creation of new works.[89] But his understanding of the Copyright Clause is as constricted as the majority's is loose. While such a narrow reading focuses on copyright's core competency and makes "public benefit" copyright's maximand, it may be shortsighted. Justice Breyer discounted the weight of the foreign policy concerns behind the URAA.[90] If his opinion had carried the day, it might have severely truncated Congress's latitude to manage America's standing in the world. Before Berne, copyright law was territorial and domestically oriented such that domestic copyright interests superseded international concerns.[91] But now the growing importance of intellectual property as a propeller of global trade[92] means that the United States can no longer afford to be only inwardly focused.

Golan's approach of ceding interpretive power to Congress results in a broad grant of power that leaves the public uncertain as to the scope of their copyrights and may ultimately curb creation. With its expansive reading of "Progress," the Court has made the Copyright Clause an enabler of congressional power instead of a limitation.

G. Constitutional Remedies

Bivens *Actions.* — In 1971's *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court interpreted the Fourth Amendment to imply a cause of action for the Amendment's violation despite the lack of an enabling statute. The Court subsequently implied causes of action for Fifth[2] and Eighth Amendment vi-

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[89] *Id.* at 900. Accordingly, Justice Breyer eyed more critically the economic justifications behind the URAA. *See id.* at 909 ("[S]imply making the industry richer does not mean that the industry, when it makes an ordinary *forward-looking* economic calculus, will distribute works not previously distributed.").

[90] Furthermore, while Justice Breyer accurately questioned whether dissemination, as a matter of economics, would lead to creation of new works, he did not address the validity of the contention that obtaining reciprocity for American works abroad may, *in the long term*, promote creation of new works. In other words, there may exist an "internationalized version of the *quid pro quo* rationale." Graeme W. Austin, *International Copyright Law and Domestic Constitutional Doctrines*, 30 COLUM. J.L. & ARTS 337, 342 (2007).

[91] *See* Nicole Maciejunes, Golan v. Holder*: A Step in the International Direction for United States Copyright Law*, 10 J. INT'L BUS. & L. 369, 376 (2011).

[92] Intellectual property rights are necessary to the development of a wealth of fields such as scientific research, creative authorship, and commercial development. Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 BUFF. L. REV. 713, 759 (1999). "[N]ow that intangible intellectual creations have become the most valuable source of wealth for twenty-first century economic development, the preservation of comity between nations requires" that nations collaborate by creating neutral rules instead of competing, which would make countries "vulnerable to the countervailing policies of other national systems." J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 381–82 (1995).

[1] 403 U.S. 388 (1971).

[2] Davis v. Passman, 442 U.S. 228, 248–49 (1979).

olations.[3] Over the past thirty years, however, the Court has consistently refused to expand the scope of "*Bivens* actions" — that is, suits against federal officials for constitutional violations. In *Wilkie v. Robbins*,[4] the Court held that a *Bivens* action was unavailable in part because the presence of "any alternative, existing process for protecting the interest" rises to a "convincing reason" to refrain from expanding the judicially created remedy.[5] Last Term, in *Minneci v. Pollard*,[6] the Supreme Court continued in this pattern and held that a *Bivens* action against private federal prison employees for Eighth Amendment violations is not available on account of the adequacy of state tort law as an alternative remedy.[7] Because the Court was correct that state tort law may indeed provide a plausible remedy in a *Minneci*-type case — at least from the perspectives of compensation of the plaintiff and deterrence of unconstitutional action — the Court was able to skirt a confrontation with *Bivens*'s increasingly uncertain status. As a result, the Court has provided little guidance regarding where the line of adequacy in alternative remedies lies. Though the Court attentively applied *Wilkie*, in its minimalist use of *Wilkie*'s test, it delayed determining at what point an alternative remedy is not adequate.

In 2001 and 2002, Richard Pollard was an inmate at a privately operated federal prison in California.[8] On April 7, 2001, Pollard injured himself when he slipped on a cart.[9] After a medical examination, he was diagnosed with possible fractures to both elbows and was referred to an outside orthopedic clinic.[10] Pollard alleged that, following the injury, prison employees forced him to perform painful activities without regard for his injury.[11] These activities ranged from putting on a jumpsuit and wearing arm restraints to mopping the floor and shoveling manure.[12] Further, he claimed that given his injury, "he was unable to feed or bathe himself" and that the prison failed to provide him with any accommodation for a period of weeks.[13]

Pollard brought a *Bivens* action against the prison employees for violating his Eighth Amendment rights.[14] Magistrate Judge Wunder-

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[3] Carlson v. Green, 446 U.S. 14, 23–24 (1980).

[4] 551 U.S. 537 (2007).

[5] *Id.* at 550.

[6] 132 S. Ct. 617 (2012).

[7] *Id.* at 620.

[8] Pollard v. GEO Grp., Inc., 607 F.3d 583, 585 (9th Cir. 2010).

[9] Pollard v. Wackenhut Corr. Corp., No. CV-F-01-6078-OWW-WMW-P, 2006 WL 2661111, at *1 (E.D. Cal. Sept. 14, 2006).

[10] *Minneci*, 132 S. Ct. at 620.

[11] *Id.* at 620–21.

[12] *Wackenhut*, 2006 WL 2661111, at *1–2.

[13] Pollard v. GEO Grp., Inc., 629 F.3d 843, 851 (9th Cir. 2010).

[14] *Wackenhut*, 2006 WL 2661111, at *1.

lich determined that Pollard was unable to pursue a *Bivens* action against employees of a privately managed prison and recommended that the suit be dismissed for failure to state a claim.[15] Judge Wunderlich reviewed the Fourth and Tenth Circuit decisions, *Holly v. Scott*[16] and *Peoples v. CCA Detention Centers*[17] respectively, that refused to recognize similar claims for Eighth Amendment violations by employees of private corporations.[18] In addition, he cited the availability of alternative remedies in state negligence law, the Supreme Court's reluctance to extend *Bivens* further in *Correctional Services Corp. v. Malesko*,[19] and the low likelihood that extending *Bivens* in this case would have a deterrent effect on conduct by federal officers.[20] Judge Wanger of the United States District Court for the Eastern District of California adopted Judge Wunderlich's recommendation in full.[21]

The Ninth Circuit reversed in part and affirmed in part.[22] Writing for the court, Judge Paez began by rejecting a pair of procedural objections by the prison employees.[23] The court then distilled Magistrate Judge Wunderlich's reasoning below to two conclusions: first, that a *Bivens* action was unavailable because the prison employees were not acting "under color of federal law";[24] and, second, that the availability of alternative remedies through state tort law also forecloses the *Bivens* remedy.[25] Judge Paez rejected both premises.[26] In determining that the prison employees should be considered federal agents acting under color of federal law for the purposes of a *Bivens* action, he chose not to follow the Fourth Circuit in *Holly*, which held that the contractual relationship between the federal government and the private prison did not extend such status to the individual employees.[27] Judge Paez instead drew parallels with state action determinations under 42 U.S.C. § 1983, which authorizes constitutional claims against state of-

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[15] *Id.* at *4.

[16] 434 F.3d 287 (4th Cir. 2006).

[17] 422 F.3d 1090 (10th Cir. 2005).

[18] *Wackenhut*, 2006 WL 2661111, at *3–4.

[19] 534 U.S. 61 (2001).

[20] *Wackenhut*, 2006 WL 2661111, at *3–4.

[21] Pollard v. Wackenhut Corr. Corp., No. CV-F-01-6078-OWW-WMW-P, 2007 WL 1660688 (E.D. Cal. June 7, 2007).

[22] Pollard v. GEO Grp., Inc., 607 F.3d 583, 603 (9th Cir. 2010). The panel affirmed the dismissal of GEO Group as defendant. *Id.*

[23] *Id.* at 586–88.

[24] *Id.* at 588. Drawing such a conclusion from his recommendation, however, requires a strained reading which imports by reference much of the logic from the Fourth Circuit's decision in *Holly*. Judge Wunderlich did not explicitly rely on, or even reach, this conclusion.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 588–89 (discussing *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir. 2006)).

ficials acting under color of law,[28] concluding that imprisonment for crimes is traditionally and exclusively a public function, thus holding that the prison employees were acting under color of federal law.[29]

Judge Paez recognized that the Supreme Court had "consistently refused to extend *Bivens* liability to any new context or new category of defendants,"[30] but applied the two-part test from *Wilkie v. Robbins*.[31] Under the *Wilkie* test, a court first identifies whether potential alternative processes exist that provide a convincing reason for courts to deny a *Bivens* claim and, second, considers any special factors that might urge the court to hesitate in authorizing an extension of *Bivens*.[32] Regarding the first factor, Judge Paez reasoned that although state tort law, via negligence and medical malpractice, provided an alternative remedy for Pollard, it did not provide a "convincing reason" for denying a *Bivens* claim, in part because of the lack of uniformity across states with regard to procedural and substantive rules for negligence and medical malpractice.[33] Regarding the second factor, Judge Paez considered the feasibility, capacity for deterrence, and potential asymmetric liability costs of state tort action, finding none of these reasons sufficiently counseled against permitting a *Bivens* action.[34]

Judge Restani concurred in part and dissented in part, agreeing that the prison employees were acting under color of law but finding the availability of the alternative remedy to be sufficient reason to deny a *Bivens* action.[35] She also rejected the panel majority's reliance on uniformity as a driving rationale for permitting the action.[36] The Ninth Circuit denied a rehearing en banc,[37] with Judge Bea's dissent underscoring the Supreme Court's reluctance to countenance *Bivens* claims when alternative remedies exist.[38]

The Supreme Court reversed.[39] Writing for the Court, Justice Breyer[40] also relied on the two-part test from *Wilkie*, describing it as a distillation of the combined reasoning of the Court's *Bivens* cases.[41]

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[28] *See id.* at 589–92.
[29] *Id.* at 593.
[30] *Id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)) (internal quotation marks omitted).
[31] *Id.* at 594.
[32] *See id.* (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).
[33] *Id.* at 596–97.
[34] *Id.* at 597–603.
[35] *Id.* at 603 (Restani, J., concurring in part and dissenting in part).
[36] *Id.* at 607–08.
[37] Pollard v. GEO Grp., Inc., 629 F.3d 843, 845 (9th Cir. 2010).
[38] *Id.* at 849–50 (Bea, J., dissenting from denial of rehearing en banc).
[39] *Minneci*, 132 S. Ct. at 626.
[40] Justice Breyer was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, Sotomayor, and Kagan.
[41] *Minneci*, 132 S. Ct. at 621–23.

However, he concluded that state tort law provided an adequate alternative remedy and that the existence of this alternative serves as a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[42] Justice Breyer then rejected each of the four major rationales advanced by Pollard for expanding *Bivens*.[43] First, in response to Pollard's argument that *Carlson v. Green*[44] directly resolved the question of the availability of *Bivens* actions for federal prisoners against their guards, Justice Breyer noted that the defendants were employees of the federal government in that case and employees of a private firm in this case.[45] Importantly, the former are not ordinarily subject to state tort actions, while the latter are.[46] Second, Justice Breyer dismissed the notion that the Court must look only to alternative federal, as opposed to state, remedies in its search for convincing reasons to refrain from expanding *Bivens*, claiming that a similar argument had been rejected in *Malesko*.[47] Third, to Pollard's claim that state tort law does not adequately protect his constitutional interests, Justice Breyer responded by listing a host of state tort holdings from jurisdictions that house private federal prison facilities protecting prisoners from the negligence of prison employees.[48] He also noted that tort law acts as a sufficient deterrent to the extent that it "provide[s] roughly similar incentives for potential defendants to comply with the Eighth Amendment."[49] Finally, Justice Breyer rejected the notion that the Eighth Amendment violations that might fall outside the purview of state tort law prevented such law from barring Pollard's claim, especially due to Pollard's inability to "convincingly show that there are such cases."[50]

Justice Scalia wrote a short concurring opinion joined by Justice Thomas to make clear that even if state tort law were an inadequate alternative remedy, he would not extend *Bivens* beyond the precise circumstances of *Bivens*, *Davis v. Passman*,[51] and *Carlson*.[52] Justice

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[42] *Id.* at 623 (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)) (internal quotation marks omitted).

[43] *Id.* at 623–26.

[44] 446 U.S. 14 (1980) (permitting a *Bivens* remedy for an Eighth Amendment violation committed by federal prison officials).

[45] *Minneci*, 132 S. Ct. at 623.

[46] *Id.*

[47] *Id.* at 624. It is not clear that *Malesko* rejected the argument, at least as conclusively as Justice Breyer intimates. The state-law-as-alternative aspect of *Malesko* did not play a major role in the holding of the case, which primarily focused on the deterrent role of *Bivens* suits against corporate entities. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70, 73–74 (2001).

[48] *Minneci*, 132 S. Ct. at 624–25.

[49] *Id.* at 625.

[50] *Id.*

[51] 442 U.S. 228 (1979) (permitting a congressional staff member's *Bivens*-type action against a member of Congress for sexual harassment).

Ginsburg dissented, invoking the need for symmetry and uniformity of remedy.[53] She pointed out that had Pollard not been incarcerated in a privately run prison, but in a federal- or state-run prison, he would have had a federal remedy either through *Bivens* or § 1983.[54]

The harms Pollard alleged he suffered at the hands of the prison employees fall directly within the core subject matter of common law tort. State tort law seems then to provide a plausible enforcement mechanism for the Eighth Amendment protection against cruel and unusual punishment. Because of this overlap, the Court did not have to address the difficult questions of the scope of *Bivens* actions going forward and of the limits of an "adequate alternative remedy" under *Wilkie*. On the one hand, the Supreme Court has grown increasingly suspicious of the judicially created remedy in *Bivens*, circumscribing it to varying degrees with each case it decides. On the other hand, *Bivens* addresses important political and social values, including constitutional values — in this case the protection against cruel treatment. The Court has either not taken or not had the opportunity to take decisive action either to discard or to reinforce the *Bivens* remedy. In *Minneci*, because Pollard had an alternative remedy, the Court again did not have to take decisive action on this issue. However, the Court will eventually encounter a set of facts that will force it to confront the more difficult question of at what point state tort law is sufficiently adequate as an alternative under the *Wilkie* test.

This comment first briefly addresses the pattern of cautious circumscription the Court has taken with respect to the *Bivens* remedy. Next, it assesses potential rationales for continuing this pattern in *Minneci*, reading the case as an attempt at solidifying the *Wilkie* test for the analysis of *Bivens* actions. Third, it looks at this approach from the perspectives of compensation, deterrence, and symmetry. This analysis reveals that though *Minneci* did not challenge the *Wilkie* approach, *Minneci* leaves serious ambiguities for future decisions.

Looming over the adequate-alternative-remedy issue in *Minneci* is the well-established reluctance of the Court to expand *Bivens*'s scope.[55] Almost as soon as it established the remedy, the Court narrowed the *Bivens* doctrine to allow for direct remedies only if there are no plausibly adequate alternatives, a position that *Minneci* also em-

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[52] *See Minneci*, 132 S. Ct. at 626 (Scalia, J., concurring).
[53] *See id.* at 626–27 (Ginsburg, J., dissenting).
[54] *Id.*
[55] *See generally, e.g.*, Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23.

braced.[56] In 1980, the Court expanded the *Bivens* remedy to cover violations of the Eighth Amendment in *Carlson v. Green*.[57] In *FDIC v. Meyer*[58] and *Malesko*, however, the Court relied on the variable deterrent effect of Eighth Amendment–based *Bivens* actions against federal agencies[59] and private prison companies,[60] respectively, in holding that such actions are not available. Then, in *Wilkie*, the Court created the test for the viability of a *Bivens* claim used in *Minneci*, which asks the court to search for a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[61] This trajectory demonstrates a caution with regard to the Court's expansion of this judicially created remedy that echoes in other recent decisions[62] — a caution that has expressed itself in the search for adequate alternatives in the *Bivens* context.

One can read *Minneci* as an attempt at a straightforward application of *Wilkie*. Seen in this light, however, Justice Breyer's opinion seems to build into the two-part test a comparison of the remedial, deterrent, and symmetrical adequacy of *Bivens* actions versus alternative remedies. The question at the heart of this approach is to what degree the alternative regime sufficiently vindicates the constitutional rights. The Court did not have to confront this question directly in *Minneci*, where state tort law was plausibly adequate, but this question could become central in later applications of the *Wilkie* framework.

Forcing a prisoner to perform activities that cause severe pain and humiliation and neglecting to provide appropriate medical care are activities that tort law directly addresses. Justice Breyer highlighted cases recognizing a duty of the captor toward his prisoner in each of the eight states that currently host privately managed federal prisons.[63] This analysis ostensibly implies that the Court sees state tort law as a plausible proxy mechanism to protect Eighth Amendment interests otherwise in the *Bivens* ambit.[64] To investigate the degree of adequacy further, this comment examines three grounds on which the adequacy of state tort law can be measured against the alternative of a

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[56] In part, this reluctance to extend the *Bivens* doctrine may have been driven by a skepticism of the appropriateness of judicially created remedies. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411–12 (1971) (Burger, C.J., dissenting).

[57] 446 U.S. 14, 23 (1980).

[58] 510 U.S. 471 (1994).

[59] *Id.* at 473.

[60] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–72 (2001).

[61] *Minneci*, 132 S. Ct. at 623 (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

[62] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 712–14 (2004) (limiting federal courts' ability to recognize new violations of the law of nations actionable under the Alien Tort Statute).

[63] *Minneci*, 132 S. Ct. at 624–25.

[64] *See* John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1676–78 (2009).

Bivens remedy in a circumstance such as Pollard's: compensation, deterrence, and symmetry. While *Bivens* and tort track closely with regard to the first two in this case, they diverge with regard to the third.

State tort law, though it does not provide identical compensation to a *Bivens* remedy — or even identical compensation as among states[65] — should provide compensation consistent at least with social and judicial norms.[66] In fact, with regard to assessing *Bivens* damages, there is little reason to believe that a court would proceed by a different analytical path than would a court in state tort or § 1983 cases, as each would employ an approach rooted in the common law.[67] Where state tort law and *Bivens* actions provide divergent remedies could depend on the judicial body making the damages assessment (state versus federal courts), potential caps on state tort damages, and the heightened symbolic and expressive weight that vindication of a constitutional violation carries.[68] With regard to the disparities between state and federal courts, even though state courts are able to adjudicate federal constitutional rights, there may be reasons to doubt their ability to do so in as unbiased a fashion as federal courts.[69] To the extent that there is a concern over state courts' ability to enforce federal law evenhandedly, there should also be a concern over their ability to do so evenhandedly through the explicit proxy mechanism of state law. However, this worry is mitigated by the fact that many of the

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[65] *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1535–36, 1551–52 (1972).

[66] *See, e.g.*, Clemente v. United States, 568 F. Supp. 1150, 1170 (C.D. Cal. 1983) (awarding damages under *Bivens* in the same manner as under a tort action), *rev'd on other grounds*, 766 F.2d 1358 (9th Cir. 1985); *see also* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1153–54 (1996) (describing compensatory considerations in tort); Note, *Measuring Damages for Violations of Individuals' Constitutional Rights*, 8 VAL. U. L. REV. 357, 358–62 (1974) (describing damages standards for § 1983 and *Bivens* cases as having been derived from "traditional" approaches to injury). *But cf.* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 (1999) (suggesting that only a small fraction of *Bivens* plaintiffs obtain a damage award or monetary settlement).

[67] 42 U.S.C. § 1988 (2006) ("[I]n all [§ 1983] cases where [the statutory regimes] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law . . . shall be extended to and govern the said courts* in the trial and disposition of the cause . . . ." (emphasis added)); *see also* Gene R. Nichol, Bivens*,* Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1134–36 (1989) (describing common law tort damages assessment as the basis for *Bivens* damage awards); Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 369–70 (1989) (same).

[68] *Cf.* J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 287–91 (2010) (describing the rhetorical weight of constitutionally based rights in the remedial context).

[69] *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 180 (1961) (expressing mistrust of state courts' ability to enforce Fourteenth Amendment rights effectively); *see generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (criticizing the Supreme Court's assumption that state courts are equally competent to address constitutional matters).

concerns over bias in state courts, especially with regard to prisoner-plaintiffs, are also present in § 1983 cases,[70] the analogous federal route for victims of constitutional violations by state officials — cases that are often heard by federal courts. This fact suggests that the federal courts may not be more hospitable than their state-level counterparts. Further, where the constitutional interest that has been violated overlaps almost completely with an interest protected by state tort law, there should be little question of state courts' subject matter expertise. With regard to damage caps, despite state-by-state variations,[71] and though caps by their nature reduce the upper bound of compensation for victims, it is not clear that they reduce compensation to such an extent as to extinguish any sense of propriety or proportionality.[72] And if restrictions on compensation were so strict — either as a result of explicit caps or through the growth of that state's tort law — as to reach that point, then a court would find itself in the nether zone of potential inadequacy that *Minneci*'s use of *Wilkie* has left unresolved.

Effective tort remedies — constitutional or otherwise — must deter harmful behavior.[73] One complaint against state tort law as an alternative to *Bivens* actions is that, while *Bivens* remedies only impose liability on an individual, state torts often impose liability on an institution. The individual deterrent rationale was a driving force of the *Malesko* decision, in which the Court held that a plaintiff cannot make a *Bivens*-type claim against the private prison operation itself.[74] However, such institutions are entirely free to indemnify their employees or agents against *Bivens* torts, thus making the deterrent effects of *Bivens* actions and state tort law practically the same.[75] The pressures of shifting liability through indemnification should create incentives for the employer to implement policies and oversight mechanisms to prevent potential abuses. This logic applies equally to state tort liability and *Bivens* liability where coverage is coextensive, so long as damages

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[70] *See* Mariana Claridad Pastore, *Running from the Law: Federal Contractors Escape* Bivens *Liability*, 4 U. PA. J. CONST. L. 850, 878 (2002) ("Juries [in § 1983 cases] may react poorly to inmates and undercompensate plaintiffs with strong suits against individual officers.").

[71] *See, e.g.*, Jeffrey A. Parness, *State Damage Caps and Separation of Powers*, 116 PENN ST. L. REV. 145, 153–62 (2011) (discussing the various considerations that enter into the analysis of damage caps on a state level).

[72] Nor has the Court provided guidance regarding the point at which compensation may be too low.

[73] *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1806 (1997); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 44–58 (1998).

[74] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–72 (2001).

[75] *See* Richard Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under Section 1983*, 78 UMKC L. REV. 967, 979–80 (2010); *see also* Pillard, *supra* note 66, 76–79 (describing the federal government's institution of employee indemnification to *Bivens* liability and its consequence of effectively transferring liability to the government).

are not so disproportionate as to be incomparable. As a result, the individual deterrent rationale would not have been notably advanced by the use of *Bivens* in *Minneci* as opposed to tort.

Under the *Wilkie* test, alternative remedies should be approximately equivalent, but a lack of symmetry between the remedies provided by state tort law and either established, fact-specific *Bivens* applications (like *Carlson*) or § 1983 cases does raise concerns about remedy adequacy — despite the Court's deeming these concerns insufficient to justify a finding of inadequacy. The question of symmetry is a problematic one for a court that is relying on state tort law to protect a constitutional interest under *Wilkie*'s test. Were Pollard's prison operated by a state or public federal entity, he would have had recourse either under § 1983 or *Carlson*,[76] but his poor luck in landing in a private facility meant that he had no available federal remedy. On its face, this result is incongruous regardless of the adequacy of state tort law. One might justify this disparity by pointing to the fact that public employees might have a qualified immunity defense whereas private prison guards definitely do not.[77] Even if it has the practical benefit of accounting for the immunity-based skew, reliance on state tort law as a stand-in remedy does not satisfy the conceptual or symbolic mismatch, nor does it provide the jurisprudential benefit of aligning § 1983 and *Bivens* actions as analogous, parallel suits against state and federal officials.[78] *Wilkie*'s "adequate alternative" approach then does not help develop a common body of decisions that might refine the common ground between the parallel doctrines — instead creating a fractured and fact-dependent line of cases — nor does it respond to the inherent misalignment on either the federal-state or the public-private axes.[79] This incongruity is detrimental to the signaling function served by providing a federal remedy for an important federal right.[80] Thus, while the compensatory and deterrent rationales were plausibly satisfied in *Minneci* under the *Wilkie* test, the decision possibly deepened these imbalances with regard to symmetry.

[76] *Minneci*, 132 S. Ct. at 626 (Ginsburg, J., dissenting).

[77] Pillard, *supra* note 66, at 67–68. Indeed, Justice Breyer relies on this distinction in his opinion. *Minneci*, 132 S. Ct. at 623.

[78] *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 139–41 (2009).

[79] *See* Matthew W. Tikonoff, Note, *A Final Frontier in Prisoner Litigation: Does* Bivens *Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 1014 (2007).

[80] *See, e.g.*, David Zaring, *Three Models of Constitutional Torts*, J. TORT L., Jan. 2008, art. 3, at 22.

To the extent that the slow circumscription of *Bivens* may derive from separation of powers concerns,[81] a sacrifice of symmetry for the compromise of state tort law as an alternative enforcement mechanism might be an attractive option. From this perspective, the maintenance of such symmetry is properly the role of Congress. The *Minneci* majority could have incorporated this argument into its position with only limited practical consequences for future plaintiffs in Pollard's position given the comparable compensatory and deterrent functions of state tort law. Yet this interpretation might require the assumption that Congress's silence is an approval of state tort law for the purposes of protecting the constitutional interest at stake — an assumption that rests on shaky ground.[82] Further, the majority opinion does not make direct reference to separation of powers principles as a justification for suppressing this potential *Bivens* application.[83] As a result, separation of powers is not a satisfying justification for *Minneci*'s deficiencies from the perspective of symmetry, whatever the theory's merits.

Minneci was a reasonably easy case on the spectrum of potential *Bivens*-through-*Wilkie* claims, as there was a plausible alternative remedy to address the violation at hand. In its straightforward application of *Wilkie*, the Court did not have to look too deeply into what the lines for proper levels of vindication are, and it was simultaneously able to maintain its demonstrated interest in cautiously restricting *Bivens* remedies. What is left in *Minneci*'s wake, however, is a firmer foundation for the application of the *Wilkie* test but little guidance as to what exactly constitutes an inadequate alternative remedy. Future courts will be left to grapple with further investigations into compensation, deterrence, and symmetry with scant assurance that the Court will look favorably on any extension of the remedy even after conducting the intensive inquiry under *Wilkie*. If potential plaintiffs are not discouraged by the broader *Bivens* trajectory, the Court will likely soon have to rule on the question of where the boundary of adequacy lies, without much guidance from *Minneci*. This necessity then could nudge the Court to choose whether to continue the gradual restriction of, finally to make its peace with, or clearly to depart from, *Bivens*.

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[81] *See* Ryan D. Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 472–73 (2006); George D. Brown, *"Counter-Counter-Terrorism Via Lawsuit" — The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 911 n.185 (2009).

[82] *See, e.g.*, Turpin v. Mailet, 579 F.2d 152, 163 (2d Cir. 1978) (en banc) ("Nothing . . . suggests that legislative silence can in any way be viewed as an expression of congressional 'intent,' let alone the sort of 'explicit congressional declaration' required by *Bivens*." (footnote omitted)).

[83] Justice Breyer does, however, quote the critical language from *Wilkie* regarding the proper role of the "Judicial Branch," which implies the underlying existence of these concerns. *Minneci*, 132 S. Ct. at 623 (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).