Constitutional Remedies in Federalism's Forgotten Shadow

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> "[F]ollowing our decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 [] (1938), federal courts are generally no longer permitted to promulgate new federal common law causes of action . . . ."[1]

> "When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?"[2]

> "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. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk."[3]

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1. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1413 n.1 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).
2. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (citing Bush v. Lucas, 462 U.S. 367, 380 (1983)).
3. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (internal footnote omitted).

In reacting to a book about habeas corpus during wartime,[4] it must seem more than a little odd for one of the opening epigraphs to be about *Erie*—a decision as geographically and analytically removed from both writs of habeas corpus and hostilities as a legal dispute can get.[5] But the more I think about Professor Tyler's wonderfully rich and accessible discussion of the role the "Great Writ" has (and has not) played in constraining military detention throughout American history, the more I keep coming back to a small but significant point on which her assessment of the relevant history differs from mine—how common law habeas practice in pre-revolutionary England should inform our contemporary understanding of what the Constitution's Suspension Clause[6] protects. To me, this modest dispute over a tiny chapter of Anglo-American legal history matters both in its own right and because of how it fits into a larger puzzle about the relationship between common law remedies and the Constitution. *Erie*, or at least how some portray *Erie* today, is emblematic of how our understandings and misunderstandings of the relevant history end up informing and misinforming that debate.

Indeed, I hope to demonstrate in this short Essay that, as has been true in the specific context of habeas, contemporary courts and commentators have lost sight of the extent to which *state* law and state courts routinely enforced constitutional rights through other common law remedies at—and long after—the Founding (especially in suits seeking retrospective relief). If anything, *Erie* only reinforced this point by clarifying that common law causes of action as articulated by state courts are part of the state substantive law that federal courts are bound to apply in diversity actions.[7]

By failing to account for this history in the habeas context, far too many current academic and judicial assessments tend to measure the scope of *federal* remedies for constitutional violations by federal officers against incomplete or altogether inaccurate historical baselines. The less we understand the significant role that state law—and judge-made remedies under both state and general common law—played in helping to provide remedies for constitutional rights throughout American history, the less we notice their absence—or the analytical consequences that should follow—today.

4. *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017).

5. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

7. *Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

Focusing specifically on damages suits for constitutional violations under *Bivens*,[8] the Essay concludes that our historical amnesia regarding the role of judge-made remedies leaves observers with the misimpression that serious separation-of-powers concerns arise from federal judicial recognition of implied causes of action when the true question these cases present—or at least *should* present—actually sounds in federalism. Although that conclusion may itself suggest that the relevant decision-makers should be more amenable to allowing federal constitutional claims to be resolved by state courts and/or under state law in the first instance, it suggests, at the very least, that federal judges should not take quite as dim a view as has become commonplace regarding their authority to fill existing gaps.

I.
COMMON LAW HABEAS AND THE SUSPENSION CLAUSE

The disagreement that helped to provoke this Essay is a narrow one that centers on a rather obscure topic—the history of habeas corpus in pre-revolutionary England. Here's the basic problem: The Supreme Court has held that, "at the absolute minimum, the Suspension Clause protects the writ [of habeas corpus] 'as it existed in 1789.'"[9] The hard part, of course, is figuring out exactly what we can divine from late-eighteenth-century English law about our own constitutional floor.[10]

Professor Tyler's book focuses largely (albeit not entirely) on the "second magna carta"[11]—the Habeas Corpus Act of 1679[12]— and on how that Act was construed and constrained in the 110 years between its enactment and the adoption of the US Constitution.[13] Over the past two decades, numerous judicial opinions have been similarly focused, with judges and Justices alike assuming that the scope of the Suspension Clause can and should be understood principally by reference to the shape and scope of the writ as enshrined in the 1679 statute.[14]

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8. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

9. INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).

10. *See, e.g.*, *id*. at 301 n.13 ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

12. 31 Car. 2 c. 2 (Eng.).

13. *See* TYLER, *supra* note 4, at 21–33. Professor Tyler is careful to emphasize that, "[w]ithout question, the Act complemented the common law writ of habeas corpus, using the preexisting writ as a vehicle for enforcing its terms." *Id.* at 24–25. Where we differ, perhaps substantially, is with regard to both the structural and substantive significance of the common law writ in identifying exactly what "the privilege of the writ" would have been understood to encompass at the time the Suspension Clause was drafted. *Id.* at 13.

14. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 557–58 (2004) (Scalia, J., dissenting); Whitmore v. Arkansas, 495 U.S. 149, 162–63 (1990); Peyton v. Rowe, 391 U.S. 54, 58–59 (1968); *see*

There is compelling archival evidence, however, that the statutory remedy provided by Parliament tells only a small—and deeply misleading—part of this story.[15] Among other things, the narrow and specific cases in which the 1679 Act authorizes relief pale in comparison to the vigorous—and flexible—common law writ that the King's Bench developed and expanded both long before and well after Parliament's late-seventeenth-century intervention. And beyond the specific contexts in which habeas was utilized without reference to (or authority from) the 1679 Act, the common law practice also suggests that the principal aspiration and accomplishment of pre-revolutionary habeas practice was the consolidation of judicial power, rather than the promotion of the specific forms of individual liberty reflected in the statute:

> By exploring hundreds of cases across many decades, we can gain a sense of practices and principles, if not rules, that constituted a jurisprudence of normalcy. At the center of this jurisprudence stood the idea that the court might inspect imprisonment orders made at any time, anywhere, by any authority. This simple idea, grounded in the prerogative, marked the point from which the justices' use of the writ expanded. Rather than analogize among cases—follow precedents—their thinking radiated in every direction from this core principle.[16]

In contrast, the 1679 Act, as Professor Paul Halliday—the historian responsible for unearthing much of this archival evidence—has written, "hid[] the once vigorous common law writ behind its chimerical statutory twin."[17] Even more disturbingly, the Act "promot[ed] the assumption that the writ could be effective only when supported by statute,"[18] despite decades of judicial practice (and literally thousands of common law writs) to the contrary.[19]

Moreover, in the century after 1679, as Tyler makes clear, Parliament repeatedly made it *easier* for the Crown to detain individuals without charges by "suspending" habeas corpus.[20] (Those suspensions, especially the 1777 version, are what helped to provoke the Suspension Clause.[21]) And "it is more than a coincidence that parliamentary suspensions followed not long on the heels of Parliament's most sweeping foray into the law governing judicial review of

also Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 523 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment in part and dissenting in part).

15. The central work on the subject is PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010). *See also* NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 69–97 (2003).

16. HALLIDAY, *supra* note 15, at 160.

17. *Id.* at 258.

18. *Id.* at 246.

19. For a summary of the lessons Halliday extracted from the common law writs his archival research uncovered, see Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 948–53 (2011) [hereinafter Vladeck, *The New Habeas Revisionism*] (reviewing HALLIDAY, *supra* note 15).

20. *See* TYLER, *supra* note 4, at 35–61.

21. *See* Vladeck, *The New Habeas Revisionism*, *supra* note 19, at 957–63.

detention."[22] All the while, English judges continued to fashion relief beyond what the 1679 Act authorized, either by resorting to common law or by inventing clever statutory fictions to sidestep the rules Parliament had imposed.[23]

Thus, among other things, "Halliday's research also calls into question the role attributed to Parliament in classical histories of the writ, suggesting not just that legislative protection of habeas was unnecessary, but also that it may have been counterproductive."[24] The statutory remedy not only crowded out its common law counterpart in context, but it also came to obscure the common law practice in retrospect—such that later generations erroneously came to understand the statutory remedy as being all but exhaustive. And if the statutory remedy was the only relief the law required, then surely it followed that what the legislature giveth, the legislature could taketh away.[25]

When the delegates to the Constitutional Convention met in Philadelphia in 1787, "they did so against the backdrop of an English history of habeas corpus, which included two centuries of judicial innovation in habeas corpus jurisprudence."[26] Although that backdrop left the delegates deeply wary of Parliament's suspension authority (hence a constitutional provision focused on limiting the circumstances in which the new Congress could similarly provide), it also reflected a far more flexible, and far more sweeping, "privilege of the writ of habeas corpus" than a focus solely on the statutory English writ would suggest. [27] As I have suggested elsewhere,

> it is notable that the only meaningful debate the provision engendered either at Philadelphia or in the ratification debates that followed was over the scope of the suspension power. Critics suggested that it was another example of unenumerated federal powers, since it would be unnecessary to limit the circumstances in which habeas *could* be suspended unless some other provision gave the government a suspension power. But the Constitution's defenders responded that the Suspension Clause was actually a *grant* of power, delimiting the only circumstances in which the legislature (perhaps even *state* legislatures) could preclude access to the writ. That the latter view prevailed is evidenced, at least in part, by the absence of any mention of habeas

22. *Id*. at 956.

23. *See id*. at 952–53.

24. *Id*. at 953; *see also id*. at 946 ("The common law writ of habeas corpus was far more powerful than we have previously appreciated, and Parliament's role in the story was far more equivocal.").

25. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 340 n.5 (2001) (Scalia, J., dissenting) ("[S]urely Congress may subsequently alter what it had initially provided for, lest the [Suspension] Clause become a one-way ratchet."). *But see* Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71 (2008) [hereinafter Vladeck, *The Riddle of the One-Way Ratchet*] (responding to Justice Scalia).

26. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 670 (2008).

27. Vladeck, *The New Habeas Revisionism*, *supra* note 19, at 960 (footnotes omitted) (quoting U.S. CONST. art. I, § 9, cl. 2).

> corpus in the Bill of Rights, even though at least one state included a request for additional protection of the writ in its proposed amendments to the federal Constitution. At least in the context of habeas, the Federalists and their opponents appeared to find common cause.[28]

The understanding of the vitality of common law habeas in England at the Founding is also reflected in the rich common law habeas practice in *state* courts, even for federal prisoners, from the adoption of the Constitution through the mid-1850s.[29] At that time, it was a decidedly uncontroversial proposition that federal officers could be subject to litigation (and liability) in state court, at least in cases seeking retrospective relief. Congress did not generally allow the removal of such suits to federal court—or authorize federal courts to exercise general federal question jurisdiction—until after the Civil War.[30] As in most (albeit not all) cases with federal ingredients, the primary fora for holding federal officers judicially accountable were state tribunals.[31]

Despite this history, two different doctrinal developments in the Supreme Court helped not only to vitiate common law writs of habeas corpus for federal prisoners but also to obscure the essential role that they had played in shaping and protecting the constitutional privilege at the Founding. The first was *Ex parte Bollman*, in which Chief Justice John Marshall cryptically suggested in (erroneous) dicta that federal courts lacked the power to issue common law writs of habeas corpus.[32] The reason, Marshall elaborated twenty-three years later, was because "the celebrated *habeas corpus* act of [1679] was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody."[33] Because Marshall (wrongly) believed that the 1679 Act described the full scope of habeas relief in pre-revolutionary England, he also (wrongly) believed that federal courts were likewise limited to issuing

28. *Id.* at 960–61.

29. *See* Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 247–51 (1965); Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007).

30. *See* Willingham v. Morgan, 395 U.S. 402, 405–06 (1969) (recounting the history of federal officer removal statutes).

31. *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law." (citing Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10 (1817))).

32. 8 U.S. (4 Cranch) 75, 93–94 (1807). The authoritative critique of *Bollman* is ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 20–48 (2003). Succinctly, the principal flaw in Marshall's analysis was his failure to account for the All Writs Act, 28 U.S.C. § 1651, which was enacted as part of the Judiciary Act of 1789 and allows federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012). Although such relief is rarely *necessary* in the federal courts today, it is not constitutionally precluded.

33. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

habeas relief consistent with the terms of section 14 of the Judiciary Act of 1789.[34]

Thanks to the state-court practice described above, *Bollman*'s dicta did not have any direct constitutional implications. Instead, all *Bollman* implied was that federal prisoners seeking common law habeas relief had to repair to state (rather than federal) court, at least in the first instance.[35] The problems caused by *Bollman* would not become apparent until the second doctrinal development—the Supreme Court's decisions bookending the Civil War in *Ableman v. Booth*[36] and *Tarble's Case*,[37] which barred state courts from issuing *all* writs of habeas corpus, common law or otherwise, to federal jailers. Between them, *Bollman* and *Tarble* appeared to provide that the only writ available to federal prisoners was the one provided by Congress—and if so, it is hard to see why state prisoners would be entitled to any greater protection, at least under federal law.

To be sure, one of the strongest academic defenses of *Tarble* is that it was premised on the "implied exclusion" of state court jurisdiction by the federal habeas statute.[38] On that view, Congress's provision of federal jurisdiction was responsible for the ouster of state-court authority, such that a constriction of federal courts' habeas authority would re-open state courthouse doors. But the Supreme Court has never embraced that view, and its one significant application of the Suspension Clause is, to a large degree, inconsistent with it.[39]

Instead, we are left with a disconnect between the role the common law writ played (and was supposed to play) in supplementing whatever remedies Congress chose to provide by statute and our contemporary, nonsensical understanding of how much (or how little) of the writ the Constitution actually protects. In *Boumediene v. Bush*, the Supreme Court for the first time held that an Act of Congress depriving lower federal courts of habeas jurisdiction (and failing to provide an adequate substitute) violated the Suspension Clause.[40] But Justice Anthony Kennedy's majority opinion provided no explanation whatsoever for why Congress could be barred from taking away from lower federal courts (which, arguably, it never had to create) a statutory remedy that it

34. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241(a) (2012)).

35. *See Bollman*, 8 U.S. (4 Cranch) at 93–94 ("[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.").

36. 62 U.S. (21 How.) 506 (1859).

37. 80 U.S. (13 Wall.) 397 (1872).

38. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 434 (7th ed. 2016) (noting the "implied exclusion" argument).

39. In *Boumediene* v. *Bush*, 553 U.S. 723, 771 (2008), the Court struck down a statute that denied *federal* habeas jurisdiction over cases where the Suspension Clause still "ha[d] full effect" and the government failed to provide an adequate substitute. If the implied exclusion argument were correct, then Congress's withdrawal of habeas jurisdiction would not have been unconstitutional; it merely would have required the *Boumediene* petitioners to press their claims in state court.

40. *Id.* at 792.

did not have to provide.[41] The common law writ was lurking in the background in *Boumediene*, but it largely stayed there.

In the more familiar context of post-conviction habeas, the modern Supreme Court has almost universally viewed the writ as a product of legislative beneficence (except when it has not).[42] Even in cases in which the remedy might nevertheless be constitutionally required, federal courts have continued to struggle mightily to explain when—and why.[43] The answer is that the Constitution protects quite a bit more than the modest statutory writ that Congress provided in 1789. But because we have lost sight of the role that common law remedies played both before and after the Founding in supplementing the shape and scope of possible relief, we have struggled (and will continue to struggle) to determine just how much more the Constitution protects.

II.
CONSTITUTIONAL TORTS AND THE "*ANCIEN REGIME*"

I do not mean to overstate the critique offered in Part I; Professor Tyler did not seek to write a comprehensive history of pre-revolutionary habeas practice, or a definitive account of the scope of the Suspension Clause. Indeed, the focus of her marvelous book lies almost entirely elsewhere—and rightly so. The reason why I have (almost certainly unfairly) fixated on this sliver is because of the extent to which a similar problem has arisen in a related (but deeply distinct) context: "Constitutional tort" suits, in which plaintiffs seek damages arising out of constitutional violations by federal officers.

Increasingly, it has become an article of faith among conservative jurists and commentators that the separation of powers forbids (or at least discourages) federal courts from fashioning not only common law writs of habeas corpus but also *any* judge-made causes of action—even to vindicate clearly established rights under statutory, constitutional, or international law.[44] This hostility to such

41. For some of what Justice Kennedy might have said to respond to these critiques, see Vladeck, *The Riddle of the One-Way Ratchet*, *supra* note 25.

42. For example, in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the Supreme Court held that state (and, a fortiori, federal) prisoners have a constitutional right to vindicate a new, substantive rule of constitutional law retroactively through collateral post-conviction proceedings. On *Montgomery*'s under-appreciated constitutional implications, see Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905 (2017) [hereinafter Vázquez & Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*].

43. As one of many examples, the Third Circuit has held in a pair of decisions that the applicability of the Suspension Clause to immigrants physically present within the United States depends upon their precise immigration status. *Compare* Osorio-Martinez v. Att'y Gen., 893 F.3d 153 (3d Cir. 2018), *with* Castro v. Dep't of Homeland Security, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017).

44. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–03 (2018).

"judicial legislation"[45] has widened dramatically in recent decades. The Supreme Court has relied upon it to limit the enforcement of federal statutes that fail to provide an express cause of action;[46] the enforcement of federal statutes through 42 U.S.C. § 1983;[47] constitutional tort suits against federal officers under *Bivens*;[48] international human rights claims under the Alien Tort Statute, as in *Jesner*;[49] and even some claims for federal injunctive relief against state officers.[50]

A recurring theme in each of the decisions extending this hostility—and in academic commentaries defending them—is that *federal* common law remedies were an idiosyncratic feature of a since-discredited "*ancien regime*";[51] a "relic of the heady days" in which federal courts exercised lawmaking powers that they either didn't, or no longer, have.[52] As the epigraph from Justice Neil Gorsuch suggests, the most common inflection point held out as heralding the analytical demise of the *ancien regime* is *Erie*, and its repudiation of "general" federal common law.[53] (Apparently, we just needed eight decades to fully appreciate what *Erie* portended.)

As is true with habeas, though, contemporary discussions of other judge-made federal causes of action are surprisingly indifferent (or oblivious) to the rich history of judge-made remedies from the Founding until—and well past—April 25, 1938, under both *state* and *general* common law. A case in point is the Supreme Court's 2017 ruling in *Ziglar v. Abbasi*, in which the Court narrowed to near nothingness the availability of *Bivens* claims—i.e., federal judge-made damages remedies against federal officers for constitutional violations.[54] Here is all that Justice Kennedy's majority opinion in *Abbasi* had to say about the historical background to *Bivens*:

> In 1871, Congress passed . . . 42 U.S.C. § 1983. It entitles an injured person to money damages if a state official violates his or her

45. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting).

46. *See* Alexander v. Sandoval, 532 U.S. 275, 279–93 (2001).

47. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 278-91 (2002) (holding that relevant Family Education Rights and Privacy Act provisions created no personal right enforceable under § 1983).

48. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (adopting "a far more cautious course before finding implied causes of action" than the Court's approach in the mid-twentieth century).

49. *Jesner*, 138 S. Ct. at 1386.

50. *See, e.g.,* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1386 (2015) (emphasizing that the Court had "no warrant to revise Congress's scheme simply because it did not 'affirmatively' preclude the availability of a judge-made action at equity"); *see also* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 619 (2012) (Roberts, C.J., dissenting) ("[L]aw would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect.").

51. *Sandoval*, 532 U.S. at 287; *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 77–78 (1992) (Scalia, J., concurring in the judgment).

52. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

53. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

54. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

> constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.
>
> In 1971, and *against this background*, this Court decided *Bivens*.[55]

What Justice Kennedy's depiction fails to mention is that, throughout our history, and at the time *Bivens* was decided, the principal means through which victims of constitutional violations by federal officers could obtain damages was through judge-made remedies—under *state* tort law (and, where appropriate, pre-*Erie* general law). As late as 1963, the Supreme Court would observe that, "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law."[56] And in *Bivens* itself, the Nixon Administration's argument against the recognition of a federal damages remedy was not that the plaintiffs should be left with nothing, but rather that New York state trespass law provided adequate redress for the alleged violations of Webster Bivens's Fourth Amendment rights.[57]

Against *that* background, *Bivens* was not a bolt from the blue—or, as it has often been portrayed, a case principally about the separation of powers. Instead, it was a case about *federalism*—and whether federal judges, rather than state judges, ought to have primary responsibility for fashioning the liability rules to govern constitutional violations by federal officers. When framed as a debate over whether the liability of federal officers for federal constitutional violations should turn on the idiosyncrasies of fifty different state tort regimes or a uniform body of federal law, it is not hard to see the allure of the latter.[58] When framed, instead, as a debate over whether the federal courts should fashion a remedy that the political branches have declined to provide, it certainly looks different.

The reason why we have lost sight of this aspect of *Bivens* is the Westfall Act.[59] That statute, enacted in 1988, was intended to convert all scope-of-employment *common law* tort claims against federal officers into Federal Tort Claims Act (FTCA) claims against the federal government.[60] Otherwise, it expressly exempted "a civil action . . . which is brought for a violation of the Constitution of the United States."[61] But the courts have read the Westfall Act,

55. *Id.* at 1854 (emphasis added).

56. Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (citing Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10, 12 (1817)); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 135–37 (1997).

57. Brief for Respondents at 35–37, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (No. 301), 1970 WL 116900 (1970).

58. *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 536 (2013) [hereinafter Vázquez & Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Questions*].

59. 28 U.S.C. § 2679(b) (2012).

60. For an example of this conversion, see *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420–21 (1995).

61. 28 U.S.C. § 2679(b)(2)(A).

almost certainly incorrectly, to preempt *all* state-law tort suits against federal officers within the scope of their employment, *including* those alleging constitutional violations.[62] In other words, the courts have interpreted the exception to the Westfall Act's exclusivity provision for constitutional claims as only exempting *federal* judge-made causes of action, and not their *state-law* counterparts.

Thus, whereas the choice the Justices faced in *Bivens* was between a judge-made tort remedy under federal law versus one under state law, the choice today is generally between a *Bivens* remedy and *nothing*. And although one might still think that such a choice should be resolved by reference to the idea that every right should have a remedy, it is at least easier to understand why, to contemporary eyes, the tension in such cases appears to derive from the separation of powers—and whether federal courts should provide a remedy that otherwise doesn't seem to exist.

As with habeas, then, our collective ignorance of the history of constitutional remedies against federal officers under common law at the Founding and throughout American history has skewed the present-day debate around constitutional torts. This defect has left us with a stilted understanding of the implications when the corresponding federal remedy is curtailed—and, for example, whether a litigant might ever have a constitutional right to a damages remedy for a constitutional tort.

III.
CONSTITUTIONAL REMEDIES AS A FEDERALISM PROBLEM

To illustrate the scope of the problem, consider the currently pending litigation in *Hernández v. Mesa* (in which I am co-counsel to the Petitioners).[63] *Hernández* arises out of the lethal and allegedly unprovoked cross-border shooting of an unarmed 15-year-old Mexican national by a US Customs and Border Protection agent standing on US soil astride the US-Mexico border.[64] Other than the distinct factual setting, the case presents a rather typical dispute over a claim that a law enforcement officer used unconstitutionally excessive force.

As such, the focus in the lower courts, at least initially, was on whether the victim's parents could maintain an FTCA claim against the United States, and on whether the officer defendant was entitled to qualified immunity. After the en banc Fifth Circuit held, in *Hernández I*, that Agent Mesa was indeed entitled to

62. *See, e.g.*, Hui v. Castaneda, 559 U.S. 799, 807 (2010). For why this reading is incorrect, see Vázquez & Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, *supra* note 58, at 566–82.

63. *See* Hernández v. Mesa (*Hernández II*), 885 F.3d 811 (5th Cir. 2018) (en banc), *petition for cert. filed*, 139 S. Ct. 306 (June 15, 2018) (No. 17-1678).

64. For the background, see Hernández v. Mesa (*Hernández I*), 137 S. Ct. 2003, 2005 (2017) (per curiam).

qualified immunity,[65] the Supreme Court granted certiorari and, in addition to the merits and qualified immunity questions presented in the petition, asked the parties to address "[w]hether the claim in this case may be asserted under *Bivens*."[66]

Rather than decide that question, the Supreme Court sent it back to the Fifth Circuit for reconsideration in light of *Abbasi*.[67] On remand, the en banc Fifth Circuit held, by a 12-2 vote,[68] that federal courts should not recognize a damages remedy in such circumstances—because the parents' damages suit presented a "new context" under *Abbasi*, and because an array of special factors counseled hesitation against judicial recognition of a damages remedy.[69] As Judge Edith Jones wrote for the majority in *Hernández II*, "plaintiffs' recovery of damages is possible only if the federal courts approve a *Bivens* implied cause of action,"[70] and "separation-of-powers principles" generally militate against such action by the federal courts.[71]

Leaving aside the (problematic) specifics of Judge Jones's doctrinal analysis,[72] *Hernández II* illustrates the exact framing problem that arises when we fail to account for the historical role of common law remedies in constitutional enforcement. The parents in *Hernández II* have no other federal remedy; for them, it's *Bivens* or nothing. But before 1988, that would not have been true. "Texas state law explicitly provides that, under specified conditions, an individual may bring an action for personal injury damages in Texas although the wrongful act causing the injury took place in a foreign country."[73] There is little question that the facts of *Hernández* would satisfy those conditions. But for Congress's elimination of the common law remedy under state tort law, the choice federal courts would face in a case like *Hernández II* is not whether to infer a remedy that the political branches have failed to provide but whether the available remedy in such cases should arise under federal law or state law.

As Part I explained, where habeas was concerned, the elimination of common law relief for federal prisoners in state court meant that, when Congress also sought to restrict the federal statutory remedy, it provoked serious

65. Hernández v. United States, 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated*, 137 S. Ct. 2003.

66. Hernández v. Mesa, 137 S. Ct. 291, 291 (2016) (mem.).

67. *Hernández I*, 137 S. Ct. at 2006–07 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).

68. Judge Dennis concurred in the judgment, but on the basis of qualified immunity, rather than a refusal to recognize a *Bivens* remedy. *Hernández II*, 885 F.3d at 823–24 (Dennis, J., concurring in the judgment).

69. *Id.* at 814.

70. *Id.* at 815.

71. *Id.* at 815–16 (citing *Abbasi*, 137 S. Ct. at 1857).

72. *See, e.g.*, *id.* at 824–32 (Prado, J., dissenting); *see also* Rodriguez v. Swartz, 899 F.3d 719, 737–44 (9th Cir. 2018) (reaching a different conclusion from the Fifth Circuit in a case with distressingly similar facts), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309).

73. Delgado v. Zaragoza, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 2008)). *See generally* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 675–76 (Tex. 1990) (summarizing the history and purpose of § 71.031).

constitutional questions that otherwise might not have arisen. The hard question is whether the same is true for constitutional torts. No one would ever seriously argue that a plaintiff had a freestanding constitutional right to a *Bivens* claim. But in cases like *Hernández II*, in which courts decline to recognize a *Bivens* remedy, the Westfall Act has the effect of depriving litigants of access to *any* judicial forum for resolution of colorable constitutional claims, a result that the Supreme Court has repeatedly insisted raises a "serious constitutional question."[74]

One way around those concerns is to treat the Westfall Act as necessarily codifying (and expanding) *Bivens* to encompass any and all claims that would have been available under state tort law as of 1988.[75] A narrower path to the same result would be to identify those state tort claims for which remedies are (or, at least, were) constitutionally compelled, and at a minimum, ensure that *Bivens* is available in those circumstances. Either way, appreciating the complementary role that state law and state courts were meant to play—and the consequences of their ouster—would highlight how, contra Justice Kennedy in *Abbasi*, the question in such cases isn't really "who should decide whether to provide for a damages remedy"; it's "under what body of law should a damages remedy be available."

Consider in this regard another line of cases in which some of the same jurists who have been hostile to *Bivens* have reached diametrically opposed conclusions about the lawmaking function of the federal courts: private tort suits against military contractors. Although some of these cases have been thrown out on the (dubious) basis that they present non-justiciable political questions,[76] the more nuanced disputes have come down to whether federal courts should derive from the Federal Tort Claims Act's exception for "[a]ny claim arising out of the combatant activities of the military or naval forces"[77] a contractor defense that displaces otherwise applicable state tort law. Because the FTCA itself expressly *exempts* contractors from its scope,[78] were such a defense to exist it all, it would have to be as a product of judge-made federal common law.

74. *See, e.g.*, Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (recognizing that if the Court construed the statute in question "to deny a judicial forum for constitutional claims," the Court would raise a "serious constitutional question" (quoting Weinberger v. Salfi, 422 U.S. 749, 762 (1975)).

75. For a variation on this argument, see James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

76. *See, e.g.*, Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458 (3d Cir. 2013); Taylor v. Kellogg Brown & Root Servs., Inc., 658 F.3d 402 (4th Cir. 2011); Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271 (11th Cir. 2009); Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007); Ghane v. Mid-South Inst. of Self Defense Shooting, Inc., 137 So.3d 212 (Miss. 2014); Am. K-9 Detection Servs., LLC v. Freeman, 556 S.W.3d 246 (Tex. 2018).

77. 28 U.S.C. § 2680(j) (2012).

78. *Id.* § 2671.

Analogizing to Justice Scalia's majority opinion in *Boyle v. United Technologies Corp.*,[79] at least two circuits have said "yes." For example, in *Saleh v. Titan Corp.*, a divided panel of the D.C. Circuit threw out state tort law claims arising out of Abu Ghraib on the basis of a federal "preemption" defense that the court derived from the FTCA.[80] As Judge Laurence Silberman wrote for the panel, "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad—it is also obvious."[81] He went on to explain:

> In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battle-field preemption": the federal government occupies the field when it comes to warfare, and its interest in combat is always "precisely contrary" to the imposition of a non-federal tort duty.[82]

And as the other judge in the majority, then-Judge Brett Kavanaugh, would note in a subsequent panel discussion, "[O]ne of the principles of the founding was that war would be waged by the Federal Government. War and foreign relations were Federal Government activities primarily, not state government activities."[83] Thus, compelling federalism-based policy arguments justified the fashioning of a federal common law rule of decision, even in a context in which Congress not only hadn't been silent but also had expressly refused to subject the defendants to federal, rather than state, tort law.[84]

To similar effect is the Fourth Circuit's ruling in *Al Shimari I*, which simply followed *Saleh*.[85] Although that ruling was subsequently vacated by the en banc Court of Appeals for lack of interlocutory appellate jurisdiction, no less a champion of judicial restraint than Judge J. Harvie Wilkinson III dissented from

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79. 487 U.S. 500 (1988).

80. 580 F.3d 1 (D.C. Cir. 2009).

81. *Id.* at 11.

82. *Id.* at 7 (citing *Boyle*, 487 U.S. at 500).

83. Conference, *War, Terror, and the Federal Courts: Ten Years After 9/11*, 61 AM. U. L. REV. 1253, 1268 (2012).

84. In an unusual (and unusually strident) dissent, then-Judge Garland objected that "[n]o congressional statute bars the plaintiffs' state-law actions from running their ordinary course in these cases. Indeed, the only cited statute suggests the opposite." *Saleh*, 580 F.3d at 35 (Garland, J., dissenting).

85. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *vacated on other grounds*, 679 F.3d 205 (4th Cir. 2012) (en banc).

the en banc decision, entirely because he thought federal judicial intervention was crucial to protect constitutionally-significant federal interests:

> [T]hese are not routine appeals that can be quickly dismissed through some rote application of the collateral order doctrine. This case instead requires us to decide whether the contractors who assist our military on the battlefield will be held accountable through tort or contract, and that seemingly sleepy question of common law remedies goes to the heart of our constitutional separation of powers. Tort suits place the oversight of military operations in an unelected judiciary, contract law in a politically accountable executive. And in the absence of some contrary expression on the part of the Article I legislative branch, the basic principles of Article II require that contractual, not tort, remedies apply.[86]

Less than four months earlier, the same Judge Wilkinson wrote the majority opinion in *Lebron v. Rumsfeld*, in which the Fourth Circuit refused to recognize a *Bivens* claim arising out of the military detention of a US citizen as an enemy combatant.[87] As he explained in that case, "Being judicial requires that we be judicious, and adherence to our constitutional role in this area requires that we await 'affirmative action by Congress.' Put simply, creating a cause of action here is 'more appropriately for those who write the laws, rather than for those who interpret them.'"[88]

The point here is not that one of these lines of cases is correct and the other is not. Nor is it that there is, or at least appears to be, a significant inconsistency in how some judges view the idea of "judicial restraint." Rather, the point is that, when cases present federal courts with a choice between state and federal remedial regimes, there tends to be far less reluctance even on the part of judges held out as champions of judicial restraint to fashion the very kind of federal common law that was supposedly a "relic of the heady days."[89] And although one might argue that fashioning federal common law defenses is less a usurpation of the separation of powers than fashioning federal common law remedies, again, the core point is that, in both contexts, we do not pay nearly enough attention to the role that federalism should also be playing in calibrating the appropriate responsibilities of federal judges.

CONCLUSION: STATE LAW'S FORGOTTEN SHADOW

At a 2011 D.C. Circuit argument over whether Congress had acted unconstitutionally by depriving the federal courts of jurisdiction over all civil actions, including *Bivens* claims, by Guantánamo detainees, then-Chief Judge David Sentelle asked counsel for the plaintiffs whether, because the federal courts did not have general federal question jurisdiction until 1875, they were

86. *Al Shimari*, 679 F.3d at 225–26 (Wilkinson, J., dissenting).
87. Lebron v. Rumsfeld, 670 F.3d 540, 548 (4th Cir. 2012).
88. *Id.* at 552 (quoting United States v. Gilman, 347 U.S. 507, 513 (1954)).
89. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

unconstitutional for their first eighty-six years of existence.[90] The answer, of course, is no (at least for *that* reason).[91] But the question neatly underscores how a lack of understanding of the role of state courts (and state law) in vindicating federal constitutional rights tends to infect our contemporary understanding of the *federal* remedies that the Constitution does—or at least should—require.

In that regard, it may be helpful to close this Essay by circling back to habeas, and to the Supreme Court's surprising 2016 decision in *Montgomery v. Louisiana*.[92] The merits question in *Montgomery* was relatively routine: whether an earlier Supreme Court decision holding that the Eighth Amendment forbids mandatory life-without-parole sentences for juvenile offenders is a "substantive" rule, such that it can be enforced retroactively through habeas petitions by prisoners whose direct appeals have become final.[93] The Court said yes,[94] but only after having to resolve a far messier jurisdictional question. *Montgomery* was a direct appeal from a *state* habeas proceeding, raising the question of whether the framework the Supreme Court outlined in *Teague* for retroactive application of new rules of constitutional law itself presented a federal question—or whether the Louisiana state courts' *choice* to apply *Teague* was an adequate and independent state ground that deprived the Supreme Court of appellate jurisdiction.[95]

In reaching the former conclusion, Justice Kennedy's opinion for the Court held that *Teague* "imposed a mandatory *constitutional* obligation on state courts to give retroactive effect in collateral post-conviction proceedings to new substantive rules of constitutional law."[96] In other words, a state prisoner with a federal constitutional objection to his conviction or sentence that is based upon a new, "substantive" rule issued by the US Supreme Court has a constitutional right to a remedy—and through collateral post-conviction relief in the *state* courts in the first instance. As the *Montgomery* majority concluded, "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution *requires* state collateral review courts to give retroactive effect to that rule."[97]

90. *See* Benjamin Wittes, Al-Zahrani *Oral Argument Mini-Summary*, LAWFARE (Oct. 6, 2011), https://www.lawfareblog.com/al-zahrani-oral-argument-mini-summary, [https://perma.cc/2PWC-GS4T]. In the resulting decision, *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012), the D.C. Circuit upheld the relevant jurisdiction-stripping provision, holding that "the only remedy [plaintiffs] seek is money damages, and, as the government rightly argues, such remedies are not constitutionally required."

91. *See, e.g.*, Steve Vladeck, *Ben's Two* Al-Zahrani *Questions*, LAWFARE (Feb. 22, 2012), https://www.lawfareblog.com/bens-two-al-zahrani-questions, [https://perma.cc/L55J-HZ6D].

92. 136 S. Ct. 718 (2016).

93. *Id.* at 727.

94. *Id*. at 734.

95. *See generally* Vázquez & Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, *supra* note 42 (discussing the sweeping impact that *Montgomery* had on the obligations of state courts in collateral post-conviction review).

96. *Id*. at 909.

97. *Montgomery*, 136 S. Ct. at 729 (emphasis added).

Although its significance may be obscured by the hypertechnical nature of post-conviction habeas doctrine, *Montgomery* is a remarkable ruling. Not only did the Supreme Court recognize, perhaps for the first time, that there are circumstances in which the Constitution mandates a *collateral* post-conviction remedy, but it also held that such a remedy will usually have to be afforded by state courts, at least where state prisoners are concerned—and that state law, as much as federal law, is responsible for providing remedies to vindicate federal constitutional rights.[98]

In a sense, *Montgomery* may represent the beginning of the Supreme Court's habeas jurisprudence coming full circle—and the vindication of Professor Hart's famous conclusion about the centrality of state, rather than federal, courts to the protection of federal constitutional rights.[99] (Insofar as Justice Kavanaugh does not share Justice Kennedy's views on these issues, the latter's retirement may complicate matters.) But even if *Montgomery* is an outlier, it is nevertheless a powerful reminder of what federal judges too often forget in contexts *not* involving prisoners challenging their detention: when it comes to the scope of remedies for federal constitutional violations, state courts—and state remedies—were usually meant to play an important role. As a result, the judicial minimization (or statutory vitiation) of that role ought to have doctrinal, and perhaps even constitutional, consequences across an array of federal courts doctrines. Thus far, the effects have principally been felt in the unlikeliest context of all: the wartime detention of enemy belligerents.

98. *See id.*
99. Hart, *supra* note 3, at 1401.