Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After *Wilkie v. Robbins*

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I. Introduction

Many constitutional violations are discrete events: FBI agents conduct a warrantless wiretap; a judge enjoins the publication of an article criticizing a political leader; a public school principal fires a teacher for expressing his doubts about the Darwinian theory of evolution; a public school teacher leads her class in a group prayer; a government agency takes private property and refuses to pay just compensation. For these kinds of well-defined and bounded violations, some legal remedy is almost always available to the victim—whether in federal court, in state court, or before an administrative agency subject to judicial review. Other constitutional violations consist of an episodic series of small events—events that in isolation may verge on the trivial. But—as the metaphor ''death by a thousand cuts'' suggests—a series of small harms, in unison or in sequence, can add up to one very large harm indeed. This article explores the problems raised by those constitutional wrongs that consist of such patterns of behavior. It does so through a close examination of the Supreme Court's recent decision in *Wilkie v. Robbins*,[1] a case that addressed precisely the sort of pattern that, viewed as a whole, can render unconstitutional the conduct involved, and the plan to engage in it.

I should disclose at the outset that I represented the respondent, a cattle rancher named Frank Robbins, pro bono before the Supreme

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[1]127 S. Ct. 2588 (2007).

Court, working with the Harvard Law School Supreme Court Litigation Clinic. His case involved a pattern of harassment, intimidation, and threats by federal employees who demanded that he grant an easement to the public. The pattern involved federal government officials who sought to wear down his resolve in insisting that the government either negotiate a purchase of the easement or take it through eminent domain and pay him just compensation. But this article is about more than just one Supreme Court case. It is about property rights in general because, after *Robbins*, government officials have a blueprint for obtaining private property without having to pay for it. All they need do is single out a property owner and gradually bring the government's vast regulatory and other powers to bear on the owner's shoulders, making it clear that the resulting burden will be lifted if—but only if—the owner will simply ''give'' some valuable property interest to the government.[2] More broadly, however, this article also addresses constitutional rights generally, exploring the future viability of constitutional tort suits against federal officials under the Supreme Court's *Bivens* line of cases.[3] I argue that the Supreme Court's decision in *Robbins* dealt a severe and unjustifiable blow both to individual rights—including, but not limited to, rights of private property—and to the role of *Bivens* remedies in implementing those rights, thus making them real.

The Court's *Bivens* analysis in *Robbins* acknowledged that both state and federal avenues of relief could well prove inadequate in the kind of situation Robbins faced—and did indeed prove inadequate to protect Robbins from the cumulative harm he was made

[2]All of us are potentially subject to an almost unthinkable degree of government intrusion into our lives and businesses, much of it lawful when engaged in for lawful purposes. One need only imagine having a police officer constantly hovering over one's shoulder ready to impose a fine any time one jaywalks, drives over the speed limit, fails to stop fully at a stop sign, or takes an improper deduction on one's tax return to understand the damage that government officials could do once they set their minds to it. It simply cannot be the case that, when the government sets out to invoke all of its powers against an individual for the demonstrable purpose of getting that individual to waive a clearly established federal constitutional right, and when that individual is able to prove that, but for this forbidden purpose, those powers would not have been invoked, no remedy is available from the federal courts unless Congress has expressly enacted one. Yet that appears to be the result after *Robbins*, at least when the right is one that attaches to private property.

[3]See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

to suffer for insisting on his rights as a property owner. But even while conceding that the combined effect of all the non-*Bivens* relief available to Robbins was predictably insufficient to address a *pattern* of conduct whose unconstitutionality lay in what the pattern was designed to accomplish and in the harm the pattern inflicted in the course of that effort, the *Robbins* Court declined to fill the resulting remedial gap with the usual form of *Bivens* relief. Instead, the Court departed from the core premise of *Bivens*—that the importance of constitutional rights justified implying a cause of action directly from the Constitution; and for the first time since *Bivens* it held, without any indication from Congress that it disfavored the application of a *Bivens* remedy in such circumstances, that a private citizen could not sue a government official for a constitutional violation, even in the absence of any alternative to such a suit that would operate to deter that kind of violation or at least redress it when deterrence failed.

The Court reached that conclusion by transforming the *Bivens* presumption in favor of a federal cause of action into a general, all-things-considered, balancing test. What makes the ruling in *Robbins* especially frustrating is not only the Court's unacknowledged and unexplained transformation of *Bivens* but also its mishandling, in *Robbins* itself, of the balancing test it purported to be applying. Thus, the Court held that a *Bivens* action was unavailable for Robbins's takings claim because of the supposedly inherent difficulty of defining a workable standard to determine when a pattern of conduct goes so far as to violate a constitutional right. Apart from everything else that may be said (and will be said below) to address that concern as a supposed justification for leaving rights without protection, one decisive irony is that the Court's holding will not serve even to avoid the problem ostensibly motivating it, because substantively identical claims will get to federal court anyway—either as claims for injunctive and/or damages relief against state officials under 42 U.S.C. § 1983,[4] or, in piecemeal form, as claims against federal officials via judicial review of final agency action under the Administrative Procedures Act (hereafter, the APA).[5]

[4] 42 U.S.C. § 1983 (2000).

[5] 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004). The *Robbins* Court may have taken solace from the thought that it was saving the lower courts the burden of defining a workable standard for Robbins's Fifth Amendment claim. Any such thought would have been mistaken, however, not only because of the availability of

After Justice David Souter's opinion for the Court in *Robbins*, an opinion at once evasive in its logic and immodest in its reach, the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery. In *Robbins*, the Court denied a cattle rancher whose business was deliberately ruined a *Bivens* remedy against the federal agents who retaliated against him over a nearly decade-long period—by means both of independently illegal acts and of abuses of their regulatory authority—for his refusal to surrender his Fifth Amendment Takings Clause rights by granting the government an easement across his property without just compensation. That rejection of a remedy under *Bivens* should have come as no surprise to anyone watching the recent trajectory of the *Bivens* doctrine. It certainly did not come as a surprise to me, as the brief writer and oral advocate for Robbins and as the attorney who had argued and lost *Schweiker v.Chilicky*,[6] the decision that had dealt the most recent major blow to *Bivens* as a precedent. But it was a bitter disappointment nonetheless. Hope springs eternal, and when it is born of a source as deeply embedded in our culture as the Bill of Rights and the principle of government accountability for constitutional wrongs, its trashing is never an easy experience.

Although the Court's failure to afford a *Bivens* remedy was no surprise, the same cannot be said about the lengths to which the Court went to reach the *Bivens* question and to answer that question as it did. The Court sacrificed on a false altar of judicial modesty—false because the Court's holding was based on its unexplained shirking of a prototypically judicial function—both the limited appellate jurisdiction of the federal courts and the bedrock principle that the government's objectives ''cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.''[7] Private

§ 1983 suits against state officials but also because of the Court's endorsement, however lukewarm, of Robbins's administrative remedies. See *infra* note 88.

[6]487 U.S. 412 (1988) (denying a *Bivens* remedy for consequential injury suffered by Social Security claimants whose claims were wrongfully denied as part of an allegedly unconstitutional scheme, where Congress had provided a comprehensive mechanism for reinstating wrongfully withheld benefits but no mechanism for remedying the kind of injury alleged by respondents).

[7]United States v. Jackson, 390 U.S. 570, 582 (1968).

property rights are thus once again relegated to ''the status of a poor relation'' of many other constitutional guarantees.[8]

The remainder of this article proceeds as follows. Part II discusses the factual background of *Robbins* and the legal arguments on both sides. Part III then explores the *Robbins* opinion with regard to its implications for property and other individual rights. Part IV focuses on the *Robbins* Court's *Bivens* analysis and discusses the Court's willingness to allow wrongs without remedy. Part V focuses on how the Court exceeded thoroughly settled limits on its exercise of interlocutory appellate jurisdiction by reaching the *Bivens* issue in this case rather than deciding simply whether the conduct by Bureau of Land Management (BLM) officials that Robbins had alleged and sought to establish at trial violated a clearly established constitutional right against retaliation for the exercise of one's Fifth Amendment property rights. Part VI then briefly concludes the article.

II. The Background of the Litigation: Oh, Give Me a Home Where the Bureaucrats Roam . . . ''Your Easement Or Your Life!''

A. The Factual Background of the Case

In the early 1990s, a Wyoming office of the federal Bureau of Land Management (the BLM) was on a mission to obtain an easement over a portion of the South Fork Owl Creek Road cutting across the High Island Ranch, a privately owned cattle and guest ranch in Hot Springs County, Wyoming. Driven by a wholly legitimate desire to increase already existing access to the national forest abutting the ranch, the BLM was able to convince the ranch's then-owner, George Nelson, to grant the U.S. government a public easement over the Owl Creek Road in exchange for a right of way over a portion of a nearby road on federal land.

In a bungle that initiated the chain of events ultimately leading to this lawsuit, the BLM failed to record the easement Nelson had granted. Shortly afterward, Nelson sold his ranch to Frank Robbins,

[8]See James W. Ely Jr., ''Poor Relation'' Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2004–05 Cato Sup. Ct. Rev. 39 (2005) (arguing that the Supreme Court's recent Takings Clause jurisprudence threatens the promise of Justice Rehnquist's declaration in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), that the Takings Clause should not be ''relegated to the status of a poor relation''). But see *infra* text accompanying notes 114–25.

who was completely unaware of the government's easement. Under the applicable Wyoming law, the BLM's failure to record meant that Robbins took title free of the government's Nelson easement. Upon realizing their embarrassing mistake, BLM officials called Robbins and ''demanded an easement to replace Nelson's.''[9] When Robbins proved willing to negotiate a fair price but ''unwilling to capitulate'' to the BLM's ''unilateral demands''[10] that he provide the easement free of charge, the BLM officials, apparently just as unwilling to accept the consequences of their own mistake and pursue one of the legally available means for obtaining the easement,[11] instigated a campaign of actions designed, as one former BLM employee reported, to ''bury'' Robbins.[12] It quickly became apparent that this was no idle threat. BLM officials embarked on a scheme to ''get . . . [Robbins's] permits and get him out of business,''[13] engaging in a pattern of egregious misconduct consisting of both independently illegal actions and demonstrable abuses of lawful authority, substantiated by ''ample evidence''[14] on the summary judgment record.[15]

[9] Wilkie v. Robbins, 127 S. Ct. 2588, 2593 (2007).

[10] *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part). Robbins was informed by one of the BLM officials that ''the Federal Government does not negotiate.'' *Id.* at 2593.

[11] The BLM's legal options for acquiring that kind of property interest in privately owned land amounted to just three: First, the agency could acquire the property through donation by, purchase from, or exchange with a willing seller or donor. Second, the agency could take the property through eminent domain, but only if certain statutory conditions were met and with the permission of the attorney general. See *infra* note 145. Third, BLM regulations permit the agency to require an ''applicant for a right-of-way'' across federal lands, ''as a condition of receiving the right of way, to grant the United States an equivalent right of way that is adequate in duration and rights.'' It appears that the arrangement the BLM had orchestrated with Nelson relied on those BLM regulations but did not meet their ''equivalence'' condition, see Brief for the Respondent at 4, Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (No. 06-219) (hereinafter Resp't Br.), but nothing in Robbins's claim depended on that failure. Another BLM regulation provides that an applicant for a permit for grazing on federal lands may be required to accord the BLM limited administrative access across private lands for the ''orderly management and protection of the public land,'' but that proviso could not furnish a legal basis for obtaining the general access to the road demanded by the BLM. See Resp't Br. at 1-2 (citations omitted).

[12] Joint Appendix at 49, 52, Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (No. 06-219) (plaintiff's third amended complaint, ¶ 42) (hereinafter Joint Appendix).

[13] Robbins, 127 S. Ct. at 2594.

[14] See Robbins v. Wilkie, No. 98-CV-201-B, 2004 WL 3659189, at *6 (D. Wyo. Jan. 20, 2004) (district court's order denying defendant's motion for summary judgment).

[15] It is settled that, on an interlocutory appeal from a decision refusing to grant officers summary judgment on the basis of qualified immunity, the district court's evaluation of the factual proof as to its denial of summary judgment is binding on each appellate court to consider the matter. Johnson v. Jones, 515 U.S. 304, 313–20 (1995).

The agents' independently unlawful actions included intentionally trespassing on Robbins's land,[16] inciting a neighbor to ram a truck into Robbins while he was on horseback,[17] breaking into his guest lodge,[18] filing trumped-up felony charges against him without probable cause,[19] and pressuring other government agents to impound Robbins's cattle without cause.[20] The officials' actions that might have been lawful in other circumstances but were unauthorized as means to the unconstitutional and thus illegal ends to which they were put here—the extraction, without any payment or exchange, of an easement to which the government had no colorable claim[21]—included canceling the right-of-way previously negotiated with Nelson that was to have run with the land;[22] filing doubtful administrative charges against Robbins and selectively enforcing others,[23] and then relying upon these charges to deny Robbins the recreational use and grazing permits essential to his cattle drive business;[24] refusing to

[16] Robbins, 127 S. Ct. at 2594.

[17] Joint Appendix, *supra* note 12, at 49, 67.

[18] Wilkie v. Robbins, 127 S. Ct. 2588, 2596 (2007).

[19] Joint Appendix, *supra* note 12, at 55–56, 68–71; Resp't Br., *supra* note 11, at 6–7.

[20] Robbins, 127 S. Ct. at 2596.

[21] It is necessary to note here the government's persistent (and persistently misleading) characterization of the defendants as engaged throughout the entirety of the case in ''attempt[s] to secure a *reciprocal* right of way over private land intermingled with public lands.'' Cert. Pet. at 10–11, Robbins v. Wilkie (No. 98-CV-201-B) (emphasis added). In support of this strain of argument, the government relied on the authority it had invoked under the BLM regulations in its dealings with Nelson to require an ''applicant for a right-of-way'' across federal lands, ''as a condition of receiving the right of way, to grant the United States an equivalent right of way that is adequate in duration and rights.'' *Id.* at 3. However, as Justice Ginsburg noted in dissent, in its reliance on those regulations, the BLM was at best ''on shaky legal ground,'' Robbins, 127 S. Ct. at 2609 (Ginsburg, J., dissenting in part), given that Robbins was not himself an applicant for a right-of way, and no law required Robbins to make up for the BLM's neglectful loss of the first easement. *Id.* In any event, even assuming the stability of that legal ground, the ground surely caved in by the end of the first year of the BLM's eight-year campaign, when it cancelled the right-of-way it had negotiated with Nelson.

[22] *Id.* at 2594. BLM officials cancelled the right-of-way in 1995, at the same time canceling whatever dubious argument they may have had for claiming, as they nonetheless continued to do throughout this litigation, that they were merely engaged in attempts to ''secure a reciprocal right of way.''

[23] *Id.* at 2595. The Court noted that ''[o]ne Bureau employee, Edward Parodi, was told by his superiors to 'look closer' and 'investigate harder' for possible trespasses and other permit violations.'' *Id.* at 2594.

[24] *Id.* at 2595–96.

keep the main access route to Robbins's property passable while fining Robbins for repairing the access road that the previous owner had been allowed to maintain;[25] and interfering with his business by ''videotap[ing] ranch guests during [a cattle] drive, even while the guests sought privacy to relieve themselves.''[26]

B. The Litigation

In attempting to respond to the rising mountain of dubious and selective charges against him, Robbins fought a predictably losing battle through the administrative appeals process to the Interior Board of Land Appeals (IBLA)—which, among other things, held itself to be without statutory authority to consider Robbins's essential claim that the actions taken against him were unconstitutionally motivated and formed part of a pattern of unconstitutional harassment.[27] Simultaneously, he was defending himself against the false criminal charges brought against him and attempting to run his business in the face of the BLM officials' attempts to make that as difficult as possible. Furthermore, the administrative appeals process afforded Robbins no opportunity to seek redress for the numerous individual actions of the BLM officials unrelated to ''final agency action,'' or for the cumulative effect of the officials' independently unlawful actions, as the Court expressly recognized:

> But Robbins's argument for a remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, ''death by a thousand cuts.'' Brief for Respondent 40. It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.[28]

[25] *Id.* at 2595.

[26] *Id.* at 2596.

[27] See Frank Robbins v. B.L.M., 170 I.B.L.A. 219, 227–30 (2006), cited in Wilkie v. Robbins, 127 S. Ct. 2588, 2598 n.5 (2007).

[28] Wilkie v. Robbins, 127 S. Ct. 2588, 2600–01 (2007).

In 1998, having already endured four years of harassment, Robbins brought an action in federal court against the BLM officials, under *Bivens v. Six Unnamed Agents*,[29] for violation of his Fifth Amendment rights under the Takings Clause.[30] Robbins also brought RICO claims against the defendants for their repeated attempts to extort the easement from him.[31]

The district court granted the defendants' motion to dismiss both claims, but the Tenth Circuit reversed and held both that Robbins had pleaded damages with adequate specificity under RICO and that the APA and the Federal Tort Claims Act (FTCA) did not preclude relief under *Bivens*, except with regard to violations consisting of final agency action for which review under the APA was available.[32]

On remand to the district court, the defendants again moved to dismiss Robbins's claims, this time solely on qualified immunity

[29] 403 U.S. 388 (1971).

[30] Originally, Robbins also alleged claims under the Fourth Amendment for malicious prosecution as well as various due process claims under the Fifth Amendment; these were dismissed on qualified immunity grounds at a later stage of the litigation, and no appeal was taken from those dismissals. In addition, Robbins voluntarily dismissed claims against the U.S. government originally included in his complaint.

[31] The Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961–1968 (2000 ed. and Supp. IV), is a criminal statute that also provides for a civil cause of action, and imposes liability for engaging in a ''pattern of racketeering activity.'' *Id.* § 1962(c). The Act defines such racketeering activity to include acts of extortion, as defined under the Hobbs Act, 18 U.S.C. § 1951 (2000), or under state law. 18 U.S.C. §§ 1961(1)(A)–(B) (2000 ed., and Supp. IV). The gist of Robbins's RICO claim was that actions of the BLM officials constituted a series of attempts to extort the easement from him, which in turn constituted an indictable offense under the Hobbs Act definition of racketeering as an attempt to ''obtain[] . . . property from another, with his consent . . . under color of official right.'' 18 U.S.C. § 1951(b)(2). Robbins also asserted that the conduct violated Wyoming's blackmail statute, Wyo. Stat. Ann. § 6-2-402, another RICO predicate. The Court held without dissent that the RICO claim was not actionable, on the ground that ''the conduct alleged does not fit the traditional definition of extortion,'' Robbins, 127 S. Ct. at 2608, which ''focused on . . . the sale of public favors for private gain,'' not ''on behalf of the Government.'' *Id.* at 2606 (footnote omitted); *id.* at 2618 n.11 (Ginsburg, J., concurring in part and dissenting in part). Although I do not agree either with the Court's interlocutory assumption of ancillary appellate jurisdiction to reach the RICO question or with the substance of its answer, the Court's disposition of the matter was a unanimous windmill against which this article makes no effort to tilt.

[32] See Robbins v. Wilkie, 300 F.3d 1208, 1211–13 (10th Cir. 2002).

grounds, and the court denied the motion.[33] After discovery, the defendants moved for summary judgment on qualified immunity. The district court denied that motion and defendants appealed that decision. After properly determining that it had interlocutory appellate jurisdiction to decide the qualified immunity issue under *Mitchell v. Forsyth*'s extension of the collateral order appeal doctrine to orders denying qualified immunity on legal as opposed to factual grounds,[34] the court of appeals affirmed, holding that Robbins had ''a clearly established right to be free from retaliation for exercising his Fifth Amendment right to exclude the Government from his private property,''[35] reasoning that ''[b]ecause retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the Government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful.''[36] In addition, the court of appeals—without pausing to consider whether it was acting within its appellate jurisdiction over the defendants' interlocutory appeal of the district court's qualified immunity decision—entertained the defendants' argument that the *Bivens* claim was precluded by the APA and/or the FTCA, and reinstated its holding from the first round of appeals that neither the APA nor any other source of law precluded *Bivens* relief for violations unrelated to final agency action.

The solicitor general, representing the BLM agents, then petitioned for certiorari on the RICO question, the *Bivens* question, and the qualified immunity question (couched in terms of the existence of a clearly established anti-retaliation right in property rights cases), in that order. The Supreme Court granted certiorari on all three questions. In its eventual decision on the merits, however, the Court did not answer the one question (qualified immunity) without which the case could not have reached it at all in this pre-trial, interlocutory posture. Bypassing that question, and remaining silent on the existence of any anti-retaliation right for property owners, the Court held that, even if such a right had been clearly established, and even

[33] The district court dismissed other claims for violations of the Fourth and Fifth Amendments. Those claims are not addressed here.

[34] 472 U.S. 511, 528–30 (1985).

[35] Robbins v. Wilkie, 433 F.3d 755, 765–67 (10th Cir. 2006).

[36] *Id.* at 766.

if the defendants had knowingly violated it and thus were entitled to no immunity from trial or from liability for damages, they were nonetheless entitled to escape trial altogether inasmuch as the *Bivens* doctrine gave Robbins no cause of action against the officers who had made good on their threat to ''bury'' him for standing firm on his Fifth Amendment rights.[37]

C. *The Fifth Amendment Right Not to Have One's Property Taken by the Government Without Receiving Just Compensation*

The constitutional claim at the heart of *Robbins* is one that may at first seem novel to many students of the Takings Clause, but it is, in fact, central to the constitutional protection of private property—and, indeed, to the effective protection of every constitutional right that takes the form of recognizing in individuals an entitlement to choose, within defined constraints, among possible courses of conduct. Obvious examples are the right to choose what to say, whether and how to pray, whether and when to end a pregnancy, and what to do with one's private property—whether to donate it to the public gratis, or sell it to the public for a fair price.[38] In the protection of private property in particular, modern Takings Clause jurisprudence is generally divided into physical takings and regulatory takings. The claim in *Robbins* falls into neither camp. It is not a physical takings claim because the BLM never actually claimed to have acquired an easement across his land; and it is not a regulatory takings claim because Robbins never alleged that any legislative or administrative enactment had deprived him of all economically beneficial use of his land or of any distinct bundle of property rights in that land.

The thrust of Robbins's claim was that the BLM agents engaged both in unlawful exercises of their otherwise legitimate regulatory powers and in entirely illegitimate acts—independently illegal acts performed under color of their office but outside their delegated authority—in order to coerce him into relinquishing his property

[37] Wilkie v. Robbins, 127 S. Ct. 2588, 2604–05, 2608 (2007).

[38] The option of simply holding onto the property forever, or until the public offers whatever extortionate price one might choose to charge, is understood to be beyond the rights that the Takings and Just Compensation Clauses confer whenever exercise of the ''takings'' or ''eminent domain'' power is legislatively authorized.

without the government being forced actually to ''take'' it and thereby incur an obligation to pay just compensation. Had it succeeded, this strategy would have accomplished a literal transfer to the government (with no pretense of compensation) of what are unquestionably compensable property rights in a way that would have entirely circumvented the just compensation requirement by making a ''taking'' of any variety—either literal or regulatory—unnecessary. For the government would never need to exercise its eminent domain power to take property or its lawmaking power to enact regulations that so affect property uses as to constitute a de facto taking—either of which might force it to pay—if it were free instead to leverage the myriad ways in which its powers can be brought to bear on an individual or on any other rights-bearing entity, and use that leverage to force a property owner into surrendering the owner's property free of charge.

The point is one that could as easily be made with respect to essentially any right of choice protected by the federal Constitution. If a constitutional provision or principle prohibits abridgment of a right that takes the form of a *choice* someone is entitled to make—for instance, a right to freedom of speech or to the free exercise of religion, or a right to be free from compelled self-incrimination—then government may escape whatever preventive or remedial regime protects persons from deprivation of that right if it is free simply to induce the rights-holder ''voluntarily'' to relinquish the right, either by threatening to inflict injury by independently unlawful means unless the right is relinquished (''your right or your life!''), or by threatening to withhold some privilege or benefit that government is entitled to condition upon other forms of forbearance on the part of the privilege-seeker but not upon sacrifice of the right in question.[39]

[39]The Fifth Amendment's Takings Clause, like its Self-Incrimination Clause but unlike, say, the First Amendment's Free Speech Clause or the First Amendment's Free Exercise of Religion Clause, has long been understood to give the government a clear but costly path along which it may extract what it wants from someone: If you want someone's property for a legitimate public use such as increasing access to a national forest, use eminent domain and pay the owner just compensation; if you want the psychological ''property'' held in someone's mind for a legitimate public purpose such as law enforcement or legislative oversight, swear the person in as a witness and give that witness immunity from criminal prosecution based on his answers or their fruits. Rights to insist that the government pursue the constitutionally designated path if it wishes to obtain one's property or one's testimony are uniquely

Not all rights are of this character, of course. Some rights, like the Establishment Clause right to live in a non-theocratic state, or the Eighth Amendment right to be free of cruel and unusual punishments, or the Article I right to be free of ex post facto laws or of bills of attainder, do not have a choice-making structure that lends itself to the distinctive sort of circumvention illustrated by what was done to Robbins by agents of the BLM in order to induce him to give up his easement and to waive his right to just compensation. But the right not to be deprived of one's private property for public use without just compensation—like the Fifth Amendment right not to be compelled to incriminate oneself without the compensating assurance provided by an appropriate grant of immunity from criminal prosecution[40]—seems paradigmatic of those choice-based rights with respect to which the technique of circumvention employed against Robbins must be deemed unconstitutional if the right is not to be rendered essentially unenforceable.

The Fifth Amendment claim in *Robbins* viewed in this light fits comfortably within the Supreme Court's longstanding and widely applied hostility toward government retaliation against the exercise of constitutional rights.[41] The anti-retaliation principle as a free-standing claim is most often seen in First Amendment cases,[42] but it has also been recognized in the context of numerous other rights, including the Fifth Amendment privilege against compelled self-incrimination,[43] the right to demand a criminal trial by

vulnerable insofar as agents of the government are given an incentive to traverse the less costly path of pressuring one to waive such rights.

[40] See *supra* note 39.

[41] See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977) (''[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'''); *id.* (''To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . .''); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (''[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .''); Griffin v. California, 380 U.S. 609, 614 (1965) (striking down ''a penalty imposed by courts for exercising a constitutional privilege''). See *supra* note 39.

[42] See, e.g., Hartman v. Moore, 126 S. Ct. 1695, 1704 (2006); Crawford-El v. Britton, 523 U.S. 574 (1998); Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282, 287 (1977).

[43] In *Griffin v. California*, 380 U.S. 609 (1965), the Court held that a prosecutor's comment on a defendant's failure to testify violated the Fifth Amendment because ''it is a penalty imposed by courts for exercising a constitutional privilege.'' *Id.* at

jury,[44] the right of access to the federal courts,[45] and the right to travel interstate.[46] In *Dolan v. City of Tigard*,[47] the Court applied this anti-retaliation principle specifically to the Takings Clause.

614. In the context of government employment, the Court has repeatedly condemned government retaliation against employees or independent contractors who refused to waive their Fifth Amendment rights. See Lefkowitz v. Turley, 414 U.S. 70, 83–84 (1973) (holding that disqualification of independent contractors from receiving government work for refusing to waive their privilege against self-incrimination was unconstitutional); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 283–84 (1968) (holding that dismissal of state employees who refused to give testimony that could have been used against them in a criminal prosecution violated the Fifth Amendment); Gardner v. Broderick, 392 U.S. 273, 279 (1968) (''[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.''); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding that ''the protection of the individual . . . against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . .'').

[44] See United States v. Goodwin, 457 U.S. 368, 384 (1982) (holding that a prosecutor may not vindictively bring greater charges against a defendant who demands a jury trial). In *United States v. Jackson*, 390 U.S. 570 (1968), the Court held that legislative retaliation for the exercise of the jury trial right was also unconstitutional and struck down a statute that authorized the imposition of the death penalty only after a jury trial. See *id.* at 582–83. The Court found that making the ''risk of death,'' *id.* at 571, the price for exercising the right to a jury trial ''needlessly penalizes the assertion of a constitutional right.'' *Id.* at 583.

[45] See Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) (''[A] state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.'').

[46] See Mem'l Hospital v. Maricopa County, 415 U.S. 250, 254–70 (1974) (holding unconstitutional a state statute requiring a year's residence in the county as a condition of an indigent's receiving medical care at the county's expense); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969) (holding that a state statute conditioning receipt of welfare benefits on one year of residence could not be justified by unconstitutional purpose of discouraging migration to the state).

[47] 512 U.S. 374 (1994). See *id.* at 385 (''Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.''). Although the *Dolan* Court invoked the doctrine of unconstitutional conditions rather than retaliation, the two merge analytically when an individual is put to the choice of exercising a right, on the one hand, or receiving some government benefit or avoiding some government penalty, on the other hand. Cf. Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998)

In *Robbins*, the retaliation issue was front and center in that the BLM was indisputably (on the record before the Court) retaliating against Robbins precisely for refusing to surrender his property without compensation and thus waive his Fifth Amendment right. Given that this property right would seem perfectly suited to, and inadequately protected without, an effective remedy against just this kind of circumvention, it is worse than ironic that the *Robbins* Court displayed no sensitivity whatever to the need for such a remedy. I say ''worse than ironic'' because, as is well known, the Supreme Court has spent much of the past few decades in a largely unsuccessful effort to delineate the situations in which government regulation of property uses amounts to a taking.[48] Yet in *Robbins* the Court turned its back on what amounts to a far more blatant form of government interference with private property rights—a form that cannot be tolerated at all if such rights are to be meaningfully protected. The BLM's strategy of acquisition through coercive acts that fall short of the direct application of physical force to wrest possession or ownership from a property holder could be used in any number of situations in which government officials want to avoid the procedural or substantive constraints of the eminent domain process. After *Robbins*, this kind of shadowy end run around the Takings Clause appears not to trigger any form of legal redress.[49]

(''Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit.'').

[48] See, e.g., Richard A. Epstein, The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993); Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine, 77 Cal. L. Rev. 1299 (1989); Carol M. Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561, 566 (1984); Jed Rubenfeld, Usings, 102 Yale L.J. 1077, 1081 (1993). For developments in the Supreme Court's modern regulatory takings jurisprudence, see Keystone Bituminous Coal Ass'n v. Debenedictus, 480 U.S. 470 (1987); Hodel v. Irving, 481 U.S. 704 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); and Lingle v. Chevron U.S.A., 544 U.S. 528 (2005).

[49] Unless the defendant is a state government official. Presumably, a property owner would have a cause of action against such an official under 42 U.SC. § 1983 (2000). See *infra* text accompanying notes 87–88.

D. An Analysis of the Government's Arguments in Robbins

The solicitor general, arguing for the BLM officials before the Supreme Court, offered several arguments for the surprising claim that no cognizable Fifth Amendment right was involved in *Robbins*. First, the solicitor general argued that the Fifth Amendment right to just compensation is ''owed by (and can be violated only by) the government itself, not by federal officials in their individual capacity.''[50] But the notion that the Fifth Amendment's property clauses are uniquely directed against the government does not withstand even the most elementary look at the constitutional text. The First Amendment, for example, commands that ''*Congress* shall make no law . . . abridging the freedom of speech,''[51] yet an individual public official can clearly be liable for violating an individual's free speech rights. In contrast, the Fifth Amendment uses the passive voice in declaring ''nor shall private property *be taken*. . . .''[52] If one of these amendments had been uniquely directed at the government, surely it would be the First and not the Fifth. More fundamentally, it is a staple of our jurisprudence that the Constitution's rights-securing strictures are directed not only at government in the abstract, but also at the human agencies and entities through which government brings power to bear upon individuals.[53] For the government to question that foundational principle at this late date ought to have been an embarrassment. Unsurprisingly, the Court did not take up (or even respond to) the invitation to do so.

Second, the solicitor general argued that the Constitution's text ensures that the only remedy for a Takings Clause violation is an award of just compensation—that is, payment to the owner of the fair market value of the taken property—and that the injunctive and declaratory relief and consequential damages Robbins sought were thus constitutionally unavailable for a Takings Clause violation.[54]

[50] Brief for the Petitioners at 29, Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (No. 06-219) (hereinafter Pet'r Br.).

[51] U.S. Const. amend. I (emphasis added).

[52] *Id.* amend. V (emphasis added).

[53] See, e.g., Ex Parte Young, 209 U.S. 123 (1908); Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[54] See Pet'r Br., *supra* note 50, at 43 (''[A] plaintiff may not sue individual government employees for a taking; his sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act once a taking has occurred.'').

According to this argument, Robbins could have had no Fifth Amendment claim unless and until the government actually acquired an easement across his property—something it never succeeded in acquiring—and, even then, he could have sued only for the fair value of the easement, not for the considerably larger amount of damages he suffered as a result of the BLM officials' campaign of harassment. But a plurality of the justices, including two who were in the majority in *Robbins*,[55] had previously rejected the counterintuitive notion that a property owner can assert no Takings claim unless and until property has been taken and just compensation has been denied. In *City of Monterey v. Del Monte Dunes at Monterey*,[56] the plurality observed that, when government repudiates its duty to provide just compensation, ''either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.''[57] The normal rule that a plaintiff in tort can recover any damages that naturally flow from the injury would then apply. And constitutional torts should be no different in this regard.[58] The plurality in *Del Monte Dunes* observed that the fact that, in most Takings Clause claims, the proper measure of damages will turn out to equal the amount of just compensation ''is neither surprising nor significant.''[59] This is so because in most takings claims—where the government simply takes some property without paying for it—the only injury is the loss of the property taken. In contrast, if government officials showed up at some unsuspecting person's home, forcibly removed its inhabitants, smashed

[55] The plurality consisted of Justices Kennedy and Thomas, both of whom were in the majority in *Robbins*, as well as the late Chief Justice Rehnquist and Justice Stevens, the latter joining Justice Ginsburg's dissent in *Robbins*.

[56] 526 U.S. 687 (1999).

[57] *Id.* at 717.

[58] See Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986) (''[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.''); Smith v. Wade, 461 U.S. 30, 48–49 (1983) (same); Carey v. Piphus, 435 U.S. 247, 257–58 (1978) (same).

[59] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999).

up valuable personal possessions, and then informed the homeowner that the house now belonged to them, the homeowner would presumably be able to recover damages for personal injury and property destruction in addition to the value of the home—whether under the Takings Clause alone or under that clause augmented by the Fourth Amendment's ban on ''unreasonable seizures,'' a ban the Court has applied to the forcible removal of a mobile home even where nothing akin to a ''privacy'' interest was disturbed.[60]

In addition, the Court has repeatedly barred government acts, whether involving unilateral executive conduct or the issuance of judicial injunctions or decrees, that would have amounted to an uncompensated taking without ever suggesting that the aggrieved property owners ought to have waited for the taking to occur and only then sued for just compensation.[61] Under the solicitor general's theory that the only remedy for a taking is just compensation, all of these cases would have been dismissed. And, under the solicitor general's theory, in a case such as *Kaiser Aetna v. United States*,[62] the Army Corps of Engineers might have forgone its suit seeking an injunction against a private marina owner that would have opened the marina to the public, and instead threatened the owner with frivolous criminal prosecutions or incited speedboat owners to ram the recalcitrant marina owner's sailboats unless the owner caved to that pressure and simply granted the desired easement to the neighboring public.

The solicitor general's arguments in this regard—which the Court neither accepted nor rejected but appears to have simply ignored—rested in significant part on a basic misconception of the historical origins and development of the Takings Clause. The Framers were less concerned with the risk of uncompensated interference with

[60] See Soldal v. Cook County, 506 U.S. 56, 65–66, 72 (1992).

[61] See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (striking permit condition that would have effected a taking); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987) (same); Hodel v. Irving, 481 U.S. 704, 713–18 (1987) (striking down federal statute under Takings Clause); Kaiser Aetna v. United States, 444 U.S. 164, 169, 178–80 (1979) (denying an injunction in suit brought by the federal government that would have required owners of a private marina to allow public access to their facilities); Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); see also E. Enters. v. Apfel, 524 U.S. 498, 519–22, 538 (1998) (plurality opinion) (concluding that federal statute should be struck down under the Takings Clause).

[62] 444 U.S. 164 (1979).

private property by legislative acts than with takings of property by executive officials acting without legislative authority. The Takings Clause can be traced back to Article 39 of the Magna Carta, which itself was prompted by ''the barons' complaints against King John'' for expropriating supplies.[63] Article 39 declared that ''[n]o freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.''[64] The result was a limit on the king's power to take private property—he could do so only with the consent either of the owner or of Parliament.[65] In practice, compensation was usually paid to the owner, but this was not an ''inviolable rule.''[66] The fear was not of uncompensated takings per se, but rather of the unconstrained abuse of power by the king.

The English custom of not requiring compensation for a legislatively authorized taking was brought over to the colonies and persisted until the Vermont Constitution of 1777 first introduced a compensation requirement.[67] The only other pre-Fifth Amendment compensation provisions, in the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787, were both motivated by a

[63] Matthew P. Harrington, ''Public Use'' and the Original Understanding of the So-Called ''Takings'' Clause, 53 Hastings L.J. 1245, 1290 (2002).

[64] Magna Carta art. 39, reprinted in William Sharp McKechnie, Magna Carta: A Commentary On The Great Charter Of King John 375 (1958).

[65] William Michael Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 698 (1985).

[66] William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 788 n.28 (1995); see also James W. Ely, Jr., ''That due satisfaction may be made:'' The Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1, 15 (1992).

[67] See Treanor, *supra* note 66, at 827. The Vermont compensation provision came about due to a widely perceived injustice Vermonters felt they had suffered at the hands of the New York legislature. When England transferred the Vermont territory from New Hampshire to New York, the colonial government of New York ''refused to make regrants of [Vermonters'] lands to the original proprietors and occupants, unless at the exorbitant rate of 2300 dollars fees for each township; and did enhance the quit-rent, three fold, and demanded an immediate delivery of the title derived before, from New-Hampshire.'' *Id.* at 828 (quoting Vt. Declaration of Rights pmbl. (1777), reprinted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 319, 320 (1971)).

''specific source of concern during the revolutionary era''—''[u]ncompensated seizures by the military.''[68]

The same concern with military impressments during the Revolutionary War was probably the main motivating factor behind the Fifth Amendment's Property Clauses.[69] Professor William Treanor, who has written the most extensive scholarly account of the historical background of the Property Clauses, cites two pieces of historical evidence for this proposition. First, in a 1778 essay, John Jay denounced ''the Practice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land.''[70] Second, St. George Tucker, the ''author of the most prominent constitutional law treatise in the early republic,'' who provided the ''only more or less contemporaneous statement of why the [Takings] clause was passed,''[71] wrote that the clause ''was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war.''[72] Other scholars have endorsed the view that the Property Clauses were chiefly aimed at preventing the unauthorized seizure of property by executive branch officials.[73]

[68] Treanor, *supra* note 66, at 831.

[69] *Id.* at 835.

[70] John Jay, A Hint to the Legislature of the State of New York (1778), in 1 John Jay: The Making of a Revolutionary, Unpublished Papers 1745–1780, at 461 (Richard B. Morris ed., 1975); *id.* at 462 (''[It is] the undoubted Right and unalienable Priviledge of a Freeman not to be divested . . . [of] Property, but by Laws to which he has assented. . . . Violations of this inestimable Right by the King of Great Britain, or by an American Quarter Master; are of the same Nature. . .'').

[71] Treanor, *supra* note 66, at 836.

[72] *Id.* at 831–32 (quoting 1 William Blackstone, Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 305–06 (St. George Tucker ed., 1803)).

[73] See, e.g., Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 103 (1999); Andrew S. Gold, Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis ''Goes Too Far,'' 49 Am. U. L. Rev. 181, 214 (1999); Matthew P. Harrington, Regulatory Takings and the Original Understanding of the Takings Clause, 45 Wm. & Mary L. Rev. 2053, 2067 (2004) (''[A]n examination of the history leading up to the inclusion of the Compensation Clause in the constitutional text reveals the clause was less about concerns with land use regulation or confiscation than it was about military impressments.'').

This history suggests that the Framers, while primarily concerned with military seizures accompanied by the use or threat of physical violence, would have been just as disturbed by the unauthorized acts of executive officials who used subtler forms of coercion and intimidation in an effort to obtain private property gratis. It also seems likely that the Framers would have considered those property owners who resisted military impressments and endured injury as a result to have suffered a clear constitutional violation.

The solicitor general also argued that there was no anti-retaliation principle implicit in the Fifth Amendment, unlike the First, because the Just Compensation Clause itself provides an incentive to assert Fifth Amendment rights, leaving no reason to worry about a ''chilling effect'' against assertion of the underlying right.[74] According to the solicitor general, it is the concern with such a chilling effect alone that justifies the existence of a freestanding retaliation claim in the First Amendment context.[75] But it has long been settled that an unwarranted burden on the exercise of a federal constitutional right need only *penalize* exercise of that right—it need have no *deterrent effect at all*—in order to be deemed unconstitutional per se.[76] And as far as chilling effect is concerned, the fact that Robbins had been invoking his Fifth Amendment rights for a dozen years in numerous forums and managed to hold out to the bitter end as he faced continued retaliation hardly means that the great majority of property owners would be similarly willing—or able—to stand on their rights while their lives were made to collapse around them. If others in Robbins's shoes—others who have either shallower pockets or softer spines—are not to be chilled into caving to their governmental tormenters, those who would torment them until they succumb must surely be confronted with the counter-threat that nothing short of a *Bivens* remedy, limited by the appropriately crafted rules of qualified immunity, can provide.

[74] See Pet'r Br., *supra* note 50, at 14.

[75] See *id.*

[76] See Memorial Hospital v. Maricopa County, 415 U.S. 250, 257–58 (1974) (holding that the fact that there was no evidence that a durational residency requirement for free non-emergency health care did not actually deter anyone from exercising his or her right to travel did not save the restriction from strict scrutiny).

The solicitor general argued, finally, that allowing Robbins's Fifth Amendment claim to go forward would unleash a flood of litigation that would cripple federal land management,[77] an argument on which the Court seized and expanded.[78] There are several responses to this floodgates concern. The first is the basic point made by Justice Harlan in his *Bivens* concurrence: That the violation at issue attacks the Constitution itself surely implies that concerns about spawning too many lawsuits should never suffice to stay the Court's hand in framing an otherwise necessary and appropriate federal damages remedy.[79]

Second, it is unreasonable to imagine that adding Fifth Amendment actions to the long list of claims the solicitor general trumpeted as already being available to (albeit insufficient for) an individual such as Robbins—state tort suits, APA actions, and First Amendment suits where the retaliation is against those petitioning the government for just compensation or other redress[80]—would make a qualitative difference in overall litigation burdens.

Third, the Court has already developed an elaborate jurisprudence of causation, burden shifting, criteria of seriousness, and the like in First Amendment retaliation cases,[81] in right to travel claims,[82] in Title VII claims,[83] in *Batson* challenges,[84] and under 42 U.S.C. § 1983,[85] all of which would be available here.

Fourth, and finally, if upholding a *Bivens* cause of action for violations of the identical Property Clauses of the Fifth and Fourteenth

[77] See Reply Brief for the Petitioners at 11, Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (No. 06-219).

[78] See Robbins, 127 S. Ct. at 2604.

[79] See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410–11 (1971) (Harlan, J., concurring).

[80] See Pet'r Brief, *supra* note 50, at 27, 40.

[81] See, e.g., Hartman v. Moore, 126 S. Ct. 1695, 1704 (2006); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[82] See Starns v. Malkerson, 401 U.S. 985 (1971), summarily aff'g 326 F. Supp. 234 (D. Minn. 1970) (upholding one-year residency requirement for reduced, instate tuition rate); cf. Sosna v. Iowa, 419 U.S. 393 (1975) (upholding one-year residency requirement for divorce).

[83] See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[84] See Batson v. Kentucky, 476 U.S. 79 (1986).

[85] See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1983).

Amendments would unleash a flood of such claims, then we should have already seen such a flood in claims brought against state officials under § 1983. As Justice Ginsburg tellingly emphasized in her *Robbins* dissent, the existence of § 1983 offers a ''controlled experiment'' as to whether a flood of Property Clause claims is likely to occur.[86] Needless to say, no such flood has materialized.

Two further observations should be made about § 1983. First, the existence of a presumed Fifth Amendment claim against state officials under § 1983 embarrassingly undercuts what turns out to be the Court's principal justification for not recognizing a *Bivens* cause of action in *Robbins*—the supposed ''difficulty in defining a workable cause of action.''[87] For, flood or no flood, courts will be unable to avoid defining the contours of the underlying Fifth Amendment claim in whatever § 1983 cases are filed against state officers who are as lawless in their pursuit of property as the BLM agents here were. Thus, the Court's holding in *Robbins* will have done nothing to avoid the inevitable judicial costs.[88] Instead—and

[86] Wilkie v. Robbins, 127 S. Ct. 2588, 2616 (2007) (Ginsburg, J., concurring in part and dissenting in part).

[87] *Id.* at 2601.

[88] This is so for yet another reason: Suppose that the next time the BLM charges someone like Robbins with trespass—or takes any final agency action that adversely affects his property interests to pressure him into giving up an easement or other property right without just compensation—the victim of the agency's persecution does what the Court seems to expect him to do and challenges the action through administrative avenues, asserting his Fifth Amendment claim as a defense to the adverse administrative action. Although the IBLA has explicitly disclaimed jurisdiction to consider such a claim, see Robbins v. Bureau of Land Mgmt., 170 I.B.L.A. 219, 226 (2006), cited in Robbins, 127 S. Ct. at 2598 n.5, one must suppose that the defendant would follow the Court's advice, *id.* (''[Robbins] could have advanced the [constitutional] claims in federal court whether or not the IBLA was willing to listen to them.''), and advance his claim in a federal court exercising judicial review under the APA. Although such review would ordinarily be limited to the factual record the agency had compiled, the end result would be exactly the situation the Court purportedly wanted to avoid by denying the *Bivens* claim: a federal court will be confronted with a claim of accumulating retaliation for having refused to waive the right to just compensation.

This time, there would be no way for the federal court to avoid the issue, given that the APA clearly gives a litigant the right to challenge each final agency action. That federal court will thus need to engage in the very same process of line–drawing aggravated by the fact that it would see only one at a time of the thousand cuts to which tomorrow's Robbins will have been subjected—that the Supreme Court thought was too difficult. And, regrettably, the court would need to undertake this line-drawing process within the confines of the APA, which drastically limits the eviden-

this is the second point—*Robbins* will simply have created an anomaly in which identical conduct by state and federal officials will result in drastically different sets of liabilities. Given the gradual eclipse of *Bivens*, this ironic asymmetry is likely to grow as the Bill of Rights, which applies of its own force only to the federal government, will as a practical matter pose less of an obstacle to federal lawlessness than to state lawlessness. State officials will be held personally accountable for violations of clearly established constitutional rights while their federal counterparts will confront no such reckoning, even when they could not qualify for immunity on the theory that the rights they violated had not yet been clearly established. While there may have been a time when there was greater reason to fear constitutional violations by state officials than by their federal counterparts, ours is not such a time.

III. The *Robbins* Opinion—Conceiving the Inconceivable

A. Manipulating Rights Out of Existence

The Supreme Court had for decades treated as ''inconceivable''[89] the notion that any of the Constitution's guarantees of individual rights could be ''manipulated out of existence''[90] through the crude device of having government officials demand the surrender of those rights on pain of suffering deprivations of benefits or privileges that would not have been imposed but for this unlawful purpose and

tiary possibilities, for judicial review under the APA is generally limited to the administrative record. See 5 U.S.C. § 706 (2000). Since the IBLA would not allow Robbins to introduce evidence supporting his constitutional claims, see Robbins, 170 I.B.L.A. at 228–30, a federal court would not have had an adequate administrative record before it on judicial review.

A federal court exercising judicial review under the APA is also limited in its remedial choices. The APA permits a court only to order, or set aside, agency action, see 5 U.S.C. § 706—equitable relief that ''is useless to a person who has already been injured,'' Butz v. Economou, 438 U.S. 478, 504 (1978), and who cannot demonstrate that the illegal conduct is ongoing or likely to be repeated, see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983). Moreover, given the unending variety of means employed by petitioners, it is difficult to imagine that respondent could have secured, or a court could have crafted, an effective injunction against the conspiracy. See, e.g., O'Shea v. Littleton, 414 U.S. 488, 495–97 (1974); Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n., 389 U.S. 64, 76 (1967); see also Fed. R. Civ. P. 65(d).

[89] Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 594 (1926).

[90] *Id.*

that, in extreme instances such as many of those involved in *Robbins*, could not otherwise lawfully have been imposed for *any* reason. In *Robbins*, the Court did the ''inconceivable'' in effectively holding that federal officials may, without incurring any risk of liability, burden individuals without limit until they surrender their Fifth Amendment right not to have their property taken without just compensation. That holding unquestionably leaves private property rights in worse shape than the Court found them, although it is difficult to be precise about the extent of the damage. On the one hand, the Court did not purport to decide whether the official actions taken in this case were so clearly unconstitutional as to make qualified immunity unavailable; indeed, it did not decide whether those actions were unconstitutional at all. Rather, the Court considered only ''whether to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights,''[91] an undertaking that proceeds on ''the *assumption* that a constitutionally recognized interest is adversely affected by the actions of federal employees.''[92] But, on the other hand, the path that the Court chose came perilously close to contradicting that assumption—in part by its seeming indifference to the fact that its approach left the ''constitutionally recognized interest'' it assumed had been ''adversely affected'' worth very little.[93]

At its root, the Court's reasoning in refusing to recognize Robbins's cause of action for damages rested on the view that recognizing claims of the kind he advanced would entail unworkable line-drawing along a spectrum of government behavior, at one end of which lies good-faith negotiation within the terms of government's regulatory authority and at the other end of which lies unconstitutional coercion. Delineating the bounds of unconstitutional conduct, the Court claimed, would involve an inquiry into whether the official action merely ''went too far'' and was thus simply ''too much.'' The Court contrasted the typical retaliation claim it had recognized in the past as instead ''turn[ing] on an allegation of impermissible

[91] Robbins, 127 S. Ct. at 2597.

[92] *Id.* at 2598 (emphasis added).

[93] *Id.*

purpose and motivation'' and thus as being susceptible of ''definite answers'' to a more simple ''what for'' question:[94]

> A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out, and a general provision for tortlike liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions.[95]

But, however close cases are to be resolved, the Court was wrong not to see the conduct of the BLM agents in this case as falling so manifestly on the wrong side of the line as to pose no close question at all. The source of the Court's myopia on this point appears to have been its evident determination to follow the government's lead in characterizing the BLM's ongoing campaign of coercion as nothing more than a ''continuing process in which each side has a legitimate purpose in taking action contrary to the other's interest.''[96] But this version of the facts, as Justice Ginsburg's dissent shows convincingly,[97] simply cannot be squared with the district court's findings—by which the Court was bound—that the coercive and punitive steps the BLM agents took would not have occurred but for Robbins's insistence on his rights under the Takings Clause and would have

[94] *Id.* at 2601. To the degree that the Court's concern was with delineating the difference between permissible persuasion and forbidden coercion, see *id.* at 2601–04, it was treating as distinctive to this property context a problem that is in fact ubiquitous, and one that comes down to defining the baseline of threats and offers that are to be allowed in the Government's dealings with individuals, whether on a one-off basis or continuously. See also *infra* text accompanying notes 114-25, discussing the Court's ineffective attempt to distinguish property-based relationships between the government and its private neighbors—relationships implicating the rights of private landowners to just compensation—from relationships between the government and its employees or between the government and private citizens generally—relationships implicating the rights of private individuals to such liberties as freedom of expression.

[95] *Id.* at 2604.

[96] *Id.* at 2603 n.10.

[97] See Wilkie v. Robbins, 127 S. Ct. 2588, 2609–11 (2007) (Ginsburg, J., concurring in part and dissenting in part) (noting that the ''full force of Robbins' complaint'' is ''not quite captured in the Court's restrained account of his allegations'' and providing a more ''complete rendition''); see also *id.* at 2614–15 (taking exception to the Court's ''dubious characterization'' of the government action in Robbins's case as involving a ''perfectly legitimate'' objective).

ceased the moment Robbins agreed to waive those rights and to drop his demand for just compensation.[98]

Just as problematic, and ultimately even more puzzling, is the concession in Justice Souter's opinion for the Court that ''Robbins does make a few allegations, like the unauthorized survey and the unlawful entry into the lodge, that charge defendants with illegal action plainly going beyond hard bargaining.''[99] Those actions standing alone, the Court's opinion suggests, *would* give rise to a *Bivens* cause of action for unconstitutional retaliation—because, ''[i]f those were the only coercive acts charged, Robbins could avoid the 'too much' problem by fairly describing the Government behavior alleged as illegality in attempting to obtain a property interest for nothing.''[100] Really? Why in the world, if a pattern of independently unlawful actions solves the ''too much'' problem, is the problem not solved just as well where, as in Robbins's case, officials *not only* act in independently unlawful ways but *also* abuse their lawful authority? How could it possibly be the case that the *addition* of actions taken in abuse of regulatory authority can render independently unlawful conduct *less* rather than *more* subject to redress by an action for damages?

The only explanation the Court offers is to assert that ''defendants' improper exercise of the Government's 'regulatory powers' is essential to [Robbins's] claim.''[101] Even if that were so, and even if ''the bulk of Robbins's charges [went] to actions that, on their own, fall within the Government's enforcement power,''[102] it would be flatly false to say, as the Court inexplicably does, that ''Robbins's challenge, therefore, is not to the object the Government seeks to achieve. . . .''[103] For, without any doubt, Robbins's challenge is *precisely* to ''the object

[98] See Robbins v. Wilkie, No. 98-CV-201-B, 2004 WL 3659189, at *6 (D. Wyo. Jan. 20, 2004) (holding that evidence that ''[d]efendants did intend and agreed to extort and punish [Robbins]''—including evidence of ''[d]efendants' alleged motive and intent, threats, lies, trespass, disparate treatment and harassment''—compelled denial of defendants' summary judgment motion).

[99] Robbins, 127 S. Ct. at 2603.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 2604.

[103] *Id.* at 2601.

the Government seeks to achieve''—namely, the acquisition of his property without the compensation guaranteed by the Fifth Amendment. To the degree that Robbins could establish, at the trial that the Court has denied him, that he was seriously injured by a campaign of conduct orchestrated by the BLM—including both flatly illegal acts and acts lawful in the abstract but unlawful when engaged in to punish the assertion of constitutional rights—that *would not have occurred but for his insistence on his Fifth Amendment rights* as an owner of private property, his case is analytically indistinguishable from one in which a property owner who continuously petitions the government for redress of grievances under the First Amendment is subjected to a relentless campaign of retaliatory acts—some illegal in themselves and others unlawful only because they would not have been taken but for the owner's insistence on exercising his First Amendment rights—that ends up driving him out of business.

Beyond this basic point, it must be added that the Court's peculiar suggestion that the mere ''improper exercise'' of the BLM officials' delegated ''regulatory powers'' is ''essential'' to Robbins's claim, besides being irrelevant, has the disadvantage of coming from thin air. To be sure, the many actions by BLM officials taken in abuse of powers formally entrusted to them aggravated the *magnitude* of the consequential harm Robbins suffered and thus the appropriate measure of his *Bivens* damages. But what made the Court imagine, for whatever it was worth, that this subset of the officials' actions was a *sine qua non* of the *Bivens* claim that Robbins advanced? The only authority the Court's opinion adduces for that supposition was a cryptic reference to ''Brief for Respondent 21.''[104]

Having written that brief, I know it well, but I reread page 21 (and the surrounding pages) to discover what the Court could possibly have been referencing. I can report that I remain mystified. Quite to the contrary of the Court's assertion, a reader of the brief could not avoid noting that, in responding to the solicitor general's argument that the BLM agents were simply exercising vigorously the powers delegated to them ''for the orderly management and protection of the public lands,''[105] the brief stressed the finding of the district court—a finding ''not subject to review on interlocutory

[104] *Id.*

[105] Resp't Br., *supra* note 11, at 20 (quoting 43 C.F.R. §4130.3-2(h)).

appeal''[106]—that ''the summary judgment evidence substantiated respondent's claim in his complaint that the incursions on his land were undertaken for an entirely different, and unlawful, purpose: to coerce and retaliate.''[107] The brief concluded, on the page cited by the Court, that ''this case has nothing to do with 'the sort of give and take that both Congress and this Court' have approved in the public lands context, . . . and everything to do with the kinds of abuse of power the Fifth Amendment [was] enacted to redress.''[108]

The most one can say in the Court's defense on this crucial point is that the brief did from time to time lump together *all* of the unlawful behavior on the part of the BLM officials—both the behavior that would have been unlawful regardless of motive and the behavior that was rendered unlawful solely by its unconstitutional aim—describing the officials as ''using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment.''[109] But that is precisely what the *Robbins* Court itself described as the kind of '''what for' question [that] has a ready answer in terms of lawful conduct,''[110] so that the claim Robbins brought plainly *did* ''fit the prior retaliation cases,'' which, the Court stressed, ''turn on an allegation of impermissible purpose and motivation.''[111] For Robbins to have treated together both the impermissibly motivated exercises of otherwise lawful regulatory authority and the conduct that was independently unlawful even without regard to its motive could by no stretch be confused with a concession that his complaint was simply that the BLM agents had been guilty only of overzealous bargaining and of doing ''too much'' of a good thing. Justice Souter's opinion thus seems uncharacteristically confused insofar as it argues that Robbins's claim called on the Court to confront an intractable ''problem of degree''[112] rather than to ''answer[] a 'what for' question or two.''[113]

[106] Resp't Br., *supra* note 11, at 21.

[107] *Id.*

[108] *Id.* (quoting Pet'r Br. at 46).

[109] Resp't Br., *supra* note 11, at 21.

[110] Wilkie v. Robbins, 127 S. Ct. 2588, 2601 (2007).

[111] *Id.*

[112] *Id.* at 2604.

[113] *Id.* at 2601.

Even accepting the Court's strained version of the facts of the case and of the character of the claim Robbins had made, its refusal to recognize a cause of action for a pattern of retaliation through the manifest abuse of official regulatory authority in a manner intentionally calculated to circumvent the Constitution's protections for private property is deeply problematic. Especially noteworthy is the Court's frankly lame attempt to contain the reach of its holding to the property context. In particular, it would be impossible to say with any confidence how the Court will apply *Robbins* in dealing, for example, with a pattern of official retaliation for someone's exercise of the First Amendment right to criticize government action. Justice Souter's opinion for the Court describes ''the standard retaliation case recognized in our precedent'' as one in which ''the plaintiff has performed some discrete act in the past, typically saying something that irritates the defendant official,'' so that the question in the ensuing *Bivens* action against that official becomes ''whether the official's later action against the plaintiff was taken for a legitimate purpose'' such as ''firing to rid the workplace of a substandard performer,'' or instead ''for the purpose of punishing for the exercise of a constitutional right.''[114] As the Court's opinion envisions the matter, in such a ''standard case'' the ''plaintiff's action is over and done with, and the only question is the defendant's purpose.''[115] The Court then contrasts *Robbins* by noting that, in this case, ''the past act or acts (refusing the right-of-way without compensation) are simply particular steps in an ongoing refusal to grant requests for a right-of-way.''[116] Because ''[t]he purpose of the continuing requests is lawful (the Government still could use the right-of-way),''[117] ''we are confronting a continuing process in which each side has a legitimate purpose in taking action contrary to the other's interest.''[118]

But exactly the same thing could arise in a First Amendment context, with a government agency or agent engaging in an ongoing series of retaliatory steps to punish an individual for his ongoing protests and to bring such constitutionally protected protests to an

[114] *Id.* at 2602–03 n.10.

[115] *Id.* at 2603 n.10.

[116] *Id.*

[117] *Id.*

[118] *Id.*

end. It is only the Court's transparent manipulation of the level of generality at which it describes the ''purpose of the continuing requests'' by the BLM agents in *Robbins*—that purpose obviously ceases to be lawful once one recognizes it not simply as the acquisition of a useful right-of-way but as the circumvention of the Just Compensation Clause with respect to that right-of-way—that enables the Court to distinguish between retaliation claims pressed by property owners under the Fifth Amendment and retaliation claims pressed by government employees or private citizens under the First Amendment.[119]

Although the Court accuses Robbins of ''chang[ing] conceptual gears [to] consider the more abstract concept of liability for retaliatory or undue pressure on a property owner for standing firm on property rights,''[120] it is in fact the Court that changes conceptual gears by describing the purpose of such retaliation as the legitimate one of acquiring an easement but *not* describing the purpose of retaliation against an employee or citizen for standing firm on his free speech rights as the legitimate one of reducing hostility and strife.

The Court also changes conceptual gears when it transforms a claim of retaliation for the exercise of a constitutional right into a claim of ''retaliation, probably motivated by spite,''[121] leading it to the odd conclusion that Robbins was arguing ''that the presence of malice or spite in an official's heart renders any action constitutionally retaliatory, even if it would otherwise have been done in the name of legitimate hard bargaining,''[122] something the Court rightly noted ''is not the law of our retaliation precedent.''[123] But that was never Robbins's argument. On the contrary, he asked only for the right to ''be placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct''[124] of refusing to give up

[119] *Id.*

[120] *Id.* at 2604.

[121] *Id.* at 2603 n.10.

[122] *Id.*

[123] *Id.*

[124] Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (enunciating retaliation standard for First Amendment cases).

an easement without just compensation—invoking the very principle that the Court in *Robbins* reiterated as controlling retaliation claims.[125]

B. The Background Principle of Unconstitutional Conditions in Robbins

The Court's decision was also particularly unsettling when considered in light of the Court's application of the doctrine of unconstitutional conditions—long invoked with regard to a broad range of constitutional rights[126]—to the specific context of the Takings Clause. In both *Dolan v. City of Tigard*[127] and *Nollan v. California Coastal Commission*,[128] the Court invalidated the state's conditioning of a discretionary grant of a development permit upon the property owner's provision of a property interest to the state.[129] Thus, under the unconstitutional conditions doctrine as developed in the context of the Takings Clause, the government ''may not require a person to give up a constitutional right—here, the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.''[130] Whatever the limits of the doctrine, it clearly affords the government no defense where, as in Robbins's case, the government demanded not only that Robbins give up his right to just compensation in exchange for a ''discretionary benefit,'' like a grazing or special use permit, but also as a condition of his incontestable entitlement to conduct his business free from the scourge of false criminal charges, illegal trespass on his land, and continued harassment of his business and

[125] Wilkie v. Robbins, 127 S. Ct. 2588, 2603 n.10 (2007).

[126] See, e.g., Mem'l Hospital v. Maricopa County, 415 U.S. 250, 256 (1974) (right to interstate travel); cf. Harman v. Forssenius, 380 U.S. 528, 542 (1965) (Twenty-Fourth Amendment); Zablocki v. Redhail, 434 U.S. 374, 387 & n.12 (1978) (right to marry).

[127] 512 U.S. 374 (1994).

[128] 483 U.S. 825 (1987).

[129] In *Nollan*, a state agency included the granting of a public easement as a condition in granting homeowners the right to build an addition to their home. Nollan, 482 U.S. at 827–28. In *Dolan*, a city required a business owner who wanted a land-use variance in order to expand her store and pave the parking lot to dedicate a portion of her land to the public. Dolan, 512 U.S. at 379–80.

[130] Dolan, 512 U.S. at 392; see also Nollan, 483 U.S. at 836–37.

customers.[131] But because, as discussed above, the Court was particularly fixated on those elements of the allegations involving abuses of regulatory authority rather than independently illegal acts, I consider next the Court's failure to see that even those ''mere'' abuses of authority likewise fell afoul of the unconstitutional conditions doctrine.

This incongruity may have been apparent to the Court, explaining its seemingly willful refusal to address those cases directly while both speaking in their language and reaching a result (albeit, as I shall argue, a patently incorrect result) within their framework. Those cases lurk in the background of a statement that lies at the heart of the Court's reasoning:

> [T]he Government was not offering to buy the easement, but it did have valuable things to offer in exchange, like continued permission for Robbins to use Government land on favorable terms (at least to the degree that the terms of a permit were subject to discretion).[132]

Here, the Court clearly envisions the government permissibly conditioning various favorable outcomes within its discretionary authority—granting as opposed to denying grazing and recreational use permits, choosing not to disproportionately seek out infractions and selectively enforce administrative regulations against Robbins—upon his uncompensated surrender of the easement. But the fact that the agents' actions were ''subject to discretion'' is the beginning, not the end, of the inquiry under *Dolan* and *Nollan*. In those cases, in holding that imposing the condition constituted a taking for which compensation must be made available, the Court made clear that the problem was the lack of a sufficiently close ''fit'' or ''nexus''

[131] See Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1, 15–18 (2001).

[132] Wilkie v. Robbins, 127 S. Ct. 2588, 2602 (2007). The Court's careful formulation of the government's stance as that of one ''offer[ing] something in exchange,'' *id.*, for the easement is a gross mischaracterization of the long course of hostile government action taking place *after* the cancellation of the right of way—a course of action that surely lacked the flavor of good-faith bargaining the Court attributes to it. See *supra* notes 21–23.

between the government's permissible reasons for granting or withholding the discretionary benefit and the Government's reasons for imposing the particular condition on granting that benefit.[133]

The relevant question, then, is the relationship between the reasons for which the BLM officials could, as a general matter of discretion, withhold ''permission . . . to use Government land on favorable terms'' and their reasons for conditioning this permission on Robbins's surrender of the easement. Here, as Justice Ginsburg irrefutably demonstrates in her dissent,[134] the objectives of the agents' conditioning of the right—to regain the ''carelessly lost'' easement gratis so as simultaneously to benefit the agency and cover the agents' tracks, and to punish Robbins for his stubborn failure to gratify that desire—are far from, and in fact bear no real relation to, any of the legitimate reasons for the government's exercise of its discretionary authority.[135]

[133]See Nollan, 483 U.S. at 837 (''T]he lack of nexus between the condition and the original purpose of the building restriction converts it to something other than it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'').

[134]Robbins, 127 S. Ct. at 2614–15 (Ginsburg, J., concurring in part and dissenting in part).

[135]The Court's elision of permissible ends with allowable means in *Robbins* is inconsistent with its previous recognition of the importance of precisely this means-ends distinction in the context of the Takings Clause. In *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), the Court rejected any notion that the California Coastal Commission's legitimate end of obtaining an easement for public access across the waterfront cured the means it chose—requiring that property owners who wanted to build an addition to their house grant the easement in exchange for a building permit—of a constitutional infirmity. *Id.* at 841–42. In *Nollan*, the Court held that the different purposes behind the permit requirement, which preserved visual access to the shore, and the easement, which would have promoted physical access to the shore, lacked an essential nexus that made the conditional permit amount to a taking. *Id.* at 837–39.

Whether or not one agrees with the *Nollan* analysis, surely the lack of nexus between the BLM's desire for an easement across Robbins's land and the purposes behind the BLM's power to charge individuals with trespassing on federal lands is all the greater. The Court's motivating concern in *Nollan*—that, without a nexus requirement, the government might tend to overregulate land use and might ''leverage'' its power to grant exemptions as currency to buy any property interest it desired, *id.* at 837 n.5—is fully applicable to the situation in *Robbins*.

C. *Caught Between a Rock and a Hard Place: Distinguishing Between a ''Taking'' and a ''Giving''*

Robbins served as an ideal case in which to condemn the government's strategy of circumventing the Takings Clause precisely because it was a case in which the strategy *failed*. Had the government been successful, it would have had a powerful argument that no ''taking'' had occurred because Robbins had merely been ''persuaded'' to give up his property—in other words, that there had been a ''giving'' for which just compensation is not required. That is what made the solicitor general's argument that, because no taking occurred, no property right was violated and no remedy was constitutionally required, so disingenuous. But, although the Court did not advert to, much less embrace, the solicitor general's inverted form of argument, it also unfortunately said nothing to reject it.

Notably, the explicit rejection of just this upside-down argument was central to the Supreme Court's analysis in the analogous situation of guilty pleas induced by the death penalty provision of the Lindbergh Anti-Kidnapping Act.[136] In *United States v. Jackson*[137] the Court struck down the portion of the Act that authorized the death penalty because the Act made that penalty available only in cases tried by a jury—i.e., only in cases in which the accused refused to plead guilty and refused to waive his Sixth Amendment right to a jury trial. The Court reasoned that this scheme put in place an unjustified and therefore impermissible penalty on the exercise of the constitutional right to trial by jury.[138] Subsequently, the Court made plain that entering guilty pleas under the influence of this problematic statutory scheme would not in itself enable those who had done so to assert that their pleas were coerced by their fear that they risked being sentenced to death if they went to trial and insisted on a jury.[139] Far from representing a retreat from *Jackson*, the Court's decision to uphold those guilty pleas and the life sentences to which they led underscored the linchpin of *Jackson*'s analysis: It was the very fact that the structural defect in the Lindbergh Act's capital

[136] P.L. No. 73-232, 48 Stat. 781 (1934) (codified as amended at 18 U.S.C. § 1201 (2000)).

[137] 390 U.S. 570 (1968).

[138] *Id.* at 583.

[139] See Brady v. United States, 397 U.S. 742, 746, 758 (1970) (holding a *Jackson*-induced waiver ''voluntarily and intelligently made'').

punishment scheme could not be cured *post hoc*—by rejecting as coerced those waivers of the right not to plead guilty and of the right to demand a jury that the scheme induced—that required the Court to strike the scheme down *on its face* rather than upholding it and waiting to invalidate particular *applications* of its punitive structure as products of forbidden coercion.[140] In other words, it was the fact that the statutory scheme was structured to penalize, without adequate justification, the assertion of Sixth Amendment rights, coupled with the inability to cure the problem case-by-case, that rendered the Act unconstitutional *on its face*. Consistent with that theory, those who had surrendered their rights when the statutory scheme was applied to them (before having been facially invalidated) were presumed to have done so voluntarily. Just so, if Robbins had succumbed to the threats made against him rather than standing his ground while his business was essentially destroyed, the government could have argued that, whatever pressure the BLM had applied to Robbins, he had relinquished the easement voluntarily and could not claim it had been ''taken.''

D. The Problem of Unauthorized Takings

Even if Robbins could somehow have established that his relinquishment of the easement under the government's unrelenting pressure amounted to an involuntary taking rather than a voluntary ''giving,'' neither the Just Compensation Clause nor the Tucker Act[141] would have allowed Robbins to recover for what would nonetheless have amounted to an *unauthorized* taking of his property by executive branch officials. For the Supreme Court has long held that the taking of property by executive officials without congressional authorization cannot subject the United States to liability for just compensation.[142] Because Congress and Congress alone possesses the power of the purse, the executive branch must not be permitted to accomplish

[140]See Jackson, 390 U.S. at 583 (''The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnaping Act.'').

[141]28 U.S.C. § 1491 (2000). This Act waives the federal government's sovereign immunity for certain types of claims, including takings claims.

[142]See, e.g., Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 127 (1974); United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) (per Brandeis, J.); Hooe v. United States, 218 U.S. 322, 335–36 (1910).

what would in effect be a congressionally unapproved appropriation of public money by the expedient of seizing private property and leaving the aggrieved owner to bring a claim for just compensation against the United States.[143]

This point has special relevance here because the BLM officials had no source of legislatively granted authority for the pattern of conduct they employed in their pursuit of the easement from Robbins—the same easement that they had originally acquired from the prior owner of Robbins's ranch but had negligently lost through their failure to timely record it. Congress entrusted the BLM with limited authority to acquire property interests through statutorily provided means beyond outright purchase from or exchange with a willing seller—specifically, via eminent domain if it makes a showing of necessity to ''secure access to public lands,''[144] or as a condition imposed on an applicant for a right-of-way across federal land.[145] And even if the requisite showing of necessity could have been made, Congress conferred no statutory authority on BLM officials to harass and threaten a property owner in order to acquire a property interest from him gratis, outside the eminent domain process. Because the actions of the BLM officials thus clearly amounted to an unauthorized attempt to obtain private property from its rightful owner, Robbins could not have sought compensation from the United States itself, under the Tucker Act or otherwise, had the BLM officials succeeded in their scheme of constitutional circumvention—a feature of the case about which the Court in *Robbins* was oddly silent but one that plainly gave it its particular poignancy.

E. The Implications of Robbins *for the Future of Property (and Other Fifth Amendment) Rights: The Shortest Cut*

The unavailability of a claim for just compensation against the United States means that in a case like *Robbins*, the remedy ''is *Bivens*

[143] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952); *id.* at 631–32 & n.2 (Douglas, J., concurring).

[144] 43 U.S.C. § 1715(a)(2000). It is doubtful that such a showing would have been possible on the facts in *Robbins*, especially given the stringent way in which the necessity requirement has been defined and policed. See United States v. 82.46 Acres of Land, 691 F.2d 474, 477 (10th Cir. 1982). In general, takings by the federal government must be effectuated through condemnation proceedings initiated by the attorney general that afford property owners significant substantive and procedural protections, as well as an important measure of political oversight and accountability. See 40 U.S.C. §§ 3111–3118; Fed. R. Civ. P. 71A.

[145] See *supra* note 11.

or nothing.''[146] Without the threat of personal liability under *Bivens*, officials working for a federal agency that seeks to acquire a private property interest but either lacks statutory authority to obtain it by eminent domain or has insufficient funds in its budget to purchase it for its fair market value have nothing to lose and much to gain by using the kinds of harassing behavior that the BLM employees used against Robbins.[147] If the officials are successful in getting the property owner to give in, then they have gained a property interest for free.[148] If they are unsuccessful, they face no personal liability after *Robbins*, and the unavailability of any claim against the United States means that their superiors would be unlikely to discipline or constrain them. While this kind of behavior seems not to have occurred with much frequency in the past—or at least seems not to have generated any noticeable waves of litigation—the *Robbins* decision could encourage it to happen with greater frequency in the future.

Beyond the likely behavioral effects of *Robbins* in prompting outright circumvention of the just compensation requirement, the decision is likely to cast a long shadow over the recent revival of the Court's concern to seek out regulations it determines to be tantamount to a taking and therefore invalid in the absence of (often unavailable) just compensation. In cases striking down legislative

[146] This is a paraphrase of Justice Harlan's oft-quoted observation that a cause of action against a federal official for a constitutional violation is especially appropriate when ''it is damages or nothing.'' Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). A claim against the United States under the FTCA was not enough to preclude a *Bivens* cause of action against prison officials in *Carlson v. Green*, 446 U.S. 14 (1980). See *id.* at 23 (''[W]e cannot hold that Congress relegated respondent exclusively to the FTCA remedy. . . .''). The fact that Robbins would not have had a claim against the United States only strengthens the argument that he should be able to assert a claim against the officials involved.

[147] One might wonder why federal officials would go to such lengths to secure property for the benefit of the government. One answer is that what is good for the employer often tends to be good for the employee. In the *Robbins* case, the BLM employees obviously had an incentive to avoid looking sloppy and wasteful due to their own negligence in losing the original easement, and may also have harbored an inchoate hope that they would be rewarded financially, through monetary bonuses or raises, for their efforts against Robbins, especially if those efforts proved successful.

[148] There might be whatever costs their efforts entailed, but in the case of truly malicious officials who are ''out to get someone,'' the costs of their efforts, as internalized by the officials themselves, would be negative.

development bans[149] and conditional development permit terms,[150] the Court has effectively reiterated its earlier declaration that ''[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.''[151] With *Robbins*, however, the Court effectively turns its back on government action that amounts to a still shorter cut, accomplishing a complete transfer of indisputably compensable property rights in ways that circumvent the just compensation requirement by making a ''taking'' of any variety—either literal or regulatory—unnecessary.

The danger the Court's decision poses for the Fifth Amendment right not to have one's property taken for public use without just compensation is acute. If anything, the case for remedying this kind of cumulative retaliatory injury to private property (including both physical property and the intellectual ''property'' embodied in one's potentially self-incriminating testimony under oath) through circumvention of the just compensation requirement (or of the requirement of witness immunity) is stronger than the case for remedying similarly inflicted injuries to other constitutionally protected interests. For *Robbins* all but invites government officials eager to obtain someone's physical or intellectual property but either lacking the requisite statutory authority[152] or unwilling to sacrifice the resources that a taking would necessitate (or the successful criminal prosecution that ''use immunity'' might frustrate) to squeeze the prospective source of the desired property or information by making his life as difficult as they can, both by withholding whatever discretionary benefits they would otherwise have granted and by initiating a torrent of independently unlawful actions that their target will be unable to fend off or be compensated for.

To be sure, the Court does not directly condone such tactics in *Robbins.* Indeed, it even concedes that the tactics here may have

[149] See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[150] See Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[151] Pa. Coal Co v. Mahon, 260 U.S. 393, 416 (1922).

[152] That such authority is needed both for a taking and for a grant of use or transactional immunity follows from elementary considerations of the separation of powers, as well as from the guarantee that neither liberty nor property may be taken ''without due process of law.''

violated the Constitution.[153] And the Court avoids embracing the government's remarkable suggestion that the conduct at issue in *Robbins* could not have violated the Fifth Amendment because no actual taking occurred. At the same time, the Court equally carefully avoids *rejecting* that astonishing suggestion, steering clear of the Fifth Amendment issue altogether and confining its ruling to the further demolition of what little remains of *Bivens*.

Whatever the Court's reasons for reaching out to dispose of the case on that basis, the result can only encourage others to engage in violations similar to those committed by the BLM agents in this case. *Robbins* obviously gives federal officials a green light in this respect unless and until Congress enacts a specifically applicable cause of action for damages against such officials. And even at the state level, where the availability of damages relief under 42 U.S.C. § 1983 might theoretically discourage some state actors from doing essentially what the BLM agents did here, that deterrence is certainly weakened by the Court's apparent reluctance to condemn the conduct involved here as flatly unconstitutional. For state actors bent on circumventing the just compensation requirement can hardly avoid noticing the Supreme Court's studious avoidance of a holding condemning what the BLM agents did to Frank Robbins as a clear violation of the Constitution. And at least some such state actors might well conclude that, if any of them were to get hammered in a § 1983 action for acting just as the BLM officials did, the Court would come to the rescue by finding the retaliatory tactics at issue not *clearly* enough unconstitutional to overcome qualified immunity.

IV. *Robbins* and the Jurisprudence of Wrongs Without Remedies

Looking back after reading the Court's opinion, one must conclude that the introduction to the Court's decision on the merits said it all. ''The first question'' before it, the Court says at the outset, ''is *whether to devise a new Bivens damages action* for retaliating against the exercise of ownership rights. . . .''[154] By describing the anti-retaliatory

[153] Wilkie v. Robbins, 127 S. Ct. 2588, 2604 (2007) (''The point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true.'').

[154] *Id.* at 2597 (emphasis added).

Bivens damages action invoked in these circumstances by Robbins as ''new,'' a Court that had for years displayed a dwindling inclination to respect the spirit of *Bivens,* much less to extend its letter, made clear what its answer would be. And—as we shall shortly see—by describing the *Bivens* question as properly before it *at all* on this purely interlocutory appeal from a qualified immunity dismissal, a Court that had previously taken care at least to respect the boundaries Congress had set on the appellate jurisdiction of the Supreme Court (and of the federal circuit courts) to review nonfinal judgments of the federal district courts left no doubt that its eagerness to cut back on *Bivens* exceeded even its fidelity to those jurisdictional boundaries.

The *Robbins* Court described its decision to reject a damages remedy for retaliatory violations of the Fifth Amendment by federal agents as based on ''the reasonable fear that a general *Bivens* cure would be worse than the disease.''[155] Justice Souter's opinion, however, suggests so strong an antipathy to the *Bivens* cause of action as to call into question any meaningful distinction between the Court's purported application of *Bivens*, on the one hand, and Justice Thomas's avowal, on the other, that he ''would not extend *Bivens* even if its reasoning logically applied to this case.''[156] If, as I develop below, the *Bivens* line of cases exhibits a basic schizophrenia with regard to the Court's view of the federal judiciary's authority and responsibility to fashion remedies for violations of the federal Constitution, its ruling in *Robbins* suggests a stubborn refusal to accept treatment.

To appreciate the degree to which the Court's decision represents a nearly pathological insistence on retaining the appearance of the judicial responsibility that *Bivens* recognized while simultaneously seeking any excuse not to exercise that responsibility, it is necessary to provide a brief overview of what one commentator has aptly dubbed ''*Bivens*'s non-doctrine.''[157]

A. The Bivens *Framework*

In *Bivens v. Six Unknown Named Agents*,[158] the Court held that the victim of a Fourth Amendment violation by federal officials could

[155] *Id.* at 2604.

[156] *Id.* at 2608 (Thomas, J., joined by Scalia, J., concurring).

[157] Gene R. Nichol, Bivens, Chilicky, and Constitutional Damages Claims, 75 Va. L. Rev. 1117, 1128 (1989).

[158] 403 U.S. 388 (1971).

recover damages against the officials in federal court even though Congress had not provided a statutory vehicle for such redress. In *Davis v. Passman*,[159] and *Carlson v. Green*,[160] the Court held that *Bivens*'s reasoning required recognition of damages remedies for Fifth Amendment and Eighth Amendment violations by federal officials, respectively, and reiterated that under *Bivens* the victims of constitutional violations by federal officials are presumptively entitled to recover damages in federal court unless either (1) ''defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress''' or (2) ''defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.''[161]

Both *Davis* and *Carlson* stressed that alternative remedies developed by Congress would not preclude relief under *Bivens* unless those remedies were ''equally effective'' and Congress expressly declared that they were meant to supplant the *Bivens* remedy of an action for damages. Both of these glosses on the ''adequate alternative'' exception to the presumptive availability of *Bivens* relief were rejected by the Court in *Bush v. Lucas*.[162] In *Bush*, the Court denied a *Bivens* remedy to a federal civil service employee who alleged that he had been discharged for protected speech in violation of the First Amendment. Noting that Congress could indicate its intent to preclude the *Bivens* remedy ''by statutory language, by clear legislative history, *or perhaps even by the statutory remedy itself*,''[163] the Court reasoned that a *Bivens* remedy was implicitly precluded by Congress's design, in the civil employment context, of an ''elaborate remedial system that has been constructed step by step, with careful

[159] 442 U.S. 228 (1979). In *Davis*, the Court held that the plaintiff, an assistant to the defendant Congressman, could recover damages for violation of her right to equal protection under the Fifth Amendment when she was terminated on the basis of her gender.

[160] 446 U.S. 14 (1980). In *Carlson*, the Court held that a prisoner could recover damages against individual prison officials for neglect of his medical needs despite the availability of relief against the government under the FTCA, reasoning that Congress had not expressly declared the FTCA remedy to supplant the *Bivens* remedy and that the *Bivens* remedy was a more effective deterrent.

[161] Carlson, 446 U.S. at 19 (citing *Bivens*, 403 U.S. at 397, and *Davis*, 442 U.S. at 245–47).

[162] 462 U.S. 367 (1983); see *id.* at 380–90.

[163] *Id.* at 378 (emphasis added).

consideration to policy considerations. . . .''[164] Furthermore, the Court held the congressionally created remedial scheme precluded *Bivens* recovery even where it assumed those alternative remedies would not ''compensate him fully for the harm he suffered.''[165]

Although the *Bush* Court purported to find in the design of the civil service remedial system a ''special factor[] counseling hesitation,''[166] the real thrust of *Bush* was to expand the class of cases in which congressionally created remedies would be held to preclude *Bivens* recovery far beyond the small, if not null, set in which Congress has explicitly declared a *Bivens* remedy to be supplanted and the somewhat larger set in which Congress might plausibly be said to have implied such preclusion.[167] Congress rarely makes (and does not often imply) a decision to preclude the possibility of relief of the sort contemplated in *Bivens*, and where it does, a *Bivens* claim is unlikely to be brought in the first place. *Bush* thus can be viewed as the Court's arrival at something of an equilibrium with regard to the limits upon its remedial authority imposed by congressional action in a field. Indeed, the *Bivens* inquiry as originally conceived arguably placed too little stock in Congress's legislative authority to devise remedies for constitutional violations.[168] This judicial disdain for Congress's exercise of its remedial powers parallels the disdain the Court has famously shown in reviewing the constitutionality of congressional legislation enacted under Section 5 of the Fourteenth Amendment, in a long series of closely divided decisions.[169]

In addition to the development, described above, of the circumstances in which Congress's legislative *activity* in a field may be

[164] *Id.* at 388.

[165] *Id.* at 372.

[166] *Id.* at 380.

[167] Nonetheless, *Bush*'s use of the ''special factors'' exception to reach its result contributed to the expansion of that exception into the unprincipled inquiry the Court conduced in *Robbins*. See Nichol, *supra* note 157, at 1147.

[168] See Nichol, *supra* note 157, at 1143–45 (arguing that Congress's authority to legislate remedies for constitutional violations means that it may in some instances supplant a *Bivens* remedy).

[169] See, e.g., Bd. of Trustees v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Florida Prepaid Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997). See generally Laurence H. Tribe, American Constitutional Law 258–67 (3d. ed. 2000); *id.* at 604 n.35.

taken to preclude recognition of a *Bivens* remedy, the Court also developed the theory that Congress's special sphere of constitutional *authority*—even if unexercised—with regard to a particular domain itself constitutes a ''special factor counselling hesitation.'' Thus, in both *Chappell v. Wallace*[170] and *United States v. Stanley*,[171] the Court held that Congress's special authority over military matters precluded judicial creation of a *Bivens* remedy for injuries arising incident to military service.[172] Under this understanding of the ''special factors'' exception, the judicial branch is to refrain from intruding into substantive fields whose regulation the Constitution is thought to entrust exclusively to Congress.[173]

To summarize, the early line of *Bivens* cases essentially recognized the judiciary's authority to fashion remedies, including money damages, as part of its core responsibility to hear cases and controversies properly within its grant of subject matter jurisdiction under Article III as implemented by 28 U.S.C. § 1331. And this judicial authority was to be presumptively exercised unless either (1) a congressionally

[170] 462 U.S. 296 (1983).

[171] 483 U.S. 669 (1987).

[172] See Chappell, 462 U.S. at 304 (''[C]ongress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.''). While the *Stanley* Court also noted that a judicially created remedy would be damaging in its disruption of military life, that construal of the ''special factors'' inquiry is unjustified, given that *Bivens* contemplated the inquiry as one into the proper *source* of remedies for constitutional violations, not into the *merits* of a particular remedy. See Bush v. Lucas, 462 U.S. 367, 380 (''The special factors counseling hesitation in the creation of a new remedy in *Standard Oil* and *Gilman* did not concern the merits of the particular remedy that was sought. Rather, they related to the question of who should decide whether such a remedy should be provided.'').

[173] In his opinion for the majority in *Stanley*, Justice Scalia denied the dissent's claim that under his reasoning ''all matters within congressional power are exempt from *Bivens*,'' noting that ''[w]hat is distinctive here is the specificity of [U.S. Const. Art. I, 8, cl. 14's authorization for Congress ''[t]o make Rules for the Government and Regulation of the land and naval Forces] and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches.'' Stanley, 483 U.S. at 682. Dean Nichol has argued that, in finding this sort of ''special factor,'' the Court essentially applies the political question doctrine under a different name. See Nichol, *supra* note 157, at 1152.

crafted remedial scheme provided adequate alternative relief or (2) the Constitution's grant to Congress of special policy-making authority over a particular field precluded judicial intervention without specific congressional invitation.

B. The Beginning of the End for Bivens

With its decision in *Schweiker v. Chilicky*,[174] the Court began to dismantle this scheme, substituting in its place an essentially unprincipled search for any factor that would allow it to shirk the judicial responsibility recognized in the earlier cases. In *Chilicky* the Court held that the denial of Social Security disability benefits pursuant to a policy inconsistent with the Fifth Amendment Due Process Clause does not give rise to a cause of action for money damages because of the elaborate remedial scheme Congress had constructed to redress erroneous benefits termination. The Court's reliance on its earlier holding in *Bush* was unpersuasive, for in *Chilicky* there was no evidence that the congressional scheme, which aimed only to remedy erroneous benefits determinations caused by mistake or oversight, was intended to address the distinct problem posed by cases, like *Chilicky*, in which the deliberately adopted *procedure* for termination was itself alleged to be unconstitutional. Indeed, the decision in *Chilicky* left the victims with no remedy other than the reinstatement of their missed benefits even where the unconstitutional cutoff of their disability payments had resulted in death or grave illness.[175] The Court's decision in *Chilicky* drew considerable scholarly criticism, with at least one commentator observing that *Chilicky* inaugurated ''an open-ended balancing approach whereby judges attempt to decide whether a damages claim serves the public good.''[176] Fulfilling that prognosis, the Court in *Robbins* openly adopted just such an approach.

C. The Bivens *Issue in* Robbins

The *Robbins* Court did not hold—nor could it plausibly have said—that a *Bivens* remedy was precluded in light of other adequate remedies available in that case. Indeed, the remedies available to Robbins plainly constituted no targeted ''elaborate remedial scheme

[174] 487 U.S. 412 (1988).

[175] For a fuller discussion of *Chilicky*, see Tribe, *supra* note 169, at 485 n.134.

[176] Nichol, *supra* note 157, at 1150.

constructed step by step,''[177] but were merely a hodge-podge of the generically available forms of administrative relief provided under the broad terms of the Administrative Procedure Act, state tort law remedies,[178] and defenses to criminal charges.[179] If it was a stretch for the *Chilicky* Court to find that the existing Social Security benefits remedial scheme precluded a *Bivens* remedy, it would have been an even more extreme deformation in Robbins's case. In truth, if the ''remedies'' available to Robbins sufficed to render *Bivens* unavailable, then most of the ink spilled in the long line of *Bivens* cases could have been saved, for remedies of the sort available to Robbins were ubiquitous in those cases.

To leave no doubt about how far it was going in cutting into *Bivens*, the Court in *Robbins* expressly conceded—as we have already seen—that, while individual remedies may have been available for many of the numerous harms Robbins suffered, these did not amount to a remedy for the *cumulative effect* of the BLM's long campaign of harassment. The Court thus seemed fully cognizant of what it was leaving unremedied when it acknowledged that ''[i]t is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult.''[180] And the Court was nothing but realistic when it conceded Robbins's point that ''[a]gency appeals, lawsuits, and criminal defense take money, and endless battling

[177] Bush v. Lucas, 462 U.S. 367, 388 (1983).

[178] State tort law remedies were potentially available in *Bivens* and were specifically held not to preclude recognition of a damages action. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394–95 (1971). For an argument that the Court's decision in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), portended reconsideration of even that basic principle, see Daniel Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343, 361 (noting that ''[i]f the *Bivens* decision once seemed, as a general matter, to extend constitutional tort remedies against federal officials as broadly as 42 U.S.C. § 1983 does against state and local officials, and to confirm the authority of federal courts to fashion appropriate remedies for violation of federal constitutional rights, *Malesko* suggests that the future may look different'').

[179] See Wilkie v. Robbins, 127 S. Ct 2588, 2600 (2007) (describing the ''forums of defense and redress open to Robbins'' as ''a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules'').

[180] *Id.* at 2600–01.

depletes the spirit along with the purse,'' leading the Court, in the end, to accept as apt Robbins's characterization of the agents' action as ''death by a thousand cuts,''[181] and to offer its own description that this was a situation in which, without doubt, ''[t]he whole here is greater than the sum of its parts.''[182] The point would have been difficult to deny. For a person in Robbins's situation, paying a fine of a few hundred dollars on an administrative trespass charge, while not an insubstantial sum, is trivial when compared with the thousands of dollars it would cost to contest each charge all the way up through the administrative process and the federal courts via the APA. For Robbins, winning was as good (bad) as losing. Every charge meant additional time and money spent regardless of the outcome. And for the officials bent on bleeding Robbins dry, these administrative challenges fed right into their plans.

Just as the *Robbins* Court could not have claimed that an adequate alternative remedial scheme was available to Robbins, so it could not claim to be deferring to Congress's special authority under the Constitution with regard to the federal government's property ownership rights.[183] In essence, the *Robbins* Court has written the ''specialness'' out of the ''special factors'' inquiry altogether by grossly mischaracterizing ''*Bivens* step two''[184]—its new term for the special

[181] *Id.* at 2600 (citing Resp't Br., *supra* note 11, at 40).

[182] *Id.* at 2601.

[183] Indeed, the Court's (mis)characteriziation of the government's status throughout this case as Regular Joe Landowner itself undermines any such claim. See, e.g., Robbins, 127 S. Ct. at 2602 (noting that ''in many ways, the Government deals with its neighbors as one owner among the rest (albeit a powerful one)''). The Court sought to analogize the facts in *Robbins* to a situation in which ''a private landowner, when frustrated at a neighbor's stubbornness in refusing an easement, may press charges of trespass every time a cow wanders across the property line or call the authorities to report every land-use violation.'' *Id.* The analogy shockingly ignores the Constitution's central premise that the government, being uniquely powerful, is uniquely in need of restraints that would be wholly out of place in our fundamental law's treatment of private parties. On the approach suggested by Justice Souter's opinion, one might as well say that, just as a private landowner, when frustrated at a neighbor's political views or voting behavior, may opt to press charges of trespass every time a cow wanders across the property line even though that landowner would not otherwise be so insistently punitive, so may the government. But the law is, of course, otherwise: The Government is not free, in the way a private party would be, to withhold lenity in a manner deliberately calculated to prevent or punish constitutionally protected speech.

[184] *Id.* at 2600.

factors inquiry—as the ''weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done.''[185] This way of framing the inquiry suggests that the Court is engaged in the policy-driven creation of any old common law cause of action, as opposed to a federal cause of action specifically crafted as necessary to remedy and deter a violation of the United States Constitution. But powerful principles underlying the Constitution itself give rise to a strong presumption that violations of federal constitutional rights are redressable by appropriate relief in the federal courts.[186] While an absolute and simplistic understanding of that principle must be—and has been—rejected,[187] surely it should furnish a baseline to guide the Court in its performance of the quintessentially judicial task of determining which remedies are available for any given constitutional violation.

D. The Future of Bivens

While the Court's prior *Bivens* cases had set the stage for *Robbins*, *Robbins* appears to represent the first time the Court has found a *Bivens* remedy unavailable to redress a run-of-the-mill constitutional claim against a federal official in the absence of an alternative remedial scheme that is even arguably designed to be comprehensive.[188] *Robbins* thus marks the Court's first genuine departure from *Bivens*'s ''core holding.''[189] The Court's foray into the unhinged and uncabined balancing inquiry foreshadowed in *Chilicky* adopts a newly ''open-ended special factors methodology'' that seems both ''unmanageable'' and ''inconsistent with a reasonable concept of separation

[185] *Id.*

[186] See Tribe, *supra* note 169, at 599–605 (discussing constitutional presumption that ''for every right there should be a remedy'').

[187] *Id.*; see also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1784–86 (1991).

[188] The Court had previously rejected *Bivens* claims against organizations as opposed to individuals, finding the purpose of deterring agents of government to be inapplicable, see Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001) (suit against private corporation); FDIC v. Meyer, 510 U.S. 471 (1994) (suit against federal agency), and in the special situation of lawsuits involving harm to military personnel arising from active service, see United States v. Stanley, 483 U.S. 669, 679 (1987); Chappell v. Wallace, 462 U.S. 296, 304 (1983), finding congressional primacy in those spheres to be dispositive, but none of those decisions is comparable to *Robbins*.

[189] Wilkie v. Robbins, 127 S. Ct. 2588, 2613 (2007) (Ginsburg, J., concurring in part and dissenting in part).

of powers.''[190] It is one thing for a cause of action to redress constitutional violations to be deemed presumptively available in the absence of a narrow set of judicially defined exceptions, but quite another for the Supreme Court to assume virtually unchecked power to decide *which* constitutional rights, and which kinds of constitutional violations, yield an implied cause of action for damages (against non-immune government actors) and which ones do not. That this newly assumed power has been exercised to the detriment of Fifth Amendment rights peculiarly in need of the protection that only a *Bivens* remedy could have ensured merely underscores how lawless and arbitrary is the enterprise on which the Court has now embarked. If the Court's exercise of essentially unbridled discretion to decide which constitutional violations to remedy is troubling in itself,[191] its unconvincing reasons for withholding a remedy here are more troubling still.

The Court's assertion that ''any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation,''[192] rings particularly hollow; for the Court, tellingly, provides no explanation of *why* Congress is in a better position to perform the prototypically judicial line-drawing functions with which the Court appears to have decided not to dirty its hands in this context. And, indeed, were Congress to step into the remedial void the Court leaves with its decision, enacting a statute providing a cause of action for damages for retaliation in violation of a property owner's Fifth Amendment rights by federal officers—or perhaps crafting an even broader statute similar to 42 U.S.C. § 1983—it would fall to the Court to perform exactly the sort of line-drawing it shrinks from here, a task the Court is already obligated to undertake in cases reaching it under § 1983. But, unfortunately, the Court's decision not to overrule *Bivens* altogether, despite the hostility to that precedent demonstrated by

[190] Nichol, *supra* note 157, at 1151.

[191] See *id.* at 1150; Meltzer, *supra* note 179, at 356–62; see also Dickerson v. United States, 530 U.S. 428, 460–61 (2000) (Scalia, J., dissenting) (contrasting the open-ended judicial power to craft prophylactic rules like the requirement of *Miranda* warnings with the congruence and proportionality the Court demands of Congress in crafting prophylactic remedies under Section 5 of the Fourteenth Amendment).

[192] Robbins, 127 S. Ct. at 2604–05.

the lengths to which the Court went to find a ''special factor'' pointing to the result reached in *Robbins*, makes congressional action in the field less, not more, likely.

V. Stretching Jurisdictional Limits to the Breaking Point

Not only has the Court's hesitation about fashioning monetary remedies for the victims of constitutional violations produced incoherence in the *Bivens* framework; beyond that, this hesitation evidently motivated the Court to compromise its fidelity to jurisdictional limits. To see that this is so and that the Court's avoidance of the constitutional merits simply cannot be understood as an instance of judicial modesty, one must remember that the posture of the *Robbins* case before the Court was an *interlocutory appeal* of the denial of a motion for summary judgment on qualified immunity grounds. The general rule in the federal courts, as enacted by Congress, is of course that litigants may appeal only from *final judgments*, not interlocutory rulings such as a denial of a summary judgment motion.[193] To be sure, there is a set of narrow exceptions to the final judgment rule, one of which allows immediate appeals of denials of qualified immunity.[194] The allowance of interlocutory appeals of pretrial denials of qualified immunity extends not only to the qualified immunity standard of whether the defendants violated clearly established law,[195] but also to the ''inextricably intertwined''[196] issues of whether any right was violated[197] (i.e., whether any constitutional tort was committed), and ''the definition of an element of th[at] tort.''[198]

But the question of *remedy*—whether a federal suit for damages under *Bivens* would be an available form of relief *if* the conduct

[193] See 28 U.S.C. § 1291 (2000); see also Will v. Hallock, 126 S. Ct. 345, 347–49 (2006).

[194] See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

[195] See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[196] Swint v. Chambers County Comm'n, 514 U.S. 35, 51 (1995).

[197] The Supreme Court has held that the proper procedure in a qualified immunity determination is to first assess ''whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'' Conn v. Gabbert, 526 U.S. 286, 290 (1999). Thus, the issue of whether a right exists at all is properly before an appellate court on interlocutory appeal of the qualified immunity issue.

[198] Hartman v. Moore, 126 S. Ct. 1695, 1702 n.5 (2006).

alleged were proven and *if* that conduct constituted a violation of a clearly established federal constitutional rule—had never before been deemed ''inextricably intertwined'' with the logically and functionally distinct question *whether* the conduct alleged constituted such a violation as a matter of law and therefore was not entitled to qualified immunity. And, of course, it is *only* the supposedly inextricable entwinement of that remedy issue with the qualified immunity issue that could *bring* the remedy issue—i.e., the availability of *Bivens* relief for the sort of violation alleged—within the limited interlocutory appellate jurisdiction that permitted the court of appeals, and the Supreme Court, to hear *Robbins* at all in the interlocutory posture presented. Thus, even assuming—as the *Robbins* Court ultimately held—that the district court was *wrong* in holding that a *Bivens* action was available to Robbins, if no question of qualified immunity had ever been raised, the defendants would presumably have had to stand trial and only then, if they lost at trial and were aggrieved by the *Bivens* relief granted against them, would they have been able to appeal the *Bivens* issue to the court of appeals and then on to the Supreme Court, where they would in the end presumably have been vindicated.[199]

To be sure, they would in that instance have undergone a trial that could have been avoided altogether had the district court decided at the outset—rightly, on the hypothesis that the Supreme Court's take on the *Bivens* issue would have been unaffected by the intervening proceedings—that no *Bivens* remedy was available. But in that respect, their situation would have been identical to that of many other defendants who lose a dispositive summary judgment motion or motion to dismiss that they should in principle have won and who, if they prevail after trial—e.g., because they are found to have acted for legitimate reasons, or are found not to have done what the complaint alleged they did—are just out of luck with respect to their claim that, had the motion been correctly ruled upon in the first instance, they would have been spared the burdens of trial and not just been handed a favorable post-trial verdict.

[199] Only ''presumably,'' however, because one cannot say with confidence that the Court's *Bivens* calculus would remain unaffected by the district court's trial and the circuit court's analysis on appeal.

While there is a surface allure to the notion that a litigant should be able immediately to appeal *any* order denying a claim of right to prevail without trial, Congress has expressly decided that it is wiser to save all appeals for the end of a case rather than having a case bounce around repeatedly from trial court to appellate court.[200] Thus, had the BLM officials not challenged the district court's pretrial denial of their qualified immunity claim, or had that challenge been regarded as frivolous, they would not have been entitled, on any view of the settled law that survives the *Robbins* Court's holding,[201] to appeal in an interlocutory posture the holding that a *Bivens* remedy was available against them. The jurisdictional issue the *Robbins* Court therefore had to resolve as a threshold matter was whether the insertion of a qualified immunity issue into this case should have been permitted to transmute the situation into one where not only the existence of qualified immunity but also the existence of a *Bivens* remedy could get resolved on appeal in advance of trial. In other words, should the *Bivens* issue be able to take a ride on the ''jurisdictional coattails''[202] of the qualified immunity issue, for purposes of pre-trial, interlocutory appellate review?

Considering the purposes of allowing interlocutory appeals of qualified immunity denials, the answer clearly ought to have been ''no.'' The sole reason for permitting interlocutory review of the qualified immunity question is that the Court has defined qualified immunity from liability for a constitutional tort—when the prerequisites of such immunity are met—as conferring upon the officials involved not just freedom from the ultimate imposition of monetary liability, but also freedom from the burdens of being put on trial.[203] The theory is that forcing government officials to suffer through a trial where, even on the plaintiff's allegations and evidence, it can be authoritatively determined in advance that there was no violation of clearly established law needlessly distracts officials from their duties, chills their legitimate exercise of discretionary authority, and

[200] See Will v. Hallock, 126 S. Ct. 952, 958 (2006). In *Will*, the Supreme Court held that federal agents who had appealed the denial of their defense of judgment bar in a *Bivens* action had to stand trial and await a final judgment before appealing the issue. See *id.* at 957.

[201] See Wilkie v. Robbins, 127 S. Ct. 2588, 2597 n.4 (2007).

[202] See Swint v. Chambers County Comm'n, 514 U.S. 35, 44 n.2 (1995).

[203] See Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

wrongly deters public service.[204] That theory justifies interlocutory appellate review of the qualified immunity issue. But the theory has no application to a case such as *Robbins*—unless there is insufficient evidence at the outset that the government officials acted for legally impermissible reasons, and that they were indeed guilty of conduct whose unconstitutionality was unmistakable and should clearly have been understood as such by those officials. Where the only issue the Court ends up addressing is a question of judicial policy as to what the appropriate remedy would have been on the *assumption* that the officials had in the end been found guilty of clearly unconstitutional conduct, the rationale for forgoing a trial and resolving that question on appeal *prior to trial* is altogether lacking. For, absent a convincing or at least an arguable claim of qualified immunity—i.e., a truly plausible argument that the sort of retaliation that this case involved did not violate any clearly established constitutional rule—this case could not be regarded as one in which there was a social interest in insulating the government officials from suit. Permitting the BLM officials to escape any trial at all solely because of the Court's concerns about defining a workable standard for *Bivens* relief gave them a complete windfall.

The Court's sole argument to the contrary, relegated to a footnote, was that the same reasoning it had used in *Hartman v. Moore*[205] to conclude that the definition of an *element* of the alleged constitutional tort was properly before it on interlocutory appeal of a qualified immunity defense applies ''to the recognition of the entire cause of action.''[206] It becomes plain that this is little more than a play on words once one sees that, in this case, the phrase ''recognition of the entire cause of action'' means not the existence of a clear constitutional right and its violation but only the availability of damages relief against the violator. So, while the Court's comparison of the case to *Hartman v. Moore* may have some superficial plausibility, it has no basis in law or logic in light of Congress's legislative decision to rule out interlocutory appeals on questions whose resolution is distinct from the question of whether, even on the allegations

[204] See *id.*; Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

[205] 126 S. Ct. 1695 (2006).

[206] Robbins, 127 S. Ct. at 2957 n.4.

made and evidence adduced, the defendant can be said, as a matter of law, to have violated no clearly established constitutional right.[207]

VI. Conclusion

In *Robbins*, the Supreme Court acknowledged that a pattern of conduct may infringe a constitutional right, but failed to provide a remedy for this manifestly important category of wrongs. To rule out a *Bivens* remedy in such cases, the Court had to stretch its jurisdictional limits and depart from the presumption of *Bivens* relief, moving instead into the realm of judicial balancing. Only time will tell what effects *Robbins* will have on property rights, or constitutional rights more generally. We may see government officials increasingly making end runs around the Just Compensation Clause by the means of coercive waiver. We may see a flood of *Robbins*-style claims under § 1983 or the APA, in which case courts will be forced to develop a workable standard, a challenge for which they are well-equipped—notwithstanding the doubts expressed on that score by the Court in *Robbins*. Or we may see relatively few lawsuits, in which case the Court's fear of a flood of claims without any way to separate the wheat from the chaff was unwarranted. Whichever of these outcomes comes to pass, *Robbins* portends a bleak future for the core premise of *Bivens* that every constitutional wrong should have some kind of remedy—and for the meaningful enforcement of the Bill of Rights against renegade government officials.

[207] In *Hartman*, the Court concluded that a plaintiff alleging retaliatory prosecution had to prove that there was no probable cause for the prosecution. See Hartman, 126 S. Ct. at 1706. If a prosecutor has probable cause, then there has been no constitutional violation, and the reasons for immunity from suit are fully applicable. In contrast, where the sole issue is not the elements of the right, but only the existence of a damages remedy and thus of a ''cause of action'' for damages, those reasons are entirely absent.