
ARTICLE

STATE LAW, THE WESTFALL ACT, AND THE NATURE OF THE *BIVENS* QUESTION

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INTRODUCTION

In the past few years, four courts of appeals have applied a presumption against recognition of a *Bivens* cause of action¹ in dismissing damages suits alleging constitutional violations arising out of federal officials' pursuit of various national security and counterterrorism policies. In each of these cases, the court's approach was based on the belief that allowing such suits to proceed would threaten undue interference with the executive branch's conduct of military and national security affairs—interference that should be tolerated, if ever, only where Congress has expressly so provided. As Fourth Circuit Judge J. Harvie Wilkinson III explained in declining to recognize a *Bivens* claim that would have allowed José Padilla to seek compensation for his allegedly unconstitutional detention and treatment as an “enemy combatant,” “To stay the judiciary’s hand in fashioning the requested *Bivens* action, it suffices to observe that Padilla’s enemy combatant classification and military detention raise fundamental questions incident to the conduct of armed conflict, and that Congress . . . has not provided a damages remedy.”²

The Second Circuit, sitting en banc, used similar reasoning in declining to recognize the right of Maher Arar to seek compensation for the allegedly unconstitutional injuries he received at the hands of government officers arising out of his extraordinary rendition to Syria.³ Other courts have sounded variations on this theme to preclude relief for claims by, for example, former Guantánamo detainees⁴ and U.S. citizens who were detained and allegedly abused by U.S. military personnel while working as

¹ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that an individual had “a cause of action under the Fourth Amendment” and thus that he could sue directly under the Constitution “to recover money damages for any injuries he has suffered as a result of the [federal] agents’ violation of the Amendment.” 403 U.S. 388, 397 (1971).

² *Lebron v. Rumsfeld*, 670 F.3d 540, 550 (4th Cir.) (citation and internal quotation marks omitted), *cert. denied*, 132 S. Ct. 2751 (2012).

³ *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

⁴ See, e.g., *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam) (holding in the alternative that “[t]he danger of obstructing U.S. national security policy” was a “special factor[.]” barring relief).

military contractors in Iraq.⁵ In the view of each of these courts, concerns about judicial interference with national security justified their refusal to recognize a federal damages remedy for the injuries caused by the defendants' allegedly unconstitutional conduct.

We argue that the analysis employed by these courts of appeals to determine whether to recognize a *Bivens* action⁶ improperly combines two problematic features. The first is the courts' conceptualization of the *Bivens* question as a choice between recognizing a *Bivens* action and leaving the plaintiff with no damages remedy at all. Because the reasons that led the courts to decline to recognize a *Bivens* action are reasons to preclude all judicial involvement in the cases, these courts clearly understood the choice before them as "*Bivens* or nothing." The second problematic feature is the courts' application of what the *Arar* court described as a "remarkably low" standard for declining to recognize a *Bivens* action.⁷ In the words of the *Arar* court, all that is necessary to justify a decision not to recognize a *Bivens* claim is that the court have reason to "pause."⁸ Considered separately, these two features of the courts' analysis are both highly problematic. When combined, they produce a wholly insupportable approach to the *Bivens* question.

The four appellate courts' conceptualization of the *Bivens* question as "*Bivens* or nothing" is decidedly at odds with the way the Supreme Court understood the *Bivens* question in *Bivens* itself. It was common ground among the Justices and the litigants in *Bivens* that, in the absence of a federal cause of action, persons harmed by federal officials' constitutional violations would be able to pursue an action for damages under state law. Consistent with a long history of recognizing common law remedies for constitutional violations, the *Bivens* Court understood the question before it to be whether common law remedies should be supplemented with a federal damages remedy. Justice Brennan's opinion for the majority ultimately held

⁵ See, e.g., *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012) (rejecting the availability of a *Bivens* remedy when such a remedy would require scrutiny of military conduct and sensitive information). As this Article went to press, the Seventh Circuit, sitting en banc, reached a similar conclusion, holding in *Vance v. Rumsfeld* that *Bivens* remedies are categorically unavailable for "damages against soldiers . . . who abusively interrogate or mistreat military prisoners, or fail to prevent improper detention and interrogation." 701 F.3d 193, 195 (7th Cir. 2012) (en banc).

⁶ We call this question the "*Bivens* question."

⁷ 585 F.3d at 574; see also *Lebron*, 670 F.3d at 548 ("The *Bivens* cause of action is not amenable to casual extension, but rather is subject to a strict test . . .") (citation omitted) (internal quotation marks omitted).

⁸ 585 F.3d at 574.

that state court remedies were inadequate, not that they were unavailable.⁹ Even the dissenters, who insisted that the recognition of a new federal cause of action was a matter for Congress, understood the question to be whether state law remedies should continue to be the exclusive remedies for constitutional violations by federal officials.¹⁰ None of the Justices in *Bivens* equated the lack of a federal cause of action with functional immunity from suit. As the Court understood the *Bivens* question in *Bivens* itself, the choice before it was “*Bivens* or (only) state law.”

Unlike the contemporary courts of appeals’ conceptualization of the *Bivens* question as “*Bivens* or nothing,” their application of a “remarkably low” standard for nonrecognition of a *Bivens* claim has some (albeit slender) grounding in the *Bivens* opinion. That grounding, however, is tied to the *Bivens* Court’s understanding of the *Bivens* question as “*Bivens* or state law.” The court in *Arar* derived its low standard from the *Bivens* Court’s suggestion that nonrecognition of a *Bivens* action would be proper if there were “special factors counseling hesitation.” “Hesitation,” the court wrote in *Arar*, “is a pause, not a full stop, or an abstention. . . . ‘Hesitation’ is ‘counseled’ whenever thoughtful discretion would pause even to consider.”¹¹ For this reason, the court of appeals concluded, the threshold for declining to recognize a *Bivens* claim is a “remarkably low” one.¹²

The *Bivens* Court’s formulation of the question as whether “hesitation” was counseled reflects its understanding of the question before it as whether to recognize a new federal cause of action to supplement existing remedies. Given the Court’s recognition of the long history of affording common law remedies to victims of federal officials’ unconstitutional conduct, the Court could not have protected federal officials from all judicial interference—as the court of appeals in *Arar* purported to do—merely by “hesitating” to act. Protecting federal officials from all judicial interference requires the elimination of existing nonfederal remedies, and the elimination of such preexisting legal remedies involves not just a negative “stay[ing]” of “the judiciary’s hand,” as the Fourth Circuit put it in *Lebron*,¹³ but the affirmative preemption or displacement of state law remedies. Taking away otherwise available

⁹ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

¹⁰ See, e.g., *id.* at 415-16, 422-24 (Burger, C.J., dissenting) (discussing the shortfalls of the federal remedy and envisioning roles for both federal and state alternative remedy schemes); *id.* at 429 (Black, J., dissenting) (“The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States.”).

¹¹ *Arar*, 585 F.3d at 574.

¹² *Id.*

¹³ *Lebron v. Rumsfeld*, 670 F.3d 540, 550 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012).

remedies would require an affirmative act of federal lawmaking; mere “hesitation” to make new law would not accomplish the task.

Thus, the “remarkably low” standard that the courts of appeals have derived from *Bivens* is directly linked to the *Bivens* Court’s understanding of the *Bivens* question as “*Bivens* or state law.” Yet if the courts of appeals had so understood the *Bivens* question, they could not have based their non-recognition of a *Bivens* claim on the need to protect federal officials in national security cases from judicial interference. If anything, such national security concerns would have led the courts of appeals to prefer a federal remedial regime over one based on state law.

Indeed, we think that recognition that nonfederal remedies would exist whether or not a *Bivens* claim were recognized should generally lead courts to be less hesitant to recognize a federal cause of action against federal officials. Federal officials have a right to remove suits against them from state to federal courts upon the assertion of federal defenses.¹⁴ Thus, even state causes of action against them will usually be adjudicated in the federal courts. As a result, recognition of a federal cause of action will not increase the caseload of the federal courts. At the same time, a federal remedial regime would be easier for the federal courts to administer, and it could be tailored more closely to the policies underlying the relevant constitutional provisions. (In the case of federal contractors, on the other hand, the costs and benefits of recognizing a federal cause of action play out differently. Because federal contractors do not have a general right to remove state law claims against them,¹⁵ recognition of a federal cause of action would increase the federal caseload. Given this higher cost, the Court has properly required a stronger showing that state remedies against such defendants would be inadequate.¹⁶)

¹⁴ See 28 U.S.C. § 1442(a) (2006); see also *Mesa v. California*, 489 U.S. 121, 139 (1989) (holding that a federal officer can remove under § 1442(a) once he avers a federal defense).

¹⁵ Contractors would be able to remove suits arising under state law if (1) complete diversity exists; and (2) the contractor is not a local defendant. See 28 U.S.C. § 1441(b)(2).

¹⁶ See, e.g., *Minneeci v. Pollard*, 132 S. Ct. 617, 620 (2012) (“Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions—actions that provide both significant deterrence and compensation—we cannot [infer a *Bivens* remedy].”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001) (noting the availability of a conventional negligence remedy in a suit against private prison contractors).

The analysis in the text leaves out of the equation (as the courts of appeals appear to have done) the constitutional need for some remedy to deter violations of the Constitution by federal officials and to compensate victims of such violations. When this additional consideration is taken into account (as we think it should be), the absence of a state remedy would, of course, counsel in favor of recognition of a federal remedy. This Article does not attempt an exhaustive examination of the constitutional questions, but we do bring constitutional concerns into the analysis in Part IV as an important reason to construe the Westfall Act as either preserving state remedies or as

In short, the courts of appeals have committed a fundamental error in combining the “*Bivens* or nothing” understanding of the *Bivens* question with a “remarkably low” standard for declining to recognize a *Bivens* action—unless, sometime after the *Bivens* decision, state tort remedies for injuries caused by federal officials’ unconstitutional conduct became unavailable either through legislation or judicial decision. As we show below, such remedies did not become unavailable through judicial decision.

The claim that state tort remedies became unavailable through legislation is more plausible. In 1988, Congress passed the Westfall Act, which is widely understood to have preempted all state tort remedies against federal officials acting within the scope of their authority.¹⁷ At the same time, the Act expressly preserved suits “brought for a violation of the Constitution,”¹⁸ an exemption that is widely thought to have preserved only *Bivens* claims.¹⁹ Although the courts of appeals in the cases discussed above did not rely on the Westfall Act, it might be argued that the prevailing understanding of that Act justified those courts’ conception of the *Bivens* question as “*Bivens* or nothing.”

We are not convinced. First, the Act’s text does not exempt just *Bivens* claims. It exempts all suits “brought for a violation of the Constitution.” This text is capacious enough to preserve state law remedies against federal officials who violate the Constitution, which the Supreme Court had recently described as the “traditional means” for obtaining redress for constitutional violations.²⁰ The Act’s legislative history confirms that the Act “would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.”²¹ Thus, we think that the better interpretation of the Act is that it does *not* preempt state law remedies against federal officials for injuries caused by conduct that violates the Constitution.

authorizing the courts to recognize a federal cause of action in circumstances in which state law remedies would previously have existed.

¹⁷ See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (amending 28 U.S.C. § 2679(b)).

¹⁸ *Id.*

¹⁹ See, e.g., *Pollard*, 132 S. Ct. at 623 (“Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.” (citing Westfall Act, 28 U.S.C. §§ 2671, 2679(b)(1))).

²⁰ *Butz v. Economou*, 438 U.S. 478, 507 n.34 (1978).

²¹ H.R. REP. NO. 100-700, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949-50.

We recognize, however, that the lower courts and most scholars and practitioners have read the Act to preempt such remedies,²² a reading that the Supreme Court in *Minneeci v. Pollard* recently endorsed, albeit without analysis.²³ If the Act is read to preempt preexisting state tort remedies for conduct that violates the Constitution, however, we think that it must also be read to preclude application of the “remarkably low” standard applied by the courts of appeals to decline to recognize *Bivens* claims in the cases discussed above. In light of the availability of common law remedies for injuries caused through constitutional violations by federal officials at the time of the Westfall Act’s enactment, Congress’s intent not to affect the ability of victims of constitutional violations to seek redress for those violations requires the conclusion that the previously available remedies remain available *either* as state law remedies *or* as federal remedies. For this and other reasons we discuss below (including the need to avoid constitutional problems), if the Westfall Act is construed to preempt state law remedies, then it must also be construed to preserve the previously available remedies as federal remedies.

We thus conclude that the Westfall Act either preserves state law remedies for injuries caused by federal officials’ violations of the Constitution—in which case the courts of appeals erred in conceiving of the *Bivens* question as “*Bivens* or nothing”—or it legislatively authorizes a robust *Bivens* action encompassing at least the sorts of remedies previously available under the common law—in which case the courts of appeals are wrong to apply a “remarkably low” standard for declining to recognize a *Bivens* claim. By combining the “*Bivens* or nothing” conceptualization of the question with a “remarkably low” standard for nonrecognition of a *Bivens* claim, the courts of appeals have turned the law in force when *Bivens* was decided entirely on its head.

We develop these arguments as follows:

In Part I, we describe in greater detail the decisions that reflect the approach that we regard as mistaken, and we explicate our critique. As we make clear in this Part, we do not deny that the national security concerns that drove the courts of appeals to decline to recognize a *Bivens* claim might, in some cases, legitimately support the conclusion that such claims should not be permitted to proceed. Our claim, rather, is that these concerns are not relevant to whether a *Bivens* claim should be recognized. There are a

²² See, e.g., James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009) (“[T]oday, it has become ‘*Bivens* or nothing’ for those who seek to vindicate constitutional rights.”).

²³ See *supra* note 19.

number of existing doctrines, such as official immunity and the state secrets privilege, that serve to limit or preclude the availability of remedies against government officials in both state and federal courts. National security concerns might be relevant to the application of one or more of these doctrines. Or, as separate panels of the D.C. and Fourth Circuits have held in dismissing state law suits arising out of alleged torture by military contractors overseas, the courts of appeals could conceivably recognize a new federal common law defense barring relief under *any* cause of action in any case implicating the concerns that these courts shoehorned into the *Bivens* analysis.²⁴ In deciding the cases on these grounds, however, the courts would not have been able to rest a decision in favor of the defendant officer on their *reluctance* to create a new federal remedy. They would not have been able to hold the defendant to the “remarkably low” burden of persuasion that the *Arar* court applied in determining whether to recognize a *Bivens* claim.²⁵ To the contrary, since official immunity and the state secrets privilege are themselves regarded as federal common law doctrines, reluctance to make new law should have worked *against* the defendants seeking expansion of those doctrines or the creation of new defenses.

Parts II and III focus on the pre-Westfall Act approach to remedying injuries caused by the unconstitutional conduct of federal officials. Because Congress, in enacting the Westfall Act, did not intend to affect the redress available to victims of constitutional violations, understanding the traditional means of remedying such violations is crucial to the proper interpretation of that Act. Part II examines the theories under which victims of constitutional violations obtained damages against federal officials prior to *Bivens*. For most of our history, tort claims against federal officers were grounded in the “general” common law, which did not vary from state to state. Moreover, once Congress authorized federal officials sued in state court to remove such suits to federal court,²⁶ the question of remedies would often be decided by federal courts, which, before *Erie Railroad v.*

²⁴ See *Al Shimari v. CACI Int'l, Inc. (Al Shimari I)*, 658 F.3d 413, 420 (4th Cir. 2011) (holding that the combat activities exception to the Federal Tort Claims Act, which would bar such claims against U.S. servicemembers, authorizes federal courts to displace state law tort suits against federal military contractors arising out of the torture of detainees at Abu Ghraib), *vacated*, (*Al Shimari II*), 679 F.3d 205 (4th Cir. 2012) (en banc); *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) (same as *Al Shimari I*). The panel decision in *Al Shimari* was subsequently vacated by the en banc Fourth Circuit on the ground that the court of appeals lacked interlocutory appellate jurisdiction. See *Al Shimari II*, 679 F.3d at 224. *But see id.* at 225-30 (Wilkinson, J., dissenting) (endorsing the three-judge panel's analysis of the federal-contractor defense).

²⁵ See *supra* notes 7-8 and accompanying text.

²⁶ See 28 U.S.C. § 1442(a)(1) (2006).

Tompkins,²⁷ did not follow state court decisions on matters of general law. After *Erie*, the existing general common law of remedies for constitutional violations came to be treated as state law. The question the Court answered affirmatively in *Bivens* was whether these remedies should be supplemented with a new judicially created federal common law cause of action.

Part III turns to the Supreme Court's understanding of the *Bivens* question in *Bivens* itself and in subsequent cases. This Part demonstrates that neither *Bivens* nor any of the Court's more recent *Bivens* decisions can fairly be read to have preempted state law remedies against federal officials as a matter of federal common law. There is stray language in a few opinions that seems to overlook the fact that nonrecognition of a *Bivens* action would leave state causes of action in place, but, on the whole, the Supreme Court's decisions are consistent with its initial understanding of the *Bivens* question—and with the general structure of remedies that had prevailed prior to 1971. This conclusion is confirmed by decisions addressing the scope of the official immunity enjoyed by federal officials in suits alleging a constitutional violation. Part III concludes that state law remedies for injuries caused by the unconstitutional conduct of federal officials—the “traditional means” of seeking compensation for such injuries²⁸—remained alive and well at the time of the enactment of the Westfall Act in 1988.

Part IV examines how, if at all, the Westfall Act changed the nature of the *Bivens* question. The Act generally immunizes federal employees from private lawsuits based on acts performed within the scope of their employment; subject to numerous limits and exceptions, the statute converts such grievances into a Federal Tort Claims Act (FTCA) suit against the United States.²⁹ But the Westfall Act also explicitly preserves actions “brought for a violation of the Constitution of the United States.”³⁰ The Court in *Minneci v. Pollard* recently endorsed the prevailing reading of the Westfall Act as preempting state law remedies against federal officials, even for conduct that violates the Constitution.³¹ Read this way, the Act leaves the federal *Bivens* action as the sole remedy against the official. If so, then nonrecognition of a *Bivens* claim would indeed be the equivalent of recognition of an immunity of such officials from suit for their unconstitutional acts.

As already noted, we think that the Westfall Act is better read as preserving state law remedies for injuries caused by the unconstitutional

²⁷ 304 U.S. 64 (1938).

²⁸ *Butz v. Economou*, 438 U.S. 478, 507 n.34 (1978).

²⁹ See 28 U.S.C. § 2679(b).

³⁰ *Id.* § 2679(b)(2)(A).

³¹ See 132 S. Ct. 617, 623 (2012) (“Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.” (citing 28 U.S.C. § 2679(b)(1))).

conduct of federal officials. If the Act is read to preempt such remedies, however, we think it must also be read as authorizing a robust approach to *Bivens* under which traditional common law remedies would presumptively be available. Thus, either the *Bivens* question remains “*Bivens* or state law,” as it was before the Westfall Act, or the Act precludes the hesitant approach to recognizing *Bivens* claims reflected in the court of appeals cases discussed above. If interpreted to preempt state law remedies without authorizing equivalent federal remedies, the Westfall Act would have worked a silent but dramatic change in the structure of damages remedies for federal constitutional violations—and raised serious constitutional questions in the process.

I. THE *BIVENS* QUESTION IN CONTEMPORARY NATIONAL SECURITY CASES

In *Bivens*, the Supreme Court for the first time recognized a federal cause of action for damages against federal law enforcement officials who violate the Fourth Amendment.³² At the same time, the Court suggested that “special factors” might “counsel[] hesitation” in recognizing such a cause of action in other contexts.³³ Since then, the Court has decided a series of cases posing the question whether *Bivens* should be “extended” to new contexts.³⁴ Although the Court has shifted over time in its willingness to extend *Bivens*, it has generally adhered to its initial conceptualization of the *Bivens* question. As understood by all of the Justices in *Bivens* and (with a few ambiguous exceptions) in all subsequent cases, the question has always been whether to recognize a federal cause of action for damages for constitutional violations by federal officials or instead to leave the availability of

³² 403 U.S. 388, 397 (1971).

³³ *Id.* at 396.

³⁴ See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (“We have seen no case for extending *Bivens* to claims against federal agencies or against private prisons.” (citations omitted)); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (declining to extend *Bivens* to allow recovery against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (“An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself.”).

We recognize that it will often be contested whether a case requires the “extension” of *Bivens* to a “new context” or instead merely the application of *Bivens* within a context in which a *Bivens* action has already been held to exist. We do not address how to determine whether an extension of *Bivens* is required in any given case. Rather, we address how the question should be approached once it has been framed that way. We also distinguish the “*Bivens* question,” as framed above, from the related though distinct question of whether state law claims remain available in a given context once a *Bivens* action has been held to exist in that context. For discussion of the latter question, see *infra* text accompanying notes 186-98.

damages for such violations entirely to state law (or another existing federal remedial regime).³⁵ Thus, in the absence of another available federal remedial regime, the alternative to recognition of a *Bivens* action has always been understood to be to leave the nature and scope of the damage remedy for federal officials' violations of the Constitution to state law. If the *Bivens* question is "*Bivens* or state law," as it has been understood by the Supreme Court since the *Bivens* decision, then it follows that a "special factor[]" counselling hesitation"³⁶ is a reason to prefer a regime in which the susceptibility of federal officers to damages claims for their violations of the Constitution is governed by state law.³⁷ In light of the existence of nonfederal remedies, the need to protect federal officials from judicial interference would not support the refusal to recognize a *Bivens* claim.

A. *Bivens* and Post-9/11 National Security Litigation

Although the Supreme Court has not veered from this understanding of the *Bivens* question, the lower courts appear to be operating under a very different conception in some notable recent cases alleging constitutional violations committed in the war on terror (and in some nonterrorism cases, as well). For example, in its widely noticed decision in *Arar v. Ashcroft*, the en banc Court of Appeals for the Second Circuit found "special factors" that counseled against recognition of a *Bivens* claim that would have allowed Maher Arar to seek damages from the various federal officials he had sued.³⁸ His suit alleged that those officials had detained him and subjected him to coercive interrogation in New York before transporting him against his will and without his knowledge to Syria, where he was detained and tortured by Syrian officials.³⁹ Arar argued that these federal officers violated his substantive due process rights under the Fifth Amendment.⁴⁰ As discussed in greater detail in Part II, the alleged acts of the federal officials would also have stated colorable claims under state tort law.

³⁵ See *infra* Section III.B.

³⁶ *Bivens*, 403 U.S. at 396.

³⁷ As noted here, and as discussed more fully in Part III, the Court also considers the availability of other federal statutory remedies in deciding whether to recognize a *Bivens* claim. Nevertheless, for the sake of simplicity, we describe the contending versions of the *Bivens* question as "*Bivens* or state law" and "*Bivens* or nothing." Those were the options as they were understood, respectively, in *Bivens* itself and in the contemporary national security cases we discuss, in which other federal remedies were not available.

³⁸ 585 F.3d 559, 565 (2d Cir. 2009) (en banc).

³⁹ Complaint and Demand for Jury Trial at paras. 1-5, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-0249) [hereinafter *Arar* Complaint].

⁴⁰ *Arar*, 585 F.3d at 563. The majority assumed without deciding that Arar had substantive due process rights. See *id.* at 569.

In considering whether Arar had stated a *Bivens* claim, all of the judges viewed the question before them as whether *any* cause of action for damages existed. The judges in the majority declined to recognize a *Bivens* claim, citing as “special factors counseling hesitation” the sensitive foreign policy concerns raised by the action,⁴¹ as well as the difficulties that would be posed by the classified nature of some of the evidence that would necessarily have to be presented.⁴² Their reasoning shows that they viewed the alternative to recognition of a *Bivens* claim as the denial of any claim, as the concerns that led them to deny a *Bivens* claim would have been equally implicated had Arar brought a state tort claim against the defendants for false imprisonment or assault. Although the four dissenters would have recognized a *Bivens* claim, they too seemed to regard the options as “*Bivens* or nothing.”⁴³

Arar is perhaps the most notable of the cases adopting this approach to the *Bivens* question, but it is not alone. Other lower courts have deployed similar analyses, both in cases raising national security concerns⁴⁴ and in

⁴¹ *Id.* at 573-76.

⁴² *Id.* at 576.

⁴³ *See, e.g., id.* at 605 (Sack, J., concurring in part and dissenting in part) (“Arar has no other remedy for the alleged harms the defendant officers inflicted on him.”); *id.* at 610 (Parker, J., dissenting) (“I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts.”); *id.* at 627 (Pooler, J., dissenting) (“Ultimately, the majority concludes that the Constitution provides Arar no remedy for this wrong, that the judiciary must stay its hand in enforcing the Constitution because untested national security concerns have been asserted by the Executive branch.”); *id.* at 630 (Calabresi, J., dissenting) (decrying “the result that a person—whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law—is effectively left without a U.S. remedy”).

⁴⁴ For example, the D.C. Circuit invoked “[t]he danger of obstructing U.S. national security policy” as a special factor counseling hesitation in declining to recognize a *Bivens* remedy for claims of torture and other abuse brought by former Guantánamo detainees. *See Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam).

In *Wilson v. Libby*, the D.C. Circuit refused to recognize a *Bivens* remedy against those responsible for the disclosure of a CIA agent’s covert status. *See* 535 F.3d 697, 710 (D.C. Cir. 2008). It noted that, “if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information.” *Id.* The D.C. Circuit drew an analogy to the litigation bar recognized in *Totten v. United States*, in which the Supreme Court held that no action could be brought to recover pay allegedly due under an espionage contract between President Lincoln and the claimant, because “[i]f upon contracts of such a [secret] nature an action against the government could be maintained . . . the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.” 92 U.S. 105, 106-07 (1875); *see Wilson*, 535 F.3d at 710. The *Wilson* court concluded that “[w]e certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents. . . . [T]he concerns justifying the *Totten* doctrine provide further support for our decision that a *Bivens* cause of action is not warranted.” 535 F.3d at 710.

cases not raising such concerns.⁴⁵ Perhaps the most detailed analysis of the justification for declining to recognize a *Bivens* remedy came from the Fourth Circuit, which held in *Lebron v. Rumsfeld* that José Padilla could not pursue a *Bivens* action against the federal officials who ordered his detention and alleged torture.⁴⁶ As Judge Wilkinson explained,

Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.⁴⁷

To similar effect is the D.C. Circuit's decision in *Doe v. Rumsfeld*.⁴⁸ There, a U.S. citizen sued various government officials for his allegedly unlawful detention and treatment arising out of his work as a military contractor in Iraq.⁴⁹ The district court denied the government's motion to dismiss in part, concluding both that recognition of a *Bivens* remedy was appropriate under the unique circumstances of the case⁵⁰ and that, based on the facts alleged in Doe's complaint, the defendants were not entitled to qualified immunity at least as to Doe's substantive due process claim.⁵¹ With respect to recognition of a *Bivens* claim, Judge Gwin's analysis

⁴⁵ Consider in this regard *Benzman v. Whitman*, in which the Second Circuit refused to recognize a *Bivens* remedy for residents of lower Manhattan based on claims that they had been misled about the air quality after the September 11th attacks. 523 F.3d 119, 126-29 (2d Cir. 2008). The court's analysis overlooked the possible availability of state tort remedies, as its refusal to recognize a *Bivens* action turned on "the right of federal agencies to make discretionary decisions when engaged in disaster relief efforts without the fear of judicial second-guessing." *Id.* at 126 (citation omitted). Interestingly, the Second Circuit traced that right to "the Stafford Act's grant of discretionary function immunity to government officials engaged in administration of the Disaster Relief Act." *Id.* (citing *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 192-93 (2d Cir. 2008)). The court of appeals did not explain why the existence of a statutory immunity in an analogous context counseled against inferring a *Bivens* remedy, rather than counseling in favor of recognizing a comparable form of immunity as a federal common law defense that would also apply in state court.

⁴⁶ 670 F.3d 540, 556 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

⁴⁷ *Id.* at 551.

⁴⁸ 683 F.3d 390 (D.C. Cir. 2012).

⁴⁹ *Id.* at 382.

⁵⁰ See *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 111 (D.D.C. 2011), *rev'd*, 683 F.3d 390.

⁵¹ See *id.* at 121.

specifically suggested that the absence of alternative remedies militated *in favor* of inferring a *Bivens* cause of action. He explained that “where the Supreme Court has declined to recognize a cause of action under *Bivens*, that decision has always relied upon the presence of alternative remedies for the alleged constitutional violation or special factors counseling judicial hesitation.”⁵² For this reason, and because a *Bivens* remedy would not unduly interfere with military or national security considerations, the district court allowed the case to proceed.⁵³

On interlocutory appeal,⁵⁴ the D.C. Circuit reversed.⁵⁵ Proceeding from the observation that “[t]he implication of a *Bivens* action . . . is not something to be undertaken lightly,” Chief Judge Sentelle emphasized that “[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.”⁵⁶ And in Doe’s case particularly,

Doe’s allegations against Secretary Rumsfeld implicate the military chain of command and the discretion Secretary Rumsfeld and other top officials gave to [Navy] agents to detain and question potential enemy combatants. . . . Litigation of Doe’s case would require testimony from top military officials as well as forces on the ground, which would detract focus, resources, and personnel from the mission in Iraq. . . . [A]llowing such an action would hinder our troops from acting decisively in our nation’s interest for fear of judicial review of every detention and interrogation.⁵⁷

A different D.C. Circuit panel framed the point even more succinctly in *Ali v. Rumsfeld*: “[A]llowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our

⁵² *Id.* at 106; *see also id.* at 107 (“Rumsfeld does not argue that remedies outside of *Bivens* damages exist for Doe’s alleged constitutional injuries. Nor does the Court find any.” (citations omitted)).

⁵³ *See id.* at 107-11 (discussing why there were no “special factors” counseling hesitation).

⁵⁴ Although it is well settled that “an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a ‘final’ judgment subject to immediate appeal” under the collateral order doctrine, *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (emphasis omitted); *see also, e.g., Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006), such appeals (1) do not bring the entire case before the appellate court; and (2) therefore have not usually encompassed the existence of a viable cause of action (such as *Bivens*), since appellate jurisdiction over collateral order appeals is necessarily limited to “issues significantly different from those that underlie the plaintiff’s basic case,” *Johnson v. Jones*, 515 U.S. 304, 314 (1995). *But see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (holding, without analysis, that an interlocutory qualified immunity appeal also encompasses the “recognition of the entire cause of action”).

⁵⁵ *Doe*, 683 F.3d 390.

⁵⁶ *Id.* at 394.

⁵⁷ *Id.* at 396.

armed forces ‘to act decisively and without hesitation in defense of our liberty and national interests.’”⁵⁸

Most recently, the Seventh Circuit, sitting en banc, reached a similar—if more categorical—conclusion in *Vance v. Rumsfeld*.⁵⁹ Building on *Arar*, *Lebron*, and *Doe*, the *Vance* court concluded that courts should never “create an extra-statutory right of action for damages against military personnel who mistreat detainees,” even where those detainees are U.S. citizens with clearly established constitutional rights.⁶⁰ Although Chief Judge Easterbrook framed the majority opinion as merely an extension of the Supreme Court’s prior jurisprudence,⁶¹ Judge Hamilton’s dissenting opinion emphasized that “the majority in effect creates a new absolute immunity from *Bivens* liability for all members of the U.S. military.”⁶²

The courts’ analyses in all of these cases clearly reflect their conceptualization of the issue before them as “*Bivens* or nothing.” The courts’ national security concerns would obviously not have justified their nonrecognition of a federal damages remedy if they had understood state tort remedies to be available for the same injuries.

B. The Courts’ “Remarkably Low” Standard and Their Scruples about Judicial Lawmaking

We do not argue that the concerns that led the Second Circuit in *Arar*, the Fourth Circuit in *Lebron*, the D.C. Circuit in *Doe* and *Ali*, and the Seventh Circuit in *Vance* to decline to recognize a *Bivens* claim are irrelevant to whether the claims should be allowed to proceed. Our contention, rather, is that those concerns are not relevant to the decision whether to recognize a *Bivens* claim. Instead, they are potentially relevant to questions of immunity, privilege, or preemption. The latter defenses would bar state remedies as well, whereas nonrecognition of a *Bivens* claim would leave them in place.⁶³

⁵⁸ 649 F.3d 762, 773 (D.C. Cir. 2011) (quoting *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007)).

⁵⁹ 701 F.3d 193 (7th Cir. 2012) (en banc).

⁶⁰ *Id.* at *3; *see id.* at *8 (“We do not think that the plaintiffs’ citizenship is dispositive one way or the other. . . . The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*.”).

⁶¹ *See id.* at *3-8.

⁶² *Id.* at *16 (Hamilton, J., dissenting); *see also id.* at *34 (Williams, J., dissenting) (“[W]e risk creating a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere.”).

⁶³ Our analysis in this Part brackets the effect of the Westfall Act. Thus, we assume here that common law remedies have not been generally preempted by statute. The Westfall Act is the focus of Part IV.

Whether these factors are treated as relevant to the existence of a *Bivens* claim or instead to the defenses of immunity, privilege, or preemption will make a very real difference in the courts' treatment of the issues and, potentially, the outcome. Specifically, the court's concerns would have to do much heavier lifting to justify a dismissal on immunity, privilege, or preemption grounds than to justify nonrecognition of a *Bivens* claim.

According to the court in *Arar*, it takes very little to justify a decision to decline to recognize a *Bivens* claim. The court need merely have reason to "hesitate."⁶⁴ As Chief Judge Jacobs wrote, "The only relevant threshold—that a factor 'counsels hesitation'—is remarkably low. . . . Hesitation is a pause, not a full stop, or an abstention. . . . 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider."⁶⁵ The court's analysis in this respect was based on the suggestion in *Bivens* that it might be appropriate to decline to recognize a federal damage remedy if there are "special factors counselling hesitation."⁶⁶ Although we do not think that the *Bivens* Court had in mind a standard as weak as the one applied in the cases discussed above, the Supreme Court's subsequent jurisprudence does give greater prominence, and broader scope, to this language from *Bivens*.

The weakness of this standard derives from the courts' reluctance to engage in judicial lawmaking. Consistent with the view of the *Bivens* dissenters,⁶⁷ the *Bivens* line of cases has come to be seen as an example of

⁶⁴ *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).

⁶⁵ *Id.* at 574.

⁶⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). The *Arar* court's conclusion in this respect was based upon the inference that if the absence of "special factors counselling hesitation" militated in favor of—or at least permitted—recognizing a cause of action directly under the Constitution, then the presence of such factors must militate against implying such a cause of action.

⁶⁷ See *id.* at 418 (Burger, C.J., dissenting) ("Today's holding seeks to fill one of the gaps of the suppression doctrine—at the price of impinging on the legislative and policy functions that the Constitution vests in Congress."); *id.* at 428 (Black, J., dissenting) ("[T]he fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."); *id.* at 430 (Blackmun, J., dissenting) ("[I]t is the Congress and not this Court that should act."); see also *Carlson v. Green*, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) ("In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the [Constitution]. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority." (citation omitted)).

federal common lawmaking.⁶⁸ As such, it is subject to a criticism directed at all federal common lawmaking—namely, the claim that such law is illegitimate because only Congress has the power to make law.⁶⁹ When *Bivens* was decided, the Court was less scrupulous about federal common lawmaking in general, and about recognition of implied rights of action in particular.⁷⁰ But the Court has steadily become more hostile to the implication of remedies without clear congressional direction; it views the creation of such remedies as a matter for Congress.⁷¹ The Court's retrenchment with respect to *Bivens* reflects a similar belief that recognizing new rights of action for constitutional violations is primarily a legislative function.⁷²

In later cases, the Justices favoring a robust approach to *Bivens* remedies resisted the characterization of *Bivens* claims as the product of federal common lawmaking. In *Davis v. Passman*, for example, Justice Brennan's opinion for the Court portrayed the Judiciary's recognition of a right of action under the Constitution as part and parcel of the Judiciary's proper role in enforcing the Constitution.⁷³ Even the Justices who have counseled a

⁶⁸ For example, *Bivens* and its progeny appear in the "Federal Common Law" chapter of the leading Federal Courts casebook. See RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 726-42 (6th ed. 2009).

⁶⁹ See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248-49 (1996) ("Such open-ended lawmaking by courts raises constitutional concerns because it bears a troublesome resemblance to the exercise of legislative power—power apparently reserved by the Constitution to the political branches."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 2 (1985) ("Generally speaking, federal common law has been perceived as raising issues of federalism and separation of powers . . ."); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 344 (1992) ("[T]here is something anomalous about federal common law, and . . . it fits uncomfortably within the general jurisprudential assumptions about the role of federal courts under the Constitution.").

⁷⁰ See *Bivens*, 403 U.S. at 402, 406-08 (Harlan, J., concurring in the judgment) (relying in part on the judiciary's then-receptive approach to the implication of private rights of action under statutes).

⁷¹ See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

⁷² See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) ("Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program."); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) ("[W]e decline to create a new substantive legal liability without legislative aid and as at the common law, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." (citation and internal quotation marks omitted)); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common law powers to create causes of action—decreasing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."). For criticism of the tendency to treat *Bivens* as implicating the same considerations as implied statutory causes of action, see generally Stephen I. Vladeck, *Bivens Remedies and the Myth of the "Heady Days"*, 8 U. ST. THOMAS L.J. 513 (2011).

⁷³ 442 U.S. 228, 241-42 (1979).

more restrained approach to judicial implication of private rights of action under federal statutes have recognized that there is greater justification for a more creative judicial role in recognizing remedies for violations of the Constitution.⁷⁴ But as noted, a more cautious approach to *Bivens* eventually took hold, reflecting the belief that recognition of new federal rights of action is properly a legislative function.

As we discuss in Part III, however, even the Justices most troubled by judicial lawmaking recognized that common law remedies typically remained available. Indeed, it is in the opinions of these Justices that we find the clearest articulation of the view that the alternative to recognition of a *Bivens* claim is the exclusivity of state common law as the source of the damage remedy against federal officials.⁷⁵ It is easy to see why: federal officials had been subject to common law remedies for their unconstitutional conduct since the beginning of our nation's history.⁷⁶ Judges who object to judicial lawmaking would presumably object with equal fervor to the displacement of these remedies by any means other than legislation. Judges and scholars who question the legitimacy of federal common lawmaking do so on the ground that such lawmaking makes it too easy to displace state law.⁷⁷ The constitutional structure, they argue (along with the Rules of Decision Act),⁷⁸ presupposes that state law will apply unless displaced through the Article I legislative process. The federal legislative process was, in turn, made as onerous as it was in order to protect the states from having

⁷⁴ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting) (“[T]his Court’s traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action. Moreover, the implication of remedies to enforce constitutional provisions does not interfere with the legislative process in the way that the implication of remedies from statutes can.”). As Justice Harlan observed in *Bivens*,

[I]t would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statutes or Constitution—is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

403 U.S. at 403-04 (Harlan, J., concurring in the judgment).

⁷⁵ See *Carlson v. Green*, 446 U.S. 14, 42 (1980); *infra* text accompanying note 209.

⁷⁶ See generally *infra* Part II.

⁷⁷ See sources cited *supra* note 69.

⁷⁸ See 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

their laws displaced too easily. Federal common lawmaking is problematic because it circumvents the “carefully wrought” procedures set up by the Constitution for displacing state law.⁷⁹ From this perspective, the displacement of common law remedies against federal officials would be just as much a legislative function as the creation of new federal rights of action, and the judicial displacement of such actions would have been just as objectionable. Judges who object to judicial lawmaking in general would insist that it is presumptively for Congress to change the legal status quo, and, as discussed in Part II, the status quo at the time of *Bivens* recognized the availability of common law remedies against federal officials.

Of course, several (primarily judge-made) doctrines might nevertheless foreclose recovery in any given case, depending on the facts. First, the official might be entitled to official immunity. The Court in *Bivens* recognized that the federal cause of action would be subject to such immunities,⁸⁰ and it has elsewhere made clear that the same is true of state tort actions.⁸¹ Today, official immunity protects executive officials from damages liability unless they violate “clearly established” federal law.⁸² Second, evidentiary privileges, such as those relating to state secrets, may apply in suits arising out of clandestine governmental programs.⁸³ An evidentiary privilege based upon state secrets is similarly applicable whether the right of action is based on federal or state law.⁸⁴ Third, state tort actions may be preempted by federal statute. For example, the Public Service Health Act, 42 U.S.C. § 233(a), provides that

⁷⁹ Clark, *supra* note 69, at 1269. For elaboration of these objections to federal common lawmaking, see, in addition to the sources cited *supra* note 69, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001). For a response, see Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601 (2008).

⁸⁰ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (“This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here.”).

⁸¹ See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (“[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff’s cause of action; instead we have described it as a defense available to the official in question.”); see also *infra* Section III.C.

⁸² See, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) (“With the law thus clearly established, officials who conduct [a warrantless] interview will not receive immunity . . .”).

⁸³ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092-93 (9th Cir. 2010) (en banc) (dismissing case “at the outset” under the state secrets privilege after finding a “painful conflict between human rights and national security”), *cert. denied*, 131 S. Ct. 2442 (2011).

⁸⁴ See, e.g., *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1269 (Fed. Cir. 2005) (remanding for determination of whether the application of state secrets privilege would preclude a state law claim from going forward).

[t]he [Federal Tort Claims Act⁸⁵] remedy against the United States . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee⁸⁶

The Supreme Court in *Hui v. Castaneda* held that this provision preempts *Bivens* claims against such officials,⁸⁷ and the statute's plain text would equally cover analogous state tort remedies.⁸⁸

In theory, state tort claims might also be displaced by federal common law, or even by the Constitution. The Supreme Court has found state tort remedies against federal contractors to be displaced as a matter of federal common law under certain limited circumstances.⁸⁹ Similarly, scholars have argued that state criminal prosecution of federal officials should sometimes be held to be preempted by the Supremacy Clause.⁹⁰ Notably, however, these scholars were writing in response to a court decision declining to find such preemption.⁹¹ We are unaware of Supreme Court decisions holding common law remedies against federal officials to be displaced as a matter of

⁸⁵ See 28 U.S.C. §§ 1346(b), 2672–2680 (2006); *infra* notes 297–305 and accompanying text.

⁸⁶ 42 U.S.C. § 233(a). Compare *id.*, with 10 U.S.C. §§ 1054(a), 1089(a), 22 U.S.C. § 2702(a), 38 U.S.C. § 7316(a), and 51 U.S.C. § 20137(a).

⁸⁷ 130 S. Ct 1845, 1852 (2010).

⁸⁸ As discussed in Part III, *infra*, the Court, citing Congress's establishment of a "comprehensive internal system of justice to regulate military life," has held that *Bivens* actions are unavailable to servicemembers injured by the unconstitutional actions of their superiors. *United States v. Stanley*, 483 U.S. 669, 679 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 302 (1983)); *cf.* *Feres v. United States*, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."). If the regulatory system is comprehensive, it presumably preempts state law remedies as well. *Cf., e.g., Estate of Himsel v. Alaska*, 36 P.3d 35, 45 (Alaska 2001) (applying the *Feres* doctrine, which bars FTCA suits arising out of military service, in state court); *Mangan v. Cline*, 411 N.W.2d 9, 12 (Minn. Ct. App. 1987) (same); *Wade v. Gill*, 889 S.W.2d 208, 214 (Tenn. 1994) (same); *Newth v. Adjutant Gen.'s Dep't*, 883 S.W.2d 356, 360 (Tex. Ct. App. 1994) (same); *Nyberg v. State Military Dep't*, 65 P.3d 1241, 1249–50 (Wyo. 2003) (same).

⁸⁹ See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05, 505 n.1 (1988) (recognizing a limited federal common law defense for contractors who design products for the military).

⁹⁰ *E.g., Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2234 (2003).

⁹¹ See *Idaho v. Horiuchi*, 215 F.3d 986, 997 (9th Cir. 2000) (distinguishing "Supremacy Clause immunity," which "protect[s] a federal agent from being held to answer to state laws," from qualified immunity), *vacated*, 253 F.3d 359 (9th Cir.) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (en banc).

federal common law or under the Constitution (as opposed to by statute).⁹² Indeed, such remedies have been available in the past even for constitutional violations occurring in war.⁹³ Nevertheless, it is conceivable that the courts might find such displacement with respect to suits implicating national security in particular ways, as they have done in state tort suits against military contractors.⁹⁴

This is not the place to explore the scope of these doctrines or their applicability to the facts of the cases under discussion. Our point, rather, is that *these* are the doctrines that address whether damages actions should proceed against federal officials. Immunity doctrine, in particular, reflects “an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”⁹⁵ In performing this balance, the Court explicitly takes “national security” and “foreign policy” concerns into account where appropriate.⁹⁶ By considering these factors instead in deciding whether to recognize a *Bivens* cause of action, the courts of appeals have pretermitted the proper analysis. Rather than grappling with the relevant concerns on both sides of the balance, as the Supreme Court has instructed, the courts of appeals’ “remarkably low” standard effectively gives controlling weight to one side. If the factors that led the courts in these cases to deny a *Bivens* claim had been considered in connection with these other doctrines, the courts could not have ruled for the defendants merely because of a disinclination to engage

⁹² Except insofar as federal common law immunities or evidentiary privileges might be understood as partially displacing state tort claims. *Cf. infra* note 212 (discussing the *Feres* doctrine).

⁹³ See Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1560-62 (2007) (explaining that common law remedies were available against federal officials for injuries committed during the Civil War, even while the writ of habeas corpus was suspended); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 651-55 (2009) (noting that, absent suspension of the writ of habeas corpus or legislation conferring immunity, federal officials were subject to common law tort remedies for injuries committed during the Civil War, though qualified immunity from suits was retroactively extended to federal officials through legislation following the war).

⁹⁴ See *supra* note 24 and accompanying text.

⁹⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citation omitted) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

⁹⁶ *Id.* at 812; see also *Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985) (rejecting argument that the Attorney General should enjoy absolute immunity from damages liability for his actions in furtherance of national security functions, because, inter alia, the secrecy of national security functions makes it “far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation,” and because of the unavailability of alternative checks on unconstitutional action, which are just as necessary “in matters of national security as in other fields of governmental action”).

in judicial lawmaking. Mere hesitation would not have produced rulings in the defendants' favor.

If a case does not fall within the established contours of any of these other doctrines, the defendant could certainly ask the court to expand the scope of one or more of these doctrines because of national security or state secrets concerns. But not all of the cases that have followed the lower courts' approach to the *Bivens* question summarized above have raised national security or state secrets concerns.⁹⁷ More importantly for present purposes, the national security concerns would have to do much heavier lifting to justify an expansion of these doctrines than to justify nonrecognition of a *Bivens* action. The doctrine of qualified immunity and the state secrets privilege are themselves regarded as judicially created federal common law doctrines.⁹⁸ If defendants were to ask a court to extend these doctrines, then the courts' reluctance to engage in judicial lawmaking would work against them.

Indeed, scruples about judicial lawmaking should make courts even more reluctant to expand an immunity or privilege than to recognize a new federal right of action. After all, a primary objection to federal common lawmaking is that it allows federal courts to displace state law too easily.⁹⁹ Expansion of an immunity or privilege would effectively preempt existing state law claims, whereas recognition of a new federal right of action would merely supplement state law.¹⁰⁰ A defendant seeking an expansion of an existing federal common law immunity or privilege would be asking the court to make law and hence to usurp the role of the legislature. For judges disinclined to make new law, a mere reason to hesitate—the “remarkably low” threshold applied by the lower courts in these recent cases—should suffice to deny the defendant the requested extension of immunity or privilege.

⁹⁷ See, e.g., *Benzman v. Whitman*, 523 F.3d 119, 123 (2d Cir. 2008) (describing the plaintiff's *Bivens* claim, which centered on the allegation that the defendant knowingly caused the EPA to release false statements about air quality at the World Trade Center disaster site).

⁹⁸ See, e.g., *Filarsky v. Delia*, 132 S. Ct. 1657, 1660 (2012) (qualified immunity); *United States v. Abu-Jihaad*, 630 F.3d 102, 140-41 (2d Cir. 2010) (state secrets), *cert. denied*, 131 S. Ct. 3062 (2011).

⁹⁹ See *supra* note 79 and accompanying text.

¹⁰⁰ To be sure, the recognition of a new remedy would displace the state's decision to deny a remedy in cases not satisfying the elements of existing state causes of action. Still, we think that taking away an existing state remedy from state citizens injured by federal officials is more offensive to state interests than granting a remedy as a matter of *federal* law where existing state law would deny it, especially if the offending conduct is independently illegal as a matter of federal law.

II. CONSTITUTIONAL TORTS BEFORE *BIVENS*

Had *Bivens* never been decided and the Westfall Act never enacted, someone in the shoes of Maher Arar, José Padilla, or the plaintiffs in *Doe v. Rumsfeld* or *Vance v. Rumsfeld* would have been able to maintain his lawsuit against the federal officials who violated his constitutional rights based on state tort law. Though he may have had to initiate his action in the state courts, the federal defendants would have been free to remove the case to the federal district court upon the assertion of a federal defense.¹⁰¹

Federal officials have never been categorically exempt from damages suits under the common law simply by virtue of their status as federal officers. From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding.¹⁰² The fact that the defendant was a government official was relevant to the official's defense rather than the existence of a cause of action. If the claim was based on the official's conduct in performing his official duties, he could plead justification as a defense, though this defense would fail if he had exceeded his authority.¹⁰³ In the United States, federal (as well as state) officials were deemed to have exceeded their authority whenever they violated the Constitution, on the theory that the government lacks the power to authorize violations of the Constitution.¹⁰⁴

Violation of the Constitution would thus result in the loss of any defense of official justification, leaving the officer vulnerable to suit under the common law as if he were a private individual. The rationale for denying the official the immunity of the state and treating him as a private party was well captured in a famous passage from *Ex parte Young* explaining why state

¹⁰¹ See 28 U.S.C. § 1442(a)(3) (2006); see also *Mesa v. California*, 489 U.S. 121, 139 (1989) (holding that a federal officer can remove under § 1442(a) once he avers a federal defense).

¹⁰² See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course. Long before 1789 it was true that sovereign immunity was not a bar to relief.")

¹⁰³ See *infra* notes 104-06, 245-86 and accompanying text.

¹⁰⁴ See Note, *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 831-32 (1957) (explaining that damages suits against federal and state officers who exceeded their authority were "for some time the most important method employed to obtain monetary recovery"; the agents were relieved of liability only where "the action in question [was] authorized by a constitutional act of Congress"); cf. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523-24 (1954) (describing the similar rationale for suits requesting injunctive relief against state officials).

officers are not protected by the Eleventh Amendment when their conduct violates the Constitution:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.¹⁰⁵

Because the violation of the Constitution was deemed to strip the official of his official or representative character, the law governing his liability was the state law imposing liability on private individuals who caused analogous injuries—not any special state law specifically applicable to government officials.¹⁰⁶

Had Maher Arar brought suit under this pre-*Bivens* regime, the injuries that he suffered would have supported claims under a number of distinct common law theories. Had he been detained and interrogated by private individuals, his detention would clearly have given rise to a false imprisonment claim,¹⁰⁷ and his coercive interrogation would likely have satisfied the elements of assault, if not also battery.¹⁰⁸ These claims would have been most likely to prevail against the John Doe defendants who directly detained and interrogated him.¹⁰⁹ These defendants would likely have defended on the ground that they were just doing their jobs as federal officials, perhaps pointing to instructions from higher-level officials. But this defense would have failed if their own conduct—or, if their defense rested on instructions from higher-level officials, the conduct of those officials—had

¹⁰⁵ 209 U.S. 123, 159-60 (1908).

¹⁰⁶ See *Developments in the Law*, *supra* note 104, at 832 (“A government officer who acts without authority is . . . subject to the same legal rules as any private person.”).

¹⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 35 (1965).

¹⁰⁸ See *id.* § 21 (assault); *id.* § 13 (battery).

¹⁰⁹ See *Arar* Complaint, *supra* note 39, paras. 22, 36-47 (alleging that Arar was “strip searched,” “taken from his cell in chains and shackles,” told false information, and denied basic constitutional rights).

been shown to have violated the Constitution. Arar also sued the higher-level officials who allegedly directed the tortious conduct.¹¹⁰ Had he brought the suit under state tort law, his ability to maintain the claim against these defendants may have turned on state law concerning agency or conspiracy.¹¹¹ Again, the defense of justification would have failed if their actions had been shown to have contravened the Constitution. Of course, Arar suffered his most severe battery at the hands of the Syrian officials who tortured him.¹¹² Arar did not sue these foreign officials, but he did allege that they were acting in concert with, or had colluded with, the federal officials he did sue.¹¹³ Again, had he sued under state tort law, his success might have depended, in the first instance, on whether he could have satisfied the relevant state law requirements for proving liability under principles of agency or conspiracy. Padilla's state tort claims would have unfolded in a similar manner, except that his claim of battery against the John Doe defendants would not have depended upon state law of agency or conspiracy, as those defendants were alleged to have physically abused him personally.¹¹⁴

Common law suits against federal officials did differ in one important respect from suits against private individuals. Though federal officials have never enjoyed the immunity of the federal government, they have enjoyed a distinct immunity, now known as "official immunity." The foregoing analysis of Arar's and Padilla's likelihood of success under a state tort theory is therefore subject to a very large qualification: they would not have succeeded if the defendants had been protected by official immunity. But exactly the same obstacle would stand in their way today had they been afforded a *Bivens* claim, as official immunity applies whatever the source of the cause of action.¹¹⁵

The scope of official immunity has varied both over time and according to the sort of official involved.¹¹⁶ Certain types of officials—legislators,

¹¹⁰ *Id.* para. 68.

¹¹¹ See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as a "fiduciary relationship" in which "the agent shall act on the principal's behalf and subject to the principal's control"). For a discussion of the common law "action on the statute," see *infra* text accompanying notes 136-43.

¹¹² *Arar Complaint*, *supra* note 39, paras. 23-24, 49-52, 69.

¹¹³ *Id.* paras. 14-21, 68-70.

¹¹⁴ See *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir.) ("Padilla was removed from civilian custody and transferred to the Naval Consolidated Brig at Charleston, South Carolina. While in military custody, Padilla claims that he was repeatedly abused, threatened with torture, deprived of basic necessities, and unjustifiably cut off from access to the outside world."), *cert. denied*, 132 S. Ct. 2751 (2012).

¹¹⁵ See *infra* note 126 and accompanying text.

¹¹⁶ In this Part, we provide a brief overview of the doctrine of official immunity. For a closer look at the precise scope of official immunity at the time the Westfall Act was passed, with a focus

judges, and prosecutors—have long enjoyed an absolute immunity from suit for most of their acts.¹¹⁷ Executive officials were initially not entitled to any immunity at all but were instead strictly liable for torts committed in excess of their authority or otherwise contrary to law.¹¹⁸ Over time, the courts came to recognize a common law immunity protecting such officials from liability under certain circumstances. But unlike the immunity of legislators, judges, and prosecutors, the immunity enjoyed by other executive officials for injuries caused by conduct exceeding their authority has generally been a qualified one.¹¹⁹

The scope of the immunity enjoyed by executive officials has a complex history. For present purposes, two points are salient. First, while the scope of immunity fluctuated over time and varied depending on the types of conduct performed by the officer involved, the officers who enjoyed the narrowest scope of immunity were those who inflicted physical injury to persons or property,¹²⁰ as some of the officials sued by Arar and Padilla are alleged to have done. Officers who inflicted less tangible sorts of injuries once enjoyed a broader immunity.¹²¹ Second, while there was much debate in the cases and in the academic commentary about the proper scope of liability of federal officials, this debate related to the scope of the immunity

on the immunity enjoyed by federal officials sued on a state tort theory for conduct violative of the Constitution, *see infra* Part III.

¹¹⁷ U.S. CONST. art. I, § 6, cl. 1 (“[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . .”); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (recognizing immunity for state legislators “acting in a field where legislators traditionally have power to act”); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1868) (“[I]t is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction.”); *see also Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (holding that prosecutors have “the same absolute immunity under § 1983” that they “enjoy[] at common law”).

¹¹⁸ *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (finding an executive official strictly liable because even instructions given by the Executive could not “legalize an act which without those instructions would have been a plain trespass”); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1864 (2010) (contrasting the lack of immunity given to executive officials under *Little* and *Murray v. Schooner Charming Betty*, 6 U.S. (2 Cranch) 64 (1804), with “modern official accountability rules,” which are more lenient).

¹¹⁹ *See infra* Section III.C.

¹²⁰ *See Ann Woolhandler, Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 451 (1987) (“Direct invasions of person and tangible property are more traditionally actionable.”).

¹²¹ *See id.* Today the “clearly established law” standard of qualified immunity applies to all executive branch officials except those exercising prosecutorial functions and the President (acting in any capacity). *See Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (“Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.”).

to which these officials were entitled, not to the existence of a cause of action.¹²² That executive officials are subject to tort suits has always been uncontroversial. Thus, although many scholarly articles in the pre-*Bivens* era tackled the subject of official liability for tortious conduct, virtually all of them focused on the scope of immunity;¹²³ the existence of a cause of action in tort was assumed.

By the middle of the twentieth century, the immunity of federal officials generally protected them from liability if they were acting in good faith.¹²⁴ The Supreme Court refashioned this immunity in *Harlow v. Fitzgerald* so that it now protects officials unless they violate clearly established federal law.¹²⁵ The status of official immunity as federal or state law was unclear in the pre-*Erie* period. Today, the immunity is understood to have the status of federal common law, protecting federal officers whether sued under *Bivens* or state common law.¹²⁶ When precisely the immunity came to be understood as federal common law is unclear, but it certainly was so understood before the Supreme Court's decision in *Bivens*, as Justice Harlan mentioned as a reason for recognizing a federal cause of action the fact that the scope of liability would in any event be governed by federal law—

¹²² See Woolhandler, *supra* note 120, at 451 (“Liability for harms to intangible economic interests, or economic expectations, traditionally was of less concern, as reflected in use of sovereign immunity to bar actions on government debt when no physical property invasions were alleged.” (emphasis added) (footnote omitted)). As discussed below, the common law extended liability to wrongs producing intangible injuries as early as the fifteenth century. See *infra* text accompanying note 134.

¹²³ See, e.g., Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Jaffe, *supra* note 102; Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); *Developments in the Law*, *supra* note 104.

¹²⁴ See, e.g., *Butz v. Economou*, 438 U.S. 478, 497-98 (1978) (“It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974))). Before *Butz*, some “policy-making” officials were thought to enjoy an absolute immunity for discretionary conduct within the outer perimeter of their line of duty. See *infra* Section III.C. *Butz* clarified that this immunity did not apply to conduct in violation of the Constitution and held that, apart from prosecutors and other quasi-judicial officers, “qualified immunity from damages liability [is] the general rule for executive officials charged with constitutional violations.” 438 U.S. at 508.

¹²⁵ See 457 U.S. at 818 (“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

¹²⁶ See, e.g., *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 307 (D.C. Cir. 1977) (en banc) (Wilkey, J., concurring dubitante); see also, e.g., *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009). Some scholars and courts have suggested that federal officials enjoy a broader immunity from state tort suits than from federal causes of action. We address this claim in Section III.C, *infra*.

apparently a reference to the doctrine of official immunity.¹²⁷ Thus, if a federal cause of action had not been recognized in *Bivens*, state law would have provided the affirmative basis for the cause of action in suits such as Arar's and Padilla's, and federal immunity law would have operated to circumscribe the cause of action. As of 1982 (when *Harlow* was decided), recovery would have been available only if the individual defendants had violated clearly established federal law.

To modern eyes unfamiliar with the history of damages claims against federal officials, the "common law cause of action/federal defense" model no doubt seems odd. The federal interest in suits in federal court against federal officials alleged to have violated the Federal Constitution would appear to be strong, and that of the states comparatively weak. Moreover, application of state law would appear to present a number of potential problems. Federal courts today follow state court precedents when applying the common law. The elements of a common law cause of action could well vary from state to state, and thus a federal official would potentially be subject to differing levels of liability for violation of the same constitutional provision, depending on the state in which he was sued. Given divergent state choice-of-law rules, a single official susceptible to suit in more than one state might well face differing levels of liability depending on where the plaintiff chose to bring suit.¹²⁸ More importantly, whether the elements of a state law tort action would advance the purposes of the constitutional provision that the officer violated would appear to be, at best, fortuitous. Finally, if the cause of action against state officials had its basis in state law, state legislatures would apparently be free to repeal the remedy, leaving persons injured by federal officials without recourse.

But, on closer inspection, these problems are less severe than they appear—and they were significantly less severe in the pre-*Bivens* era than they are today. First, states are unlikely to want to do away with remedies for their citizens against federal officers who injured them. More likely, states would want to be overly generous—a problem addressed by the tandem of

¹²⁷ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in the judgment) ("It seems to me entirely proper that these injuries be compensable, according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability.").

¹²⁸ Cf. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086-87 (2011) (Kennedy, J., concurring) (objecting to the possibility that different rules might apply in different jurisdictions in national security cases, and suggesting instead that, "[w]hen faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes").

the federal officer removal statute and the federal common law of official immunity. Moreover, the states are not completely unfettered by federal law in revising their common law in its applicability to federal officials alleged to have violated the Federal Constitution. The cases denying government officers sovereign immunity suggest that officers who violate the Constitution must be treated by the states like private parties who cause analogous injuries.¹²⁹ If so, the states would not be free to alter their common law only for suits against federal officials; they would have to revise their tort law generally.¹³⁰ A similar conclusion would appear to follow from the principle that the states may not discriminate against federal law.¹³¹ As Professor Hill noted before *Bivens*, the nondiscrimination principle would appear to require a state to make its tort remedies available for injuries caused by violation of the Federal Constitution as long as it supplies a remedy for injuries caused by violation of analogous standards of care imposed by state law.¹³²

It is true that the elements of common law torts will often not match up well with the purposes underlying the constitutional provision that was violated. For example, federal officials whose actions violated the Fourth Amendment were usually sued in trespass, which traditionally required a physical injury to person or property, whereas the Fourth Amendment also protects less tangible interests. But, very often, if one common law cause of action would be inadequate to protect the constitutional interests involved, another cause of action will be available to fill that gap. Indeed, the common law has long been characterized by its flexibility and its openness to evolving

¹²⁹ See *supra* text accompanying notes 105-06.

¹³⁰ Professor Amar has proposed that the states enact “converse-1983” statutes establishing a statutory remedy for persons injured by action under color of federal law that violates the Constitution. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 & n.15 (1987); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 160 (1993); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994). If the analysis in the text is correct, the states may not be at liberty to establish special rules for the liability of federal officials. (The nondiscrimination principle, see *infra* note 131 and accompanying text, may also constrain the states in this regard.)

¹³¹ See *Testa v. Katt*, 330 U.S. 386, 393 (1947) (“[T]he policy of the federal Act is the prevailing policy in every state. . . . [A] state court cannot refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.” (citation omitted) (internal quotation marks omitted)); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934) (“A state may not discriminate against rights arising under federal laws.”).

¹³² See Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1144-46 (1969) (“As long as the state allows an action in negligence, its courts can hardly hold, as a matter of law, that a railroad was not negligent though in violation of a safety standard embodied in paramount federal law.”).

to meet new needs.¹³³ Thus, the inadequacies of the tort of trespass were addressed in the fifteenth century through the evolution of the tort of “trespass on the case,” which provided for liability even where “the wrong complained of [did] not . . . consist of the direct application of unlawful physical force to the body, lands, or goods of the plaintiff.”¹³⁴ From the tort of trespass on the case evolved such modern-day torts as defamation and libel, negligence, and deceit.¹³⁵

More relevantly, contemporaneously with the development of trespass on the case, there developed from common law trespass the common law “‘action on the statute’—a cause of action in tort resulting from activity in violation of a legislatively created duty or standard.”¹³⁶ As early as “the late fourteenth and fifteenth centuries, actions labeled ‘trespass’ were being brought upon statutes whether or not they provided in terms for special penalties.”¹³⁷ Although there was some retrenchment in the seventeenth and eighteenth centuries, the reluctance during this period to permit tort actions based on certain statutes extended only to statutes that themselves provided for damages recovery by injured individuals, thereby suggesting that Parliament intended to exclude other remedies.¹³⁸ Decisions such as *Ashby v. White*¹³⁹ and *Couch v. Steel*¹⁴⁰ demonstrate that the “common law right” to recover for breach of a “duty . . . created by statute” was alive and well in England during this period.¹⁴¹ In the United States, the common law

¹³³ As discussed in Section III.A, the flexibility of the common law was one reason proffered by the Solicitor General in his argument against creating a federal cause of action in *Bivens*. See *infra* text accompanying note 185.

¹³⁴ W.F. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* 54 (A.H. Chaytor & W.J. Whittaker eds., 1910).

¹³⁵ See *id.* at 360-61.

¹³⁶ Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts* in Bell v. Hood, 117 U. PA. L. REV. 1, 18 (1968); see also Hill, *supra* note 132, at 1134 (“[T]he common law did not accommodate itself to paramount positive law only in allowance of a new right to overcome a defense. Actions directly upon statutes were quite common.”).

¹³⁷ Katz, *supra* note 136, at 20.

¹³⁸ *Id.* at 28 (explaining that in cases where recovery was denied, the statutes involved “provided for a mode of recovery that would compensate the plaintiff in money”).

¹³⁹ (1703) 92 Eng. Rep. 126 (K.B.) 136; 2 Ld. Raym. 938, 953-54 (Holt, C.J., dissenting) (“Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.”); see also Katz, *supra* note 136, at 25 (“The Chief Justice’s dissenting opinion was accepted by the House of Lords, which reversed the King’s Bench and entered judgment for the plaintiff.”).

¹⁴⁰ (1854) 118 Eng. Rep. 1193 (K.B.) 1197; 3 El. & Bl. 402, 412-13.

¹⁴¹ *Id.*; see *id.* (“[T]he common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is [not] taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty.”).

“action on the statute” is reflected in decisions that are today sometimes thought to have involved the implication of a cause of action under a statute,¹⁴² as well as in the black letter tort of negligence per se.¹⁴³

The common law tort of “action on the statute” and its modern-day manifestations are, of course, of direct relevance to the question of state tort remedies for violation of the Constitution. A state that recognizes this tort may well permit recovery for violation of duties or standards set forth in the Federal Constitution as well as those set forth in state law. Indeed, if a state permits the recovery of damages for violation of standards imposed by the state constitution, or perhaps even just by state statutes, its failure to permit recovery on the basis of the Federal Constitution may run afoul of the nondiscrimination principle mentioned above.¹⁴⁴

Finally, disuniformity of remedies from state to state was not a significant problem throughout most of the pre-*Bivens* era because the pre-*Bivens* era was, for the most part, also the pre-*Erie* era. At that time, the common law was regarded as part of the “general” law.¹⁴⁵ During the long reign of *Swift v. Tyson*,¹⁴⁶ federal courts did not follow state court precedents; they interpreted and applied the common law according to their own best judgment.¹⁴⁷ Since 1948, all federal officials sued in state court have had the

¹⁴² See *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) (“A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law” (emphasis added)).

¹⁴³ See RESTATEMENT (SECOND) OF TORTS § 286 (1965) (setting out the circumstances under which a court may adopt the requirements of a legislative enactment or administrative regulation as the standard of conduct of a reasonable man); PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (W. Page Keeton et al. eds, 5th ed. 1984) (“When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate.”). For a contemporary Supreme Court decision involving negligence per se, see *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986). In *Merrell Dow*, the plaintiffs claimed that the misbranding of a drug in violation of federal law created a “rebuttable presumption of negligence.” *Id.* at 805-06.

¹⁴⁴ See *supra* text accompanying notes 129-32.

¹⁴⁵ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 71-73 (1938) (discussing how, in the past, “[t]he federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes”).

¹⁴⁶ 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. 64.

¹⁴⁷ See *Erie*, 304 U.S. at 71-73; TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 39-40 (1981) (analyzing the discretion given to federal judges under the *Swift* regime in deciding commercial cases); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 83-84 (1991) (discussing the *Swift* Court’s failed attempt to create uniformity in commercial law); Clark, *supra* note 69, at 1276 (suggesting that “federal courts expanded the *Swift* doctrine to permit federal courts to disregard state judicial decisions on an ever-expanding range of issues”); Ann Woolhandler, *The Common Law Origins of Constitutionally*

statutory right to remove such suits to federal court on the basis of a federal defense.¹⁴⁸ Before 1948, many—though not all—federal officials enjoyed such a right.¹⁴⁹ In addition, suits against federal officials could often be brought in federal court on the basis of diversity. As a result, the elements of the common law torts for which the officials were sued would very often be decided in the federal courts, subject to Supreme Court review.¹⁵⁰ Moreover, because the common law was characterized by its flexibility, it could be molded to the exigencies of constitutional litigation. As Ann Woolhandler has demonstrated, federal courts adjudicating common law tort actions against state and federal officials who were alleged to have violated the Constitution during the pre-*Erie* period did not slavishly follow state precedents regarding procedural or substantive issues, such as who the appropriate parties were, or even what the elements of the relevant torts were.¹⁵¹ Instead, they deviated from state law precedents on these issues when they regarded such deviation to be necessary for the advancement of the federal interests involved.¹⁵²

Matters changed when the Supreme Court decided *Erie Railroad v. Tompkins* in 1938.¹⁵³ The Court disavowed the concept of “general law,” and held that the common law was ordinarily state law.¹⁵⁴ Federal courts were thenceforth required to interpret and apply the common law as would the courts of the state in which they sat. On the same day it decided *Erie*, the Court recognized that certain matters of uniquely federal concern would be governed by a federal common law.¹⁵⁵ Federal common law differs from the

Compelled Remedies, 107 YALE L.J. 77, 87-88 (1997) (highlighting the Court’s willingness “to ignore both state statutes and common law in areas that were ‘general’ rather than ‘local,’” partly in the “belief that the application of state law might exceed the territorial limits of state power in such cases”).

¹⁴⁸ See Pub. L. No. 80-773, § 1442(a)(3), 62 Stat. 869, 938 (1948) (codified as amended at 28 U.S.C. § 1442(a)(3) (2006)).

¹⁴⁹ See FALLON ET AL., *supra* note 68, at 746 (describing “myriad” federal rights and jurisdictional provisions that allowed for removal to federal courts before the right of removal was extended to all federal officers in 1948).

¹⁵⁰ See Woolhandler, *supra* note 147, at 89-90.

¹⁵¹ See *id.* at 110-11 (“[T]he federal courts in both law and equity showed considerable independence as to procedures and with respect to standing-to-sue and other elements of underlying causes of action.”).

¹⁵² See *id.* at 162-63.

¹⁵³ 304 U.S. 64 (1938).

¹⁵⁴ *Id.* at 78.

¹⁵⁵ See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (determining that the issue of interstate water rights “is a question of federal common law”).

general law in that it displaces inconsistent state law. State courts accordingly must follow federal precedent in interpreting and applying such law.¹⁵⁶

After *Erie*, Courts addressing the question of damages for constitutional violations could have framed the question as whether the previously available “common law” remedies should now be understood to have the status of federal common law. Because the availability of such remedies had been determined by federal courts largely independently of state decisions, and given the obvious federal interests involved, the federal courts’ pre-*Erie* approach could easily and properly have been retained and recharacterized in post-*Erie* terms as the application of a federal common law of remedies for constitutional violations. Had this approach been taken, federal courts could have pursued the development of such remedies with sensitivity to the federal interests involved, including the need to give efficacy to the Constitution, without being tied to state precedents, much as they had done before *Erie*. Had the pre-*Erie* common law of remedies for federal officials’ violations of the Constitution been recharacterized as federal common law, these remedies might well have been held to preempt the field, thus rendering the decision whether a federal cause of action existed in a particular context, effectively, “*Bivens* or nothing.” But, if that approach had been taken, the question of federal remedies for constitutional violations would have been answered with a proper appreciation of the long tradition of providing remedies according to a common law technique notable for its flexibility in meeting constitutional needs. The recognition of a federal remedy would not have been regarded as an act of judicial lawmaking so much as the continuation of a longstanding and, indeed, constitutionally contemplated remedial approach.¹⁵⁷ The remedies would have been assumed to be available, as they had been before *Erie*, without having to be judicially created.

But that road was not taken. After *Erie*, the pre-existing common law remedies were assumed to be state law remedies, and the question eventually confronted by the Court was whether these state law claims should be supplemented, or perhaps replaced, by a federal cause of action. That is how

¹⁵⁶ See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (holding that rules of federal common law articulated by the federal courts necessarily displace state law even in state courts); see also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421-22 (1964) (noting the vertical uniformity accomplished by post-*Erie* federal common law).

¹⁵⁷ The Solicitor General in *Bivens* argued that state tort remedies were the constitutionally contemplated remedies for federal officials’ violations of the Constitution. See *infra* text accompanying notes 184-85.

the issue was posed, soon after *Erie*, in *Bell v. Hood*.¹⁵⁸ The plaintiff, asserting a claim under the Federal Constitution, had brought suit against a federal official directly in federal court (rather than bringing suit in state court and waiting for the suit to be removed).¹⁵⁹ The lower court dismissed for lack of subject matter jurisdiction, holding that the case did not arise under federal law.¹⁶⁰ (Although the plaintiff had at a minimum raised a federal response to an anticipated defense, under the well-pleaded complaint rule, federal jurisdiction is lacking when the federal issue is introduced only by way of defense or replication.¹⁶¹) The Supreme Court found that the case arose under federal law because the question whether federal law provided a cause of action for violation of the Constitution was sufficiently substantial to support federal question jurisdiction.¹⁶² But the Court did not resolve whether federal law provided a cause of action for violation of the Constitution. Instead, the case was remanded to the district court,¹⁶³ which held that federal law did not provide a cause of action.¹⁶⁴ The decision in *Bell v. Hood* on remand was largely followed by the lower courts.¹⁶⁵ There matters stood when the courts were presented with the same question in *Bivens*.

III. *BIVENS* AND ITS AFTERMATH

Although the judges of the en banc Second Circuit disagreed vehemently over the correct outcome in *Arar v. Ashcroft*, they (and their colleagues on the Fourth, Seventh, and D.C. Circuits) agreed on one point: the plaintiff either had a *Bivens* action or had no cause of action for damages at all.¹⁶⁶ In this respect, the courts of appeals' recent approach to the *Bivens* question was very different from the Supreme Court's approach in *Bivens* itself:

¹⁵⁸ 327 U.S. 678 (1946).

¹⁵⁹ *Id.* at 679.

¹⁶⁰ *Id.* at 680.

¹⁶¹ See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 153 (1908) (requiring the plaintiff to present a federal question in a "statement of its cause of action" and not by anticipating a defense (citation omitted)).

¹⁶² *Bell*, 327 U.S. at 684-85.

¹⁶³ *Id.*

¹⁶⁴ *Bell v. Hood*, 71 F. Supp. 813, 820-21 (S.D. Cal. 1947).

¹⁶⁵ See, e.g., *United States v. Faneca*, 332 F.2d 872, 875 (5th Cir. 1964); *Johnston v. Earle*, 245 F.2d 793, 796 (9th Cir. 1957) ("[T]he federal government has created no cause of action enforceable in its courts for such torts under the state law, and hence the district court here lacked jurisdiction of the subject matter."); *Koch v. Zuieback*, 194 F. Supp. 651, 656 (S.D. Cal. 1961) ("[A]n action for damages against a federal official whose acts constitute a denial of due process of law is not a case arising under the Fifth Amendment and presents no federal question."); *Garfield v. Palmieri*, 193 F. Supp. 582, 586 (E.D.N.Y.), *aff'd per curiam*, 290 F.2d 821 (2d Cir. 1960).

¹⁶⁶ See *supra* Section I.A.

Consistent with the pre-*Bivens* approach to constitutional remedies described above, all of the Justices in *Bivens*, and all of the litigants, regarded the *Bivens* question as a choice between recognizing a federal right of action for damages directly under the Constitution or leaving the matter of damages for violations of the Constitution by federal officials to the common law. It was common ground in *Bivens* that, in the absence of a federal cause of action, damages would be available on the basis of the common law.¹⁶⁷ On this understanding of the nature of the *Bivens* question, the “special factors” that the Court said might “counsel[] hesitation” in recognizing a *Bivens* action¹⁶⁸ must be factors that favor leaving the question of damages to other existing remedial regimes, including state law. Factors that would favor leaving the plaintiff with no cause of action at all would bear instead on the question of defenses, such as official immunity.

A. *The Bivens Case*

Webster Bivens was arrested on narcotics charges and had his home searched by agents of the federal Bureau of Narcotics who lacked a warrant for either the arrest or the search.¹⁶⁹ In his complaint, Bivens alleged that the agents had manacled him in front of his wife and children and threatened to arrest the whole family. Bivens was later taken to the station, where he was subjected to a strip search.¹⁷⁰ He sued the agents in federal district court, alleging that they had caused him “great humiliation, embarrassment, and mental suffering.”¹⁷¹ He sought \$15,000 from each agent for the violation of his “constitutional rights.”¹⁷² Although his pro se complaint did not refer specifically to the Fourth Amendment,¹⁷³ it did allege that the search was conducted without a warrant and, according to the Supreme Court, “fairly read, it allege[d] as well that the arrest was made without probable cause.”¹⁷⁴ The district court dismissed the complaint, citing the lower

¹⁶⁷ See *supra* notes 9-10, 75-79 and accompanying text.

¹⁶⁸ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

¹⁶⁹ *Id.* at 389.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 389-90. For more on Webster Bivens’s treatment, see also James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275 (Vicki C. Jackson & Judith Resnik eds., 2010).

¹⁷² *Id.* at 280-81; see also *Bivens*, 403 U.S. at 398 (Harlan, J., concurring in the judgment).

¹⁷³ Pfander, *supra* note 171, at 281.

¹⁷⁴ *Bivens*, 403 U.S. at 389.

court's decision in *Bell v. Hood* on remand,¹⁷⁵ and the Second Circuit affirmed.¹⁷⁶

To grasp how the *Bivens* question was understood by the Supreme Court in *Bivens*, it is best to begin with the brief filed by President Nixon's Solicitor General, Erwin Griswold, who argued on behalf of the United States against recognition of a federal damages remedy.¹⁷⁷ Griswold presented the question to the Court as whether an "additional" damage remedy should be recognized.¹⁷⁸ He argued that a federal right of action for damages for violation of the Fourth Amendment was inconsistent with original intent.¹⁷⁹ According to the Solicitor General, the Founders contemplated that injuries suffered as a result of acts of federal officials that contravened the Amendment would be compensated through common law actions such as trespass.¹⁸⁰ As explained in Part II, the breach of the Constitution operated to defeat any defense of official justification, thereby leaving the official open to common law remedies. The Solicitor General added that the "plan envisaged when the Bill of Rights was passed" was that a person injured by a breach of the Constitution "may proceed . . . by a suit at common law . . . for damages for the illegal act."¹⁸¹ Thus, the original intent was not that a damages remedy would be unavailable until enacted by Congress; to the contrary, the Founders contemplated that a damages remedy *would* be available, namely, the remedy furnished by the common law. Solicitor General Griswold regarded the common law remedy not merely as the default damages remedy, but also as the constitutionally contemplated one.

Griswold conceded that judicial recognition of a federal remedy would be appropriate if such a remedy were "indispensable for vindicating constitutional rights."¹⁸² It was on this ground, in his view, that federal law had come to recognize the availability of injunctive relief for constitutional violations by state and federal officials.¹⁸³ But recognition of a federal damages remedy was not necessary, he argued, because common law

¹⁷⁵ *Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics*, 276 F. Supp. 12, 15 (E.D.N.Y. 1967).

¹⁷⁶ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 726 (2d Cir. 1969).

¹⁷⁷ Brief for the Respondents, *Bivens*, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900.

¹⁷⁸ *Id.* at 40.

¹⁷⁹ *Id.* at 4-6.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 12 (citation omitted).

¹⁸² *Id.* at 24.

¹⁸³ *Id.* at 17.

remedies were available.¹⁸⁴ The Solicitor General acknowledged that common law remedies were sometimes inadequate, but he contended that the federal remedy would suffer from the same deficiencies, and he noted that the inadequacies could, in any event, be addressed within the common law model, as “growth and improvement have always been the great tradition of the common law.”¹⁸⁵ In short, the existence of common law remedies was central to the government’s argument against recognizing a federal cause of action directly under the Constitution in two important ways: First, it was the damages remedy envisioned by the Framers. Second, the existence of the state remedy made a federal remedy unnecessary.

The Court in *Bivens* similarly took for granted the existence of common law damages remedies and understood the question before it as whether the common law remedy should remain the exclusive one. It rejected the government’s argument for such exclusivity as “unduly restrictive,” and it recognized an “independent” federal claim affording damages to victims of Fourth Amendment violations by federal officials, “regardless of whether the State in whose jurisdiction [the federal] power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.”¹⁸⁶ The Court, and Justice Harlan in his concurrence, also rejected the government’s argument that a federal remedy need be “indispensable” for vindicating the Fourth Amendment.¹⁸⁷ In Justice Harlan’s words, the question instead was whether damages were “‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.”¹⁸⁸

The conception of the *Bivens* question as whether existing common law remedies should be supplemented with a federal one is perhaps most clearly reflected in the opinions of the dissenting Justices, who would have declined to recognize a federal cause of action on the ground that creating such remedies is a legislative function. In their view, the majority was usurping the power of Congress.¹⁸⁹ This rationale is consistent only with a determination to leave preexisting common law remedies in place. After all, a decision to displace state law and replace it with nothing is just as much an act of judicial legislation as a decision to displace state law and replace it

¹⁸⁴ *Id.* at 40.

¹⁸⁵ *Id.*

¹⁸⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391-92, 395 (1971).

¹⁸⁷ *Id.* at 392; *see also id.* at 406-07 (Harlan, J., concurring in the judgment).

¹⁸⁸ *Id.* at 407 (Harlan, J., concurring in the judgment).

¹⁸⁹ *See supra* notes 67-68.

with something.¹⁹⁰ In the absence of congressional action, federal courts engage in judicial lawmaking when they decide to displace state law, whether because of a need for uniformity or for another reason. Having taken that step, the decision to replace a state law cause of action with a federal cause of action is no more an act of lawmaking or a usurpation of the role of the legislature than the decision to replace it with no cause of action at all. Leaving victims of constitutional violations with neither a federal cause of action nor their preexisting common law causes of action would be as much a usurpation of legislative power as providing them with a substitute federal cause of action.

To be clear, we do not argue that a decision that a state law cause of action is displaced as a matter of federal common law would in no circumstances be justified.¹⁹¹ The point is merely that such a decision cannot rest on a claimed lack of legislative power. A lack of legislative power can only support a decision to leave the status quo in place, and, as discussed above, that status quo at the time *Bivens* was decided was that federal officers who violated the Constitution were subject to common law remedies. The reluctance of the dissenting Justices in *Bivens* to engage in judicial lawmaking is thus consistent only with the view that state law should continue to govern. For those Justices, the supplementation or supplanting of such actions was a decision for Congress, not the courts.

The Justices in the majority held a less restrictive view of the courts' discretion to make law in the absence of congressional action.¹⁹² It is not

¹⁹⁰ Henry Hart made this point forcefully (albeit in a different context) while noting that the Supreme Court had overlooked the point in certain cases. See Hart, *supra* note 104, at 534 & n.179. Hart wrote in 1954 that this "trend" (that is, the trend reflected in the cases overlooking our point in the text) had "never been adequately thought through, and can be expected to pass." *Id.* at 534. Lamentably, his prediction has not proved entirely accurate. See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643-47 (1981) (recognizing that the antitrust laws preempt state rules of contribution but holding that federal courts lack the power to create a federal right of contribution for antitrust cases). But the Supreme Court's occasional lapses do not undermine the validity of Hart's point, which we embrace here. *But cf.* *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011) (noting that where federal law governs and "where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress").

¹⁹¹ As discussed in Part IV, *infra*, however, the Constitution itself may in certain circumstances require the availability of a damages remedy.

¹⁹² Their decision to recognize a cause of action not explicitly authorized by Congress would not have been an act of lawmaking had they held that the Constitution implicitly *required* these remedies. As previously discussed, the Solicitor General seemed to argue that the Constitution required the availability of common law remedies as well as any additional remedies necessary for vindicating the Constitution. The *Bivens* Court did not reject this view, but neither did it suggest that the Constitution required the damages remedy the Court recognized insofar as it went

entirely clear from the opinion whether these Justices understood the federal remedy they were creating as preemptive of or supplemental to the common law remedy. The majority never stated that it viewed the federal remedy as exclusive. It did assert that the interests underlying trespass law were sometimes hostile to those underlying the Fourth Amendment, but the examples it gave of such hostility mainly involved situations in which the common law underprotected Fourth Amendment interests.¹⁹³ If underprotection was the problem, then the solution would be to supplement the state cause of action with a federal cause of action, not to preempt the state cause of action. Any concern that common law liability would unduly restrict federal officials in the performance of their duties would have been addressed by those officials' "immun[ity] from liability by virtue of their official position"¹⁹⁴—an immunity that applies equally in common law and *Bivens* actions.¹⁹⁵

On the other hand, Justice Harlan's concurrence mentioned the benefits of uniformity and the undesirability of subjecting federal officials to "different rules of liability . . . dependent on the State where the injury occurs."¹⁹⁶ These considerations would support the conclusion that the *Bivens* action preempts preexisting common law damage remedies. Still, uniformity is not necessarily an overriding concern. The Federal Tort Claims Act, for example, exposes the federal government to liability under the laws of different states depending on where the injury occurred.¹⁹⁷ Thus, following the *Bivens* decision, one prominent contemporaneous scholar concluded that "the existence of a federal substantive cause of action in no way forecloses continued access to state tort remedies for those plaintiffs who would favor

beyond what was "indispensable for vindicating constitutional rights." *Bivens*, 403 U.S. at 406 (Harlan, J., concurring in the judgment) (citation omitted).

¹⁹³ See *id.* at 394-95 (majority opinion) (noting that trespass law is more lenient to individuals asserting authority to enter as private citizens rather than as government agents). *But cf.* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001) (noting that in *Bivens* the Court "found alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment" (quoting *Bivens*, 403 U.S. at 394)).

¹⁹⁴ *Bivens*, 403 U.S. at 397.

¹⁹⁵ See *id.* at 409 (Harlan, J., concurring in judgment) (noting "the very large element of federal law which must in any event control the scope of official defenses to liability," and citing pre-*Bivens* cases); see also *infra* Section III.C.

¹⁹⁶ *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

¹⁹⁷ See 28 U.S.C. § 1346(b)(1) (2006) (granting federal court jurisdiction over suits against the United States for harms committed by its employees, "in accordance with the law of the place where the act or omission occurred").

the state cause of action. . . . The federal remedy is independent, not preemptive, of the state common law causes of action.”¹⁹⁸

In any event, the important question for present purposes is not whether common law remedies remain available in a particular context after a federal cause of action has been recognized in that context, but rather whether common law actions are preempted in contexts in which a federal cause of action has not yet been recognized.¹⁹⁹ In other words, does *Bivens* hold that the liability of federal officials for damages is always exclusively a matter of federal law? Nothing in *Bivens* supports such a reading. The Court was careful to limit its holding to Fourth Amendment cases, and it expressed no views about causes of action for violations of other constitutional provisions.²⁰⁰ Further, the focus of the Justices, especially the dissenters, on whether the Court was usurping Congress’s power is consistent only with the conclusion that they regarded the alternative to recognizing a *Bivens* claim to be leaving the question of damages for constitutional violations by federal officers as they found it. As discussed earlier, federal officers were subject to common law actions under the status quo ante *Bivens*. Thus, after *Bivens*, the question for courts considering whether to “extend *Bivens* to new contexts” continued to be, as it was in *Bivens* itself, whether to recognize a federal damages remedy or instead to retain the common law as the exclusive basis for the damages remedy. The special factors that might counsel hesitation in recognizing a *Bivens* claim must therefore be factors that militate in favor of leaving the question of damages to another existing remedial regime, including state law, not factors that militate against any right to damages at all.

B. *After Bivens*

The Supreme Court’s subsequent cases addressing whether *Bivens* should be “extended to new contexts” are consistent with a conception of the *Bivens* question as “*Bivens* or state law.” Few of the subsequent cases dwell on the existence of common law damages remedies as an alternative to a federal cause of action, but not because common law remedies were

¹⁹⁸ Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540 (1972).

¹⁹⁹ As noted above, the “*Bivens* question” that is the focus of this Article is the question whether to extend *Bivens* to a new context. See *supra* notes 6 & 34.

²⁰⁰ See *Bivens*, 403 U.S. at 397 (“The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.”).

thought to be unavailable. As discussed below, the failure of those cases to focus on common law remedies stems from the fact that alternative federal remedies were available that were more appealing than those available under state law. Yet even these cases include language confirming that, as a general matter, common law remedies remained one alternative to a potential federal cause of action.

1. Initial Extensions of *Bivens*

Bivens was followed by two cases extending the federal cause of action to federal officials' violations of other constitutional provisions. In the first such case, *Davis v. Passman*, the Court recognized a federal cause of action for violation of the Due Process Clause of the Fifth Amendment.²⁰¹ The alleged violation of the Due Process Clause consisted of gender discrimination in staff hiring by a sitting Congressman.²⁰² The alternative of suing under state law was not given extensive consideration, but only because the plaintiff conceded that she "ha[d] no cause of action under Louisiana law."²⁰³

In the second case, *Carlson v. Green*, the Court recognized a federal cause of action against federal prison officials for violations of the Eighth Amendment's ban on cruel and unusual punishment.²⁰⁴ The plaintiff alleged that the defendants' failure to provide medical treatment to a prisoner who subsequently died reflected "deliberate[] indifferen[ce] to the prisoner's welfare."²⁰⁵ The district court had upheld a claim by the prisoner's mother under an Indiana wrongful death statute, but the statute placed severe limits on the amount of recovery.²⁰⁶ In holding that a federal cause of action existed, the Court did not question the availability of this state remedy. Its analysis did not focus extensively on the alternative of recovery under state law because a better alternative was available through the Federal Tort

²⁰¹ 442 U.S. 228, 248-49 (1979).

²⁰² *Id.* at 231.

²⁰³ *Id.* at 245 n.23 (quoting Brief for Petitioner at 19). The Court went on to suggest that a state cause of action might have been constitutionally unavailable, stating that "it is far from clear that a state court would have authority to effect a damages remedy against a *United States Congressman* for illegal actions in the course of his official conduct." *Id.* (emphasis added) (citing *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872)). The Court's doubts appear to have stemmed from the unique fact that the defendant was a U.S. Congressman; the Court was not suggesting that common law damages actions against federal officials were generally unavailable.

²⁰⁴ 446 U.S. 14, 20 (1980).

²⁰⁵ *Id.* at 16 & n.1.

²⁰⁶ *Id.* at 17 n.4.

Claims Act.²⁰⁷ The Court found even that alternative remedy to be inadequate for a variety of reasons, including the unavailability of punitive damages under the FTCA.²⁰⁸ It was left to Justice Rehnquist, in dissent, to confirm that the alternative to recognizing a federal right of action is generally to leave the common law as the exclusive source of the damages remedy. “It thus would seem,” he wrote, “that the most reasonable explanation for Congress’ failure explicitly to provide for damages in *Bivens* actions is that Congress intended to leave this responsibility to state courts in the application of their common law.”²⁰⁹

2. Subsequent Retrenchment

Following *Carlson v. Green*, a series of decisions declined to extend *Bivens* to new contexts. These decisions, too, are—with one ambiguous exception—consistent with the proposition that the alternative to recognizing a *Bivens* claim is to leave the question of damages to the common law. In most of these cases, as in both *Davis* and *Carlson*, the alternative of a common law remedy did not receive prominent consideration. But, as in *Carlson*, the failure to focus on state tort remedies stemmed from the fact that Congress had established an alternative federal remedial scheme. For example, in *Chappell v. Wallace*²¹⁰ and *United States v. Stanley*,²¹¹ the Court declined to recognize a *Bivens* action in the military context at least in part because Congress had established “a comprehensive internal system of justice to regulate military life.”²¹² Similarly, in *Bush v. Lucas*²¹³ and

²⁰⁷ See *id.* at 20 (“In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in the complaint still have an action under [the] FTCA against the United States *as well as* a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.” (emphasis added)).

²⁰⁸ See *id.* at 21-22 (discussing the inadequacy of an FTCA suit as a deterrent because of the statutory prohibition on punitive damages, whereas, in a *Bivens* suit, “[p]unitive damages are ‘a particular remedial mechanism normally available in the federal courts’” (quoting *Bivens*, 403 U.S. at 397)). The Court was also concerned with a lack of uniformity under the FTCA, and noted that the FTCA cause of action “exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward,” whereas “it is obvious that the liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules.” *Id.* at 23. This analysis would also render the *Bivens* action preferable to an action under the common law.

²⁰⁹ *Id.* at 42 (Rehnquist, J., dissenting). His reference to state courts overlooked the fact that federal officers typically have a right to remove state law claims against them to federal court.

²¹⁰ 462 U.S. 296 (1983).

²¹¹ 483 U.S. 669 (1986).

²¹² *Id.* at 679 (quoting *Chappell*, 462 U.S. at 302). These decisions—especially *Stanley*—are sometimes invoked by the lower courts to support broader preclusion of *Bivens* remedies in military and national security cases. See, e.g., *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C.

Schweiker v. Chilicky,²¹⁴ the Court focused on the alternative remedial scheme that Congress had created to address the sorts of injuries that the plaintiffs had suffered.²¹⁵ Where Congress has conferred remedies, the key question is whether Congress has implicitly or explicitly precluded other remedies.

Even so, the Court did note in some of these cases that common law remedies are ordinarily available. For example, in *Chappell*, the Court distinguished a nineteenth-century precedent, *Wilkes v. Dinsman*,²¹⁶ on the ground that it “involved a well-recognized common law cause of action by a marine against his commanding officer for damages suffered as a result of punishment,” and thus the plaintiff “did not ask the Court to imply a new kind of cause of action.”²¹⁷ And in *Bush*, the Court recognized that *Bivens*

Cir. 2012) (invoking *Stanley* as evidence that the Supreme Court has “preclude[d] *Bivens* claims even . . . where damages are the sole remedy by which the rights of plaintiffs and their decedents might be vindicated”). But a critical part of the reasoning in *Stanley* was that the plaintiff was seeking to challenge his treatment while he was a servicemember. As the Court had already established under the FTCA in *Feres v. United States*, there are special reasons to prevent servicemembers from using the courts to vindicate claims against their (former) superior officers, see 340 U.S. 135, 143-44 (1950)—reasons the *Chappell* and *Stanley* courts recognized as “special factors,” 483 U.S. at 679; 462 U.S. at 298.

These “special factors” apply even to claims, like the FTCA claim in *Feres*, that are otherwise provided for by statute (and they appear to apply in state court, as well). See *supra* notes 88-89 and accompanying text. As Justice Scalia explained, the key in *Stanley* was that the “‘special factors counseling hesitation,’—‘the unique disciplinary structure of the Military Establishment and Congress’s activity in the field— . . . require abstention in the inferring of *Bivens* actions as *extensive* as the exception to the FTCA established by *Feres* and *United States v. Johnson*.” *Stanley*, 483 U.S. at 683-84 (emphasis added) (citations omitted) (quoting *Chappell*, 462 U.S. at 304). In other words, the basis for not inferring a *Bivens* remedy was a unique immunity doctrine applicable to disputes between servicemembers and their superiors that the Court had already established for all claims arising under state or federal law. See *Vance v. Rumsfeld*, 701 F.3d 193, 228 (7th Cir. 2012) (en banc) (Williams, J., dissenting) (“*Stanley* describes its principal point unambiguously: Members of the military cannot invoke *Bivens* for injuries arising out of ‘activity incident to service.’ Indeed, the Court reserved the possibility of *Bivens* suits by servicemen against military officials in other contexts.” (quoting *Stanley*, 483 U.S. at 681)).

²¹³ 462 U.S. 367 (1983).

²¹⁴ 487 U.S. 412 (1988).

²¹⁵ See *id.* at 429 (declining to extend a remedy for wrongful termination of benefits because Congress had “addressed the problems”); *Bush*, 462 U.S. at 388 (“[The question] is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”).

²¹⁶ 48 (7 How.) 89 (1849), *after remand*, 53 U.S. (12 How.) 390 (1851).

²¹⁷ *Chappell*, 462 U.S. at 305 n.2. The Court also noted that “since the time of *Wilkes*, significant changes have been made establishing a comprehensive system of military justice,” *id.*, thereby suggesting that the common law remedy recognized in *Wilkes* may subsequently have been preempted by congressional action.

had “reject[ed] the argument that a state tort action in trespass provided the *only* appropriate judicial remedy.”²¹⁸

When the *Bivens* issue has arisen in a context in which Congress had not affirmatively provided an alternative federal remedial scheme, the availability of common law damage remedies has featured prominently in the Court’s analysis. For example, in *Correctional Services Corp. v. Malesko*, the Court declined to recognize a *Bivens* action against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons.²¹⁹ It relied heavily on the fact that prisoners injured by private corporations “enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities.”²²⁰ And in *Wilkie v. Robbins*, the Court declined to recognize a *Bivens* claim in part because the plaintiff “had a civil remedy in damages for trespass” against the offending federal officials.²²¹ The *Wilkie* Court cited *Malesko*’s similar reliance on the existence of “state tort remedies in refusing to recognize a *Bivens* remedy.”²²² More recently, in *Minneci v. Pollard*, the Court relied on the availability of state tort remedies in declining to recognize a *Bivens* action against employees of privately run prisons.²²³

Some post-*Carlson* opinions include language or reasoning that is in tension with the Court’s understanding that the *Bivens* question poses a choice between federal and state remedies. In *Stanley*, for example, Justice Brennan’s dissenting opinion seemed to equate the absence of a *Bivens* remedy with the existence of absolute immunity from liability.²²⁴ So understood, the alternative to a *Bivens* remedy would indeed be no remedy at all, as an official’s absolute immunity from suit would defeat both a *Bivens* remedy and any common law action. If the *Bivens* question were understood as “*Bivens* or state law,” the absence of a *Bivens* action would not amount to an absolute immunity from liability in damages, as the official could still be

²¹⁸ *Id.* at 375 (emphasis added).

²¹⁹ 534 U.S. 61, 72-73 (2001).

²²⁰ *Id.* The Court presumably meant that this parallel tort remedy was not available to prisoners housed in government facilities because the prison itself, or the government, is not suable. The Court had earlier distinguished between suits against the United States or the Bureau of Prisons and suits against the individuals who operate the prison. *See id.* at 72.

²²¹ 551 U.S. 537, 551 (2007).

²²² *Id.*

²²³ 132 S. Ct. 617, 624-26 (2012).

²²⁴ *See* 483 U.S. 669, 692 (Brennan, J., concurring in part and dissenting in part) (“The practical result of this decision is absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military.”); *id.* at 691-92 (“As a practical matter, the immunity inquiry and the ‘special factors’ inquiry are the same; the policy considerations that inform them are identical, and a court can examine these considerations only once.”).

liable under the common law. Since Justice Brennan was the author of *Bivens*, in which he clearly distinguished the existence of a *Bivens* action from the presence of official immunity,²²⁵ he presumably did not mean to suggest that the absence of a *Bivens* action always renders federal officials absolutely immune from damages relief. Presumably, he meant instead that the failure to recognize a *Bivens* action in the particular context of the *Stanley* case would be tantamount to recognizing an absolute immunity for the particular federal officials involved. Perhaps Justice Brennan's analysis here assumed the unavailability of common law remedies in the unique context of suits by servicemembers for the reasons underlying the Court's earlier decision in *Feres v. United States*.²²⁶

More puzzling is the Supreme Court's statement in *FDIC v. Meyer* that, "by definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right."²²⁷ On the surface, this statement appears to deny the possibility that the common law could be a "source of liability" for injuries caused by federal officials through conduct that violates the plaintiff's federal constitutional rights. As we have seen, however, common law actions such as trespass were traditionally the "source of liability" for federal officials alleged to have violated the Constitution.²²⁸ Because the statement, if read literally, is so clearly incorrect, an alternative reading should be preferred, if available.

The Court's statement in *Meyer* comes in a part of the opinion holding that the FDIC's entitlement to immunity had been waived by its organic statute.²²⁹ The proposition in question was central to the Court's analysis of the relationship between the FDIC's organic statute and several provisions of the FTCA. Section 2679(a) of the FTCA provides that agencies are not suable under their organic statutes for "claims which are cognizable under section 1346(b)" of the FTCA.²³⁰ Section 1346(b), in turn, confers jurisdiction on the federal courts over damages claims against the United States for injuries caused by federal employees within the scope of their employment "under circumstances where the United States, if a private person, would be

²²⁵ In *Bivens*, the Court held that a federal cause of action existed, yet it remanded for consideration of whether the defendants were entitled to immunity. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971).

²²⁶ See *Stanley*, 483 U.S. at 679; see also *id.* at 683-84 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

²²⁷ 510 U.S. 471, 478 (1994).

²²⁸ See *supra* Part II.

²²⁹ See *Meyer*, 510 U.S. at 475 ("By permitting the [FDIC] to sue and be sued, Congress effected a 'broad' waiver of the [FDIC's] immunity from suit.").

²³⁰ 28 U.S.C. § 2679(a) (2006).

liable to the claimant in accordance with the law of the place where the act or omission occurred.”²³¹ The Court concluded that Meyer’s claim was not cognizable under § 1346(b), and that the waiver of immunity in its organic statute was consequently applicable, because the source of the liability in Meyer’s case was federal, not state, law.²³² Hence, the United States, if a private person, would not be liable under the law of the state where the act or omission occurred.

If the Court were understood to be saying that state law “by definition” cannot provide the source of liability for claims alleging constitutional deprivations, the statement would be contradicted by the long history of state tort remedies against state and federal officials whose conduct was deemed to be unauthorized because it violated the Constitution. The Court should instead be understood to have stated that a complaint asserting a *federal* cause of action for violation of the Constitution “by definition” does not set forth a state law claim. In other words, the Court should be understood to have said that a claim is not cognizable under § 1346(b) where the claimant *has framed his claim* as a federal constitutional claim. The point seems tautological, but the opinion’s language indicates that the Court was only making a definitional point. On this reading, if a claimant framed his claim as one of trespass, assault, or false imprisonment, the claim would fall within § 1346(b), and the agency would therefore be immune except to the extent authorized by the FTCA, even if the employee’s conduct also violated the Constitution.²³³

The alternative would be to read this statement as reflecting the Court’s view that, sometime after *Bivens*, state law remedies against federal officials had come to be preempted as a matter of federal common law. But such a reading is untenable for three reasons. First, the Court did not purport to be making a point about the current state of the law; rather, it purported to be making a point about the logic of constitutional claims.²³⁴ Second, as noted, in *Malesko* and *Wilkie*, both decided after *Meyer*, the Court recognized the possibility of common law tort claims for injuries resulting from acts by federal agents or officials that violated constitutional rights. Indeed, in *Westfall v. Erwin*, the Court clearly upheld the availability of state tort

²³¹ *Id.* § 1346(b)(1).

²³² *Meyer*, 510 U.S. at 477-78.

²³³ As discussed in the next Part, the Westfall Act would immunize the officer as well from liability on a common law tort theory, but as we also explain in Part IV, it is not clear that the Act was intended to immunize the officer when the plaintiff alleges a violation of the Constitution.

²³⁴ This conclusion follows from the Court’s declaration that “[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right.” *Meyer*, 510 U.S. at 478 (emphasis added).

remedies against federal officials.²³⁵ Although the focus of the Court's discussion in *Westfall* was the scope of the officials' immunity, the opinion left no doubt that state law causes of action were available. The *Westfall* case did not involve allegations of a constitutional violation, but there is little reason or support for barring state tort remedies when the federal official has violated a state duty of care *and* the Federal Constitution, but not when the official has violated a state duty of care but not the Federal Constitution. If a distinction were to be drawn according to whether the Constitution was violated, one would expect the presence of allegations of a constitutional violation to have cut the other way (as indeed Congress provided when it addressed the issue in the Westfall Act²³⁶).

Finally, such a broad preemption of state tort remedies would have constituted a massive exercise of legislative power, something that Justices disinclined to "extend" *Bivens* regard as the function of Congress, not of the courts. If the Court had meant to assert that this radical change had come about through federal common lawmaking sometime after the *Bivens* decision, one would have expected from the Justices in the majority in *Meyer* at least some analysis of this issue and a hint of criticism of such judicial activism.²³⁷ Moreover, if federal common law had somehow come to preempt the field of remedies against federal officials for constitutional violations, then an aversion to judicial lawmaking could no longer ground an unwillingness to recognize a federal cause of action: as already discussed, once the courts have held state law to be preempted as a matter of federal common law, a decision to replace state law with nothing is no less an act of judicial legislation than a decision to replace it with something. Yet the

²³⁵ See 484 U.S. 292, 296 (1988) (refusing to adopt the position that federal employees are immune from damage suits under state tort law), *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 Westfall Act § 2(a)(4) ("Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees."); Westfall Act § 2(a)(5) ("This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.").

²³⁶ See Westfall Act § 5 (excepting from its grant of immunity those actions that violate the Federal Constitution) (codified at 28 U.S.C. § 2679(b)(2)(A)); see also *supra* note 235.

²³⁷ Another alternative would be to read the Court's statement in *Meyer* as reflecting the Court's interpretation of the Westfall Act as preempting all state tort claims against federal officials. This reading is equally untenable. The Court in *Meyer* did not even cite the Westfall Act. Moreover, as noted in the text, the Court purported to be making a point about the logic of constitutional actions, not a point about the current state of the law.

Justices in the *Meyer* majority continue to assert that recognition of a *Bivens* claim would usurp the power of Congress.²³⁸

In summary, the Court's more recent cases determining whether to extend *Bivens* to new contexts do not deviate from its initial conceptualization of the *Bivens* question as "Bivens or (only) state law." Several decisions rely on the existence of state law remedies as a reason for declining to extend *Bivens*. Stray language in some opinions suggests, *at most*, that some Justices (and, on one occasion, the Court as a whole) have at times overlooked the fact that state tort remedies would generally remain available for federal officials' violation of the Constitution even if a *Bivens* action were not recognized. To read these statements as reflecting a never-explained and never-justified federal common law preemption of the field of remedies against federal officials for violation of the Constitution would be an unwarranted interpretation of ambiguous language.

Preemption of state tort remedies through *congressional* action would not be vulnerable to this particular criticism, and the Supreme Court in *Pollard* appears to have read the Westfall Act to have done just that.²³⁹ As we show in Part IV, however, if the Westfall Act preempts state tort remedies for federal officials' violations of constitutional rights, then it also rules out the courts of appeals' "hesitant" approach to the recognition of *Bivens* claims.

C. Federal Officials' Immunity from Liability for their Unconstitutional Acts

The foregoing analysis shows that, at least in theory, state law causes of action remained available at the time Congress passed the Westfall Act in 1988. But there remains the possibility that such remedies may have been effectively unavailable as a result of the operation of official immunity doctrines. Thus, before turning to the Westfall Act, we examine the scope of federal officials' immunity from common law tort claims as it stood in 1988, when the Westfall Act was passed. Although scholars have claimed that, by 1988, federal officials had come to enjoy absolute immunity from

²³⁸ See, e.g., *Malesko v. Corr. Servs. Corp.*, 534 U.S. 61, 68-69 (2001) (noting appropriateness of deference to Congress); *id.* at 75 (Scalia, J., concurring) (decrying the Court's previous creation of causes of action "implied" by the mere existence of a statutory or constitutional prohibition . . . since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress").

²³⁹ See *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) ("Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.").

common law actions,²⁴⁰ the cases actually confirm that such officials enjoyed, at most, a qualified immunity from common law actions seeking compensation for injuries resulting from their unconstitutional conduct.

As discussed in Part II, today most federal officials enjoy a qualified immunity from *Bivens* actions: they are immune if they did not violate clearly established federal law. This standard was articulated by the Court in *Harlow v. Fitzgerald*, decided in 1982.²⁴¹ Before *Harlow*, federal officials enjoyed immunity for conduct undertaken in good faith.²⁴² *Bivens* itself suggests that federal law enforcement officials sued on a common law tort theory for constitutional violations enjoyed no more than a qualified immunity: In explaining his agreement with the majority's recognition of a federal right of action, Justice Harlan noted that federal law would in any event govern federal officials' defenses to liability²⁴³—an apparent reference to those officials' immunity. Since Justice Harlan was making a point about the necessary role of federal law in suits against such officers in the event a federal right of action were not recognized, he must have meant that federal officers enjoyed such immunity from state law tort suits. He also must have understood the immunity to be a qualified one. If he and the other Justices in *Bivens* had believed that federal officers enjoyed an absolute immunity from state law tort suits—the only sort of suit recognized at the time—they would not have regarded the choice before them—as all of them, and the litigants, did—as “*Bivens* or (only) state law.”²⁴⁴

Although the pre-*Bivens* cases were not uniform, most are consistent with the view that qualified immunity was the rule and absolute immunity the exception, at least for federal officials of the sort involved in *Bivens*. As noted, the Court has long recognized that judges and prosecutors enjoy an absolute immunity.²⁴⁵ In *Barr v. Matteo*, the Court extended this absolute immunity to an additional (though uncertain) range of executive officials.²⁴⁶ Specifically, the *Barr* Court held that the head of an administrative agency enjoyed an absolute privilege from suit for defamation or libel for conduct

²⁴⁰ See, e.g., FALLON ET AL., *supra* note 68, at 1006-07 (“Prior to 1988, when a state law tort action was brought against a federal officer, federal common law had established a shield of absolute immunity from damages liability . . .”).

²⁴¹ 457 U.S. 800, 818 (1982).

²⁴² See *supra* note 124.

²⁴³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in the judgment).

²⁴⁴ See also *Butz v. Economou*, 438 U.S. 478, 505 (1978) (“Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute.”).

²⁴⁵ See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 43-47 (1972).

²⁴⁶ 360 U.S. 564, 574-76 (1959) (plurality opinion).

taken "within the outer perimeter of [his] line of duty," notwithstanding allegations in the complaint of malice.²⁴⁷ The Court declined to limit the privilege to cabinet officials, but it acknowledged that the immunity enjoyed by the head of an agency was "far broader than in the case of an officer with less sweeping functions."²⁴⁸ With respect to the case before it, the Court held that the official was immune from liability because his conduct "was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively."²⁴⁹

The lower courts had considerable difficulty applying the *Barr* standard. Many distinguished between "discretionary" and "ministerial" functions, but one prominent contemporaneous commentator noted that such a dichotomy is "at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result."²⁵⁰ Nevertheless, and consistent with *Barr's* recognition that officials exercising "less sweeping functions" enjoyed a narrower privilege, most of the lower courts found *Barr's* absolute privilege inapplicable to police and similar rank-and-file law enforcement officers. In *Bivens* itself, the Court did not reach the immunity question, although Justice Harlan, the author of the plurality opinion in *Barr*, expressed his belief that immunity would be inapplicable "with respect, at least, to the most flagrant abuses of official power."²⁵¹

On remand from the Supreme Court, the Second Circuit in *Bivens* held that the defendants were not entitled to the broad immunity recognized in *Barr*,²⁵² and concluded instead that they were entitled to a qualified privilege protecting them from liability for actions taken in good faith.²⁵³ In so holding, the court relied on prior decisions involving common law suits against federal officials and suits against state officials under 42 U.S.C. § 1983, without suggesting that the scope of immunity varied depending on

²⁴⁷ *Id.* at 575.

²⁴⁸ *Id.* at 573.

²⁴⁹ *Id.* at 575; *see also id.* ("It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty.").

²⁵⁰ Jaffe, *supra* note 123, at 218. Jaffe's thesis was that the immunity cases reflected an implicit "balancing of certain important factors," namely, "the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of the law." *Id.* at 219.

²⁵¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

²⁵² *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1345-47 (2d Cir. 1972).

²⁵³ *Id.* at 1347-48.

the source of the remedy being sought.²⁵⁴ Admittedly, the case law addressing which other types of federal officials were entitled to absolute immunity and which were entitled to qualified immunity, and for which sorts of claims, was in a highly unsettled state until the Court held in *Butz v. Economou* that, with very limited exceptions, executive officials sued for their unconstitutional conduct enjoyed only a qualified immunity.²⁵⁵ A few years after *Butz*, the Court brought additional certainty to this area of the law by holding in *Harlow* that qualified immunity protects federal officials only if their conduct was consistent with clearly established federal law. That is where the law of official immunity stood when Congress enacted the Westfall Act in 1988.

Nevertheless, the current edition of the *Hart and Wechsler* casebook, citing *Barr*, asserts that, “[p]rior to 1988, when a state law tort action was brought against a federal officer, federal common law had established a shield of absolute immunity from damages liability for actions within the ‘outer perimeter of [the official’s] line of duty.’”²⁵⁶ If the claim is that federal officials came to enjoy an absolute immunity from common law tort claims upon the Court’s decision in *Barr* in 1959, or soon thereafter, that position is contradicted by the authorities discussed above.²⁵⁷ Although a range of federal officials of uncertain scope enjoyed an absolute immunity, the immunity did not by any means apply to all—as *Barr* itself made clear.

²⁵⁴ See *id.* at 1346 (“[T]he common law has never granted police officers an absolute and unqualified immunity” (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967))); *id.* at 1347 (“[A] Federal officer . . . sued in tort at common law, should [not] be held to enjoy an immunity denied his state or territorial brother similarly situated.” (quoting *Carter v. Carlson*, 447 F.2d 358, 371 (D.C. Cir. 1971) (Nichols, J., concurring), *rev’d on other grounds*, 409 U.S. 418 (1973))); see also *Bethea v. Reid*, 445 F.2d 1163, 1165 (3d Cir. 1971) (emphasizing that *Bivens* reserved the applicable immunity for “enforcement agents”); *Anderson v. Nossner*, 438 F.2d 183, 194-95 (5th Cir. 1971) (reiterating the distinction between the absolute immunity of some officers and the qualified immunity of others); *Kelley v. Dunne*, 344 F.2d 129, 133 (1st Cir. 1965) (postal inspector not entitled to *Barr* immunity); *Hughes v. Johnson*, 305 F.2d 67, 70 (9th Cir. 1962) (holding federal game wardens not entitled to immunity from a trespass action alleging unconstitutional search, and distinguishing *Barr* as not involving allegations of constitutional violations); *Developments in the Law*, *supra* note 104, at 835 (“[L]ower ranking officers are severely restricted in the amount of judgment they are permitted to exercise without risking liability.” (citing cases)). *But cf.* *Norton v. McShane*, 332 F.2d 855, 859-60 & nn.5-6 (5th Cir. 1964) (relying on pre-*Barr* cases for the proposition that some federal law enforcement officers are entitled to absolute immunity even under *Barr*’s framework).

²⁵⁵ 438 U.S. 478, 507 (1978).

²⁵⁶ FALLON ET AL., *supra* note 68, at 1006-07 (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion)).

²⁵⁷ See also PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1421 (2d ed. 1973) (“Did not the Supreme Court decision in *Bivens* imply, notwithstanding reservation of the question, that federal officials perpetrating an unconstitutional search or seizure were not totally immune to liability for damages?”).

If the claim is instead that, sometime *between* the *Bivens* decision and the enactment of the Westfall Act, federal officials came to enjoy an absolute immunity from state tort claims, albeit not from the federal *Bivens* action, it is contradicted by the Supreme Court decisions discussed below.

The claim that by 1988 federal officials had come to enjoy an absolute immunity from state tort claims clearly conflicts with at least one Supreme Court decision (and a unanimous one at that)—*Westfall v. Erwin*, in which the Court held that officials who do not exercise discretionary functions do not enjoy any such immunity.²⁵⁸ But *Westfall* is the decision that precipitated the enactment of the Westfall Act, the purpose of which, according to Congress, was to restore the law of immunity to where it stood before the Court's decision, which Congress regarded as erroneous.²⁵⁹ Of course, the Court in *Westfall* may have correctly applied existing law, and Congress may have been mistaken about the state of the prior law. Nevertheless, given that Congress's intent was to restore what it regarded as the law that predated what it regarded as an erroneous Supreme Court decision, in interpreting the Westfall Act we must assume that the Court's holding in *Westfall* was mistaken.

But what was the error in *Westfall* that Congress intended to correct? For present purposes, the important aspect of *Westfall* is one it shares with *Barr v. Matteo*²⁶⁰: neither case involved conduct by a federal official in violation of the Constitution. We argue in Part IV that the Westfall Act is best understood to have preempted state tort actions against federal officials who did not violate the Constitution. Here, we show that the Supreme Court had clearly held, in the years immediately preceding the Westfall Act, that only federal officials who were not alleged to have violated the Constitution enjoyed an absolute immunity from state tort suits. With the exception of prosecutors and other quasi-judicial officials,²⁶¹ federal officials enjoyed only a qualified immunity from liability for their unconstitutional conduct. Thus, to the extent that the Westfall Act was intended to restore the pre-*Westfall* law, it must have been intended to confirm the unavailability

²⁵⁸ See 484 U.S. 292, 297-98 (1988) (“[A]bsolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature.”), *superseded by statute*, Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2679(b)).

²⁵⁹ See H.R. REP. NO. 100-700, at 4 (1988) (“The functional effect of H.R. 4612 is to return Federal employees to the status they held prior to the *Westfall* decision.”).

²⁶⁰ 360 U.S. 564. This case contains the “outer perimeter” language quoted by FALLON ET AL., *supra* note 68, at 1006-07. See 360 U.S. at 575 (plurality opinion); see also *supra* note 256 and accompanying text.

²⁶¹ As discussed above, certain categories of officials, such as judges and prosecutors, enjoyed an absolute immunity from certain types of claims. See *supra* notes 111-18 and accompanying text.

of state tort remedies in cases not alleging a violation of the Constitution—the sorts of cases exemplified by *Westfall* and *Barr v. Matteo*.²⁶²

The most thorough post-*Bivens*, pre-*Westfall* Act discussion of the scope of the immunity enjoyed by federal executive officials from liability for their constitutional violations—and the last word on the subject before the enactment of the *Westfall* Act (apart from the *Westfall* decision itself)—is found in *Butz v. Economou*.²⁶³ The plaintiff in *Butz* had sued a number of officials of the Department of Agriculture, raising *Bivens* claims as well as common law tort claims such as abuse of process, malicious prosecution, invasion of privacy, negligence, and trespass.²⁶⁴ The district court had dismissed the claims, citing the “outer perimeter” language from *Barr*.²⁶⁵ The Supreme Court reversed, holding that the officials were entitled only to qualified immunity.²⁶⁶ Although *Butz* is sometimes read to have held that federal officials are entitled to qualified immunity from *Bivens* claims but absolute immunity from state law claims,²⁶⁷ the opinion actually establishes that qualified—not absolute—immunity applies to state law claims in which the defendant is alleged to have violated the Constitution, *regardless* of the legal basis of the remedy being sought.

The Court in *Butz* began by distinguishing *Barr v. Matteo*, on which the district court and the defendant had principally relied.²⁶⁸ *Barr*, the Court noted, did not involve a claimed violation of the Constitution. Instead, the issue in *Barr* was whether the defendant official could be held liable for conduct “otherwise within the official’s authority” if he had acted with malice.²⁶⁹ The Court in *Barr* rejected such liability.²⁷⁰ But, the *Butz* Court stressed, “quite a different question would have been presented [in *Barr*]

²⁶² See also 28 U.S.C. § 2679(b)(2)(A) (2006) (exempting actions “brought for a violation of the Constitution” from the application of the provision otherwise rendering the FTCA the exclusive remedy (and thereby preempting state law) for the torts of federal officials); *Hui v. Castaneda*, 130 S. Ct. 1845, 1851 (2010) (“The *Westfall* Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims Notably, Congress also provided an exception for constitutional violations.” (citing 28 U.S.C. § 2679(b)(2)(A))).

²⁶³ 438 U.S. 478 (1978).

²⁶⁴ *Id.* at 482–83, 483 n.5.

²⁶⁵ See *id.* at 483–84 (“The District Court . . . held that the individual defendants would be entitled to immunity if they could show that ‘their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.’” (citation omitted)).

²⁶⁶ *Id.* at 507.

²⁶⁷ See, e.g., *Martin v. D.C. Metro. Police Dep’t*, 812 F.2d 1425, 1428 n.11 (D.C. Cir. 1987) (noting that there was a “distinction indicated (but not explained) in *Butz* between a federal official’s absolute immunity from common law claims and qualified immunity from constitutional claims”).

²⁶⁸ *Butz*, 438 U.S. at 487.

²⁶⁹ *Id.* at 488.

²⁷⁰ *Id.*

had the officer ignored an express . . . constitutional limitation on his authority."²⁷¹ To recognize absolute immunity in the latter situation would, according to the Court, contradict Supreme Court decisions stretching back to the beginning of the Republic.²⁷² Notwithstanding the immunity that federal officials otherwise enjoyed, the Court, in well-known cases such as *Little v. Barreme*,²⁷³ had recognized that "[a] federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts."²⁷⁴ Although *Little v. Barreme* involved conduct exceeding the scope of authority as set forth in statutes, the Court noted in *Butz* that the principle applied equally to conduct that was outside the official's authority because it violated the Constitution.²⁷⁵ "Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense."²⁷⁶

Barr and *Spalding v. Vilas*,²⁷⁷ upon which *Barr* had relied,²⁷⁸ were entirely consistent with this older line of cases. Indeed, "[i]f any inference is to be drawn from *Spalding* . . . it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute."²⁷⁹ Although *Barr* extended the immunity somewhat beyond *Spalding*, the important point for the Court in *Butz* was that "[t]he liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or *Spalding*."²⁸⁰ Thus, neither case supports absolute immunity in such circumstances.

In distinguishing *Barr* and *Spalding* throughout the opinion, the language used by the Court in *Butz* encompassed not just *Bivens* claims, but any claim based on unconstitutional conduct. Thus, the Court wrote that "*Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of

²⁷¹ *Id.* at 489.

²⁷² *See id.* ("*Barr* did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his power.>").

²⁷³ 6 U.S. (2 Cranch) 170 (1804).

²⁷⁴ *Butz*, 438 U.S. at 489-90.

²⁷⁵ *Id.* at 490.

²⁷⁶ *Id.* at 490-91.

²⁷⁷ 161 U.S. 483 (1896).

²⁷⁸ *See Barr v. Matteo*, 360 U.S. 564, 570-72 (1959) (plurality opinion).

²⁷⁹ *Butz*, 438 U.S. at 494.

²⁸⁰ *Id.* at 495.

fairness embodied in the Constitution.”²⁸¹ The Court furthermore explained that

neither [*Barr* nor *Spalding*] purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.²⁸²

Each time the Court described the type of case to which absolute immunity did not extend, it referred to the type of conduct in which the defendant engaged—specifically, whether the conduct exceeded authority, including by violating the Constitution—not whether the cause of action asserted was based on federal or state law.²⁸³ In the Court’s view, suits based on unconstitutional conduct were just a subset of a larger set of cases not subject to absolute immunity, namely, suits in which the officer exceeded the scope of his authority.²⁸⁴ The Court thus cannot be taken to have limited its holding to *Bivens* claims, as suits based on conduct that exceeded the officer’s statutory authority but did not violate the Constitution cannot give rise to a *Bivens* claim.

Although the Court’s conclusion that qualified immunity, not absolute immunity, applies to suits seeking state tort remedies for conduct in violation of the Constitution is clear enough from the foregoing parts of its analysis, the Court removed all doubt in a later footnote addressing that very question. After discussing the Court’s earlier holding in *Scheuer v. Rhodes* that high-level state executive officials enjoy only a qualified immunity from claims under 42 U.S.C. § 1983,²⁸⁵ Justice White wrote for the Court in *Butz*:

The Government argued in *Bivens* that the plaintiff should be relegated to his traditional remedy at state law. “In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals.” Although, as this

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See id.* at 490-96.

²⁸⁴ *See id.* at 495.

²⁸⁵ *See Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (“[A] qualified immunity is available to officers of the executive branch of [state] government . . .”).

passage makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a *Scheuer* immunity.²⁸⁶

The Court here was specifically addressing claims brought against federal officials on a common law tort theory, which, as it explained, and as we discussed in Part II, were the “traditional” means of obtaining damages against federal officials who had violated the Constitution. This footnote confirms the conclusions we reached above regarding the availability of state tort suits post-*Bivens*: neither *Bivens* itself nor any decisions after it eliminated such claims. The footnote also shows that, as late as 1978, the Court viewed the immunity issue in such “traditional” suits against federal officials who had violated the Constitution as a choice between qualified immunity and no immunity at all. In *Butz*, the Court opted for qualified immunity.

The only ambiguity in the above analysis is whether the views the Court expressed in *Butz* regarding the scope of the immunity enjoyed by federal officials in state tort suits alleging constitutional violations were dicta or holding. The Court’s reasoning in deciding that the *Bivens* claims were only subject to a qualified immunity extends equally to state tort suits alleging unconstitutional conduct. The inapplicability of absolute immunity in *Bivens* claims was deduced from the broader proposition that such immunity does not apply when the officer exceeds his authority. As the Court has often said, a decision’s holding encompasses the legal propositions that formed part of the Court’s reasoning in reaching its judgment in the case.²⁸⁷

On the other hand, in another footnote, the Court seemed to limit its holding to “constitutional claims.”²⁸⁸ As noted above, the plaintiff in *Butz* brought both state tort claims as well as *Bivens* claims. After noting that both the District Court and the Court of Appeals in *Butz* had focused on the “constitutional claims,” the Supreme Court wrote that “[t]he argument before us . . . has focused on respondent’s constitutional claims, and our holding is so limited.”²⁸⁹ Even if the state law claims were not technically before the Court, however, the fact remains that the Court derived its holding regarding *Bivens* claims from a broader principle applicable to any claims alleging conduct by federal officials exceeding their authority. Thus,

²⁸⁶ 438 U.S. at 507 n.34 (citation omitted).

²⁸⁷ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”).

²⁸⁸ *Butz*, 438 U.S. at 495 n.22.

²⁸⁹ *Id.*

in leaving open the scope of the immunity enjoyed by federal officials from state law suits alleging constitutional violations, the Court was likely leaving open whether such officials were entitled to qualified immunity or no immunity at all—the options the Court referred to in the other footnote discussed above.²⁹⁰ In any event, if the views expressed by the Court in *Butz* are dicta rather than holdings, they are reasoned dicta regarding the very question under discussion. *Butz* was the Supreme Court's last word on the scope of federal officials' immunity from state tort claims alleging constitutional violations before the *Westfall* decision and then the Westfall Act. The Court could hardly have stated more clearly that the immunity enjoyed by federal officials in such circumstances was, at best, a qualified one.²⁹¹

As noted, the *Butz* Court did not resolve the scope of the immunity enjoyed by federal officials if no violation of federal law was alleged. That issue appears to have been settled, albeit indirectly, a few years later in *Harlow v. Fitzgerald*.²⁹² The Court in *Harlow* self-consciously refashioned the qualified immunity enjoyed by federal executive officials, such that they are immune from liability to the extent that they do not violate clearly established federal law.²⁹³ Although the Court did not discuss suits against federal officials under state tort law, it is clear after *Harlow* that such a suit can succeed only if the official has actually violated federal law. A tort suit of the kind involved in *Barr* or *Spalding*, where no violation of federal law was alleged, can never meet the qualified immunity standard articulated in *Harlow*, because there can never be a violation of “clearly established” federal law if there is no allegation that federal law was violated in the first place.

²⁹⁰ *Id.* at 507 n.34.

²⁹¹ The *Butz* Court noted elsewhere that, “[u]nless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.” *Id.* at 507-08. We do not think the Court can be taken to be saying here that nonfederal causes of action were wholly unavailable against federal officials based on their unconstitutional conduct. The latter claim is directly contradicted by the Court's statement, in a footnote coming just a few lines before, that federal officials sued by “traditional means” (meaning through common law rights of action) should enjoy qualified immunity. *Id.* at 507 n.34. In our view, the Court's statement about motions to dismiss was directed at a different point—i.e., why, despite the Court's rejection of absolute immunity, “[i]nsubstantial” *Bivens* claims “can be quickly terminated by federal courts.” *Id.* at 507; see also *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (noting the rule of prior cases that a claim may be dismissed for want of jurisdiction when it “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous”).

²⁹² 457 U.S. 800 (1982).

²⁹³ See *id.* at 818 (“[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

So understood, *Harlow's* new formulation of "qualified" immunity confirms that federal officials performing discretionary functions actually enjoy absolute immunity from state tort suits in the absence of an allegation that the official violated federal law. But, except in cases implicating specific executive functions, where the suit alleges a violation of the Constitution or other federal law, the immunity of the federal official is a qualified one, protecting the officer only if the federal law that he violated was not clearly established.

IV. THE WESTFALL ACT

The nature of the *Bivens* question as a choice between a federal or a state source for the right of action against federal officials for constitutional violations—and the error of the lower courts in cases like *Arar* in posing the question as "*Bivens* or nothing"²⁹⁴—would be rather clear-cut were it not for Congress's enactment of the Westfall Act in 1988.²⁹⁵ As noted above, the prevailing understanding of the Westfall Act, now endorsed by the Supreme Court, is that it preempts *all* nonfederal remedies against federal employees acting within the scope of their employment, including nonfederal remedies for constitutional violations.²⁹⁶

In our view, the Westfall Act can be read as preserving not only *Bivens* actions but also state law remedies against federal officials who have violated the Constitution. If so, then the choice before a court deciding whether to recognize a *Bivens* claim continues to be between a federal and a state remedial regime, and the national security concerns that drove the court in *Arar* to decline to recognize a *Bivens* claim should actually cut in favor of a federal remedial regime.

However, we recognize that the Westfall Act has come to be read as preempting all nonfederal remedies against federal officials acting within the scope of their employment. In our view, however, if the Westfall Act is interpreted this way, it also rules out the courts of appeals' recent "hesitant" approach to the recognition of *Bivens* claims. Indeed, the Act, so construed, provides substantial support for a robust approach to the recognition of *Bivens* claims.

Because the Westfall Act was an amendment to the FTCA, this Part opens with a brief survey of the history of that statute and describes the

²⁹⁴ See *supra* Introduction & Section I.A.

²⁹⁵ Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 28 U.S.C. (2006)).

²⁹⁶ See *supra* text accompanying note 23.

enactment of the Westfall Act and the statute's interaction with the rest of the FTCA. It then explains why the Westfall Act does not support the radical transformation of the *Bivens* question reflected in cases like *Arar*.

A. *The FTCA, Common Law Remedies, and the Westfall Act*

Others have carefully explored the background of the FTCA,²⁹⁷ as well as its legislative history and jurisprudence,²⁹⁸ and so we keep our discussion brief.

The FTCA for the first time waived the sovereign immunity of the federal government for most nonmaritime torts.²⁹⁹ To that end, the FTCA as enacted in 1946 authorized civil actions against the United States for monetary relief “on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,” under circumstances in which “a private person[] would be liable to the claimant . . . in accordance with the law of the place where the act or omission occurred.”³⁰⁰

As originally enacted, the FTCA expressly exempted intentional torts.³⁰¹ But neither the original statute, as enacted eight years after *Erie*, nor any of its many amendments between 1947 and 1970, purported to affect the availability of state tort remedies against individual federal officers. In 1974, after (and arguably in light of) *Bivens*, Congress authorized a remedy against the United States for certain intentional torts committed by federal

²⁹⁷ Federal Tort Claims Act, Pub. L. No. 79-601, tit. IV, ch. 753, 60 Stat. 812, 842-47 (1946) (codified as amended in scattered sections of 28 U.S.C.).

²⁹⁸ See, e.g., GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS 160-336 (2000) (providing relevant case law, questions, and commentary to explain the background and application of the FTCA).

²⁹⁹ In the Tucker Act of 1887, Congress expressly conferred jurisdiction upon the federal district courts for claims (not exceeding \$10,000) against the United States arising under contract or “not sounding in tort.” Act of Mar. 3, 1887, ch. 359, §§ 1-2, 24 Stat. 505, 505 (current version at 28 U.S.C. § 1346(a)(2)). In 1920, Congress expanded the government’s liability to encompass claims arising out of admiralty or maritime torts involving merchant vessels or tugboats owned by the federal government. See Act of Mar. 9, 1920, ch. 95, §§ 1-3, 41 Stat. 525, 525-26; see also Act of Mar. 3, 1925, ch. 428, 43 Stat. 1112, 1112 (expanding the 1920 Act to include damages caused by public vessels of the United States). It was not until the FTCA that Congress otherwise provided for governmental liability in tort.

³⁰⁰ Federal Tort Claims Act § 410(a), 60 Stat. at 842-44 (current version at 28 U.S.C. § 1346(b)(1)).

³⁰¹ *Id.* § 421(h), 60 Stat. at 845-46 (current version at 28 U.S.C. § 2680(h)). Section 421(h) exempted “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” *Id.*

law enforcement officers.³⁰² As Professors Pfander and Baltmanis have explained, the Ninety-Third Congress “deliberately retained the right of individuals to sue government officers for constitutional torts and rejected proposed legislation from the Department of Justice that would have substituted the government as a defendant on such claims.”³⁰³ The Supreme Court confirmed this view in 1980, when it concluded in *Carlson* that, “when Congress amended [the] FTCA in 1974 . . . the congressional comments accompanying that amendment made it crystal clear that Congress view[ed] [the] FTCA and *Bivens* as parallel, complementary causes of action.”³⁰⁴ What was just as true during the same time period was that state law remedies against federal officers also remained available, subject to any defenses or immunities supplied by federal law.³⁰⁵

Practically, then, had an individual in Arar’s position attempted to pursue relief between 1974 and 1988 against the federal officers who had mistreated him, he could have proceeded simultaneously along three paths: (1) an FTCA claim against the United States, to the extent that he sought relief for intentional torts committed by law enforcement officers that fell outside the FTCA’s discretionary function exception (including any such claim grounded in the Constitution);³⁰⁶ (2) a *Bivens* claim against the officers, to the extent that he sought relief for a violation of his constitutional rights (and special factors did not counsel hesitation); and (3) state law tort claims

³⁰² See Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending the FTCA to permit suits for “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” against “investigative or law enforcement officers”).

³⁰³ Pfander & Baltmanis, *supra* note 22, at 131; see also *id.* at 133 (“In [rejecting the DOJ’s proposal], members of Congress made clear that the *Bivens* action was to survive the expansion of government liability for law enforcement torts. The federal courts quickly confirmed this conclusion.”).

³⁰⁴ *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

³⁰⁵ For a discussion of official immunity and state secrets privilege, see *supra* text accompanying notes 82-84, 95-100 & 115-27, and Section III.C. Cf. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-06 (1988) (recognizing a federal common law defense for federal contractors for certain activities approved by federal officials in the exercise of discretionary functions); *Saleh v. Titan Corp.*, 580 F.3d 1, 5-9 (D.C. Cir. 2009) (extending federal contractor defense to certain activities related to “combatant activities”); *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 459-60 (5th Cir. 2010) (describing the three-part test given in *Boyle* to determine whether federal law preempts state tort law remedies).

³⁰⁶ See, e.g., *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (holding that the discretionary function exception does not encompass actions by government agents that are “unconstitutional, proscribed by statute, or exceed the scope of an official’s authority”); see also *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (“[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.”).

directly against the relevant officers. Different defenses may have made recovery difficult under any or all of these theories, but all three causes of action could have been pursued simultaneously.

In its 1988 decision in *Westfall v. Erwin*, the Supreme Court held that federal officials could be sued on a state tort theory for claims not alleging a constitutional violation.³⁰⁷ The Court unanimously rejected the argument that absolute immunity shielded federal officers from all state tort liability so long as the officers were acting within the scope of their employment.³⁰⁸ As Justice Marshall concluded for a unanimous Court, immunity would be available, at most, if the officer was acting within the scope of his official duties *and* his conduct was “discretionary in nature.”³⁰⁹ The availability of a state law cause of action was taken for granted.

Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 (which, for obvious reasons, became known to posterity as the Westfall Act). Among other things, section 5 of the Westfall Act expressly provided that an FTCA suit was the “exclusive” remedy for conduct covered by the statute, thereby preempting claims that might otherwise have been pursued under state law.³¹⁰ Because of the limits on recovery under the FTCA, the Westfall Act had the effect of displacing state remedies in favor of *no* remedy against the government whatsoever in at least some cases. To take just four (of many) examples, the FTCA does not encompass (1) claims for intentional torts committed by non-law enforcement officers;³¹¹ (2) claims arising out of a federal officer’s performance of a discretionary function;³¹² (3) claims arising in a foreign country;³¹³ or (4) claims arising out of, or incident to, military service.³¹⁴ And even where the FTCA encompasses a particular tort claim, the statute requires administrative exhaustion;³¹⁵ only provides for a nonjury trial;³¹⁶ caps attorneys’ fees;³¹⁷ and bars punitive damages³¹⁸ and prejudgment interest.³¹⁹ Thus, both

³⁰⁷ 484 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)).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* § 5, 102 Stat. at 4564 (codified at 28 U.S.C. § 2679(b)(1) (2006)).

³¹¹ 28 U.S.C. § 2680(h).

³¹² *Id.* § 2680(a).

³¹³ *Id.* § 2680(k).

³¹⁴ *Feres v. United States*, 340 U.S. 135, 146 (1950).

³¹⁵ 28 U.S.C. § 2675.

³¹⁶ *Id.* § 2402.

³¹⁷ *Id.* § 2678.

³¹⁸ *Id.* § 2674.

³¹⁹ *Id.*

substantively and procedurally, the effect of the Westfall Act is to narrow the universe of (and scope of recovery for) tort claims that individuals can pursue for injuries caused by federal officials.

As relevant here, though, the statute also included a critical caveat exempting from section 5's exclusivity provision any civil action against a federal officer "which is brought for a violation of the Constitution of the United States."³²⁰ All agree that this language preserved *Bivens* claims. The harder question is whether it preserved *only Bivens* claims.

B. *Two Alternate Readings of the Westfall Act*

The court in *Arar* assumed the unavailability of state tort remedies, perhaps because of the Westfall Act.³²¹ At the same time, the court applied a "remarkably low" standard in determining whether special factors counseled nonrecognition of a *Bivens* claim. This standard reflects the view that recognition of a *Bivens* claim would constitute illegitimate judicial lawmaking. In the paragraphs that follow, we show that the combination of the unavailability of state tort remedies and a reluctant approach to recognizing *Bivens* claims conflicts with Congress's intent in enacting the exemption provided by section 5 of the Westfall Act. Fidelity to Congress's intent as expressed in the statute's text and legislative history requires either an interpretation of the Westfall Act as preserving state tort remedies for constitutional violations by federal officials or a far more receptive approach to recognition of *Bivens* claims against federal officials (as distinguished from federal contractors) than is evident in cases like *Arar*.

1. Preserving State Constitutional Tort Remedies

Although the Supreme Court in *Minneeci v. Pollard* appears to have endorsed a reading of the Westfall Act that would preclude state tort remedies against federal officials acting within the scope of their employment, the Court did not give the interpretive question the scrutiny that it deserves. Before *Pollard*, the Supreme Court's decisions were equivocal on the point. In *Hui v. Castaneda* the Court referred to the section 5 exception in passing as the "*Bivens* exception."³²² On the other hand, in *Wilkie v. Robbins*, a case decided after the enactment of the Westfall Act, the Court assumed the continued availability of common law tort remedies against federal officials

³²⁰ *Id.* § 2679(b)(2)(A).

³²¹ See *supra* notes 38-43, 107-14 and accompanying text.

³²² 130 S. Ct. 1845, 1853 (2010).

alleged to have violated the Constitution.³²³ Since the Court in *Wilkie* relied on the availability of such claims in determining that the recognition of a *Bivens* claim in that case was unnecessary, its views on this point cannot be dismissed as dictum. Professors Pfander and Baltmanis suggest that the Court in *Wilkie* was simply “mistaken[]” on this point.³²⁴ It is, of course, possible that the Court overlooked the Westfall Act, but such a reading of a Supreme Court decision is disfavored.³²⁵ If the Court did construe the Westfall Act to preserve state law remedies in cases alleging constitutional violations by federal officials, it was on solid ground in doing so.

As noted above, the provision of the Westfall Act containing the so-called *Bivens* exception does not mention *Bivens*. Instead, it refers generally to civil actions “brought for a violation of the Constitution of the United States.”³²⁶ This language is broad enough to cover state law remedies for constitutional violations, thus exempting them from section 5’s preemption of civil remedies against federal officials. On this view, section 5 would preempt state law remedies in cases like *Westfall* itself, where there were no allegations of unconstitutional conduct. In other words, on this reading, the Westfall Act preempts *most* state tort claims against federal officers but leaves intact *constitutional* tort claims against federal officers, whether the remedy is provided by federal or state law.

This reading is supported by the accompanying House Report, which makes clear that the Act “would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.”³²⁷ Reading the exception to preserve the state law remedies that previously existed would be the most direct way to give effect to this intent. After all, as shown in Part II, common law actions had been the standard vehicle for obtaining damages from federal officials who violated the Constitution since early in our history, and, as shown in Part III, such remedies remained available in the period between the *Bivens* decision and the enactment of the Westfall Act. Removing such remedies would acutely and severely “affect” the remedial rights of victims of constitutional violations by federal officials.

In our view, the available alternative readings of this text are less plausible. On one such alternative view, a common law claim is not a claim

³²³ See 551 U.S. 537, 551 (2007); see also *supra* text accompanying notes 221-22.

³²⁴ Pfander & Baltmanis, *supra* note 22, at 128.

³²⁵ The Federal Tort Claims Act was brought to the Court’s attention in both parties’ briefs in *Wilkie*. 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.

³²⁶ 28 U.S.C. § 2679(b)(2)(a) (2006).

³²⁷ H.R. REP. NO. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949-50.

“brought for a violation of the Constitution” even if it alleges a constitutional violation. Such claims, the argument would go, are “brought” to obtain compensation for certain interests protected by state law. The Constitution enters into such cases in order to defeat a defense of official justification, but the affirmative remedy compensates for injury to interests protected by state law, not for constitutional injuries. On this view, the overlap between common law interests and constitutional interests is fortuitous and does not transform a suit seeking compensation for injuries to common law interests into a suit “brought for a violation of the Constitution.” We might call this the “well-pleaded complaint” reading of section 5’s exemption, as it relies on the fact that the Constitution comes into the case by way of replication in order to deny that such claims are “for” a constitutional violation.³²⁸

We believe that the well-pleaded complaint interpretation is less faithful to the statutory text than the alternative. By referring to suits “brought for a violation of the Constitution,” the exemption’s text appears to ask the court to identify the purpose for which the plaintiff initiated the suit. In cases where the defendant’s conduct violates the Constitution as well as common law interests, the plaintiff’s purpose in bringing a state law tort action will likely be to compensate for *both* the common law and the constitutional injuries. An approach that turns on the plaintiff’s actual purpose in bringing the claim would thus usually encompass common law claims in cases where the defendant has violated the Constitution.

A proponent of the “well-pleaded complaint” approach might respond that the exemption cannot turn on the *plaintiff’s* purpose in bringing the claim—a subjective test inappropriate in this context—but should turn instead on the *legislature’s* purpose in creating the cause of action. On this view, a cause of action is brought “for” a violation of the Constitution if its *raison d’être* is to compensate the plaintiff for constitutional violations. A common law claim for trespass would, under this theory, not be brought “for” a violation of the Constitution because it exists to compensate for injury to certain common law interests and only sometimes happens to involve constitutional violations as well.

There are several problems with such an interpretation. First, it strains the statutory language, which alludes to the purpose for which the action was “brought,” not the purpose for which the cause of action was *created*. Second, the dichotomy between constitutional interests and common law interests that underlies this distinction will often prove to be a false one:

³²⁸ Cf. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

constitutional provisions such as the Fourth Amendment were designed, at least in part, to protect interests also protected by the common law. Indeed, Solicitor General Griswold argued to the Court in *Bivens* that the protection of these common law interests was the Fourth Amendment's *sole* purpose.³²⁹ The Court disagreed, but it did not deny that protection of common law interests in privacy was *among* its purposes.³³⁰ To deny that a trespass action against an official who has infringed rights of privacy through conduct that violates the Constitution is a claim "for a violation of the Constitution" would bring us full circle.

Third, even under the narrowest plausible construction, the exemption would nevertheless encompass *some* state law actions. Recall that the "action on the statute" has long been recognized as a common law claim.³³¹ Such an action is literally "brought for" a violation of the Constitution even if one construes that phrase to encompass only actions whose *purpose* is to remedy constitutional violations. For similar reasons, a converse-1983 action of the sort advocated by Professor Amar would also survive under this narrow construction of the exemption.³³² It is true that some states may not recognize one or either of these causes of action, but the possibility that some states may recognize them is sufficient to establish the lack of fit between the *Arar* court's analysis and its decision not to recognize a *Bivens* action.³³³ As long as *some* states recognize these actions, or even just reserve the possibility of recognizing them, a decision not to recognize a *Bivens* claim will not succeed in protecting the national security-related interests cited by the *Arar* court in reaching its decision.³³⁴

We think that reading section 5's exemption to preserve state law remedies for conduct by federal officials in violation of the Constitution is more faithful to the statute's text. Even if it were not, however, the statute is susceptible to that interpretation. Because this reading of the exemption would be the most direct way to give effect to Congress's intent to preserve the remedies then available to victims of constitutional torts, it is preferable to an interpretation that would take away such remedies.

Additionally, this interpretation is preferable because it would avoid, rather than provoke, constitutional problems, which is doubly appropriate

³²⁹ See 403 U.S. 388, 394 (1971) (noting "respondents' argument that the Fourth Amendment serves *only* as a limitation on federal defenses to a state law claim" (emphasis added)).

³³⁰ See *id.*

³³¹ See *supra* notes 136-43 and accompanying text.

³³² See *supra* note 130. However, special state remedies for constitutional violations by federal officials may violate nondiscrimination doctrine. See *supra* notes 130-32 and accompanying text.

³³³ See *supra* notes 41-43 and accompanying text.

³³⁴ See *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (en banc).

in interpreting the Westfall Act's exemption. First, avoiding such problems was evidently Congress's purpose in including an exemption for claims implicating the Constitution. Second, and independently, the constitutional avoidance canon favors an interpretation that would avoid, rather than provoke, constitutional questions.³³⁵ Here, the avoidance canon and Congress's intent converge in favor of interpreting the exemption to encompass state law remedies for constitutional violations by federal officials.

This is not the place to address fully the circumstances in which the Constitution requires a damages remedy for federal officials' violation of the Constitution. For present purposes, it should suffice to note that the claim that the Constitution requires such remedies in at least some circumstances is a substantial one. To this end, we recall that it was central to the argument of Richard Nixon's Solicitor General in *Bivens* against recognition of a federal cause of action that the state tort remedy was the one contemplated by the Framers.³³⁶ That the Constitution requires the availability of state tort remedies (or an adequate substitute), at least in certain circumstances, has been defended by prominent scholars writing both before³³⁷ and after³³⁸

³³⁵ See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (citation omitted)); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); cf. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) ("Our disposition avoids the 'serious constitutional question' that would arise if we construed [the statute in question] to deny a judicial forum for claims arising under [the act in question]."). In *Bartlett v. Bowen*, the D.C. Circuit explained,

[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise. These cases recognize and seek to accommodate the venerable line of Supreme Court cases that casts doubt on the constitutionality of congressional preclusion of judicial review of constitutional claims.

816 F.2d 695, 699-700 (D.C. Cir. 1987) (footnote omitted).

³³⁶ See *supra* notes 178-81. That Solicitor General was noted constitutional scholar and long-time dean of Harvard Law School, Erwin Griswold, "a lifelong Republican with a background of Midwest conservatism." Dennis Hevesi, *Erwin Griswold of Harvard, Ex-Solicitor General*, 90, N.Y. TIMES, Nov. 20, 1994, at 58.

³³⁷ See, e.g., Hill, *supra* note 132, at 1153; Katz, *supra* note 136, at 52; see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.").

Bivens. Moreover, numerous Supreme Court cases establish that the Fourteenth Amendment's Due Process Clause sometimes requires a damages remedy (or a substitute remedy against the government) against state officials who violate federal law.³³⁹ A similar analysis would appear to apply to federal officers via the Fifth Amendment's Due Process Clause.³⁴⁰

³³⁸ See, e.g., Amar, *Of Sovereignty and Federalism*, *supra* note 130, at 1485-86 ("Few propositions of law are as basic today . . . as the ancient legal maxim [that w]here there is a right, there should be a remedy."); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 337 (1995) (arguing that "in the absence of effective congressional remedies, the courts are not only empowered but obligated to craft a broad range of remedies on their own"); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1154 (1989) ("The judiciary's obligation—whether federal or state—to decide cases arising under the Constitution embraces and demands the implementation of effective remedies."); Woolhandler, *supra* note 147, at 120-21. As Richard Fallon, Jr. and Daniel Meltzer explain,

Within our constitutional tradition, . . . the *Marbury* dictum [that there must be a remedy for every right] reflects just one of two principles supporting remedies for constitutional violations. Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law. Both principles sometimes permit accommodation of competing interests, but in different ways. The *Marbury* principle that calls for individually effective remediation can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress.

Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778-79 (1991); accord Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1800 (1997).

³³⁹ E.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (holding that a due process violation sometimes occurs where the state intentionally infringes patents and fails to provide an adequate remedy); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990) (holding that the Due Process Clause is sometimes violated where state denies refund for unconstitutional taxes); *Ward v. Love County*, 253 U.S. 17, 24 (1920); see also Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1944-47 (2000) (discussing recognition in *Florida Prepaid* that the Due Process Clause requires a retrospective remedy in certain circumstances).

Indeed, the Due Process Clause sometimes requires a damage remedy against a government official when there has been an unlawful deprivation of liberty or property, even when the Constitution itself was not violated. See *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990) (holding that the Due Process Clause sometimes requires damages remedy for unlawful deprivations of liberty); *Parratt v. Taylor*, 451 U.S. 527, 537, 544 (1981) (holding that the Due Process Clause sometimes requires damage remedy for unlawful deprivations of property), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1998). We take no position on whether the Westfall Act's exemption of suits "brought for a violation of the Constitution" should be read to exempt cases in which the Constitution requires a damage remedy but where there was no underlying constitutional violation. The canon of avoidance would suggest so, but the statutory language extends only to cases in which the suit is brought for a violation of the Constitution. Even if the exemption does not cover such a case, however, the victim should be able to maintain a suit against the official by arguing that the Westfall Act's elimination of his state tort claim is unconstitutional. For an argument that the constitutionally required remedy for violation of the

Of course, to the extent that the Constitution requires the availability of a damage remedy, it is probably within Congress's power to immunize federal officials from personal liability if it substitutes a remedy against the federal government itself. But it is far from clear that the remedy provided by the FTCA suffices to meet constitutional requirements, given the exemptions and exceptions noted above.³⁴¹

One could perhaps argue that, in light of the Westfall Act, the FTCA's exceptions should be construed with an eye toward ensuring the availability of any remedies required by the Constitution.³⁴² But this approach would risk distorting longstanding case law regarding the scope of these exceptions. Moreover, it would require the courts to resolve the constitutional issue in each case, whereas the approach suggested here would avoid those difficult questions. The latter approach is more faithful to Congress's intent, since the text and legislative history of the Westfall Act indicate that Congress sought to address the constitutional question by excluding claims implicating the Constitution from the scope of the Act altogether.³⁴³

The constitutional issues could also, of course, be channeled into the *Bivens* analysis. The Constitution is presumably indifferent as to whether the required damage remedy is provided by state or federal law, and for obvious reasons a federal remedy seems preferable in most contexts. One could thus interpret the Westfall Act as repealing state law remedies against federal officials and implicitly instructing the courts to ensure the availability of any constitutionally required damages remedies by means of *Bivens* claims. This approach too, however, would require the courts routinely

Constitution should be understood to have its basis in the Supremacy Clause rather than the Due Process Clause, see Vázquez, *supra* note 338, at 1777-85.

³⁴⁰ We recognize that immunity doctrines frequently prevent recovery of damages against federal and state officials who violate the Constitution. We do not contend that the Constitution requires a remedy for every violation. But we do think that there is a substantial constitutional argument that the Constitution sometimes requires a damages remedy for constitutional violations in circumstances in which the FTCA would not provide one. Since the official immunity doctrine would bar a remedy under both federal or state law, it suffices for purposes of the constitutional avoidance argument that the Constitution requires a damages remedy for some violations of clearly established constitutional law in contexts in which the FTCA does not provide a substitute remedy against the government.

³⁴¹ See *supra* text accompanying notes 311-19.

³⁴² Thus, some courts have held that the discretionary function exception does not apply to constitutional claims. See, e.g., *Castro v. United States*, 560 F.3d 381, 390 (5th Cir. 2009) ("While it is well-recognized that violations of constitutional mandates are not actionable under the FTCA, the occurrence of such a violation would involve the performance of a non-discretionary function for jurisdictional purposes, if the constitutional tort is also cognizable as an intentional tort under state law." (citation omitted)).

³⁴³ See *supra* note 320 and accompanying text; *supra* Section IV.B.

to confront difficult constitutional questions. As noted, Congress appears to have intended to avoid, not provoke, such questions.

We recognize that the availability of state tort remedies may not always suffice to satisfy constitutional requirements. Still, a reading of the Westfall Act's exemption as preserving state law remedies for constitutional violations by federal officials is more compatible with Congress's intent to avoid constitutional questions than an interpretation that takes these state law remedies away.

In sum, the Westfall Act could be read to preserve not just *Bivens* claims but also state tort remedies in cases alleging a violation of the Constitution by federal officials. Such a reading would be more faithful to Congress's intent to preserve the remedies available to victims of constitutional violations by federal officials than is the alternative. And it would avoid rather than provoke constitutional problems, as Congress intended and as the avoidance canon requires.

2. Preserving Only *Bivens* Claims

As already noted, however, the Supreme Court in *Pollard* endorsed a broad reading of the Westfall Act's preemptive scope. This interpretation, in which the Westfall Act has the effect of preempting all civil actions against federal officials except *Bivens* claims, is a plausible, if not the best, reading of the statutory text. If the Westfall Act is to be read as preempting all nonfederal remedies against federal officials, however, we think that it also rules out the hesitant approach to the recognition of *Bivens* actions applied by the court in *Arar*. Indeed, we think that the statute, so construed, affirmatively supports a more receptive approach to the recognition of *Bivens* claims against federal officials than is evident even in the Supreme Court's most recent decisions. These conclusions follow from three inter-related arguments.

a. *Congress's Intent to Preserve the Remedies Available to Victims of Constitutional Violations*

As noted in the preceding section, the House Report expresses Congress's intent to leave unaffected "the ability of victims of constitutional torts to seek redress" for their injuries.³⁴⁴ Consistent with this intent, the statutory text preserves "actions" which are "brought for a violation of the

³⁴⁴ H.R. REP. NO. 100-700, at 6 (1988).

Constitution.”³⁴⁵ As discussed above, this language is best read to preserve state tort remedies for violations of the Constitution by federal officials. If the Westfall Act is to be read to preempt all such remedies, however, then giving effect to Congress’s intent to preserve the ability of victims of constitutional torts to seek redress for their injuries requires that the formerly available state tort remedies now be available as federal remedies.

The most straightforward way to give effect to Congress’s intent not to narrow the ability of victims of constitutional violations to seek redress for their violations would be simply to apply the tort laws of the various states, including their choice of law rules. Doing so, however, would vitiate one of the clearest advantages of a federal remedial regime over a state law remedial regime: the elimination of the need for courts and federal officials to contend with the vagaries of state tort law. We thus prefer a post–Westfall Act approach to *Bivens* claims under which the action would be uniform throughout the nation. However, in keeping with Congress’s intent to preserve previously available remedies, the courts should presume the availability of the remedies that most states make available for analogous injuries caused by private individuals. A *Bivens* cause of action should thus be available *at a minimum* in the situations in which the common law would generally have provided a tort remedy, such as in cases involving assault, trespass, false imprisonment, and the like.

It might well be preferable to avoid the need to consult state tort law even to this extent. We think the courts would be justified in simply presuming 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. The arguments discussed below would support a post–Westfall Act approach to *Bivens* that recognizes the availability of a damage remedy unless Congress has provided an adequate alternative remedial scheme—subject, of course, to any defenses of immunity, privilege, or preemption. Such an approach would be consistent with, if not required by, Congress’s intent to preserve the redress available to victims of constitutional torts before the Westfall Act’s enactment. It would also correct the wrong turn the courts took in the wake of *Erie* by treating the pre-*Erie* “general law” of remedies for constitutional violations by federal officials as state law rather than federal common law.³⁴⁶ An approach that would deny a *Bivens* remedy in circumstances in which a

³⁴⁵ Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2679(b)).

³⁴⁶ See *supra* text accompanying notes 153-65.

common law remedy would previously have been available, on the other hand, would be inconsistent with congressional intent.

b. *Congress's Intent to Preserve the Bivens Action As It Then Stood*

A broad availability of a *Bivens* action is also affirmatively supported by Congress's intent in enacting the Westfall Act to preserve the *Bivens* action as it then stood. For the reasons discussed in the previous parts, the *Arar* approach to the *Bivens* question constitutes a drastic narrowing of the availability of the *Bivens* action. Before the Westfall Act, a "special factor[] counselling hesitation" was a reason to prefer a state law remedial regime or an alternative federal remedial scheme provided by Congress.³⁴⁷ Reasons to deny any remedy at all—such as the national security and state secrets concerns that motivated the decision in *Arar*—would have been relevant at most to defenses such as immunity, privilege, or preemption. In the latter context, the courts' concerns would have had to do much heavier lifting. A reluctance to engage in judicial lawmaking would not have justified denial of relief on such grounds. The "remarkably low" standard applied by the *Arar* court would have been applicable only to a decision to relegate the plaintiff to common law remedies.

Consistent with Congress's intent not to narrow *Bivens*, the concept of "special factors counselling hesitation" should continue to be confined to reasons to relegate victims of constitutional violations to another *actually available* remedial regime. Reasons for denying plaintiffs any remedy at all should continue to be considered solely in connection with defenses such as immunity, privilege, or preemption. If a "special factor[] counselling hesitation" is a reason to prefer another available remedial regime, then the Westfall Act's preemption of state tort remedies should serve to make it easier to find a *Bivens* remedy, as the statute takes away one of the principal alternative remedial regimes. The preemption of state tort remedies would leave only alternative federal remedies provided for by Congress (excluding the FTCA itself, which Congress clearly made nonpreemptive of *Bivens* claims) as the sole alternative remedial regimes. Thus, after the Westfall Act, a special factor counseling hesitation to recognize a *Bivens* claim should be solely a reason to prefer a separate existing federal remedial regime.

³⁴⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); see *supra* Part I.

c. *Avoidance of Constitutional Questions*

As discussed above, a reading of the Westfall Act as preempting state tort remedies without creating a substitute would raise constitutional concerns. To the extent the Constitution requires a damage remedy, it is presumably indifferent as to whether the remedy is provided as a matter of state or federal law. Consequently, constitutional concerns would be avoided if the Westfall Act were construed to make the remedies previously available as state tort remedies now available as federal remedies. Thus, the canon of avoidance and Congress's obvious intent to avoid raising constitutional questions both support an interpretation of the Westfall Act as making available as federal remedies at least those remedies that were previously available under state tort law.

* * *

In sum, the Westfall Act should eliminate the courts' hesitant approach to recognizing *Bivens* actions one way or the other. As discussed earlier, this hesitancy is based on the view that, in our constitutional system, it is the role of Congress, not the courts, to make law. Those who object to federal common lawmaking do so because, in their view, permitting the courts to make preemptive federal law circumvents the Constitution's carefully crafted procedures for displacing state law. If the Westfall Act is interpreted as removing state tort remedies against federal officials acting within the scope of their employment, then the preemption of state tort remedies will have been accomplished by Congress through the usual bicameralism and presentment process for preempting state law.

But this preemption was coupled with Congress's intent to preserve then-available remedies for constitutional violations and, in particular, its intent to preserve *Bivens* as it then stood. The question for the courts is thus now one of statutory interpretation rather than pure judicial common lawmaking. If Congress had decided that there should be no damage remedies against federal officials, then the courts would be required to give effect to that decision, subject to constitutional limitations. Instead, Congress left in place *Bivens* actions against federal officials and expressed an intent to preserve then-available remedies. Under these circumstances, courts recognizing *Bivens* actions for federal officials' violations of constitutional norms would not be usurping Congress's role, but merely giving effect to congressional legislation.

A *Bivens* skeptic might respond that the *Bivens* action that Congress left in place in 1988 was a severely restricted one, as the Court had already

begun retrenching from the receptive approach to recognizing *Bivens* actions that had prevailed a decade before. As we have already shown, however, the pre-1988 decisions declining to recognize *Bivens* actions did so in deference to an alternative federal remedial scheme crafted by Congress. A few more recent decisions (*Malesko*, *Pollard*) have declined to recognize a *Bivens* action against federal contractors on the ground that state tort remedies against such actors provided adequate deterrence and compensation. For reasons already discussed, we do not think that the Court's analysis in the latter cases would have required the same conclusion for suits against federal officials if the Westfall Act had not preempted state tort suits against such officials. To the contrary, we think the availability of state remedies should in many respects make the courts less hesitant to recognize a *Bivens* claim against federal officials.³⁴⁸

But the more important point is that, at the time of the Westfall Act's enactment, the Court's decisions declining to recognize a *Bivens* action did so in deference to another existing remedial scheme, or in rare cases in favor of an affirmative congressional decision to deny a remedy.³⁴⁹ They did not reflect a judicial judgment that there should be no remedy at all, nor a judicial determination that the Constitution established a default rule of no damages remedy. To the contrary, the default rule that existed at the time of the Westfall Act's enactment was that state tort remedies were available.

Indeed, as discussed above, there is a substantial argument that damages for constitutional violations are sometimes constitutionally required. The Westfall Act's exemption of "suits brought for a violation of the Constitution" appears to reflect Congress's recognition of the constitutional dimensions of this issue. Read in this light, the decisions in *Malesko* and *Pollard* supply strong additional support for our reading of the Westfall Act. In those cases, the Court regarded the availability of state tort remedies as a reason to decline to recognize a *Bivens* claim against privately run prisons and their employees. In *Pollard*, the Court specifically distinguished suits against

³⁴⁸ In addition to making national security concerns irrelevant to the *Bivens* question (as opposed to possible defenses), recognition that state remedies would in any event be available means that finding a *Bivens* action against federal officials would not increase the federal courts' caseload, given the right of such officials to remove on the basis of a federal defense. Recognition of a *Bivens* action against contractors would increase the federal caseload. The increased caseload for federal contractors potentially outweighs the benefits of a single uniform federal cause of action more closely tailored to the constitutional interests at stake. See *supra* notes 14-15 and accompanying text.

³⁴⁹ See *supra* subsection III.B.2.

federal *contractors* from suits against federal *employees* on this ground.³⁵⁰ If the availability of state tort remedies against federal contractors is a reason to decline to recognize a *Bivens* claim, then the Westfall Act's elimination of such remedies against federal employees, coupled with Congress's intent to preserve remedies for constitutional violations and to avoid constitutional questions, cuts strongly *in favor of* recognition of a federal cause of action.

In any event, before the Westfall Act, concerns such as the ones that motivated the decision in *Arar* would not have grounded a decision declining to recognize a *Bivens* claim. Congress's decision to preserve the then-prevailing approach to *Bivens* supports a post-Westfall Act approach to *Bivens* under which such factors continue to be relevant only to the defenses of immunity, privilege, or preemption, and not to the existence *vel non* of a *Bivens* claim.

V. CONCLUSION

The lower courts in recent decisions have approached the *Bivens* question in a way that deviates sharply from how the Supreme Court itself has approached that question. Rather than seeing the choice before them as "*Bivens* or state law," they have posed the question as "*Bivens* or nothing." Moreover, they have combined this "*Bivens* or nothing" approach with a "remarkably low" standard for declining to recognize a *Bivens* claim, thereby virtually guaranteeing that *Bivens* itself will amount to nothing. The combination of the "*Bivens* or nothing" approach and the "remarkably low" standard for declining to recognize a *Bivens* claim has resulted in the denial of a remedy for constitutional violations producing even physical injuries of the sort which have long and uncontroversially been remedied at common law.

This Article has shown that this revised approach is supported neither by the Supreme Court's post-*Bivens* decisions nor by Congress's enactment of the Westfall Act. The statute exempts suits "brought for a violation of the Constitution"—an exemption designed to leave unaffected the ability of victims of constitutional torts to seek redress from the federal officials who caused their injuries. This exemption could have been read to leave in place state law remedies for injuries caused by the unconstitutional acts of federal officials. The Supreme Court in *Pollard* has instead read the Westfall Act to preempt all state tort remedies against federal officials acting within the

³⁵⁰ *Minecci v. Pollard*, 132 S. Ct. 617, 623 (2012); see also *supra* note 16 (noting that, if constitutional need for a damages remedy is recognized, absence of state remedies cuts in favor of finding a federal remedy).

scope of their employment. If the Westfall Act does preempt all such remedies, however, it also rules out the hesitant approach to recognition of *Bivens* claims reflected in cases like *Arar*. Congress's elimination of state tort remedies, combined with its intent to (a) preserve the remedies available to victims of constitutional violations, (b) leave *Bivens* as it found it, and (c) avoid rather than provoke constitutional problems, supports a far more receptive approach to *Bivens* claims than is reflected in cases like *Arar*, or indeed in the Supreme Court's own recent *Bivens* cases. Courts confronting suits implicating sensitive national security and/or military concerns have other tools available to them if they believe that relief should be barred. But to use the appropriate tools would require far more of a principled justification for judicial *intervention* than the faux judicial restraint exemplified by their decisions not to recognize *Bivens* remedies.