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Hernandez, Bivens, and the Supreme Court's Expanding Theory of Judicial Abdication

William J. Aceves

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INTRODUCTION

Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican child, was playing with his friends in Mexico when he was shot in the face by a U.S. Border Patrol Agent standing in the United States. Sergio died on the concrete ground where he fell.

In *Hernandez v. Mesa*, Sergio's family brought a federal lawsuit seeking to hold Agent Jesus Mesa, Jr. responsible for the death of their son.[1] They alleged Agent Mesa had violated Sergio's constitutional rights and based their claim on the *Bivens* doctrine.[2] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court established a limited right to sue federal government officials for constitutional violations.[3] Historically, damages remedies had long been recognized "for an invasion of personal interests in liberty."[4] The Court noted in *Bivens* that federal courts maintained a unique role in protecting the Bill of Rights.[5] Damages remedies would serve that purpose by "deter[ring] individual federal officers from committing constitutional violations."[6] Since 1971, *Bivens* has allowed federal courts to acknowledge a cause of action against federal officials for violations of certain constitutional rights.[7] Sergio's family argued that Agent Mesa should be civilly liable under the *Bivens* doctrine for violating the Fourth and Fifth Amendments because he shot and killed Sergio without cause.[8]

In a 5–4 decision, the Supreme Court rejected the lawsuit, holding the Constitution provided Sergio's family no such remedy.[9] Given the Roberts

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1. 140 S. Ct. 735 (2020).

2. *Hernandez*, 140 S. Ct. at 740.

3. 403 U.S. 388 (1971) (establishing an implied right of action for violations of the Fourth Amendment).

4. *Bivens*, 403 U.S. at 395.

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

6. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001).

7. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (establishing an implied right of action for violations of the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (establishing an implied right of action for violations of the Fifth Amendment).

8. Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020).

9. *Id.* at 739.

Court's skepticism of the *Bivens* doctrine, the decision is not surprising. It is consistent with a line of Supreme Court cases that has effectively ended *Bivens* remedies for constitutional violations.[10] Indeed, it is a reflection of the Court's continued abdication of the judiciary's role as an adjudicator of rights and a coequal branch of government.[11]

This Essay examines the *Hernandez* decision and critiques the Court's expanding theory of judicial abdication, an approach with profound implications for civil rights and the future of the judiciary. While *Hernandez* involved a cross-border shooting, the Court's reasoning extends to all facets of civil litigation.[12] Accordingly, this Essay proposes a new theory of judicial engagement that would empower federal courts to grant relief for constitutional claims against federal officials. It is a theory founded in extant constitutional jurisprudence that the Court has used for over a century to apply the Bill of Rights to state and local governments—an approach that examines whether a constitutional right is fundamental to our scheme of ordered liberty and has deep roots in our history and tradition. This Essay proposes that a similar methodology be used to assess whether a civil remedy exists for violations of constitutional rights by federal officials.

I. *HERNANDEZ V. MESA*: FIGHTING FOR SERGIO IN FEDERAL COURT

On June 7, 2010, Sergio was playing with several friends in the cement culvert that serves as the border between the United States (El Paso, Texas) and Mexico (Ciudad Juárez).[13] Sergio and his friends were running from the Mexican side of the culvert up to the U.S. side to touch the border wall.[14] While they were playing, Agent Mesa arrived on the U.S. side of the border.[15] At the same time, smugglers were allegedly in the vicinity and throwing rocks at Border Patrol agents.[16] Mesa then shot at Sergio through the border

10. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537 (2007).

11. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that gerrymandering claims raise nonjusticiable political questions). *See generally* Linda Greenhouse, *Who Will Be Left Standing in the Supreme Court?*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/opinion/supreme-court-trump.html [https://perma.cc/TPZ4-YHJ5].

12. Cross-border shootings are not unique. *See, e.g.*, Rodriguez v. Swartz, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *vacated*, 800 F. App'x 535 (2020); *see also* Mark Binelli, *10 Shots Across the Border*, N.Y. TIMES MAG. (Mar. 3, 2016), https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html [https://perma.cc/6DLV-VQWG].

13. *See* Plaintiffs' Original Complaint ¶ 24, Hernandez v. United States, 802 F. Supp. 2d 834 (W.D. Tex. 2011) (No. 6:11-cv-00013), 2011 WL 333184 [hereinafter Hernandez Complaint].

14. *Id.*

15. *See id.* ¶ 25.

16. *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, U.S. DEP'T JUST. (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-

wall while Sergio was on the Mexican side of the border.[17] Mesa fired at least twice and struck Sergio in the face, killing him instantly.[18]

Although the Justice Department investigated the shooting, it concluded that Agent Mesa should not be prosecuted. According to the investigation, the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a [Customs and Border Patrol] agent who was attempting to detain a suspect."[19] Under these facts, the Justice Department determined the shooting was consistent with Border Patrol policy.[20] Mexico's request to extradite Agent Mesa to Mexico was rejected by the U.S. government.[21]

Sergio's family sued several defendants, including Agent Mesa, for damages in federal district court, arguing that the use of deadly force violated the Fourth and Fifth Amendments.[22] While 42 U.S.C. § 1983 authorizes civil rights claims against state and local government officials who violate U.S. constitutional rights, there is no comparable statutory basis for suing federal officials.[23] Accordingly, Sergio's family pursued a *Bivens* claim.[24]

Initially, the district court dismissed the lawsuit.[25] After the plaintiffs amended their complaint, the district court again dismissed their claims, and this decision was upheld on appeal except as to the claim against Agent Mesa.[26] The Fifth Circuit then affirmed the district court's dismissal as to all defendants upon en banc review.[27] The en banc panel held Sergio's family could not assert a claim under the Fourth Amendment because Sergio was a Mexican citizen who was on Mexican territory at the time of the shooting.[28] As to the Fifth Amendment claim, the court held that Agent Mesa was entitled to qualified immunity because the viability of a Fifth Amendment claim

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investigation-death-sergio-hernandez-guereca [https://perma.cc/27U8-EE5K] [hereinafter DOJ Press Release].

17. *See* Hernandez Complaint, *supra* note 13, ¶ 25.

18. *Id.*

19. DOJ Press Release, *supra* note 16.

20. *Id.*

21. Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. TIMES (Oct. 17, 2016), https://www.nytimes.com/2016/10/18/us/politics/an-agent-shot-a-boy-across-the-us-border-can-his-parents-sue.html [https://perma.cc/YJ9X-RDCZ].

22. Hernandez Complaint, *supra* note 13, ¶ 1.

23. *See* Hernandez v. Mesa, 140 S. Ct. 735, 747 (2020).

24. Hernandez Complaint, *supra* note 13, ¶ 1.

25. Hernandez v. United States, 802 F. Supp. 2d 834 (W.D. Tex. 2011), *aff'd in part, rev'd in part*, 757 F.3d 249 (5th Cir. 2014), *aff'd on reh'g en banc per curiam*, 785 F.3d 117 (5th Cir. 2015), *vacated per curiam sub nom* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

26. Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014), *aff'd on reh'g en banc per curiam*, 785 F.3d 117 (5th Cir. 2015), *vacated per curiam sub nom* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

27. Hernandez v. United States, 785 F.3d 117 (5th Cir. 2015) (en banc) (per curiam), *vacated per curiam sub nom* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

28. *Id.* at 119.

in the context of a cross-border shooting had not been clearly established at the time of the shooting.[29]

In June 2016, the Supreme Court issued a per curiam ruling that vacated the Fifth Circuit's decision and remanded the case so the lower court could consider the *Bivens* claims in light of the Supreme Court's recent ruling in *Ziglar v. Abassi*, a case involving the *Bivens* doctrine.[30] In *Ziglar*, the Supreme Court had rejected a *Bivens* claim against federal agents involved in detaining hundreds of non-U.S. citizens in the United States after 9/11.[31] The Court in *Ziglar* used a two-part test for assessing whether a *Bivens* remedy was warranted. First, the Court considered whether the pending case differed in a meaningful way from the Court's previous decisions upholding a *Bivens* remedy.[32] If the case was similar to the factual context of these prior decisions, the *Bivens* claim could continue. If not, the Court then considered whether "special factors" counseled against recognizing a *Bivens* remedy.[33]

Following remand, the Fifth Circuit again considered and dismissed the case.[34] The court held that a *Bivens* action was not available because the claims brought against Agent Mesa were unique, and special factors counseled against recognizing a private right of action in the case.[35] These special factors included the cross-border nature of the lawsuit and its national security implications.[36] In contrast, the two dissenting judges argued that a *Bivens* remedy was appropriate in this case. They rejected the majority's assertion that the case raised national security concerns, stating, "[A]s we say in Texas," the contention is "all hat, no cattle."[37]

On May 28, 2019, the Supreme Court granted certiorari to address "[w]hether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens*."[38]

II. *HERNANDEZ* AND "*BIVENS* OR NOTHING"

Written by Justice Alito, the *Hernandez* decision affirmed the lower court rulings and denied relief to Sergio's family.[39] The decision follows a

29. *Id.* at 121.

30. Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam).

31. Ziglar v. Abbasi, 137 S. Ct. 1843 (2017). In *Ziglar*, the plaintiffs alleged they were detained indefinitely because of their race, ethnicity, and national origin.

32. *Id.* at 1859.

33. *Id.* at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

34. Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018) (en banc).

35. *Id.* at 814.

36. *Id.* at 818–19.

37. *Id.* at 825 (Prado, J., dissenting).

38. *See* Petition for a Writ of Certiorari, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678).

39. Hernandez v. Mesa, 140 S. Ct. 735 (2020).

consistent narrative from recent years, where the Court has repeatedly weakened judicial review—in this case, by declining to recognize the power of federal judges to develop implied causes of action for constitutional violations.

In assessing whether a *Bivens* remedy was available, the Court first considered whether the petitioners' claims involved a "new context" or a "new category of defendants" that was different from cases previously recognized by the Court.[40] It concluded that the cross-border nature of the claims in the case was "meaningfully different" from previous *Bivens* cases.[41] Having established the petitioners' claims arose in a new context, the Court then considered whether special factors counseled hesitation in extending a *Bivens* remedy to these claims.[42]

The Court identified three distinct factors that counseled against recognizing the petitioners' claims for relief. First, the Court considered the implications of a decision on U.S. foreign relations. According to Justice Alito, the cross-border nature of the underlying claims was significant. "A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests. Such an incident may lead to a disagreement between those countries, as happened in this case."[43] In such cases, Justice Alito believed litigation was unwarranted. "In the absence of judicial intervention," the Court suggested, "the United States and Mexico would . . . reconcile their interests through diplomacy."[44]

Second, the Court indicated the case would affect national security and, in particular, security at the U.S.-Mexico border. The decision referenced the large flow of people and goods between the two countries, which included "illegal cross-border traffic."[45] In this context, border agents played an essential role in preventing the illegal entry of both people and goods.[46] The national security implications of "regulating the conduct of agents at the border" also counseled against recognizing a *Bivens* remedy.[47]

Finally, the Court considered it significant that Congress had declined to provide civil remedies in several statutes for harms inflicted abroad by federal officers. For example, the Court noted that 42 U.S.C. § 1983, which provides a cause of action against state and local officials for the deprivation of constitutional rights, was explicitly limited to U.S. citizens or other persons within the jurisdiction of the United States.[48] Similarly, the Torture Victim

40. *Id.* at 743 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).
41. *Id.* at 743–44.
42. *Id.* at 744.
43. *Id.*
44. *Id.* at 745.
45. *Id.* at 746.
46. *Id.*
47. *Id.* at 747.
48. *Id.* (referencing 42 U.S.C. § 1983 (2012)).

Protection Act, codified as a note to 28 U.S.C. § 1350, was limited to claims against a person "who acted under the authority of a foreign state."[49] According to Justice Alito, these statutes were relevant for considering the *Bivens* claims in *Hernandez* because they indicated that Congress had "taken care to preclude claims for injuries that occurred abroad."[50]

The Court distilled these distinct considerations into a single concern: "respect for the separation of powers."[51] Citing its prior decisions, the Court asserted the judiciary is ill-equipped to address the myriad of issues arising out of cases involving "the delicate web of international relations."[52] In these cases, Congress and the President are better suited to provide redress.

Justices Thomas and Gorsuch issued a concurring opinion, which called on the Court to abandon the *Bivens* doctrine altogether.[53] Their concurrence highlighted how *Bivens* was an anomaly in the Court's jurisprudence, and how it had been significantly limited in subsequent cases to the point of irrelevance.[54] In contrast, Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor, dissented from the Court's opinion. Unlike the majority, the dissent framed the petitioners' claims against Agent Mesa as falling within existing *Bivens* jurisprudence.[55] But even if their claims could be categorized as "new," no special factors counseled hesitation in recognizing a constitutional claim.[56] Neither foreign policy nor national security concerns, which were at most conjectural, justified dismissing the claims.[57] For the dissent, it was significant that no other remedies were available and that "to redress injuries like the one suffered here, it is *Bivens* or nothing."[58]

III. A THEORY OF JUDICIAL ABDICATION

There are many puzzling aspects to the Court's decision in *Hernandez*. Yet, there is also a unifying theme—judicial abdication. Throughout the *Hernandez* opinion, the Court continues its drive to weaken judicial authority by limiting the ability of individuals to file civil claims in federal court and instead deferring to Congress and the President for relief.

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49. *Id.* at 748–49 (referencing 28 U.S.C. § 1350 note (2018)).

50. *Id.* at 749.

51. *Id.*

52. *Id.*

53. *Id.* at 750 (Thomas, J., concurring).

54. *Id.* at 751–53.

55. *Id.* at 756–57 (Ginsburg, J., dissenting).

56. *Id.* at 757.

57. *Id.* at 757–59.

58. *Id.* at 760 (referencing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan J., concurring in the judgment) ("For people in Bivens' shoes, it is damages or nothing.")).

A. *Foreign Affairs Obfuscation*

In *Hernandez*, the Court uses foreign policy and national security to justify its reasoning, but its decision extends well beyond these realms. For example, the Court offers a unique understanding of judicial review, one that removes judges from their historic roles as neutral actors. In justifying the Court's refusal to recognize the petitioners' claims, Justice Alito suggests a contrary outcome would directly inject the Court into an international dispute.[59] According to Justice Alito, "[w]hen a third party intervenes and takes sides in a dispute between two countries, one country is likely to be pleased and the other displeased. But no matter which side the third party supports, it will have injected itself into their relations."[60] As a factual matter, this statement disregards that *Hernandez* was a civil lawsuit between two private parties, and neither Mexico nor the United States were litigants before the Court.[61] While Justice Alito offers this statement in the context of a dispute between two countries, the dynamic he describes is not unique to interstate conflicts.[62] It would apply to any dispute between two parties.

This is an odd statement for any court, let alone the Supreme Court, to make. Justice Alito suggests that a judge who agrees to hear a case is both intervening in the dispute and taking sides. This view seems to cast judges as actual parties to litigation, akin to Rule 24 intervenors.[63] Yet this perspective is contrary to the most basic principles of judicial review in an adversarial system.[64] Courts do not intervene in litigation when they are asked to adjudicate disputes. Judges do not become parties when they write their decisions.

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59. *See id.* at 744–45 (majority opinion). Of course, the Court's refusal to consider the case also has international consequences. *See id.* at 759 (Ginsburg, J., dissenting) ("Withholding a *Bivens* suit here threatens to exacerbate bilateral relations, and in no way fosters our international commitments." (citations omitted)).

60. *Id.* at 745 n.3 (majority opinion). Justice Alito also equated judicial review in the case to arbitration, indicating "[i]t is not our task to arbitrate between" the United States and Mexico. *Id.*

61. While the petitioners initially sued the United States, only Agent Mesa was left in the litigation when the case was argued before the Court. However, both the United States and Mexico submitted amicus briefs to the Court. *See* Brief of the Gov't of the United Mexican States as *Amicus Curiae* in Support of the Petitioners, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678); Brief for the United States as Amicus Curiae Supporting Respondent, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678). There were, in fact, nineteen amicus briefs filed in the case.

62. Domestic and international tribunals share similar features and challenges. *See* SHAI DOTHAN, INTERNATIONAL JUDICIAL REVIEW: WHEN SHOULD INTERNATIONAL COURTS INTERVENE? (Andreas Føllesdal & Geir Ulfstein eds., 2020).

63. *See* FED. R. CIV. P. 24.

64. *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."); Greenlaw v. United States, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

They issue legal opinions based on legal principles; they do not take sides. In fact, judges are prohibited from doing so.[65]

This is not meant to suggest that judicial decisions will not result in outcomes that support the legal arguments of one side. This is inevitable in an adversarial system. But this is quite different from the proposition that judges effectively become advocates for one side by deciding to hear a case. Such an interpretation simply perpetuates the politicization of the judiciary.[66]

In fact, judicial review can defuse tension between two parties when a conflict enters the legal process. Courts bring neutrality to a dispute.[67] As long as their decisions comply with due process and are guided by extant legal norms, courts will be seen as credible and their decisions as legitimate.[68] Courts are thus an integral part of democratic governance, and their decisions should not be considered "an embarrassment to the United States or to the executive branch," a point Justice Kagan raised at oral argument.[69]

Throughout the majority opinion, the Court invokes the talismans of bygone cases in support of judicial abdication—asserting the lawsuit raised the fear of " 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question,' " and that "special factors . . . counse[l] hesitation."[70] In fact, the Court elevates these talismanic incantations to almost mythical proportions, indicating that foreign policy and national security cases "involve large elements of prophecy."[71] However, the Court fails to explain why these cases require divination

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65. Federal common law requires judges to recuse themselves from litigation when they are a party. In 1927, the Supreme Court recognized that judges must recuse themselves from a case when they have "a direct, personal, substantial, pecuniary interest." Tumey v. Ohio, 273 U.S. 510, 523 (1927). The Court traced this principle to *The Federalist Papers*, and its admonition that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961); *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). This principle is now codified in the federal code, which requires disqualification when judges or their close family members are a party to the proceedings. 28 U.S.C. § 455(b)(5)(i) (2018).

66. *See generally* David Russell, *Politicization in the Federal Judiciary and Its Effect on the Federal Judicial Function*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 21 (2018).

67. Martin Shapiro has observed that courts transform disputes from dyadic to triadic relationships. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981).

68. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 212 (2002). In the absence of enforcement mechanisms, legitimacy is essential to judicial power. *See* Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 155 (2013).

69. Transcript of Oral Argument at 62, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678) [hereinafter Hernandez Transcript].

70. *Hernandez*, 140 S. Ct. at 744 (quoting Brief for United States as Amicus Curiae, *supra* note 61, at 18); *id.* at 743 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)) (alteration in original).

71. *Id.* at 749 (quoting Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring in part and concurring in the judgment)).

any more than cases involving purely domestic matters.[72] Legal analysis involves reasoned analysis, and prophecy is best left to fortune-tellers.

B. *An Ahistorical Approach*

For a Court that regularly invokes history for guidance in constitutional interpretation, it is striking how the *Hernandez* decision ignores the historical record involving civil actions against federal officials. From the earliest years of the Republic and into the twentieth century, the federal courts recognized common law claims for intentional torts by federal officers.[73] Yet when the petitioners referenced this common law history, the Court responded by quoting the admonition in *Erie Railroad Co. v. Tompkins* that "[t]here is no federal general common law" and stating that "federal courts today cannot fashion new claims in the way that they could before 1938."[74]

It is true that *Erie* held there was no federal general common law.[75] It is also true that this decision represented a profound change in how federal courts managed the common law.[76] But *Erie* has never stood for the proposition that federal common law ceased to exist or that federal courts do not retain their inherent federal common law powers.[77] *Erie* was a diversity case, and its reference to federal general common law was limited to such cases.[78] As the Court itself recognized in *Sosa v. Alvarez-Machain*, the *Erie* decision simply narrowed the realm of federal common law to "havens of specialty" and "interstitial areas of particular federal interest."[79]

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72. *Id.* at 758 (Ginsburg, J., dissenting). During oral argument, Justice Kagan repeatedly asked the Principal Deputy Solicitor General for examples of the foreign policy concerns raised by the litigation. Hernandez Transcript, *supra* note 69, at 59–62.

73. *See, e.g.*, Bell v. Hood, 327 U.S. 678 (1946); Bates v. Clark, 95 U.S. 204 (1877); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

74. *Hernandez*, 140 S. Ct. at 742 (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (alteration in original)).

75. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). *See generally* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

76. *See* Albert J. Schweppe, *What Has Happened to Federal Jurisprudence?*, 24 A.B.A. J. 421 (1938).

77. *See, e.g.*, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 878 (2007); Philip C. Jessup, Editorial Comment, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

78. 304 U.S. at 71, 78. On the same day that *Erie* was decided, the Supreme Court issued an opinion upholding the application of federal common law in a dispute involving water rights. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); *see also* D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 470 (1942) (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent.").

79. 542 U.S. 692, 726 (2004); *see also* Samantar v. Yousuf, 560 U.S. 305 (2010) (assessing claims of foreign official immunity under federal common law).

To justify its denial of a *Bivens* remedy, the Court also cites recent cases that have rejected implied causes of action arising out of federal statutes.[80] Citing *Alexander v. Sandoval*, the Court indicates that "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress."[81] But this argument disregards the unique role of the Supreme Court in protecting the Constitution. By definition, federal statutes are the purview of Congress, which is free to address or ignore remedial mechanisms for statutory breaches. The Constitution, however, is different, and it has never depended exclusively on Congress or the President for its protection.[82] Nor should it. In fact, remedial mechanisms for constitutional violations have long been within the Court's purview.[83] In the seminal decision on judicial review, Justice Marshall cited Blackstone for the proposition that "where there is a legal right, there is also a legal remedy" and that such injuries "are cognizable by the courts of the common law."[84] Whether referenced in classic terms (*ubi jus ibi remedium*) or contemporary language (a right without a remedy is "nothing more than a nice idea"), judicial remedies for constitutional violations are steeped in history and necessary to protect basic rights.[85]

The Court's ahistorical approach to constitutional remedies is further evidenced by its treatment of 42 U.S.C. § 1983, which provides a cause of action against state and local officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution" but limits such claims to "citizen[s] of the United States or other person[s] within the jurisdiction

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80. At the same time, the Court disregarded the language of the Westfall Act, which immunizes federal officers from state common law tort claims but establishes a clear exception for actions involving "a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A) (2018). *See generally* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).

81. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)). However, *Alexander* did not address constitutional claims. Rather, it addressed whether private individuals could sue to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964.

82. *See* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 283, 299 (1989) ("In treating *Bivens* plaintiffs the same way it treats statutory plaintiffs, the Court has adopted a course of action urged in another context: Just say no.").

83. *See generally* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995); Ryan D. Newman, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 473–75 (2006); Gene R. Nichol, Bivens*,* Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

84. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109).

85. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); *see also* EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 44 (1941); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735–36 (1992).

thereof."[86] The Court found it significant that Congress had explicitly limited the statute to U.S. citizens or other persons within the jurisdiction of the United States.[87] Section 1983 was adopted in 1871 by Congress "in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers."[88] When Congress authorized civil claims against state and local officials who violate the Constitution, it was targeting violations of the Thirteenth, Fourteenth, and Fifteenth Amendments by these officials.[89] The statute's domestic focus is revealed by one of its more common names—the Ku Klux Klan Act.[90] Instead of acknowledging the statute's provenance, the Court asserts "the limited scope of § 1983 weighs against recognition of the *Bivens* claim at issue here."[91] There is another historical reason why § 1983 should not be used to restrict *Bivens*. In 1871, the most likely perpetrators of intentional torts committed abroad would have been federal officials, and claims against them were already available through the common law.[92]

C. *Separation of Powers Anxiety*

Hernandez is the latest iteration of the Court's expanding theory of judicial abdication.[93] The Court indicates its decision is premised on "respect for the separation of powers."[94] And yet, the decision evinces a lack of respect for the Court's own power.[95] The Court rejects the original understanding of

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86. 42 U.S.C. § 1983 (2012).

87. Hernandez v. Mesa, 140 S. Ct. 735, 747 (2020).

88. Felder v. Casey, 487 U.S. 131, 147 (1988).

89. *See* Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862–1952*, 20 U. CHI. L. REV. 363, 369–70 (1953).

90. *See generally* Paul J. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, CONST. STUD., 2016, at 81 (discussing the history of the Ku Klux Klan Act's private right of action); Maslow & Robison, *supra* note 89.

91. *Hernandez*, 140 S. Ct. at 747.

92. *See, e.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

93. Complaints of judicial abdication have been raised by both conservatives and liberals. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court Just Abdicated its Most Important Role: Enforcing the Constitution*, BERKELEY BLOG (June 28, 2019), https://blogs.berkeley.edu/2019/06/28/the-supreme-court-just-abdicated-its-most-important-role-enforcing-the-constitution/ [https://perma.cc/3PDA-JL4K]; Editorial, *Judicial Activism and Judicial Abdication*, NAT'L REV. (Oct. 7, 2014, 7:58 PM), https://www.nationalreview.com/2014/10/judicial-activism-and-judicial-abdication-editors/ [https://perma.cc/XJ7Q-7A4N]; Jaba Tsitsuashvili, *Judicial Abdication at the Supreme Court*, INST. FOR JUST. (Mar. 11, 2020), https://ij.org/cje-post/judicial-abdication-at-the-supreme-court/ [https://perma.cc/U5UK-8EP7].

94. *Hernandez*, 140 S. Ct. at 749.

95. *But see* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (2016) (arguing the judiciary abnegates its authority to the administrative state in cases involving foreign relations). *See generally* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992)

judicial authority under the common law, which empowered federal courts to grant relief for harms inflicted by federal officials. It questions the ability of judges to manage cases with any international connections. It also negates the judiciary's unique role in protecting the Constitution.[96]

Time and again, the Roberts Court has issued decisions making it more difficult for litigants to bring civil actions in federal courts, further weakening the judicial power. This theme is present across a variety of issues. The Court has imposed heightened pleading requirements in civil litigation.[97] It has adopted narrow interpretations of federal statutes to limit human rights litigation and transported principles of statutory construction beyond their historic application to further limit these lawsuits.[98] And, it has routinely rejected civil rights claims filed under *Bivens*.[99] If the Court overturns *Bivens*—as Justices Thomas and Gorsuch have explicitly sought—it will have abdicated its historic role and ceded a significant portion of its judicial authority to the President and Congress.[100] In an era when the unitary executive theory has been championed within an imperial presidency, this is a dangerous development for the rule of law.[101] Judicial review is an essential check to executive and legislative overreach, particularly in the realm of constitutional rights.

(arguing there are no reasons, including constitutional and policy considerations, for judicial abdication in foreign relations cases).

96. *See* Powell v. McCormack, 395 U.S. 486, 549 (1969) (citing Baker v. Carr, 369 U.S. 186, 211 (1962), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) (describing the Supreme Court as "the ultimate interpreter of the Constitution"); *see also* Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101 (1951).

97. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

98. *See* Jesner v. Arab Bank, PLC., 138 S. Ct. 1386 (2018); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

99. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1858–63 (2017).

100. Hernandez v. Mesa, 140 S. Ct. 735, 753 (2020) (Thomas, J., concurring).

101. *See* Matt Ford, *A Courtier for the Imperial Presidency*, NEW REPUBLIC (July 23, 2018), https://newrepublic.com/article/150112/brett-kavanaugh-courtier-imperial-presidency [https://perma.cc/J9M3-YHPW]; Kevin D. Williamson, *Pruning the Presidency*, NAT'L REV. (Nov. 27, 2019, 6:00 AM), https://www.nationalreview.com/2019/11/executive-overreach-imperial-presidency-congress-must-reclaim-proper-place-constitutional-order/ [https://perma.cc/PA7B-PCF3]. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (First Mariner Books ed. 2004, Houghton Mifflin Co. 1973) (detailing and championing the historical development of the executive branch as the strongest branch); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009) (book review) (critiquing a narrow conception of the unitary executive that does not also include implied executive powers).

IV. PROMOTING A NEW THEORY OF JUDICIAL AFFIRMATION

In 1971, the Supreme Court issued *Bivens* to give meaning to constitutional norms.[102] *Bivens* also remedied a constitutional anomaly—if state and local officials could be subject to civil liability for violating constitutional rights, then federal officials should be subject to similar liability.[103] There is little reason to distinguish among federal, state, and local government officials who violate constitutional rights. Yet the Court's recent jurisprudence rejects this reasoning, and the *Hernandez* decision perpetuates this distinction.[104] If the Court becomes interested in resolving this anomaly, there is an intriguing solution living within its own jurisprudence. Providing a remedy is, in fact, a constitutional obligation.[105]

Originally, the Bill of Rights only applied to the federal government.[106] The adoption of the Fourteenth Amendment in 1868 provided the Court an opportunity to extend constitutional provisions to state and local governments. However, the Court's initial interpretation of the Fourteenth Amendment in the *Slaughter-House Cases* was exceedingly narrow, thereby limiting its application.[107] This reluctance eventually gave way to a gradual yet forceful process of selective incorporation.[108] The Court did not wait for another constitutional amendment or even statutory authorization to act.

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102. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 (1971) (Harlan, J., concurring in the judgment); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 n.125 (1975) ("I think that *Bivens* is an explicit recognition that the constitutional guarantee embraces a right of action . . .which is enforceable by any appropriate remedy including damages, in either the state or federal courts." (citation omitted)).

103. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1749–50 (1991); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

104. In fact, the Court's parade of horribles concerning foreign policy and national security concerns would presumably apply to lawsuits filed against state and local officials pursuant to 42 U.S.C. § 1983, and yet the Court failed to provide any explanation for why these cases should be treated differently.

105. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972) (arguing that with respect to constitutional norms, "there is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and fulfillment to the promise those norms embody"); Fallon & Meltzer, *supra* note 103, at 1788 ("The Constitution thus contemplates a judicial 'check' on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values—one of the hallmarks of the rule of law."); *cf.* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) ("Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'" (quoting 28 U.S.C. § 1331 (2018))).

106. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 253 (1833). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 504–05 (6th ed. 2019).

107. 83 U.S. (16 Wall.) 36 (1873).

108. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); Twining v. New Jersey, 211 U.S. 78 (1908); Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

Quite simply, the Court recognized there was no meaningful reason for limiting the application of the Bill of Rights and for not applying these norms to all government actors.[109] Accordingly, the Court began applying discrete provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, a process of selective incorporation that the Court still uses.[110] In determining whether a provision in the Bill of Rights applies to state and local governments, the Court considers if the right is "fundamental to our scheme of ordered liberty" and has "dee[p] root[s] in [our] history and tradition."[111] Today, all but three provisions in the Bill of Rights have been selectively incorporated and applied to state and local governments.[112] As Justice Kavanaugh asked during oral argument in a recent case, is it "just too late in the day to argue that any of the Bill of Rights is not incorporated?"[113]

The Court can use this same reasoning to assess civil liability for violations of constitutional rights: Is a remedy for discrete constitutional violations by federal officials fundamental to our scheme of ordered liberty, and does it have deep roots in our history and tradition? This analysis would replace the existing two-step *Bivens* framework. Like selective incorporation, the analysis would be conducted on a case-by-case basis. It would assess the historical record associated with the underlying constitutional right: Have violations of the right historically given rise to civil actions?[114] It would also consider whether recognizing an implied right of action—to deter wrongful government action and provide redress to the individuals whose rights have been violated—is fundamental to our scheme of ordered liberty.[115] Echoing

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109. *Cf.* Brown, *supra* note 82, at 263 ("It creates symmetry within the legal system by placing plaintiffs who claim damages from constitutional violations by federal officials on the same footing as plaintiffs with similar claims against state and local officials.").

110. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682 (2019) (holding the Eighth Amendment's protection from excessive fines is incorporated and applies to the states).

111. *Id.* at 686–87 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)) (alterations in original).

112. CHEMERINSKY, *supra* note 106, at 531.

113. Transcript of Oral Argument at 33, *Timbs*, 139 S. Ct. 682 (No. 17-1091). Justice Gorsuch shared this perspective by noting, "And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?" *Id.* at 32–33.

114. In deciding whether to apply a provision of the Bill of Rights to state and local governments, the Court has used an expansive approach to establish whether a particular right exists in "this Nation's history and tradition." McDonald v. City of Chicago, 561 U.S. 742, 767 (2010). It reaches into English history, examines the colonial era, and reviews subsequent practice in the United States before and after the adoption of the Fourteenth Amendment. *See, e.g.*, *Timbs*, 139 S. Ct. at 687–89; District of Columbia v. Heller, 554 U.S. 570, 576–628 (2008). *See generally* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012).

115. In *Palko v. Connecticut*, the Supreme Court held that the Due Process Clause protects only those rights that are "of the very essence of a scheme of ordered liberty." 302 U.S.

selective incorporation, this methodology distinguishes between the existence of an implied right of action and the scope of that right.[116]

The incorporation doctrine is instructive for another proposition. The right to a remedy for constitutional violations should not vary based on whether the violations are committed by federal, state, or local officials. As the Court has stated, "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[117] The same reasoning should apply to constitutional remedies.[118] Thus, § 1983 should be informative but not dispositive when the Court is assessing claims for relief against federal officials.[119] To the extent § 1983 imposes any limitations on claims for relief against state and local officials, the Court would need to determine whether to impose similar limitations on claims for relief against federal officials, or whether such limitations are contrary to history and tradition as well as our scheme of ordered liberty. That constitutional claims—steeped in countermajoritarian values—would be more expansive than statutory claims—which are subject to congressional fiat—should not be surprising.[120] And given the Court's historic role in protecting the Bill of Rights, allowing Congress to restrict the scope of relief available for constitutional violations would surely raise separation of powers concerns.

For Sergio's family, the outcome of this constitutional analysis would be evident—the murder of an unarmed child by the *ultra vires* actions of a gov-

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319, 325 (1937). Such rights constitute "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

116. The Court highlighted this distinction in *Ramos v. Louisiana*: "The scope of an incorporated right and whether a right is incorporated at all are two different questions." 140 S. Ct. 1390, 1405 n.63 (2020).

117. *Timbs*, 139 S. Ct. at 687.

118. *See generally* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132 (2012) (arguing that existing scholarship fails to consider the proper relationship between the Constitution and common law remedies); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010) (comparing antebellum indemnification practices with current qualified immunity standards); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 121 (1997) (providing an example of where a common law remedy was found to be constitutionally required).

119. An alternative approach that accepts distinct forms of relief for constitutional violations committed by federal, state, and local officials is clearly disfavored. In the incorporation realm, the Supreme Court has clearly rejected "the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government." *Ramos*, 140 S. Ct. at 1398.

120. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); *see also* Fallon & Meltzer, *supra* note 103, at 1788 ("Within the constitutional scheme, an important role of the judiciary is to represent the people's continuing interest in the protection of long-term values, of which popular majorities, no less than their elected representatives, might sometimes lose sight.").

ernment agent has long been recognized as the type of action that can give rise to civil claims.[121] This does not resolve the ultimate question of liability. But this determination would allow the Hernández family to have their claims heard and adjudicated, ensuring that Sergio's legacy extends beyond the concrete ground where he fell.[122] And, it would reverse the Supreme Court's trajectory from abdication to affirmation of the federal judicial power.

121. As petitioners in *Hernandez* argued to the Court, Texas law expressly recognized a tort remedy even when the wrongful act causing the injury occurred in a foreign country. Brief for the Petitioners at 19, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678) (citing Delgado v. Zaragoza, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016)). Indeed, this right of action existed in Texas law since at least 1913. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 675–76 (Tex. 1990).

122. This would address another flaw in the Supreme Court's approach to *Bivens* litigation—the assumption that these cases are only about money. They are not. They are also about providing victims a voice before a neutral tribunal. They are about acknowledging the painful loss of a young child. They are about denouncing the wrongful acts that caused this loss and identifying the perpetrators. These are essential features of civil litigation and something the Supreme Court often ignores. In its amicus submission to the Court, the United States also disregards these features of civil litigation and instead focuses on the financial aspects of *Bivens* actions. *See* Brief for the United States, *supra* note 61, at 24–25.