**Louisiana Law Review**

Volume 41 | Number 1
*Fall 1980*

# Davis v. Passman: A Private Cause of Action for Damages Under the Fifth Amendment

John Jeffrey Simon

prior jurisprudence[84] clearly establish that the legitimate portion of a forced heir cannot be encumbered with conditions. But when the donor bequeaths more than the legitimate portion, he perhaps could attach any lawful conditions which would apply to the bequest as a whole.[85] Should the heir dispute the condition, transfer of the forced portion is unaffected.[86] If the legatee takes without disputing the condition, it is assumed that he takes all of the legacy subject to the condition. Should he then fail to meet the requirements of that condition, transfer of the disposable portion would be precluded,[87] although the legatee is still entitled to receive the forced portion.

The minimal impact of *Baten* is to sanction brief suspensively conditional legacies. More broadly, the decision demonstrates a fairly liberal attitude, favoring freedom of testation, which may be manifested in subsequent cases in this area. The tendency seems to be to afford such dispositions a presumption of validity which will stand unless denied by a specific prohibition, and applicable prohibitions will be narrowly construed. To uphold the will in *Baten*, the court had to dispel some entrenched misconceptions concerning several ancient doctrines. That it was able to do so while clarifying the underlying principles of those doctrines is commendable.

*Daryl H. Owen*

## *Davis v. Passman*: A PRIVATE CAUSE OF ACTION FOR DAMAGES UNDER THE FIFTH AMENDMENT

The plaintiff brought suit seeking damages[1] alleging that Congressman Otto Passman had discriminated against her on the basis of sex by firing plaintiff from her position as his deputy administrative assistant.[2] The United States Supreme Court, reversing

84. *See, e.g.*, Succession of Turnell, 32 La. Ann. 1218 (1880); Chase v. Matthew's Executors, 12 La. 357 (1838).

85. Succession of Turnell, 32 La. Ann. 1218, 1220 (1880).

86. *Id.*

87. *Cf.* LA. CIV. CODE art. 1698 (legacy is invalid if the legatee dies before the condition can be fulfilled).

1. The petitioner also sought equitable relief in the form of reinstatement, but Congressman Passman's election defeat rendered this claim moot.

2. The federal district court sustained the respondent's Federal Rules of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.

the Fifth Circuit,[3] held that redress in damages for a fifth amendment violation may be implied directly from the due process clause when no alternative forms of relief are available.[4] *Davis v. Passman*, 442 U.S. 228 (1979).

The implication of private causes of action from public law is not a new jurisprudential discovery but dates from the origins of the Anglo-American legal system. The idea that individuals should be able to enforce, judicially, provisions of public law that do not expressly grant private remedies is as old as the Magna Carta itself.[5] Moreover, the conceptual distinction between public and private law has been challenged repeatedly in the federal courts.[6] In many cases, litigants desiring private remedies have had to argue that the courts may and should infer private causes of action from provisions that apparently were originally written to allow enforcement only on behalf of the public at large.[7] Federal trial and appellate courts over the years have recognized these implied causes of action in certain circumstances in cases based both on federal statutes and on the Constitution itself.[8]

In several instances the federal courts have allowed actions for remedies other than damages in suits based on federal statutes which did not explicitly provide individual remedies.[9] In addition,

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3. The United States District Court for the Western District of Louisiana held that the plaintiff had no private right of action under the fifth amendment. A panel of the Fifth Circuit Court of Appeals reversed, 544 F.2d 865 (5th Cir. 1977), and was ultimately overruled by an *en banc* decision of the same court. 571 F.2d 793 (5th Cir. 1978).

4. After remand to the district court, the suit on the merits was settled out of court for an undisclosed amount. *See* Washington Post, Aug. 25, 1979, at 9, col. 5.

5. The Great Charter drew no distinction between private law and limits on governmental action. In addition, statutes that were passed during the reign of Edward I and flexible forms of action developed later in the courts recognized enforcement by individuals of limits on sovereign authority. *See* Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PENN. L. REV. 1, 9-23 (1968). *See generally* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 20-40, 106-56, 424-83 (1956).

6. Comment, *Implying Private Causes of Action from Federal Statutes: Amtrak and Cort Apply the Brakes*, 17 B.C. IND. & COM. L. REV. 53, 53 (1975).

7. *See* Katz, *supra* note 5, at 2-5.

8. On implication generally, *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Katz, *supra* note 5.

9. For example, an individual plaintiff was awarded injunctive relief against an agent who allegedly had sold securities through fraudulent misrepresentations and concealments in violation of the Securities and Exchange Act of 1933. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). Similarly, the Supreme Court in 1944, finding that the right of a class not to be discriminated against could fairly be inferred from the Railway Labor Act, awarded equitable relief to a black plaintiff by enjoining

these courts have also found implied actions for monetary damages in statutes which did not expressly authorize relief.[10] In deriving these remedies from federal regulatory law, the courts generally have allowed a private action for the breach of a statutory duty when the remedy is consistent with the purpose of the legislation and when the statute expresses no contrary legislative intent.[11] A recent implication case, *Cort v. Ash*,[12] articulated the standards that the Court has used to determine whether or not a cause of action for damages is implied in a particular federal statute. In refusing to hold that a stockholder's derivative suit for damages was implicit in a criminal statute prohibiting certain political campaign activities, the Court asked: 1) Is the plaintiff one of the class for whose especial benefit the statute was enacted, such that the statute creates a right in favor of the plaintiff? 2) Is there an indication of legislative intent to create or deny a remedy? 3) Is implication consistent with the purposes of the legislative scheme? and 4) Is the cause of action one traditionally relegated to state law in an area basically the concern of the state, so that it would be inappropriate to base a cause of action on federal law?[13]

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the enforcement of a discriminatory labor contract that had been entered into by a bargaining representative who had been chosen under the Act. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). *See also* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944).

10. For example, in the first statutory implication case, the Supreme Court in 1916 found that an employee of an interstate railway company was within the protection of the Federal Safety Appliance Act and allowed him an implied right of action against his employer for injuries caused by the employer's failure to comply with federal safety regulations. Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916). In a later case the Supreme Court allowed a private right of action for monetary damages against a corporation that allegedly had violated the proxy rules of the Securities and Exchange Act of 1934. J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

11. *See* Katz, *supra* note 5, at 31.

12. 422 U.S. 66 (1975).

13. In one recent case that discussed the *Cort* criteria, a woman who was allegedly denied admission to two medical schools on the basis of sex was found to have the right to pursue private actions against the universities under Title IX of the Education Amendments of 1972. Cannon v. University of Chicago, 441 U.S. 677 (1979). For criticism of the *Cort* standards, *see* Justice Powell's dissent in the case. 441 U.S. at 730 (Powell, J., dissenting). Justice Powell argued that the criteria are so broad as to allow the judiciary to legislate and that the *Cort* test has produced a flood of statutory implication claims. Justice Powell's *Cannon* view is reflected in a recent case that suggests that the Court has abandoned the *Cort* approach in favor of a closer examination of legislative intent. Writing for the Court in denying a private damages remedy under the Investment Advisors Act of 1940, Justice Stewart, relying on *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 575 (1979), for criticism of the *Cort* standards, argued that the Court, instead of examining the desirability of implying private rights of action in order to effectuate the purposes of a given statute, as it had done in previous cases, should restrict its inquiry to the intent of Congress to authorize such a remedy. Trans-

The constitutional limits on governmental activity also have been sources of implied remedies. Federal courts have allowed private actions when individual rights may be inferred from constitutional provisions, if alternative forms of relief are lacking or inadequate.[14] This extension of public law has most commonly occurred in actions for relief other than damages.[15] Until recently, the federal judiciary has been reluctant to allow individual plaintiffs to collect damages for violations of constitutional rights unless specific statutory or constitutional declarations grant a right to recovery.[16] Damage remedies have been inferred in only a few instances.[17] In none of these cases was monetary relief implied absent some independent authority.[18]

*Bivens v. Six Unknown Named Agents of the Federal Bureau of*

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america Mtg. Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979). In dissent, four justices, White, Brennan, Marshall, and Stevens, wrote that the *Cort* standards should have been applied. 100 S. Ct. at 25 (White, J., dissenting). It is left for future decisions to determine whether or not the Supreme Court will continue to apply the stricter standard. See note 70, *infra*.

14. *See* Dellinger, *supra* note 8; Hill, *supra* note 8; Katz, *supra* note 5.

15. One Supreme Court decision allowed ejectment as a remedy for violation of the constitutional provision prohibiting the taking of private property without just compensation. United States v. Lee, 106 U.S. 196 (1882). In *Bolling v. Sharpe*, 347 U.S. 497 (1954), when minor plaintiffs filed a class action suit seeking to enforce their fifth amendment right to be admitted to public schools on a non-segregated basis, the Court authorized the application of equitable principles in fashioning judicial decrees aimed at eliminating obstacles to desegregation. Suppression of evidence obtained as a result of searches and seizures that violate the fourth amendment also gives rise to an implied remedy. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (cases in state courts); Weeks v. United States, 232 U.S. 383 (1914) (cases in federal courts).

16. For discussion of the reluctance to imply damage remedies, *see* Dellinger, *supra* note 8, at 1542-43; Hill, *supra* note 8, at 1142.

17. In two cases decided at the turn of the century, the high court allowed actions for damages based on the constitutional right to vote. Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900). A later case similarly allowed monetary recovery for voting right violations. Nixon v. Herndon, 273 U.S. 536 (1927). The only other case prior to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to infer a right to money damages for a breach of constitutional liberties involved the Supreme Court's award of relief under the fifth amendment for land flooded as the result of a federal water project. Jacobs v. United States, 290 U.S. 13 (1933).

18. In the *Swafford*, *Wiley*, and *Nixon* cases, though the Court stated that it was inferring a right to sue for recovery directly from the Constitution, specific statutory provisions authorized such relief. *Jacobs* can be distinguished from pure implication cases in that the fifth amendment itself authorizes compensation when property is taken for public use. *See* Note, *The Truly Constitutional Tort*, 33 U. PITT. L. REV. 271, 282 (1971); Note, *Judicial Creation of a Federal Cause of Action for Damages for Fourth Amendment Violations by Federal Officers*, 1971 WASH. U. L.Q. 686, 688 (1971).

*Narcotics*,[19] was a watershed case[20] in the area of implied causes of action for damages for violations of individual constitutional liberties. In *Bivens*, the plaintiff sought redress in federal court for a search that allegedly had been made by federal agents in violation of the fourth amendment. The Supreme Court inferred a damage remedy directly from the amendment, noting the historical role of damages as the ordinary remedy for violations of personal rights.[21] The Court stated that the case involved "no special factors counselling hesitation in the absence of affirmative action by Congress."[22] Moreover, the Court did not frame the issue as being whether money damages were necessary to the enforcement of the fourth amendment. Noting the absence of an explicit congressional statement that those in petitioner's situation must be limited to other remedies found to be equally effective by Congress,[23] the Court stated, "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his fourth amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."[24] In a separate concurring opinion, Justice Harlan argued that the federal courts have authority to infer private damage remedies from public law and that, in deciding

19. 403 U.S. 388 (1971).

20. In *Bell v. Hood*, 327 U.S. 678 (1946), the Court found that a suit to recover compensation for a fourth amendment violation by federal agents stated a claim arising under federal law, giving rise to federal question jurisdiction. Although the question of whether or not a cause of action for monetary relief was available was not before the Court, in dictum the Court said, "It is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, a federal court may use any available remedy to make good the wrong done." *Id.* at 684. This dictum has been cited by subsequent decisions, including *Bivens*, 403 U.S. at 396, and *Davis*, 442 U.S. at 245, as authority for the proposition that causes of action for monetary redress of breaches of constitutional rights should be inferred in appropriate situations. Ironically, Justice Black, the author of *Bell*, dissented in *Bivens*, objecting to *Bivens'* extension of *Bell* beyond the jurisdictional issue.

In *Butz v. Economou*, 438 U.S. 478 (1978), a case involving a suit by a former registered futures commission merchant against the Department of Agriculture and others, seeking damages for wrongful initiation of administrative proceedings, the Court's discussion of *Bivens* was limited to a statement that a compensable injury to a constitutionally protected interest could be vindicated in a suit for damages based upon the general federal question jurisdiction of the federal courts. *Id.* at 486. The Court's *Bivens* discussion, however, was dicta, as the case was decided on an immunity issue.

21. 403 U.S. at 395.

22. *Id.* at 396.

23. *Id.* at 397.

24. *Id.*

whether or not to infer a cause of action, the federal judiciary should weigh the same policies that a legislature would and should award relief "'necessary' or 'appropriate' to the vindication of the interest involved."[25]

Although *Bivens* recognized a monetary remedy for a constitutional violation, several questions fundamental to further application of *Bivens* were left unanswered by the Court. First, must the courts recognize a remedy in damages whenever there is a violation of constitutional rights and a plaintiff is without an effective remedy, or may courts exercise the legislative discretion that Justice Harlan endorsed? Additionally, if a remedy is not constitutionally compelled, what criteria should the courts use to decide whether or not an implied remedy exists? Also, to what extent does the availability of other remedies preclude damages?[26] Finally, under what conditions can the *Bivens* rationale be extended to other constitutional provisions?

Subsequent federal appellate decisions have done little to explain *Bivens*.[27] Such explanation is needed, as the lower federal courts have already extended *Bivens* to the first,[28] fifth,[29] sixth,[30] eighth,[31] ninth,[32] thirteenth,[33] and fourteenth[34] amendments.

In *Davis* a panel of the United States Court of Appeals for the Fifth Circuit, extending *Bivens*, held that a damages remedy was in-

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25. *Id.* at 407 (Harlan, J., concurring).

26. For a unique approach to the question, consider Circuit Judge Roney's concurring opinion in *Davis*, when the case was decided by the *en banc* Fifth Circuit, 571 F.2d at 802 (Roney, J., concurring), in which he argued that the *Bivens* rationale should be limited to pre-constitutional torts—violations of constitutional provisions that protect rights that were recognized at the time of the drafting of the Constitution. Distinguishing *Davis* from *Bivens*, Judge Roney wrote:

> In this case, however, no similar right is at stake. The defendant has not intruded upon a liberty interest with preconstitutional origins. . . . But the Constitution has allegedly given her a right not to be fired on the basis of her sex. This right is not, however, a protected inherent right, but a right "created" by the Constitution, a right which in fact encroaches upon what was historically viewed as an inherent right of her employer.

*Id.* The *Davis* holding, of course, implicitly rejects this limitation.

27. *See* cases cited in notes 29-34, *infra*. Generally, these decisions quote the *Bell* dictum, see note 20, *supra*, but offer no interpretation of *Bivens*.

28. *See, e.g.*, Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973).

29. *See, e.g.*, Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); State Marine Lines, Inc. v. Shulz, 498 F.2d 1146 (4th Cir. 1974); United States v. Koelzer, 457 F.2d 892 (3d Cir. 1972).

30. *See, e.g.*, Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D. D.C. 1976).

31. *See, e.g.*, Jihaad v. Carlson, 410 F. Supp. 1132 (E.D. Mich. 1976).

32. *See, e.g.*, Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975).

33. *See, e.g.*, Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975).

34. *See, e.g.*, Owen v. City of Independence, 421 F. Supp. 1110 (W.D. Mo. 1976).

ferrable directly from the fifth amendment whenever a plaintiff was otherwise remediless.[35] The decision was overruled in an *en banc* rehearing,[36] wherein the court found that Davis had no implied action for damages. The Fifth Circuit on rehearing applied the criteria that the Supreme Court had fashioned in *Cort v. Ash* to decide whether or not to infer a private damages remedy and found that the infringement of Davis' due process rights was not sufficient to justify a *Bivens* remedy, that Congress, in enacting section 717 of the Civil Rights Act of 1964, intended those in the petitioner's position to be without legal redress, and that the recognition of a damages remedy for due process violations would create "the danger of deluging federal courts with claims otherwise redressable in state courts."[37]

Reversing the court of appeals, Justice Brennan, writing for a five-member majority,[38] found that the Fifth Circuit applied the wrong test in deciding whether or not Davis had an enforceable right.[39] The majority stated that the issue before the court of appeals in deciding whether or not a cause of action existed was "a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[40] The Court determined that in deciding this

35. Davis v. Passman, 544 F.2d 865 (5th Cir. 1977).

36. 571 F.2d 793 (5th Cir. 1978).

37. *Id.* at 800.

38. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's majority opinion.

39. 442 U.S. at 241.

40. *Id.* at n.18. The majority also stated that the court of appeals had confused the issue of standing, which involves inquiry into the extent of the plaintiff's injury, with the question of the existence of a cause of action, which deals with the nature of the right that the petitioner asserts. *Id.* In applying the first *Cort* criterion, which addresses the special benefit conferred on the plaintiff by a particular statute, the court of appeals found that Davis' rights were violated, but not to the extent that Bivens' had been. 571 F.2d at 797. The Supreme Court found that this approach improperly looked to the extent of the plaintiff's injury to determine the existence of a cause of action. 442 U.S. at 241 n.18. The Court also stated that the court of appeals had found that the petitioner had no cause of action in the sense that those in the petitioner's position were not able to enforce the due process right asserted. 442 U.S. at 241. This statement is at the least misleading and arguably incorrect. The Fifth Circuit did find that a damages remedy was not available to those in petitioner's position but left open the possibility that an equitable remedy might be available to congressional employees discharged on unconstitutional grounds: "Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief where the employer remained in office . . . ." 571 F.2d at 800. If the court of appeals had found that the petitioner did not have a cause of action to enforce the due process rights that she asserted, as the Supreme Court said the lower court did, 442 U.S. at 241, then an equitable remedy

issue the court of appeals should not have applied the *Cort* statutory implication standards,[41] because that test inquires into congressional intent, a factor essential to statutory interpretation but irrelevant to constitutional construction.[42] Instead of seeking legislative intent, the Court examined the basis of the petitioner's claim and found a cause of action implied directly by the due process clause of the fifth amendment, because the plaintiff's complaint alleged a violation of her fifth amendment rights and the petitioner had no effective extra-judicial means to invoke the protection given by the amendment.[43]

In deciding that the plaintiff's complaint presented appropriate circumstances for monetary compensation, the Court ruled that in this case: 1) relief in damages was appropriate because a damages remedy is "the ordinary remedy for invasion of personal interests in liberty," and was judicially manageable, while no other redress was available to Davis;[44] 2) the concerns arising from the fact that the defendant was a congressman were co-extensive with the protection afforded him under the Speech or Debate Clause;[45] 3) Congress has not expressly declared that a congressional employee discharged as a result of sex discrimination cannot recover;[46] and 4) extension of a

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necessarily would have been precluded. The Supreme Court's characterization of the Fifth Circuit's disposition of the issue is correct only if the phrase "those in petitioner's position" refers only to unconstitutionally discharged congressional employees *whose employers have left office*. Chief Justice Burger objected to the suggestion that were Congressman Passman still in office, a federal court could order him, under penalty of contempt, to rehire the petitioner. 442 U.S. at 250 (Burger, C.J., dissenting). The majority intimated no view on this question. 442 U.S. at 241 n.24.

41. Some commentators, arguing that the federal courts function under the same legislative authorization and conduct the same balancing analysis whether interpreting constitutional or statutory material, challenge the notion that the courts should not use statutory implication reasoning in interpreting the Constitution. Dellinger, *supra* note 8, at 1545; Katz, *supra* note 5, at 39-43.

42. 442 U.S. at 241.

43. *Id.* at 243.

44. *Id.* at 245, *quoting* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

45. Article I, Section 6 of the United States Constitution states of senators and representatives: "and for any Speech or Debate in either House, they shall not be questioned in any other place."

46. Section 717 of Title VII of the Civil Rights Act of 1964, as amended in 1972 by the Equal Employment Opportunity Act, prohibits discrimination in federal employment on the basis of race, color, religion, sex, or national origin and provides for enforcement by the Civil Service Commission and the federal district courts. Davis was unable to invoke the provisions of section 717 because it specifically excludes from its protection government employees in non-competitive service. The court of appeals *en banc* opinion found that Congress intended section 717 to be the exclusive remedy for discrimination in federal employment and that those in petitioner's position were ex-

damages remedy to violations of due process would not expand the scope of federal jurisdiction so radically that the federal courts would be flooded with claims of compensable injuries caused by violations of due process.[47] The Court then remanded the case for disposition of the defendant's claim to Speech or Debate Clause immunity.[48]

The Court's opinion does little to explain further the *Bivens* decision and implication of private causes of action from public law. Instead, the decision raises several difficult issues of its own and leaves unanswered some of the more important questions raised by *Bivens*.

One difficulty with the *Davis* opinion stems from the fact that the Court decided the case without deciding the issue of justiciability,[49] essential to the determination of whether or not petitioner Davis should have been allowed a cause of action for money damages. The justiciability issue, as it arose in the instant case, arguably involved two related aspects. The first was the extent to

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cluded from its provisions. In so concluding, the court of appeals relied on *Brown v. General Services Administration*, 425 U.S. 820 (1976), which held that Congress intended section 717 to create an exclusive, preemptive scheme for the redress of federal employment discrimination. The appellate court, applying the *Cort* statutory implication criteria to *Davis*, denied a cause of action for damages, their denial based in part upon Congress' adoption of section 717. 571 F.2d at 798. Justice Brennan's majority opinion in *Davis* disagreed with the Fifth Circuit's evaluation of the scope and intent of section 717, maintaining that Congress did not exclude expressly alternative remedies. Although Justice Brennan's conclusion is "suspect"—as Justice Powell in dissent pointed out, 442 U.S. at 254 (Powell, J., dissenting), given *Brown's* holding and Congress' explicit exclusion of non-competitive employees from the statute's employment discrimination provisions—the outcome of the investigation of congressional intent is perhaps not as important to future litigants as is the question that is raised by the fact of the inquiry: If the *Davis* damages remedy is constitutionally compelled and cannot be precluded by congressional intent to leave the petitioner remediless, see text at notes 62-64, *infra*, why did Justice Brennan feel compelled to look to the intent behind section 717?

47. The Court rejected this potition with three arguments. First, 42 U.S.C. § 1983 (1976) is already available to afford redress to due process violations which occur under state law. In addition, the court did "not hold that every tort by a federal official may be redressed in damages," 442 U.S. at 248, and Congress might obviate the need for such relief by providing "equally effective alternative remedies," *id.* Finally, considerations of judicial economy should not thwart the protection of constitutional rights. *Id.*

48. See note 4, *supra*, for the disposition of the case.

49. Justiciability generally concerns the question of whether or not a controversy is the type that should be entrusted to the courts for resolution. "In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" Powell v. McCormack, 395 U.S. 486, 517 (1969), *quoting* Baker v. Carr, 369 U.S. 186, 198 (1966).

which the Speech or Debate Clause barred inquiry into the defendant's firing of Davis.[50] The second aspect concerned the degree to which judicial examination of congressional employment practices is barred by the principle of separation of powers.[51] The Court, however, treated the separation of powers claim as "co-extensive with the protections afforded by the Speech or Debate Clause,"[52] and remanded the case for a determination of the extent of Speech or Debate Clause protection.[53]

Regardless of the merits of the Speech or Debate Clause argument,[54] its consideration is arguably necessary to a determination of

50. Legislative Speech or Debate Clause immunity has been construed narrowly by the Court, which has noted that the protection does not extend to all conduct relating to legislative activities, but only "protects against inquiry into acts that occur in the regular course of the legislative process and the motivation for those acts." United States v. Brewster, 408 U.S. 501, 525 (1972). *See also* Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972). A congressman's employment decisions regarding staff members whose positions are basically clerical might be held to be outside of the protection accorded acts within the regular course of the legislative process, but the Court's disposition of the case postponed determination of the nature of Davis' duties and their relevance to Speech or Debate Clause immunity.

51. Chief Justice Burger wrote that the principle of separation of powers made this case non-justiciable because the employment of congressional staff members involves political decisions committed to the discretion of congressmen. 442 U.S. at 249 (Burger, C.J., dissenting). Justice Brennan, writing for the majority, stated that the bar to inquiry arises when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." 442 U.S. at 242, *quoting* Baker v. Carr, 369 U.S. 186, 217 (1962). Arguably, review of Congressman Passman's decision was barred by one or more of these considerations. After *Baker v. Carr*, the Court decided *Powell v. McCormack*, 395 U.S. 486 (1969), which strictly construed the *Baker v. Carr* criteria of non-justiciability and indicated that the Court will not refuse to review all congressional decisions dealing with internal practices. The Court in *Davis*, for the first time, held that the protection afforded by the principle of separation of powers extends no farther than the protection afforded by the Speech or Debate Clause. The correctness of this holding is arguable. See note 53, *infra*.

52. 442 U.S. at 246.

53. The Court equated the Speech or Debate Clause and separation of powers issues, stating: "Second, although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause." 442 U.S. at 246. The advisability of this equation is arguable. Justice Powell wrote that this assertion was "a striking departure from precedent." 442 U.S. at 253 n.2 (Powell, J., dissenting). Justice Powell argued that the Court ignored the fact that "[o]ur constitutional structure of government rests on a *variety* of checks and balances." *Id.* (emphasis added). The majority, he stated, acted as if the Speech or Debate Clause were the only check. *Id.* Chief Justice Burger in a dissenting opinion joined by Justices Powell and Rehnquist also viewed the two issues as distinct. 442 U.S. at 249 (Burger, C.J., dissenting).

54. Chief Justice Burger in dissent reached the merits of this issue. For him, because of the issue of separation of powers, "judicial power in this area is circumscribed." 442 U.S. at 250 (Burger, C.J., dissenting). Curiously, Justice Powell, in

the ultimate issue in *Davis*. It is disturbing that the Court, when presented with two issues of constitutional significance, decided the question of a cause of action for damages but remanded the case for hearing on the justiciability issue, which had been briefed fully by both petitioner and respondent.[55] The Speech or Debate question is no less important than the matter actually heard; a decision for respondent on the issue would have been dispositive of the case. It would seem that the Court should determine, before deciding whether or not to infer a damages remedy, whether or not the controversy can be adjudicated at all. Although it has been stated that the Court will neither decide a question of constitutional law before its decision is necessary nor pass upon a properly presented constitutional question when a case can be resolved by ruling on an issue of general or statutory law,[56] it was not necessary to do either here. The Court explained in *Davis* that it heard the issues that it did in order to avoid imposing "additional litigative burdens" on the respondent.[57] It is arguable, however, that hearing the Speech or Debate Clause issue might have relieved the respondent of "litigative burdens" by making further consideration of the petitioner's case unnecessary.[58]

In the interests of judicial efficiency, the Court could have taken one of two courses of action. It could have vacated the judgment of the court of appeals and remanded the case to the district court or court of appeals for resolution of the Speech or Debate Clause issue. Or, alternatively, the Court itself could have decided that question. The Court, however, believed that a refusal to decide the cause of action and remedy questions might also create unnecessary litigative burdens.[59]

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dissent, professed not to reach the merits of the Speech or Debate Clause argument, 442 U.S. at 254 n.3 (Powell, J., dissenting), despite the fact that he joined in Chief Justice Burger's opinion, which did reach the merits. The Chief Justice and Justice Rehnquist also joined Justice Powell's dissenting opinion.

55. Brief for Respondent at 21-30. Brief for Petitioner at 50-62.

56. In his concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 341 (1936), Justice Brandeis articulated seven rules that, he argued, the Court had developed to determine whether or not it would hear a constitutional question that had been placed before it for decision. *Id.* at 346-48. The second and fourth rules are, respectively, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" and "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 346-47.

57. 442 U.S. at 236 n.11.

58. Justice Stewart made this argument in his dissent. 442 U.S. at 251 (Stewart, J., dissenting). Justice Rehnquist joined Justice Stewart's opinion.

59. 442 U.S. at 236 n.11.

*Davis* does not expressly establish standards for determining when a damages remedy is appropriate relief for violation of a constitutional right and can be read as supporting either the proposition that some remedy is compelled by the Constitution or the argument that a court may exercise something akin to legislative discretion in deciding when to grant damages. The Court, considering the propriety of a damages remedy and the possibility of a deluge of due process claims, appeared to address policy considerations, as a legislature would.[60] Furthermore, the holding that separation of powers concerns are co-extensive with the reach of the Speech or Debate Clause may have been a product of evaluating competing policies.[61] Likewise, the Court's treatment of congressional intent may support the inference that the Court was exercising a principled discretion, willing to take congressional intent into consideration, when appropriate, as one factor to be weighed in making a policy determination. Thus, from the finding that Congress did not expressly preclude monetary relief for those in petitioner's position, it might be inferred that if Congress had so intended, such a fact would be entitled to consideration in deciding whether or not a damage remedy should be granted.

By concluding that Congress did not intend to foreclose relief to congressional employees, the Court avoided deciding whether or not Congress has the authority to preclude a remedy altogether. Logically, of course, if a remedy for a constitutional violation is constitutionally compelled, there would be no need to decide whether

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60. The Court found "the most fundamental answer" to the "deluge" argument in a quotation from Justice Harlan: "Current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Id.* at 248, *quoting* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. at 411 (Harlan, J., concurring). It might be argued from this passage that the Court considers some remedy for a constitutional violation to be constitutionally compelled, irrespective of any effect on swollen dockets. Thus, it is possible that in discussing the "deluge" argument the Court was not really confronting the problem of swollen dockets, but was in fact dismissing it as irrelevant.

61. Justice Powell's dissent seems to indicate otherwise. He wrote: "Among those policies that a court certainly should consider in deciding whether to imply a constitutional right of action is that of comity toward an equal and coordinate branch of government." 442 U.S. at 253 (Powell, J., dissenting). To him, the Court's decision "avoids our obligation to take into account the range of policy and constitutional considerations that a legislature is expected to ponder in determining whether a particular remedy should be enacted." *Id.* at 254. However, it is arguable that the Court did weigh such considerations and, for the majority, the overriding policy consideration was that "[n]o man in this country is so high that he is above the law." *Id.* at 246, *quoting* Butz v. Economou, 438 U.S. 478, 506 (1978), *quoting* United States v. Lee, 106 U.S. 196, 220 (1882).

Congress intended to foreclose relief, because Congress would have no such power. Thus, the Court's examination of congressional intent may mean that the remedy is not constitutionally compelled.[62] The Court avoided the constitutional question, but the failure of *Davis* to state that congressional intent is irrelevant in deciding whether or not to infer a damages remedy does not foreclose the possibility that some remedy is constitutionally compelled. The Court, which usually avoids deciding issues not necessary to resolving the case before it,[63] need not have addressed the question of Congress' power to foreclose redress, inasmuch as the Court found that Congress had not tried to exercise any such power. Thus, the Court's treatment of congressional intent may not have been part of a legislative-like balancing, but rather an attempt to avoid a constitutional collision with a coordinate branch of government.[64]

Though *Davis* hints that the *Bivens* remedy is not constitutionally compelled, there are also strong indications that the *Davis* Court is stating that there must be a remedy available to redress violations of constitutional rights. After disagreeing with the Fifth Circuit ruling that a damages remedy was not implied in this case, the Court stated:

> And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, *must* be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.[65]

62. See note 46, *supra*.

63. *See* Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

64. If some remedy is constitutionally compelled, then there is no need to examine congressional intent; in that case, the Court's consideration of congressional intent arguably indicates that a remedy is *not* constitutionally compelled. But given the fact that the Fifth Circuit's opinion was in large measure based on the view that Congress intended to preclude such relief, the Supreme Court had to address the issue and could reach the result it did by finding that Congress did not intend to foreclose relief or, alternatively, by finding that Congress had no power to do so. In choosing the former course to avoid a constitutional holding that might limit congressional power, the Court was acting consistently with its handling of the Speech or Debate Clause issue. The Court avoided the sensitive question of whether a Congressman is judicially accountable for an unconstitutional discharge of an employee. Thus, *Davis* could be cited as an example of the Court's reluctance to decide sensitive issues that go to the heart of the relationship between two coordinate branches of government, when such decisions are at all avoidable. However, Justice Powell feels that *Davis* goes too far in encroaching on congressional prerogatives; he suggests that Congress might respond to the *Davis* decision by limiting federal judicial jurisdiction in an attempt to "reassert the proper balance between the legislative and judicial branches." 442 U.S. at 255 n.4 (Powell, J., dissenting).

65. 442 U.S. at 242 (emphasis added).

Although the Court spoke in terms of "jurisdiction," the reference to "no effective means" of enforcing and protecting constitutional rights addresses the issue of relief. Further, the Court, by stating that Congress could obviate the need for damages by creating "equally effective alternative remedies," implies that some remedy must be available.[66] In addition, the majority opinion implies that Congress is powerless to preclude relief totally. Explaining that the *Cort* criteria are inapplicable in deciding whether or not a constitutional cause of action exists, the Court stated that Congress may decide who can enforce statutory rights, but that the question of who can enforce a constitutional right is a "fundamentally different . . . question."[67] One final indication that some remedy is compelled is contained in Justice Powell's dissent, in which he stated, "I have thought it clear that federal courts must exercise a principled discretion when called upon to infer a private cause of action directly from the Constitution."[68] In his view, "the decision of the Court . . . is not an exercise of principled discretion. It avoids the obligation to take into account the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted."[69]

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66. *Id.* at 248. On May 30, 1979, Representatives Morris Udall, Robert Drinan, and Patricia Schroeder introduced House Resolution 292, the House Fair Employment Practices Bill, which would bring Congress into line with provisions of Title VII of the Civil Rights Act and the Equal Pay Act. The resolution provides for the creation of a Fair Employment Relations Board, which is to hear discrimination complaints and to supervise operations within a Fair Employment Relations Office. In addition to counselling, the Office offers employees and job applicants who believe themselves to have been targets of discrimination a procedure for formal and informal complaints. Either party to a dispute may appeal Board recommendations to the House Ethics Committee. H.R. RES. 292, 96th Cong., 1st Sess., 125 CONG. REC. 3906 (daily ed. May 30, 1979).

67. 442 U.S. at 241.

68. 442 U.S. at 252 (Powell, J., dissenting).

69. *Id.* at 254. See note 61, *supra*, and accompanying text. Arguably, the difference in approach between Justice Brennan in *Davis* and Justices Harlan, in *Bivens*, and Powell, in *Davis*, represents a fundamental disagreement as to the extent of judicial discretion to decline jurisdiction constitutionally granted to it. Justice Brennan's *Davis* opinion reflects his support for the view that the Court should adopt an activist posture and open its doors to plaintiffs whenever they allege a violation of constitutionally protected rights and no other remedy is provided. Chief Justice Marshall articulated this position in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), when he wrote for the Court, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," and in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), in which he stated, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *See also* Justice Fortas' opinion for the majority in Epperson v. Arkansas, 393 U.S. 97 (1968); H. HART & H. WECHSLER, THE FEDERAL COURTS 657-62 (2d ed. 1973); Gunther, *The Subtle Vices of the "Passive Vir-*

The significance of *Davis v. Passman* transcended the compensation of one congressional employee by offering the Court an opportunity to clarify an important area of constitutional law. But *Davis* left to future cases the responsibility of defining precisely the nature of the *Bivens* remedy and of determining the point at which judicial extension of the *Bivens* rationale will end.[70]

*John Jeffrey Simon*

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*tues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV L. REV. 1 (1959). Justices Harlan and Powell adopt a different approach and argue that the Court should be able to make quasi-legislative decisions in determining whether or not to recognize a cause of action. This principle is articulated in A. BICKEL, THE LEAST DANGEROUS BRANCH 121-33 (1962). *See* Poe v. Ullman, 367 U.S. 497 (1961); Naim v. Naim, 350 U.S. 891 (1955); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v. TVA, 297 U.S. at 341 (1936) (Brandeis, J., concurring). *See also* Davis v. Passman, 442 U.S. at 253 n.2 (Powell, J., dissenting), *citing* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (wherein the Court refused to decide cases over which it had jurisdiction because of the principle of comity toward the states).

70. In the very recent case of *Carlson v. Green*, 100 S. Ct. 1468 (1980), a 5-4 Court held that a private damages remedy could be inferred directly from the eighth amendment, despite the availability of a cause of action for damages under the Federal Tort Claims Act. The Court's opinion, written by Justice Brennan, stated that a *Bivens*-type cause of action is allowed when 1) there are no special factors counselling hesitation in the absence of affirmative action by Congress, and 2) there is no explicit Congressional preclusion. The Court's consideration of policy issues (such as the appropriateness of protecting prison officials from suit and the comparative effectiveness of *Bivens*-type and FTCA remedies) and its indication that Congress has the authority to modify or preclude remedies for constitutional violations leave this area of the law where *Davis* left it. It is still unclear whether or not the *Bivens* remedy is constitutionally compelled.