HERNÁNDEZ V. MESA: RINGING IN A FOURTH DECADE OF JUDICIAL OVER-RESTRAINT

ABSTRACT

In 1971, the U.S. Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* created a federal cause of action by which individuals could bring claims for constitutional violations by federal officials. Though this "*Bivens* claim" was at first specifically applied in Fourth Amendment search and seizure contexts the Supreme Court left the door open to qualified "*Bivens* extension" into new contexts. However, since 1980 the Court has refused to extend *Bivens* despite ten opportunities to do so, each time finding that alternative remedies or the implication of special factors counseled hesitation in extension. Given the contemporaneous narrowing of alternative remedies for constitutional violations by federal officials, this refusal to extend *Bivens* amounts to unwarranted judicial over-restraint. In *Hernández v. Mesa*, the case of a fifteen-year-old Mexican national shot and killed by Customs and Border Protection while he stood on Mexican soil, the Court once more found reason to refuse extension of *Bivens* doctrine.

This Comment first argues that the Supreme Court has erroneously justified its decades of *Bivens* over-restraint by (1) adopting an incomplete account of the historical development of remedies for constitutional violations by federal officials, and (2) by disregarding Congress's implicit ratification of the *Bivens* cause of action. Then, this Comment analyzes the special factors implicated in the new *Bivens* context raised by *Hernández*, arguing that the factors counseled extension instead of hesitation. This Comment concludes by arguing that *Hernández* warranted extension because it was the quintessential *Bivens* case—it was *Bivens* or nothing.

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INTRODUCTION

On June 7, 2010, fifteen-year-old Sergio Hernández was shot and killed by U.S. Customs and Border Protection (CBP) Agent Jesus Mesa, Jr. in a culvert on the Mexican–American border. Given the transnational nature of the shooting, Hernández has understandably become the subject of one of the most high-profile constitutional tort cases to reach the U.S. Supreme Court.[1] One could be forgiven for assuming that remediating constitutional violations by federal officials is a fundamental responsibility of the American judiciary—in fact, for much of the nation's history, this proposition was nonprovocative, with well-worn remedial paths in place in both state and federal courts, even in the absence of a statutory cause of action.[2] It was generally understood that the government could not authorize its officials to violate the Constitution and that the judiciary had the power, and duty, to rectify infringing conduct.[3]

However, beginning in 1948 and continuing throughout the remainder of the twentieth century, both state and federal remedies for constitutional violations thinned.[4] In 1971, recognizing the evolving landscape, and in an effort to give effect to the Fourth Amendment, the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[5] *Bivens* established a federal cause of action by which a victim of a Fourth Amendment violation could bring a damages claim against federal officials.[6] While the Supreme Court later applied this "*Bivens* cause of action" or "*Bivens* claim" to constitutional claims be-

1. Hernández v. Mesa, 140 S. Ct. 735, 740 (2020).
2. *See* Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, 161 U. PA. L. REV. ONLINE 221, 223 (2013).
3. *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, 531 (2013).
4. *See id.* at 540 (summarizing the impact of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).
5. 403 U.S. 388 (1971).
6. *Id.* at 397.

yond the Fourth Amendment, the Court has refused to further extend *Bivens* since 1980.[7]

The case of *Hernández v. Mesa*[8] was one such instance where the Court again refused to extend *Bivens*.[9] In analyzing *Hernández*, this Comment first reflects on the historical evolution of remedies for constitutional violations by federal officials, including recent *Bivens* decisions. Then, this Comment explores the *Hernández* decision through the procedural history, majority opinion, Justice Thomas's concurrence, and the dissent. This Comment then argues that the Supreme Court has for decades justified its hesitation to extend the *Bivens* doctrine by (1) relying on an incomplete view of the historical development of remedies for constitutional violations by federal officials and (2) by disregarding Congress's implicit ratification of the *Bivens* cause of action. This Comment concludes by arguing that *Hernández* warranted extension of *Bivens* as the implicated special factors counseled extension and because *Hernández* was the quintessential "*Bivens* or nothing" case.

I. BACKGROUND

For much of American history, damages claims against federal officials who exceeded their authority were the most common method by which victims obtained monetary redress for constitutional violations.[10] In the absence of an express, federal statutory cause of action for violations of the U.S. Constitution, state courts applied common law damages suits against federal officers as if they were private individuals.[11] Treating a federal official as a private individual stripped the official of any immunity imparted by the official's role as an agent of the federal government, which might otherwise render them wholly unanswerable to suit.[12] Instead, the official was fully subject to the same state laws that any tortious actor would be, ensuring claimants their day in court.[13] Further, while most cases were initially filed in state court, for various reasons (including diversity and subject-matter jurisdiction), they were often ultimately adjudicated in federal court—leading to well-developed remedies that amounted to federal common law.[14]

The first major development in the remedies regime for constitutional violations was the enactment of the Civil Rights Act of 1871, Sec-

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7. *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 741 (2020).
8. 140 S. Ct. 735 (2020).
9. *Id.* at 746–47.
10. *See* Vázquez & Vladeck, *supra* note 3, at 531 (citing Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523–24 (1954)).
11. *Id.*
12. *See id.* at 532.
13. *See id.* at 532–33 (discussing a pre-*Bivens* hypothetical where a federal official could be liable for assault, battery, and false imprisonment under state law).
14. *See id.* at 539.

tion 1 of which was eventually codified as 42 U.S.C. § 1983.[15] The modern § 1983, thus, has as its genesis Reconstruction-era notions of the need for statutory protection of federal rights granted to former slaves by the Fourteenth Amendment.[16] It was crafted in recognition of the need to safeguard against, and provide redress in the event of, incursion upon these rights by state or local officials.[17] In effect, § 1983 makes a claim for damages available to "any citizen of the United States or other person within the jurisdiction thereof"[18] whose constitutional rights have been violated by a state or local official.[19] It is noteworthy that protections provided by both the original Act and the contemporary § 1983 apply exclusively to state and local officials; Congress did not provide a comparable statutory cause of action that applied to federal officials in the original Act and, thus, they remained subject to federal common law.[20]

That remained the state of things until the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[21] wholly upended the system of federal common law.[22] *Erie* mandates that federal courts hearing cases based on diversity jurisdiction apply state law, including state common law, to the legal matters at hand.[23] As such, *Erie* made clear that federal courts could no longer create and apply substantive federal common law.[24] Writing for the Court in *Erie*, Justice Brandeis bluntly summed up this tidal shift in federal judicial procedure: "There is no federal general common law."[25] Accordingly, because there was no federal common law, the federal courts assumed the previously developed federal common law remedies for constitutional violations by federal officials were, in fact, state law remedies.[26] Subsequent Supreme Court cases, most notably *Bell v. Hood*,[27] definitively established that federal law did not provide an express cause of action for such constitutional violations.[28] This compelled

15. 42 U.S.C. § 1983 (2018); *see also* Mitchum v. Foster, 407 U.S. 225, 238 (1972) (describing the history and purpose of the Civil Rights Acts in the nineteenth century).

16. U.S. CONST. amend. XIV, § 1 (forbidding any state from (1) "mak[ing] or enforce[ing] any law which shall abridge the privileges or immunities of citizens of the United States;" (2) "depriv[ing] any person of life, liberty, or property, without due process of law;" or (3) "deny[ing] to any person within its jurisdiction the equal protection of the laws").

17. *See* Hernández v. Mesa, 140 S. Ct. 735, 753 (2020) (Ginsburg, J., dissenting).

18. 42 U.S.C. § 1983.

19. Rodriguez v. Swartz, 899 F.3d 719, 742 (9th Cir. 2018), *vacated*, 140 S. Ct. 1258 (2020) (mem.).

20. *See Hernández*, 140 S. Ct. at 752 (Thomas, J., concurring).

21. 304 U.S. 64 (1938).

22. *See* Vázquez & Vladeck, *supra* note 3, at 540–42 (summarizing the impact of *Erie* on the federal courts' application of state law).

23. *Erie*, 304 U.S. at 78.

24. *Id.*

25. *Id.*

26. *See* Vázquez & Vladeck, *supra* note 3, at 541.

27. 327 U.S. 678 (1946).

28. *See* Vázquez & Vladeck, *supra* note 3, at 542 (first citing United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964); then citing Johnston v. Earle, 245 F.2d 793, 796 (9th Cir. 1957); then citing Koch v. Zuieback, 194 F. Supp. 651, 656 (S.D. Cal. 1961); and then citing Garfield v. Palmieri, 193 F. Supp. 582 (E.D.N.Y.), *aff'd per curiam*, 290 F.2d 821 (2d Cir. 1960)).

the question by jurists and scholars alike whether state law tort claims should be supplemented by a federal cause of action for constitutional violations.[29]

This was the state of the law when the Court decided *Bivens*.[30] On November 26, 1965, six agents of the Federal Bureau of Narcotics conducted a warrantless search of Webster Bivens's home, where they detained him and threatened to arrest his family before subjecting him to a visual strip search.[31] Bivens subsequently brought suit in federal court seeking damages from each of the federal agents involved for the "embarrassment, humiliation, and mental suffering" he experienced.[32] After the district court dismissed the case for failure to state a claim, and the Second Circuit affirmed, the Supreme Court granted certiorari.[33] Disregarding the government's argument that Bivens was only entitled to obtain damages via state tort action, the Court implied a federal cause of action, holding that damages could be obtained for injuries resulting from a violation of the Fourth Amendment by federal officials.[34] Noting that the Fourth Amendment does not specifically provide for monetary damages, the Court found that where a citizen has suffered an injury to a constitutionally protected interest, the citizen may invoke federal question jurisdiction to obtain monetary recompense.[35] Writing for the majority, Justice Brennan explained that to find otherwise would necessarily entail treating the relationship between a citizen and a federal official "as no different [than] the relationship between two private citizens,"[36] a conception the Court simply could not sustain given a federal official's "far greater capacity for harm."[37] However, the majority also included a caveat in the *Bivens* decision that set the stage for decades of *Bivens* claim denials.[38] In a seemingly innocuous statement, Justice Brennan noted that the circumstances in *Bivens* did not involve any special factors that would otherwise counsel hesitation in forming a federal cause of action.[39]

Justice Harlan's concurrence noted that the suggestion that the Court is powerless to infer federal causes of action in the absence of express congressional action is misaligned with Congress's acquiescence to the Court's granting of equitable remedies against invasions of constitutional interests.[40] Expanding on the need for the Court to create compa-

29. *See id.* at 542.
30. 403 U.S. 388 (1971).
31. *Id.* at 389.
32. *Id.* at 389–90.
33. *Id.* at 390.
34. *See id.* at 395–97.
35. Butz v. Economou, 438 U.S. 478, 504 (1978).
36. *Bivens*, 403 U.S. at 391–92.
37. *Id.* at 392.
38. *See id.* at 396.
39. *Id.*
40. *Id.* at 402 (Harlan, J., concurring).

rable traditional remedies at law, Justice Harlan noted the judiciary's responsibility to assure the "vindication of constitutional interests."[41] To this end, the *Bivens* remedy was crafted to both compensate victims of constitutional violations and to serve as a deterrent against future violations by federal officers.[42] This "*Bivens* deterrence" was to derive largely from the fact that monetary damages were assessed against federal officers in their individual capacity, instead of against the U.S. government as their employer.[43]

In the late 1970s and early 1980s the Court extended the *Bivens* cause of action to constitutional provisions beyond the Fourth Amendment.[44] In *Davis v. Passman*,[45] a former congressional staff member sought damages related to alleged sex-based discrimination, a violation of the Fifth Amendment.[46] While the lower courts held that the staffer had no cause of action, the Supreme Court found a *Bivens* cause of action for damages was available pursuant to the Fifth Amendment's Due Process Clause.[47]

In *Carlson v. Green*,[48] the Court sustained an administrator's cause of action under the *Bivens* doctrine where the plaintiff alleged that federal prison officials violated the Eighth Amendment's ban on cruel and unusual punishment when they failed to render medical care to her deceased son.[49] More specifically, the Court refined the *Bivens* analysis and clarified that a claim may be defeated if the defendant demonstrates (1) the presence of "special factors counselling hesitation in the absence of affirmative action by Congress" or (2) "that Congress has provided an alternative remedy which it explicitly declared to be [an equally effective] substitute for recovery directly under the Constitution."[50]

In the forty years since *Carlson*, there have been ten Supreme Court cases seeking extension of the *Bivens* cause of action;[51] in each case, the Court decided against extending *Bivens* into a new context.[52] In the majority of cases, the Court refused to extend *Bivens* due to the availability of an alternative remedy scheme outside of a federal cause of action.[53]

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41. *Id.* at 407.
42. Carlson v. Green, 446 U.S. 14, 21–22 (1980).
43. *Id.* at 21.
44. Vázquez & Vladeck, *supra* note 3, at 549.
45. 442 U.S. 228 (1979).
46. *Id.* at 230–31.
47. *Id.* at 245.
48. 446 U.S. 14 (1980).
49. *Id.* at 16–18.
50. *Id.* at 18–19 (emphasis omitted) (first quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); and then citing *Bivens*, 403 U.S. at 397).
51. *See* Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (citing the nine other cases in which the Court declined to extend *Bivens*).
52. Vázquez & Vladeck, *supra* note 3, at 550.
53. *See id.* at 550–51.

For example, in *Minneci v. Pollard*,[54] a prisoner in a federal facility filed an Eighth Amendment *Bivens* claim against prison guards employed by a private company.[55] The Court found that the prisoner could not assert a *Bivens* claim because the prison guards were private employees; thus, state tort law provided an alternative remedy.[56] Similarly, in *Wilkie v. Robbins*[57] and *Correctional Services Corp. v. Malesko*,[58] the Court found that *Bivens* claims were unwarranted given the availability of alternative state-tort-law remedies.[59]

The Court has also found that *Bivens* actions are unwarranted when a specialized, internal remediation system is available.[60] For example, in the cases of *Chappell v. Wallace*[61] and *United States v. Stanley*,[62] where the plaintiffs were service members that suffered harms during the course of their service, the Court refused to extend *Bivens* given the unique nature of military service and the availability of a comprehensive internal system of military justice.[63] Even outside of the inimitable circumstances created by military service, the Court has found that established alternative remediation systems contraindicate the application of a *Bivens* action.[64] In *Bush v. Lucas*,[65] the Court held that an aerospace engineer's retaliatory demotion did not warrant a *Bivens* action given the engineer's access to comprehensive procedural and substantive provisions that protect civil servants against arbitrary actions by their supervisors.[66]

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54. 565 U.S. 118 (2012).

55. *Id.* at 120–22 (holding that *Bivens* extension was not warranted where a prisoner accused prison guards of violating his Eighth Amendment rights by failing to properly care for injuries he sustained in a fall).

56. *Id.* at 126.

57. 551 U.S. 537 (2007).

58. 534 U.S. 61 (2001).

59. *Wilkie*, 551 U.S. at 551 (finding that *Bivens* action was unwarranted given the availability of civil trespass remedy in a case where a private citizen alleged harassment and intimidation by Bureau of Land Management employees related to citizen's refusal to extend property easement); *Malesko*, 534 U.S. at 61–62 (finding that, given the availability of state tort remedies, specifically negligence claims, federal offender did not have right to *Bivens* action against private operator of halfway house for damages related to injuries sustained while a resident at the halfway house).

60. Vázquez & Vladeck, *supra* note 3, at 550.

61. 462 U.S. 296 (1983).

62. 483 U.S. 669 (1987).

63. *Id.* at 671, 683–84 (finding that servicemember who sustained injuries related to Army's secret administration of LSD was not entitled to a *Bivens* action given availability of comprehensive internal system of military justice); *see also Chappell*, 462 U.S. at 297, 300 (finding that Navy-enlisted men discriminated upon by superior officers were not entitled to *Bivens* action given the need and justification for a special and exclusive system of military justice).

64. *See* Vázquez & Vladeck, *supra* note 3, at 551–52.

65. 462 U.S. 367 (1983).

66. *Id.* at 367, 383–85, 388–90 (noting the elaborate system of administrative and judicial remedies available to civil servants as provided by the Lloyd-LaFollette Act of 1912, Veterans Preference Act of 1944, Back Pay Acts of 1948 & 1966, Civil Service Reform Act of 1978, and various Executive Orders); *see also* Schweiker v. Chilicky, 487 U.S. 412, 424–25 (1988) (finding that *Bivens* action was unavailable to claimant whose social security disability benefits were wrongly terminated due to the availability of an unusually protective multi-step process for the review and adjudication of disputed claims).

But, while the Court emphasized a preference for state tort claims over *Bivens* claims throughout the 1980s, the Westfall Act of 1988 (Westfall)[67] dramatically changed the legal landscape.[68] Westfall is an amendment to the Federal Tort Claims Act (FTCA),[69] legislation that waives the sovereign immunity of the federal government for tort suits, including intentional torts.[70] Westfall made FTCA suits "the 'exclusive' remedy for torts committed by federal actors," which courts interpreted as a foreclosure on state lawsuits.[71] Even still, Westfall seemingly carved out space for *Bivens* claims by allowing for suits brought for violations of the U.S. Constitution.[72]

Given the remedy-narrowing nature of Westfall, its passage should have made the legal climate more conducive to *Bivens* extension.[73] As Justice Harlan noted in his *Bivens* concurrence, "the judiciary has a particular responsibility to assure the vindication of constitutional interests."[74] Losing state tort suits as a remedy, without substitute, made meeting this responsibility far more challenging[75]—though broad use of *Bivens* extension seemingly offered a viable alternative. However, paradoxically, the Court became more conservative in *Bivens* cases, declining extension even where state-tort-law remedies were not available.[76] For example, in the case of *FDIC v. Meyer*,[77] the first *Bivens* extension case to reach the Supreme Court after the passing of Westfall, the Court held that there were special factors counseling hesitation in extending *Bivens* to provide for a cause of action against federal agencies.[78]

The Court took its *Bivens* extension abstinence a step further in deciding *Ziglar v. Abbasi*[79] where it narrowed the *Bivens* analysis.[80] As opposed to the Court's framing in *Carlson*, which applied a presumption of *Bivens* applicability,[81] the Court in *Abbasi* firmly established the two-step *Bivens* extension inquiry[82]: (1) whether the request involves a

67. Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, 28 U.S.C. § 2679(b)(1) (2018).

68. *See* Vázquez & Vladeck, *supra* note 3, at 566.

69. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 2401, 2671–80.

70. *See id.* § 1346(b)(1).

71. Bernstein, *supra* note 2, at 223.

72. *Id.* at 224.

73. Vázquez & Vladeck, *supra* note 3, at 580.

74. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

75. *See* Vázquez & Vladeck, *supra* note 3, at 580.

76. *See id.* at 580–83.

77. 510 U.S. 471 (1994).

78. *Id.* at 473–74, 477, 484–86 (denying *Bivens* extension for discharged employee's claim of due process violation related to his employment termination). The Court ruled that the claimant could not bring a *Bivens* action against the Federal Deposit Insurance Corporation because *Bivens* allows for claims against federal *agents*, but not federal *agencies*. *Id.* at 486.

79. 137 S. Ct. 1843 (2017).

80. *See id.* at 1857–58.

81. Carlson v. Green, 446 U.S. 14, 18–23 (1980).

82. *Abbasi*, 137 S. Ct. at 1857.

"new context or [a] new category of defendants"; and (2) if so, whether there are any "special factors [that] counsel[] hesitation in" allowing the extension.[83] The Court further clarified that a context is regarded as new if it is "different in a meaningful way from previous *Bivens* cases."[84] Justice Kennedy, writing for the majority, summed up the tidal shift in *Bivens* litigation with the blunt assertion that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[85]

II. *HERNÁNDEZ V. MESA*

A. Facts

On June 7, 2010, a fifteen-year-old Mexican national, Sergio Adrián Hernández Güereca, was playing with his friends in a "cement culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico."[86] The middle of the culvert marks the international boundary; "Hernández and his friends were playing a game in which they [would] [run] up [an] embankment on the [U.S.] side, touch[] [a] fence, and then [run] back down."[87] During one particular cycle of the game, one of Hernández's friends was detained by CBP Agent Jesus Mesa, Jr. on the U.S. side of the culvert.[88] Seeing this, Hernández ran across the international boundary to Mexico and stood near a bridge pillar.[89] From the United States, Agent Mesa aimed and fired at least two shots across the border at Hernández; one of the bullets struck Hernández in the face, killing him.[90]

Subsequent investigation eventually revealed that Hernández was unarmed and nonthreatening at the time of the incident.[91] However, when the Department of Justice (DOJ) initially investigated the incident, it concluded that the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a [CBP] agent who was attempting to detain a suspect."[92] As such, the DOJ determined that Agent Mesa had acted consistently with CBP policy and declined to bring federal civil rights charges against him.[93]

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83. *Id.* (first quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001); and then quoting *Carlson*, 446 U.S. at 18).
84. *Id.* at 1859.
85. *Id.* at 1857 (citing Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
86. Hernández v. Mesa, 137 S. Ct. 2003, 2005 (2017).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *See id.*

B. Procedural History

In early 2011, Hernández's parents brought suit in the U.S. District Court for the Western District of Texas.[94] Among multiple claims, they brought a *Bivens* claim alleging violations of Hernández's Fourth and Fifth Amendment rights.[95] Agent Mesa filed a motion to dismiss that the district court granted in August 2011.[96] In June 2014, a panel of the Fifth Circuit Court of Appeals found that Hernández lacked Fourth Amendment rights but held that Agent Mesa had violated Hernández's Fifth Amendment rights; the United States and Agent Mesa filed for a rehearing en banc.[97] In April 2015, on rehearing en banc, the Fifth Circuit again held that Hernández lacked Fourth Amendment rights; however, with respect to Hernández's Fifth Amendment rights, the Fifth Circuit found that Agent Mesa was entitled to qualified immunity.[98]

The Supreme Court granted certiorari and in June 2017 vacated the Fifth Circuit's decision, remanding for a review of the case in light of the recently decided *Abbasi* case.[99] In March 2018, on remand from the Supreme Court, the en banc Fifth Circuit again refused to recognize a *Bivens* remedy in the matter, leading the Supreme Court to grant certiorari a second time in May 2019.[100]

C. Majority Opinion

On February 25, 2020, Justice Alito delivered the opinion of the Court.[101] Chief Justice Roberts and Justices Thomas, Kavanaugh, and Gorsuch joined his opinion affirming the judgment of the Fifth Circuit, denying extension of *Bivens*.[102] Justice Alito, using the *Bivens*-extension inquiry delineated in *Abbasi*, began by stating that it was "glaringly obvious"[103] that Hernández's "claims involve[d] a new context" and that there was a "world of difference" between Hernández's claims and the previously successful claims in *Bivens* and *Davis*.[104] However, Justice Alito did not specifically state concrete examples of how Hernández's claims meaningfully differed from previous *Bivens* doctrine cases.[105]

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94. Hernández v. Mesa, 140 S. Ct. 735, 740 (2020).
95. *Id.*
96. *Id.*
97. Supplemental En Banc Brief of Jesus Mesa, Jr. at 7, Hernández v. United States, 771 F.3d 818 (5th Cir. 2014) (No. 11-50792).
98. *Hernández*, 140 S. Ct. at 740.
99. *Id.*
100. *Id.* at 741.
101. *Id.* at 738.
102. *Id.* at 738–39.
103. *Id.* at 743.
104. *Id.* at 744 (first citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971); and then citing Davis v. Passman, 442 U.S. 228, 230 (1979)).
105. *See id.*

Having established a new context, Justice Alito then analyzed the factors that counseled hesitation in extending *Bivens*.[106] Focusing first on the potential effect that Hernández's claim might have on foreign relations, Justice Alito emphasized the Executive Branch's dominance in the field of foreign relations and the nature of the shooting as an international incident necessitating careful diplomacy.[107] Additionally, emphasizing the DOJ's exoneration of Agent Mesa, Justice Alito reasoned that allowing a *Bivens* action to proceed in *Hernández* could cause the government to speak with a fractured voice, with the Executive Branch saying one thing and the Judicial Branch saying another.[108]

Justice Alito next discussed the impact a *Bivens* claim could have on aspects of national security.[109] Setting the stage with a discussion of illegal immigration and drug smuggling on the Mexican border, he asserted that the conduct of Border Patrol agents is clearly and strongly connected to national security.[110] Thus, because the regulation of agent conduct at the border has national security implications, the risk of undermining border security provided reason to hesitate before extending the *Bivens* doctrine in *Hernández*.[111] Specifically, Justice Alito cited the danger of disrupting the "system of military discipline" that guides the conduct of Border Patrol agents as the prime national security impact at play in *Hernández*.[112]

Reasoning that legislative guidance is relevant in estimating the boundaries of judicially implied causes of action, Justice Alito embarked on an examination of legislative acts that provide causes of action roughly analogous to a *Bivens* claim.[113] Specifically, he focused on statutes that do not authorize the award of damages for injury inflicted extraterritorially, namely § 1983, the FTCA, and the Torture Victim Protection Act of 1991 (TVPA).[114] Relying heavily on *Kiobel v. Royal Dutch Petroleum Co.*,[115] the major theme of this statutory recapitulation was that when Congress has created damages remedies for injuries caused by fed-

106. *Id.*
107. *Id.* at 744–45.
108. *Id.* at 744.
109. *Id.* at 746.
110. *Id.*
111. *Id.* at 747.
112. *Id.* at 746–47.
113. *Id.* at 747.
114. *Id.* at 747–48. The Torture Victim Protection Act of 1991 specifically established a civil action against:

> [Any] individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

115. 569 U.S. 108 (2013). *Kiobel* found valid the presumption that statutes do not apply extraterritorially to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 116.

eral officials, it has precluded claims for injuries that occur abroad so as not to risk treading on the foreign policy intentions of the political branches.[116] Taking this point one step further, Justice Alito noted that if the danger of treading on foreign policy intentions exists where Congress has provided statutory guidance, there is "even greater reason for hesitation in deciding whether to extend a judge-made cause of action beyond [U.S.] borders."[117] As such, the majority found ample reason to hesitate in extending *Bivens* in *Hernández*.

D. Justice Thomas's Concurring Opinion

In his concurring opinion, joined by Justice Gorsuch, Justice Thomas argued that not only was an extension of *Bivens* doctrine not warranted in this case, but the time had come to overrule *Bivens* entirely.[118] His analysis centered on the difference in the legal environment between when *Bivens* was decided and present day.[119] Specifically, he referenced the "heady days"[120] when the Court freely created implied causes of action for damages and the forty years of *Bivens* extension denials that followed.[121] Notably, Justice Thomas also emphasized the fact that § 1983 affords a cause of action against state officers and does not provide for an analogous cause of action against federal officials.[122] Taking this into account, Justice Thomas concluded that it is not the Court's place to "fill any hiatus congress has left"[123] by extending *Bivens*, nor should the Court adhere to *Bivens* doctrine generally.[124] In Justice Thomas's estimation it is time to definitively overrule *Bivens.*[125]

E. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg authored the dissenting opinion and was joined by Justices Breyer, Sotomayor, and Kagan.[126] The main thrust of her argument was that *Hernández* did not constitute a new *Bivens* context, and even if it did, there were no special factors that counseled hesitation in extending *Bivens*.[127] Justice Ginsburg began the substantive part of her dissent by arguing that Hernández's case arose in a context very much akin to that of *Bivens* itself.[128] Specifically, she argued that in both

116. *Hernández*, 140 S. Ct. at 749.
117. *Id.* at 747.
118. *Id.* at 750 (Thomas, J., concurring).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 752 (noting that in passing 42 U.S.C. § 1983 Congress exclusively provided a cause of action for recovery of damages for deprivations of constitutional rights by state officers and has chosen not to provide an analogous cause of action against federal officers).
123. *Id.* (emphasis omitted) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).
124. *See id.*
125. *Id.* at 752–53.
126. *Id.* at 753 (Ginsburg, J., dissenting).
127. *Id.*
128. *Id.* at 756.

Bivens and *Hernández* the conduct in question was the unjustified use of excessive force by a federal officer.[129] She further asserted that the fact the bullet hit Hernández on the Mexican side of the border should not matter given that Agent Mesa shot from U.S. territory, and it was his conduct—as opposed to Hernández's injury—that was the aim of *Bivens* deterrence.[130]

Justice Ginsburg then briefly discussed the lack of alternative remedies for Hernández's parents, given that the incident would not qualify for relief under Mexican law, state law, § 1983, the FTCA, the TVPA, or federal criminal law.[131] She noted that while a lack of alternative remedy is not dispositive of what warrants a *Bivens* remedy, it is a significant factor.[132] With regard to foreign relations, Justice Ginsburg pointed out that while cross-border shootings do spark bilateral discussion, so too do other cross-border incidents, such as smuggling, that are routinely litigated at the same time that diplomatic negotiations take place.[133]

Refuting the majority's national security argument, Justice Ginsburg argued that requiring Border Patrol agents to avoid using unjustified deadly force would hardly undermine national security prerogatives.[134] She closed by noting that the majority did not discuss any statutes that were on point to support counseling against federal officer liability for a transnational injury.[135] The dissenting justices believed that the ruling of the Fifth Circuit should have been overturned and Agent Mesa should have faced suit for violation of Hernández's Fourth and Fifth Amendment rights.[136]

III. ANALYSIS

The Court incorrectly decided *Hernández* because the majority's ruling serves as the latest unwarranted erosion of the essential *Bivens* cause of action. By yet again declining to extend the *Bivens* doctrine, the Court has extended a forty-year-regime of excessive judicial restraint that risks eviscerating the sole source of damages for many who have had their constitutional rights violated by federal officials. This Part first argues that judicial over-restraint in extending *Bivens* doctrine, though often justified by claims of disfavored and improper judicial lawmaking, is at odds with the historical and legislative development of remedies for constitutional torts in the United States. The Supreme Court has erroneously justified its decades of *Bivens* over-restraint by adopting an incom-

129. *Id.*
130. *Id.* at 757.
131. *Id.*
132. *Id.*
133. *Id.* at 758.
134. *Id.*
135. *Id.* at 759.
136. *Id.* at 760.

plete account of the historical development of remedies for constitutional violations by federal officials. This Part then discusses how the Court has applied a level of judicial restraint in *Bivens* doctrine cases that Congress had not anticipated—or intended—as it shaped the process for holding federal officials accountable for constitutional violations throughout the twentieth century.[137]

Finally, this Part discusses how the Court's decision in *Hernández* is a particularly striking example of over-restraint where the holding did not align with the Court's stated standards for determining the validity of a *Bivens* claim. While *Hernández* did draw the *Bivens* doctrine into a new context, the special factors involved suggest that *Hernández* was a case where the Court's weighing of the costs and benefits of allowing a *Bivens* action to proceed counseled *Bivens* extension.[138] Further, *Hernández* epitomized how the Court's pattern of *Bivens* over-restraint, in the face of narrowing remedies for constitutional violations by federal officers, betrays the spirit of *Bivens* as a last lifeline to many victims who would otherwise lack redress. *Hernández*, as the quintessential "*Bivens* or nothing" claim, embodies the consequences of such paradoxical restraint.

A. The Supreme Court's Refusal to Extend Bivens *Doctrine Since 1980 Is Unwarranted in Light of the Historical Development of Remedies for Constitutional Violations and Implicit Congressional Ratification*

1. Section 1983's Omission of a Cause of Action Against Federal Officials Does Not Render Such a Cause of Action Generally Disfavored

Section 1983 was originally enacted as Section 1 of the Civil Rights Act of 1871 during Reconstruction in the wake of the American Civil War.[139] The Act held as a broad mandate the protection of the constitutional rights of citizens against abuse by state governments,[140] but the Act's more refined purpose was to facilitate the enforcement of the rights provided by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[141] During Reconstruction, former Confederates refused to accept the national authority of the Amendments and instead engaged in violent repression and economic intimidation when freedmen attempted to assert their constitutionally guaranteed rights.[142] In enacting § 1983, the federal government effectively positioned itself as the "guarantor of

137. *See* Bernstein, *supra* note 2, at 222–23.
138. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).
139. Mitchum v. Foster, 407 U.S. 225, 238–39 (1972).
140. J. Kennerly Davis, Jr., *Could a New Section 1983 Covering Federal Officials Curb Executive Branch Abuse of Constitutional Rights?*, 17 FEDERALIST SOC'Y REV. 4, 6 (2016).
141. *Id.*
142. Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 51 (1987).

basic federal rights"[143] against state power.[144] At the time of the Act's passage, "state power" often entailed institutions and agencies deeply permeated by members of the Ku Klux Klan and other white supremacist groups committed to abridging the rights of newly freed slaves.[145]

The historical context in which § 1983 was enacted is critical. In assessing the wisdom of extending *Bivens*, the Court has often misguidedly placed emphasis on the fact that § 1983 provides a cause of action for recovery of damages for constitutional violations by state officials but not federal officials.[146] In particular, Justice Thomas's concurrence in *Hernández* makes use of this fact in arguing that because § 1983 does not contain a cause of action against federal officials, it is not for the Court "to fill any *hiatus* Congress has left in this area."[147] But, to rely on this detail to justify hesitation in extending *Bivens* is to take an oversimplified view of the circumstances § 1983 was enacted to address and the overarching evolution of the federal government. It was Southern *state* officials that codified repressive ideals and practices in their constitutions and laws;[148] it was Southern *state* officials that refused to provide impartial justice to freed African-Americans in Southern courts;[149] and it was Southern *state* officials' continual abridgement of fundamental civil rights via corrupt use of their police powers that ultimately compelled Congress to enact § 1983.[150] As one Republican senator at the time noted, "We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the Thirteenth Constitutional Amendment."[151] Section 1983 specifically provides a cause of action against state officials because it was *state* officials who posed the greatest threat to the rights that the section aimed to protect.

In contrast, Congress failed to provide a comparable cause of action against federal officials in the latter half of the nineteenth and early twentieth centuries because the federal government's institutional willingness and ability to constrain individual civil rights were far more limited.[152] Throughout the late nineteenth century and into the first quarter of the twentieth century, the federal government maintained a laissez-faire approach to the direct regulation of individual citizens' civil rights.[153]

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143. *Mitchum*, 407 U.S. at 239.
144. Davis, Jr., *supra* note 140, at 6.
145. *Id.*
146. Hernández v. Mesa, 140 S. Ct. 735, 752 (2020).
147. *Id.* (emphasis in original) (internal quotations omitted) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).
148. Kaczorowski, *supra* note 142, at 51.
149. *Id.*
150. *See id.* at 52 (discussing the development and enactment of the Civil Rights Act of 1866).
151. *Id.* at 59.
152. *See* Gary Gerstle, *The Civil War and State-Building: A Reconsideration*, J. CIV. WAR ERA, https://www.journalofthecivilwarera.org/forum-the-future-of-reconstruction-studies/the-civil-war-and-state-building/#_edn1 (last visited Apr. 2, 2021).
153. *See id.*

These police powers rested largely with the states, and as such, any potential constitutional violation of civil rights was a risk associated with state—rather than federal—powers.[154]

Expansive federal law enforcement capability (the major inspiration for later development of causes of action against the U.S. government and its officers),[155] was only just emerging when § 1983 was enacted.[156] While the U.S. Marshals Service had long been involved in policing the expanding western United States, Congress only formally created the DOJ in 1871,[157] the same year as enactment of § 1983's precursor Civil Rights Act.[158] Even after formation of the DOJ, federal law enforcement's policing activity remained miniscule as compared to that of the states throughout the late nineteenth century [159] and was related primarily to its chief task of protecting voting rights.[160] Further, even as federal law enforcement did expand into the daily lives of ordinary citizens, deputation of local law enforcement effectively limited the need for federal officers to be directly involved in the hands-on detainment of criminal offenders.[161] Put simply, Congress omitted a cause of action against federal officials in § 1983, not because such a provision was disfavored, but because such a provision was contemporarily unnecessary.

2. Congress Did Not Anticipate or Intend the Supreme Court's Consistent *Bivens* Denials

Justice Thomas's concurrence in *Hernández* epitomized a common Supreme Court anti-*Bivens* argument: Congress's failure to provide an express cause of action against federal officials renders the *Bivens* cause of action disfavored judicial lawmaking.[162] However, regarding the *Bivens* cause of action as anything less than a congressionally endorsed federal parallel to § 1983 is to exalt form over substance.[163] The Court itself has gone so far as to refer to *Bivens* as § 1983's "federal analog," though it has also taken care to note that *Bivens* is more limited in certain respects.[164] However, this distinction, often bolstered by charges of improper judicial law-making, is unwarranted. The constitutional injuries remedied by a *Bivens* claim are no less severe than those actionable by a

154. *See id.*
155. *See* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 426 (2011).
156. *See* Jonathan Obert, *A Fragmented Force: The Evolution of Federal Law Enforcement in the United States, 1870–1900*, 29 J. POL'Y HIST. 640, 641 (2017).
157. *Id.*
158. *See id.* at 643.
159. *See id.* at 646.
160. *Id.* at 643.
161. *See id.* at 660.
162. Hernández v. Mesa, 140 S. Ct. 735, 752 (2020) (Thomas, J., concurring).
163. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009).
164. Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006).

§ 1983 claim.[165] Similarly, Congress's implicit ratification of the *Bivens* cause of action in Westfall is no less valid than its explicit ratification of the § 1983 claim against state officials.[166] While the causes of action under § 1983 and *Bivens* differ in institutional and historical origin, they both reflect congressional intent to provide for corrective responses to the violation of constitutional rights by government entities.[167] By placing undue emphasis on *Bivens*'s lack of explicit congressional origins, and ignoring Congress's implicit ratification, the Court has betrayed Congress's intent.

As discussed in reference to § 1983, the suggestion that a cause of action against federal officials is a disfavored prospect wholly ignores the historical development of federal tort legislation.[168] The development of the FTCA reflects this with even greater force. While the federal government's involvement in the daily lives of ordinary citizens was limited in the late nineteenth century, U.S. participation in the first World War led to a significant increase in the size and scope of federal government activity and increased the federal government's influence on nearly all aspects of American society.[169] Inevitably, torts and abuses of power by federal officials came with this growth of government; an evolution that did not go legislatively unnoticed.[170] Between 1921 and 1946, over thirty bills were introduced in Congress proposing methods of relief for tort claims against the federal government.[171] Finally, in 1946, Congress passed the FTCA, providing a federal cause of action against the U.S. government for torts committed by federal officials within the scope of their employment—though, of note, intentional torts by federal officials did not expose the federal government to liability.[172] As the federal government's ability to impact the lives of American citizens grew, the need for redress for constitutional violations took on new importance.

Accordingly, when the Court decided *Bivens* in 1971 Congress took no action to try to curtail its application or relevance.[173] At times, Congress has expressly acknowledged the virtue of *Bivens*, and at others has made accommodations for it in legislation that otherwise inhibits causes of action.[174] In fact, amendments to the FTCA reinforced the limiting principle that a cause of action against the federal government and its

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165. *See* Butz v. Economou, 438 U.S. 478, 500 (1978).
166. *See* Pfander & Baltmanis, *supra* note 163, at 123.
167. *See Hernández*, 140 S. Ct. at 747.
168. *See* Davis, Jr., *supra* note 140, at 6.
169. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 122–23 (1987).
170. *See* Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1333 n.5 (2000).
171. *Id.*
172. Pfander & Aggarwal, *supra* note 155, at 426.
173. *See* Hernández v. Mesa, 140 S. Ct. 735, 758 (2020).
174. *See* Vázquez & Vladeck, *supra* note 3, at 576.

officers is not only favored, but considered essential.[175] In 1974, only three years after the Supreme Court decided *Bivens*, Congress—in response to reports of excessive force used by federal officers during a series of unconstitutional no-knock raids in Missouri—amended the exceptions to the FTCA to provide for damages against the United States for intentional torts by its law enforcement officers.[176] Congress went so far as to champion the need for the *Bivens* cause of action against an individual officer to work hand-in-hand with a complementary cause of action against the federal government.[177] The legislative history to the 1974 amendment specifically states that "this provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the government independently liable in damages."[178] Congress never questioned the validity or merit of *Bivens* in amending the FTCA—quite oppositely, Congress was primarily concerned with bolstering the *Bivens* remedy, as it feared that it would be hollow without a complementary cause of action against the federal government given that federal officers are often judgment-proof.[179]

Congress took its support of *Bivens* one step further with its implicit statutory ratification of the cause of action via Westfall in 1988.[180] Westfall immunized federal officials from state tort liability, and came close to wholly immunizing them from federal tort liability, when it made the FTCA the exclusive remedy for most tort claims against federal officials acting within the scope of their employment.[181] Under Westfall, any state tort law claim against a federal official for actions within the scope of the official's employment is removed to federal court where the federal government stands in as the defendant, effectively immunizing the tortious officer.[182] However, Congress stopped short of fully immunizing the individual officer by explicitly exempting from this removal regime civil actions brought against federal employees for constitutional violations.[183] In the realm of constitutional tort claims, like *Hernández*, this can only be in reference to the *Bivens* cause of action as there is no statutory source of relief.[184] Therefore, though Congress did not explicitly codify the *Bivens* cause of action, it did constructively ratify it as an implicit provision for the assertion of constitutional tort claims.[185] This implicit ratification and the fundamental premise that courts "must recognize and

175. *See* Pfander & Aggarwal, *supra* note 155, at 452.
176. *Id.*
177. *Id.*
178. S. REP. NO. 93-588, at 3 (1973).
179. Pfander & Aggarwal, *supra* note 155, at 452.
180. *See* Pfander & Baltmanis, *supra* note 163, at 131.
181. *Id.* at 134.
182. *See id.*
183. 28 U.S.C. § 2679(b)(2)(A) (2018).
184. *See* Pfander & Baltmanis, *supra* note 163, at 135.
185. *Id.*

enforce rights of action that Congress has created"[186] both erode any foundation for claims that enforcement or extension of *Bivens* relies on improper judicial lawmaking.[187]

Nevertheless, in the past four decades, the Supreme Court has seen fit to deny extension of *Bivens* on ten occasions, applying a "remarkably low"[188] threshold for dismissal.[189] In most cases, the Court has pointed to the Judiciary's need to avoid straying into the Executive's role of national security or foreign relations, or the Court's lack of expertise to design remedies where Congress has not.[190] This stance presents two ironies. First, in some cases—including *Hernández*—by choosing not to recognize a cause of action, the Court inserts itself into national security and foreign relations *more* so than if it simply allowed a *Bivens* action to be decided on the merits.[191] In *Hernández*, the Mexican government made clear that a *Bivens* denial was what would lead to international discord.[192] The second irony is that in extending *Bivens*, the Court would not be usurping congressional intent. Instead, the Court would be giving practical effect to Congress's implicit ratification of the *Bivens* cause of action, and its clearly evinced promotion of the virtue of a *Bivens* remedy.[193] To do any less is to usurp Congress's efforts and intent.[194]

B. In Hernández*, the Supreme Court Extended Unwarranted Over-Restraint Where It Should Have Extended* Bivens

1. Nothing Special About the Special Factors in *Hernández*: Factors Counsel Extension Rather than Hesitation

While the dissent argued that *Hernández* did not implicate a new *Bivens* context, this was based on a broad and incomplete reading of the Court's precedent.[195] Justice Ginsburg argued that *Hernández* was directly akin to *Bivens* because it engendered a Fourth Amendment unreasonable seizure claim.[196] However, given the Court's precedential cases—*Abbasi*, in particular—*Hernández* fits within the Court's definition of "meaningful difference."[197] As Justice Kennedy wrote in *Abbasi*, meaningful differences may include "the rank of the officers involved; the

186. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 415–16 (1982).
187. *See* S. REP. NO. 93-588, at 3 (1973).
188. Bernstein, *supra* note 2, at 221 (quoting Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009)).
189. *See* Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (citing the nine other cases in which the Court declined to extend *Bivens*).
190. *See* Bernstein, *supra* note 2, at 225–26.
191. *Hernández*, 140 S. Ct. at 758 (Ginsburg, J., dissenting).
192. *Id.*
193. *See* S. REP. NO. 93-588, at 3 (1973).
194. *See* Bernstein, *supra* note 2, at 224.
195. *See Hernández*, 140 S. Ct. at 756 (Ginsburg, J., dissenting).
196. *Id.*
197. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017).

constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors not considered in previous *Bivens* cases."[198]

While *Hernández* shared many parallels with the *Bivens* case itself, *Hernández* also differed in crucial ways. Most meaningfully, *Hernández* involved several special factors that *Bivens* did not. Given the shooting's proximity to the U.S.–Mexico border and the transnational nature of the incident, *Hernández* necessitated a discussion of potential impacts on foreign relations and national security that *Bivens* never implicated.[199] As the Mexican government indicated in its amicus brief, the United States' willingness to consider Hernández's parents' claim on the merits had the potential to affect international relations.[200] Similarly, border security is inherently national security; Congress has gone so far as to statutorily task CBP with the detection and interdiction of terrorists, smugglers, and traffickers at the border.[201] Because *Hernández* called into question the conduct of CBP agents tasked with securing the border, it held the *potential* to impact national security.[202] The potential implication of these special factors pulled the case into a new context, but should not have counseled hesitation in extending *Bivens*.

When analyzing these special factors within the *Bivens* analysis, the question is not whether such factors are implicated; the question is whether such factors *as they are implicated* counsel hesitation in extending *Bivens* into the subject context.[203] The idea that foreign relations are implicated by a transnational shooting across a highly contested border, like that between the United States and Mexico, is not controversial. However, holding that such implication counsels hesitation to extend a judicial cause of action pursuant to excessive force by federal officials does not follow.

Justice Alito noted that matters related to foreign relations are so relevant to the roles of the political branches as to be "largely immune from judicial inquiry or interference."[204] Plainly, *Hernández* did not interfere with foreign relations between the United States and Mexico. Justice Alito noted this himself when he pointed out that "[i]n the absence of judicial intervention, the United States and Mexico would at-

198. *Id.* at 1849.

199. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

200. Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners at 12, Hernández v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678) [hereinafter Gov't of United Mexican States' Amicus Brief].

201. *See* 6 U.S.C. § 211(c)(5) (2018).

202. *See* Hernández v. Mesa, 885 F.3d 811, 819 (5th Cir. 2018).

203. *See Abbasi*, 137 S. Ct. at 1848.

204. Hernández v. Mesa, 140 S. Ct. 735, 744 (2020) (internal quotations omitted) (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)).

tempt to reconcile their interests through diplomacy—and that has occurred."[205] This is true in that after Hernández's death, the United States and Mexico established a joint Border Violence Prevention Council and the U.S.–Mexico Human Rights Dialogue.[206] However, these diplomatic interactions did not happen in lieu of judicial intervention, instead, they occurred in the midst of the legal proceedings between Hernández's parents and the U.S. government.[207]

Ironically, the Court's refusal to allow for a *Bivens* action in *Hernández* is what risked disrupting foreign relations.[208] As Justice Ginsburg pointed out in her dissent, the Mexican government specifically stated that refusal "to consider [Hernández's] parents' claim on the merits . . . is what has the potential to negatively affect international relations."[209] The majority alluded to this when it quoted the Mexican government's amicus brief, stating, "it is a priority to Mexico to see that the United States provides adequate means to hold the agents accountable and to compensate the victims."[210] Given the circumstances, the United States could only afford justice in this case by extending a *Bivens* claim to Hernández's parents.[211] Instead, the Court ignored the implications, denied an extension, and set the stage for a foreign relations upheaval. Rather than counseling hesitation in extending *Bivens*, the foreign-relations implications in *Hernández* counseled extension.

Justice Alito also briefly discussed how potential interference with national security policy counseled hesitation in extending *Bivens*;[212] yet, his majority opinion did not give any concrete examples other than to say that border security could be undermined by interference with the system of military discipline.[213] However, it is unclear what system of military discipline would not discourage federal officers from shooting children at play. Agent Mesa's attorney perhaps came closer to an explanation when he described the potential impact on Border Patrol agents as a "chilling effect."[214] However, if holding Border Patrol agents accountable for shooting unarmed children would have a chilling effect, it would be no more chilling than the standards already limiting agents' use of deadly force.[215] These standards prescribe that an immigration officer may only use deadly force when there are "reasonable grounds to believe

205. *Id.* at 745.
206. *Id.*
207. *See* Hernández v. United States, 757 F.3d 249, 255 (5th Cir. 2014).
208. *See* Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 12.
209. *Hernández*, 140 S. Ct. at 758 (Ginsburg, J., dissenting) (quoting Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 12).
210. *Id.* at 745 (majority opinion) (quoting Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 3).
211. *See id.* at 757 (Ginsburg, J., dissenting).
212. *Id.* at 746–47 (majority opinion).
213. *See id.*
214. Transcript of Oral Argument at 35, *Hernández*, 140 S. Ct. 735 (No. 17-1678).
215. *See* 8 C.F.R. § 287.8(a)(2)(ii) (2016).

that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury."[216] None of these elements were met in the shooting of Hernández.[217] Thus, allowing a *Bivens* action in *Hernández* would add no additional restrictions to Border Patrol agents' conduct that are not already binding against them.

Further, Justice Alito misrepresented the issue at hand in *Hernández* when he said that the question is "whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border."[218] In *Hernández* the *Bivens* action would not actually alter the federal regulatory codes guiding Border Patrol agents' enforcement activities. To the contrary, the cause of action would serve as an additional measure deterring violations of the existent regulations.[219] Moreover, it cannot be said that the internal mechanisms in place to investigate the use of unlawful force at the border are beyond reproach or have a record of merit that would render augmentation excessive.[220] In 2016, the CBP Integrity Advisory Panel concluded that CBP's disciplinary processes were "broken" and that they "undermine[d] the deterrence goals of discipline."[221] Former CBP Chief of Internal Affairs, James Tomsheck, went so far as to say that CBP "aggressively resisted" efforts to hold CBP agents accountable for excessive force.[222] Allowing a *Bivens* claim in *Hernández* would not alter the regulation scheme put in place by the political branches.[223] It would supplement a clearly flawed disciplinary process to give greater effect to the regulatory framework that the political branches have already created.

Similarly, the majority's assertion that the extraterritorial nature of the injury in *Hernández* counseled hesitation is deeply flawed. Justice Alito cited *Kiobel* in asserting the presumption that statutes do not apply extraterritorially in the absence of clearly expressed intent to the contrary.[224] In *Kiobel,* Nigerian nationals residing in the United States filed suit

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216. *Id.*

217. *See* Hernández v. Mesa, 137 S. Ct. 2003, 2005–06 (2017) (reciting the facts of the case and the findings of a panel of the Court of Appeals for the Fifth Circuit).

218. *Hernández*, 140 S. Ct. at 746.

219. *See* Transcript of Oral Argument, *supra* note 214, at 29.

220. *See* Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 21–23, *Hernández*, 140 S. Ct. 735 (No. 17-1678).

221. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL 21 (2016).

222. Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 30 (2017) (quoting Mark Binelli, *10 Shots Across the Border: The Killing of a Mexican 16-year-old Raises Troubling Questions About the United States Border Patrol*, N.Y. TIMES MAG. (Mar. 3, 2016), https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html.).

223. *See* Transcript of Oral Argument, *supra* note 214, at 29.

224. Hernández v. Mesa, 140 S. Ct. 735, 747 (2020) (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013)).

under the Alien Tort Statute (ATS)[225] alleging that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in committing violations of the law of the nations in Nigeria.[226] The Court held that the presumption against extraterritorial application of U.S. statutes, in the absence of clear indication to the contrary, applied to the ATS.[227] However, as Justice Ginsburg's dissent in *Hernández* aptly pointed out, *Kiobel* also stands for the idea that "if [the] conduct [in question] 'touch[es] and concern[s] the territory of the United States . . . with sufficient force,' the presumption against extraterritoriality is displaced."[228] *Kiobel* did not touch and concern U.S. territory because all of the relevant conduct occurred outside of the United States;[229] however, in *Hernández*, Agent Mesa fired his weapon—the relevant conduct—from U.S. soil.[230]

There is much debate (and even a circuit split) about what it takes for conduct to sufficiently touch and concern U.S. territory.[231] Yet still, Agent Mesa's conduct satisfies even the "extremely high territorial bar"[232] set by Justice Alito himself in *Kiobel*, requiring that the conduct "violate an international law norm" that is both definite and accepted "among civilized nations."[233] The right to freedom from the arbitrary deprivation of life is recognized as a "bedrock principle" of customary international law.[234] It is a norm that is so widely accepted that it has effectively attained "*jus cogens* status as a non-derogable norm that binds all states."[235] It is further generally accepted that where life is deprived through the use of force, the lawfulness and permissibility of the deprivation turns on whether the use of force was necessary and proportionate.[236] In *Hernández*, even accepting the facts as alleged in the DOJ's initial investigation of the incident, it still pitted rock-throwing children against a CBP officer firing live ammunition.[237] Agent Mesa's use of force cannot be said to have been necessary or proportionate under the circumstances. As such, it constituted an arbitrary deprivation of life in violation of a widely accepted and definite international law norm.[238] This

225. 28 U.S.C. § 1350 (2018).
226. *Kiobel*, 569 U.S. at 112–13.
227. *Id.* at 124.
228. *Hernández*, 140 S. Ct. at 759 (Ginsburg, J., dissenting) (quoting *Kiobel*, 569 U.S. at 124–25).
229. *Kiobel*, 569 U.S. at 124.
230. Hernández v. Mesa, 137 S. Ct. 2003, 2005 (2017).
231. Note, *Clarifying* Kiobel's *"Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1902 (2017).
232. Sarah H. Cleveland, *The* Kiobel *Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT'L L. 8, 22 (2013).
233. *Kiobel*, 569 U.S. at 126–27 (Alito, J., concurring).
234. Mamani v. Sánchez Bustamante, 968 F.3d 1216, 1237 (11th Cir. 2020).
235. William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 118–19 (2018).
236. *See id.* at 181.
237. Hernández v. Mesa, 137 S. Ct. 2003, 2005 (2017).
238. *See Kiobel*, 569 U.S. at 126–27 (Alito, J., concurring).

fulfills the "touch and concern" standard, even under Justice Alito's extreme test, and should have displaced the presumption against extraterritoriality.[239]

Beyond these precedential arguments, the majority's extraterritoriality argument runs contrary to fundamental notions of deterrence.[240] The location of the victim is wholly irrelevant because it is the conduct of the perpetrator that the law seeks to deter.[241] Location does not make the act of the offender any less deplorable, nor does it make deterrence any less necessary.[242] Few would argue that a murderer need not be deterred because his victim died on a cruise ship instead of a plane. Nor is there a very strong argument that a thief not be deterred because her victim was pickpocketed in a park instead of on the subway. Applied to *Hernández*, Agent Mesa's use of force was no less excessive, and worthy of deterrence, simply because his bullet hit Hernández a few feet into Mexico instead of a few feet into the United States.[243] Agent Mesa acted on U.S. soil as a federal government official; accordingly, his deterrable conduct fell within the jurisdiction of the United States.[244] A *Bivens* action was the ideal source of deterrence in *Hernández* because *Bivens* is concerned with deterring the officer's conduct, not the victim's injury.[245]

2. *Hernández* Was the Quintessential *Bivens* Claim

The Court's forty years of resistance to extending *Bivens* is all the more galling when one considers that the Court created—and Congress implicitly ratified—the *Bivens* cause of action to address gaps in the protection of constitutional rights.[246] The *Bivens* remedy was designed to attend to the irreconcilable blind spot in statutory protection of constitutional rights whereby federal officials could violate a citizen's constitutional rights unimpeded, while similar conduct by state officials was punishable under § 1983.[247] As the Court pointed out, to allow for a system "in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[248] Thus, the heartland of *Bivens* is truly those circumstances in which victims of constitutional violations have no other viable remedy—that is to say, when it is "*Bivens* or nothing."[249]

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239. *Id.*
240. *See* MODEL PENAL CODE § 1.02(1) (AM. L. INST. 2019).
241. *See id.*
242. *See* Hernández v. Mesa, 140 S. Ct. 735, 757 (2020) (Ginsburg, J., dissenting).
243. *See Hernández*, 137 S. Ct. at 2005.
244. *See id.*
245. *See* FDIC v. Meyer, 510 U.S. 471, 485 (1994).
246. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394–95 (1971).
247. *See id.*
248. Butz v. Economou, 438 U.S. 478, 504 (1978).
249. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017).

In addition to the question of whether there are special factors present that counsel hesitation in extending *Bivens*, the Court also must consider whether there are already adequate alternative processes protecting the constitutional interest at stake that might provide redress.[250] In *Hernández*, there was no adequate alternative process by which Hernández's family could seek to redress the violation of his Fourth and Fifth Amendment rights.[251] This lack of alternatives is not for lack of trying; Hernández's family brought a total of eleven claims under the FTCA, the ATS, and *Bivens*.[252] In turn, the lower courts rejected all the non-*Bivens* claims before they could be decided on their merits.[253]

Hernández's parents brought seven separate FTCA claims against Agent Mesa, including claims for assault and battery, negligence, and use of excessive deadly force;[254] the district court dismissed all seven.[255] The FTCA explicitly states that the United States' waiver of immunity does not apply to any claims arising in a foreign country.[256] While the statute itself is ambiguous about whether the tortious act giving rise to the claim must occur in a foreign country for the exception to apply,[257] the Court has held that the exception bars all claims "based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[258] Because Hernández was standing in Mexico when Agent Mesa shot him, the FTCA provided no relief to his family.[259]

The ATS affords federal district courts original jurisdiction over any civil tort action brought by a non-U.S. citizen that specifically alleges a violation of the law of nations or a treaty of the United States.[260] Hernández's parents' claim against Agent Mesa pursuant to the ATS alleged a violation of the international prohibition on extrajudicial killings.[261] Much like with their FTCA claims, the family would not see their ATS claim decided on the merits.[262] The Fifth Circuit, like the Fourth and Ninth Circuits in previous cases, held that while a district court may have original jurisdiction over a particular violation of the law of nations, the

250. Minneci v. Pollard, 565 U.S. 118, 125–26 (2012); Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
251. Hernández v. United States, 757 F.3d 249, 273 (5th Cir. 2014).
252. *Id.* at 255.
253. *See id.* at 256, 258–59, 280.
254. *Id.* at 255 n.2.
255. *Id.* at 256.
256. 28 U.S.C. § 2680(k) (2018).
257. Hernández v. United States, 802 F. Supp. 2d 834, 841 (W.D. Tex. 2011). Ambiguity has resulted from the fact that the FTCA states that its provisions do not apply to any claim "arising in a foreign country," yet prior to 2004 some federal courts allowed FTCA claims for injuries suffered abroad if a claimant could demonstrate that the act or omission giving rise to a tort occurred on U.S. soil. *Id.*
258. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
259. *Hernández*, 757 F.3d at 258.
260. 28 U.S.C. § 1350.
261. *Hernández*, 757 F.3d at 259.
262. *Id.*

ATS does not itself act as a waiver of sovereign immunity, thus, the claimant must demonstrate that the United States has consented to suit under the given circumstances.[263] Hernández's parents, of course, could not show that the United States consented to suit, and thus, the Fifth Circuit dismissed their ATS claim.[264]

The two other theoretical means of redress—state tort suits and extradition for criminal proceedings in Mexico—have been, respectively, legislatively voided[265] and historically ignored.[266] Westfall officially immunized federal officers from state law tort suits by establishing the FTCA as the exclusive remedy for damages claims brought against employees of the federal government who were acting within the scope of their employment at the time of the incident in question.[267] Thus, a state tort suit against Agent Mesa was never an option. With an eye toward protecting the rights of its citizens, the Mexican government requested that the United States extradite Agent Mesa to face criminal charges in Mexican court.[268] Even though Agent Mesa did not face comparable criminal charges in the United States, the U.S. government rejected Mexico's request forthwith.[269] This kind of denial is not a new phenomenon; the United States has never extradited a Border Patrol agent to stand trial in Mexico, rendering the remedy effectively meaningless.[270]

Hernández was the quintessential *Bivens* claim, as the Hernández family lacked any adequate alternative remedy. Given the FTCA's foreign country exception,[271] the ATS's lack of inherent waiver of sovereign immunity,[272] Westfall's preclusion of state tort remedies,[273] and the United States' refusal to extradite Agent Mesa to face charges in the Mexican court system,[274] *Hernández* truly was *Bivens* or nothing. Still, *Hernández* is only the latest example of the Court refusing to apply the wholly legitimate *Bivens* cause of action.[275] With its denial of Hernández's parents' claim, the Court has once more betrayed the very spirit of *Bivens*.

The transnational nature of Hernández's death complicated and limited the potential remedy regime in *Hernández*. However, unwarranted overemphasis of this extraterritoriality obscures the fact that remedies for

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263. *Id.*
264. *Id.*
265. Pfander & Baltmanis, *supra* note 163, at 134.
266. *See* Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 4.
267. Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, 28 U.S.C. § 2679(b)(1) (2018).
268. Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 10.
269. *Id.*
270. *See* Brief of Amici Curiae Former Officials of U.S. Customs & Border Protection Agency in Support of Petitioners at 4, Hernández v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).
271. 28 U.S.C. § 2680(k).
272. *Id.* § 1350.
273. Bernstein, *supra* note 2, at 223–24.
274. Gov't of United Mexican States' Amicus Brief, *supra* note 200, at 10.
275. *See* Vladeck & Vazquez, *supra* note 3, at 566.

constitutional violations by federal officers generally narrowed in the latter half of the twentieth century.[276] In the wake of *Erie* and Westfall, both the availability and scope of redress for victims of unconstitutional conduct by federal officers contracted.[277] While this contraction would seem to represent one more factor counseling extension of *Bivens*,[278] the Supreme Court has seen fit to paradoxically deny extension on ten separate occasions in the last four decades.[279] This over-restraint has fundamentally changed the nature of constitutional tort claims against federal officers such that it is no longer a question of *how* a victim will be redressed for an officer's constitutional violation, but rather, *if* they will be.[280]

CONCLUSION

The *Hernández* decision is the latest example of the Supreme Court's unwarranted judicial over-restraint when it comes to extending *Bivens*. A review of the legislative and historical development of constitutional tort remedies demonstrates that such over-restraint cannot be justified by labelling *Bivens* a disfavored act of judicial lawmaking. Further, a fair reading of the special factors analysis in *Hernández* finds ample justification for extending *Bivens* into the new context that the case presented. Finally, failing to recognize a valid *Bivens* action in *Hernández* betrayed the principles *Bivens* stands for and the recourse Congress intended.

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276. *See* Vázquez & Vladeck, *supra* note 3, at 570.

277. *See id.*

278. *Id.* at 566.

279. *See* Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (citing the nine other cases in which the Court declined to extend *Bivens*).

280. *See* Brief of Amicus Curiae the Institute for Justice in Support of Petitioners at 7, Hernández v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678).

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