THE INCONSISTENT ORIGINALISM OF JUDGE-MADE REMEDIES AGAINST FEDERAL OFFICERS

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[T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.[1]

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.[2]

With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . .[3]

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1 The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824).

2 Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

3 Hernández v. Mesa, 140 S. Ct. 735, 742 (2020) (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

INTRODUCTION

No statute expressly authorizes civil suits against federal officials who violate the Constitution—for *any* form of relief.[4] Although Congress certainly has the power to enact such legislation (and has authorized such suits against *state* officers),[5] it has, for a number of reasons, never chosen to provide a cause of action for constitutional violations by federal officers. Does Congress's inaction leave courts powerless to enforce the Constitution through civil litigation? Or are there circumstances in which it is not only appropriate, but necessary, for judges to fashion common-law civil remedies to vindicate constitutional rights?

As the second Justice Harlan put it in 1971, constitutional rights "are aimed predominantly at restraining the Government as an instrument of the popular will."[6] To that end, he wrote, it would be "anomalous" to conclude that courts are powerless to provide remedies to enforce those rights simply because the majority—the democratically elected political branches—has refused to do so.[7] To put it more bluntly, constitutional rights wouldn't be worth all that much if they provided nothing other than a defense to civil or criminal enforcement proceedings. More than that, judicial enforcement of the Constitution *against* the political branches is an essential aspect of meaningful government accountability.

And yet, in recent years, the Supreme Court has not only embraced different answers to these questions depending upon the type of relief that plaintiffs have sought; it has embraced different methodological approaches to how these questions should be answered in the first place. Indeed, even a cursory perusal of the Court's recent jurisprudence reveals profound inconsistencies as to whether (and to what extent) historical practice and Founding-era understandings of the federal judicial power can and should inform the contemporary scope of judge-made remedies for federal constitutional violations.

On one hand, the contemporary Court (unanimously) acknowledges that, per one of the epigraphs, "[t]he ability to sue to *enjoin* unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."[8] Thus, courts may fashion such relief in appropriate cases even though Congress has not expressly authorized them to do so. And one need not look far to see both high- and lower-profile Supreme Court deci-

4 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017).

5 *Cf.* 42 U.S.C. § 1983 (2018) (authorizing damages for anyone acting under color of state law who violates federal rights, including rights "secured by the Constitution").

6 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment).

7 *Id.* at 403–04.

8 Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (emphasis added); *see also id.* at 336–37 (Sotomayor, J., dissenting).

sions in recent years turning on just such judge-made remedies, i.e., nonstatutory injunctions against unconstitutional conduct by federal officers.[9]

On the other hand, the same Court treats as virtually irrelevant the comparably "long history" of challenging *completed* unconstitutional conduct by federal officers,[10] including the robust regime of judge-made damages actions that persisted well into the twentieth century in both state and federal courts.[11] Ditto the Justices' more recent unwillingness to take seriously Founding-era understandings of the scope of habeas corpus—also a legal, as opposed to equitable, remedy—in interpreting the Constitution's Suspension Clause.[12] There, at least, the Court has *claimed* that it is attempting to divine the scope of the writ at least "as it existed in 1789";[13] it's only that its historical work product has been unconvincing.[14]

The Supreme Court has never attempted to explain—or justify—the methodological (and historiographical) dichotomy between the propriety *vel non* of judge-made prospective and retrospective relief against federal officers. Indeed, although the tension between these lines of cases is latent, the Justices themselves have barely acknowledged that such an inconsistency even exists. Only one opinion has even *attempted* to make the normative case that judge-made injunctions against federal government action should generally be met with less skepticism than judge-made after-the-fact damages remedies.[15] To say the least, it fails to persuade.[16] Despite all of this, and despite the venerable maxim that "equity follows the law," rather than the other way around,[17] there seems to be widespread acceptance (or, at least, defeatism) that this is just the way it is.

Professor Carlos Vázquez and I have explained in depth why the Supreme Court's evisceration of damages remedies for constitutional viola-

9 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (affirming an injunction against a federal policy).

10 *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 742 (2020).

11 *See* Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019–2020 CATO SUP. CT. REV. 263, 267–70.

12 *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1975–76 (2020); *see also* 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.").

13 INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)).

14 *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 959–78 (2011) (book review) (noting the many historical shortcomings of contemporary judicial analysis of the scope of habeas corpus at the time the Constitution was drafted).

15 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858, 1861–63 (2017).

16 Steve Vladeck, *The Incoherence of the Normative Case Against* Bivens, LAWFARE (June 21, 2017, 2:53 PM), https://www.lawfareblog.com/incoherence-normative-case-against-bivens.

17 The term is shorthand for the broader principle that equity is meant to provide a backstop (and supplement) to legal remedies—to fill gaps in that regime, rather than to take preeminence over it. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 649–50 (2010) (discussing the relationship between law and equity).

tions by federal officers is analytically and historically incoherent.[18] And I have written elsewhere about the extent to which modern constitutional remedies doctrine has turned a remarkably blind eye to foundational principles of federalism—paying little more than lip service to the robust availability of common-law damages (and habeas) remedies against federal officers in *state* courts from the Founding through the Civil War—and, at least for damages, well into the twentieth century.[19] I don't mean to rehash (or relitigate) either argument here.

Rather, this Essay aims to build on that scholarship, asking a different question: To Justices who insist on a methodological commitment to originalism (in whatever form),[20] why has the uncontested understanding of the central role of *judges* in fashioning constitutional remedies against federal officers at (and well after) the Founding played such an *inconsistent* role in their contemporary analyses? That is to say, why is there an originalism-heavy school of thought driving the Court's modern jurisprudence of *prospective* relief, but not *retrospective* relief?

The easy and obvious answer, of course, is that even the staunchest originalists aren't originalists about everything. But cynicism aside, the goal of this Essay is to demonstrate that there is no good methodological or analytical justification for this dichotomy—for why the historical understanding *has* mattered with respect to injunctive relief but has proven irrelevant with respect to damages. Put another way, my thesis is that the Supreme Court's modern hostility to judge-made damages remedies against federal officers, in contrast to its solicitude toward judge-made injunctive relief, is not just inconsistent with the original understanding; it is, *because* of that defect, affirmatively *antithetical* to originalism as a modality of constitutional interpretation.

Whatever the appropriate role of courts with regard to remedies for violations of statutory rights, this Essay argues that the same principles that drive the ability of judges to fashion constitutional remedies for prospective relief ought to drive their ability to fashion such remedies for retrospective relief.[21]

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18 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).

19 Stephen I. Vladeck, *Constitutional Remedies in Federalism's Forgotten Shadow*, 107 CALIF. L. REV. 1043 (2019).

20 I do not mean to join the rich debate over the merits of "originalism" as a modality of constitutional interpretation, or even the evolving debate over whether originalism is properly understood to be focused on the original *intent* of the Founders or on the original public meaning of the words they wrote—or whether those are even opposing constructions. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1371 (2019). At least on the topic of this Essay, there is no meaningful debate over what was understood at the time of the Founding (or by whom); rather, the debate is only about the extent to which that understanding does—and should—matter to contemporary courts.

21 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment) ("[T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests

Insofar as the Supreme Court has allowed the latter to diverge from the former, it has not only unmoored the doctrine from any satisfying analytical tether; it has driven home that its aversion to *some* judge-made constitutional remedies is not just ahistorical, but is methodologically incorrect even on (a majority of) the Justices' preferred terms.

I. Damages Versus Injunctions: The Present Dichotomy

It is familiar sledding that the Supreme Court over the past two decades has become increasingly hostile to "implied" causes of action—to what Justice Scalia derided as the "*ancien regime*," during which federal courts often fashioned civil remedies in circumstances in which Congress had not expressly authorized them.[22] Initially, this hostility was pegged to the private judicial enforcement of federal *statutory* rights. After all, the argument went, courts would be arrogating legislative power were they to read statutes to provide judicial relief that the drafters of the statute—the legislature—had not expressly authorized.[23]

But to whatever extent that argument made sense in the context of implied statutory causes of action,[24] it was quickly expanded to encompass other classes of claims—including suits to enforce federal statutes under 42 U.S.C. § 1983 (which, to be clear, is an *express* statutory cause of action);[25] suits to enforce (putatively) peremptory norms of international human rights law under the Alien Tort Statute, 28 U.S.C. § 1350;[26] and, as especially relevant here, suits seeking damages for constitutional violations by federal officers under the Supreme Court's 1971 *Bivens* decision.[27] Indeed, by 2018, this hostility to judge-made remedies had become so pervasive that Justice Kennedy, writing for a majority in *Jesner v. Arab Bank, PLC*, referred to it as "this Court's *general* reluctance to extend judicially created private rights of action."[28]

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federal courts of the power to grant damages absent express congressional authorization.").

22 *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001).

23 *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 730–31 (1979) (Powell, J., dissenting).

24 *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 231–34 (2003) (criticizing this line of reasoning).

25 *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002).

26 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

27 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1851–52 (2017); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").

28 138 S. Ct. 1386, 1402 (2018) (emphasis added); *see also id.* ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" (quoting *Sosa*, 542 U.S. at 727)).

In the specific context of "*Bivens* claims," i.e., suits seeking judge-made damages for constitutional violations by federal officers, there were at least three reasons why this objection made (and continues to make) no sense. First, unlike statutory (or common-law) rights, *Bivens* claims seek to enforce *constitutional* protections against federal officers. It would hardly be "arrogating" legislative power to fashion relief for substantive rights the scope of which was entirely beyond the legislature's control. Again, this was perhaps the central point of Justice Harlan's concurrence in *Bivens* itself.[29]

Second, although Justice Scalia's *Malesko* concurrence attempted to group *Bivens* in with the "*ancien regime*" of statutory interpretation decisions that his majority opinion in *Sandoval* had repudiated seven months earlier,[30] *Bivens*'s true lineage traced much further back in time. Indeed, as Part II explains in more detail, judge-made remedies for damages arising out of constitutional violations by federal officers dated all the way back to the Founding—whether in state or federal court.[31]

Third, and in any event, the absence of any remedy for a constitutional violation raises serious constitutional questions that generally do not arise from the absence of a remedy for a statutory violation. In *Hernández*, for instance, the petitioners *would* have been entitled to pursue a remedy under state tort law before 1988—when Congress, in the Westfall Act, preempted *all* state tort remedies against federal officers arising within the scope of their federal employment.[32] Although the petitioners therefore asked the Supreme Court to also address whether, if they were not entitled to a *Bivens* remedy, the Westfall Act was therefore unconstitutional insofar as it deprived them of any *other* access to the courts,[33] the Justices declined to take up that question.[34]

Despite these material distinctions between implied constitutional damages remedies and implied statutory damages remedies, the Court eventually collapsed the distinction—at least where claims against federal officers are concerned. In *Ziglar v. Abbasi*, for instance, Justice Kennedy wrote for a 4–2 majority that, even though constitutional remedies raise materially different considerations from statutory ones, "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under

29 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 403–04 (1971) (Harlan, J., concurring in the judgment).

30 *See Malesko*, 534 U.S. at 75 (Scalia, J., concurring); Alexander v. Sandoval, 532 U.S. 275, 287 (2001).

31 *See also* Stephen I. Vladeck, Bivens *Remedies and the Myth of the "Heady Days,"* 8 U. ST. THOMAS L.J. 513, 513–15 (2011) (explaining why the analogy between *Bivens* and implied statutory remedies does not withstand scrutiny).

32 *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 § 5, 28 U.S.C. § 2679(b) (2018). On whether the Westfall Act *meant* to thereby preempt state tort claims resting on *constitutional* violations, see Vázquez & Vladeck, *supra* note 18, at 514–15.

33 *See* Petition for Writ of Certiorari at i, 23–27, Hernández v. Mesa, 139 S. Ct. 2636 (2019) (mem.) (No. 17-1678), 2018 WL 3155839, at *i, *23–27.

34 *Hernández*, 139 S. Ct. at 2636 (limiting the grant of certiorari to "Question 1 presented by the petition").

the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."[35] In particular,

> [c]laims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered.[36]

Even though *Abbasi* thereby declined to recognize a series of *Bivens* claims in circumstances in which the availability of an alternative remedy was unclear, at best, it purported to leave open challenges to "individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact."[37] Indeed, Justice Kennedy went out of his way to stress that "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[38] After all,

> *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.[39]

But after Justice Kavanaugh replaced Justice Kennedy, the Court backtracked from those commitments in *Hernández v. Mesa*,[40] where it declined to recognize a *Bivens* claim against a rogue federal law enforcement officer who shot and killed an unarmed, fifteen-year-old Mexican teenager, allegedly without provocation.[41] Of the five Justices in the majority in *Hernández*, two would have overruled *Bivens* altogether;[42] the other three seemed content to all but limit it to its facts.[43]

And although the Court in *Hernández* at least acknowledged the longer historical tradition of judge-made damages claims, it dismissed the relevance of that tradition in light of the Supreme Court's 1938 rejection of federal courts' *general* common lawmaking powers in *Erie Railroad Co. v. Tompkins*.[44] As Justice Alito wrote for the Court in *Hernández*, because of *Erie*:

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35 137 S. Ct. 1843, 1856 (2017).

36 *Id.*

37 *Id.* at 1862.

38 *Id.* at 1856.

39 *Id.* at 1856–57 (emphasis added).

40 140 S. Ct. 735 (2020).

41 *Id.* at 739–40.

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

43 *See id.* at 756–59 (Ginsburg, J., dissenting).

44 *Id.* at 742 (majority opinion); *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

> federal courts today cannot fashion new claims in the way that they could before 1938. With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy.[45]

For the proposition that, *because of Erie*, even constitutional damages remedies must be authorized by statute, Justice Alito offered only a single citation—to the Court's rejection of implied *statutory* causes of action in *Alexander v. Sandoval*.[46] Thus, to whatever extent there might still be *some* *Bivens* remedies going forward, *Hernández* certainly seems to bring the analogy to implied statutory causes of action (and the Court's repudiation of them) full circle.[47]

While all of this was happening, though, the Supreme Court has never evinced similar skepticism to judge-made claims for *prospective* relief. To the contrary, in a series of cases involving suits seeking relief for constitutional violations by *state* officers, the Court repeatedly asserted not just the *validity* of judge-made injunctive relief, but its *necessity* to "promote the vindication of federal rights."[48] Thus, although the Eleventh Amendment,[49] as interpreted by the Supreme Court, foreclosed suits directly against nonconsenting states even for constitutional violations,[50] courts could enjoin state *officers* who acted in violation of the Constitution without running afoul of sovereign immunity (and, apparently, without arrogating Congress's power to expressly authorize such suits).[51]

The same logic applied *a fortiori* to federal officers.[52] Although the Supreme Court repeatedly struggled before 1976[53] with the question of when

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45 *Hernández*, 140 S. Ct. at 742 (citations omitted) (citing Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)).

46 *See id.*

47 *See* Vladeck, *supra* note 11, at 276–79, 281–85 (criticizing *Hernández* and sketching out its implications).

48 *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

49 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

50 *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 9–15 (1890).

51 *See Ex parte* Young, 209 U.S. 123, 149, 155–56 (1908). *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927–35 (7th ed. 2015) (fleshing out the scope of *Ex parte Young*).

52 *See, e.g.*, Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902) ("In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled.").

53 A 1976 amendment to the Administrative Procedure Act expressly waived the federal government's sovereign immunity from any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." Act of Oct. 21, 1976,

the federal government's sovereign immunity would bar suits for injunctive relief against federal officers to enforce *statutory* rights,[54] it never seriously balked at the availability of such relief (or the central role of courts in providing it) in suits to enforce the Constitution.[55] And even after the Court began to express skepticism about judge-made remedies in *other* contexts, suits for injunctive relief against federal officers proceeded without any meaningful objection—sovereign immunity or otherwise.

That the historical acceptance of judge-made injunctions survived the Court's more recent repudiation of judge-made damages claims is best encapsulated in a pair of cases from 2012 and 2015 raising the same issue—whether Medicaid providers or beneficiaries could pursue injunctive relief against state officers for enforcing state laws that set reimbursement rates so low as to be inconsistent with the "equal access" requirement of the federal Medicaid statute (and that thereby violated the Supremacy Clause).[56]

In the first case, *Douglas v. Independent Living Center of Southern California, Inc.*, the majority ducked the question—on the ground that intervening administrative action, which had (arguably) altered the posture of the dispute, should be considered in the first instance by the lower courts.[57] But Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented—arguing that, regardless of the intervening administrative action, the answer should be no.[58] As the Chief Justice wrote, no judge-made injunction should be available to private parties to enforce a federal statute that they could not otherwise enforce directly:

> [T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence. . . . This body of law would serve

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Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721 (codified at 5 U.S.C. § 702). Thus, today, sovereign immunity provides no obstacle to any suit seeking injunctive relief against a federal officer for violating the Constitution.

54 *See, e.g.*, Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682 (1949). As Professor Sisk has explained,

> under the *Larson-Malone* sovereign immunity doctrine, a suit may be maintained directly against a governmental officer under two circumstances. First, if the officer allegedly acted outside of the authority conferred upon his or her office by Congress, that is, beyond delegated statutory power, then his or her conduct will be treated as individual in nature and will be neither attributed to the sovereign nor barred by sovereign immunity. Second, if the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution, then sovereign immunity again is lifted. In sum, when a government officer acts . . . .

Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 457 (2005) (footnotes omitted).

55 *See, e.g.*, *Larson*, 337 U.S. at 689–92.

56 For background, see Bruce C. Vladeck & Stephen I. Vladeck, *Killing Medicaid the California Way*, N.Y. TIMES, Oct. 14, 2011, at A31.

57 *See* 565 U.S. 606, 613–16 (2012).

58 *See id.* at 620–21 (Roberts, C.J., dissenting).

> 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.[59]

The Chief Justice's dissent would therefore have limited the availability of judge-made injunctions based upon the same concerns animating the Court's rejection of judge-made damages. Indeed, the quoted passage expressly *cited* one of those cases—*Gonzaga University v. Doe*, which the Chief Justice had (successfully) argued while in private practice.[60]

But even Chief Justice Roberts agreed that judge-made injunctions would still be appropriate in *some* circumstances—"to enforce the supremacy of federal law when such action gives effect to the federal rule, rather than contravening it."[61] In other words, the Chief Justice's *Douglas* dissent did not disclaim the power of federal courts to fashion judge-made injunctive relief in appropriate cases; it merely would have narrowed the class of cases in which such relief was "appropriate."[62]

Thus, when the same issue returned to the Court three years later in *Armstrong v. Exceptional Child Center, Inc.*, the Chief Justice joined Justice Scalia's majority opinion, which reasserted that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."[63] Although this discussion came as part of a broader holding that such a cause of action did not derive from the Constitution *itself*, it necessarily endorsed the idea that such judge-made remedies are not inappropriate solely *because* they are judge-made.

The *Armstrong* majority went on to hold that the federal government's administrative enforcement role, as contemplated by the Medicaid statute, necessarily displaced any remedies that would traditionally have been available in equity.[64] And yet, although there is much to criticize in that holding,[65] the critical point for present purposes is that the Court viewed such statutory displacement as *necessary*—that, but for the Medicaid statute's remedial provisions, a nonstatutory claim for an injunction *would* have remained available. At the same time as the Court was closing the federal courthouse door to judge-made damages remedies (even for constitutional violations),

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59 *Id.* at 619 (citations omitted).

60 *See id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002)).

61 *Id.* at 620.

62 For a critique of the Chief Justice's analysis on this point, see Stephen I. Vladeck, Douglas *and the Fate of* Ex parte Young, 122 YALE L.J ONLINE 13 (2012).

63 *See* 575 U.S. 320, 327 (2015).

64 *See id.* at 328–31; *see also id.* at 333–36 (Breyer, J., concurring in part and concurring in the judgment) (arguing that Congress intended to foreclose injunctive relief in these specific factual circumstances).

65 *See id.* at 341–47 (Sotomayor, J., dissenting); *see also* Steve Vladeck, Armstrong*: Is Utterly Disingenuous Statutory Interpretation Ever Worth It?*, PRAWFSBLAWG (Mar. 31, 2015, 8:27 PM), https://prawfsblawg.blogs.com/prawfsblawg/2015/03/armstrong-is-utterly-disingenuous-statutory-interpretation-ever-worth-it.html.

then, it was also reaffirming the availability—and, in some cases, the propriety—of judge-made *prospective* relief.

To underscore the point, consider footnote 2 of Chief Justice Roberts's majority opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a suit for injunctive relief against federal officers (and a federal agency) in which the Court invalidated part of the Sarbanes-Oxley Act on the ground that it violated the separation of powers:

> The Government asserts that "petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional provisions at issue here. If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.[66]

Faced with an argument from the Solicitor General that the Court should *not* expand an implied cause of action to encompass a new context, the exact kind of argument that had featured so prominently in the Court's restriction of implied damages remedies, the Justices' "general reluctance to extend judicially created private rights of action"[67] was nowhere to be found.

II. Damages and Injunctions from the Founding Onward

Part I established that the contemporary Supreme Court is simultaneously *hostile* to judge-made damages remedies for constitutional violations by federal officers, but quite *solicitous* of judge-made equitable remedies for the same. This Part demonstrates that this divergence is a modern phenomenon. Both before and after the merger of law and equity, the Supreme Court's jurisprudence reflected no such distinction well into the twentieth century. If anything, in line with traditional principles concerning the relationship between the two, the Court's expressed preference was for *damages* in cases in which they were adequate. In all cases, though, the propriety of *judge-made* remedies in the absence of express statutory authorization was never disputed; the assumption was that, so long as Congress had conferred subject-matter jurisdiction over the dispute, "federal courts may use any available remedy to make good the wrong done."[68] As Justice Black wrote for the Court in 1946, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[69]

66 561 U.S. 477, 491 n.2 (2010) (citations omitted).

67 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

68 Bell v. Hood, 327 U.S. 678, 684 (1946).

69 *Id.* (first citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803); and then citing Tex. & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569–70 (1930)).

This was so because, in drafting the Constitution, the Founders intended, in the respects relevant here, to replicate many of the features of the English legal system of the time—including the by-then well-settled ability of courts to use nonstatutory remedies as a mechanism for holding government officers (and, through them, the government) to account.[70] Federal courts may not always have had subject-matter jurisdiction (Congress would not bestow general federal question jurisdiction upon the lower federal courts until 1875),[71] but in cases in which federal courts had jurisdiction, it was understood that they could fashion nonstatutory remedies for official misconduct.

I've described the nineteenth-century Supreme Court decisions repeatedly sustaining (and, in some cases, themselves fashioning) judge-made damages remedies in detail elsewhere.[72] Suffice it to say, "[a]t the Founding, and for much of American history, there was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers. Not only did federal courts routinely provide such relief, but the Supreme Court repeatedly blessed the practice,"[73] as far back as one of the first appeals argued to Chief Justice Marshall.[74] At least initially, many of these rulings came in admiralty cases,[75] but that was largely a function of the limited scope of federal subject-matter jurisdiction at the time. As early as 1817, the Supreme Court expressly affirmed the power of *state* courts to award damages against federal officers who had acted unlawfully.[76]

At the same time as the Court showed no hesitation to award judge-made damages against federal officers, it also showed no reluctance to sustain injunctive relief in cases in which it was appropriate. Most famously, in *Osborn v. Bank of the United States* in 1824, Chief Justice Marshall sustained an injunction against an Ohio state official who unlawfully withdrew money from a branch of the Second Bank of the United States even though (1) no statute expressly provided a right to seek it; and (2) the Eleventh Amendment would have barred the same suit had it been brought directly against

70 *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197–213 (abr. student ed. 1965).

71 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

72 *See* Vladeck, *supra* note 11, at 267–70.

73 *Id.* at 267.

74 *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), was argued December 16 and 19, 1801—during the Court's first regular sitting after Chief Justice Marshall's swearing-in in February of that year. *See* ANNE ASHMORE, SUP. CT. OF THE U.S., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS 4 (2018), https://www.supremecourt.gov/opinions/datesofdecisions.pdf; *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#19 (last visited Mar. 13, 2021).

75 *See., e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 373–74 (1824); *Little*, 6 U.S. (2 Cranch) at 178.

76 *See* Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10 (1817).

Ohio.[77] After explaining that the Bank's "sue and be sued clause" gave it the authority to invoke federal jurisdiction (and was constitutional in so providing),[78] Marshall devoted eight pages of his analysis to why an injunction was appropriate under traditional principles of equity—without so much as a word about whether the fact that the remedy was judge-made called its propriety into question.[79]

Just three days after *Osborn*, the Court handed down its opinion in *The Apollon*—a tort action brought by the master of a French ship that had been seized by a U.S. official while in Spanish waters.[80] Although the case presented significant foreign policy and diplomatic implications,[81] Justice Story's opinion for the Court dismissed them, explaining that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress."[82] Because the seizure in question was "wholly without justification under our laws," the U.S. official could not avoid plaintiff's common-law damages claim—even though the seizure took place outside the territorial United States.[83]

To be sure, damages remedies were more commonplace than injunctions during the first century under the Constitution—but that was at least in part a reflection of their *robustness*, and the long-settled view that no equitable remedy could be provided where an adequate remedy existed at law.[84] The more that the Supreme Court endorsed judge-made damages remedies against federal officers—as it did time and again from 1804 onward—the less that it was asked to resort to equity. The only regular question in these cases was whether they were properly brought in state or federal court—which necessarily evolved alongside the initial adoption and subsequent expansion of the federal officer removal statute.[85]

That did not mean, of course, that the Supreme Court never issued nonstatutory injunctions; again, *Osborn* was an important precedent to the contrary. But the primary mechanism for holding federal officers (and, through them, the federal government) accountable throughout the nineteenth century was suits for damages arising under either state law or, especially after *Swift v. Tyson*,[86] the "general" common law. Moreover, as Professor Jim Pfander and Jonathan Hunt recently demonstrated, the liability regime nec-

77 *See* 22 U.S. (9 Wheat.) 738, 849–50, 870–71 (1824).

78 *See id.* at 817–28.

79 *See id.* at 838–46.

80 *The Apollon*, 22 U.S. (9 Wheat.) at 363.

81 *See id.* at 366.

82 *Id.* at 367.

83 *Id.* at 365–66, 372, 379.

84 *See, e.g.*, Ins. Co. v. Bailey, 80 U.S. (13 Wall.) 616, 621 (1871).

85 28 U.S.C. § 1442(a)(1) (2018). The evolution of the statute, the first iteration of which was enacted in 1815, is described in *Willingham v. Morgan*, 395 U.S. 402, 405–06 (1969).

86 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

essarily *assumed* the propriety of judge-made damages remedies, leaving the question of whether the officers should be indemnified to Congress—which provided such relief in approximately sixty percent of the cases Pfander and Hunt surveyed.[87]

Critically, no one ever suggested that federal courts were powerless to act—whether to award damages or injunctive relief—against federal officers until and unless Congress expressly authorized them to do so. Whether because Founding-era and nineteenth-century jurists assumed that Congress had provided such authorization simply by conferring subject-matter jurisdiction, or they believed that no specific congressional endorsement was necessary, the result was the same: the *power* of federal courts to issue judge-made remedies in cases in which they had jurisdiction was simply never in dispute.

Nor were these cases limited to claims arising under statutes, contracts, or other subconstitutional bodies of law. Instead, constitutional rights were increasingly litigated through tort suits—where state (or general) common law provided the cause of action and the federal officer asserted a public authority defense, one that inevitably turned on whether he was acting within or without the Constitution.[88] Thus, perhaps the canonical statement came from the Supreme Court in 1902—directing the lower court to impose a preliminary injunction against the Postmaster General for ordering a subordinate to refuse delivery of certain items of mail.[89] As Justice Peckham wrote for the Court:

> The Postmaster General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled.[90]

As was true in pre-revolutionary England, "equity followed the law," and federal courts fashioned remedies against federal officers from both.

III. The Weak Case(s) for Injunctions over Damages

As Part II shows, the dichotomy between how the contemporary Court views judge-made prospective relief for constitutional violations by federal officers and judge-made retrospective relief finds no support in Founding-era understandings or historical practice. If anything, those materials and that practice reflected traditional understandings about the relationship between legal

87 *See* 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, 1867–68 (2010).

88 *See* Vázquez & Vladeck, *supra* note 18, at 531–42.

89 *See* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 98, 111 (1902).

90 *Id.* at 110. *McAnnulty* was not just a canonical statement of the law as of the turn of the twentieth century; it was also the fountainhead of what Professor Jaffe has described as the "presumption of judicial review" that followed. *See* Jaffe, *supra* note 70, at 339–53.

and equitable relief—and the canonical view that "equity follows the law," rather than the reverse.

For Justices committed to interpreting the Constitution by reference to such Founding-era understandings and historical practice, that analysis ought to lend itself to two related conclusions: First, there is no justification for viewing judge-made damages remedies against federal officers with any greater skepticism than judge-made injunctions. Both are exercises of judicial power that were both commonplace and significant to patterns of official accountability at (and after) the Founding. Second, there is no justification for being particularly skeptical about *either* mode of relief as an appropriate exercise of federal judicial power in the abstract—again, at least by reference to prevailing understandings when the Constitution was written and first entered into effect. That's not to say that plaintiffs will always be entitled to *relief*, but rather that the existence *vel non* of a cause of action was never central to judicial analysis in such cases—and certainly did not differ depending upon whether the action was one at law or in equity.

Notwithstanding those conclusions, the Supreme Court in recent years has not only continued to expand the distinctions between these two modes of relief; it has, for the first time, attempted to *defend* such reasoning. In *Abbasi*, for instance, Justice Kennedy's majority opinion endeavored to explain why injunctions were *preferable* to damages in at least some suits challenging unconstitutional federal conduct.[91] And in *Hernández*, Justice Alito's majority opinion dismissed the Founding-era and historical understandings described in Part II on the putative ground that they were implicitly but necessarily repudiated by *Erie*.[92]

This Part turns to those two defenses (and one other possible distinction that the Justices have offered with regard to suits against *state* officers) and explains why they are each unavailing in their own right. No less important, though, is that none of these arguments are predicated on any claim about what was understood to be true at the Founding—or in widespread judicial practice for at least the first two centuries thereafter. Thus, even if one is persuaded by the merits of these justifications (and I am not), what cannot be gainsaid about them is how little they have to do with *any* species of originalism.

A. Abbasi *and the Normative Case Against Damages*

Justice Kennedy's majority opinion in *Abbasi* included perhaps the most sustained effort to articulate prudential and/or normative reasons why federal courts should be *more* skeptical of judge-made damages remedies for constitutional violations by federal officers than of judge-made injunctions. Among other things, as Justice Kennedy wrote:

> [T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the

91 *See infra* Section III.A.

92 *See infra* Section III.B.

> burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.[93]

And although those concerns would apply to *all* damages suits arising out of constitutional violations by federal officers, Justice Kennedy suggested that they were especially pronounced in cases implicating national security:

> National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.[94]

As I've previously argued, *Abbasi*'s reasoning on these points suffered from at least three distinct analytical shortcomings: First, Justice Kennedy provided no support for his claim about the economic and noneconomic costs that recognition of damages remedies would impose—besides a handful of references to previous Supreme Court decisions which themselves cited no more compelling sources.[95] And there is significant (and compelling) empirical academic research to the contrary.[96]

Among other things, the federal government generally indemnifies its officers from damages liability for any and all conduct that falls within the scope of their employment.[97] To that end, any costs created by such suits are inevitably borne by the federal government—not the individual officers. That doesn't mean these costs don't exist, but it does call into at least some question Justice Kennedy's breezy assertion that individual officers will be ever-mindful of the potential impact on their own bottom lines. More than that, as one recent study unearthed, even the relevant *agency* is seldom forced to pay a successful damages judgment out of its budget; rather, such judgments are paid out of the general Judgment Fund of the U.S. Department of

93 Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

94 *Id.* at 1861 (citations omitted) (quoting Christopher v. Harbury, 536 U.S. 403, 417 (2002)); *see also id.* at 1860–61 ("[T]he discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch." (citation omitted)).

95 *Id.* at 1855–58; *see* Vladeck, *supra* note 16.

96 *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 566 (2020) ("[T]he federal government effectively held its officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases.").

97 *See id.* at 613.

Treasury[98]—negating any argument that such liability has budgetary consequences even for the offending officer's immediate employer.

Second, and as importantly, the concern about *non*economic costs is already accounted for by a number of other doctrines—qualified immunity foremost among them. Indeed, the principal justification *for* qualified immunity is the need to forestall discovery, let alone a trial, in any case in which the plaintiff cannot plausibly allege facts that, if true, would establish a violation of clearly established constitutional rights.[99] Among other things, that's why a trial court's interlocutory denial of a motion to dismiss based upon qualified immunity is, in most cases, an immediately appealable "collateral order."[100]

Insofar as Justice Kennedy worried that "[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy,"[101] that's the precise justification typically invoked (including by Justice Kennedy himself) to defend the qualified immunity doctrine.[102] Using those concerns to justify not even recognizing a cause of action (including in cases in which the defendant would *not* be entitled to qualified immunity) not only has the effect of "double counting" them,[103] but it also converts *qualified* immunity into a functional form of *absolute* immunity—because damages will be unavailable no matter how egregious the officer defendant's conduct may have been.[104]

Third, the most significant concern that seemed to be animating Justice Kennedy—that courts might "interfere in an intrusive way with sensitive functions of the Executive Branch"[105]—is, without question, a far greater issue in suits for *prospective* relief (where plaintiffs seek to halt ongoing government action) than in suits for damages long after the government action at issue has ceased. A court order directing the government, under pain of contempt, to halt an ongoing military operation,[106] or to pause a new immigra-

98 *See id.* at 566–67.

99 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807–08, 815–18 (1982); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

100 *See* Mitchell v. Forsyth, 472 U.S. 511, 512 (1985).

101 Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017).

102 *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 746–47 (2011) (Kennedy, J., concurring) ("If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security." (citing Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009)).

103 *See* Arar v. Ashcroft, 585 F.3d 559, 601–03 (2d Cir. 2009) (en banc) (Sack, J., concurring in part and dissenting in part); *id.* at 635 (Calabresi, J., dissenting).

104 *See* Vladeck, *supra* note 11, at 283 ("[T]he absence of a cause of action, although it sounds technical, is tantamount to a form of functional absolute immunity where no recourse is available no matter how far over the line federal officers tread.").

105 *Abbasi*, 137 S. Ct. at 1861.

106 *See, e.g.*, Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973).

tion policy,[107] necessarily reflects a far more significant intrusion into the "sensitive functions of the Executive Branch" than an after-the-fact damages action. Separate from the optics of such a remedy, there are factual and legal reasons why courts may not be in the best position to resolve the dispute, including the possibility that critical facts will only become clear in retrospect.[108]

A judge-made damages remedy, in contrast, raises none of those concerns—especially when accompanied by both indemnification and qualified immunity. That's not to say that there are no costs; clearly, there are. But "those costs seem . . . to pale in comparison to the very real (and real-time) costs that prospective relief imposes (and can impose) on national security policies and policymakers."[109] And whereas that might be a reason to oppose *all* judicial review in cases implicating national security, that wasn't Justice Kennedy's argument in *Abbasi*. Instead, he insisted that "[t]hese concerns are even *more* pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief."[110]

Simply put, Justice Kennedy's attempt to offer a normative case for preferring injunctions to damages, whether in national security cases specifically or in *all* challenges to unconstitutional conduct by federal officers, does not withstand meaningful scrutiny—even on its own terms. Worse still, even on its merits, it relied upon a host of policy-oriented concerns that, in other contexts, the Justices have insisted are better left for Congress. As Justice Thomas wrote for the Court last December, in explaining why an express statutory provision for damages against a "government" should be understood to allow damages suits against government officers in their individual capacity,

> The [federal] Government also posits that we should be wary of damages against government officials because these awards could raise separation-of-powers concerns. But this exact remedy has coexisted with our constitutional system since the dawn of the Republic. To be sure, there may be policy reasons why Congress may wish to shield Government employees

107 *See, e.g.*, E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020).

108 A common example is whether the use of lethal force by a law enforcement officer was justified. *See* Tennessee v. Garner, 471 U.S. 1 (1985). For more on the affirmative case to prefer damages in national security litigation, see Stephen I. Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 24 (2014).

109 Vladeck, *supra* note 16.

110 *Abbasi*, 137 S. Ct. at 1861 (emphasis added). In the process, Justice Kennedy appeared to be suggesting that it was more important for courts to stay their hand when individual *officers* might be liable than when the entire federal government would be affected. *See* Vladeck, *supra* note 16. Even if that is a satisfying reason to privilege injunctions over damages, it is based upon the fallacy that the individual officer faces any meaningful specter of bearing the burden alone.

> from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead.[111]

So too, here.

B. Hernández *and* Erie

Separate from its intrinsic shortcomings, Justice Kennedy's analysis in *Abbasi* also did nothing to explain why the Founding-era and historical practice was wrong—or, if it wasn't, what had happened since to disrupt it. Justice Scalia's concurring opinion in *Sosa* in 2004 had provided the first seeds of an argument to that end—that it was all about *Erie*.[112] As he wrote with respect to whether a federal common-law rule of decision grounded in norms of international human rights law could be inferred from the Alien Tort Statute, "Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law."[113] Of course, the Court had *already* agreed to create new federal common law in federal officer suits; as Justice Scalia himself had explained for the Court sixteen years earlier, "Another area that we have found to be of peculiarly federal concern, warranting the [judicial] displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty."[114] It's just that the federal common law the Court had created there was a *defense*—to wit, qualified immunity.

But whereas Justice Scalia framed the *Erie* question as whether federal common-law remedies *should* be recognized in lieu of state ones (and his opinion in *Boyle* offered one argument in favor of doing so), the *Hernández* majority read *Erie* as altogether foreclosing the possibility. In particular, the petitioners in *Hernández* had argued that *Bivens* had to be understood in context—as part of a longstanding historical practice, dating to the Founding, in which state and federal courts routinely fashioned judge-made damages remedies against federal officers who had acted ultra vires.[115] The federal government (as an amicus curiae in support of the respondent) dismissed that historical practice as "beside the point,"[116] and Justice Alito's majority opinion agreed:

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111 Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

112 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 744–46 (2004) (Scalia, J., concurring in part and concurring in the judgment).

113 *Id.* at 746; *see also* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1413 n.1 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("[F]ollowing our decision in *Erie* . . . , federal courts are generally no longer permitted to promulgate new federal common law causes of action in [tort or contract cases]." (citation omitted)).

114 Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988).

115 Brief for Petitioners at 10–19, Hernández v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3714475, at *10–19.

116 Brief for the United States as Amicus Curiae Supporting Respondent at 13, *Hernández*, 140 S. Ct. 735 (No. 17-1678), 2019 WL 4858283, at *13.

> [F]inding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.
>
> This problem does not exist when a common-law court, which exercises a degree of lawmaking authority, fleshes out the remedies available for a common-law tort. Analogizing *Bivens* to the work of a common-law court, petitioners and some of their amici make much of the fact that common-law claims against federal officers for intentional torts were once available. But *Erie* held that "[t]here is no federal general common law," and therefore federal courts today cannot fashion new claims in the way that they could before 1938.
>
> With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy.[117]

There are at least three problems with this reading of *Erie*. First, it misreads *Erie* itself—as limiting "a federal court's authority to recognize a damages remedy" to cases in which a "statute expressly creates a *Bivens* remedy."[118] But "*Erie* did not generally repudiate the federal courts' power to fashion common law; it merely repudiated the power to do so generally."[119] After all, on the same day that the Supreme Court rejected the existence of "general" federal common law in *Erie*, it reiterated the propriety of federal judicial lawmaking in narrower—and more substantively appropriate—circumstances, which the Court has continued to flesh out in the eight decades since.[120] And the Supreme Court also continued, after *Erie*, to stress the central role state tort law played in holding federal officers accountable.[121]

Thus, *Erie* called into question neither the general understanding that judge-made remedies are central to holding individual federal officers accountable, nor the specific possibility that judge-made federal remedies would be appropriate in some cases. The only difference was that, unlike before *Erie*, federal courts needed specific justifications for applying *federal*, as opposed to *state*, common law. But that distinction only raises the question of whether federal judge-made remedies are appropriate; it doesn't answer it.

Second, neither Justice Alito's majority opinion in *Hernández* nor any other analysis has explained why it took the Court the better part of seventy years to appreciate this apparently seismic impact of *Erie*. Indeed, by that logic, the rise of implied *statutory* causes of action in the 1960s would have

117 *Hernández*, 140 S. Ct. at 742 (citations omitted).

118 *See id.*

119 Vladeck, *supra* note 11, at 278.

120 *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); *see also* Collins v. Virginia, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (noting the contexts in which the Court has continued to fashion federal common law after *Erie*). *See generally* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421–22 (1964).

121 *E.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

itself been flatly inconsistent with *Erie*. And yet, no one at the time seems to have noticed. Even the Nixon administration, in arguing against recognition of a judge-made federal damages remedy on behalf of the defendants in *Bivens*, did not read *Erie* so aggressively.[122]

Third, and most importantly for present purposes, even if *Erie* had the impact that Justice Alito claims, there is nothing in *Hernández* (or *Erie*, for that matter) that explains why *Erie*'s fundamental reconfiguration of federal judicial power in this respect would be limited to cases seeking *retrospective* relief. If *Erie* did, indeed, *foreclose* the power of federal courts to fashion judge-made remedies without authorization from Congress (as opposed to requiring class-specific justifications for fashioning federal—versus state—rules), how could it have simultaneously *preserved* the federal courts' power to do so when plaintiffs sought only prospective relief?

After all, although the formal merger of law and equity would postdate *Erie* by five months, *Erie*'s repudiation of general federal common law is hardly remedy-specific. As the Supreme Court explained seven years after *Erie*, even before the merger of law and equity, federal courts applied the Rules of Decision Act[123] *without* distinguishing between the two systems.[124] If, as *Hernández* concludes, *Erie* categorically forecloses the fashioning of federal judge-made remedies for damages, what possible argument would distinguish federal judge-made remedies for injunctions? Needless to say, neither Justice Alito's majority opinion nor Justice Thomas's concurrence endeavors to answer that question.

C. Edelman *and Sovereign Immunity*

At least where *state* officers are concerned, there is a richer body of Supreme Court opinions articulating distinctions between judge-made remedies for prospective and retrospective relief. Indeed, in a line of cases from *Edelman v. Jordan*[125] onward, the Supreme Court has, rightly or wrongly, read the availability of relief under *Ex parte Young* to turn quite sharply on whether a plaintiff seeks relief properly characterized as "prospective."[126] If the relief is not properly so characterized, then a claim against a nonconsenting state,

122 *See* Brief for Respondents at 19–20, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900, at *19–20 (citing *Erie* for the proposition that post-*Erie* federal common law requires particular justifications).

123 28 U.S.C. § 1652 (2018) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

124 Guaranty Tr. Co. v. York, 326 U.S. 99, 103–04 (1945), *overruled on other grounds by* Hanna v. Plumer, 380 U.S. 460 (1965).

125 415 U.S. 651 (1974).

126 *See id.* at 663–71; *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104–06 (1984) (explaining the importance of the distinction to *Edelman* and related cases).

or against an officer of a nonconsenting state in her official capacity, is foreclosed by the sovereign immunity that the Supreme Court has pegged to the Eleventh Amendment.[127] At least superficially, this seems to be the closest thing yet to a body of law expressing a sharp preference for injunctions over damages. But the notion that sovereign immunity (or, at the very least, the Supreme Court's sovereign immunity jurisprudence) generally effects a preference for injunctive relief over damages is belied by two considerations—one applicable to suits challenging *state* official misconduct, and one applicable to suits challenging *federal* official misconduct.

To the former, these cases were all decided against the backdrop of 42 U.S.C. § 1983, which, at least by 1961,[128] was clearly understood to authorize damages claims against state officers who violated federal rights. *Edelman* and its progeny controversially limited the circumstances in which federal courts could award injunctive relief directly against states (or arms thereof), but the "officer fiction" still provided a way through the federal (and state) courthouse doors for plaintiffs challenging unconstitutional state action.

To the latter, although Congress waived the federal government's sovereign immunity in suits for injunctive relief in 1976, there was no suggestion that, prior to 1976, sovereign immunity *generally* barred such suits. Rather, as noted above,[129] the Supreme Court articulated a complex framework for ascertaining when claims for prospective relief truly *were* or were not properly understood as being brought against the United States—rather than individual officers thereof. Sovereign immunity loomed in the background, but not as an on/off switch depending upon the nature of the relief being sought.

* * *

There may be other arguments for why there is no tension in the Supreme Court's contrasting contemporary view of judicial power vis-à-vis nonstatutory constitutional remedies against federal officers. But such an argument would not, at first blush, find any support in Founding-era materials or historical practice. And it has not even been alluded to by the Supreme Court. If nothing else, this lacuna suggests not only that the Court's contemporary approach to judge-made remedies against federal officers is inconsistent, but also that, at least with respect to damages for constitutional violations, it is based upon some as-yet-unidentified theory of government accountability—one that has no apparent connection to any previously articulated conception of originalism.

127 *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985).

128 *See* Monroe v. Pape, 365 U.S. 167, 172–87 (1961) (interpreting "under color of law" in § 1983 to encompass both authorized and unauthorized conduct by state officers within the scope of their employment).

129 *See supra* notes 52–55 and accompanying text.

CONCLUSION

My goal in this Essay has been to demonstrate that (1) the modern Supreme Court takes an inconsistent approach to the propriety of judge-made remedies for constitutional violations by federal officers; (2) no such inconsistency existed at the Founding or for quite some time thereafter; and (3) no good explanation exists for why, at some point along the way, the federal judicial role with respect to fashioning injunctions and fashioning damages began to diverge so radically. The hardest question, of course, is *why*, if all of this is true, the Supreme Court's current doctrine not only says what it says, but is outwardly oblivious to these shortcomings.

One possibility may be a widespread misunderstanding by contemporary courts and commentators of the role that nonstatutory remedies played at the Founding—a misunderstanding exacerbated by a related misunderstanding about the vitality of such relief in *state* courts at least up to the Civil War. Consider in this regard a recent concurring opinion by Judge Oldham—who argued, repeatedly, that the scope of habeas corpus in pre-revolutionary England and in post-revolutionary America was defined entirely by statute, so that the scope of those statutes should govern the scope of any constitutional challenges to contemporary limits on post-conviction review.[130]

It is by now clear beyond peradventure that Judge Oldham is wrong about the preeminence and predominance of *statutory* habeas remedies both before and after the Founding. Archival research in England and in U.S. state courts has unearthed concrete evidence that *common-law* writs of habeas corpus played a central role both in preserving individual liberty and promoting governmental accountability.[131] To focus only on what was true in the lower federal courts during a period in which their jurisdiction was remarkably constrained by both statute and practice is thus to miss most of the forest by focusing on the closest tree.

But at least Judge Oldham viewed what (he believed) was true at the Founding as the relevant baseline, rather than dismissing such Founding-era materials as "beside the point." The Supreme Court's recent evisceration of judge-made damages remedies against federal officers for constitutional violations doesn't even have that to commend it. Instead, a majority of the Justices have hung their hats on a series of modern doctrinal and normative arguments that are not only unconvincing in their own right, but that are necessarily indifferent to the historical legacy of government accountability. Perhaps one day, the Court will explain (convincingly or otherwise) why Founding-era understandings and historical practice simultaneously justify both a general solicitude for judge-made injunctive relief against federal

130 *See* Beras v. Johnson, 978 F.3d 246, 253–56 (5th Cir. 2020) (Oldham, J., concurring).

131 *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010) (publishing the results of archival research into habeas practice in England before and after the revolution); Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265 (2007) (carefully studying pre–Civil War state habeas practice for federal prisoners, most of which was through common law writs).

officers and a categorical aversion to judge-made damages against the same defendants. But it hasn't yet.