T]he Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. [*Alexander v.*] *Sandoval,* 532 U.S. [275,] 286 [(2001)]. If the statute itself does not "displa[y] an intent" to create "a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." . . .

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U.S.C. § 2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee "which is brought for a violation of the Constitution").

For these and other reasons, the Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the

search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. [*Ashcroft v.*] *Iqbal,* 556 U.S. [662,] 675 [(2009)]. This is in accord with the Court's observation that it has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years. . . .

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? . . .

The answer most often will be Congress. When an issue " 'involves a host of considerations that must be weighed and appraised,' " it should be committed to " 'those who write the laws' " rather than " 'those who interpret them.' " . . . In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if " 'the public interest would be served' " by imposing a " 'new substantive legal liability.' " . . . As a result, the Court has urged "caution" before "extending *Bivens* remedies into any new context." . . . The Court's precedents now make clear that a *Bivens* remedy will not be available if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' " . . .

This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that

Congress would want the Judiciary to interfere. See *Chappell, supra,* at 302 (military); *Stanley, supra,* at 679; *Meyer, supra,* at 486 (public purse); *Wilkie, supra,* at 561–562 (federal land). And sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created "any alternative, existing process for protecting the [injured party's] interest" that itself may "amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." . . .

III

It is appropriate now to turn first to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. The Court will refer to these claims as the "detention policy claims." The detention policy claims allege that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The term "detention policy claims" does not include respondents' claim alleging that Warden Hasty allowed guards to abuse the detainees. That claim will be considered separately, and further, below. At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a *Bivens*-type remedy to those claims. . . .

[The Court noted that the court of appeals had not inquired whether "special factors" counseled hesitation because the court of appeals believed that such an inquiry was necessary only when extending *Bivens* remedies to a new context and that the context of this case was not new, because the constitutional right at issue was the same as in a prior *Bivens* case and the "mechanism of injury" was also the same.]

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the

confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. See *Bivens,* 403 U.S. 388; *Davis,* 442 U.S. 228; *Chappell,* 462 U.S. 296. The Court of Appeals therefore should have held that this was a new *Bivens* context. Had it done so, it would have recognized that a special factors analysis was required before allowing this damages suit to proceed. . . .

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." . . . Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "The purpose of *Bivens* is to deter the *officer*." . . . *Bivens* is not designed to hold officers responsible for acts of their subordinates. . . .

Even if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties. . . .

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. . . . Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. . . . These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. . . .

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents' detention policy claims challenge more than standard "law enforcement operations." . . . They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. . . .

National-security policy is the prerogative of the Congress and President. See U.S. Const. Art. I, § 8; Art. II, § 1, § 2. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." . . . These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

For these and other reasons, courts have shown deference to what the Executive Branch "has determined ... is 'essential to national security.' " . . . Indeed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise." . . . Congress has not provided otherwise here.

There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. . . . [N]ational-security concerns must not become a talisman used to ward off inconvenient claims. . . .

Even so, the question is only whether "congressionally uninvited intrusion" is "inappropriate" action for the Judiciary to take. . . . The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than "inadvertent." . . . This possibility counsels hesitation "in the absence of affirmative action by Congress." . . .

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," . . . and some of that interest has been directed to the conditions of confinement at issue here. . . . Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." . . .

This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent." . . .

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." . . . Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus. . . .

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. . . . And when alternative methods of relief are available, a *Bivens* remedy usually is not. . . .

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper

exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. . . . The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents' detention policy claims to proceed under *Bivens*.

IV

A

One of respondents' claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC's warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

. . . [The Court held that the plaintiffs' allegations (including that guards routinely abused them and that the warden encouraged the abuse) stated a constitutional claim, so that the plaintiffs would be able to proceed if *Bivens* applied.]

Warden Hasty argues, however, that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context. . . .

It is true that this case has significant parallels to one of the Court's previous *Bivens* cases, *Carlson v. Green,* 446 U.S. 14. There, the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care. . . .

Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. As noted above, a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. . . .

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. . . . And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—"deliberate indifference to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents.

This case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. And there might have been alternative remedies available here, for example, a writ of habeas corpus; . . . an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages

remedy is itself a factor counseling hesitation. . . . Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U.S.C. § 1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This Court has said in dicta that the Act's exhaustion provisions would apply to *Bivens* suits. . . . But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens,* the Court of Appeals should have performed a special factors analysis. It should have analyzed whether there were alternative remedies available or other "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in a suit like this one. . . .

B

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

One issue remains to be addressed: the claim that petitioners are subject to liability for civil conspiracy under 42 U.S.C. § 1985(3). . . .

[The Court held that assuming the plaintiffs' § 1985 conspiracy claim to be well-pleaded, the defendants would be entitled to qualified immunity from the claim, because it would not have been clear to a reasonable official that a "conspiracy" covered by the statute could arise from agreement among officials of the same government department, especially when the alleged "conspiracy" consisted of discussing departmental policy. The concept of qualified immunity is explored in Part 8.B.2 of the Casebook.]

If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected. . . .

The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE GORSUCH took no part in the consideration or decision of these cases.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

. . . [Justice Thomas stated that (1) he agreed with the Court insofar as it held that *Bivens* remedies were not available for the plaintiffs' claims, (2) he thought the claim treated in Part IV of the Court's opinion should be dismissed as well, and (3) he concurred in the Court's qualified immunity ruling but was concerned about the way the Court's qualified immunity cases had strayed from common law principles and had become "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." He suggested that the Court should reconsider its qualified immunity jurisprudence.]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

. . . In my view, [the plaintiffs'] claims are well-pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law. For those reasons, I would affirm the judgment of the Court of Appeals. . . .

The Court's holdings in *Bivens, Carlson,* and *Davis* rest upon four basic legal considerations. First, the *Bivens* Court referred to longstanding Supreme Court precedent stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with *Marbury v. Madison,* 1 Cranch 137 (1803) . . . . Chief Justice John Marshall wrote for the Court that

> "[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.,* at 163.

. . . Second, our cases have recognized that Congress' silence on the subject indicates a willingness to leave this matter to the courts. . . .

Third, our *Bivens* cases acknowledge that a constitutional tort may not lie when "special factors counse[l] hesitation" and when Congress has provided an adequate alternative remedy. . . . The relevant special factors in those cases included whether the court was faced "with a question of 'federal fiscal policy,' " . . . or a risk of "deluging federal courts with claims." . . . *Carlson* acknowledged an additional factor—that damages suits "might inhibit [federal officials'] efforts to perform their official duties"—but concluded that "the qualified immunity accorded [federal officials] under [existing law] provides adequate protection." . . .

Fourth, as the Court recognized later in *Carlson,* a *Bivens* remedy was needed to cure what would, without it, amount to a constitutional anomaly. . . . [F]ederal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U.S.C. § 1983. . . . But federal statutory law did not provide a damages remedy to a person whom a federal official had deprived of that same right. . . . "[Our] 'constitutional design,' " the Court wrote, "would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Carlson, supra,* at 22 . . . .

The *Bivens* Court also recognized that the Court had previously inferred damages remedies caused by violations of certain federal statutes that themselves did not explicitly

authorize damages remedies. . . . At the same time, *Bivens, Davis,* and *Carlson* treat the courts' power to derive a damages remedy from a constitutional provision not as included within a power to find a statute-based damages remedy but as flowing from those statutory cases *a fortiori.*

As the majority opinion points out, this Court in more recent years has indicated that "*expanding* the *Bivens* remedy is *now* a ' disfavored' judicial activity." . . . Thus, it has held that the remedy is not available in the context of suits against *military* officers, see *Chappell v. Wallace,* 462 U.S. 296, 298–300 (1983); . . . in the context of suits against *privately* operated prisons and their employees, see *Minneci v. Pollard,* 565 U.S. 118, 120; . . . in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, see *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988); and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see *Bush v. Lucas,* 462 U.S. 367, 368 (1983), and the other involving protection of land rights, see *Wilkie v. Robbins,* 551 U.S. 537, 551 (2007). Each of these cases involved a context that differed from that of *Bivens, Davis,* and *Carlson* with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were "*fundamentally different* from anything recognized in *Bivens* or subsequent cases." . . . In each of them, the plaintiffs were asking the Court to " 'authoriz[e] a *new kind* of federal litigation.' " . . .

Thus the Court, as the majority opinion says, repeatedly wrote that it was not "expanding" the scope of the *Bivens* remedy. . . . But the Court nowhere suggested that it would narrow *Bivens*' existing scope. . . .

This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted *Bivens* actions. . . . First, the plaintiffs are civilians, not members of the military. . . .

Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons. . . .

Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. . . . [The] claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment). . . .

It is true that the plaintiffs bring their "deliberate indifference" claim against Warden Hasty under the Fifth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. . . . [I]t cannot be maintained that the difference between the use of the two Amendments is "fundamental." . . .

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. . . . And, in fact, there is strong

evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—*e.g.,* Congress continued to permit prisoners to recover for physical injuries, the typical kinds of *Bivens* injuries. . . .

I recognize that the Court finds a significant difference in the fact that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. . . . But because I believe the Court's argument here is its strongest, I will consider it at greater length below. . . .

Because the context here is not new, I would allow the plaintiffs' constitutional claims to proceed. . . . And because it is clearly established that it is unconstitutional to subject detainees to punitive conditions of confinement and to target them based solely on their race, religion, or national origin, the defendants are not entitled to qualified immunity on the constitutional claims. . . . (Similarly, I would affirm the judgment of the Court of Appeals with respect to the plaintiffs' statutory claim . . . [under] 42 U.S.C. § 1985(3). . . . I agree with the Court of Appeals that the defendants are not entitled to qualified immunity on this claim. . . .)

. . . [Justice Breyer also argued that even if the plaintiffs were attempting to extend *Bivens* remedies to a new context, the Court, before denying a *Bivens* remedy, should consider whether the plaintiffs would have any alternative remedy. Justice Breyer argued that the plaintiffs had no alternative remedy, because the plaintiffs could not have sought prospective injunctive relief during a period, allegedly some two or three months, when they were held incommunicado.]

[Justice Breyer then turned to the question of whether "special factors counse[l] hesitation" in approving a *Bivens* remedy.]

The Court describes two general considerations that it believes argue against an "extension" of *Bivens.* First, the majority opinion points out that the Court is now far less likely than at the time it decided *Bivens* to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. . . . Second, it finds the "silence" of Congress "notable" in that Congress, though likely aware of the "high-level policies" involved in this suit, did not "choose to extend to any person the kind of remedies" that the plaintiffs here "seek." . . .

The first consideration, in my view, is not relevant. . . . [T]he majority and concurring opinions in *Bivens* looked in part for support to the fact that the Court had implied damages remedies from *statutes* silent on the subject. . . . But that was not the main argument favoring the Court's conclusion. Rather, the Court drew far stronger support from the need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. . . . The Court believed such a remedy was necessary to make effective the Constitution's protection of certain basic individual rights. . . . Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against *Federal* Government abuse . . . as effective as protections against abuse by *state* officials. . . .

Nor is the second circumstance—congressional silence—relevant in the manner

that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court's exercise of its traditional remedy-inferring powers. See *Bivens, supra,* at 397. Congress' subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. After all, Congress rejected a proposal that would have eliminated *Bivens* by substituting the U.S. Government as a defendant in suits against federal officers that raised constitutional claims. . . . Later, Congress expressly immunized federal employees acting in the course of their official duties from tort claims *except* those premised on violations of the Constitution. See . . . 28 U.S.C. § 2679(b)(2)(A). We stated that it is consequently "crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as [providing] parallel, complementary causes of action." . . .

The majority opinion also sets forth a more specific list of factors that it says bear on "whether a case presents a new *Bivens* context." . . . In my view, these factors do not make a "meaningful difference" [in determining whether a plaintiff is attempting to extend *Bivens* to a new context.] . . . Consider them one by one:

(1) *The rank of the officers*. . . . [If] a plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, *and* he shows that the defendant does not possess any form of immunity or other defense, *then* why should he not have a damages remedy for harm suffered? . . . Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) *The constitutional right at issue*. I agree that this factor can make a difference, but only when the substance of the right is distinct. . . . But, for reasons I have already pointed out, there is no relevant difference between the rights at issue here and the rights at issue in our previous *Bivens* cases. . . .

(3) *The generality or specificity of the individual action*. I should think that it is not the "generality or specificity" of an official action but rather the nature of the official action that matters. *Bivens* should apply to some generally applicable actions, such as actions taken deliberately to jail a large group of known-innocent people. And it should not apply to some highly specific actions, depending upon the nature of those actions.

(4) *The extent of judicial guidance*. This factor may be relevant to the existence of a constitutional violation or a qualified-immunity defense. . . . But I do not see how, assuming the violation is clear, the presence or absence of "judicial guidance" is relevant to the existence of a damages remedy.

(5) *The statutory (or other) legal mandate under which the officer was operating*. This factor too may prove relevant to the question whether a constitutional violation exists or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. . . .

(6) *Risk of disruptive judicial intrusion*. All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized *Bivens* actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. See . . . *Malesko, supra,* at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). . . .

(7) *Other potential special factors*. Since I am not certain what these other "potential factors" are and, since the Court does not specify their nature, I would not, and

the Court cannot, consider them in differentiating this suit from our previous *Bivens* cases or as militating against recognizing a *Bivens* action here. . . .

In my view, the Court's strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. . . .

We have not, however, answered the specific question the Court places at issue here: Should *Bivens* actions continue to exist in respect to policy-related actions taken in time of war or national emergency? In my view, they should.

For one thing, a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. . . . The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." . . . Similarly, the Fifth Amendment bars only conditions of confinement that are not "reasonably related to a legitimate governmental objective." . . . What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was "clearly established" at the time they acted. *Harlow,* 457 U.S., at 818.

Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is "plausible." *Iqbal,* 556 U.S., at 679. . . . And the Court has protected high-level officials in particular by requiring that plaintiffs plead that an official was personally involved in the unconstitutional conduct; an official cannot be vicariously liable for another's misdeeds. *Id.,* at 676.

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official's work. . . .

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of, *Bivens* actions goes too far. . . .

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. . . . The pages of the U.S. Reports themselves recite this Court's refusal to set aside the Government's World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps, see *Korematsu v. United States,* 323 U.S. 214 (1944). . . .

Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. . . .

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. See *Boumediene,* 553 U.S., at 732–733; *Hamdi v. Rumsfeld,* 542 U.S. 507; cf. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). I should think that the wisdom of permitting courts to consider *Bivens* actions, later granting monetary compensation to those wronged at the time, would follow *a fortiori*. . . .

With respect, I dissent.

Notes and Questions

1. The Court does not abolish the *Bivens* remedy, and it specifically states that its opinion "is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." But what does the opinion require when a plaintiff attempts to extend the *Bivens* remedy to a new context? What counts as a "new context" for this purpose? What differences between this case and prior cases did the Court cite in determining that this case presented a "new context"?

How restrictive is the opinion? What are its likely effects on future *Bivens* litigation?

2. The Court says that when a plaintiff seeks to extend *Bivens* to a new context, a court must first determine whether Congress or the court should decide whether a damages remedy should be available for the constitutional violation at issue, and that the answer will usually be Congress. How is a court to make this decision—the decision about who decides?

3. The Court relies on the increasing restrictiveness of the test for implied causes of action in cases arising under federal *statutes*. Justice Breyer says that these cases are not relevant to cases about implied causes of action arising under the federal *Constitution*. Who's right?

4. The Court relies on the fact that Congress has been "silent" and has not created an express remedy against federal officials who commit the wrongs alleged in the plaintiffs' complaint in *Ziglar*. Justice Breyer observes that in prior cases the Court took Congress's silence "as indicating an absence of congressional hostility" to the *Bivens* remedy. What is the correct inference to draw from Congress's failure to expressly approve or expressly forbid damages remedies for constitutional violations?

What is the correct inference to draw from Congress's treatment of constitutional

violations in statutes such as the Federal Tort Claims Act, mentioned by both the majority and dissenting opinions? If in these statutes Congress did not *provide* for damage actions against individual federal officers for constitutional violations, but also did not *foreclose* such actions, should courts assume that Congress wants or does not want *Bivens* actions to continue?

B. OFFICIAL IMMUNITIES

2. Qualified Immunity.

Add at end of note 4, p. 788:

The Court's recent cases have emphasized the stringency of this standard, which, the Court has said, "protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (internal quotation omitted); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("existing precedent must have placed the statutory or constitutional question beyond debate") (internal quotation omitted); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015); *White v. Pauly*, 137 S. Ct. 548, 551 (2017). The last-cited case also re-emphasized the principle that "the clearly established law must be particularized to the facts of the case," so that a reasonable defendant official would have known that what he was doing violated the plaintiff's rights. 137 S. Ct. at 552 (internal quotation omitted). Moreover, recent cases have held that in applying the qualified immunity test, a court should consider only the facts knowable to the defendant officers. *Id*. at 550. "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017).

Chapter 10: Supreme Court Review—Especially of Cases Decided by State Courts

C. THE SCOPE OF SUPREME COURT REVIEW OF CASES DECIDED BY STATE COURTS

2. Adequate and Independent State Grounds

b. What Constitutes an "Independent" State Ground?

Add to note 3, p. 932:

Justice Sotomayor took up Justice Stevens's position in *Kansas v. Carr*, 136 S. Ct. 633 (2016). In that case, Kansas' highest court vacated defendants' death sentences on the ground that the Eighth Amendment requires certain jury instructions that had not been given. The state sought U.S. Supreme Court review, and the Supreme Court reversed and remanded, holding that the Eighth Amendment imposes no such requirement. Justice Sotomayor, in a lone dissent, argued that the Court should not have granted certiorari in a case in which the state had overprotected a federal right. She

offered several reasons why granting certiorari in this kind of case entails costs that outweigh the benefits. She mentioned some reasons discussed by Justice Stevens, such as avoiding advisory opinions and conserving judicial resources. She also extolled the value of state experimentation in protecting individual rights and argued that in this kind of case the Supreme Court, as it explains why the federal Constitution did not require the state to go as far as the state's highest court believed, is likely to disparage the private interest at stake (here, the defendants' interest in receiving the favorable jury instruction) in a way that "risks discouraging States from adopting valuable procedural protections even as a matter of their own state law." Is this argument convincing? The Court responded to Justice Sotomayor's arguments by noting the need for uniformity in federal law and by observing that "When we correct a state court's federal errors, *we return power to the State, and to its people*."

Chapter 11: Habeas Corpus

B. HABEAS CORPUS FOR PERSONS HELD PURSUANT TO A CRIMINAL CONVICTION

3. Claims Cognizable in Habeas Corpus Proceedings.

c. Claims Based on "New" Rules.

Replace the last paragraph of note 5, p. 1023, with the following:

In several subsequent cases, the Court has stated that the first *Teague* exception still applies, but never in a context that required the Court squarely to confront the language of 28 U.S.C. § 2254(d)(1).

In *Schriro v. Summerlin*, mentioned in the previous note, the Court stated that "[n]ew *substantive* rules generally apply retroactively," even for purposes of collateral review. However, the remark was dictum, inasmuch as the case did not involve a new substantive rule.

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court again stated that new substantive rules apply retroactively and indeed held that a state court must apply new substantive rules retroactively when considering a *state* habeas petition. The Court also held that a new "substantive" rule may be a rule about the permitted *punishment* for a crime. The Court required Louisiana to apply a rule announced by the Court in 2012—a rule that a state may not sentence a juvenile to a mandatory term of life imprisonment without parole—to a state habeas petition from a prisoner convicted of murder more than 40 years earlier. However, the case was not subject to § 2254(d)(1) because it involved a state habeas petition.

Finally, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court restated both of *Teague*'s exceptions, but the case involved a habeas petition from a *federal* prisoner, subject to 28 U.S.C. § 2255, not § 2254.

Thus, while the Court has provided strong indications that the *Teague* exceptions survive the enactment of § 2254(d)(1), the Court has not yet expressly reconciled the

exceptions with the language of that section.

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4. The Standard of Review in Habeas Proceedings

b. Federal Adjudication of Legal Issues in Habeas Proceedings

Add at the end of note 6, p. 1041:

In numerous recent cases, the Supreme Court has emphasized the importance of this standard of review and has reversed courts of appeals, sometimes summarily, for not showing enough deference to state court judgments. Habeas is appropriate, the Court has emphasized, only where the Supreme Court's own cases (not merely lower court cases) make clear, beyond any possibility for fairminded disagreement, that the state courts erred on the specific question presented by a habeas petition. *E.g.*, *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017); *Woods v. Etherton*, 136 S. Ct. 1149 (2016); *White v. Wheeler*, 136 S. Ct. 456 (2015); *Woods v. Donald*, 135 S. Ct. 1372 (2015); *Glebe v. Frost*, 135 S. Ct. 429 (2014); *Lopez v. Smith*, 135 S. Ct. 1 (2014). However, there are still cases, albeit rare ones, in which the standard is met. *E.g.*, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) (holding that the state courts had clearly failed to satisfy the federal constitutional requirement that an indigent criminal defendant whose mental status is relevant to the case must be provided with access to a competent psychiatrist who will examine the defendant and assist in preparing the defense).

Add new note 8 on p. 1042:

8. A recent trend calls attention to another avenue for postconviction relief for state prisoners that avoids AEDPA's stringent standard of review. In several recent cases, the Supreme Court has granted certiorari to review the decision of state courts on a *state* habeas petition—i.e., a habeas petition filed in state court by a state prisoner. In such cases, the Supreme Court can correct state court errors on points of federal law without being subject to AEDPA's § 2254(d). *See*, *e.g.*, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Wearry v. Cain*, 136 S. Ct. 1002 (2016); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Justices dissenting in these cases have argued that states are not constitutionally required to provide for state habeas petitions at all, and so federal requirements for states that choose to entertain state habeas petitions should be limited. *Montgomery*, 136 S. Ct. at 746 (Thomas, J., dissenting). They have also called the Court's decision to grant review of state court action on a state habeas petition, rather than waiting for the prisoner to file a federal habeas petition (which would be subject to AEDPA), a "depart[ure] from our usual procedures." *Wearry*, 136 S. Ct. at 1012 (Alito, J., dissenting).

Are these criticisms valid? Should Supreme Court review of a state decision on a state habeas petition be the same as its review of the state decision in the prisoner's original trial, or should it be more restrained? In any event, the availability of such review is limited by the Supreme Court's very limited time and capacity to hear cases.

5. Claims Defaulted in State Court Proceedings

Replace note 3, p. 1058 with the following:

3. *Prejudice*. Assuming the prisoner has "cause" for procedurally defaulting a claim in state proceedings, the prisoner must still show that the state court's allegedly incorrect ruling on the claim "prejudiced" his case. That is, the prisoner must show that the state court's error was not a harmless error. In essence, a harmless error is one that did not affect the outcome of the case; a prejudicial error is one that did affect the outcome. For example, imagine that a state trial court wrongly refused to allow a defendant to subpoena a crucial witness, but then the witness testified voluntarily. In such a case, the trial court's error would not have affected the outcome and so would be harmless.

The requirement that the prisoner be prejudiced to obtain relief is an important and general requirement. It is not limited to cases where the prisoner's constitutional claim was defaulted in state court proceedings. It applies to all habeas petitions, and it also applies on direct appeal of a criminal conviction. Thus, as a general rule, even when a court concludes that a constitutional error occurred in a criminal trial, the court will not grant relief if the error was harmless.

While it may be obvious in a given case whether an error affected the outcome, it is often impossible to know for certain whether an error was harmless or prejudicial. If, for example, some evidence against the defendant is improperly admitted and the defendant is convicted, it may be impossible to know for certain whether the defendant would have been convicted without that evidence. Courts must therefore apply judgment in determining whether an error was harmless. A standard is needed to guide that judgment. The standard is different (a) on direct appeal, (b) in habeas cases where the prisoner's claim was properly presented in state court, and (c) in habeas cases where the prisoner's claim was procedurally defaulted in state court.

a. Direct Appeal. On direct appeal from a criminal conviction, the standard is that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Thus, if, on direct appeal of a criminal conviction, there is reasonable doubt as to whether the case would have come out the same way had the challenged error not occurred, the court must vacate the judgment.

b. Habeas Cases Where the Claim of Constitutional Error was Properly Presented in State Court. In habeas cases, the standard for prejudice is more stringent. "There must be more than a 'reasonable possibility' that the error was harmful. . . . [T]he court must find that the defendant was actually prejudiced by the error." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619 (1993)) (internal quotations omitted). However, if a court is in "grave doubt" as to the harmlessness of an error (i.e., the court finds itself in "virtual equipoise" as to whether the error was harmless), it must treat the error as prejudicial. *O'Neal v. McAninch*, 513 U.S.

432, 435 (1995). Thus, the burden of persuasion on the issue of harmlessness rests with the state.[1]

c. Habeas Cases Where the Claim of Constitutional Error was Procedurally Defaulted in State Court. Finally, in habeas cases in which the prisoner has procedurally defaulted his claim of error in state court but shows good cause for the default, the prisoner "must convince [the court] that there is a reasonable probability that the result of the trial would have been different" without the error. *Strickler v. Greene*, 527 U.S. 263, 289 (1999) (internal quotation omitted). Presumably, this standard is at least as strict as the *Brecht* standard quoted above, and its wording suggests that in this kind of case, the burden of persuasion as to prejudice rests on the prisoner.

d. Exception for "Structural" Errors. There is an exception to the prejudice requirement for "structural" errors, also known as "per se prejudicial" errors. Structural errors are errors that "by their very nature cast so much doubt on the fairness on the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). While there is no single test for which errors are structural, in general such errors involve "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," as opposed to "trial error," which is "error which occurred during the presentation of the case to the jury." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). For example, complete deprivation of the defendant's right to counsel, trial by a biased judge, or denial of the right to a public trial, are structural errors, *see*, *e.g.*, *Neder v. United States*, 527 U.S. 1, 8 (1999), but the wrongful admission of evidence—even powerful evidence such as a confession—is subject to harmless error analysis. *Fulminante*, 499 U.S. at 309-10.

The exception for structural errors applies on direct appeal and in habeas cases where the claim of error was properly presented in state court. *Brecht*, *supra*, at 629-30; *Davis v. Ayala*, *supra*, at 2197. However, the weight of authority is that the exception does not apply where a habeas petitioner procedurally defaulted his claim of error in state court. That is, where the prisoner procedurally defaulted a claim of error but has good cause for the default, the prisoner must show actual prejudice to obtain relief, even if the error was structural. *E.g.*, *Jones v. Bell*, 801 F.3d 556, 563 (6th Cir. 2015); *Hunt v. Houston*, 563 F.3d 695, 704 n.2 (8th Cir. 2009). *But see*, *e.g.*, *Sustache–Riveria v. United States*, 221 F.3d 8, 17 (1st Cir. 2000).

[1] If the state courts themselves conducted a harmlessness inquiry and determined that a constitutional error that occurred at the prisoner's trial was harmless, then § 2254(d) of the habeas statute applies to that determination. That is, a federal court in habeas may overturn the state courts' determination of harmlessness only if it was "contrary to, or involved an unreasonable application of" the Supreme Court's clearly established law, as that phrase was interpreted in *(Terry) Williams v. Taylor*, p. 1031, main volume. *Davis v. Ayala*, *supra*, at 2198-99. However, the Supreme Court has suggested that if a federal habeas court determines that an error in a prisoner's trial was prejudicial using the *Brecht* standard, then a state court's determination that the error was harmless under the *Chapman* test will necessarily be unreasonable, so the *Brecht* test "subsumes" the requirement of § 2254(d). *Fry v. Pliler*, 551 U.S. 112, 120 (2007); *Davis v. Ayala*, *supra*, at 2198-99.

Table of Cases