State Law and the Nature of the Bivens Question

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In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 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. At the same time, the Court suggested that “special factors” might “counsel[] hesitation” in recognizing such a cause of action in other contexts. Since then, the Court has decided a series of cases posing the question whether *Bivens* should be “extended” to new contexts. (We refer to this as “the *Bivens* question.”) Although the Court has shifted over time in its willingness to extend *Bivens*, it has generally adhered to its initial – and, in our view, correct – 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 violation of the Constitution by federal officials or instead to leave the availability of damages for such violations to state law. The alternative to recognition of a *Bivens* action, in other words, has always been understood to be the exclusivity of state law as the source of the damage remedy. If the *Bivens* question is “*Bivens* or state law,” as it has been understood by the Supreme Court since the *Bivens* decision, then a “special factor counseling hesitation,” is a reason to prefer a regime in which the susceptibility of

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1. 403 U.S. 388 (1971)

2. *Id.* at 396.


4. We recognize that it will often be contested whether a case requires the “extension” of *Bivens* to a “new context” or instead merely requires 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 determined that the case requires an extension of *Bivens* to a new context. We also distinguish the “*Bivens* question,” as framed above, from the related though distinct question 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 117–118.
federal officers to damage claims for their violations of the Constitution is governed by state law.

Although the Supreme Court has never veered from this understanding of the *Bivens* question, the lower courts in some notable recent cases alleging constitutional violations committed in the fight against terrorism (and in some non-terrorism cases, as well), appear to be operating under a very different conception of the *Bivens* question. For example, in its widely noticed decision in *Arar v. Ashcroft*, the *en banc* U.S. Court of Appeals for the Second Circuit found “special factors” that counseled non-recognition of a *Bivens* claim for Maher Arar against various federal officials who detained him and coercively interrogated him in New York and then transported him against his will and without his knowledge to Syria, where he was detained and tortured by Syrian officials at the behest of the federal officials he wished to sue. Arar argued that the officials had violated his substantive due process rights under the Fifth Amendment. As discussed in greater depth below, the alleged acts of the federal officials would also have stated several colorable claims under state tort law.

In considering whether Mr. 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, as well as the difficulties that would be posed by the secret nature of some of the evidence that would necessarily have had to be presented. Their reasoning shows that they viewed the alternative to recognition of a *Bivens* claim as the denial of any claim at all, as the concerns that led them to deny a *Bivens* claim would have been equally implicated had Mr. Arar brought a state tort law claim against the defendants for false imprisonment or assault. Had they conceived the *Bivens* question as the *Bivens* Court did, they would likely have reached a different conclusion, as each of the “special factors” cited by the majority would have counseled, if anything, for the application of federal rather than state law. And


7. *Arar*, 585 F.3d at 563.

8. *See, e.g., id.* at 574–76.

9. *See, e.g., id.* at 576.
although the four dissenters would have recognized a *Bivens* claim, they too seemed to regard the issue as "*Bivens* or nothing."\(^{10}\)

Several other federal courts have declined on similar grounds to recognize a *Bivens* action against defendants who allegedly caused injury to the plaintiff in violation of the Constitution. In each of these cases, had the court understood the *Bivens* question to be "*Bivens* or state law," they would very likely have come out the other way. For example, in *Lebron v Rumsfeld*,\(^{11}\) plaintiff José Padilla sued a number of federal officials, some of whom he alleged had subjected him to physical torture within the territory of the United States.\(^{12}\) Such torture, of course, constitutes the tort of battery under the law of every state, in addition to being a violation of the Constitution. Relying on the reasoning of the court in *Arar*, the district court in *Lebron* concluded that “special factors” counseled non-recognition of a *Bivens* claim, overlooking the fact that its concerns would apply just as much to a state-law claim – yet “hesitation” to recognize a *Bivens* claim does nothing to prevent state law claims from going forward. To similar effect, 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.\(^{13}\) Again, the court seems to have overlooked the fact that non-recognition of a *Bivens* claim leaves state remedies in place.

Even in non-terrorism cases, recent courts have relied on comparable considerations as “special factors” counseling against a *Bivens* remedy. Thus, in *Wilson v Libby*, the D.C. Circuit refused to recognize a *Bivens* remedy against those

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\(^{10}\) *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”).


\(^{13}\) *See* Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir.), *cert. denied*, 130 S. Ct. 1013 (2009); *see also* Rasul v. Myers, 512 F.3d 644, 672–73 (D.C. Cir. 2008) (Brown, J., concurring) (expanding on the “special factors” analysis).
responsible for the disclosure of a CIA agent’s covert status. Here, too, the court’s analysis reveals (but does not explain) its assumption that state remedies would not be available. As the court there explained, “We . . . cannot ignore 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.” And in Benzman v. Whitman, the Second Circuit refused to recognize a Bivens remedy by residents of lower Manhattan based on claims that they had been misled about the air quality after the September 11 attacks. Again, 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.”

The national security overtones of some of these cases might well have blinded the courts to the possible availability of state tort remedies. Because of the obvious predominance of the federal government’s interest in suits challenging federal officials’ actions in fighting international terrorism, it is certainly understandable that courts unfamiliar with the pre-Bivens approach remedies for constitutional violations to assume that the suit could go forward under federal law or not at all. But, if these courts meant to hold that, for reasons of national security, these sorts of suits should not go forward at all, they rested their holdings on the wrong doctrine. There are a number of doctrines that might have grounded such a result, but the absence of a Bivens action is not one of them. First, the official might be entitled to official immunity. The Court in Bivens recognized that the federal cause of action is


15. Id. at 710. The D.C. Circuit drew an analogy to the litigation bar recognized in Totten v. United States, 92 U.S. 105 (1875), concluding that “We certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents. . . . Here, although Totten does not bar the suit, the concerns justifying the Totten doctrine provide further support for our decision that a Bivens cause of action is not warranted.” Wilson, 535 F.3d at 710.

16. 523 F.3d 119 (2d Cir. 2008).

17. Id. at 126 (internal quotation marks 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)). Thus, the court of appeals held that the existence of a statutory immunity from suit in an analogous context counseled against inferring a Bivens remedy, rather than counseling in favor of recognizing a comparable form of immunity that would also apply in state court.
subject to such immunities, and it has elsewhere made clear that the same is true of state tort actions. Today, official immunity protects executive officials from damages liability unless they violate “clearly established” federal law. The qualified immunity of federal officers has always been understood to apply regardless of the source of the right of action. Second, evidentiary privileges, such as those relating to state secrets, may apply in suits arising out of clandestine governmental programs. An evidentiary privilege based upon state secrets is similarly applicable whether the right of action is based on federal or state law. Third, state tort actions may be preempted by federal statute. For example, the Federal Tort Claims Act provides that “[t]he remedy against the United States provided . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee . . . 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 employee.” The Supreme Court in held that this provision preempts claims against such officials, and the statute’s plain text would equally cover state tort remedies.

In theory, state tort claims might be preempted by federal common law, or even by the Constitution. The Supreme Court has found state tort remedies against federal contractors to be preempted as a matter of federal common law under certain circumstances, and scholars have argued that state criminal prosecution of federal officials should be held to be preempted by the Supremacy Clause under certain

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19. 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.”).

20. See id.


22. See, e.g., Crater Corp. v. Lucent Technologies, Inc., 423 F.3d 1260 (Fed. Cir. 2005) (remanding to determine whether application of state secrets privilege would preclude a state law claim from going forward).


24. See Hui v. Castaneda, 130 S. Ct 1845, 1852 (2010) (holding that the text of the Public Health Service Act, which incorporates the FTCA, plainly indicates that it precludes a Bivens action against petitioners for the alleged harm).

circumstances. We are unaware of any decisions holding state tort remedies against federal officials to be preempted as a matter of federal common law or under the Constitution (as opposed to by statute), but it is conceivable that the courts might find such preemption with respect to suits bearing certain connections to national security. A dismissal on the ground of preemption would of course relegate the plaintiff to federal remedies, and a dismissal on the ground of immunity or privilege would deny the plaintiff a remedy altogether. But a dismissal for lack of a Bivens remedy leaves in place whatever state-law remedies may exist.

Recognizing that the concerns that drove the court in Arar to deny a Bivens action are relevant instead to issues such as immunity, privilege, or preemption does more than just change the label under which the plaintiff will ultimately be thrown out of court. First, the case may well fall outside the current contours of the relevant immunity or privilege, and most cases alleging constitutional violations will not be preempted under existing interpretations of federal statutes. Official immunity should not be a barrier when the defendant has violated clearly established constitutional law. The state secrets privilege will only be implicated in some cases touching on national security, and is very unlikely to be a problem in cases not implicating national security, such as the Benzman litigation arising out of the post-September 11 cleanup. If a case does raise significant national security concerns, the defendant can ask the court to recognize a new immunity or to expand an existing one. But the analysis the court will have to undertake to resolve this argument will be very different from the analysis that the court in Arar and the other cases noted above have employed to decline to recognize a Bivens action. Even though some of the same factors will be in play, they would have to do very different work to support the creation of a new immunity or privilege than to justify the non-recognition of a Bivens action.

The majority in Arar stressed that, to deny a Bivens action, it need merely find some reason to “hesitate.” It justified this approach as a natural reading of the Bivens Court’s suggestion that non-recognition of a federal cause of action would be warranted if there were “special factors counseling hesitation.” The Arar majority’s reluctance to recognize a Bivens action was, in turn, consonant with the views of the


27. We discuss below whether the Westfall Act strips victims of constitutional violations by federal officials of their state tort remedies.

Justices who dissented in *Bivens* and subsequent cases recognizing *Bivens* claims, and those in the majority in the later cases declining to extend *Bivens*, who considered the judicial creation of a federal cause of action to be a usurpation of the role of the legislature. These Justices’ concerns are a specific example of a more general objection to federal common law-making: that such judicial law-making is an end run around the “carefully wrought” procedure set up by the Constitution for creating preemptive federal law. From this perspective, a special justification is necessary to “extend” *Bivens* into a new context, and mere “hesitation” suffices to refuse to do so. We recognize the force of this objection, although we think this sort of law-making is often justified, particularly in the remedial context.

But if the issue is whether to recognize a new immunity or privilege or expand an existing one, the courts’ proper “hesitation” to engage in judicial law-making should work in the plaintiff’s favor. If under current law federal officials are subject to state tort remedies unless they are immune or the evidence is privileged, and if the current law of immunity or privilege does not defeat the lawsuit, then it is the defendant who will be seeking to “extend [the immunity or privilege] to new contexts.” A court reluctant to engage in judicial law-making should hesitate to do so. If the defendant argues that the Constitution should be read to preempt the plaintiff’s claim, then the argument should stand or fall on its merits. “Hesitation”

29. *Bivens*, 403 U.S. 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) (“But the point of this case and the 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 Eighth Amendment or any other constitutional provision. … The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.”) (citation omitted)).

30. *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 omitted)); *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.”); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (“[C]ongressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”).

to engage in judicial law-making will not get the defendant his immunity. The court should, indeed, be even more hesitant to create a new immunity or privilege than to recognize a federal cause of action, as the recognition of a *Bivens* claim merely supplements state law, while an immunity or privilege supplants state law. Finally, if the courts pose the question as we argue they should, they will address the question of immunity, privilege or preemption with a proper appreciation of the fact that the existence of a damage remedy for federal officials’ violation of the Constitution has long been the norm and may well have constitutional dimensions. Any decision to deny such remedies by expanding immunities or privileges should be informed by this tradition.

Understanding that state remedies have long been – and remain – available against federal officials who violate the Constitution should not only lead courts to hesitate to expand privileges and immunities, it should also make courts less hesitant to recognize a *Bivens* action. For a number of obvious reasons noted by the Court in *Bivens* itself, a federal remedial regime is usually more appropriate than a state remedial regime for suits challenging federal officials’ violations of the federal Constitution, as it can be tailored in a way that is more responsive to the federal interests of both the officer and the victim. Moreover, recognition of a federal right of action is far less of a judicial leap when an alternative remedial regime already exists than when the alternative is no remedy at all. Indeed, recognizing a federal remedy may not be a leap at all. Consider the Supreme Court’s recent decision in *Ashcroft v. Iqbal*. The Court there held that there is no vicarious liability in *Bivens* actions; the plaintiff must show that each defendant committed a constitutional violation. It seems to follow from *Iqbal* that state tort law that recognizes vicarious liability is preempted; otherwise, the policies underlying the Court’s imposition of limitations on *Bivens* claims would be undermined. *Iqbal* illustrates the federal remedial regime’s greater responsiveness to the federal interests at play. (Of course, the *Iqbal* problem could also be addressed by holding all state remedies to be preempted as a matter of federal common law or constitutional law, but the Court has yet to take that step. As discussed above, a holding that all state remedies are preempted in certain categories of cases would have to be reached with a proper appreciation of the constitutional interests involved, including the constitutional interests in deterring and remedying constitutional violations that such remedies have traditionally advanced.)

In short, *Arar* and its progeny departed from the Supreme Court’s approach to the *Bivens* question by assuming that the choice before the court was “*Bivens* or nothing.” Ordinarily, to identify a difference between the Supreme Court’s

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33. *Id.* at 1948.
understanding of an issue and that of a lower federal court would be to demonstrate that the lower court erred. The judges in Arar did not defend their deviation from the Supreme Court’s understanding of the Bivens question and presumably were not aware of the deviation. If they had considered the point, however, they might have concluded that a shift from the Supreme Court’s conceptualization of the issue was necessitated by an intervening federal statute. In 1988, Congress enacted the Westfall Act, amending the Federal Tort Claims Act (FTCA). Known for the Supreme Court decision that it was enacted to overrule, the Westfall Act sets forth a detailed procedure for substituting the United States as the defendant whenever a federal official is sued for allegedly tortious conduct that took place within the scope of his employment. After substitution, the action may proceed against the federal government, but only pursuant to the rules (and exceptions) contained within the FTCA. The Westfall Act expressly preempts all civil actions against federal employees based upon conduct performed in their official capacities. Although the Second Circuit did not mention the Westfall Act, some scholars have argued that, in enacting that law, Congress did indeed quietly transform the Bivens question from “Bivens or state law” to “Bivens or nothing.”

We take issue with such a reading of the Westfall Act. Although Congress did immunize federal officials from state law actions, it explicitly exempted actions “brought for violation of the Constitution of the United States.” This exemption is commonly understood to have preserved Bivens claims, but the statutory language

36. Westfall Act § 6, 102 Stat. at 4564–65 (codified at 28 U.S.C. § 2679(d)).
37. See id.
38. Id. § 5, 102 Stat. at 4564 (codified at 28 U.S.C. § 2679(b)(1)) (“Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.”).
39. James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 GEO. L.J. 117, 127 (2009) (“In 1971, it was ‘damages or nothing’ for Webster Bivens, as Justice Harlan vividly explained; today, it has become ‘Bivens or nothing’ for those who seek to vindicate constitutional rights.”)
41. Pfander & Baltmanis, supra note 39, at 121-22. See also Hui v. Castaneda, 130 S. Ct. at 1853 (referring in dictum to the “Bivens exception”).
is broad enough to preserve state-law actions as well, if “brought for violation of the Constitution.” We argue that the better reading of the Westfall Act would immunize federal officials only from state-law actions not alleging conduct that violates the Constitution. Thus, after the Westfall Act, the *Bivens* question remains, as it was before, “*Bivens* or state law.”

Part I of this essay examines the theories under which victims of constitutional violations obtained damages against federal officials in the years before the Court recognized a federal cause of action in *Bivens*. Very early in our nation’s history, the Court recognized that federal officials were suable in damages pursuant to the common law forms of action. Trespass was the principal action employed, though numerous others were maintained. Persons harmed by a federal official’s conduct would initiate a common law action, the officer would then plead official authority as a defense, and the plaintiff would plead the constitutional violation to overcome the defense, on the theory that the government cannot authorize its officials to violate the Constitution. It may seem odd to modern eyes for the availability of remedies for a federal official’s violation of the federal Constitution to be determined by state law. But for most of our history, the common law was regarded as “general” law, which did not vary from state to state. Moreover, since Congress early on authorized federal officials sued in state court to remove to federal courts, the question of remedies would invariably be decided by federal courts, which, before *Erie Railroad v. Tompkins*, did not follow state court decisions on matters of general law. The question whether federal or state law governed the availability of remedies for violation of the federal Constitution lay largely dormant during the long reign of *Swift v. Tyson*.

Part II discusses the Supreme Court’s understanding of the *Bivens* question in *Bivens* and subsequent Supreme Court decisions. Both parties in *Bivens*, and all of the Justices, understood the alternatives to be (a) recognition of a federal cause of action or (b) continued reliance on the common law (now clearly understood as state law) as the exclusive source of the damage remedy against federal officials who violated the Fourth Amendment. The majority’s recognition of what has since become known as a *Bivens* action was based on its view that state law remedies were inadequate, not that they were unavailable. The dissenters, for their part, regarded the recognition of a federal cause of action as an act of legislation and thus a matter for Congress, not the courts. The dissenters’ analysis shows even more clearly that they viewed the alternative as the continued availability of state remedies:

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43. 304 U.S. 64 (1938).

44. 41 U.S. (16 Pet.) 1 (1842).
presumably the dissenters would have regarded any deviation from the status quo as improper judicial law-making, and the status quo, as we discuss in Part I, was the existence of common law remedies for federal officials’ constitutional violations.

In none of the subsequent cases addressing whether Bivens should be extended to new contexts has the Court deviated from its initial conceptualization of the Bivens question. The cases declining to extend Bivens illustrate the point most forcefully, as they often decline to extend Bivens on the ground that adequate state remedies exist. In addition, these decisions rely on the idea that recognition of a federal cause of action is properly viewed as an act of law-making and is thus an issue for Congress, a line of analysis which, as noted, disfavors the judicial subtraction of state law as much as (or more than) the addition of federal law. There is some stray language in a few opinions that seems to overlook the fact that non-recognition of a Bivens action would leave state causes of action in place, but overwhelmingly the Supreme Court’s decisions are consistent with its initial understanding of the Bivens question.

Part III considers whether Congress’ enactment of the Westfall Act in 1988 can reasonably be understood to have transformed the Bivens question from “Bivens or state law” to “Bivens or nothing.” As already noted, the statute’s language does not support such a reading. Even if the language were deemed ambiguous, however, the constitutional avoidance canon would counsel an interpretation that would leave state remedies for constitutional violations in place. Both before and after the Bivens decision, respected scholars – including the one serving as the Solicitor General at the time of Bivens, in arguing the case against recognition of a federal cause of action – have deemed state common law damage remedies to be constitutionally required in at least some circumstances. Additionally, it is plain that Congress intended to leave Bivens actions untouched by the Westfall Act. To read the Westfall Act as having radically transformed the antecedent question of whether a Bivens claim exists would be inconsistent with such an intent. Thus, even if Congress had preempted all state remedies for violation of the Constitution by federal officials, we would argue that its intent to leave Bivens claims unaffected would require that courts address the Bivens question as if the choice continued to be between “Bivens and state law.” Fortunately, this admittedly artificial inquiry is unnecessary because the text of the Act’s exemption is broad enough to preserve state-law claims seeking damages for constitutional violations in addition to those brought under Bivens.

I. CONSTITUTIONAL TORTS WITHOUT BIVENS

If Bivens had never been decided, or had come out the other way, someone in the shoes of Maher Arar or José Padilla would have been able to maintain his lawsuit against the federal officials who violated his constitutional rights based on state tort
law. He would have had to initiate his action in the state courts, but, because of a special removal statute entitling federal officials to remove claims from state to federal court, the defendants would have been free to remove the case to the U.S. district court that ultimately decided Arar’s and Padilla’s cases.

Federal officials have never been categorically exempt from damage suits under the common law 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 they were in England before independence. The fact that the defendant was a government official was far from irrelevant to the case, but it was relevant to the official’s defense rather than his suability. If the claim was based on the official’s conduct in performing his official duties, he would plead justification as a defense. But the defense would fail if the official exceeded his authority. 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.

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 officers were not protected by the Eleventh Amendment when their conduct violated 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

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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.48

Since the violation of the Constitution was deemed to strip the official of his official or representative character, the state law that governed his liability was the law governing private individuals who perpetrated the sorts of injuries suffered by the plaintiff, not any special state law specifically applicable to government officials.49

The injuries that Arar and Padilla suffered would have supported claims under a number of distinct common law theories. Had Arar been detained and interrogated by private individuals, his detention would clearly have constituted false imprisonment,50 and his coercive interrogation would likely have satisfied the elements of assault, if not also battery.51 These claims would have been most likely to prevail against the John Doe defendants who directly detained and interrogated him.52 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 been shown to have violated the Constitution. Arar also sued the higher-level officials who allegedly directed the tortious conduct.53 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.54 Again, the defense of justification would have failed if their actions had been shown to contravene the Constitution. Of course, Arar suffered his severest battery at the hands of the Syrian officials who tortured him.55 Arar did not sue these foreign officials.


49. See Developments in the Law, supra note 47, at 832 (“A government officer who acts without authority is . . . subject to the same legal rules as any private person.”).

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

51. See id. § 21; id. § 13.


54. RESTATEMENT (THIRD) OF AGENCY § 1 (2006). See also infra text accompanying notes 78-85 (discussing common law “action on the statute”).

officials, but he did allege that they were acting in concert with, or had colluded with, the federal officials he did sue.\textsuperscript{56} Again, had he sued under state tort law, his success may have depended, in the first instance, on whether he 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 way, except that his claim of battery against the John Doe defendants would not have depended on state law of agency or conspiracy, as those defendants were alleged to have inflicted torture on him personally.

Common law suits against federal officials do differ in one important respect from suit 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.” Thus, the above analysis of Arar’s and Padilla’s likelihood of success under a state tort theory is subject to the very large qualification that neither would have succeeded if the defendants had been protected by official immunity. But exactly the same would be true had the court afforded them a \textit{Bivens} claim, as official immunity applies whatever the source of the cause of action. The scope of official immunity has varied both over time and according to the sort of official involved. Certain types of officials – legislators, judges, and prosecutors – have long enjoyed an absolute immunity from suit for most of their acts.\textsuperscript{57} 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.\textsuperscript{58} Over time, the courts came to recognize an immunity protecting such officials from liability under the common law. But, unlike the immunity of legislators and judges and prosecutors, the immunity enjoyed by other executive officials has always been a qualified one. 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


\textsuperscript{57} U.S. CONST. art. I, § 6, cl. 1 (legislators); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (extending 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 (1869) (“[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.”); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (“We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law.”).

enjoyed the narrowest scope of immunity were those who inflicted physical injury to
the person or property, as the officials sued by Arar and Padilla are alleged to have
done.59 Officers who had inflicted less tangible sorts of injuries once enjoyed a
broader immunity.60 Second, while there was much debate in the cases and in the
academic commentary about the proper scope of liability of federal officials, all of
this debate related to the scope of the immunity to which these officials were
entitled, not the existence of a cause of action.61 That executive officials are subject
to tort suits has always been uncontroversial. Thus, although many scholarly
articles in the pre-\textit{Erie} era tackled the subject of official liability for tortious conduct,
virtually all of them focused on the scope of immunity;62 all assumed the existence of
a cause of action in tort.

By the middle of the twentieth century, the immunity of federal officials
generally protected them from suit if they were acting in good faith.63 The Supreme
Court subsequently refashioned this immunity, so that it now protects officials
unless they violated clearly established federal law.64 The status of official
immunity as federal or state law was unclear in the pre-\textit{Erie} period. Today, the
immunity is understood to have the status of federal common law, protecting federal
and state officers whether sued under \textit{Bivens} or \S 1983 or state common law.65

When, precisely, the immunity came to be understood as federal common law is


60. \textit{See id.} (“Liability for harms to intangible economic interests, or economic expectations, traditionally was of less concern.”). Today the “clearly established law” standard of qualified immunity applies to all executive officials except prosecutors and the President. \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 809 (1982) (“Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.”).

61. \textit{See id.} (“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)). As discussed below, the common law extended liability to wrongs producing intangible injuries as early as the fifteenth century. \textit{See infra} text accompanying note 76.


unclear, but it certainly was so understood before the Supreme Court’s decision in
*Bivens*, as Justice Harlan in *Bivens* 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, apparently referring to the doctrine of official immunity. 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 law would have operated to circumscribe the cause of action,
permitting recovery only if the official violated clearly established federal law.

The Supreme Court has also recognized certain evidentiary privileges, such as
that relating to state secrets. In certain circumstances, the state secrets privilege
can result in the dismissal of a lawsuit. The judges in the majority in the Second
Circuit decision in *Arar* cited the confidential nature of much of the relevant
evidence as a reason not to recognize a *Bivens* action. This is, of course, a concern
that is addressed most directly by the state secrets privilege. Had the court in *Arar*
understood the choice before it as “*Bivens* or state law,” it would have channeled
these concerns into its analysis of the state secrets privilege rather than the
existence of a *Bivens* action, as precisely the same concerns would arise had Arar
sought state tort remedies. Like official immunity, the state secrets privilege has the
status of (at least) federal common law and applies equally to federal and state
causes of action. A court’s non-recognition of a *Bivens* action, on the other hand,
leaves state tort remedies in place.

To modern eyes unfamiliar with the history of damage claims against federal
officials, the “common law cause of action/federal defense” model no doubt seems

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69. *Arar*, 585 F.3d at 577 (“The preference for open rather than clandestine court proceedings is a special factor that counsels hesitation in extending *Bivens* to the extraordinary rendition context.”).

70. *See*, e.g., Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998) (“[T]he state secrets privilege is an evidentiary privilege rooted in federal common law.”); *In re* United States, 872 F.2d 472, 474 (D.C. Cir. 1989) (“The state secrets privilege is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.”). Some courts and commentators maintain that the privilege has constitutional underpinnings. *See*, e.g., El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007). If so, it would be applicable in state tort actions as well as *Bivens* claims.
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 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 federal officials would 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 could well face differing levels of liability depending on where the plaintiff chooses to bring suit. 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 from federal officers who injured them. More likely, they would want to be overly generous, a problem addressed by 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 explaining the rationale for denying federal officers the immunity enjoyed by the federal government suggest that federal officers who violate the Constitution must be treated by the states like private parties who cause analogous injuries.71 Thus, 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.72 A similar conclusion would appear to follow from the principle that the states may not discriminate against federal law.73 As Professor Hill noted before Bivens, the

71. See supra text accompanying note 48 (quoting Ex parte Young).

72. Akhil 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, 1230 (1994). The analysis in the text suggests that states are not at liberty to establish special rules for the liability of federal officials. (The non-discrimination principle, discussed below, may also constrain the states in this regard.)

nondiscrimination principle would appear to preclude the states from making their tort law inapplicable to injuries caused by violation of the federal Constitution as long as it supplies a remedy for injuries caused by violation of standards of care imposed by state law.\textsuperscript{74}

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 who 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 form of action would be inadequate to protect the constitutional interests involved, another form of action will be available to fill in the gap. Indeed, the common law has long been characterized by its flexibility and its openness to evolution to meet new needs.\textsuperscript{75} 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.”\textsuperscript{76} From the tort of trespass on the case evolved such modern-day torts as defamation and libel, negligence, and deceit.\textsuperscript{77}

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.”\textsuperscript{78} Already “[i]n the late fourteenth and fifteenth centuries, actions labeled ‘trespass’ were being brought upon statutes whether or not they provided in terms for special penalties.”\textsuperscript{79} Although there was some retrenchment in the seventeenth and eighteenth centuries, the reluctance 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.”\textsuperscript{77} (citation omitted)).


\textsuperscript{75} As discussed in Part II, this was one reason proffered by the Solicitor General in \textit{Bivens} for refraining from creating a federal cause of action. \textit{See infra} text accompanying note 109.

\textsuperscript{76} FREDERICK MAITLAND, THE FORMS OF ACTION AT COMMON LAW 54 (1909).

\textsuperscript{77} \textit{See id.}

\textsuperscript{78} Al Katz, \textit{The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts} in \textit{Bell v. Hood}, 117 U. PA. L. REV. 1, 18 (1968). \textit{See also} Hill, \textit{supra} note 74, 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.”).

\textsuperscript{79} \textit{Katz}, \textit{supra} note 78, at 20.
during these years to permit tort actions on the basis of certain statutes extended only to statutes that themselves provided for damage recovery by injured individuals, the inference being drawn that Parliament meant to exclude other remedies. Decisions such as Ashby v. White and Couch v. Steel show that the “common law right” to recover for breach of a “duty . . . created by statute” was alive and well in the United Kingdom during this period. In the United States, the common law “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, as well as in the black-letter tort of negligence per se. The common law tort of action on the statute and its modern-day manifestations are, of course, of immense and 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 well as state law. Indeed, if a state permits the recovery of damages for violation of standards imposed by state statutes, its failure to permit recovery on the basis of federal statutes or the Constitution may run afoul of the non-discrimination principle mentioned above.

Finally, disuniformity of remedies from state to state was not a significant problem for 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

80. See id. at 28.

81. 118 Eng. Rep. 126, 136 (K.B. 1703) (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.) The Chief Justice’s opinion was adopted by the House of Lords, which reversed King’s Bench and entered judgment for the plaintiff. See Katz, supra note 78, at 25.

82. 118 Eng. Rep. 1193, 1197 (K.B. 1854) (“[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.”)

83. The quoted language is from Couch v. Steel, 118 Eng. Rep. at 1197. See supra note 82.

84. See Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39–40 (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 the doctrine of the common law.”) (emphasis added)).

85. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 36 (5th ed. 1984); RESTATEMENT (SECOND) OF THE LAW OF TORTS §§ 286 (1965). For a recent Supreme Court decision involving negligence per se, see Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986).
the “general” law. During the long reign of *Swift v. Tyson*, federal courts did not follow state court precedents; they interpreted and applied the common law according to their own best lights. As noted above, federal officials sued in state court have long been entitled to remove the case to federal court. As a result, the elements of the common law torts for which they were being sued would invariably be decided in the federal courts, subject to Supreme Court review. This regime produced significant uniformity in the application of common law torts to federal officials. 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 alleged to have violated the Constitution during most of the pre-*Erie* period did not slavishly follow state precedents regarding procedural or substantive issues, such as who were the appropriate parties, and even what the elements of the relevant torts were. Instead, they deviated from state law precedents on such questions when they regarded such deviation to be necessary for the advancement of the federal interests involved.

Matters changed with the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* in 1938. The Court disavowed the concept of “general law,” holding that the common law was ordinarily state law. Federal courts were thenceforth required to interpret and apply the common law as would the courts of the state in which they sat. At the same time, the Court recognized that certain matters of uniquely federal concern would be governed by a federal common law. Federal common law differs from the general law in that it preempts inconsistent state law. State courts accordingly must follow federal precedent in interpreting and applying such law.

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91. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
92. See Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (“[W]e have held that a few areas, involving ‘uniquely federal interests’ … are so committed by the Constitution and laws of
Courts addressing the question of damages for constitutional violations after *Erie* 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. Since the availability of such remedies had been determined by federal courts largely independently of state decisions, and given the obvious federal interests involved, the pre-*Erie* approach could easily and properly have been re-characterized in post-*Erie* terms as the application of a federal common law of remedies for constitutional violations. As such, the development of such norms could have been pursued by the federal courts with a sensitivity to the federal interests involved, including the need to give efficacy to the Constitution, and without being tied to state precedents, much as it had 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 would have been answered with an appreciation of the long tradition of providing remedies according to a common law technique notable for its flexibility in meeting constitutional needs. And recognizing a remedy would not have been regarded as an act of judicial law-making so much as the continuation of a long-standing and, indeed, constitutionally contemplated remedial approach.93

But that road was not taken. After *Erie*, the pre-existing common law remedies were assumed to be state law remedies, and the question that was 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 the issue was posed, soon after *Erie*, in *Bell v. Hood*.94 The plaintiff had brought suit against the federal official directly in federal court (rather than bringing suit in state court and waiting for the suit to be removed) asserting a claim under the federal Constitution. The lower court dismissed for lack of federal jurisdiction, holding that the case did not arise under federal law.95 (Although the plaintiff had at a minimum raised a federal defense, under the well-pleaded complaint rule, federal jurisdiction is lacking when the federal issue is introduced by way of defense

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93. That state tort remedies were the constitutionally contemplated remedies for violation of the Constitution by federal officials was argued by the Solicitor General in *Bivens*. See infra text accompanying note 106.

94. 327 U.S. 678 (1946).

95. 150 F.2d 96 (9th Cir. 1945), rev’d, 327 U.S. 678 (1946).
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 substantial enough to support federal question jurisdiction. But the Court did not resolve that question. On remand, the lower court held that federal law did not provide a cause of action. The decision in *Bell v. Hood* on remand was largely followed by the lower courts. There matters stood when the courts were presented with the same question in *Bivens*.

II. *Bivens* AND ITS PROGENY

Although the judges of the Second Circuit disagreed vehemently over the correct outcome in the *Arar* case, they agreed on one point: all of them believed that Arar either possessed a *Bivens* action or had no cause of action for damages at all. In this respect, the Second Circuit’s approach to the *Bivens* question was very different from the Supreme Court’s approach in *Bivens* itself. 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. On this understanding of the nature of the *Bivens* question, the “special factors” that the Court said might “counsele[] hesitation” in recognizing a *Bivens* action must be factors that favor leaving the question of damages to state law. Factors that would favor leaving the plaintiff with no cause of action at all bear instead on the question of official immunity.

A. The *Bivens* Case

Webster *Bivens* was arrested on narcotics charges, and his home searched, by agents of the federal Bureau of Narcotics who lacked a warrant either for the arrest or the search. In his complaint, he alleged that the agents 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. He sued the agents in

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98. *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.”).
federal district court, alleging that they had caused him “great humiliation, embarrassment, and mental suffering.”99 He sought $15,000 from each agent for their violation of his “constitutional rights.”100 Although his pro se complaint did not refer specifically to the Fourth Amendment,101 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.”102 The district court dismissed the complaint on the authority of the lower court’s decision in Bell v. Hood on remand,103 and the Second Circuit affirmed.104

To grasp how the Bivens question was understood by the Supreme Court in Bivens itself, it is best to begin with the brief filed by President Nixon’s Solicitor General, Erwin Griswold, arguing on behalf of the United States against recognition of a federal damages remedy. Griswold clearly presented the question to the Court as whether an “additional” damage remedy should be recognized.105 He argued that a federal right of action for damages for violation of the Fourth Amendment was inconsistent with original intent because 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. As discussed in Part I, the breach of the Constitution would operate to defeat any defense of official justification, leaving the official open to common law remedies. According to the Solicitor General, 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.”106 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. The Solicitor General regarded the common law remedy not merely as the default damages remedy, but also as the constitutionally contemplated one.

99. For this and all previous propositions in this paragraph, see James E. Pfander, The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, in FEDERAL COURTS STORIES 275 (Judith Resnik & Vicki C. Jackson eds., 2009).

100. Id. at 280-81.

101. Id. at 281.

102. 403 U.S. at 389.


104. 409 F.2d 718 (2d Cir. 1969).


106. Id. at 12.
The Solicitor General conceded that judicial recognition of a federal remedy would be appropriate if such a remedy were “indispensable for vindicating constitutional rights.”\textsuperscript{107} 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.\textsuperscript{108} But recognition of a federal damage remedy was not necessary, in the Solicitor General’s view, because common law remedies were available. The Solicitor General acknowledged that the common law remedies were sometimes inadequate, but he argued 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.”\textsuperscript{109} 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 damage remedy envisioned by the Framers; and second, the existence of the state remedy was the central justification for rejecting a federal remedy.

The Court in \textit{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,\textsuperscript{110} “regardless of whether the State in whose jurisdiction [the federal] power is exercised would... penalize the identical act if engaged in by a private citizen.”\textsuperscript{111} The Court, and Justice Harlan in his concurrence, also explicitly rejected the government’s argument that the federal remedy need be “indispensable” for vindicating the Fourth Amendment.\textsuperscript{112} In Justice Harlan’s words, the question instead was whether damages were “necessary’ or ‘appropriate’ to the vindication of the interest asserted.”\textsuperscript{113}

The conception of the \textit{Bivens} question as whether existing common law remedies should be supplemented with a federal one is perhaps best reflected in the opinions

\textsuperscript{107} Id. at 24.
\textsuperscript{108} Id. at 17.
\textsuperscript{109} Id. at 40.
\textsuperscript{111} Id. at 392.
\textsuperscript{112} Id. at 388; see also id. at 406 (Harlan, J., concurring).
\textsuperscript{113} Id. at 407 (Harlan, J., concurring).
of the dissenting Justices. These Justices would have declined to recognize a federal cause of action on the ground that creating such remedies is a legislative function. In the view of these Justices, the majority was usurping the power of Congress.114 This rationale is consistent only with a determination to leave preexisting common law actions in place. After all, a decision to preempt state law and replace it with nothing is just as much an act of judicial legislation as a decision to preempt state law and replace it with something.115 Thus, leaving victims of constitutional violations with neither a federal cause of action nor their preexisting common law actions 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 maintain that a decision that a state cause of action is preempted as a matter of federal common law would in no circumstances be justified.116 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 was that federal officers who violated the Constitution were subject to common law causes of action. In the view of these dissenting Justices, the preemption of such actions would be a decision for Congress, not the courts.

The Justices in the majority held a less restrictive view of the courts’ ability to make law in the absence of congressional action.117 Whether these Justices

114. *Id.* at 412 (Burger, C.J., dissenting); *id.* at 428–29 (Black, J., dissenting). *See supra* note 29.

115. Henry Hart made this point forcefully (albeit not is discussing the question of federal causes of action for constitutional violations) in Hart, *supra* note 47, at 534, while noting that the Supreme Court had overlooked the point in certain cases. *See id.* at 534 & n.179. Hart wrote in 1954 that “this . . . trend has never been adequately thought through, and can be expected to pass.” *Id.* Lamentably, his prediction has not proved entirely accurate. *See* Texas Industries Inc. v Radcliffe Materials, Inc., 451 U.S. 630 (1981). But the Supreme Court’s occasional lapses do not undermine the validity of Hart’s point, which we embrace here. Federal courts engage in judicial law-making when they decide to preempt state law, whether because of a need for uniformity or for another reason. Having crossed that road, the decision to replace a state cause of action with a federal cause of action is no more an act of law-making or a usurpation of the role of the legislature than the decision to replace it with no cause of action at all. * Accord* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler’s *The Federal Courts and the Federal System* 788-89 (5th ed. 2003).

116. As discussed in Part III, however, the Constitution itself may in certain circumstances require the availability of a damage remedy.

117. Their decision to recognize a cause of action not explicitly authorized by Congress would not be an act of lawmaking if their holding was that the Constitution implicitly required these remedies. As discussed above, the Solicitor General seemed to argue that the Constitution required the availability of common law remedies and perhaps also of any additional remedies that were indispensable to vindicating the Constitution. The Court in *Bivens* did not reject this view, but neither
understood the federal remedy they were creating as preemptive of the common-law remedy or as supplemental is not entirely clear from the opinions. The majority never stated that it viewed the federal remedy was 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 under-protected Fourth Amendment interests.118 If under-protection was the problem, then the solution would be the recognition of a federal cause of action, not preemption of state causes of action. Any concern that liability under the common law 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,”119 an immunity that applies equally in common law and Bivens actions.120

On the other hand, Justice Harlan in his concurring opinion 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.”121 These considerations would support the conclusion that the Bivens action preempts preexisting common law damage remedies. Still, the absence of uniformity is not necessarily an overriding concern, as shown by the Federal Tort Claims Act, which exposes the federal government to liability under the laws of different states depending on where the injury occurred.122 One prominent contemporaneous scholar concluded after the Bivens decision 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 the state cause of action. . . . The federal remedy is independent, not preemptive, of state common law causes of action.”123

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119. Bivens, 403 U.S. at 397.

120. See id. at 409 (Harlan, J., concurring) (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).

121. Bivens, 403 U.S. at 409 (Harlan, J., concurring).

122. 28 U.S.C. § 1346(b)(1).

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. The important question is whether common law actions are preempted in contexts in which a federal cause of action has not yet been recognized. In other words, does Bivens hold that the liability of federal officials to damages claims 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 violation of other constitutional provisions. As discussed above, the fact that all of the Justices (especially the dissenters) focused on whether the Court was usurping Congress’s power is consistent only with the conclusion that they regarded the alternative to recognition of a Bivens claim to be leaving the question of damages for constitutional violations by federal officers as they found it. As discussed, the status quo ante was that federal officers were subject to common law actions. 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 damage remedy or instead to retain the common law as the exclusive basis for the damage 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 the common law, not factors that militate against any right to damages at all.

B. The Post-Bivens Cases

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 whether to recognize a federal cause of action as a supplement to or replacement for common-law remedies. Although few of the subsequent cases dwell on the existence of common law damages remedies as an alternative to a federal cause of action, the failure of those cases to focus on this alternative stems from the fact that an alternative federal remedy was available that was more appealing than the common law action. Yet even these cases include language confirming that, as a general matter, common law remedies remained one alternative to recognizing a 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 Davis v. Passman, the Court recognized a federal cause of action for violation of the Due Process Clause of the Fifth Amendment. The alleged violation of the Due Process Clause consisted of

124. See supra note 4.
gender discrimination by a sitting Member of Congress in his hiring of staff. The alternative of suing under state law was not given extensive consideration, but only because it was conceded that the plaintiff “ha[d] no cause of action under Louisiana law.”

In the next case, *Carlson v. Green*, the Court recognized a federal cause of action against federal officials for violations of the Eighth Amendment’s ban on cruel and unusual punishment. The defendants were alleged to have failed to provide medical treatment to a prisoner in a manner that reflected deliberate indifference to his welfare. The district court had upheld recovery for the prisoner’s mother under a state wrongful death statute, subject to severe limits on the amount of recovery. In holding that a federal cause of action existed, the Court did not question the availability of this state cause of action. Its analysis did not focus much on the alternative of recovery under state law because a better alternative was available through the Federal Tort Claims Act. (The Court found even that alternative to be inadequate for a variety of reasons, including the unavailability under the FTCA of punitive damages.) 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 . . . would seem,” he wrote, “that the most reasonable explanation for Congress’ failure 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 . . . .”

2. Subsequent Retrenchment

*Carlson v. Green* was followed by a series of decisions declining to extend *Bivens*

125. 442 U.S. at 245 n.23. The Court went on to suggest that a state cause of action might have been constitutionally unavailable, citing *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1872). But the Court’s doubts appear to have stemmed from the fact that the defendant was a Member of Congress. *See* 442 U.S. at 245 n.23. The Court was not suggesting that common law damages actions against federal officials were generally problematic as a constitutional matter.

126. 446 U.S. 14 (1980).

127. *Id.* at 16 & n.1.

128. *Id.* at 17–18 n.4.

129. *Id.* at 21–22. The Court also found the FTCA cause of action inadequate because it “exists only if the State in which the alleged misconduct occurred would permit a cause of action 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 federal action preferable to an action under the common law.

130. *See* 446 U.S. at 42 (Rehnquist, J., dissenting).
to new contexts. These decisions, too, are consistent with the proposition that the alternative to recognizing a *Bivens* claim is to leave the question of damages to the common law. Again, the alternative of common law damages actions did not receive prominent consideration in most of these cases. But, as in *Carlson v. Green*, the failure to focus on state tort remedies stemmed from the fact that Congress had supplied alternative federal remedies. For example, in *Chappell v. Wallace*¹³¹ and *United States v. Stanley*,¹³² the Court declined to recognize a *Bivens* action in the military context because Congress had established “a comprehensive internal system of justice to regulate military life.”¹³³ Similarly, in *Bush v. Lucas* and *Schweiker v. Chilicky*, the Court focused on the alternative remedial scheme that Congress had provided for the sorts of injuries that the plaintiff had suffered.¹³⁴ Where Congress has conferred remedies, the courts naturally focus on the alternative federal remedies, as they are usually more generous than any available common law remedies. The key question in such cases 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 *Wilkes v. Dinsman* on the ground that the latter case “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 did not require recognition of a new federal cause of action.¹³⁵ And in *Bush v. Lucas*, the Court recognized that *Bivens* had “reject[ed] the argument that a state tort action in trespass provided the only appropriate judicial remedy.”¹³⁶

When the *Bivens* issue has arisen in a context in which Congress had not affirmatively authorized alternative federal remedies, the availability of common law damage remedies did feature prominently in the Court’s analysis. For example, the Court in *Correctional Services Corp. v. Malesko* declined to recognize a *Bivens*

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¹³³ *Stanley*, 483 U.S. at 679; *see Chappell*, 462 U.S. at 305 n.2 (noting “comprehensive system of military justice”).


¹³⁵ 462 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,” 462 U.S. at 305 n.2, suggesting that the common law remedy recognized in *Wilkes* may have subsequently been preempted by congressional action.

¹³⁶ 462 U.S. at 375 (emphasis added).
action against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons, relying prominently on the fact that persons injured by such entities “enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities.” 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. The Court cited Malesko’s similar reliance on the existence of “state tort remedies in refusing to recognize a Bivens remedy.”

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 United States v. Stanley, for example, Justice Brennan’s dissenting opinion seemed to equate the absence of a Bivens remedy with the existence of an absolute immunity from liability. So understood, the alternative to a Bivens remedy would indeed be no remedy at all, as an official’s 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 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, 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 correctness of the majority’s holding that Congress had preempted the field for federal law by enacting an otherwise comprehensive system of military justice.

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

137. 534 U.S. 61, 72–73 (2001). The Court presumably meant that the 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.


139. 483 U.S. 669, 692 (Brennan, J., dissenting).

140. In Bivens, the Court held that a federal cause of action existed, yet it remanded for consideration of whether the defendants were immune from liability. 403 U.S. at 398.

141. Stanley, 483 U.S. at 683-84.
alleging the deprivation of a federal constitutional right.” 142 On the surface, this statement appears to disregard the possibility that the common law could be the “source of liability” for injuries caused by federal officials through conduct that violates the plaintiff’s federal constitutional rights. As we have seen, common law actions such as trespass were traditionally the “source of liability” for federal officials alleged to have violated the Constitution. Because the statement, if read literally, is so clearly incorrect, we must seek an alternative reading.

This statement from Meyer comes in the part of the Court’s opinion addressing the FDIC’s entitlement to immunity and holding that the agency’s immunity had been waived by its organic statute.143 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 Federal Tort Claims Act. Section 2679(a) of the FTCA provides that agencies are not suable under their organic statutes for claims that are cognizable under § 1346(b) of the FTCA.144 And the latter section, in turn, confers jurisdiction over damage 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 liable to the claimant in accordance with the law of the place where the act or omission occurred.”145 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, and hence the United States, if a private person, would not be liable under the law of the place (understood as the state) where the act or omission occurred.

If the Court were understood to be saying that 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 violative of the Constitution. The Court should instead be understood to have stated merely that “by definition” a complaint asserting a federal constitutional claim is not cognizable under § 1346(b) where the claimant has framed his claim as a federal constitutional 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 the claimant framed

143. Id. at 474.
144. 28 U.S.C. 2679(a).
145. 510 U.S. at 478.
his claim as one of trespass or 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.\footnote{146}

The alternative would be to read this statement as reflecting the Court’s view that, sometime after \textit{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. 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.\footnote{147} Second, as noted, in \textit{Malesko} and \textit{Wilkie}, both decided after \textit{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 \textit{Westfall v. Erwin},\footnote{148} the Court clearly upheld the availability of state tort remedies against federal officials. (Although the focus of the Court’s discussion was the scope of the officials’ immunity, the opinion left no doubt that state law causes of action were available.) The \textit{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 \textit{and} the federal Constitution, but not when the official has violated a state duty of care without violating 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 Congress provided when it addressed the issue in the Westfall Act).

Finally, such a broad preemption of state tort remedies would have constituted a massive exercise of legislative power, something that the Justices disinclined to “extend” \textit{Bivens} regard as the function of Congress, not the courts. If the Court had meant to assert that this radical change had come about through federal common law-making sometime after the \textit{Bivens} decision, one would have expected from the Justices in the majority in \textit{Meyer} at least a little analysis of this issue and a least a hint of criticism of such judicial activism.\footnote{149} Moreover, if federal common law had

\textsuperscript{146} 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 explain below, the Act does not immunize the officer from such suits when the plaintiff alleges a violation of the Constitution.

\textsuperscript{147} This conclusion follows from the Court’s use of the phrase, “by definition.”


\textsuperscript{149} Another alternative would be to read the statement as reflecting the Court’s interpretation of the Westfall Act as having preempted all state tort claims against federal officials. This reading, however, is equally untenable. The Court in \textit{Meyer} did not even cite the Westfall Act. Moreover, as
somehow come to preempt the field of remedies against federal officials for constitutional violations, then an aversion to judicial law-making could no longer ground an unwillingness to recognize a federal cause of action, for, as already discussed, once the courts have held state law to be preempted, 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 Justices in the *Meyer* majority continue to claim that recognition of a *Bivens* claim would usurp the power of Congress.

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. Several rely on the existence of state law remedies as a reason for declining to extend *Bivens*. Stray language in some opinions suggest, at most, that the some Justices (and, on one occasion, the Court as a whole) have at times overlooked the fact that the alternative to recognition of a *Bivens* action is the exclusivity of state tort remedies for federal officials’ violation of the Constitution. To read these statements as reflecting a never-explained and never-justified assumption that the question of remedies against federal officials for violation of the Constitution is always solely a matter of federal law, such that the alternative to recognition of a *Bivens* claim in a given context is no cause of action at all, would be an unreasonable interpretation of ambiguous language. Indeed, it is untenable that the Court’s more recent statements reflect the view that state tort remedies have been preempted as a matter of federal common law, as such preemption would constitute an act of judicial law-making of the sort that critics of *Bivens* have long derided – an even-more-egregious usurpation of legislative power than the critics accuse *Bivens* itself of being. Because such a usurpation would be anathema to the Justices who have been in the majority in most of the recent cases presenting the *Bivens* question, the statements cannot plausibly be read as uncritical acceptance of such judicial legislation.

Preemption of state tort remedies through congressional action would not be vulnerable to this particular criticism, and scholars have argued that Congress did just that when it passed the Westfall Act in 1988. As we show in Part III, however, the language and legislative history do not bear them out. To the contrary, in enacting the Westfall Act, Congress explicitly stated that it meant to leave

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150. See *supra* note 114 and accompanying text.

151. See, e.g., *Malesko*, 534 U.S. at 68 (noting appropriateness of deference to Congress’ institutional competence); *id.* at 75 (Scalia, J., dissenting).

constitutional tort actions untouched. It would be inconsistent with this intent to read the Westfall Act as having radically transformed the question whether a Bivens action exists in a given context.

III. THE WESTFALL ACT

The nature of the Bivens question as a choice between a federal and 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” – would be rather clear-cut were it not for Congress’s enactment of the Westfall Act in 1988.153 Although the judges in Arar did not rely on the Westfall Act as a justification for framing the issue as they did, the statute may have been the reason that Arar’s lawyers posed the question that way. In any event, scholars have argued that the Westfall Act quietly transformed the Bivens question from “Bivens or state law” to “Bivens or nothing.”154 For a variety of reasons, we argue, the Westfall Act cannot be read that way.

The Westfall Act was an amendment to the Federal Tort Claims Act. Thus, we begin with a brief look at the history of that statute, and then describe the enactment of the Westfall Act and the statute’s interaction with the rest of the FTCA. We then explain why the Westfall Act cannot be read to have transformed the Bivens question in the radical way that some have claimed it did.

A. The FTCA and Common Law Remedies

Others have carefully explored the background to the FTCA,155 its legislative history, and its jurisprudence.156 As relevant here, the Act for the first time waived the sovereign immunity of the federal government for most non-maritime torts.157 To that end, the FTCA as enacted in 1946 provided that:


157. In 1887, Congress in the Tucker Act expressly conferred jurisdiction upon the federal district courts for claims (not exceeding $10,000) arising under contract or “not sounding in tort” (as of 1855, claims exceeding $10,000 could be resolved by the Court of Claims). See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505 (codified as amended 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.
Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, 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 where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.158

Because Congress’s focus was on “ordinary common-law torts” under the “law of the place where the [tort] occurred” and committed by federal officers acting within the scope of their employment,159 the FTCA as originally enacted in 1946 expressly exempted intentional torts.160 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 claims for certain intentional torts committed by federal law enforcement officers, including assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution.161 As James Pfander and David 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

158. FTCA § 410(a), 60 Stat. at 843–44 (codified as amended at 28 U.S.C. § 1346(b)(1)).
160. See FTCA § 421(h), 60 Stat. at 846 (codified as amended at 28 U.S.C. § 2680(h)).
substituted the government as a defendant on such claims.” The Supreme Court confirmed this view in 1980, concluding in *Carlson* that, “when Congress amended FTCA in 1974 . . ., the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . . .” What was just as true during the same time period is that state law remedies against federal officers remained available as well, subject to any defenses or immunities supplied by federal law.

Practically, then, had an individual in Arar’s position attempted to pursue relief against the federal officers who mistreated him between 1974 and 1988, he could have proceeded simultaneously along three paths: 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; a *Bivens* claim against the officers, to the extent that he sought relief for a violation of his constitutional rights; and state law tort claims directly against the relevant officers. Different defenses may have made recovery difficult under each or all of these avenues, but the relevant point for present purposes is that all three causes of action would have been available simultaneously.

**B. Westfall and the Westfall Act**

That federal officers could also still be sued under state tort law after *Bivens* and the 1974 amendments to the FTCA is nowhere better demonstrated than the Supreme Court’s 1988 decision in *Westfall v. Erwin*, a state law negligence suit in which 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. As Justice Marshall concluded for a unanimous Court, “absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official

162. Pfander & Baltmanis, supra note 39, at 131 (2009); see also id. at 133 (“In so doing, 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.”).


duties and the conduct is discretionary in nature.” 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. 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.”

This exemption has commonly been assumed to exempt Bivens claims (and only Bivens claims) from the scope of the exclusivity provision. Indeed, Pfander and Baltmanis rely on this language as the linchpin of their argument that Congress has effectively ratified Bivens. In their view, the fact that Congress simultaneously preempted state common law claims and exempted Bivens claims leads inexorably to the conclusion that, after 1988 if not before, the question really is “Bivens or nothing.” They recognize that their interpretation of the Westfall Act is inconsistent with the Supreme Court’s analysis in Wilkie v. Robbins, a post-Westfall Act case in which the Court relied on the continued availability of state tort remedies against federal officials sued for constitutional violations, but they suggest that the Court in Wilkie was “mistaken[].” As we argue below, however, the Court was on solid ground in concluding that the Westfall Act did not affect the availability of state tort remedies against federal officials alleged to have violated the Constitution.

As noted above, the plain text of the Westfall Act does not mention Bivens at all.

166. Id. at 297–98.
168. Id. § 5, 102 Stat. at 4564 (codified at 28 U.S.C. § 2679(b)(1)).
169. Id. (codified at 28 U.S.C. § 2679(b)(2)(A)).
170. See Pfander & Baltmanis, supra note 39.
171. See id. at 122.
172. Id. at 127.
173. See supra text accompanying note 138.
174. Pfander & Baltmanis, supra note 39, at 128 (“[T]he Court in Wilkie assumed (perhaps mistakenly) that trespass remedies were available as a matter of state tort law.”).
Instead, it speaks generally to civil actions brought for constitutional violations. Its language is thus broad enough to cover actions under state or federal law, and exempts those (as well as claims arising under more specific federal statutes) from the proviso that the FTCA shall be the exclusive remedy. The text draws no distinction between *Bivens* claims and state law remedies for constitutional violations.

This reading is confirmed by the authoritative House Report accompanying the Act, which makes clear that the purpose of the exemption was to protect all claims for constitutional torts, and not just those arising under *Bivens*. Thus, as the summary of section 5 concluded, “[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.” In other words, although the Westfall Act preempted most state tort claims against federal officers, it left intact constitutional tort claims against federal officers. Any different conclusion would be inconsistent with Congress’ intent to leave unaffected “the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.” After all, as shown in Part I, the common law forms of action had been the standard vehicle for obtaining damages from federal officials who violated the Constitution since early in our history. Preemption of such remedies would acutely and severely “affect” the remedial rights of victims of constitutional violations by federal officials. Thus, both the plain text and the legislative history of the Westfall Act unambiguously support the conclusion that, to whatever extent the pre-1988 *Bivens* question was “*Bivens* or state law,” the Westfall Act did nothing to change the inquiry. Put simply, the Westfall Act left constitutional tort claims the way it found them.

Even if Congress had only meant to leave *Bivens* claims untouched, giving effect to its intent would require the courts to continue to approach the *Bivens* question as if the choice remained “*Bivens* or state law.” If the Westfall Act were read to transform the *Bivens* question “*Bivens* or nothing,” then it would produce a radical change in *Bivens* doctrine. As noted above, the Justices who resisted recognition of a federal cause of action viewed the creation of a federal cause of action as a legislative act properly for Congress, not the courts. The opposite view prevailed because the question was correctly framed as “*Bivens* or state law.” In the view of the Justices in the majority in *Bivens*, such judicial legislation was justified, if only to eliminate the anomaly of leaving the availability of damages against federal officials for violation of the federal Constitution to “the vagaries of state law.” To read the Westfall Act to transform the *Bivens* question to “*Bivens* or nothing” would un-tether *Bivens* from its moorings by eliminating one of the background rules that made the case for

recognition of a federal cause of action so straightforward and self-evidently right. Such a dramatic change in the judicial approach to determining whether a Bivens action exists would be inconsistent with Congress' intent to leave Bivens claims unaffected. Fortunately, neither the text nor the legislative history require, or even support, any such change in approach.

A textual counterargument might be that a common law claim is not a claim “brought for violation of the Constitution” even if it alleges a constitutional violation. Such claims, it might be argued, are “brought” to obtain compensation for certain interests protected by the common law or state law. The Constitution comes into such cases to defeat a defense of official justification, but the affirmative remedy compensates for injury to interests protected by state law, not for constitutional interests. 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 constitutional violations.”

This textual counterargument collapses under its own weight, however. The distinction it seeks to draw between interests protected by the common law and interests protected by the Constitution is unstable, if not untenable. First, many – perhaps most – constitutional provisions by design protect interests defined by state law. Some do so explicitly. For example, the Contracts Clause protects contracts, which are in turn defined by state law.176 The Due Process Clause protects property, which is also defined by state law.177 State law also helps to define the liberty interest protected by the Due Process Clause.178 Other constitutional provisions implicitly protect interests defined by the common law. For example, the Fourth Amendment protects interests in privacy that are also the concern of common law torts such as trespass. To be sure, as the Court noted in Bivens, the interests underlying the Fourth Amendment do not overlap completely with those underlying the common law, but they overlap enough to make it untenable to draw the strict distinction on which such a textual counterargument would rest.

Furthermore, just as some constitutional provisions protect state-created or state-defined rights, some common law torts, as noted above, protect rights created or defined by positive law, including the Constitution. When the victim of a constitutional violation brings a tort suit based on a common law “action on the

176. See, e.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938).


178. See, e.g., Wilkinson v. Austin, 545 U.S. 209, 222 (2005) (“[A] liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations.”).
“statute” theory, he is quite literally bringing an action “for violation of the Constitution,” even though the action has its source in state rather than federal law. The state tort of “negligence per se” is widely recognized and could well support claims based on violations of the Constitution. And state “converse-1983” statutes of the sort that Akhil Amar has proposed would also fall within the plain terms of the Westfall Act’s exemption. Thus, at a minimum, some actual and potential state tort actions would undeniably be “brought for violation of the Constitution” and would survive a literal interpretation of the Westfall Act.

Finally, even if this alternative interpretation of the scope of the Westfall Act’s exemption (as not including, and therefore preempting, all common law claims for constitutional torts) were otherwise tenable, it would have to be rejected because it would raise substantial constitutional questions. The constitutional avoidance canon compels interpreting an ambiguous statute so as not to raise that question unnecessarily. Quite apart from the avoidance canon, it is clear that Congress in enacting the Westfall Act intended to avoid constitutional questions. A reading of the Westfall Act as exempting only federal causes of action for constitutional violations is, at best, no more plausible than the one that would exempt all remedies for claims against federal officials alleging a violation of the Constitution. (Indeed, in our view, the latter interpretation is more consistent with the statutory language.) Faced with such competing interpretations, and without any indication that Congress meant to provoke such a momentous constitutional conflict, the Westfall Act’s exclusivity provision should be read to exempt the cases it specifies—all civil suits claiming a violation of the Constitution.

This is not the place to address fully the question whether the Constitution itself requires a damage remedy for federal officials’ violation of Constitution. It suffices to note that the claim is a substantial one. To this end, we recall that it was central to

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180. See, eg, Ashwander v. TVA, 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” (internal quotation marks omitted)); see also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.”); cf. Bowen v. Mich. Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Bartlett v. Bowen, 816 F.2d 695, 699–700 (D.C. Cir. 1986) (“[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.” (footnote omitted)).
the argument of Richard Nixon’s Solicitor General in *Bivens*, in arguing against recognition of a federal cause of action, that the state tort remedy was the one contemplated by the Framers. That Solicitor General was the noted constitutional scholar and longtime dean of Harvard Law School, Erwin Griswold, “a lifelong Republican with a background in Midwest conservatism.”

The position 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 before and after *Bivens*. Finally, numerous Supreme Court cases establish that Fourteenth Amendment’s Due Process Clause sometimes requires a damage remedy (or a substitute remedy against the government) against state officials who violate federal law. Although these cases involved state

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182. See Hill, supra note 74; Katz, supra note 78; see also Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the 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.”).


We take no position on whether the Westfall Act should be read to exclude 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...
officials who had violated the federal Constitution, it is difficult to see why similar analysis wouldn’t apply to federal officers via the Fifth Amendment’s Due Process Clause.¹⁸⁵

To the extent that the Constitution requires the availability of a damage remedy, it may well be within Congress’ 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. One could perhaps argue that, in light of the Westfall Act, the FTCA’s exceptions – such as the discretionary function exception – should be construed with an eye to providing for any remedies required by the Constitution. But this approach would risk distorting long-standing 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’ intent, since the text and legislative history of the Westfall Act show that Congress sought to address the constitutional question by excluding claims “for violation of the Constitution” from the scope of the Act altogether.

The constitutional issues could also, of course, be channeled into the *Bivens* analysis. The Constitution is presumably indifferent to whether the required damage remedy is provided under the rubric of federal or state law, and for obvious reasons a federal remedy seems preferable. One could thus interpret the Westfall Act as repealing state-law remedies against federal officials and implicitly instructing the courts to provide for the availability of any constitutionally required damage remedies by means of *Bivens* claims. This is the heart of the claim advanced by Pfander and Baltmanis, who argue that the Westfall Act represented a conscious choice by Congress to “ratify[y]” *Bivens* – that, in “foreclosing suit against federal officers on state law theories of liability and shifting to remedies against the

⁠the suit is brought for 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 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 Constitution should be understood to have its basis in the Supremacy Clause rather than the Due Process Clause, see Vázquez, *supra* note 183, at 1777-85.

¹⁸⁵. 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 damage remedy for constitutional violations in circumstances in which the FTCA would not provide one. Thus, so long as there are any cases in which the Constitution requires such a remedy, an interpretation of the Westfall Act as preempting all such remedies would present substantial constitutional problems.
government under the FTCA, the Westfall Act assumes the routine availability of a *Bivens* remedy.”

We agree that *Bivens* claims should be routinely available, subject to immunity and privilege doctrines that apply both to federal and state causes of action. But we think that Congress provided for such routine availability indirectly—i.e., by retaining the longstanding understanding of the *Bivens* question as “*Bivens* or state law.” As discussed above, when the issue is so framed, the case for a federal cause of action seems straightforward and self-evident. To interpret the Westfall Act as eliminating all state remedies and then argue for routine availability of a *Bivens* action by appealing to the importance of the policy of providing remedies for constitutional violations, as do Pfander and Baltmanis, would place the existence of a remedy at the mercy of the unguided judicial appraisal of the importance of providing a remedy as against the sorts of concerns that drove the Second Circuit to deny a federal claim in *Arar*. Supplementing the policy analysis with a constitutional argument favoring remedies for constitutional violations would help, but such an approach would require judges to face difficult constitutional questions in every case.

We certainly agree that judges should always have such constitutional considerations in the back of their minds in making decisions about the availability of a *Bivens* claim. But to interpret the Westfall Act as implicitly pushing these considerations to the forefront of the *Bivens* analysis seems less faithful to Congress’ intent to leave the remedial rights of victims of constitutional torts entirely unaffected than an interpretation that preserves state-law remedies for constitutional violations by federal officials. Congress plainly intended to avoid the constitutional question by leaving untouched “the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.” The language of the Westfall Act is perfectly consistent with this intent. The Act should accordingly not be read to have transformed the *Bivens* question to “*Bivens* or nothing.” Where constitutional torts are concerned, the Westfall Act simply has nothing to say on the matter. The *Bivens* question instead remains today, as it was framed in 1971, as a choice between a judicially inferred federal remedy and state law.

If so, then the “special factors counseling hesitation” to which Justice Brennan adverted in *Bivens* should be reframed with an eye toward hesitation vis-à-vis

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188. *See id.*
existing state remedies. In other words, such special factors should only cut against inferring a *Bivens* remedy when there are strong reasons to defer to the process of the state courts, whether sounding in federalism, institutional competence, or other considerations. Such hesitation would, it seems to us, rarely be appropriate. More concretely, restoring the original understanding of the *Bivens* question calls into question any number of recent lower court decisions – *Arar* foremost among them – where the special factors on which the courts relied cut against state remedies at least as much as they cut against *Bivens*, if not more so. In other words, framing the choice as between *Bivens* and state law suggests that cases with unique federal interests, be they disputes over foreign affairs, national security policies, or any other predominantly federal sphere, are particularly well-suited for *Bivens* remedies, given the strong and well-established reasons disfavoring state oversight of such important federal regimes. The concerns that drove the courts in those cases to decline to recognize a *Bivens* action were relevant instead to the question of immunity or privilege. As noted above, channeling consideration of these factors to the immunity or privilege analysis would clarify that the factors must be persuasive enough to justify judicial law-making, rather than counsel against it.

Relatedly, and perhaps most importantly, understanding that the choice in constitutional tort cases is between *Bivens* and state law alleviates a concern raised by the recent examples we have seen of the “*Bivens* or nothing” mentality in action – *i.e.*, the likelihood that many constitutional violations may lack any judicial remedy. Although we leave for a later day the difficult question of whether and under what circumstances the Constitution requires such a remedy, the critical point here is that nothing in the Supreme Court’s *Bivens* jurisprudence, including its recent retrenchment, is inconsistent with the idea that the Constitution generally requires an effective remedial scheme for violations of the Constitution by federal officials. Denial of a federal cause of action does not challenge this principle so long as state tort remedies or alternative federal remedies remain available. Nothing in the Westfall Act suggests that Congress meant to push that particular envelope.

**CONCLUSION**

Although it seems clear that certain of the current Justices would prefer to inter *Bivens*, the Court as a whole has never found neither a federal nor a state cause of action to be available for a federal official’s violation of the Constitution except on grounds of official immunity or privilege. In cases like *Arar*, where federal interests in national security and state secrets are close to the surface, the case for a federal remedial regime is at its zenith. To deny a federal or state action for such egregiously tortious violations of the Constitution is to bridge a constitutional Rubicon that history, precedent, and policy overwhelmingly advise against crossing, and which, popular opinion to the contrary notwithstanding, Congress and the Supreme Court have consistently respected.