

WHY *BIVENS* WON'T DIE: THE LEGACY OF *PEOPLES V. CCA DETENTION CENTERS*

LUMEN N. MULLIGAN[†]

ABSTRACT

Interpreting recent Supreme Court precedent, the Tenth Circuit in Peoples v. CCA Detention Centers held that a federal prisoner confined in a privately run prison may not bring a Bivens suit against the employees of a private prison for violations of his constitutional rights when alternative state-law causes of action are available. The author first reviews the Supreme Court's evolving Bivens jurisprudence and turns next to an overview of the Tenth Circuit's opinion. Third, the author argues that, despite the Tenth Circuit's new approach, putative constitutional claims brought under state-law theories of recovery will often be "re-federalized" producing uniform federal liability rules and federal jurisdiction. The author concludes that should the Supreme Court truly wish to end the practice of implying causes of action from the Constitution, it must reconsider a whole host of federal common law and jurisdictional doctrines—a course of action the Court may find unpalatable.

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INTRODUCTION

In what may become a landmark prisoner's rights ruling, the United States Court of Appeals for the Tenth Circuit in *Peoples v. CCA Deten-*

[†] Lecturer of Law, University of Kansas School of Law. B.A., University of Kansas 1995; M.A., University of Colorado 1999; J.D., University of Michigan School of Law 2002. I am especially grateful to Jonathon E. Boatman, Esq.; Professor Bridgette Carr; Professor Jack F. Preis; and Jeffrey L. Stowell, Esq. for their helpful thoughts and comments. Additionally, many thanks are due to my wife Emily for her editorial help and continual support. I also note that I was employed by the Tenth Circuit Court of Appeals when *Peoples v. CCA Detention Centers* was argued. This article reveals no confidential information and reflects no one's views but my own.

*tion Centers*¹ held that a federal prisoner confined in pre-trial detention in a privately run prison operating under contract with the United States Marshal Service may not bring a *Bivens v. Six Unknown Federal Narcotics Agents*² claim against the employees of the federal-contractor prison for violations of his Fifth and Eighth Amendment rights when alternative state-law causes of action are available.³ The *Peoples* case raises several concerns. As the dissent notes, it is at least questionable whether the majority opinion: (a) conforms with Supreme Court precedent, (b) properly rejects the principle of parallelism between prisoner's rights in publicly and privately run prisons, (c) appropriately denigrates the uniformity of federal rights, and (d) deters future constitutional violations in privately run prisons.⁴ Moreover, given the growth in the use of privately run federal prisons,⁵ decisions such as *Peoples*, which, absent diversity, deprive federal prisoner plaintiffs of a federal forum for putative constitutional claims, may well foist portions of the substantial costs of prisoner litigation onto the state courts.⁶ Finally, the *Peoples* case also raises the issue of federalization of putative constitutional tort claims, which is the focus this article.

Many jurists and scholars have leveled challenges to the propriety of implying federal causes of action directly under the Constitution since the Supreme Court first decided *Bivens*.⁷ Many have argued that implying the *Bivens* cause of action directly from the Constitution violates

1. 422 F.3d 1090 (10th Cir. 2005). Indeed, just prior to the publication of this article, the Fourth Circuit adopted the Tenth Circuit's approach to *Bivens* actions brought against employees of privately run federal prisons. *Holly v. Scott*, No. 05-6287, 2006 WL 60276, at *9 (4th Cir. Jan 12, 2006) (adopting *Peoples*).

2. 403 U.S. 388 (1971) (holding that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment). Conventionally speaking a *Bivens* action is the federal equivalent of a 42 U.S.C. § 1983 action. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION 523-44 (2d ed. 1994); SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 16-22 (1995).

3. *Peoples*, 422 F.3d at 1108.

4. *Id.* at 1108-13 (Ebel, J., dissenting).

5. See Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 340-41 (2001) (concluding private prisons will continue to exist and grow in the United States not replacing public prisons, but competing with them and stimulating improvement of the total prison system); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 902-03 (2004); Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2218 (1998) ("The number of inmates in private prisons is expected to grow thirty percent per year.").

6. See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003) (discussing the efficacy of the Prisoner Litigation Reform Act in reducing costs of prisoner litigation in the federal courts).

7. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Carlson v. Green*, 446 U.S. 14, 31-54 (1980) (Rehnquist, J., dissenting); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 52 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978). But see Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1822 (1991) (praising the Court's decision to hold individual officers liable for constitutional violations as genius).

principles of separation of powers.⁸ Several commentators have noted that the ability to imply causes of action is simply beyond the powers conferred upon the federal courts altogether.⁹ Others have noted a host of pragmatic concerns that arise from implying causes of action directly under the Constitution.¹⁰ Given these many concerns, the Court has been loath to expand the scope of the *Bivens* cause of action since 1980.¹¹ Indeed, the Court's post-1980 *Bivens* jurisprudence may be fairly characterized as a "slow death" of the implied constitutional cause of action.¹²

In this article, I argue that the *Peoples* opinion illustrates that the Court's slow-death approach to the *Bivens* claim does not attain the goal of ending federal-court-created liability rules for constitutional torts. I contend that putative constitutional tort claims brought by federal prisoners in privately run prisons under state-law theories of recovery are often embedded with federal issues capable of conferring a federal liability rule and federal jurisdiction. I proceed as follows: part I provides a brief outline of the Court's slow-death methodology to eliminating the *Bivens* cause of action; part II reviews the opinion in *Peoples*; and, part III considers two quandaries lurking in *Peoples*. First, many putative constitu-

8. In *Carlson*, Justice Rehnquist states:

In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.

Carlson, 446 U.S. at 34 (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 250 (1979) (Burger, C.J., dissenting) ("[U]ntil Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed. The Court today encroaches on that barrier."); Merrill, *supra* note 7, at 19–24 (arguing that inferring causes of action violates the principle of separation of powers); Schrock & Welsh, *supra* note 7, at 1127–28 (same).

9. See, e.g., *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."); Schrock & Welsh, *supra* note 7, at 1127 (arguing that the power of judicial review does not include the power to infer causes of action).

10. See, e.g., *Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting); *id.* at 428 (Black, J., dissenting) (asserting that *Bivens* would "choke" the courts with lawsuits and prognosticating that a *Bivens* remedy would open the door for frivolous suits that would inevitably delay an already slow path of justice); Jeffries, *supra* note 7, at 101–02 (arguing that *Brown v. Board of Education* would never have been decided if school districts had been subject to money damages and that constitutional rights would have stagnated); Schrock & Welsh, *supra* note 7, at 1146–71 (considering a detailed list of "realists" concerns).

11. The *Malesko* court noted:

In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.

Malesko, 534 U.S. at 70.

12. See generally Matthew G. Mazefsky, Note, *Correctional Services Corp. v. Malesko: Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639, 661–62 (2003) (concluding that *Malesko* marks the final throws of the cause of action implied directly under the Constitution); Mariana Claridad Pastore, Comment, *Running From the Law: Federal Contractors Escape Bivens Liability*, 4 U. PA. J. CONST. L. 850, 867–69 (2002) (same); Andrea Robeda, Note, *The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence: Correctional Services Corp. v. Malesko*, 33 N.M. L. REV. 401 (2003) (same).

tional torts pursued as state-law claims may be subject to preemption under the government contractor doctrine, which provides a federal liability rule and an avenue back to federal court. Second, many putative constitutional claims that are filed under state-law theories of recovery will incorporate a constitutional rule as the standard of care, which is sufficient under the “necessary construction test” to gain federal subject matter jurisdiction. Finally, I argue that the Court’s slow-death approach to the *Bivens* cause of action achieves its goal of ending the era of implied constitutional causes of action in form only. In substance, many of these putative constitutional actions will be “re-federalized”. I conclude that, if the Court truly wishes to end “the heady days in which [it] assumed common-law powers to create causes of action,”¹³ it must reconsider a much broader scope of jurisdictional and federal common law doctrines; a prospect it may find unattractive.

I. THE SLOW DEATH OF *BIVENS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS*¹⁴

In *Bivens*, the Supreme Court held that a “violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”¹⁵ Mr. Bivens had alleged that federal agents, under color of federal law, illegally restrained him, searched his home, and arrested him.¹⁶ The lower courts dismissed Mr. Bivens’ action, agreeing with the defendants’ argument that Mr. Bivens’ proper remedy lay in a state-law trespass claim.¹⁷ The Supreme Court reversed.¹⁸

The *Bivens* Court rejected the notion that the protections afforded under the Fourth Amendment are strictly co-extensive to those found under state law.¹⁹ Indeed, the Court held that the Fourth Amendment is an independent check upon federal power consistently applied throughout the country, which “is not tied to the niceties of local trespass laws.”²⁰ Moreover, the Court held that the interests protected under state-law trespass and invasion of privacy doctrines and those interests protected under the Fourth Amendment may be inconsistent with, or even hostile to, each other.²¹ For example, the Court noted that to bring a state-law trespass claim the plaintiff must show that he did not allow the

13. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

14. 403 U.S. 388 (1971). For a fuller discussion of the *Bivens* cause of action, Professor Chemerinsky provides a thorough review. CHEMERINSKY, *supra* note 2, at 523–44.

15. *Bivens*, 403 U.S. at 389.

16. *Id.*

17. *Bivens v. Six Unknown Fed. Narcotics Agents*, 409 F.2d 718 (2d Cir. 1969); *Bivens v. Six Unknown Fed. Narcotics Agents*, 276 F. Supp. 12 (E.D.N.Y. 1967).

18. *Bivens*, 403 U.S. at 390.

19. *Id.* at 392–94.

20. *Id.* at 393–94.

21. *Id.* at 394.

defendant into the home.²² But the Court reasoned that an officer “who demands admission under a claim of federal authority stands in a far different position” from the typical trespasser.²³ As a result, the Court concluded that, in most cases, a mere invocation of authority by a federal official will cause the average citizen to allow the official access to the home, rendering trespass doctrine an ineffective remedy against abuses of federal power.²⁴

Finally, the Court held that the provision of monetary damages was the appropriate remedy for a violation of Fourth Amendment rights.²⁵ The Court acknowledged that it lacked a statutory basis for providing this remedy and that “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation.”²⁶ Nevertheless, the Court held that it could imply such a cause of action directly from the Constitution when three conditions were met. First, the implication is appropriate when there is a federal statute (viz., 42 U.S.C. § 1983) granting a general right to sue for constitutional violations.²⁷ Second, the implication is appropriate when there are no special factors counseling hesitation, such as making a claim upon the federal fisc, weighing against extending a cause of action.²⁸ Third, the implication is appropriate when there is no explicit congressional declaration stating that money damages may not be awarded for constitutional violations caused by federal agents.²⁹

Despite the expansive language in *Bivens* itself, the Court has held that a *Bivens* action lies against federal officers for money damages on only two other occasions.³⁰ In *Davis v. Passman*,³¹ the Court held that plaintiff could bring a cause of action for monetary damages for violations of the Due Process Clause of the Fifth Amendment.³² In *Carlson v. Green*,³³ the Court held that a federal claim lies against federal prison officials for violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment.³⁴

22. *Id.* at 394.

23. *Id.*

24. *Id.*

25. *Id.* at 395.

26. *Id.* at 396.

27. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). What the Court means by “general right to sue” in this context is far from clear. Section 1983 is limited to actions against state officials. *See, e.g., Wheedlin v. Wheller*, 373 U.S. 647, (1963) (holding federal agents are not liable under 42 U.S.C. § 1983). Thus, at the time *Bivens* was decided there was not a general right to sue federal agents for constitutional violations, merely a general right to sue state agents.

28. *Bivens*, 403 U.S. at 396.

29. *Id.* at 396–97.

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

31. 442 U.S. 228 (1979).

32. *Id.* at 243–44.

33. 446 U.S. 14 (1980).

34. *Id.* at 20.

Faced with a series of rebukes concerning the appropriateness of implying causes of action directly under the Constitution, the Court, since *Carlson*, has restricted the scope of *Bivens* claims.³⁵ In *Chappell v. Wallace*,³⁶ issued just three years after *Carlson*, the Court refused to hear a *Bivens* action brought by military personnel who, lacking any remedy, alleged that the unconstitutional actions of their superior officers injured them.³⁷ Harkening to the limitations upon implying causes action first laid out in *Bivens* itself,³⁸ the Court held that a special factor counseled hesitation in hearing a *Bivens* claim in such circumstances: namely “the unique disciplinary structure of the Military Establishment and Congress’ activity in the field.”³⁹ The Court, in *United States v. Stanley*,⁴⁰ later reaffirmed that a *Bivens* action is unavailable against members of the military “whenever the injury arises out of activity ‘incident to [military] service.’”⁴¹

In addition to refusing to hear military claims, the Court now broadly allows Congress to create alternative federal remedies to a *Bivens* action.⁴² In *Bush v. Lucas*,⁴³ the Court declined to hear a *Bivens* claim alleging First Amendment violations brought by government employees when they had access to alternative “comprehensive procedural and substantive provisions giving meaningful remedies against the United States.”⁴⁴ Relying on the notion, introduced in *Passman*⁴⁵ and *Carlson*,⁴⁶ that Congress can create alternative remedies to a *Bivens* claim, the *Bush* Court ruled that the congressionally installed administrative system could supplant a *Bivens* cause of action.⁴⁷ The *Bush* Court, however, went one step further than the *Passman* and *Carlson* decisions. In *Passman* and *Carlson*, the Court reasoned that alternative congressionally created remedies to a *Bivens* action were acceptable as long as they were “viewed as equally effective” to a *Bivens* claim.⁴⁸ The Court in *Bush*, by contrast, found a congressionally created alternative remedy sufficient to bar a *Bivens* action, even though the administrative scheme’s “remedies do not provide complete relief for the plaintiff,”⁴⁹

35. See cases cited *supra* note 7.

36. 462 U.S. 296 (1983).

37. *Id.* at 303–04.

38. *Bivens*, 403 U.S. at 396 (citing “no special factors counseling hesitation”).

39. *Chappell*, 462 U.S. at 304.

40. 483 U.S. 669 (1987).

41. *Id.* at 681 (citing the “incident to service” test from *Feres v. United States*, 340 U.S. 135, 144 (1950)).

42. See *Bush v. Lucas*, 462 U.S. 367 (1983).

43. 462 U.S. 367 (1983).

44. *Id.* at 367.

45. *Passman*, 442 U.S. at 248.

46. *Carlson*, 446 U.S. at 18–20.

47. *Bush*, 462 U.S. at 386.

48. *Carlson*, 446 U.S. at 19; *Passman*, 442 U.S. at 248.

49. *Bush*, 462 U.S. at 388. See also David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of*

so long as Congress “provide[d] meaningful remedies.”⁵⁰ Following this same tack, the Court in *Schweiker v. Chilicky*⁵¹ barred *Bivens* claims filed by disabled social security beneficiaries who lacked monetary relief for emotional distress due to delays in receiving their Social Security benefits.⁵² As in *Bush*, the Court relied upon Congress’ creation of alternative, although not equivalent, administrative relief to prohibit the *Bivens* claim.⁵³

The Court further limited who may be a proper defendant in a *Bivens* action in *FDIC v. Meyer*.⁵⁴ Here, the Court held that the logic of *Bivens* itself—which is founded upon individual, not agency, liability—does not support hearing *Bivens* claims against federal agencies.⁵⁵ The *Meyer* Court concluded that “[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government.”⁵⁶ As the *Bivens* Court itself held that such a result should counsel hesitation in implying a cause of action directly under the Constitution,⁵⁷ the *Meyer* Court took this potential fiscal impact as a ground for barring a *Bivens* claim.⁵⁸

Although the Court has spent fifteen years chipping away at the edges of the *Bivens* cause of action, prior to *Correctional Services Corporation v. Malesko*,⁵⁹ the following generalizations could be made about the Court’s *Bivens* jurisprudence. First, a *Bivens* claim was considered a free-standing, generally implied, cause of action independent of state law.⁶⁰ Second, the Court considered it fundamental that federally employed agents be subject to uniform rules, be it under *Bivens* or a congressionally created alternative for constitutional violations.⁶¹ Third, a

the Bivens Action, 19 GA. L. REV. 683, 694 (1985) (contending that after *Davis* and *Carlson* the Court abandoned the “equally effective” approach).

50. *Bush*, 462 U.S. at 386.

51. 487 U.S. 412 (1988).

52. *Schweiker*, 487 U.S. at 424–25.

53. *Id.* at 429 (“Congress . . . has addressed the problems created by state agencies’ wrongful termination of disability benefits” through the creation of administrative remedies).

54. 510 U.S. 471 (1994).

55. *Meyer*, 510 U.S. at 473.

56. *Id.* at 486 (internal citation omitted).

57. *Bivens*, 403 U.S. at 396 (noting that in the instant case, “we are not dealing with a question of ‘federal fiscal policy’”).

58. *Meyer*, 510 U.S. at 486.

59. 534 U.S. 61 (2001).

60. *Bivens*, 403 U.S. at 392–94; Robeda, *supra* note 12, at 405; Pastore, *supra* note 12, at 854; CHEMERINSKY, *supra* note 2, at 526–31. At least one commentator finds that a *Bivens* remedy is still “generally” available post-*Malesko*. See Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Round Table Dialogue*, 19 TOURO L. REV. 625, 678 (2003) (Professor Chemerinsky asserting: “[A]lthough the Court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned.”).

61. See *Schweiker*, 487 U.S. at 424–29 (finding uniform and comprehensive administrative relief available); *Bush*, 462 U.S. at 368 (same); *Carlson*, 446 U.S. at 23 (“the liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules.”);

Bivens claim could only be brought against individual defendants—not agencies of the federal government.⁶² Fourth, although the Court had only explicitly approved of *Bivens* actions for violations of the Fourth Amendment, the Due Process Clause of the Fifth Amendment, and the Cruel and Unusual Punishment Clause of the Eighth Amendment, the courts of appeals considered the *Bivens* action generally available for any constitutional violation.⁶³ Fifth, a *Bivens* action was not appropriate when Congress provided meaningful, alternative forms of relief, even if that relief did not provide plaintiffs with complete satisfaction.⁶⁴ Finally, *Bivens* claims were precluded in the absence of affirmative action by Congress when there were special factors counseling hesitation.⁶⁵ These

Bivens, 403 U.S. at 393-94 (holding that the Fourth Amendment “is not tied to the niceties of local trespass laws.”).

62. See *Meyer*, 510 U.S. at 471. Some consider this focus upon individual liability an ingenious means of skirting sovereign immunity and like doctrine. Fallon & Meltzer, *supra* note 7, at 1822 (praising the Court’s decision to hold individual officers liable for constitutional violations as genius). Others, however, see this focus on individual liability as little more than form over substance. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L. J. 65-7 (1999) (arguing that as a result of governmental indemnification and government-provided defense individuals are not in practice liable under *Bivens*). Given that the Department of Justice’s Constitutional and Specialized Tort Branch is devoted to defending federal officers against *Bivens* suits at public expense, Pillard’s point is a strong one. See <http://www.usdoj.gov/civil/brochure/brochure.html> (last visited Jan. 30, 2006). Moreover, the key premise of the *Meyer* decision—that individual, not agency, liability is the key to deterrence—runs contrary to the fundamental tort principle of respondeat superior, as well as common sense. Compare *Meyer*, 510 U.S. at 485 (“It must be remembered that the purpose of *Bivens* is to deter the officer.”) with DAN B. DOBBS, *THE LAW OF TORTS* 907 (2000) (considering, in the context of justifying the respondeat superior rule, that “the best deterrence is to impose liability upon the employer, who will then seek to avoid his own liability by exercising his considerable control over employees to discourage their torts.”).

63. See *Carlson* 446 U.S. at 23 (Eighth Amendment); *Passman*, 442 U.S. at 228 (Fifth Amendment); *Bivens*, 403 U.S. at 388 (Fourth Amendment). The lower courts, however, have heard *Bivens* claims for a broader set of constitutional violations. See, e.g., *Switzer v. Coan*, 261 F.3d 985, 990 (10th Cir. 2001) (“Plaintiff’s allegations of unconstitutional delegation of Article III authority to law clerks and staff attorneys in pro se proceedings would appear to state [a *Bivens*] claim.”); *Ruff v. Runyon*, 258 F.3d 498, 499 (6th Cir. 2001) (remanding a Ninth Amendment *Bivens* claim); *Hammond v. Kunard*, 148 F.3d 692, 694–95 (7th Cir. 1998) (upholding a Sixth Amendment *Bivens* claim against a qualified immunity challenge); *National Commodity and Barter Ass’n v. Archer*, 31 F.3d 1521, 1527 (10th Cir. 1994) (“We likewise hold that if claims of violations of First . . . Amendment rights are proven, then a *Bivens* remedy may be afforded to the plaintiffs for recovery of damages for such constitutional wrongs.”).

64. See *Schweiker*, 487 U.S. at 424–29; *Bush*, 462 U.S. at 368, 386–88. This alternative remedy doctrine raises many issues, which are beyond the scope of this article but worthy of note. See, e.g., Susan Brandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 SO. CAL. L. REV. 289 (1995) (arguing that *Bivens* stands for the proposition that judicial enforcement of constitutional rights through monetary damages should not depend on action by Congress); Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087 (1992) (arguing that *Bivens* actions are available except where Congress clearly states its intent to supersede them); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1129 (1989) (“It is surprising, as I have indicated, that *Bivens* decisions, while employing the form of constitutional interpretation, concede a willingness to be reversed by Congress”); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552–53 (1972) (“[W]here the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy.”).

65. See Nichol, *supra* note 64, at 1142–53 (critiquing the Court’s “special factors” approach).

factors included: (a) potential direct claims upon the federal fisc,⁶⁶ and (b) the potential to interfere with the unique nature of the military.⁶⁷

The Supreme Court's recent *Malesko* decision may further limit the general availability of the *Bivens* action dramatically.⁶⁸ Mr. Malesko, a federal prisoner living in a privately run halfway house, had a heart condition that entitled him to use the elevator to access his fifth floor room despite the general policy requiring inmates to use the stairs.⁶⁹ One evening upon his return, an employee of the halfway house required him to climb the stairs, which resulted in Mr. Malesko suffering a heart attack.⁷⁰ Mr. Malesko then brought a *Bivens* suit alleging Eighth Amendment violations against the halfway house, which was run by a private corporation under contract with the United States Bureau of Prisons.⁷¹ The Court held that such a suit could not be brought against federal contractors who operate prisons, providing three rationales for its decision.⁷²

First, the Court stated that the purpose of a *Bivens* action is to deter individual federal officers from committing constitutional violations—not governmental agencies or corporate entities.⁷³ Relying heavily on *Meyer*, the Court held that “threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.”⁷⁴ Reasoning by analogy to *Meyer*, the *Malesko* Court stated that if corporate defendants were available for suit under *Bivens*, prisoner plaintiffs would focus their suits against the corporate employer and not the individual directly responsible for the injury.⁷⁵ The Court concluded that the logic of *Meyer* foreclosed hearing a *Bivens* action against a corporate entity.⁷⁶

While this no-entity-liability principle was seemingly sufficient to decide the case, the Court went on to provide two more rationales for its decision.⁷⁷ The second factor provided by the *Malesko* Court as ground-

66. *Meyer*, 510 U.S. at 486; *Bivens*, 403 U.S. at 396.

67. *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). The courts of appeals have relied upon several other special factors to bar a *Bivens* action. *See, e.g., Beattie v. Boeing Co.*, 43 F.3d 559, 563 (10th Cir. 1994) (holding that “that the predominant issue of national security clearances amounts to such a special factor counseling against recognition of a *Bivens* claim in this case.”).

68. *See, e.g., Mazefsky, supra* note 12 (concluding that *Malesko* marks the final throws of the cause of action implied directly under the Constitution); *Robeda, supra* note 12 (same); *Pastore, supra* note 12 (same). *But see Chemerinsky & Schwartz, supra* note 60, at 678 (stating the *Malesko* does not overrule the core holding of *Bivens*).

69. *Malesko*, 534 U.S. at 64.

70. *Id.*

71. *Id.* at 63.

72. *Id.*

73. *Id.* at 71.

74. *Id.* at 70; *see also Meyer*, 510 U.S. at 485 (“If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. [T]he deterrent effects of the *Bivens* remedy would be lost.”).

75. *Malesko*, 534 U.S. at 71.

76. *Id.*

77. There is a strong argument to be had that these following two rationales, then, are merely obiter dicta.

ing for its ruling was the need to maintain parity between the remedies afforded prisoners at privately operated facilities and those at government-operated facilities (the “symmetry principle”).⁷⁸ Thus, the Court rejected Mr. Malesko’s *Bivens* claim against the private prison, at least in part, because federal prisoners incarcerated in federally run facilities do not have plaintiff’s contemplated remedy.⁷⁹ That is to say, because federal prisoners in government-run facilities may not bring a *Bivens* suit against the guard’s employer (i.e., the United States or the Bureau of Prisons) federal prisoners in privately run prisons may not bring *Bivens* suits against their corporate jailors.⁸⁰ If such an asymmetry is to be imposed, the Court reasoned that Congress was better positioned to impose it.⁸¹

Finally, the Court reasoned that the existence of alternative remedies precluded a *Bivens* claim (the “alternative-relief principle”).⁸² The Court pointed to two alternative remedies available to Mr. Malesko.⁸³ The Court first stated, unexceptionally given its prior case law in *Bush* and *Chilicky*, that the possibility of administrative relief within the Bureau of Prisons (i.e., alternative, congressionally created, administrative relief) precludes a *Bivens* claim.⁸⁴ In a move that was quite exceptional given its rulings in *Bivens* and *Carlson* which reject the notion that state torts sufficiently protect constitutional interests, the Court stated that Mr. Malesko’s claim was quintessentially one for negligence and, thus, a state-law tort claim was available to remedy his constitutional claim.⁸⁵

The Court’s over-determination of its holding in *Malesko* has only fostered confusion. Even assuming each *Malesko* factor (i.e., the no-entity-liability principle, the symmetry principle, and the alternative-relief principle) is sufficient standing alone to bar a *Bivens* claim,⁸⁶ the *Malesko* decision raises the further question of whether the existence of alternative federal remedies, alternative state-law remedies, or both

78. *Malesko*, 534 U.S. at 71–72.

79. *Id.* at 71.

80. *Id.* at 72.

81. *Id.*

82. *Id.* (finding that Mr. Malesko was not “confronted with a situation in which claimants in [his] shoes lack effective remedies.”).

83. *Id.* at 72–74.

84. *Id.* at 74; *see also* 28 C.F.R. § 542.10; *Schweiker*, 487 U.S. at 413 (holding that the existence of alternative federal remedies is sufficient, standing alone, to bar a *Bivens* suit); *Bush*, 462 U.S. at 368 (same).

85. *Compare Malesko*, 534 U.S. at 73 with *Carlson v. Green*, 446 U.S. 14, 23 (1980) (“the liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules.”) and *Bivens*, 403 U.S. at 393–94 (holding that the Fourth Amendment “is not tied to the niceties of local trespass laws.”).

86. There are good reasons to make this assumption. *See Meyer*, 510 U.S. at 484–85 (holding that the no-entity-liability principle, standing alone, is sufficient to bar a *Bivens* action); *Schweiker*, 487 U.S. at 421 (holding that the federal alternative relief principle, standing alone, is sufficient to bar a *Bivens* action); *Bush*, 462 U.S. at 388–90 (same).

barred Mr. Malesko's *Bivens* claim.⁸⁷ If *Malesko*, properly understood, endorses the view that the existence of a state-law remedy standing alone precludes a *Bivens* action against a private defendant, then the *Malesko* Court has radically departed from its past *Bivens* jurisprudence.⁸⁸ This issue is of particular importance in *Bivens* suits against employees of privately run federal prisons because in such suits *Malesko*'s no-entity-liability principle and the symmetry principle are inapposite.⁸⁹ Moreover, given that the Bureau of Prisons' administrative remedies are available only to persons under its authority,⁹⁰ a suit brought by a federal pre-trial detainee who is under the authority of the U.S. Marshal Service would test whether the existence of a state-law remedy standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.

II. PEOPLES V. CCA DETENTION CENTERS⁹¹

The Tenth Circuit faced just such a perfect storm of facts in *Peoples*. In a case of first impression in the federal courts of appeals post *Malesko*,⁹² the Tenth Circuit held that the existence of a state-law remedy

87. *Malesko*, 534 U.S. at 72 (presenting both sets of alternative remedies as grounds for barring a *Bivens* claim).

88. See *supra* notes 60–67 and accompanying text. Indeed, prior to *Malesko*, the Courts of Appeals regularly heard *Bivens* claims against private defendants acting under color of federal law without a determination that plaintiff lacked a state-law alternative remedy. See, e.g., *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698 (6th Cir. 1996) (holding that a *Bivens* claim may be brought against a private actor if the defendant was acting under color of federal law); *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1337 (9th Cir. 1987) (same); *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984) (same); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1222–23 (5th Cir. 1982) (same); *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 308 (D. Mass. 1999) (same). The First Circuit, pre-*Malesko*, appears to assume that such an action is appropriate. See *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447, 449 (1st Cir. 1983). Prior to *Malesko*, three courts of appeals had declined to answer whether a plaintiff may assert a *Bivens* claim against a private actor. See *DeVargas v. Mason & Hanger Silas Mason Co., Inc.*, 844 F.2d 714, 720 n.5 (10th Cir. 1988); *Morast v. Lance*, 807 F.2d 926, 930–31 n.5 (11th Cir. 1987); *McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 75–76 (8th Cir. 1976). Notably, prior to *Malesko*, only the First Circuit, in dicta, had stated that “[w]hile federal officers may, at times, be subject to suit for unconstitutional behavior . . . there is no cause of action against private parties acting under color of federal law or custom.” *Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 932 n.8 (1st Cir. 1974). As is illustrated above, however, the First Circuit appeared to reject this dicta by 1983. See *Gerena*, 697 F.2d at 449. In any event, no circuit predicated the existence of a *Bivens* claim upon the absence of a state-law remedy.

89. This question was specifically reserved by the Court. *Malesko*, 534 U.S. at 65 (“the parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.”). In fact, both parties to the *Malesko* case assumed that a *Bivens* action would lie against employees of privately run prisons, which may have affected the Court's decision. See Brief of Petitioner, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 53566, at *13; Brief of Respondent, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 883679 at *8, *12.

90. 28 C.F.R. § 542.10 (2001) (Bureau of Prisons administrative remedies “do [] not apply to inmates confined in other non-federal facilities”).

91. 422 F.3d 1090 (10th Cir. 2005).

92. *But see Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004) (assuming in dicta that plaintiff may bring a *Bivens* claim against a guard at a privately run, federal, pre-trial, detention center); *Sanusi v. INS*, 100 Fed. Appx. 49, 52 n.3 (2d Cir. 2004) (unpublished) (remanding the question). Two District Courts have substantively addressed the issue. See *Sarro v. Cornell*

standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.⁹³

Peoples is a consolidated appeal combining two suits, both brought pro se by Mr. Peoples in the District of Kansas.⁹⁴ In the first case (“*Peoples I*”),⁹⁵ Mr. Peoples brought a *Bivens* claim alleging that, while being held in pretrial detention, staff at the privately run prison failed to protect him from other inmates after he repeatedly requested protection.⁹⁶ As a result of the staff’s failure to protect him, Mr. Peoples contends that other inmates beat him with padlocks, chains, and full soda cans.⁹⁷ Mr. Peoples clearly states an Eighth Amendment violation sufficient to survive a *Federal Rule of Civil Procedure* 12(b)(6) motion if he has a means of bringing the cause of action.⁹⁸ Under the Eighth Amendment, prison officials have an obligation to protect prisoners from attack by other prisoners.⁹⁹ As the Supreme Court has held, a “prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”¹⁰⁰ As such, if Mr. Peoples had been housed in a government-run prison, these allegations would have given rise to a *Bivens* claim.¹⁰¹ The district court in *Peoples I* reasoned, however, that because Mr. Peoples was housed in a privately run facility and a state-law tort claim was available, *Malesko* precluded a *Bivens* ac-

Corrs., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003) (holding that existence of a state-law remedy standing alone does not foreclose a *Bivens* action against employees of a federal contractor running a private prison); see also *Jama v. INS*, 343 F. Supp. 2d 338, 362 (D.N.J. 2004) (adopting *Sarro*). At the time this article was written, there apparently was no scholarly treatment of this issue.

93. *Peoples*, 422 F.3d at 1103 (“Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under . . . state . . . law against the individual defendant for the harm created by the constitutional deprivation.”).

94. *Id.* at 1093. Mr. Peoples did obtain counsel for his appeal of *Peoples I*.

95. *Peoples v. CCA Detention Ctrs.*, No. Civ.A. 03-3129-KHV, 2004 WL 74317 (D. Kan. Jan. 15, 2004) (Vratil, J.) (unpublished) [hereinafter *Peoples I*].

96. *Peoples*, 422 F.3d at 1093–94.

97. *Id.* at 1094.

98. The court notes that because Mr. Peoples is a pretrial detainee, his claim is technically a Fifth Amendment due process claim. *Id.* at 1094 n.1. Nevertheless, because the standard is the same under either the Fifth or Eighth Amendment, the court, for ease of reference, refers to this failure to protect claim as an Eighth Amendment violation. *Id.* I follow the court in this regard.

99. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citation omitted, alteration omitted). For the purposes of this article, I will assume that federal contractors, and their employees, act under color of federal law when operating a federal prison. See *Rosborough v. Mngt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003) (holding, in light of *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72n.5 (2001) and *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (holding that a 42 U.S.C. § 1983 plaintiff may sue privately employed prison guards because they are state actors operating under color of state law). Neither the Tenth Circuit nor the District Courts in *Peoples* address the element of acting under color of federal law. But given the strong parallels between a *Bivens* and § 1983 action, there is good reason to believe that these courts would apply the Fifth Circuit’s *Rosborough* approach in the *Bivens* context.

100. *Farmer*, 511 U.S. at 828.

101. See, e.g., *Benefield v. McDowall*, 241 F.3d 1267 (10th Cir. 2001) (holding that deliberate exposure of federal inmate housed in a federally run penitentiary to risk of harm at hands of other inmates violates the Eighth Amendment giving rise to a *Bivens* claim).

tion.¹⁰² The district court, therefore, dismissed the claim for lack of subject matter jurisdiction.

In the second case (“*Peoples II*”),¹⁰³ Mr. Peoples alleged three *Bivens* claims.¹⁰⁴ The first claim arose out of the thirteen months he spent in administrative segregation on the direct order of the Marshal Service, who considered him a flight risk.¹⁰⁵ Mr. Peoples did not receive written notice of the reason for his segregation upon his request and he was not allowed a hearing on his segregation status for five months, which he contended violated his Fifth Amendment due process rights.¹⁰⁶ Mr. Peoples also alleged that while in segregation he lacked sufficient access to legal materials and that his phone calls to his attorney were monitored, both of which he contended violated his due process rights.¹⁰⁷ The district court in *Peoples II* rejected the notion that *Malesko* bars a *Bivens* suit against employees of a privately run prison, but nevertheless dismissed all three due process claims on the merits for failure to state a claim upon which relief may be granted.¹⁰⁸

On appeal, the Tenth Circuit first held that the *Peoples I* district court erred in treating as jurisdictional the issue of whether the existence of a state-law relief precludes a *Bivens* action.¹⁰⁹ The circuit relied primarily on *Bell v. Hood*¹¹⁰ in its jurisdictional analysis.¹¹¹ In *Bell*, the Supreme Court held that complaints seeking to recover directly under the Constitution raise a federal question sufficient to ground subject matter jurisdiction, excepting two scenarios.¹¹² The Tenth Circuit concluded that neither exception set forth in *Bell* applied.¹¹³ First, the court assumed without discussion that the *Peoples* complaints were not artfully pleaded merely to gain federal jurisdiction.¹¹⁴ Second, the court quickly dispensed with the notion that Mr. Peoples’ complaints were insubstantial.¹¹⁵ The court concluded, then, that *Bell* directly controlled and ad-

102. *Peoples*, 422 F.3d at 1094.

103. *Peoples v. Corr. Corp. of Am.*, No. 02-3298, 2004 WL 2278667 (D. Kan. Mar. 26, 2004) (Murgia, J.) (unpublished) [hereinafter *Peoples II*].

104. *Id.* at *1.

105. *Peoples*, 422 F.3d at 1094.

106. *Id.*

107. *Id.*

108. *Id.* at 1095.

109. *Id.* at 1095–96. Judge Ebel, who generally dissents from the majority’s opinion, concurs in this aspect of the majority’s decision. *Peoples*, 422 F.3d at 1108 (Ebel, J., dissenting).

110. 327 U.S. 678 (1946).

111. *Peoples*, 422 F.3d at 1095.

112. *Bell*, 327 U.S. at 681–82.

113. See *Peoples*, 422 F.3d at 1096.

114. *Id.* at 1095 (holding that complaints that “clearly appear[] to be immaterial or made solely for the purpose of obtaining jurisdiction” should be dismissed under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction).

115. *Id.* at 1095 (discussing insubstantiality of the complaint); see also *Bell*, 327 U.S. at 682–83 (holding that complaints that are “wholly insubstantial and frivolous” should be dismissed under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction).

monished litigants not to conflate the lack of a cause of action with lack of federal subject matter jurisdiction.¹¹⁶

Next, the Tenth Circuit held “that there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state . . . causes of action for damages are available to the plaintiff.”¹¹⁷ The circuit recognized that this holding was in tension with the Supreme Court’s *Carlson* decision.¹¹⁸ Nevertheless, by adopting something akin to a last-in-time rule, which may be a questionable interpretive tool,¹¹⁹ the Tenth Circuit reasoned that given the Supreme Court’s evolving *Bivens* jurisprudence it was most prudent to resolve ambiguities among the Court’s decisions by relying upon its most recent pronouncements on the topic made in *Malesko*.¹²⁰ The circuit concluded that “the purpose of *Bivens* is only ‘to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally [as in *Carlson*], or to provide a cause of action for a plaintiff who lacked any alternative remedy [as in *Davis*].’”¹²¹ As a consequence, the Tenth Circuit held that the existence of an alternative state-law remedy bars a *Bivens* claim against employees of federal contractors.¹²²

The court next turns its attention, *sua sponte*, to the existence of alternative state-law claims for Mr. Peoples’ *Bivens* suits.¹²³ First, it holds that Mr. Peoples could have brought his Eighth Amendment, failure-to-protect claim under Kansas common law as prison guards owe a duty of reasonable care to safeguard a prisoner in their custody from attack by

116. *Peoples*, 422 F.3d at 1095–96 n3. See also Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 643 (2005) (arguing that federal courts err by treating factual elements of substantive federal causes of action, such as an interstate commerce or employee numerosity requirement, as going to the jurisdiction of the federal court). Although a full discussion of this issue is beyond the scope of this article, there is reason to think that the Tenth Circuit’s jurisdictional analysis is wrong-headed given its case-by-case implication approach. Here, the court dismisses Mr. Peoples’ claims without considering the merits of his claim or the merits of an affirmative defense. The dismissal of Mr. Peoples’ claims walk and talk like a common law plea in abatement not a demurrer, corresponding more to a FED. R. CIV. P. 12(b)(1) motion than to a FED. R. CIV. P. 12(b)(6). Cf. Wasserman, *supra*, at 649–53 (discussing the “first phase” of litigation where jurisdictional questions are properly addressed).

117. *Peoples*, 422 F.3d at 1101.

118. *Id.*

119. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is [the Supreme] Court’s prerogative alone to overrule one of its precedents.”).

120. *Peoples*, 422 F.3d at 1102.

121. *Id.* at 1101 (quoting *Malesko*, 534 U.S. at 70). It is worth noting that the Tenth Circuit chose not to refer to this text from *Malesko* as a holding, but rather referenced it as “statements.” This suggests, perhaps, that even the Tenth Circuit considers *Malesko*’s presentation of the alternative-remedy principle as obiter dicta. Nevertheless, from the Tenth Circuit’s point of view, the status of this rationale as dicta is immaterial. See *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (“[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.”).

122. *Peoples*, 422 F.3d at 1101.

123. *Id.* at 1103.

other inmates.¹²⁴ The court then considers Mr. Peoples' Fifth Amendment, monitoring-of-his-phone-conversations claim.¹²⁵ The Tenth Circuit again concludes that a Kansas cause of action, this time implied from criminal statutory prohibitions, exists to remedy the alleged injury.¹²⁶ The court then dismissed both claims for failure to state a claim upon which relief may be granted because Mr. Peoples had alternative state-law causes of action.¹²⁷

The Tenth Circuit cryptically treats Mr. Peoples two remaining Fifth Amendment claims (*viz.*, improperly being held in segregation and inadequate access to the courts). The court states that it "need not even look to state law causes of action because we agree with the District Court that Mr. Peoples's allegations . . . do not rise to the level of a constitutional violation."¹²⁸ The court then proceeds to consider these *Bivens* claims on their constitutional merits and dismisses them under Rule 12(b)(6).¹²⁹ The court, however, does not state whether an alternative state-law cause of action exists for these claims nor does it state whether these *Bivens* claims, although failing on the merits, were appropriately brought as *Bivens* actions.¹³⁰ One suspects that the Tenth Circuit took this approach precisely because Kansas law does not provide an alternative tort remedy for these Fifth Amendment violations.¹³¹ While this lack of clarity does not offer direction to future litigants or the lower courts, it appears fair to summarize the court's holding as producing a doctrine where *Bivens* suits must be reviewed claim-by-claim to determine whether an alternative state-law action is available. Under this regime, *Bivens* claims without a state-law analogue will (presumably) be legitimately filed and proceed to an on-the-merits review, while *Bivens* claims with a state-law analogue should be dismissed for failure to state a claim.¹³²

124. *Id.* at 1104 (quoting *Washington v. State*, 839 P.2d 555, 559 (Kan. Ct. App. 1992)).

125. *Id.* at 1105.

126. *Id.* at 1107-08 (citing KAN. STAT. ANN. §§ 21-4001 to -4002 (2005)); Kan. Op. Atty. Gen. No. 93-93 (1993)).

127. *Peoples*, 422 F.3d at 1105; *see also id.* at 1108.

128. *Id.* at 1105.

129. *Id.*

130. *See id.* at 1113 (Ebel, J., dissenting) (discussing this point).

131. Proving a negative is always difficult, but the author of this article diligently searched for an alternative Kansas remedy to the improper administrative detention and inadequate access to the courts claims against a private actor. The closest conceivable action to the administrative detention claim would be a false imprisonment claim. *See Brown v. State*, 927 P.2d 938, 940 (Kan. 1996) (providing elements of false imprisonment). The author was unable to unearth a Kansas-law analogue to the access to the courts claim.

132. The dissent strongly critiques this approach. "Thus, what we have here under the majority opinion is a framework where some, but not all, due process violations should be brought as *Bivens* actions and some should be brought as state-law tort suits." *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting). Such an approach is "an intensely fact-driven endeavor," *id.* at 1112, that is inappropriate given that the doctrinal inquiry here is whether a cause of action exists, providing "yet another reason why the majority's reasoning is flawed." *Id.* at 1113.

Assuming that the *Peoples* court¹³³ correctly reads *Malesko* to command this result, the Tenth Circuit faces a prima facie Supremacy Clause problem.¹³⁴ Under the traditional understanding of a *Bivens* claim as a free-standing cause of action independent of state law,¹³⁵ it could appear that the circuit has employed a “reverse preemption” doctrine whereby a state-law claim preempts a federal *Bivens* claim. That it to say, one could read *Peoples* as holding that the plaintiff had two *Bivens* claims that were preempted by the existence of Kansas tort claims. Of course, such a reverse preemption theory is doctrinal heresy.¹³⁶

While the court does not address this issue directly, the better reading of *Peoples* illustrates that the Tenth Circuit avoids this prima facie Supremacy Clause problem. The court achieves this result by implicitly rejecting the traditional understanding of the *Bivens* claim.¹³⁷ Instead of viewing *Bivens* as implied generally, the circuit views *Bivens* actions as implied claim-by-claim. This understanding is first evidenced during the court’s claim-by-claim analysis of whether analogous state-law actions exist. The court concludes each of these analyses by rendering a claim-specific ruling on whether to imply a *Bivens* cause of action.¹³⁸ This claim-by-claim approach is further evidenced during the court’s discussion of the *Malesko* symmetry principle.¹³⁹ The Tenth Circuit recognizes that under its ruling federal prisoners incarcerated in privately run prisons lack a remedy (i.e., a *Bivens* suit against individual officers) that is available to federal prisoners held in government-run facilities.¹⁴⁰ While recognizing this as violating *Malesko*’s symmetry principle, the court states, “it was not created by this decision.”¹⁴¹ “An implied right,” the

133. The reader will excuse this little joke.

134. U.S. CONST., art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

135. See *supra* note 60.

136. See, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971) (“For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised.”); *M’Culloch v. Maryland*, 17 U.S. 316, 427 (1819) (“It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.”); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1105 (10th Cir. 1998) (“If [Defendant] means to argue that Colorado’s Workers’ Compensation Act provides the exclusive remedy for all work-related injuries including emotional distress caused by violations of the [federal] civil rights laws, that argument is readily disposed of by the Supremacy Clause.”).

137. See *supra* notes 60-67 and accompanying text (outlying the traditional understanding).

138. *Peoples*, 422 F.3d at 1105 (“Therefore, because Kansas law gives rise to a cause of action for damages for the injuries Mr. Peoples suffered as the result of the alleged deprivation of his Eighth Amendment rights, we will not imply an additional cause of action directly under the Constitution in *Peoples I.*”); *Id.* at 1108 (“We conclude, then, that Mr. Peoples could have brought suit under Kansas law [for the alleged unlawful monitoring of his phone calls]. Therefore, we will not imply a *Bivens* claim as to this allegation.”).

139. *Id.* at 1103.

140. *Id.* at 1102.

141. *Id.* at 1103.

court goes on to explain, “by definition, is created by the courts and cannot exist until it is judicially announced.”¹⁴²

In essence, the Tenth Circuit’s view is that a *Bivens* cause of action only springs into existence when no alternative remedy is available. Prior to that moment, the federal cause of action simply does not exist. The presence of alternative state-law relief, then, does not preempt plaintiff’s federal *Bivens* action under the Tenth Circuit’s view, but rather the existence of the state-law relief fails to provide a condition precedent for the *creation* of the *Bivens* action by implication. Thus, state-law remedies do not displace the federal *Bivens* action under the circuit’s view because in those cases where alternative state-law remedies exist there simply is no federal cause of action to displace.

While the court appears to avoid the Supremacy Clause problem, it is unclear exactly why *Bivens* claims with a state-law analogue should be dismissed as a procedural matter. While the court does make clear that such dismissals are not jurisdictional,¹⁴³ it fails to address whether the existence of alternative state-law claims acts as an element of plaintiff’s claim or an affirmative defense. Neither choice is attractive. On the one hand, there appears to be little authority to treat the lack of an alternative state-law action as an element of the *Bivens* claim.¹⁴⁴ On the other hand, if the existence of an alternative state-law claim is an affirmative defense the reverse preemption problem rears its ugly head again, because but for the state-law defense plaintiff would have a federal cause of action. Moreover, an affirmative defense can be waived,¹⁴⁵ potentially leaving a federal court with the unsavory duty of litigating a “non-existent” federal cause of action.

Given the increasingly complex legal analysis imposed by the *Peoples* regime coupled with the possibility for dismissal without the court addressing the merits of a plaintiff’s claim, it may be appropriate for district courts to exercise their discretion to dismiss putative *Bivens* claims without prejudice when they conclude that alternative state-law causes of action bar the claim,¹⁴⁶ allowing prisoner plaintiffs to refile their claims under the state-law theory. Indeed, dismissal without prejudice seems especially appropriate here as the overwhelming majority of prisoner-plaintiffs proceed pro se.¹⁴⁷ Of course, this ability to refile as-

142. *Id.*

143. *Id.* at 1095–96.

144. *See, e.g.,* Morgan v. United States, 323 F.3d 776, 780 (9th Cir. 2003) (holding post *Malesko* that “the elements of a *Bivens* claim [are properly pleaded] by alleging a violation of his constitutional rights by agents acting under the color of federal law.”).

145. *See* FED. R. CIV. P. 8(c).

146. *See* FED. R. CIV. P. 41(a)(2).

147. *See* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 479–80 (2002) (“The majority of prisoners proceed pro se in these actions [civil prisoner constitutional rights litigation]—ninety-six percent according to a recent survey.”).

sumes that the statute of limitations will not have run, which would stymie any such attempt. Nevertheless, most state saving statutes would provide prisoner-plaintiffs an additional window of opportunity to refile a state claim if the statute of limitations had run while the *Bivens* claim was pending as long as the first dismissal is entered without prejudice.¹⁴⁸

The difficulties created by the majority's application of *Malesko* do not end here. Judge Ebel, while recognizing that this was a hard case, strongly dissents and calls for the Supreme Court to take up the issue of *Bivens* suits against employees of federal contractors.¹⁴⁹ He begins his analysis by arguing that the majority opinion fails to give *Carlson* its due.¹⁵⁰ Judge Ebel argues that Supreme Court precedent does not treat alternative causes of action as fungible, but rather requires that alternatives to a *Bivens* action be alternative constitutional causes of action.¹⁵¹ Next, Judge Ebel contends that the majority violates the *Malesko* symmetry principle, because a *Bivens* action against staff is available to federal prisoners in government-run facilities but not in privately run facilities. Also, in Judge Ebel's view, the majority violates the traditional parallelism between a *Bivens* action and a 42 U.S.C. § 1983 action, because a § 1983 action against staff members is available to state prisoners held in private prisons but a *Bivens* action is not available to federal prisoners incarcerated in private facilities.¹⁵² Fourth, Judge Ebel asserts that the majority, contrary to the Court's directives in *Bivens* and *Carlson*, renders the enforcement of federal rights non-uniform by making a *Bivens* action contingent upon the vagaries of state law.¹⁵³ Finally, Judge Ebel

148. For instance, under Kansas law:

If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure.

KAN. STAT. ANN. § 60-518 (2005). In Kansas, examples of such judgments "not on the merits" include: denial of class certification for lack of numerosity, *Waltrip v. Sidwell*, 678 P.2d 128, 133 (Kan. 1984); dismissal for failure to file an amended petition following a partially successful motion for a more definite statement, *Barrett v. Porter*, 408 P.2d 574 (Kan. 1965); dismissal without prejudice, *Cox v. Trousdale*, 27 P.2d 298 (Kan. 1933); and dismissal for voidable service of process, *Goldsberry v. Lewis*, 574 P.2d 566 (Kan. Ct. App. 1978).

149. *Peoples*, 422 F.3d at 1108 n.2 (Ebel, J., dissenting).

150. *Id.* at 1108-10.

151. *Id.* at 1109.

152. *Id.* at 1110-12.

153. *Id.* at 1112-13. The District of Rhode Island, in rejecting the claim-by-claim approach later adopted by the Tenth Circuit, offered this further critique:

[W]hile *Malesko* indicates that the existence of state law remedies may be a factor to be considered, in applying *Bivens*, state law remedies cannot be construed as a manifestation of Congressional intent to preclude the application of *Bivens*. Indeed, making the federal remedies available to a federal prisoner at a privately operated institution contingent upon whether there are adequate alternative state law remedies would require a case by case analysis of state law and would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid.

Sarro v. Cornell Corrs., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003).

warns that the majority's opinion will fail to deter future constitutional violations.¹⁵⁴

III. LATENT FEDERAL QUESTIONS

Although Judge Ebel raises strong points, I will assume that the majority correctly construes *Malesko* as holding that the existence of a state-law remedy standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.¹⁵⁵ Nevertheless, even if cases such as Mr. Peoples' are henceforth espoused under state-law theories of recovery, many will contain a federal question sufficient to re-federalize the liability rule and provide for federal jurisdiction. This path back to a federal question proceeds via two independent routes: the government contractor doctrine and the necessary construction test.

A. The Government Contractor Doctrine

Assuming the Tenth Circuit correctly interprets *Malesko* as foreclosing a *Bivens* action against employees of a federal contractor running a private prison when a state-law alternative action exists,¹⁵⁶ the government contractor doctrine provides an independent ground for re-federalizing prisoner constitutional claims against employees of privately run federal prisons.¹⁵⁷ The *Peoples* court does not address this issue.¹⁵⁸ Nonetheless, future prisoner plaintiffs in positions similar to Mr. Peoples may find themselves subject to a federal liability rule in a federal forum and possibly in a double bind—unable to bring a *Bivens* claim because of

154. *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting).

155. *But see Sarro*, 248 F. Supp. 2d at 63 (holding that *Malesko* does not mandate this result).

156. *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1103 (10th Cir. 2005) (“Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under . . . state . . . law against the individual defendant for the harm created by the constitutional deprivation.”).

157. For general discussions of the government contractor doctrine see: Kenneth G. English, Note, *Government Complicity and a Government Contractor's Liability in Qui Tam and Tort Cases*, 33 PUB. CONT. L.J. 649 (2004) (critiquing government contractor doctrine as economically inefficient); Mazefsky, *supra* note 12, at 659–61 (discussing the government contractor doctrine as it is addressed in *Malesko*); Sean Watts, Note, *Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687 (1999) (arguing for Congressional action to resolve doctrinal confusion in this area); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities From Exemplary Damages?*, 58 OHIO ST. L.J. 175 (1997) (critiquing the extension of government immunities to institutions such as private prisons under the government contractor doctrine); Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991) (providing an economic analysis of the government contractor doctrine); A.L. Haizlip, *The Government Contractor Defense in Tort Liability: A Continuing Genesis*, 19 PUB. CONT. L.J. 116 (1989).

158. Apparently the Tenth Circuit at one point considered a discussion of the government contractor doctrine. *Peoples*, 422 F.3d at 1108 n.13 (“As we discussed above, the government contractor doctrine is not applicable because there is nothing in the record indicating that the Marshal Service specifically ordered the monitoring of Mr. Peoples's calls to his attorney.”). But the opinion lacks any “discussion above.” Presumably, the court decided a full discussion of government contractor doctrine imprudent in this opinion.

the existence of an alternative state-law remedy yet finding their state-law remedy preempted by federal common law.

The Supreme Court's leading government contractor doctrine case is *Boyle v. United Technologies Corp.*,¹⁵⁹ where the Court held that federal common law preempts state-law tort actions against independent contractors who manufacture munitions for the federal government. In *Boyle*, a copilot of a Marine Sikorsky helicopter drowned following its crash into the Atlantic. His estate brought a successful state-law tort claim against Sikorsky, contending that the outward-opening escape hatch was ineffective in an underwater crash and that its handle was obstructed by other equipment.¹⁶⁰ The Court overturned the jury verdict on the grounds that the government contractor defense, as a matter of federal common law, preempted the state-law claim.¹⁶¹

The Court reasoned that federal common law preempts state law where there is a uniquely federal interest and there is a significant conflict between federal policy and the operation of state law.¹⁶² The Court found these criteria met in *Boyle*. The Court noted that without government-contractor immunity "the contractor will [either] decline to manufacture the design specified by the government, or it will raise its price."¹⁶³ Next, the Court feared that the threat of state-law liability would interfere with the Government's legitimate balancing of safety features against military efficacy in designing war materiel.¹⁶⁴ The Court then fashioned a three-prong test to determine when a defendant has successfully asserted a defense under the government contractor doctrine. To wit, state-law liability for design defects in military equipment is preempted by federal common law when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.¹⁶⁵

The lower federal courts have since split on the scope of the federal contractor doctrine outside of the military supplier context.¹⁶⁶ A minority of courts refuse to apply the doctrine outside of military procurement cases.¹⁶⁷ A majority of courts, however, apply the government contractor

159. *Boyle*, 487 U.S. 500 (1988).

160. *Id.* at 503.

161. *Id.* at 512.

162. *Id.* at 507-08.

163. *Id.* at 507.

164. *Id.* at 511.

165. *Id.* at 512.

166. See Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing A Manufacturer's Liability for Defective Products?*, 28 SETON HALL L. REV. 430, 432 (1998).

167. *Id.*

doctrine in any scenario that satisfies the *Boyle* three part test.¹⁶⁸ As the Eleventh Circuit noted, the history of the government contractor doctrine and its general rationale lend support to the conclusion that it would be illogical to limit the availability of the doctrine solely to military contractors.¹⁶⁹ To this end, the doctrine has been applied to cases involving “manufacturers of letter sorting equipment for the United States Postal Service; postal vehicles; ambulances; military air conditioners; army surplus tree-trimming belts; service contracts for the Department of Energy; a security guard service for a federal building; and the Environmental Protection Agency.”¹⁷⁰

While the Supreme Court has not definitively held that the government contractor doctrine applies to private prisons, the *Malesko* Court suggested that it would. In a footnote citing *Boyle*, the Court stated, “Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert [federal preemption]. The record here would provide no basis for such a defense.”¹⁷¹ Thus, it appears that the Court, given an appropriate set of facts, would find the government contractor doctrine applicable to suits brought by prisoners held in privately run federal prisons. Indeed, the lower courts in the *Malesko* litigation assumed that the government contractor doctrine could apply and gave the argument full consideration.¹⁷²

Moreover, privately run federal prisons are currently attempting to use the government contractor doctrine as a bar to prisoner plaintiffs’ state-law claims. Recently the Southern District of New York, sitting in diversity, considered a suit brought by two former female federal prisoners against a privately run federal prison alleging sexual misconduct by the prison’s guards.¹⁷³ The plaintiffs brought two state-law causes of action—negligent hiring and retaliation.¹⁷⁴

The private prison moved for summary judgment, *inter alia*, on the grounds that it was entitled to government contractor immunity.¹⁷⁵ The District Court assumed that the doctrine was applicable outside of the

168. *Id.*

169. *Burgess v. Colo. Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985). *See also* *Brown v. Nationsbank Corp.*, 188 F.3d 579, 588–89 (5th Cir. 1999) (extending the doctrine to protect persons from state-law liability when they in good faith assist the Government in law enforcement operations); *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986) (applying the doctrine in “civilian relationships” where “a contractor has acted in the sovereign’s stead and can prove the elements of the defense.”).

170. *Beh*, *supra* note 166, at 432.

171. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001); *see also* *Mazefsky*, *supra* note 12, at 659–61 (discussing the government contractor doctrine as it is addressed in *Malesko*).

172. *Malesko v. Corr. Servs. Corp.*, 229 F.3d 374, 382 (2d Cir. 2000), *rev’d on other grounds*, 534 U.S. 61 (2001).

173. *Adorno v. Corr. Servs. Corp.*, 312 F. Supp. 2d 505 (S.D.N.Y. 2004).

174. *Id.* at 513.

175. *Id.*

military supplier context, but it held that, given the facts in the instant case, the private prison could not satisfy the three-part *Boyle* test.¹⁷⁶

In August 2005, the District Court for the District of Columbia heard a similar argument. In *Ibrahim v. Titan Corp.*,¹⁷⁷ Iraqi nationals who were held in a privately run federal prison in Iraq brought common law suits against the operator of the prison. Among other defenses, the private prison argued that the plaintiffs' common law claims were pre-empted by the government contractor doctrine.¹⁷⁸ The court held the doctrine applicable to private prisons, but as in the New York case, held that the facts did not support a finding that the *Boyle* three-prong test was met.¹⁷⁹

Given that the federal courts currently apply the government contractor doctrine to claims brought against privately run federal prisons, many federal inmates who are denied a *Bivens* claim against guards on the basis that an alternative state-law claim exists may find they lack a viable state-law claim as well. The *Peoples* case itself provides a prime example. Recall, Mr. Peoples brought a Fifth Amendment due process claim arising out of his thirteen months of administrative segregation. This segregation was imposed by order of the Marshal Service, not by a discretionary act of the private prison.¹⁸⁰ If Mr. Peoples had brought this claim under a state-law theory of recovery such as false imprisonment,¹⁸¹ his claim would have been highly susceptible to the assertion of the government contractor doctrine because, as the *Malesko* Court put it, the Government "directed [the private prison] to do the very thing that is the subject of the claim."¹⁸² Indeed, the three-prong *Boyle* test, at least based upon the scant factual background provided in the *Peoples* opinion, should be met here. First, the Government, by ordering the administrative segregation, approved a reasonably precise course of conduct. Second, the private prison followed those instructions. Third, the Marshal Service was, presumably, aware of the constitutional implications of unjustifiably holding a pretrial detainee in administrative segregation.¹⁸³

176. *Id.* at 521; see *Scainetti v. United States ex rel. Federal Bureau of Prisons*, No. 01 Civ. 9970 (SHS), 2002 WL 31844920, *1 (S.D.N.Y. Dec. 18, 2002) (unpublished) (noting that the Southern District of New York previously faced nearly identical government contractor arguments and applied nearly the same reasoning); *Norwood v. Esmor Inc.*, No. 95 Civ. 8281 (LAP), 1997 WL 65913, *4 (S.D.N.Y. Feb. 13, 1997) (unpublished).

177. 391 F. Supp. 2d 10 (D.D.C. 2005).

178. *Ibrahim*, 391 F. Supp. 2d at 16.

179. *Id.* at 17.

180. *Peoples v. CCA Detentions Ctrs.*, 422 F.3d 1090, 1093 (10th Cir. 2005).

181. See *Brown v. State*, 927 P.2d 938, 940 (Kan. 1996) (providing elements of false imprisonment); see also *supra* note 131.

182. *Malesko*, 534 U.S. at 74 n.6.

183. See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988). The reader will note a slight rephrasing of the *Boyle* test here given the change in context from ordering a product to ordering a course of conduct, which the author intends as mere change in the form of—not the substance of—the *Boyle* test. Courts applying the test in the prison context adopt a similar formulation of

Hence, claims such as Mr. Peoples's administrative segregation claim, if brought under a state-law theory of recovery, would likely be preempted under the government contractor doctrine.

This conclusion should not be overstated. As the Tenth Circuit has made clear in other contexts, "[t]he government contractor defense . . . [only applies] when the [contractor] has conformed to reasonably precise specifications established or approved by the government."¹⁸⁴ The Second Circuit has suggested this same principle applies in privately run prison cases as well. "The government contractor defense only shields a [privately run federal prison] from claims arising out of its actions where the government has exercised its discretion and judgment in approving precise specifications to which the contractor must adhere."¹⁸⁵ Given that the government contractor defense is essentially a claim that "[t]he Government made me do it,"¹⁸⁶ it is not surprising that both the Southern District of New York and the District of Columbia District Courts have denied attempts by employees of privately run prisons to invoke the government contractor doctrine absent specific evidence that the Government ordered the course of action bringing rise to the lawsuit. But this is not to say that the doctrine could never be successfully invoked in cases, such as *Peoples*, where the Government did specifically order the conduct giving rise to the suit.

Further, it is unclear what effect the preemption of state-law claims under the government contractor doctrine would have on the availability of a *Bivens* suit under the *Peoples* analysis. The Tenth Circuit adjudicated Mr. Peoples's administrative segregation claim on its constitutional merits.¹⁸⁷ The court thereby avoided the need to discuss preemption under the government contractor doctrine. Assuming there was an alternative state-law theory of recovery for the administrative segregation claim, such as false imprisonment,¹⁸⁸ the court's analysis leaves a significant question unanswered: if such a state-law false imprisonment claim were preempted by the federal contractor doctrine, would an alternative state-law remedy be rendered *unavailable*, giving rise to a *Bivens* claim? Alternatively, if the government contractor doctrine is merely an affirmative defense¹⁸⁹ to an otherwise generally available state-law claim, would an alternative state-law claim be *available* (but unmeritorious) and hence

the test. See, e.g., *Malesko v. Corr. Servs. Corp.*, 229 F.3d 374, 382 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001).

184. *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372 n.2 (10th Cir. 1990).

185. *Malesko*, 229 F.3d at 382.

186. *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990).

187. See *supra* note 128 and accompanying text.

188. See *Brown*, 927 P.2d at 940 (providing elements of false imprisonment).

189. See *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997) ("The [government] contractor defense is an affirmative defense") (note omitted); *but see* *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934, 944–45 (E.D.N.Y. 1992) (noting the considerable confusion as to whether *Boyle* lays down a "defense" or a "standard of liability.").

a *Bivens* claim inappropriate? If the former is the Tenth Circuit's approach, then the case-by-case analysis regarding the implication of *Bivens* claims has become even more complicated and fact intensive (and hence unworkable) than Judge Ebel describes in his dissent.¹⁹⁰ If the latter is the Tenth Circuit's approach, then prisoner plaintiffs such as Mr. Peoples are stuck in a double bind—the alternative state-law claim bars a *Bivens* claim yet the government contractor doctrine preempts their state-law claim. Either approach appears unseemly.

Finally, the *Peoples* approach will not relieve the federal courts of the burden of sorting through this conundrum, because the presentation of the government contractor defense provides grounds for removal under 28 U.S.C. § 1442(a)(1). Although the well-pleaded complaint rule generally limits jurisdiction under 28 U.S.C. § 1331 to federal questions raised in the complaint (i.e., federal defenses do not give rise to federal jurisdiction under § 1331),¹⁹¹ the constitutional grant of federal jurisdiction provides a broader scope of federal question jurisdiction than is found under § 1331.¹⁹² As the Court has noted, Congress invoked this broader scope of constitutional federal question jurisdiction by enacting § 1441(a)(1), which allows defendants, acting under color of federal authority, to remove to federal court on the basis of a federal defense, contrary to the dictates of the well-pleaded complaint rule.¹⁹³ Generally speaking, a private defendant may remove under § 1442(a)(1) if it: (a) demonstrates that it acted under the direction of a federal officer; (b) raises a federal defense to plaintiffs' claims; and (c) demonstrates a causal nexus between plaintiffs' claims and acts it performed under color of federal office.¹⁹⁴ Following this line of analysis, numerous federal courts have allowed private defendants to remove to federal court on the basis of the *Boyle* federal contractor doctrine.¹⁹⁵ Thus, *Peoples* may send

190. See *Peoples*, 422 F.3d at 1112 (Ebel, J., dissenting).

191. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (stating that the well-pleaded complaint rule is an interpretation of § 1331, not of Article III); *Louisville & Nashville Rail Co. v. Mottley*, 211 U.S. 149, 152 (1908) (establishing the rule).

192. U.S. Const. art. III, § 2 (prescribing the limits of subject matter jurisdiction for the federal courts); see *Osborn v. Bank of the United States*, 22 U.S. 738, 822–23 (1824) (holding that any federal “ingredient” is sufficient to satisfy the Constitution's federal question jurisdiction parameters), for a discussion on federal question jurisdiction, as a matter of Constitutional law, jurisdiction “arising under the Constitution, laws, or treaties of the United States,” is quite broad.

193. *Mesa v. California*, 489 U.S. 121, 136 (1989) (“The removal statute itself . . . serves to overcome the ‘well-pleaded complaint’ rule which would otherwise preclude removal even if a federal defense were alleged.”).

194. See generally 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3727 (3d ed. 1998).

195. See, e.g., *McAboy v. IMO Indus.*, No. C05-124L, 2005 WL 2898047, *3–*5 (W.D. Wash. Oct. 27, 2005) (slip op.); *In re Agent Orange Product Liability Litig.*, 304 F. Supp. 2d 442, 446–51 (E.D.N.Y. 2004); *Carter ex. rel. Estate of Carter v. Acands, Inc.*, No. 3:02-CV-00009 2002 WL 31682352, *3–*5 (E.D. Tex. June 27, 2002) (unpublished); *Good v. Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1127–28 (E.D. Pa. 1996); *Guillory v. Ree's Contract Serv. Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994); *Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1327 (E.D. La. 1994); *Akin v. Big Three Indus.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992); but see *Kristina*

many federal-prisoner plaintiffs out in search of a state-law theory of recovery only to have many of these plaintiffs (assuming the courts eschew the double-bind difficulty outlined above) return to federal court with a federal standard of liability.

B. The Necessary Construction Test

It is not only defendants, however, who may assert that putative constitutional claims brought under the auspices of a state-law theory of recovery raise federal issues. Under the *Peoples* decision, many plaintiffs' claims may raise substantial issues of federal law in their state-law theories on the face of the complaint by invoking the Constitution as the standard of care. Under the jurisdictional doctrine famously espoused in *Smith v. Kansas City Title & Trust Co.*¹⁹⁶ and recently reaffirmed in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,¹⁹⁷ if a state law claim necessarily requires the resolution of a substantial issue of federal law, then the state-law claim will arise under 28 U.S.C. § 1331. Given that many state-law tort claims brought by federal prisoner plaintiffs against defendants acting under color of federal law will look to the constitutional standard as the appropriate duty of care, these suits may well fall within the scope of *Smith* and *Grable & Sons*, once again re-federalizing these claims.

The Court has established two independent tests for meeting the § 1331 grant of jurisdiction. The Court has long held that a suit arises under § 1331 if federal law creates the plaintiff's cause of action.¹⁹⁸ As this understanding of § 1331 was forcefully put forward by Justice Holmes, this view is oft referred to as the "Holmes test." The majority of federal-question-jurisdiction cases find their way into federal court by satisfying the Holmes test.¹⁹⁹ The Holmes test, however, best operates as a rule of inclusion not exclusion (i.e., it provides a sufficient, but not necessary, ground for federal question jurisdiction).²⁰⁰ Federal question jurisdiction can also arise under § 1331 if vindication of the plaintiff's state-law cause of action necessarily requires the construction of a substantial issue of federal law ("the necessary construction test").²⁰¹ While

L. Garcia, *The Boyle Festers: How Lax Causal Nexus Requirements and the "Federal Contractor Defense" are Leading to a Disruption of Comity under the Federal Officer Removal Statute*, 28 U.S.C. § 1442(a)(1), 46 EMORY L.J. 1629 (1997) (critiquing the practice of allowing private parties to remove to federal court by coupling the federal contractor doctrine and § 1442(a)(1)).

196. 255 U.S. 180, 199 (1921).

197. 125 S. Ct. 2363, 2367 (2005).

198. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

199. *Merrell Dow*, 478 U.S. at 808.

200. See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.); see also *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983).

201. *Grable & Sons*, 125 S. Ct. at 2366–68; *Merrell Dow*, 478 U.S. at 808–09; *Smith*, 255 U.S. at 199; see also Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408, 2415 (2002) (employing the moniker "necessary construction test" for this font of federal question jurisdiction).

the Supreme Court instructs that the necessary construction test should be applied with caution as this realm of jurisdiction lies at the outer reaches of § 1331,²⁰² and that the imbedded question of federal law must be substantial,²⁰³ the Court itself and the courts of appeals continue to apply the doctrine.²⁰⁴

Indeed, for nearly one hundred years, the Supreme Court has recognized that federal question jurisdiction will lie over state-law claims that raise significant federal issues, of which the *Smith* case is the classic example.²⁰⁵ In *Smith*, a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.²⁰⁶ The plaintiff's theory of the case was that such a purchase would constitute a breach of fiduciary duty under Missouri law because the corporation could only purchase bonds "authorized to be issued by a valid law" and that the Federal Farm Loan Act was unconstitutional.²⁰⁷ Although the plaintiff pursued a state-law cause of action, the Court held

202. *Merrell Dow*, 478 U.S. at 810.

203. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) (holding that plaintiff's right to relief must necessarily depend upon the "resolution of a substantial question of federal law"); *Smith*, 255 U.S. at 199 (holding that cases that present issues merely colorable as federal or unreasonably relying upon federal law are not proper grounds for federal question jurisdiction).

204. *See, e.g., Grable & Sons*, 125 S. Ct. at 2368 (taking federal question jurisdiction over a quiet title action as resolution of the state-law claim required a determination of whether the Internal Revenue Service had given adequate notice of sale); *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388–91 (3d Cir. 2002) (taking federal question jurisdiction over malicious prosecution claim that required the construction of federal maritime law); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25–27 (2d Cir. 2000) (finding federal question jurisdiction lies in case to overturn arbitration award based upon negligent interpretation of federal law); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997) (finding federal question jurisdiction lies in case involving state tort claim that could affect foreign mining industry, because the case implicated significant foreign policy considerations); *Additive Controls & Measurement Sys., Inc. v. FlowData, Inc.*, 986 F.2d 476, 477–79 (Fed Cir. 1993) (taking federal question jurisdiction over state-law business tort when ownership of federal patent was the decisive issue); *Garvin v. Alumax of S.C., Inc.*, 787 F.2d 910, 911–15 (4th Cir. 1986) (finding federal question jurisdiction over state tort claim against manufacturer and owner of a ship loader because plaintiff's ability to proceed in the face of a state law immunity defense turned on plaintiff's asserted claim that the immunity defense was preempted by the Federal Longshoremen's and Harbor Workers' Compensation Act); *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 192–96 (2d Cir. 1984) (finding federal question jurisdiction over claim for declaratory judgment that defendant breached a lease in violation of the Federal Condominium and Cooperative Abuse Relief Act even though that Act provided no federal cause of action); *see also* WRIGHT ET AL., *supra* note 194, § 3564; Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2291–93 (2002) [hereinafter *Mr. Smith*] (arguing that the necessary construction test should be delimited by the principles of comity between federal and state courts and unique federal competency); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1788–94 (1992) (providing a thorough analysis of the necessary construction test). This is not to say that the application of this doctrine is without confusion or frustration. *See* *Almond v. Capital Props., Inc.*, 212 F.3d 20, 23 (1st Cir. 2000) ("The Supreme Court has periodically affirmed this basis for jurisdiction [i.e., the necessary construction test] in the abstract . . . , occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear.").

205. *Grable & Sons*, 125 S. Ct. at 2367.

206. *Smith*, 255 U.S. at 195.

207. *Id.* at 198.

that if on the face of the complaint plaintiff's right to relief depends upon the construction of a significant issue of federal law, then federal question jurisdiction arises under the predecessor statute to 28 U.S.C. § 1331.²⁰⁸ In so doing, the Court found that a plaintiff could avail himself of a federal forum on a state-law theory of recovery without being diverse from the defendant because plaintiff's Missouri cause of action necessarily required the court to pass upon the constitutionality of a federal act.

Despite the potential for the necessary construction test to be the exception that swallowed the rule, the Supreme Court has not "treated 'federal issue' as a password opening federal courts to any state action embracing a point of federal law."²⁰⁹ Indeed, it has consistently held that the necessary construction test "must be read with caution."²¹⁰ To this end, the Court has required that the imbedded federal issue in the state-law claim be a substantial one in order to invoke federal question jurisdiction under the necessary construction test.²¹¹ Further, the Court recently clarified that presenting a substantial federal issue imbedded in a state-law cause of action is not sufficient for jurisdiction to arise under § 1331.²¹² The federal courts must also consider congressional intent before taking jurisdiction under the necessary construction test.²¹³ As the Court put it, "the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331."²¹⁴

While these limitations on the application of the necessary construction test are considerable, many putative constitutional torts, such as those in the *Peoples* case, could be re-federalized under the necessary construction test. Consider again Mr. Peoples's Fifth Amendment due process claim arising out of his thirteen months of administrative segregation. If Mr. Peoples had brought this claim under a state-law theory of recovery such as false imprisonment,²¹⁵ it may well have raised an actually disputed and substantial issue of federal law.²¹⁶

208. *Id.* at 199; see also Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. REV. 1, 10 (2005) (discussing *Smith*).

209. *Grable & Sons*, 125 S. Ct. at 2368.

210. *Merrell Dow*, 478 U.S. at 809.

211. See *Grable & Sons*, 125 S. Ct. at 2367; *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988); *Merrell Dow*, 478 U.S. at 814; *Franchise Tax Bd.*, 463 U.S. at 27–28; *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117–18 (1936); *Smith*, 255 U.S. at 199; *Shulthiz v. McDougal*, 225 U.S. 561, 569 (1912).

212. See *Grable & Sons*, 125 S. Ct. at 2367.

213. See *Mr. Smith*, *supra* note 204, at 2290–91 (foreshadowing the *Grable & Sons* Court's comity discussion).

214. *Grable & Sons*, 125 S. Ct. at 2367; see also *Franchise Tax Bd.*, 463 U.S. at 8.

215. See *Brown*, 927 P.2d at 940 (providing elements of false imprisonment).

216. *Grable & Sons*, 125 S. Ct. at 2368.

Under Kansas law, for example, false imprisonment may be brought to remedy “any unlawful physical restraint by one of another’s liberty, whether in prison or elsewhere.”²¹⁷ Thus, a necessary element for plaintiff to prove is that defendant acted unlawfully. In many states, it is settled that to bring a claim of false imprisonment against a defendant acting under color of law, plaintiff must prove that defendant violated the constitutional standard of care set by the Fourth Amendment.²¹⁸ In these states, then, because an element of the state-law false imprisonment claim necessarily requires the court to make a determination of whether defendant’s actions comported with the strictures of the Fourth Amendment, a substantial federal issue will be raised.²¹⁹ Moreover, this necessary construction of constitutional law is not unique to false imprisonment claims against defendants acting under color of law; many putative constitutional torts brought under other state-law theories will raise similar questions of constitutional law.²²⁰ Of course, mere reference to federal law as part of a state-law claim is insufficient to implicate federal question jurisdiction under the necessary construction test.²²¹ Similarly, ministerial application of federal law in a state-law analysis is insufficient to invoke federal question jurisdiction under § 1331 pursuant to the

217. *Arceo v. City of Junction City*, 182 F. Supp. 2d 1062, 1086 (D. Kan. 2002) (quoting *Gariety v. Fleming*, 245 P. 1054, 1055 (Kan. 1926)).

218. *See, e.g., Ex parte Duvall*, 782 So. 2d 244, 246–48 (Ala. 2000) (holding state-law torts of assault, unlawful arrest, false imprisonment and conspiracy barred as a matter of law because officer met the Fourth Amendment’s probable cause standard when detaining plaintiff); *Susag v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 278–79 (Cal. Ct. App. 2002) (holding that state-law claims of battery, intentional infliction of emotional distress, and false imprisonment fail as a matter of law because plaintiff “did not meet his burden of producing evidence showing they used physical force against or exerted authority over him that resulted in a ‘seizure’ under the Fourth Amendment.”); *State v. Hall*, 716 A.2d 335, 337 (Md. Ct. Spec. App. 1998) (holding existence of constitutional probable cause bars state-law claim of false imprisonment); *Sanducci v. City of Hoboken*, 719 A.2d 160, 166 (N.J. Super. App. Div. 1998) (dismissing plaintiff’s state-law false imprisonment claim because defendant met the constitutional probable cause standard); *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994) (false imprisonment plaintiff must show that defendant’s actions were unlawful, which often amounts to whether defendant acting under color of law had probable cause). One must not mistakenly find, however, that because a defendant is liable for a state-law false imprisonment claim that defendant is necessarily liable under the Fourth Amendment. *Baker v. McCollan*, 443 U.S. 137, 146–47 (1979) (“Just as ‘[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,’ false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.”).

219. In other states this issue is an affirmative defense. *See, e.g., Miller v. City of Jacksonville*, 603 So. 2d 1310, 1312 (Fla. Dist. Ct. App. 1992); *Broughton v. State*, 335 N.E.2d 310, 315 (N.Y. 1975) (noting that under New York law, “[j]ustification may be established by showing that the arrest was based on probable cause.”). In these jurisdictions, a privately employed federal prison guard may well have a sufficient federal defense to remove to federal court under 28 U.S.C. § 1442(a)(1). *See supra* Part III.A.

220. *See, e.g., Ex parte Duvall*, 782 So.2d at 246–48 (holding state-law torts of assault, unlawful arrest, and conspiracy barred because officer acted with probable cause); *Susag*, 115 Cal. Rptr. 2d at 278–279 (holding that plaintiff’s claims of battery and intentional infliction of emotional distress fail because defendant acted with probable cause).

221. *See, e.g., Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 53–55 (2d Cir. 1996) (holding federal approval of Stock Exchange rules insufficient to take federal question jurisdiction in a state-law tort case); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 570–71 (2d Cir. 1995) (holding mere reference to federal labor laws that endorse collective bargaining agreements insufficient to take federal question jurisdiction over a contract claim).

necessary construction test.²²² But in cases where the constitutionality of defendant's conduct will be a central element of a plaintiff's state-law cause of action, the federal question is substantial.²²³

Furthermore, hearing putative constitutional claims brought by federal prisoners in federal court under the necessary construction test would not displace the congressionally mandated division of labor between the state and federal courts.²²⁴ When state-law causes of action, like those under consideration here, incorporate federal law as controlling an element of the claim, these claims are categorized as hybrid causes of action.²²⁵ Prior to *Grable & Sons*, some courts of appeals held the existence of a federal private right of action as the definitive factor for divining congressional intent on the propriety of taking federal question jurisdiction over hybrid claims.²²⁶ *Grable & Sons*, however, makes clear that the existence of a federal private right of action is not required before taking federal question jurisdiction under the necessary construction test.²²⁷ Rather, the relevant question is whether taking jurisdiction over the claim "would . . . materially affect, or threaten to affect, the normal currents of litigation."²²⁸ This boils down to a gate-keeping function. The Court will not allow the necessary construction test to flood the federal courts, absent specific congressional approval or diversity, with suits that are traditionally the exclusive reserve of the state courts.²²⁹ Following the *Grable & Sons* decision, the lower courts, while being

222. See, e.g., *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1291-93 (11th Cir. 2004) (holding federal law requiring certain banking contracts to be in writing insufficient to take federal question jurisdiction over a contract claim); *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) (holding that referencing a federal table of drugs insufficient to take federal question jurisdiction over a state statutory claim).

223. See *Merrell Dow*, 478 U.S. at 814 n.12 (noting jurisdiction was appropriate in *Smith* because the federal issue raised was a constitutional one); *Smith*, 255 U.S. at 199 (holding plaintiff's state-law claim, which necessarily requires inquiry in to constitutionality of federal act, arises under 28 U.S.C. § 1331); *Almond v. Capital Prop., Inc.*, 212 F.3d 20, 22-24 (1st Cir. 2000) (taking federal question jurisdiction and noting that the federal interest is high where "important constitutional issues" are presented and low "where a state tort claim merely incorporate[s] a federal fault standard."); Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEXAS L. REV. 1781, 1788 (1998) ("In *Smith*, the decision as to the constitutionality of the federal act would determine the continued vitality of the statute [and] all federal programs or conduct that were based on the statute."). But see *Mr. Smith*, *supra* note 204, at 2288 (critiquing this constitutional law versus statutory law dichotomy).

224. See *Grable & Sons*, 125 S. Ct. at 2368 (imposing this requirement for taking jurisdiction under the necessary construction test).

225. See Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1148-57 (1985) (discussing creation of hybrid state law claims).

226. See, e.g., *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000) (holding the federal courts may not take federal question jurisdiction over state-law claims absent a federal private right of action). See also *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.2 (6th Cir. 2000); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998); *PCS 2000 LP v. Romulus Telecomm., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998); *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994); *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987).

227. *Grable & Sons*, 125 S. Ct. at 2369-70.

228. *Id.* at 2371.

229. *Id.*

careful not to open the doors of the federal courts to claims traditionally heard in the state courts, have injected a new-found life into the necessary construction test.²³⁰

In the context of federal prisoner litigation, federal jurisdiction under the necessary construction test as delineated in *Grable & Sons* appears especially appropriate because this litigation has long taken place in federal court and Congress clearly envisions that the federal courts will bear the brunt of federal prisoner litigation. Prior to the passage of the Prisoner Litigation Reform Act²³¹ (“PLRA”) in 1996, excluding habeas corpus claims, the federal courts heard upwards of 40,000 prisoner-plaintiff civil suits a year—approximately one-fifth of the overall civil federal docket.²³² While the PLRA has limited the number of prisoner suits on the federal docket significantly, it has not altered the underlying fact that prisoner litigation is primarily conducted in the federal courts—with approximately seventy-five percent of all prisoner civil litigation taking place in a federal forum.²³³ While Congress has sought to limit the flood of perceived frivolous prisoner litigation, it has done so with the clear intention that the federal courts will retain jurisdiction over these claims. For example, the PLRA’s limitations on prisoner suits are limited to federal claims over which the federal courts could take federal question jurisdiction.²³⁴ Moreover, Congress has enacted numerous other devices to control litigation by prisoner plaintiffs—from summary dismissal of frivolous cases²³⁵ to discovery rules²³⁶—that further evidence that it envisions taking federal jurisdiction over large amounts of prisoner litigation in the federal courts. Further, as the Court in *Carl-*

230. See *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194–96 (2d Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law contract claim that required construction of federal cable television law because taking this jurisdiction would not upset the flow of litigation in state and federal courts); *Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law contract claim that required construction of HUD regulations); *Hayes v. American Airlines, Inc.*, No. 04CV3231CBAJMA, 2005 WL 2367623, *3–*4 (E.D.N.Y. Sept. 27, 2005) (unpublished) (applying *Grable & Sons* and taking jurisdiction over state-law unjust enrichment claim because taking this jurisdiction would not upset the flow of litigation in state and federal courts); *In re Zyprexa Products Liability Litig.*, 375 F. Supp. 2d 170, 172–73 (E.D.N.Y. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law restitution claim); *Mr. Smith*, *supra* note 204 at 2292–93; *Redish*, *supra* note 204, at 1793 (arguing that federal question jurisdiction over hybrid claim should lie to “increase the level of state-federal judicial interchange in the shaping and development of the relevant federal statute.”).

231. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h (2005)).

232. *Schlanger*, *supra* note 6, at 1557 (this includes both state and federal prisoner suits).

233. *Id.* at 1573 n.52 (“a very gross estimate might be that about a quarter of what prison and jail officials think of as inmate litigation is currently filed in state court.”).

234. 18 U.S.C. § 3626(d) (2005) (“The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.”).

235. See 28 U.S.C. § 1915A (2005) (screening prisoner cases for frivolousness prior to serving defendant).

236. See FED. R. CIV. P. 26(a)(1)(E)(iii) (no required disclosures in prisoner-plaintiff cases).

*son*²³⁷ noted, Congress has approved of the *Bivens* cause of action (albeit after the fact) as a complementary theory of recovery to the Federal Torts Claims Act.²³⁸ In furtherance of this congressional acceptance of federal jurisdiction over *Bivens* claims, Congress created the Constitutional Torts Branch of the Department of Justice, which defends these actions exclusively in federal court.²³⁹ As these factors illustrate, there should be little concern that taking federal jurisdiction over putative constitutional torts espoused under a state-law theory of recovery “would . . . materially affect, or threaten to affect, the normal currents of litigation” envisioned by Congress.²⁴⁰

Under *Grable & Sons*, then, many putative constitutional claims filed by federal prisoners espousing a state-law theory of recovery may be re-federalized. These hybrid cases will often raise substantial issues of constitutional law and taking federal jurisdiction over them will not materially alter the balance of federal-court versus state-court litigation. In so doing, courts will in effect employ a uniform federal standard of care and a federal forum will be accessible—as is the case for claims re-federalized under the government contractor doctrine. In substance, then, the goals the *Bivens* Court set out—uniform rules of liability enforceable in a federal court—will often be advanced in putative constitutional tort litigation against federal actors, even as the form of the *Bivens* action withers.²⁴¹

CONCLUSION

There can be little doubt that the current Supreme Court considers implying federal causes of action from federal statutes or the Constitution beyond its powers.²⁴² The Tenth Circuit in its *Peoples* decision

237. *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

238. The Federal Torts Claim Act is codified at 28 U.S.C. § 2680(h) (2005). As part of the Senate Report, Congress considered the interaction of the FTCA and *Bivens*:

[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids . . . will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. NO. 93-588 at 3 (1973).

239. See *Pillard*, *supra* note 62, at 66 n.6 (discussing the numbers of *Bivens* suits filed and their defense).

240. *Grable & Sons*, 125 S. Ct. at 2371.

241. See *Carlson*, 446 U.S. at 23 (“[T]he liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules.”); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 393-94 (1971) (holding that the Fourth Amendment “is not tied to the niceties of local trespass laws.”). See also *supra* Part I discussing slow death of the *Bivens* cause of action.

242. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition”);

grasps the Court's directive and takes it (nearly) to its logical conclusion by foreclosing a *Bivens* action against employees of a federal contractor running a private prison when an alternative state-law action exists.²⁴³ Nevertheless, this victory for the opponents of implied federal causes of action may be Pyrrhic. As I endeavored to illustrate above, many putative constitutional claims brought by federal prisoner plaintiffs under state-law theories of recovery may be re-federalized either as a matter of federal common law, under the government contractor doctrine, or pursuant to Byzantine jurisdictional doctrine, via the necessary construction test.

All this is to illustrate a broader point. Sharply distinguishing between federal common law and implied rights of action for the purpose of eliminating the latter is impracticable as these concepts differ only as a matter of degree, not as a matter of kind.²⁴⁴ First of all, most scholars consider the *Bivens* action to be merely a species of federal common law,²⁴⁵ rendering the federal common law versus implied cause of action distinction moot. Even if one does not consider *Bivens* an instance of federal common law, numerous scholars have argued that there is no meaningful difference between the "legitimate" practice of inferring a federal liability rule sufficient to confer federal question jurisdiction without congressional pre-approval as a matter of federal common law²⁴⁶

Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (abandoning the power of federal courts to imply federal causes of action from statutes).

243. Peoples v. CCA Detentions Ctrs., 422 F.3d 1090, 1105 (10th Cir. 2005).

244. See Merrill, *supra* note 7, at 4–6 (contending that federal common law and implied causes of action differ only as a matter of degree).

245. See, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 405 (Harlan, J., concurring) (noting that the federal common law in *Bivens* arose not directly from the Constitution, but rather from the combination of the Court's historical ability to provide a remedy for the violation of individual liberties and an interpretation of 28 U.S.C. § 1331); Grey, *supra* note 64, at 1104 ("Most commentators contend that the Constitution does not require the *Bivens* remedy, but rather that it is a creature of federal common law"); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172-73 (1986); Merrill, *supra* note 7, at 48–49 (considering whether federal courts may decide implied remedies "in the manner of 'a common law tribunal'") (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)); Henry P. Monaghan, Foreword, *Constitutional Common Law*, 89 HARV. L. REV. 1, 23–25 (1975) (concluding that the *Bivens* action is a species of federal common law).

246. The Court clearly accepts federal common law as a legitimate practice. See, e.g., *Boyle v. United Tech. Corp.*, 487 U.S. 500, 527 (1988) (adopting federal common law liability rule for federal military contractors to state products liability action); *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972) (adopting federal common law liability rule regarding interstate nuisance); *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding, as a matter of federal common law, that an Oregon statute that required probate courts to evaluate the normative value of foreign political systems, under the guise of reciprocity, before transferring property to foreign next of kin invalid as an intrusion upon the federal government's exclusive right to conduct foreign affairs even though the president and Congress had failed to act); *Banco de Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) (adopting federal common law liability rule for issues involving foreign affairs); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (adopting federal common law liability rule that one who seeks to raise laches as defense against United States in suit to recover payment on forged commercial paper must prove actual damage resulting from United States' delay in notifying of forgery); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 461-62 (1942) (adopting federal common-law rule that one who makes fraudulent note to bank later insured by FDIC may not raise a claim of lack of consideration in FDIC action to enforce note); *Hinderlider v. La Plata River & Cherry Creek*

and the “illegitimate” practice of inferring a federal liability rule sufficient to confer federal question jurisdiction without congressional pre-approval by inferring a cause of action.²⁴⁷

The *Peoples* case proves this point. Under the *Peoples* regime, the implied *Bivens* cause of action against employees of private federal prisons is expunged from the federal courts in form only, not in substance. Uniform federal rules of liability will come to govern many constitutional violations committed by privately employed custodians of federal prisoners by other means. The slow death of the *Bivens* cause of action, then, has only made application of these uniform federal judge-made rules conceptually more difficult to apply; it does not eliminate them. Should the Supreme Court truly desire to end the substance—not merely the form—of the implied federal cause of action, it may well need to excise huge swathes of federal common law and fonts of jurisdiction. But such a pill may be too bitter to swallow.²⁴⁸

Ditch Co., 304 U.S. 92, 110 (1938) (adopting federal common law liability rule regarding water ways).

247. See, e.g., George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs - Have the Bivens Dissenters Prevailed?*, 64 IND. L. J. 263, 266 (1989) (concluding that “all forms of judicial lawmaking by federal courts - whether presented as constitutional adjudication, statutory interpretation or federal common law - are essentially the same and should be placed under the general rubric of federal common law.”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889–90 (1986) (concluding that there is no meaningful difference “between the creation of federal common law and the ordinary interpretation of federal enactments”); Merrill, *supra* note 7, at 4–6.

248. See, e.g., Donald L. Doernberg, *Juridical Chameleons in the “New Erie” Canal*, 1990 UTAH L. REV. 759, 810–11 (1990) (contending that federal common law must exist to implement the Constitution and federal legislation); CHEMERINSKY, *supra* note 2, ch. 6; Henry J. Friendly, *In Praise of Erie--And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). But see Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 356–57 (1992) (concluding that because federal common law has no principled limits it must be abandoned).