Constitutional Law-Civil Procedure-Implied Cause of Action-Extending Bivens to the Fifth Amendment-Davis v. Passman, 442 U.S. 228 (1979)
Shirley Davis was employed by Congressman Otto Passman of Louisiana as his deputy administrative assistant from February 1 to July 31 of 1974. On July 31, Passman terminated Davis' employment, stating in a letter to her that although she was "able, energetic, and a very hard worker . . . it was essential that the understudy to my Administrative Assistant be a man."

Davis brought suit against Passman in federal district court, claiming federal jurisdiction through the federal question provisions of 28 U.S.C. § 1331(a). She charged that Congressman Passman's gender-based employment decision discriminated against her in violation of the due process clause of the fifth amendment. Adopting the rationale of Bivens u. Six Unknown Named Agents of the Federal Bureau of Narcotics, Davis claimed that a cause of action implied from the due process clause gave her a right to a damages remedy to compensate for this violation of her fifth amendment rights.

The U.S. District Court of Louisiana dismissed the suit, declaring that no private right of action existed directly from the fifth amendment in the absence of congressional authorization. On appeal to the Fifth Circuit Court of Appeals, two hearings were held. A panel of the appeals court reversed the district court's dismissal, but the rehearing en banc upheld the district court's conclusion that a private right of action could not be implied from the fifth amendment in this situation.

2. 28 U.S.C. § 1331(a) (1976) provides that "district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States."
3. 403 U.S. 388 (1971). In Bivens the Supreme Court implied a cause of action directly from the fourth amendment.
5. See Davis v. Passman, 571 F.2d 793, 795 (5th Cir. 1978) (en banc).
7. Davis v. Passman, 571 F.2d 793 (5th Cir. 1978) (en banc), rev'd, 442 U.S. 228
iority of the circuit courts of appeal had either implied causes of action from other provisions of the Constitution, or had indicated a willingness to extend the \textit{Bivens} doctrine beyond the fourth amendment, the Supreme Court agreed to review \textit{Davis v. Passman} to resolve the question.

\section{Background}

\subsection{Gaps in Statutory Authorization for a Damages Remedy}

Davis was forced to rely on a cause of action implied from the fifth amendment to redress her grievance because she had no statutory grounds for seeking damages relief. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex in employment practices, but the original enactment (1979).

8. The First Circuit was the only circuit court of appeals that had failed to extend the \textit{Bivens} implication doctrine to constitutional guarantees other than those of the fourth amendment. See Kostka v. Hogg, 560 F.2d 37, 42-44 (1st Cir. 1977) (municipality vicariously liable under the fourteenth amendment). The remaining circuit courts have found \textit{Bivens}-type actions in various constitutional settings or have been sympathetic to an extension of the \textit{Bivens} doctrine. See Loe v. Armistead, 582 F.2d 1291, 1294 (4th Cir. 1978), \textit{petition for cert. filed sub nom.} Moffit v. Loe, 48 U.S.L.W. 3077 (U.S. Feb. 13, 1979) (No. 78-1260) (fifth amendment); Green v. Carlson, 581 F.2d 669, 673 (7th Cir. 1978), \textit{cert. granted}, 442 U.S. 940 (1979) (\textit{Bivens} should apply to any constitutional guarantee when appropriate); Gentile v. Wallen, 562 F.2d 193, 196 (2d Cir. 1977) (fourteenth amendment); Owen v. City of Independence, 560 F.2d 925, 932-33 (8th Cir. 1977), vacated, 438 U.S. 902 (1978), \textit{modified}, 589 F.2d 335 (1978), \textit{cert. granted}, 100 S. Ct. 42 (1979) (fourteenth amendment); Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928, 942 (9th Cir. 1977), \textit{modified on other grounds}, 566 F.2d 1353, 1364 (9th Cir. 1979), \textit{modified on other grounds sub nom.} Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (fifth amendment); Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977), \textit{cert. denied}, 438 U.S. 916 (1978) (first amendment); Paton v. LaPrade, 524 F.2d 862, 869-70 (3d Cir. 1975) (first amendment); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (sympathetic to claim under the thirteenth and fourteenth amendments); Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 1392, 1392 (6th Cir. 1975), \textit{aff'd on remand}, 578 F.2d 164 (1978) (per curiam), \textit{cert. denied}, 439 U.S. 983 (1978) (first amendment); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 (10th Cir. 1975) (dictum) (\textit{Bivens} not limited to the fourth amendment); Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) (injunctive relief for sixth amendment violation). See also Comment, \textit{Constitutionally Implied Causes of Action: A Policy of Protection, Expansion, or Restriction?}, 30 \textit{Mercer L. Rev.} 1023, 1027-31 (1979).

9. Davis originally sought equitable relief in the form of reinstatement and specific relief in addition to damages. However, Congressman Passman was defeated in the 1976 primary election, 422 U.S. at 230 n.1, so these other forms of relief were no longer available. Consequently, the suit was narrowed to a request for damages. \textit{Id.} at 231 n.4.


11. 42 U.S.C. § 2000e-2(a) (1976) provides that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such indi-
covered only certain private sector employees and not federal employees.\textsuperscript{12} Although the Equal Employment Opportunity Act of 1972 extended coverage of Title VII to most federal employees,\textsuperscript{13} congressional staff employees not governed by competitive service regulations were left outside its protective umbrella.\textsuperscript{14}

Davis was unable to base her suit on the federal statute granting a private cause of action to parties deprived of their constitutional rights under color of state law,\textsuperscript{15} since this act does not extend to constitutional violations committed by federal officials like Congressman Passman. Nor did Davis have a cause of action under Louisiana law.\textsuperscript{16} Even if she had, a state court would arguably have lacked the authority to award a damages remedy against a federal congressman.\textsuperscript{17} Consequently, Davis' only possibility for relief rested on judicial extension of the \textit{Bivens} doctrine to the fifth amendment.

\textbf{B. The Implied Constitutional Cause of Action Doctrine}

The Supreme Court laid the foundation for the creation of implied constitutional causes of action in \textit{Bell v. Hood}.\textsuperscript{18} The district court in \textit{Bell} had dismissed for lack of subject matter jurisdiction a money damages suit against federal officers who had allegedly violated the plaintiffs' constitutional rights. This was done because the remedy had not been authorized by Congress or the Constitution. In reversing this holding, the Supreme Court stated that when a deprivation of constitutional rights

\begin{itemize}
  \item \textsuperscript{12} Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253 (1964) (codified at 42 U.S.C. § 2000e (1976)) ("The term 'employer'... does not include (1) the United States... ").
  \item \textsuperscript{13} Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972) (codified at 42 U.S.C. § 2000e-16 (1976)). This legislation provided that "[a]ll personnel actions affecting employees... in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service... shall be made free from any discrimination based on... sex."
  \item \textsuperscript{14} Congressional staff employees are not hired under the competitive service, so they are not protected by Title VII. \textit{See} 442 U.S. at 247 & n.26. The competitive service is defined in 5 U.S.C. § 2102(a) (1976). Congressional staff personnel decisions are governed by 2 U.S.C. § 92 (1976), which provides "[t]hat such persons shall be subject to removal at any time by such Member [of Congress]... with or without cause."
  \item \textsuperscript{15} 42 U.S.C. § 1983 (1976).
  \item \textsuperscript{16} 422 U.S. at 245 n.23.
  \item \textsuperscript{17} \textit{Id}.
  \item \textsuperscript{18} 327 U.S. 678 (1946).
\end{itemize}
was alleged, federal jurisdiction was conferred by the federal question jurisdiction statute, which authorized suits "arising under the Constitution." The defense of the nonavailability of money damages was based on a failure to state a claim for relief, an issue that could be raised only after jurisdiction was exercised. As to whether or not relief could be granted to the Bell plaintiffs, the Court observed in dictum that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The authoritative ruling on the discretionary ability of federal courts to award judicially-authorized damages came twenty-five years later in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.* In *Bivens,* federal narcotics agents entered and searched Bivens' apartment without a search warrant and arrested him without probable cause. The Supreme Court held that there was a federal cause of action arising directly out of the fourth amendment's prohibition of unreasonable searches and seizures. The Court, disclaiming any need for statutory authorization to award a remedy, fashioned a federal common law money damages remedy from the implied authority of the Constitution itself. Writing for the majority, Justice Brennan found "no special factors counselling hesitation [in granting a remedy] in the absence of affirmative action by Congress." He emphasized that relegating Bivens to alternative state law remedies would be inadequate, since the interests protected by those state remedies were not as extensive as, and in some cases even conflicted with, the interests protected by the fourth amendment.

Justice Harlan, concurring, also concluded that federal courts do not need specific congressional permission to create remedies for constitutional violations. Harlan argued that federal courts had previously used the general jurisdictional grant of 28 U.S.C. § 1331(a) as authority to grant equitable relief to

19. *Id.* at 682-85. The current version of this statute is at 28 U.S.C. § 1331(a) (1976).
20. *Id.* at 684.
22. *Id.* at 397.
23. *Id.*
24. *Id.* at 396.
25. *Id.* at 394-95.
26. *Id.* at 399 (Harlan, J., concurring).
27. *See* note 2 supra.
plaintiffs asserting constitutional violations. He could see no logical reason why this power should not also extend to awarding traditional legal remedies like damages.\textsuperscript{28} Harlan also required a separate determination that the "compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."\textsuperscript{29} Therefore, judicial consideration of policy factors equal in scope to those examined by a legislative body enacting a statutory remedy was necessary to meet Harlan's test.\textsuperscript{30} Finally, however, the lack of viable alternatives to a federal damages remedy for Bivens necessitated a vindication of his fourth amendment rights; for people in Bivens' position it was "damages or nothing."\textsuperscript{31}

II. \textbf{Instant Case}

In 1978 the Fifth Circuit concluded in \textit{Davis v. Passman} that it should not extend the \textit{Bivens} logic beyond the narrow confines of the fourth amendment to the more nebulous causes of action that could arise from the due process clause of the fifth amendment.\textsuperscript{32} After determining that the remedy in \textit{Bivens} was partially derived from federal common law sources and not mandated exclusively by the Constitution, the court applied the Cort \textit{v. Ash}\textsuperscript{33} criteria for implying statutory causes of action to the \textit{Davis} facts. It concluded that a private right of action was not so compelling as to "countermand the clearly discernible will of Congress [by creating] a cause of action where Congress declined to provide one."\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} 403 U.S. at 405 (Harlan, J., concurring).
\item \textsuperscript{29} Id. at 407.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. at 410.
\item \textsuperscript{32} Davis v. Passman, 571 F.2d 793, 801 (5th Cir. 1978) (en banc), rev'g \textit{Davis v. Passman}, 544 F.2d 865 (5th Cir. 1977). See \textit{46 GEO. WASH. L. REV. 137} (1977) for comments on the prior panel decision.
\item \textsuperscript{33} 422 U.S. 66 (1975). The Cort criteria for determining if a private cause of action should be implied from a statutory scheme of relief are the following:
\begin{itemize}
\item First . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?
\item Id. at 78.
\item \textsuperscript{34} 571 F.2d at 800.
\end{itemize}
\end{itemize}
On appeal, the Supreme Court reversed the Fifth Circuit with a five to four decision and decreed that the *Cort* criteria do not apply to constitutional guarantees. The Court held that Davis, who suffered a deprivation of her due process rights by federal action, had a right to an implied cause of action from the fifth amendment, with a damages remedy to redress her injury.

In his opinion for the majority, Justice Brennan reasoned that the "implied" equal protection component of the fifth amendment gave Davis a right to be protected from gender discrimination by her congressional employer if the discrimination did not serve "important government objectives." To Brennan "the question whether a litigant has a 'cause of action' [was] analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive;" therefore, he adopted Justice Harlan's viewpoint in *Bivens* and separated his consideration of the issues concerning (1) the existence of a cause of action, and (2) the plaintiff's right to judicial relief.

**A. Cause of Action**

Brennan characterized a "cause of action" as the judicial determination of whether a plaintiff belonged to a class of potential litigants who could, as a matter of law, enforce certain rights. He asserted that the Fifth Circuit's conclusion that Davis could not judicially enforce her due process rights in a private action failed to recognize that constitutional rights and statutory rights are derived from different sources. It is essential to find legislative intent to allow a private cause of action when statutory rights are involved, since those rights are derived from congressional action. However, the judicial branch has the primary responsibility of enforcing rights derived directly from the Constitution; therefore, where constitutional rights are involved, the *Cort* legislative intent requirements are not applicable. Victims of federal discriminatory practices with no practical means to otherwise secure their constitutional rights must be able to use the federal courts to protect those interests; other-

35. 442 U.S. at 244.
36. Id. at 248.
37. Id. at 234 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
38. 442 U.S. at 239.
39. Id. at 239 n.18.
40. Id. at 241-42.
wise, their rights would be meaningless.\textsuperscript{41} Therefore, Davis had a right to a federal cause of action to enforce her fifth amendment rights, even though Congress had not expressly or impliedly authorized a private suit.

\subsection*{B. Appropriateness of the Remedy}

Although Davis had a right to a cause of action, Justice Brennan still found it necessary to examine the appropriateness of the damages remedy she requested. He believed that the Fifth Circuit erred in emphasizing congressional failure to provide a remedy for congressional employees threatened by employment discrimination. Brennan reasoned that Congress did not intend to preclude alternative judicial remedies for violation of the constitutional rights of congressional employees by failing to extend coverage of Title VII to them. He found that the rights of congressional employees to certain remedies for constitutional violations existed before the Civil Rights Act was passed, since these rights were grounded in the Constitution itself. Therefore, a statutory scheme that bypassed those employees did not affect their preexisting constitutional remedies.\textsuperscript{42} Finding that manageability and the unavailability of alternative relief made a damages remedy proper,\textsuperscript{43} the Court decided that the federal judiciary was justified in extending the \textit{Bivens} doctrine to imply a damages remedy under the fifth amendment.

The majority opinion aroused three vigorous dissents.\textsuperscript{44} Chief Justice Burger insisted from a separation of powers viewpoint that congressmen needed complete discretion in employment decisions, since loyal staffs are essential to the performance of their legislative duties; therefore, he concluded, "until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed."\textsuperscript{45}

Justice Stewart objected to the Court's decision to bypass the speech or debate clause\textsuperscript{46} immunity issue by remanding it for

\begin{itemize}
\item 41. Id. at 242.
\item 42. Id. at 247.
\item 43. Id. at 245-48.
\item 44. Chief Justice Burger, Justice Stewart and Justice Powell wrote separate dissenting opinions. Justice Rehnquist joined all three dissents. Justice Powell and the Chief Justice joined each other's opinion.
\item 45. 442 U.S. at 250 (Burger, C.J., dissenting).
\item 46. U.S. CONST. art. I, § 6. "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."
\end{itemize}
consideration by the trial court as a factor that might "counsel hesitation" in granting a remedy. He felt that immunity was "a preliminary question that may be completely dispositive [of the case] . . . regardless of the abstract existence of a cause of action or a damages remedy."47

Justice Powell appealed for discretion by federal courts when implying a cause of action directly from the Constitution. Among the policy factors that Powell felt the Court had ignored in exercising that discretion was comity or respect for an equal branch of government.48 Since Congress "took pains to exempt itself from the coverage of Title VII,"49 Powell believed that the Court recklessly disregarded the desire of Congress to preclude judicial examination of its employment decisions.

III. Analysis

Davis is significant in terms of constitutional theory not only because it extends the Bivens rationale beyond the fourth amendment context, but also because it explores the reasons for implying constitutional causes of action.50 Despite fears that the Court would restrict the constitutional cause of action theory,51 Davis reinforced Bivens by applying its logic to the due process clause. Moreover, the Court adopted Justice Harlan's reasoning in Bivens and clarified some of the gaps in the Bivens logic.

The Fifth Circuit was disturbed by the lack of concrete guidelines in Bivens,52 therefore, the court's opinion in Davis at-

47. 442 U.S. at 251 (Stewart, J., dissenting).
48. Id. at 252 (Powell, J., dissenting).
49. Id. at 254.
50. The Supreme Court allowed the lower federal courts to wrestle with the extension of the Bivens rationale to other constitutional issues during the eight year period between Bivens and Davis by reserving the question for future consideration. See Butz v. Economou, 438 U.S. 478, 486 n.8 (1978); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278-79 (1977); Aldinger v. Howard, 427 U.S. 1, 4 n.3 (1976).
51. Lehman, Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 HASTINGS CONST. L. Q. 531, 603-04 (1977). Surprisingly, the controversy in Davis centered on the appropriate use of the doctrine of constitutional causes of action and not on the validity of the doctrine. "[I]t has been clear . . . that in appropriate circumstances private causes of action may be inferred from provisions of the Constitution." 442 U.S. at 252 (Powell, J., dissenting) (emphasis added).
52. Because the Fifth Circuit felt it could not formulate "acceptable limits on the right of action Davis would have us imply," the court refused to extend Bivens to a complaint founded on the fifth amendment "until the Supreme Court answers the open question of whether any such right should exist." 571 F.2d at 801. The commentators have also been disturbed by the lack of guidelines for application of the Bivens doctrine:
tempted to formulate manageable standards for determining when implication of a constitutional cause of action is warranted. Although the Supreme Court repudiated the Fifth Circuit's use of the Cort criteria, Davis does not signal a complete abandonment of all barriers in suits alleging violations of constitutional interests by federal action. Instead, the Court reiterated the Bivens principle that the implication of a constitutional cause of action is not obligatory, but lies within the court's discretion. Justice Brennan identified four major hurdles that conceivably could prevent favorable judicial action for a constitutional cause of action suit: jurisdiction, standing, cause of action, and relief.53

Jurisdiction guidelines were established in Bell v. Hood,54 which declared that there was subject matter jurisdiction in cases alleging constitutional violations, unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."55 In addition, Davis had "alleged such a personal stake in the outcome of the controversy"56 to ensure sufficient standing to bring her suit in federal court. The controversy in Davis arose over the cause of action and relief issues. Although Justice Brennan's attempt to analytically separate these two issues served his immediate purposes, it also introduced a new source of confusion about the reach of the doctrine of implied constitutional causes of action.

A. Existence of a Cause of Action

When a constitutional violation is alleged, Davis asserts that a court must consider whether a right to bring a private suit to enforce constitutional guarantees stems directly from the Constitution itself, absent congressional authorization. Because she

"[A]lthough [Bivens] provides the federal courts with a potentially powerful tool, there is very little instruction on how or when it is to be used." Dellinger, Of Rights and Remedies: The Constitution As a Sword, 85 HARV. L. REV. 1532, 1543 (1972). Also see id. at 1544, which suggests that Bivens might be limited to remedies that have "traditionally been available in the federal courts for other constitutionally based actions."

53. 442 U.S. at 239 n.18. Other obstacles that plaintiffs have encountered with Bivens-type actions are outside the scope of this note. However, they are discussed in Note, "Damages or Nothing"—The Efficacy of the Bivens-type Remedy, 64 CORNELL L. REV. 667 (1979).
54. See notes 18-20 and accompanying text supra.
55. 327 U.S. at 682-83.
56. 442 U.S. at 239 n.18 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
had no effective alternative means of protection, Davis had a right to "invoke the existing jurisdiction of the courts for the protection of [her] justiciable constitutional rights." Davis reinforced the Harlan view in Bivens that the federal question jurisdiction statute impliedly authorized the judicial branch, not Congress, to decide which litigants may properly demand the use of the enforcement mechanism of the courts when constitutional rights are involved.

However, this judicial power is not unlimited. In both Davis and Bivens the Court emphasized that any alternative state tort actions were either inadequate or nonexistent. Implying a constitutional cause of action was particularly compelling in both cases, because without federal judicial intervention the plaintiffs' constitutional rights would be unenforceable. Where an action under state law or other appropriate means of protection are available to preserve an aggrieved party's interests, federal courts would be less justified in implying a right to bring suit.

B. Appropriateness of the Remedy

The issue most carefully scrutinized in both Davis and Bivens was the appropriateness of the remedy fashioned by the Court. In Bivens, Justice Brennan outlined three areas of concern: (1) whether the circumstances involved in the case would make awarding damages appropriate; (2) whether there were any "special factors counselling hesitation in the absence of affirmative action by Congress;" and (3) whether there was an "explicit congressional declaration that persons injured by a federal officer's violation of [constitutional guarantees] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress." Brennan explained in Davis that "[a]lthough [Davis] has a cause of action, her complaint might nevertheless be dismissed under Rule 12(b)(6) unless it can be determined that judicial relief is available." Under Brennan's analysis, if a damages remedy had

57. Id. at 242.
58. See note 2 and accompanying text supra.
59. Compare 442 U.S. at 242-45 with 403 U.S. at 405 (Harlan, J., concurring). See also Dellinger, supra note 52, at 1542-43.
60. 403 U.S. at 395-96.
61. Id. at 396.
62. Id. at 397.
63. 442 U.S. at 244.
not been a proper form of relief, a dismissal for “failure to state a claim upon which relief can be granted” would have been in order, even though a cause of action existed.

1. General appropriateness of the circumstances

In Davis, Justice Brennan justified the propriety of authorizing a damages remedy by listing the factors supporting the grant of that remedy. These factors were: (1) the historic use of damages as the “ordinary remedy for an invasion of personal interests in liberty,”65 (2) the judicial manageability of awarding damages when there were no “difficult questions of valuation or causation,”66 due to the extensive experience of federal courts with similar Title VII damages awards, and (3) the lack of equitable relief or other alternative remedies for Davis.67

By analyzing these factors, Brennan implicitly abandoned his sweeping generalization in Bivens that as long as a constitutional cause of action could be implied, it was logical for a court to “use any available remedy to make good the wrong done” in order to protect federally-guaranteed rights. Instead, Brennan followed the Harlan position in Bivens that an extensive analysis of policy considerations was required before a judicially-authorized remedy could be created.

Justice Harlan had claimed that “the range of policy considerations [the Court] may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.”68 Among the factors considered by Harlan were the qualifications of the federal courts to deal with the questions raised by the constitutional claim,69 the limitations on state damages remedies, the desirability of assessing damages claims against federal

66. 442 U.S. at 245.
67. Id.
68. 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. at 684).
69. 403 U.S. at 407 (Harlan, J., concurring).
70. Id. at 408-09. See also Butz v. Economou, 438 U.S. 478, 503 (1978). In Butz, Justice White addressed the Bivens problem in dictum and admonished that “[a]bsent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages . . . and whether the courts are qualified to handle the types of questions raised by the plaintiff’s claim” (citations omitted).
officials according to uniform federal standards, and the pressures on judicial branch resources from an overburdened caseload.\textsuperscript{71}

A question left unanswered by \textit{Davis} is whether it is appropriate to imply a cause of action to protect all constitutional interests. The Court’s analysis in \textit{Davis} suggests that even if the nature of the constitutional guarantee being asserted gives rise to a cause of action, appropriateness problems could result in the denial of a remedy for that guarantee. Consequently, the implication of constitutional causes of action by lower federal courts under the first,\textsuperscript{72} sixth,\textsuperscript{73} eighth,\textsuperscript{74} thirteenth,\textsuperscript{75} and fourteenth amendments\textsuperscript{76} will be validated only when the requested remedy is warranted under the \textit{Davis} criteria.

\textit{Davis}, therefore, affirms Harlan’s suggestion that, in the absence of congressional authority, federal courts weigh the relevant policy issues before granting relief under an implied cause of action. Implication of a cause of action in the context of one constitutional guarantee does not necessarily justify the implication of a cause of action in the context of another.\textsuperscript{77} The breadth of the judiciary’s discretion and the proper time for its invocation are still in question.\textsuperscript{78}

\textsuperscript{71} 403 U.S. at 410. (Harlan, J., concurring).


\textsuperscript{73} See, e.g., Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) (injunctive relief for sixth amendment violation).


\textsuperscript{75} See, e.g., Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (sympathetic to claim under the thirteenth amendment).

\textsuperscript{76} See, e.g., Gentile v. Wallen, 562 F.2d 193, 196 (2d Cir. 1977).

\textsuperscript{77} See 403 U.S. at 409 n.9 (Harlan, J., concurring).

\textsuperscript{78} The commentators have suggested other approaches in determining the appropriateness of a requested remedy. Professor Dellinger has suggested that [a]s a prerequisite to supplying a remedy, the court must first determine that the implicated constitutional provision provides substantive protection to one in the position of the plaintiff. The focus should then be upon whether there are other remedies available to those in the plaintiff’s position that would as fully effectuate the purpose of the constitutional guarantee as the remedy sought.

Dellinger, supra note 52, at 1551. Other suggestions include use of the traditional “legislative defined standards of conduct” to guide the courts in determining if a particular alleged tort will be recognized. Note, \textit{Remedies for Constitutional Torts: “Special Factors Counselling Hesitation,”} 9 Ind. L. Rev. 441, 445 (1976), [hereinafter cited as \textit{Remedies}].
2. Special factors counselling hesitation

Justice Brennan boldly proceeded to fashion a damages remedy in *Bivens* because there were "no special factors counselling hesitation in the absence of affirmative action by Congress." Brennan faced a different situation in *Davis*: the scope of speech or debate clause immunity in a suit against a congressman was clearly a "special factor" counselling hesitation. Brennan disposed of this dilemma by acknowledging the existence of this special factor, and by then concluding that it had no relevance to the Court's authority to allow Davis to bring a private suit against Congressman Passman. The special factors would only counsel hesitation in granting a remedy, not hesitation in the implication of a constitutional cause of action. There being a cause of action, the scope of the immunity for Congressman Passman was therefore to be determined by the trial court on remand, since that was the appropriate forum for granting a remedy.

The Court refused to infer that Congress intended to deny Davis a remedy by failing to extend Title VII protections to congressional employees, since there had been "no explicit congressional declaration" of legislative intent. The majority rejected vague inferences from congressional inaction as a special factor. These special factors must be objective considerations capable of careful evaluation by a federal court, they warned, not convenient excuses for denying a plaintiff relief.

In *Davis*, Justice Brennan has not exhausted the special factors that conceivably would counsel hesitation in formulating damages remedies in constitutional cause of action cases. However, his decision to limit the review of special factors to the remedy stage hampers the proper consideration of these factors,

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79. 403 U.S. at 396. Special factors that had deterred the Court from implying a federal common law remedy in prior cases were not present in *Bivens*. Those cases involved: (1) the United States as the plaintiff in a tort action with no specific statutory grounds for relief, and (2) attempts to impose liability on congressional employees who had exceeded their congressional authority without violating a constitutional prohibition. *Id.*

80. 442 U.S. at 235 n.11, 246.

81. *Id.* at 235 n.11.

82. *Id.* at 246-47 (quoting *Bivens* v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. at 397) (emphasis in *Davis*).

83. See *Remedies*, supra note 78, at 461-62, for suggestions that "[p]rovisions of the Constitution itself" and "specific grants of legislative powers" might counsel hesitation in awarding a remedy to a plaintiff.
since many of the potential special factors are directly related to
the issue of whether the plaintiff should have the right to be in
court with a cause of action. Such factors as the advisability of
vicarious liability for municipalities,\textsuperscript{84} the feasibility of using
the procedural guidelines developed in section 1983 suits to de-
termine whether related constitutional causes of action should be
allowed,\textsuperscript{85} and the extent to which the courts will allow a plain-
tiff to use a \textit{Bivens}-type action to circumvent the procedural dif-
ficulties that attend available statutory causes of action\textsuperscript{86}
will call for continued judicial balancing of the merits of implying
both a right to judicial action and a right to a particular remedy.
It is difficult to see how the Court can justifiably limit the appli-
cation of "special factors counselling hesitation" to the remedy
issue only.

3. \textbf{Remittance to an equally effective remedy}

\textit{Davis} implicitly criticizes Congress' less than exemplary em-
ployment record and its failure to extend Title VII or other em-
ployment protections to its own employees.\textsuperscript{87} \textit{Davis} produced
"the anomalous result of granting federal employees in noncom-
petitive positions, whom Congress did not intend to protect, a
remedy far more extensive than Congress adopted for federal
employees in the competitive service, whom it did intend to pro-
tect."\textsuperscript{88} If Davis had been covered by Title VII, she would have
been limited under the principles of \textit{Brown v. General Services

84. See Gagliardi v. Flint, 564 F.2d 112, 115-16 (3d Cir. 1977), cert. denied, 438 U.S.
904 (1978); Kostka v. Hogg, 560 F.2d 37, 42-44 (1st Cir. 1977); Kite v. Kelley, 546 F.2d
334, 337 (10th Cir. 1976).

85. The Seventh Circuit noted that "because actions brought under the Civil Rights
Acts and those of the \textit{Bivens}-type are conceptually identical and further the same poli-
cies, courts have frequently looked to the Civil Rights Acts and their decisional gloss for
guidance in filling the gaps left open in \textit{Bivens}-type actions." The Court therefore de-
cided to apply the § 1983 standards for survivorship of a federal claim after the death of
a federal prisoner in a \textit{Bivens}-type case. Green v. Carlson, 581 F.2d 669, 673 (7th Cir.

86. Professor Dellinger noted that "[t]he \textit{Bivens} decision leads to the rather striking
conclusion that section 1983 may simply be unnecessary: money damages, as well as eq-
uitable relief, may be obtained in suits founded directly upon the Constitution." Dellin-
ger, supra note 52, at 1559.

87. 442 U.S. at 247. \textit{See also Comment, The Last Plantation: Will Employment
Reform Come to Capitol Hill?, 28 CATH. U.L. REV. 271 (1979) (hereinafter cited as \textit{Last
Plantation}); North, Congress: The Last Plantation, BARRISTER, Fall 1978, at 46; Isbell,
\textit{Congress as Ol' Massa}, CIV. LIB. REV., Jan./Feb. 1978, at 46.

88. Davis v. Passman, 571 F.2d at 798.
Administration to the exclusive administrative remedies authorized by the Civil Rights Act. Consequently, she would have been restricted to bringing suit against her former employer in his official capacity if she was dissatisfied with her administrative remedies.

In Bivens, the Court began making policy judgments on the availability of judicial relief for plaintiffs alleging constitutional violations. Although the dissenters in Bivens criticized the majority's usurpation of legislative functions, the Court justified its actions by paying lip service to the concept of deferring to legislative judgment if alternative remedies were provided. Since there was "no explicit congressional declaration that persons injured . . . may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress," the Court rationalized that it could fill the gap created by Congress' silence by providing an implied remedy.

In Davis, however, Congress had legislated in the area of judicial relief for federal employees and arguably had concluded that congressional employees could not recover money damages from congressional employers. Bivens initiated a significant infringement by the judicial branch into the arena of policymaking; Davis furthered this encroachment by disregarding Congress' prior action in this area. As Justice Powell warned,

it would not be surprising for Congress to consider today's action unwarranted and to exercise its authority to reassert the proper balance between the legislative and judicial branches. If the reaction took the form of limiting the jurisdiction of federal courts, the effect conceivably could be to frustrate the vindication of rights properly protected by the Court.

89. 425 U.S. 820 (1976). This case held that a federal employee covered by Title VII was required to follow the statutory administrative relief scheme set up under Title VII as his exclusive remedy. The aggrieved employee was not permitted to bypass the procedures set up under Title VII by filing a Bivens-type action in federal court after he missed a statutory deadline for judicial review.

90. 571 F.2d at 798 n.10. The Civil Service Commission has the "authority to enforce the provisions of subsection (a) of this section [42 U.S.C. 2000e-16] through appropriate remedies, including reinstatement or hiring of employees with or without back pay . . . ." 42 U.S.C. § 2000e-16(b) (1976). The aggrieved federal employee may file a civil action against the head of his or her department if he is dissatisfied with the actions taken by the Commission. Id. § 2000e-16(c) (1976).

91. 403 U.S. at 411-12 (Burger, C. J., dissenting); id. at 428 (Black, J., dissenting).
92. 403 U.S. at 397.
93. 442 U.S. at 255 n.4 (Powell, J., dissenting).
The potential for personal liability of members of Congress in the future will undoubtedly motivate Congress to “reform” its employment practices. However, it is unclear under Davis how much leeway Congress will be allowed in structuring an alternative relief scheme. Davis implicitly reserved a judicial veto over the legislature’s right to choose the best alternative for protecting congressional employees. “[W]ere Congress to create equally effective alternative remedies,” the Court declared, “the need for damages relief might be obviated.” The Court’s use of the qualifying word “might” indicates that the judicial branch will evaluate the practicality or effectiveness of alternative remedies created by Congress and will not merely defer to the judgment of the legislature.

The Court probably felt that heightened judicial scrutiny of congressionally-enacted alternative remedies was needed, because Congress could not be presumed to act fairly and objectively in providing alternative remedies for congressional employees. It is conceivable that an exception to the Brown rule of limiting federal employees to alternative statutory relief schemes mandated by Congress could be established for congressional employees due to the Davis idea that Congress cannot deprive its employees of their preexisting implied right to a damages remedy by formulating other remedies. Congress may therefore have difficulty creating a viable alternative to the personal liability of congressmen that was imposed by Davis.

C. A Confusing Distinction?

Justice Brennan’s two-step analysis in Davis presents conceptual and practical difficulties. The focus of the first step of the analysis is on the “nature of the right [plaintiff] asserts,” which determines whether a cause of action will be implied to protect that right. As for the second step, if the requested remedy effectuates the constitutional right being protected, then the judiciary is qualified to grant that remedy.

94. For some suggestions on alternative means of protecting congressional employment rights, see Last Plantation, supra note 87, at 304-10 (1979).
95. 442 U.S. at 248 (emphasis added).
96. Professor Dellinger agreed with this proposition: “The ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review.” Dellinger, supra note 52, at 1548 n.89.
97. 442 U.S. at 239 n.18.
In support of his analysis, Brennan asserted the unique proposition that "[a] plaintiff may have a cause of action even though he be entitled to no relief at all." This statement, supportable for declaratory judgments, is of dubious validity for a money damages remedy. Adjudicating a constitutionally-implied claim when the money damages requested are not available is tantamount to an advisory opinion on the merits of the claim. The Federal Rules of Civil Procedure link the right to bring a claim with the relief the claim is based upon; if the relief is unavailable, the cause of action it rests on must fail also. Justice Brennan's attempt to disregard the linkage between a cause of action and its subsequent remedy only confuses the policy issues involved with both.

Brennan's approach effectively narrows the scope of analysis of constitutional causes of action and distorts the broad policy analysis envisioned by Justice Harlan for these claims. The two-step analysis weights the scales in favor of plaintiffs with constitutional grievances, since narrowing the focus of analysis eliminates many potential stumbling blocks. However, while favoring constitutional plaintiffs, this method of analysis fails to adequately justify allowing these plaintiffs to use the enforcement powers of the courts.

Justice Powell was convinced that Brennan's zeal to protect plaintiffs with constitutional grievances led him to ignore prudential factors that should have been weighed by the Court. Courts must act responsibly if they seek to assume the traditional legislative responsibility of weighing policy factors and determining which parties are entitled to judicial protection. According to Powell, "weighting of relevant concerns," such as comity and separation of powers, must be made before deciding to infer a cause of action from the Constitution. The Davis dissenters were disturbed by the assessment of a money damages remedy against a congressman, not by the nature of the remedy itself. The two-step Davis analysis ignored the broad policy implications of awarding such a remedy against a con-

98. Id.
99. See notes 63-64 and accompanying text supra.
100. Justice Powell protested that "the decision of the Court today . . . avoids our obligation to take into account the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted." 442 U.S. at 254-55 (Powell, J., dissenting).
101. Id. at 252-53.
gressman, and the "legitimate interests of Members of Congress" in carefully avoiding the creation of a statutory cause of action were not taken into account. The Brennan approach does not allow for careful deliberation of all relevant policy factors that should be considered in the constitutional cause of action context.

IV. CONCLUSION

Davis v. Passman was the first definitive Supreme Court ruling on the scope of the doctrine of implied constitutional causes of action since the doctrine's origin in Bivens. Davis formulated a two-part analysis of the propriety of implying causes of action from constitutional guarantees, separating the issues of a cause of action and the remedy for the cause of action. Applying this analysis, the Court first declared its power to award a cause of action to hear the merits of Davis's constitutional claim, since there was no effective alternative means of enforcing the asserted constitutional right. Secondly, the Court concluded that the Constitution impliedly authorized the judiciary to award money damages for plaintiffs in Davis' situation without express congressional approval, as long as the circumstances were "appropriate" for granting the remedy.

The Davis analysis is troubling because it limits the consideration of policy factors to the nature of the constitutional guarantee asserted and the proper remedy to protect that interest. The dissenters in Davis forcefully argued for a more broadly-based analysis of all the factors related to the implication of a constitutional cause of action. Davis could be subject to congressional attack because it directly interferes with the independence of congressional decisionmaking.

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102. Id. at 255.