
RESPONSE

W(H)ITHER *BIVENS*?

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In response to Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

It is a great pleasure to comment on a recent paper by Professors Vázquez and Vladeck.¹ We think the Article offers an important contribution to *Bivens* scholarship, an excellent description of recent developments in the lower courts, a useful exploration of the too often overlooked connection between *Bivens* and the Westfall Act,² a first-rate account of qualified immunity, and a challenging claim about the preservation of state law rights of action.

Indeed, Vázquez and Vladeck's Article has much in common with our own work on the *Bivens* doctrine.³ For example, we have argued that, in a pre-*Bivens* world, litigants could mount state common law tort claims as-of-right against federal officials and use such claims to test the constitutionality of federal action; Vázquez and Vladeck agree.⁴ We have

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¹ Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

² See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified in scattered sections of 28 U.S.C.).

³ See generally James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

⁴ Compare *id.* at 134 (advancing that "[i]n 1971 and for much of the nation's history, state common law provided victims with a right of action that . . . could eventually result in the

argued that the *Erie* decision⁵ played an important (and too often neglected) role in the Court's decision to federalize the *Bivens* action by limiting the federal courts' flexible management of the remedy; Vázquez and Vladeck agree.⁶ We have argued that the Westfall Act confirms the viability of the *Bivens* action, thus providing important legislative support for such litigation and underscoring the Court's conclusion that the Federal Tort Claims Act does not displace *Bivens*; Vázquez and Vladeck agree.⁷ We have argued that, to the extent the Westfall Act displaced state common law rights of action, the Act fundamentally transforms the *Bivens* inquiry and casts serious doubt on recent decisions by the Supreme Court and lower federal courts to use special factors analysis in declining to extend the doctrine; Vázquez and Vladeck agree.⁸ Both papers conclude that, to the extent that state common law claims have been truly displaced, federal courts should be more willing to recognize the existence of a federal *Bivens* right of action; indeed, we all agree that the doctrine of constitutional avoidance lends support to such recognition.⁹ Finally, we have argued that the routine

vindication of their constitutional rights" by treating the constitutional violation as "invalidat[ing] any authority conferred by federal law"), with Vázquez & Vladeck, *supra* note 1, at 531 ("From the beginning of the nation's history, federal (and state) officials have been subject to common law suits . . . on the theory that the government lacks the power to authorize violations of the Constitution."). For a discussion of federal court damages actions stemming from unconstitutional taxes, see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 *YALE L.J.* 77, 135-37 (1997).

⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64, 71-73 (1938).

⁶ Compare James E. Pfander, Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 *PENN ST. L. REV.* 1387, 1415 (2010) ("*Erie* created the very real possibility that in tort suits aimed at enforcing constitutional rights, both the right to sue the federal official and the incidents of official liability would be governed by state law."), with Vázquez & Vladeck, *supra* note 1, at 541 (noting that the decision to frame remedial issues in state law terms after *Erie* "tied" the federal courts to "state precedents" and prevented them from taking account of "the federal interests involved, including the need to give efficacy to the Constitution").

⁷ Compare Pfander & Baltmanis, *supra* note 3, at 134-37 (arguing that the language of the Westfall Act preserves the *Bivens* action by creating an explicit exception for suits for "violations of the Constitution"), with Vázquez & Vladeck, *supra* note 1, at 570 (explaining that "[a]ll agree that" the saving provision of the Westfall Act "preserved *Bivens* claims").

⁸ Compare Pfander & Baltmanis, *supra* note 3, at 136 ("Congress has eliminated the state common law option and has failed to replace it with suits under the FTCA to vindicate constitutional rights."), with Vázquez & Vladeck, *supra* note 1, at 566 (recognizing that "the Westfall Act has come to be read as preempting all nonfederal remedies against federal officials acting within the scope of their employment").

⁹ Compare Pfander & Baltmanis, *supra* note 3, at 138 (invoking the doctrine of constitutional avoidance and the associated presumption in favor of judicial review of constitutional claims to support an interpretation of the Westfall Act as confirming the "presumptive viability of the *Bivens* action"), with Vázquez & Vladeck, *supra* note 1, at 573-74, 579 (invoking the doctrine of

recognition of a *Bivens* right of action would not necessarily deprive the federal courts of their ability to tailor defenses to take account of relevant federal interests; Vázquez and Vladeck agree.¹⁰

With so much in common, perhaps a comment on Vázquez and Vladeck would seem to amount to little more than a declaration of mutual admiration. But while we have great admiration for the work of Vázquez and Vladeck in general,¹¹ as well as for Vázquez and Vladeck's Article in particular, we also differ on some important points. Most significantly, we disagree with Vázquez and Vladeck about the post–Westfall Act viability of state common law claims brought in state court against federal officials to vindicate constitutional rights. Vázquez and Vladeck regard such claims as having been saved by the language in the Westfall Act that preserves the right of individuals to bring suits against federal officials “for a violation of the Constitution of the United States.”¹² In contrast, we view the savings language as exclusively preserving an implied federal *Bivens* right of action in federal (or state) court. The Westfall Act immunity was designed, we think, to apply broadly, displacing all state common law actions against federal employees, whether or not such actions seek to vindicate a constitutional right.

In responding to Vázquez and Vladeck's argument that state common law claims that seek to vindicate the Constitution survived the Westfall Act, we begin with a brief overview of our argument. We think the text, structure, and history of the Westfall Act all point in a single direction: the foreclosure of all state common law claims against federal officials for actions within the scope of their official duties. We think the only claims against federal officials saved by the Westfall Act were those based on federal rights of action, including constitutional tort claims under *Bivens* and federal statutory claims otherwise authorized. Such a reading not only comports with text and history, but also gives effect to the evident purpose of the Westfall Act. The point of the Act, after all, was to secure

constitutional avoidance in defending a reading of the Westfall Act that would make constitutional tort remedies more broadly available).

¹⁰ Compare Pfander & Baltmanis, *supra* note 3, at 124-25, 139-50 (describing a range of doctrines, including qualified immunity and implied preemption, that federal officers could invoke as defenses to a presumptively available *Bivens* action), with Vázquez & Vladeck, *supra* note 1, at 578 (calling on the courts to “presume[e] the availability of a damages remedy for violation of constitutional rights and channeling all possible reasons for limiting or denying such claims into the immunity, privilege, or preemption analyses”).

¹¹ See, e.g., James E. Pfander, *Fifty Years (More or Less) of “Federal Courts”: An Anniversary Review*, 77 NOTRE DAME L. REV. 1083, 1119-20 (2002) (expressing admiration for the doctrinal sophistication in Vázquez's work).

¹² Vázquez & Vladeck, *supra* note 1, at 571 (quoting 28 U.S.C. § 2679(b)(2)(A) (2006)).

federal employees' absolute immunity from suits based on state common law (an immunity the *Westfall* Court had previously rejected).¹³ The exceptions in 28 U.S.C. § 2679(b)(2) were fashioned to preserve existing federal law remedies.¹⁴ We explore the Act's text, structure, and judicial reception in the next three parts.

I. RESPONDING TO THE TEXTUAL ARGUMENT

In their textual argument, Vázquez and Vladeck identify two kinds of claims: (1) a state common law claim in which the alleged conduct violates state tort law and also happens to violate the federal constitution; (2) a state common law claim specifically for violation of the federal constitution, comparable, say to an action on a statute.¹⁵ Vázquez and Vladeck contend that both of these actions are actions "brought for a violation of the Constitution of the United States" within the meaning of Westfall Act exception.¹⁶ But will the language of the statute bear that meaning? Consider the interests the plaintiff would be seeking to vindicate in the first sort of state law claim.¹⁷ Such state law trespass, battery, and false imprisonment claims seek to vindicate a state law interest in bodily integrity and liberty. To make out the elements of a viable claim under state law, the plaintiff need not establish that the Constitution was violated. True, the plaintiff may have to show a constitutional violation to recover damages; otherwise the official immunity defense of the federal officer could bar recovery. But reliance on a constitutional rejoinder to an immunity defense that the official *may or may not assert* does not obviously make the initial action one "for a violation of the Constitution." Moreover, so long as state law controls the measure of damages, a showing that the officer violated the Constitution would only trump an immunity defense but would not, by hypothesis, alter the remedial calculus. While we agree with Vázquez and Vladeck that such common law actions traditionally

¹³ See *Westfall v. Erwin*, 484 U.S. 292, 296-98 (1988), *superseded by statute*, Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2679(b)); see also H.R. REP. NO. 100-700, at 2-4 (1988) (explaining that the purpose of Westfall Act was to "provide immunity for Federal employees from personal liability for common law torts committed within the scope of their employment" and to "amend the [FTCA] to address the potential liability of Federal employees which results from the *Westfall* decision").

¹⁴ 28 U.S.C. § 2679(b)(2) provides that the exclusivity provision in § 2679(b)(1) does not apply to "civil action against an employee of the Government, (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."

¹⁵ See Vázquez & Vladeck, *supra* note 1, at 536-39.

¹⁶ See *id.* at 514 (quoting Westfall Act § 5, 102 Stat. at 4564).

¹⁷ See *id.* at 572.

provided an important vehicle for the protection and articulation of constitutional values,¹⁸ we think it stretches the language of the Westfall Act to characterize such an action as one “brought for” a constitutional violation when the interests at issue and measure of relief are defined by state, rather than federal, law.

Vázquez and Vladeck hypothesize a second sort of state law action, something comparable to an action on a statute.¹⁹ Here, Vázquez and Vladeck admittedly come closer to identifying a state law right of action that could be plausibly characterized as “brought for” a constitutional violation within the meaning of the Westfall Act.²⁰ The constitutional violation would appear as an element of the plaintiff’s claim and the remedy would presumably take account of the constitutional interests involved.²¹ But we have not seen state laws or decisions that seek to facilitate this type of litigation and did not see any such state authority discussed in Vázquez and Vladeck’s Article.²² To be sure, Vázquez and Vladeck suggest that a state may owe a positive duty to provide such rights of action in order to avoid discriminating against federal law in violation of the Court’s Supremacy Clause jurisprudence.²³ But the Court’s Supremacy Clause cases focus on the state’s (discriminatory) refusal to entertain an existing federal right of action in circumstances where the state would hear a similar state right of action.²⁴ None of the cases affirmatively obligates the state to fashion a state

¹⁸ See, e.g., *id.* at 540 (“[B]ecause the common law was characterized by its flexibility, it could be molded to the exigencies of constitutional litigation.”).

¹⁹ See *id.* at 539.

²⁰ For reasons discussed below, we do not think such claims would survive the Westfall Act’s exclusivity provisions. See *infra* text accompanying notes 46-49.

²¹ Even here, though, one could quibble. Vázquez and Vladeck rely on *Merrell Dow Pharmaceuticals Inc. v. Thompson* to illustrate an action on a statute, but in that case the plaintiff alleged that the violation of a federal statute raised a “rebuttable presumption of negligence” made actionable under state tort law. See *id.* at 539 n.143 (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 805-06 (1986)). It appears that such an action would seek to vindicate a state law interest in preventing the negligent infliction of harm rather than a federal interest in properly labeled drugs.

²² See *id.* at 539 & n.143 (citing the RESTATEMENT (SECOND) OF TORTS § 286 (1965) and PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (W. Page Keeton et al. eds, 5th ed. 1984), both of which recognize the possibility that a negligence action might be used to enforce statutory or regulatory rights, but failing to identify any state court decisions that have extended the idea to the use of intentional torts to vindicate federal constitutional rights).

²³ See *id.* at 537 & n.132. Here again, Vázquez and Vladeck’s example deals with state law claims of negligence rather than the intentional torts that would undergird many *Bivens* claims.

²⁴ See, e.g., *Haywood v. Drown*, 556 U.S. 729, 740-41 (2009) (concluding that the state cannot refuse to entertain a federal § 1983 claim against state prison officials, even where it created an alternative regime for the imposition of prison-based liability on the state instead of its employees);

law right of action to vindicate federal interests.²⁵ We thus find little reason to regard the state law claims to which Vázquez and Vladeck point as more than simply hypothetical, and it seems unlikely that Congress wrote a provision into the Westfall Act to save these claims from displacement. These textual conclusions find ample support in the structure of the Westfall Act's exclusivity and preemption provisions.

II. UNDERSTANDING THE STRUCTURE OF THE WESTFALL ACT

The Westfall Act proceeds on a simple distinction between state common law rights of action (which are displaced) and federal rights of action (which are preserved). The language of the Act contains two moving parts: the first declares the Federal Tort Claims Act (FTCA) remedy exclusive for all claims for injuries resulting from the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."²⁶ This language duplicates earlier sections in the FTCA that use identical language.²⁷ To highlight the connection between the exclusivity rule and the liability rule, § 2679(b) of the Westfall Act specifically refers to § 1346(b) and § 2672 of the FTCA as the statutory source of the exclusive remedy.²⁸ The first element of the Westfall Act thus establishes a regime of FTCA exclusivity for claims based on state common law. As we explain below, the Act perfects this regime of exclusivity for state common law claims by creating a system for the substitution of the federal government as the defendant and transformation of the claim into one arising under the FTCA.²⁹

Apart from its scheme of exclusivity, the Westfall Act contains a much broader *preclusion* provision that was drafted to apply to all conceivable claims one might bring against a federal employee. That provision declares that "[a]ny other civil action or proceeding . . . arising out of or relating to the same subject matter . . . is precluded without regard to when the act or

see also *Testa v. Katt*, 330 U.S. 386, 389-90 (1947) (holding that federal laws are presumptively enforceable in state courts).

²⁵ Indeed, in perhaps the closest analogy, the Court permitted Maine to refuse to entertain a federal suit for damages under the Fair Labor Standards Act in part on the ground that no such right of action could proceed in federal court under the doctrine of state sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 758 (1999).

²⁶ 28 U.S.C. § 2679(b)(1) (2006).

²⁷ *Cf. id.* §§ 1346(b)(1), 2672.

²⁸ *See id.* § 2679(b)(1).

²⁹ *See infra* text accompanying note 33.

omission occurred.”³⁰ The purpose of the preclusion provision is entirely straightforward; after making the (limited) FTCA remedy exclusive and securing that exclusivity through substitution of the government as a defendant, the Westfall Act foreclosed any other civil liability in suits brought against government employees for actions taken within the scope of their office. It was this absolute immunity for federal employees that the Court had denied in its *Westfall* decision and that Congress chose to confer by statute.³¹ But while the preclusion provision was broad enough to foreclose all claims based upon state law rights of action against federal employees (without regard to whether the claims in question were actionable under the FTCA), it also posed a threat to the federal *Bivens* right of action. The provision thus necessitated the creation of the two savings provisions that appear in subsection (b)(2): one for *Bivens* constitutional tort actions and one for otherwise authorized federal statutory rights of action.³² In short, the Westfall Act appears to be drawing a simple distinction between state common law rights of action (actionable exclusively in suits under the FTCA) and federal rights of action (actionable under *Bivens* and other relevant federal statutory authority).

Subsequent provisions of the Westfall Act confirm that Congress was drawing a line between state and federal law rights of action. The Westfall Act enforces its regime of state common law tort claims by setting out representation, certification, and substitution procedures that force the plaintiff to pursue common law claims against the Government rather than against the employee.³³ When one examines these representation, certification, and substitution provisions, one can see that they were meant to apply to state law rights of action against a federal employee for a negligent or wrongful act as to which subsection (b) had declared the FTCA remedy exclusive, and not to federal rights of action, such as *Bivens* claims.

Following the paragraph that saves *Bivens* actions from the FTCA’s exclusive remedial scheme, the Westfall Act creates an additional set of protections for federal officers sued in state court. To begin with, the Westfall Act requires the federal government to defend employees sued for actions taken in the scope of their employment.³⁴ The next provision calls upon the Attorney General of the United States to issue a certification, when applicable, that a federal employee sued in state court was acting

³⁰ 28 U.S.C. § 2679(b)(1).

³¹ See *supra* note 13 and accompanying text (describing the *Westfall* decision and the stated purpose of the Westfall Act).

³² 28 U.S.C. § 2679(b)(2)(A), (B).

³³ See *id.* § 2679 (c), (d).

³⁴ See *id.* § 2679 (c).

within the scope of his office.³⁵ Once such a certification has been issued, “any civil action or proceeding commenced upon such claim in a State court shall be removed” to federal court and the action shall be deemed one “brought against the United States” under the FTCA and “the United States shall be substituted as the party defendant.”³⁶ This rather sweeping language suggests that state court civil actions or proceedings are subject to certification, removal, and transformation. Notably, the provisions for removal and transformation depend on a certification that the claim arose out of an action taken in the line of duty, an essential element to any constitutional claim. But the provisions do not include an exception for suits brought in state court for a violation of the Constitution.³⁷

When read as a whole, however, the Westfall Act makes clear that *Bivens* claims are preserved against individual officers and not subject to the provisions of subsection (d). Subsection (b) applies to claims for “injury or loss of property, or personal injury or death” resulting from a negligent or wrongful act committed by the defendant within the scope of office;³⁸ as we have seen, this language tracks the FTCA provisions subjecting the Government to liability for state common law tort claims.³⁹ Subsection (c) of the Westfall Act picks up this language, declaring that DOJ “shall defend” any action brought against a federal employee “for any *such* damage or injury.”⁴⁰ The reference to “such” damage or injury links the duty to defend to the claims for property damage and personal injury that were declared exclusively cognizable under the FTCA in subsection (b)(1), not those exceptions carved out in subsection (b)(2). This interpretation is borne out by the DOJ’s position that it has no obligation to defend DOJ employees sued on a *Bivens* claim, but provides representation (and indemnity) only where doing so advances the interests of the Government and comports with applicable regulations.⁴¹ Again, we see a statutory distinction between state common law claims and claims based on federal rights of action.

³⁵ See *id.* § 2679 (d)(1).

³⁶ *Id.* § 2679 (d)(2).

³⁷ See Pfander & Baltmanis, *supra* note 3, at 135-36.

³⁸ 28 U.S.C. § 2679 (b)(1).

³⁹ *Id.* § 1346(b)(1).

⁴⁰ *Id.* § 2679(c) (emphasis added).

⁴¹ See 28 C.F.R. § 50.15(a) (2012) (stating that the Attorney General has discretion to provide representation to officials sued in their individual capacities); see also Cornelia T.L. Pillard, *Taking Fiction Seriously: the Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76-78 (1999) (describing the regulations that govern indemnification of federal employees in *Bivens* litigation); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and*

A similar distinction underlies subsection (d), which sets out the actual machinery of FTCA exclusivity. Following notice to the DOJ of the pendency of the action, subsections (d)(1) and (d)(2) require the DOJ to certify that claims pending in state or federal court against a federal employee were based on actions taken “within the scope of his office or employment.”⁴² Following the issuance of such a scope-of-office certification, the Act provides that the action shall be “deemed an action against the United States [under the FTCA]” and the United States “shall be substituted as the party defendant.”⁴³ And in the case of an action pending in state court, the Act further provides that the certification shall trigger removal of the action to federal court.⁴⁴ Although the Act thus embraces claims brought in both state and federal court, it limits the certification, removal, and substitution provisions to any civil action “commenced upon *such* claim.”⁴⁵ In all three provisions, in short, the limiting reference to claims clarifies that the procedures apply only to state common law proceedings deemed exclusively cognizable under the FTCA. In keeping with the intent of the drafters then, the Westfall Act does not bring federal *Bivens* claims for constitutional torts within the framework of FTCA exclusivity, and it does not provide for certification, removal, and substitution of the government as a defendant in *Bivens* claims.

With this simple distinction between state and federal law rights of action, coupled with the transformation of state common law claims into claims against the government under the FTCA, Congress foreclosed the assertion of state law–based constitutional tort claims. As we noted in our earlier paper, the statutorily required substitution of the federal government as a defendant in state common law causes of action will prove fatal to constitutional claims.⁴⁶ Congress has never subjected the *government* to liability for constitutional torts; a series of decisions confirm that the waiver of sovereign immunity in the FTCA does not extend to constitutional tort claims.⁴⁷ The Westfall Act, moreover, expressly permits the government to

Its Consequences for the Individual Liability Model, 62 STAN. L. REV. 809, 850 n.185 (2010) (listing a host of regulations concerning the indemnification of federal employees).

⁴² 28 U.S.C. § 2679(d)(1), (2).

⁴³ *Id.* § 2679(d)(1).

⁴⁴ *Id.* § 2679(d)(2).

⁴⁵ *Id.* § 2679(d)(1), (2) (emphasis added).

⁴⁶ See Pfander & Baltmanis, *supra* note 3, at 135 (explaining that “[a] long line of cases hold that constitutional claims for damages may not be brought against the federal government itself” and therefore, “the failure of Congress to provide a clear statement authorizing constitutional suits against the government has proven fatal to their assertion”).

⁴⁷ See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994) (rejecting a *Bivens* claim against a federal agency).

assert all of its defenses to liability following its post-substitution appearance as a defendant in the proceeding. Subsection (d)(4) provides that,

[u]pon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) . . . and shall be subject to the limitations and exceptions applicable to those actions.⁴⁸

Simply put, the fact that an individual cannot recover from the government under the FTCA will not prevent the substitution of the government as the proper defendant in an action based on state common law.⁴⁹ Well-advised attorneys will forego state common law claims, except those that plausibly seek to impose a form of government liability cognizable under the FTCA.

Here then lies the problem with Vázquez and Vladeck's argument for the preservation of state common law claims to vindicate constitutional rights. The transformation and substitution provisions of subsection (d) do not contain any exception to preserve state common law actions seeking to vindicate constitutional rights. Congress left the *Bivens* action (and other, statutory federal rights of action) outside the scheme of exclusivity in subsection (b) and the certification, transformation, and substitution provisions of subsection (d), but brought *all* state common law actions within these provisions' terms. So long as the state law right of action falls within the scope of the Westfall Act's proclamation of exclusivity, certification, transformation, and substitution, the ultimate substitution of the federal government as a defendant will foreclose individual liability and authorize government liability only in keeping with the provisions of the FTCA.⁵⁰

One final element of the Westfall Act confirms that Congress declined to save state common law constitutional tort claims as it did *Bivens* claims. In drafting the Westfall Act, Congress clearly confronted the question of what state common law rights of action to preserve. It resolved that question by preserving only claims that arise from conduct *outside* the scope of

⁴⁸ 28 U.S.C. § 2679(d)(4).

⁴⁹ See, e.g., *United States v. Smith*, 499 U.S. 160, 166-67 (1991) (applying the FTCA to bar a medical malpractice claim against both the government and the federal doctor).

⁵⁰ One might ask what prevents a *Bivens* claim from falling into the certification and substitution regime of subsection (d). The answer lies in the Court's conclusion that, as federal rights of action, *Bivens* claims are simply not "cognizable" under the FTCA's provision for suits based upon state common law and thus do not trigger the certification and substitution provisions of the Act. See *Meyer*, 510 U.S. at 476-79 (construing meaning of "cognizable" under the FTCA and holding that *Bivens* claims are not cognizable).

the employee's official duties;⁵¹ that is, Congress (quite properly) preserved the common law tort, contract, and property liability of federal employees for action those employees take in their private capacities. (For instance, imagine the federal employee who faces liability on a contract for the sale of a private home or for an automobile accident on a weekend trip to the mall.) Congress implemented this exception through the certification and remand provisions of subsection (d); in brief, if the DOJ declines to certify that the action was taken within the scope of office, then the transformation provisions do not apply and the suit remains one against the employee in his or her personal capacity under state law.⁵²

One could argue, of course, that a statute that forecloses the assertion of constitutional claims would violate the Fifth Amendment Due Process Clause. Scholars generally agree that colorable claims of constitutional dimension cannot be entirely zoned out of the courts, state or federal,⁵³ and the federal courts have expressed general agreement with that view.⁵⁴ But the removal and transformation provisions of the Westfall Act apply only to state law claims;⁵⁵ they leave litigants entirely free to mount federal constitutional tort claims in federal (or state) court, hence the exception for actions brought "for a violation of the Constitution of the United States."⁵⁶ The *Bivens* option, needless to say, would appear to answer any due process concerns. Congress can presumably channel constitutional tort claims into the federal arena, and having made that avenue available, foreclose access to state law for the assertion of such claims. We do not mean to disparage the due process argument; indeed, to the extent that the statute forecloses some forms of common law tort liability against officers and fails to restore that

⁵¹ See 28 U.S.C. § 2679(b)(1) (making claims exclusive under the FTCA only when the disputed actions were committed while an employee was "acting within the scope of his office or employment").

⁵² As an additional protection, the employee can petition the court to find that the action occurred within the scope of his office, and transformation will occur if the court so finds. 28 U.S.C. § 2679(d)(3).

⁵³ See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 42-47 (2d ed., Michie Co. 1990) (1980); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 70-71 (1981).

⁵⁴ See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (stating that its decision avoided the "serious constitutional question" that would arise if Congress denied any judicial forum for the resolution of constitutional claims (citations omitted)); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (applying the doctrine of constitutional avoidance to find that there was not general preclusion of constitutional challenges under a statute that purported to make benefit determinations by the Veterans' Administration final and unreviewable).

⁵⁵ In addition, 28 U.S.C. § 2679(d)(1) provides for substitution of the United States as a defendant upon the Attorney General's certification. As discussed above, this provision applies to any state common law action. See *supra* text accompanying notes 42-45.

⁵⁶ 28 U.S.C. § 2679 (b)(2)(A).

liability under the FTCA, constitutional concerns do arise.⁵⁷ We only suggest that the foreclosure of the state law option for constitutional tort claims does not raise such concerns.

III. THE SUPREME COURT AND THE WESTFALL ACT

The Supreme Court's decisions regarding the Westfall Act confirm both the operation of the Act's removal and transformation provisions and the scope of the constitutional tort exception. To begin with, the Court has consistently treated the FTCA as the exclusive means of redress for injuries caused by federal employees within the scope of office, subject to an exception that the Court has characterized as applicable to *Bivens* claims. In *Smith*, for example, the Court described the two exceptions in the following terms: "(1) a *Bivens* action, seeking damages for a constitutional violation by a Government employee; or (2) an action under a federal statute that authorizes recovery against a Government employee."⁵⁸ Similarly, in *Hui v. Castaneda*, the Court distinguished a specialized liability scheme for public health employees from the remedial scheme of the Westfall Act, pointing out that the latter includes a *Bivens* action.⁵⁹

Apart from these decisions about the meaning of the constitutional tort exception, the Court has ascribed broad immunizing force to the Westfall Act's preclusion of state law claims. Thus, in *Gutierrez de Martinez v. Lamagno*, the Court explained that "Congress was notably concerned with the *significance* of the scope-of-employment inquiry—that is, *it wanted the employee's personal immunity to turn on that question alone*."⁶⁰ This statement equates the employee's immunity with actions taken in the scope of employment and suggests that such actions cannot give rise to individual tort liability at common law. Finally, the Court has explained why these immunizing substitution rules do not apply to *Bivens* actions: wholly apart

⁵⁷ For this reason, we agree with Vázquez and Vladeck's analysis that the lower courts are wrongheaded in their increasingly chary approach to *Bivens* claims in the absence of other remedies, as we outlined in *Rethinking Bivens: Legitimacy and Constitutional Adjudication*. See Pfander & Baltmanis, *supra* note 3, at 149–50; Vázquez and Vladeck, *supra* note 1, at 550–51.

⁵⁸ *United States v. Smith*, 499 U.S. 160, 166–67 (1991) (footnote omitted) (citing 28 U.S.C. § 2679(b)(2) (1988)).

⁵⁹ 130 S. Ct. 1845, 1851 (2010).

⁶⁰ 515 U.S. 417, 426 (1995) (second emphasis added); see also *Osborn v. Haley*, 549 U.S. 225, 238–41 (2007) (explaining that a proper scope-of-employment certification by the DOJ conclusively forecloses common law suits against individual officers).

from the constitutional tort exception, a *Bivens* action is not “cognizable” under the FTCA because it does not rely on state common law.⁶¹

The Court’s recent decision in *Minnecci v. Pollard*⁶² points in the same direction, as Vázquez and Vladeck gamely admit.⁶³ There, the Court considered the viability of a *Bivens* action under the Eighth Amendment against private prison officials.⁶⁴ The Court acknowledged that prisoners would have a *Bivens* claim against federal prison employees for cruel and unusual punishment under *Carlson v. Green*.⁶⁵ But the Court distinguished the situation presented in *Carlson* from that in *Pollard* on the basis of the viability of alternative state common law remedies.⁶⁶ In the case of harms inflicted by private prisons, state law tort remedies would remain available. In contrast, the Court relied on the Westfall Act in concluding that prison inmates “ordinarily cannot bring state-law tort actions against employees of the Federal Government.”⁶⁷ The Court’s analysis thus confirms the simple dichotomy that we find in the Westfall Act: state law tort claims against federal employees have been displaced, but federal rights of action under *Bivens* have been preserved.⁶⁸

⁶¹ See *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994) (drawing a sharp distinction between the federal character of a *Bivens* action and the state law character of claims under the FTCA and concluding that *Bivens* claims are not cognizable under the FTCA). Vázquez and Vladeck argue that the *Meyer* Court was “clearly incorrect” in suggesting that federal law provides the “source of liability” for constitutional tort claims. Vázquez & Vladeck, *supra* note 1, at 553-54. But the *Meyer* Court was writing in 1994, well after the Westfall Act arguably displaced the tradition of presumptively available state common law actions to which Vázquez & Vladeck point in questioning the Court’s conclusion.

⁶² 132 S. Ct. 617, 623 (2012).

⁶³ Vázquez & Vladeck, *supra* note 1, at 514 n.19, 515 & n.22, 570.

⁶⁴ See *Minnecci*, 132 S. Ct. at 623.

⁶⁵ See *id.* (citing *Carlson v. Green*, 466 U.S. 14 (1980)).

⁶⁶ See *id.* at 623-25.

⁶⁷ *Id.* (citing 28 U.S.C. §§ 2671, 2679(b)(1) and *Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007)).

⁶⁸ Vázquez and Vladeck agree with us that the Court has relied on the viability of state law tort claims in the course of rejecting a *Bivens* action. See *Wilkie v. Robbins*, 551 U.S. 537, 550-52 (2007) (citing its own decision in *Correctional Services Corp. v. Malesko*, 535 U.S. 61 (2001) for the proposition that the availability of state common law remedies was relevant to the *Bivens* analysis, but acknowledging that Wyoming law would not necessarily provide a state tort remedy for malicious prosecution against federal officials). Compare Vázquez & Vladeck, *supra* note 1, at 570-71, with Pfander & Baltmanis, *supra* note 3, at 128. Vázquez and Vladeck argue that the *Wilkie* decision may represent a considered recognition of the viability of state law constitutional tort claims rather than a mistaken failure to recognize the preemptive impact of the Westfall Act on state law claims. See Vázquez & Vladeck, *supra* note 1, at 570-71. But there’s nothing in the opinion to suggest that the *Wilkie* Court viewed the invocation of the federal constitution as the key to the ongoing viability of state law tort claims. The Court never acknowledged the possibility that the Westfall Act displaces state tort claims against federal employees and never mentioned the hypothesis that such displacement was prevented by the Westfall Act exception for constitutional claims. Moreover, although Vázquez and Vladeck suggest that these issues were briefed to the

A similar state–federal dichotomy informs other aspects of the FTCA regime. Consider first a set of FTCA cases involving the interplay between the discretionary-function exception and claims of constitutional violation. In brief, the discretionary-function exception shields the federal government from liability under the FTCA when the alleged injuries arose from the exercise of official discretion.⁶⁹ While the lower federal courts are divided on the issue of whether the exception applies when conduct violates the Constitution,⁷⁰ none has suggested that the FTCA claims at issue in those cases (for assault, false imprisonment, and the like) should be regarded as constitutional tort claims that fall within the scope of the Westfall Act’s exception. If Vázquez and Vladeck’s reading of the Westfall exception were correct, one might anticipate that courts cabinning the discretionary-function exception for unconstitutional conduct might logically recognize the claim as one “brought for” a violation of the Constitution and limit official immunity.⁷¹ Yet this is not, in practice, what has happened. Suffice it to say that no court has yet treated the introduction of constitutional defenses to FTCA immunities as transforming the state law claim into one “brought for” a violation of the Constitution. Note, too, that litigants frequently bring claims under the FTCA and under *Bivens* as part of the same proceeding, seeking remedies for the same alleged government misconduct.⁷² If Vázquez and Vladeck are right about the transformative quality of alleged constitutional violations, we would expect federal courts to conceptualize the FTCA claim as one that involves a violation of the Constitution.

Court, *id.* at 571 n.325, the briefs simply refer in passing to the FTCA and the Westfall Act without addressing the impact of those statutes on the viability of state tort claims or highlighting the possibility of Westfall Act displacement. See Brief for Petitioners at 9, *Wilkie*, 551 U.S. 537 (No. 06-219), 2007 WL 128587; Brief for Respondent at 40-41, *Wilkie*, 551 U.S. 537 (No. 06-219), 2007 WL 550926. We think the *Wilkie* Court simply misunderstood the statutory framework and little weight should be accorded to its (mistaken) assumption about the viability of state tort remedies, which appears to rest on the *Malesko* Court’s recognition of the presumptive availability of such remedies against *private* prison firms.

⁶⁹ See 28 U.S.C. § 2680(a) (2006); see also, *e.g.*, *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

⁷⁰ See, *e.g.*, *Castro v. United States*, 608 F.3d 266, 269 (5th Cir. 2010) (en banc) (Dennis, J., concurring in the judgment in part and dissenting in part) (discussing whether the exception should apply when officials’ actions are unconstitutional).

⁷¹ See Vázquez & Vladeck, *supra* note 1, at 537.

⁷² See, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 355 (2006) (dismissing for want of appellate jurisdiction a district court decision that recognized the right of individuals to pursue both FTCA and *Bivens* liability for the same alleged misconduct); *Manning v. United States*, 546 F.3d 430, 438 (7th Cir. 2008) (treating the FTCA judgment bar as a barrier to *Bivens* liability in a case where the district court entered judgment for the government on a related FTCA claim).

To summarize, the statute appears to use a fairly simple sorting device. For claims arising from conduct within the scope of office, state common law proceedings against federal officials trigger exclusivity and government substitution under the FTCA. While the FTCA represents a waiver of the federal government's sovereign immunity,⁷³ the waiver does not extend to constitutional torts.⁷⁴ Federal rights of action, meanwhile, may proceed against federal officials so long as they seek a money remedy for constitutional violations or violations of other authorized federal statutory rights. While state common law remains relevant to enforce a federal employee's obligations incurred in a personal or private capacity (that is, outside the scope of office), no exception appears in the exclusivity provisions of the Westfall Act for the preservation of state common law claims on the basis that they seek to vindicate constitutional rights. As we have shown, the constitutional tort exception was written into the preclusion language of the Westfall Act, but it was not written into the FTCA exclusivity provisions that transform state common law claims into suits against the government and provide for the assertion of all applicable governmental defenses. Vázquez and Vladeck's mistake lies in focusing their analysis solely on the language of the *Bivens* exception rather than on the structure of the exclusivity provisions.

IV. EVALUATING POLICY CONSIDERATIONS

Even if the signs did not point so clearly toward the conclusion that the Westfall Act preserves only federal *Bivens* claims, one can raise serious questions about the wisdom of continued reliance on the state common law option. The move away from state court litigation, begun in *Bivens*, has only accelerated over the past forty years. For example, suits to challenge official action under the Administrative Procedure Act are in the exclusive province of the federal judiciary.⁷⁵ Similarly, actions for habeas and mandamus relief directed at federal officials presumptively begin and end in the federal courts.⁷⁶ Indeed, state courts so rarely see actions challenging federal official

⁷³ See 28 U.S.C. § 2674 (subjecting the United States to tort liability "in the same manner and to the same extent as a private individual under like circumstances").

⁷⁴ See Pfander & Baltmanis, *supra* note 3, at 135 & n.102. (collecting authorities for the proposition that constitutional torts against the government have been suggested but rejected as an alternative to the current regime).

⁷⁵ See, e.g., 28 U.S.C. § 2342 (conferring exclusive jurisdiction on the federal circuit courts of appeal to review certain agency actions).

⁷⁶ On the exclusivity of federal jurisdiction over habeas claims challenging the legality of federal detention, see *Tarble's Case*, 80 U.S. (13 Wall.) 397, 406-07 (1871). As for the exclusivity of

action that one can question how effectively they would handle such matters. In any event, the Department of Justice follows an unyielding practice of removing state court litigation against federal officials to federal court.⁷⁷ So even if the state court option were preserved, current removal practice suggests that such a right of action would rarely, if ever, result in any state court litigation of constitutional tort claims.

In fairness, Vázquez and Vladeck recognize that the state law–state court option would be less than ideal for reasons on which we all agree: varying pockets of state law could undermine uniformity and pose problems for the vindication of important federal interests.⁷⁸ Rather than defend the state common law model as desirable on its own terms, Vázquez and Vladeck put it forward as a kind of backstop, available as a measure of the adequacy of federal remedies and perhaps as a fallback source of remediation when federal remedies fall short. We agree with the importance of providing a measure of the adequacy of *Bivens* remediation but we would instead encourage courts to rely upon the rich body of constitutional tort law under § 1983, which regulates the conduct of state officials.⁷⁹ We argue that federal courts should draw on this body of law in developing the *Bivens* doctrine to regulate federal official action.

For these reasons, we believe that the remedial regime structured along the lines of the prevailing interpretation of the Westfall Act—with state-law tort claims running against the federal government (subject to the exceptions of the FTCA) and individual constitutional claims running against federal employees under *Bivens*—presents a simpler and more coherent

federal jurisdiction over mandamus claims against federal officials, see *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 600 (1821).

⁷⁷ See OFFICES OF THE U.S. ATTORNEYS, CIVIL RESOURCE MANUAL § 45, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/civ00045.htm (“In . . . civil suits against government officers, employees, service personnel, and agencies, and particularly in cases in which personal injury, death, a significant federal interest, or property damage is involved, care should be taken to remove to the United States district court.”).

⁷⁸ See Vázquez & Vladeck, *supra* note 1, at 573 (acknowledging that “some states may not recognize” various causes of action). Notably, the vagaries of state law and potential gaps in recovery are among the reasons why the Court in *Carlson v. Green* recognized a *Bivens* claim under the Eighth Amendment. See 446 U.S. 14, 23 (1980) (“The question whether respondent’s action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.”).

⁷⁹ See 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

framework. In the framework we outlined in *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, a *Bivens* remedy would presumptively be available for constitutional claims against federal employees absent some other remedy provided by Congress displacing such claims, subject to whatever defenses and immunities may apply in a particular case.⁸⁰ Therefore, those injured by the constitutional violations of federal employees would have the same presumptive right to sue that § 1983 affords those injured by state official action.⁸¹

CONCLUSION

In the end, our friendly disagreement with Vázquez and Vladeck may turn more on tactics than on substance. After all, Vázquez and Vladeck reach a result broadly consistent with the approach we proposed in our earlier article. We argued that the federal courts should take account of the Westfall Act's likely displacement of the state common law option when evaluating the current vitality of the *Bivens* action in federal court.⁸² Vázquez and Vladeck agree with this conclusion.⁸³ We differ from Vázquez and Vladeck primarily because we believe the state law option has been clearly taken off the table. This structural fact helps to support an argument for the presumptive viability of the *Bivens* action in federal court. That's why we like Professor Tribe's paraphrase, "*Bivens* or nothing,"⁸⁴ as a way to capture the reality that litigation based on federal rights of action has become the only game in town for those who wish to challenge the constitutionality of federal employees' actions in a suit for damages.

Unfortunately, as Vázquez and Vladeck demonstrate, the lower federal courts have been far too reluctant to recognize what we both believe should be the presumptive viability of a *Bivens* right of action.⁸⁵ Here's where the question of tactics may take center stage. By arguing for the continued viability of a state law constitutional tort claim, Vázquez and Vladeck offer a

⁸⁰ See Pfander & Baltmanis, *supra* note 3, at 139-40.

⁸¹ *Id.*

⁸² *See id.* at 123.

⁸³ Vázquez & Vladeck, *supra* note 1, at 578.

⁸⁴ Laurence Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006-2007 CATO SUP. CT. REV. 23, 59-60.

⁸⁵ *See* Vázquez & Vladeck, *supra* note 1, at 578. In an important recent contribution to the literature, two scholars have supported our contention that the displacement of state common law remedies lends force to an argument for presumptively available relief under *Bivens*. *See* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 8), available at <http://ssrn.com/abstract=2042175> (arguing that the Court erred in *Minneci* in over-emphasizing the availability of state law remedies and suggesting several strategies for cabining the effect of that decision on future *Bivens* litigation).

framework that may make it easier for jurists to recognize a *Bivens* action. When confronted with the question, *Bivens* or state law, many jurists may respond in precisely the same way the Supreme Court did when it confronted that question in the *Bivens* case itself.⁸⁶ As Vázquez and Vladeck so nicely show, the argument for recognition of a federal right of action has special force in a world where the government's routine practice of removal will invariably shift the claims in question to a federal docket and where liability will ultimately depend on judicial assessments of such federal law issues as the potency of the federal right at issue and the scope of any federal immunity defense.⁸⁷ If one views the claims as viable, one way or the other, the decision to federalize the cause of action looks far less adventuresome.

Vázquez and Vladeck may be right in their tactical judgment. While we think that they have misread the preclusive force of the Westfall Act, we agree that a properly presumptive recognition of the right to pursue a *Bivens* action may still emerge from a clear understanding of what Congress meant to preserve in the Act. So far, our account has done little to persuade the federal courts to rethink their grudging approach to assessing the viability of a *Bivens* action. As Vázquez and Vladeck demonstrate, the lower federal courts consistently refuse to recognize any "novel" *Bivens* actions.⁸⁸ Perhaps, then, the attempt to restore an effective constitutional tort remedy will require further legislative intervention. If so, the work of Vázquez and Vladeck will provide a valuable resource in documenting the way federal courts have continued to undercut constitutional tort remedies that Congress apparently meant to preserve.

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⁸⁶ See Vázquez & Vladeck, *supra* note 1, at 513.

⁸⁷ See *id.*

⁸⁸ *Id.* at 550-51.