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INTRODUCTION

In its most recent decision narrowly construing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court derided *Bivens* as the product of an "'*ancien regime*,' . . . [in which] the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose."[2] In the context of statutorily created rights, the Court has rejected this *ancien régime* on the ground that it reflects a mistaken understanding of the nature of the legislative process. As the Court wrote in *Hernández v. Mesa*:

> [W]hen a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power. No law "'pursues its purposes at all costs.'" Instead, lawmaking involves balancing interests and often demands compromise. Thus, a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages.[3]

The Court's decision in *Hernández* was based on the view that these considerations also apply with respect to damage remedies for constitutional violations.

This Essay considers the relevance for *Bivens* claims of the Court's shift to a *nouveau régime* to address the implication of private rights of action under statutes. Part I describes and assesses the Court's reasons for shifting to the *nouveau régime* in the statutory context. Part II explains why the Court's shift to a *nouveau régime* for implying damage remedies under federal statutes does not justify a similar shift with respect to constitutional remedies.

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1 403 U.S. 388 (1971).

2 Hernández v. Mesa, 140 S. Ct. 735, 741 (2020) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).

3 *Id.* at 741–42 (first quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013); and then citing Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986)).

The Constitution's omission of specific remedies for violation of the Constitution's substantive provisions does not reflect the Founders' belief that such remedies are unnecessary to give efficacy to those provisions, or that those provisions should be of only limited efficacy. The Constitution was adopted against the background of an ongoing system of common-law remedies, and the Founders understood that such remedies would be available to victims of constitutional violations. This Essay explains why this *ancien régime* of common-law remedies for constitutional violations retains considerable relevance to the current status and scope of *Bivens* remedies.

For most of our history, these remedies were regarded as neither federal law nor state law; they were understood to be part of the general common law. When the Supreme Court in *Erie Railroad v. Tompkins* eliminated this in-between category of law, the courts without discussion came to regard the common-law remedies as state-law remedies and, in *Bivens*, the Court recognized a supplemental federal remedy. Congress subsequently preempted state-law remedies against federal officials, preserving only the *Bivens* remedy. The Court, in turn, has been chipping away at *Bivens* on the ground that it constitutes improper judicial lawmaking. These developments risk leaving us with a remedial regime far narrower than that which had prevailed for most of our history. This Essay argues that the federal damage remedy recognized in *Bivens* could have been framed—and should now be understood—as the post-*Erie* manifestation of the general common-law remedial regime that prevailed since the Founding. The existence of these remedies, as supplemented by *Bivens*, has until now obviated substantial constitutional questions about the remedies necessary to give efficacy to the constitutional obligations of federal officials. Any further narrowing of *Bivens* would require the Court to confront these long-dormant questions.

I. THE *NOUVEAU RÉGIME* IN THE STATUTORY CONTEXT

As Justice Alito's opinion in *Hernández* makes clear, the *nouveau régime* regarding implied statutory rights of action is based on the insight that legislation does not reflect a single legislative purpose but is instead the product of a compromise among competing interests. This insight undergirds a principal critique of purposive statutory interpretation advanced by so-called "new textualists."

> [T]he framing of statutory policy entails not merely the articulation of legislative purposes, but also the specification of the *means* for carrying out those purposes. Since the choice of means may be the product of hard-fought legislative compromise, textualists argued that abstracting from a statute's textual details to the broader purposes behind them "dishonors the legislative choice as effectively as expressly refusing to follow the law."[4]

4 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 654 (7th ed. 2015) (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994)); *see also* Frank H. Easterbrook, *Foreword: The Court*

The Court has applied this critique with particular intensity to the question of implied statutory remedies. "[A] statute is often the product of a pitched battle between competing interest groups, one outcome of which may be a compromise that the available remedies would be limited—that full compliance was neither desired nor desirable."[5] The insight that lawmaking is a matter of compromise, and that the legislative compromise is sometimes reflected in a statute's withholding of certain enforcement mechanisms, eventually led the Court to fashion a self-consciously novel approach to the implication of private rights of action under statutes. The receptive approach to inferring rights of action reflected in cases like *J.I. Case Co. v. Borak*[6] was replaced by the stringent approach to the issue reflected in cases like *Alexander v. Sandoval*.[7] Recognizing rights of action not explicitly in the statute, the Court now believes, is a usurpation of legislative power.[8]

Whether the Court's insight about the legislative process warranted a shift of approach on the question of inferring rights of action under statutes is debatable. Whether a statute creates a private right of action is ultimately a question of statutory interpretation.[9] Congress enacts statutes against the background of past judicial decisions concerning how statutes are to be interpreted.[10] While the Court adhered to the *Borak* approach, that approach provided the background against which Congress enacted statutes that did not expressly provide a damage remedy. Congress can be presumed to have enacted such statutes with the understanding that the courts would construe

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and the Economic System, 98 HARV. L. REV. 4, 16–17 (1984) [hereinafter Easterbrook, *Foreword*]; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4, 7 (2001); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 102–05 (2006).

5 FALLON ET AL., *supra* note 4, at 742 (emphasis omitted) (citing Easterbrook, *Foreword*, *supra* note 4, at 45–51).

6 377 U.S. 426, 432 (1964).

7 532 U.S. 275, 293 (2001).

8 *See Hernández*, 140 S. Ct. at 741–42; *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

9 *Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *see also* Stephen I. Vladeck, Bivens *Remedies and the Myth of the "Heady Days,"* 8 U. ST. THOMAS L.J. 513, 521 ("[W]hatever the merits of *Sandoval*'s approach . . . the crux of the dispute between the majority and the dissenters—and between more recent and older case law—boils down to methodological disagreements over statutory interpretation. There is simply no dispute today that congressional intent is dispositive when it comes to the existence of a private cause of action to enforce a federal statute . . . ."). Professor Vladeck points out that, unlike statutory causes of action, "the existence of a *Bivens* remedy in no way required indicia of legislative intent." *Id.* at 519. For this reason, he argues that "reading these two lines of cases together distorts the fundamentally distinct considerations that animate them and thereby risks obscuring the critical constitutional questions lurking in *Bivens*' background." *Id.* at 514.

10 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

them to authorize damage remedies in the circumstances contemplated by *Borak*. It is thus unclear how deference to the legislature justified Congress's replacement of the *Borak* background rule of interpretation with the *Sandoval* background rule of interpretation. Indeed, if applied retroactively, the shift in interpretive approach would appear to thwart the apparent intent of a Congress that legislated against the background of the *Borak* rule. If applied prospectively, a shift to a new background rule construing legislative silence as reflecting the absence of a damage remedy might be justified instead as, for example, a deliberation-forcing penalty default rule, but such rules succeed at forcing deliberation because they set as the default the result the legislators are *least* likely to have wanted.[11] Interpretive presumptions are supposed to provide "a stable background against which Congress can legislate with predictable effects."[12] Any shift in such presumptions would appear to require a special justification, and such justifications would have to be grounded in considerations *other than* deference to the legislature.

In any event, shifting to a new interpretive presumption in the statutory context entails limited costs, particularly if the new presumption is only applied prospectively. A presumption against inferring remedies places the burden of inertia on those who wish to create remedies, but the legislature can be expected to adjust to whichever presumption the Court imposes. The same cannot be said of a presumption disfavoring remedies for constitutional violations.

II. THE *NOUVEAU RÉGIME* AND CONSTITUTIONAL REMEDIES

Even if the Court's insight that statutes are typically the product of compromise did justify its rejection of the *ancien régime* in the context of statutory remedies, it would not justify application of the *nouveau régime* to the question of remedies for *constitutional* violations. The inapplicability of the *nouveau régime* to the question of remedies for constitutional violations, was, indeed, acknowledged from its inception. If *Sandoval* reflects the triumph of the *nouveau régime*, then Justice Powell was that regime's Rousseau.[13] His dissenting opinion in *Cannon v. University of Chicago* laid the groundwork for the regime that ultimately prevailed.[14] In that opinion, Justice Powell clearly recognized that the new approach he favored for inferring rights of action under statutes had no applicability to the question of constitutional remedies. "[T]his Court's traditional responsibility to safeguard constitutionally protected rights," Justice Powell wrote, "as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action."[15] Beyond

11 *See, e.g.*, John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 848 (2006).

12 *Morrison*, 561 U.S. at 261.

13 *See* Jack R. Censer, *Intellectual History and the Causes of the French Revolution*, 52 J. SOC. HIST. 545, 546 (2019) (discussing Rousseau's influence on the French Revolution).

14 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

15 *Id.* at 733 n.3.

these structural points, which echo points made by Justice Harlan in *Bivens* and are discussed further below, Justice Powell directly contradicted Justice Alito's claim that inferring a damage remedy for violation of the Constitution would be inconsistent with the understanding of the legislative process that underlies the *nouveau régime*: "[T]he implication of remedies to enforce constitutional provisions," Justice Powell wrote, "*does not interfere with the legislative process in the way that the implication of remedies from statutes can*."[16]

This Essay argues that the Court's reasons for rejecting the *ancien régime* for inferring remedies from statutes affirmatively supports the opposite approach with respect to constitutional remedies. For starters, the rights-creating provisions of our Constitution were adopted many years ago, during the reign of a remedial regime that was decidedly *ancien*. The Court has been forthright in recognizing that its current approach to implying remedies under statutes reflects a sharp shift from its prior approach.[17] To apply this new approach to constitutional provisions adopted centuries ago is decidedly anachronistic.[18]

It is true that the Constitution was itself the product of compromise. Think of the Madisonian Compromise,[19] or the notorious Three-Fifths Compromise.[20] But these compromises related to the Constitution's substantive provisions. It is implausible to claim that, when the Founders adopted the Bill of Rights without expressly providing for a damage remedy for violation of those provisions, they were calibrating the degree of effectiveness they wanted those provisions to have. Their omission of particular remedies does not reflect their determination that the underlying rights be only partially effective. We usually assume that the Founders intended the rights guaranteed by those constitutional provisions to be generally effective.[21] It is noteworthy that the institution of judicial review also does not expressly appear in the constitutional text, yet the Court has had no trouble inferring it from the constitutional structure. Indeed, despite the Constitution's silence on judicial review, Thomas Jefferson famously defended the addition of a Bill of

16 *Id.* (emphasis added).

17 Indeed, this was Justice Alito's point in *Hernández*.

18 *Cf.* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) ("We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago."); *cf. also id.* at 490 (relying on the "legal 'backdrop against which Congress enacted' [a statute] to confirm[ ] the propriety of individual-capacity suits." (quoting Stewart v. Dutra Constr. Co., 543 U.S. 481, 487 (2005))).

19 *See* James E. Pfander, Essay, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 207–12 (2007) (describing the Madisonian Compromise).

20 *See* Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 104–13 (1989) (describing the Three-Fifths Clause).

21 *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–91 (1991).

Rights to the Constitution because of "the legal check which it puts in the hands of the judiciary."[22]

The Framers' expectations regarding the remedies that would be available to give efficacy to the constitutional rights they were adopting can be gleaned from the British history of subjecting government officials exceeding their powers to common-law remedies.[23] The Framers adopted the Constitution's rights-conferring provisions against the background of an existing system of remedies under the common law and equity. From the beginning of our history, damages were available against federal officials who violated the Constitution via common-law claims.[24] As many scholars have detailed, victims of constitutional violations could bring common-law claims, such as trespass, against federal (and state) officials.[25] The official could be expected to defend on the ground that she was lawfully enforcing the law. The Constitution would then come in by way of replication to nullify the defense of official authority. As the Court put it in *Ex parte Young* in explaining why claims against state officials are not barred by the Eleventh Amendment, the constitutional violation "strip[s] [the official] of his official or representative character and [he] is subjected in his person to the consequences of his

22 PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 445 (2010) (quoting Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, at 586, 587 (James Morton Smith ed., 1995)); *see* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 306, 309, 323–24 (1996).

23 As James Iredell noted in the North Carolina ratification debates, the British notion that "the king could do no wrong" was understood to mean that the King's advisers "should be personally responsible" for their advice. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKINGS OF THE UNITED STATES CONSTITUTION 374 (2016) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 109 (Jonathan Elliot ed., 2d ed. Washington 1836) (remarks of Mr. Iredell)).

24 *See* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020) ("In the early Republic, 'an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials' for money damages 'payable by the officer.' These common-law causes of action remained available through the 19th century and into the 20th." (alteration in original) (quoting 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, 1871–75 (2010))).

25 *See, e.g.*, Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1792–93 (2021) (noting that courts held officers accountable under common law in the early days of the American republic); Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1880 (2021) ("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.'" (alteration in original) (quoting Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019–2020 CATO SUP. CT. REV. 263, 267)).

individual conduct."[26] Although *Young* involved prospective injunctive relief, the same theory was relied on in many cases to enable victims of constitutional violations to common-law damage remedies.[27]

Justice Alito in *Hernández* acknowledged these historical precedents for damage relief against federal officials under the common law, but he rejected the argument that the federal courts should, by analogy, be understood to have a common-law authority to recognize new federal remedies for constitutional violations.[28] According to the Court, "*Erie R. Co. v. Tompkins* . . . 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."[29]

But the majority in *Hernández* missed the true significance of the *ancien régime*. This history is not relevant because it supports an analogous federal judicial power to *create* damage remedies in a common-law fashion. Rather, this history is important because it reflects the understanding when the Constitution was ratified, and subsisting long thereafter, that damages were an appropriate remedy for constitutional violations by federal (and state) officials.[30] The availability of such remedies was the background against which the relevant constitutional provisions were adopted. The remedy of damages for constitutional violations was an *existing* remedy, not a "new claim" (to use Justice Alito's term) created by the federal judiciary in *Bivens*.

A. The Ancien Régime *as General Common Law*

It is true that, before *Erie*, these remedies were understood to be based on the general common law, and after *Erie*, we no longer believe in the general common law. What we once considered to be general common law we now ordinarily regard as state law. Consistent with this view, the pre-*Bivens* common-law remedies against federal officials who violate the Constitution came to be regarded, post-*Erie*, as state-law remedies.[31] When *Bivens* came to the Court, the issue was framed as whether the common-law trespass remedy

26 209 U.S. 123, 159–60 (1908) ("If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.").

27 *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE. L.J. 77 (1997).

28 *See* Hernández v. Mesa, 140 S. Ct. 735, 742 (2020) ("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.").

29 *Id.* (alteration in original) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

30 *Cf.* Tanzir v.Tanvir, 141 S.Ct. 486, 491 (2020) (relying on historical availability of damage relief against government officials in concluding that damage remedies are "appropriate relief" under RFRA).

31 *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, 517 (2013).

should be supplemented by a federal damage remedy. The Court did recognize a supplemental federal remedy and, after initially expanding it, the Court shifted to its current more hostile approach to *Bivens*. At first, the *Bivens* remedy coexisted with the common-law remedies, but, in the Westfall Act, Congress eliminated state-law remedies against federal officials, preserving only the *Bivens* remedy.[32]

The fact that the rights-conferring provisions of the Constitution were adopted during the *ancien régime* has obvious relevance to the *Bivens* question. This regime of common-law remedies is the *ancien régime* against which the Constitution's rights-conferring provisions were enacted. As President Nixon's Solicitor General, Erwin Griswold, argued in *Bivens* itself, the "plan envisaged when the Bill of Rights was passed" was that a person injured by a constitutional violation "may proceed . . . by a suit at common law . . . for damages for the illegal act."[33] The Framers' failure to include an explicit right to damages in the Constitution thus does not imply that the Framers thought the Bill of Rights would be efficacious without damage remedies or that the Framers desired a less-than-efficacious Constitution, as Justice Alito's analysis in *Hernández* suggests might be true for statutes that do not explicitly authorize damage remedies.[34]

Solicitor General Griswold was relying on the existence of common-law remedies as a reason not to recognize a supplemental federal right of action.[35] The Court rejected his argument and did recognize a supplemental federal right of action. Perhaps because the Court was rejecting the argument that common-law remedies for constitutional violations should remain the exclusive remedy (in the absence of congressional action), the Court did not rely on the long pre-*Bivens* history of awarding damages on a common-law theory as an affirmative basis for recognizing the federal damage remedy. Its focus was instead on the many reasons for departing from a regime in which the damage remedy for constitutional violations by federal officials

32 The Westfall Act exempts not just *Bivens* actions but all suits "brought for a violation of the Constitution," 28 U.S.C. § 2679(b)(2)(A) (2018), which appears to include the pre-existing common-law remedies for constitutional violations. Stephen Vladeck and I have argued that the Westfall Act should be interpreted to preserve common-law remedies for constitutional violations by federal officials. *See* Vázquez & Vladeck, *supra* note 31, at 514. Without considering this possibility, however, the Court appears to have interpreted the Westfall Act to preclude all damage remedies against federal officials other than *Bivens* claims. *Id.* at 515. *Cf. Tanzin*, 141 S. Ct. at 491 (noting that "the Westfall Act foreclosed common-law claims for damages against federal officials, but it left open claims for constitutional violations and certain statutory violations" (citation omitted)).

33 Brief for Respondents, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900, at *10 (quoting Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10 (1817) (second alteration in original)).

34 Hernández v. Mesa, 140 S. Ct. 735, 741–42 (2020).

35 Brief for Respondents, *supra* note 33, at *10–12.

would have its basis in state law.[36] The Court had good reasons to depart from that model, but its argument would have been less vulnerable to the "judicial usurpation" critique if the Court had stressed its continuity with the *ancien régime*. The Court could and should have presented the federal right of action it recognized in *Bivens* as the post-*Erie* manifestation of the pre-*Erie* general common-law regime that all parties then accepted as consistent with the original understanding.[37]

The Court's recognition of a federal damage remedy in *Bivens* appeared discontinuous with past practice because the pre-*Bivens* right of action was thought to be based on state law. But the understanding that the common-law damage remedy was a state-law remedy was itself only of recent vintage. Before the Court's decision in *Erie*, the common-law remedy was understood to be based on the general common law.[38] The general common law, in turn, resembled post-*Erie* state law in some respects, but it resembled post-*Erie* federal law in other respects. It was neither state nor federal law.

The general law resembled federal law in that its content was not understood to depend on state judicial decisions interpreting it. The general common law was thought to have an existence independent of state or federal judicial decisions, and the federal courts were thought to be as capable of discovering it as were the state courts. The general common law was believed to be a "brooding omnipresence in the sky," as Justice Holmes derisively but accurately described the pre-*Erie* understanding.[39] The federal courts accordingly used their independent judgment in applying the general common law. In other respects, however, the general common law resembled current-day state law. First, the federal courts' interpretation of such law was not binding on the state courts, and the Supreme Court lacked jurisdiction to review the state courts' interpretation of such law.[40] Second, the general common law was subject to alteration by state legislatures.[41]

It is thus fair to describe the general common law, as enforced in the pre-*Erie* era, as having an "in-between" status. It was neither federal law nor state law. It had features of both. *Erie* held that this in-between status no longer existed. After *Erie*, therefore, the question for the federal courts, with respect to the general common law as applied in discrete contexts, was whether to upgrade the law's status to federal law or to downgrade it to state law. Because the in-between status was no longer available, the courts had to adjust its status *up* (to federal-law status) or adjust it *down* (to state-law status).

36 *See Bivens*, 403 U.S. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.").

37 *See* Vázquez & Vladeck, *supra* note 31, at 541.

38 *Id.* at 539.

39 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

40 *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517, 1527, 1560 (1984).

41 *See id.* at 1560, 1558–62 ("An obvious weakness of the federal system was the ability of the state legislatures to provide by statute a rule of law different from that provided by the [general] common law.").

In most contexts, the general common law was properly downgraded to state-law status. The federal government is one of limited and specified powers. Its powers do not encompass all areas covered by the general common law. Moreover, the Constitution specifies how preemptive federal law is to be made—through bicameralism and presentment (for statutes) or by negotiation with another country and the consent of two-thirds of the Senate (for treaties). Treating the general common law as federal law would have circumvented the carefully wrought procedure the Founders adopted for enacting preemptive federal law.

But, even after *Erie*, the Court recognized that federal common law would govern in certain areas. On the same day it decided *Erie*, for example, the Court decided that interstate disputes would be governed by federal common law.[42] After *Erie*, the Court faced the choice of whether to downgrade the *ancien régime* of remedies for violations of the Constitution from general-law status to state-law status, or to upgrade it to federal-law status, as it found appropriate in certain discrete areas. Initially, and without analysis, the courts assumed that the *ancien régime* of remedies for constitutional violations had been downgraded, along with the rest of the general common law.[43] For this reason, the question as formulated in the *Bivens* case was whether to recognize a supplementary federal remedy. The Court could have formulated the question instead as whether the *ancien régime* of common-law remedies for violation of the Constitution should be upgraded, post-*Erie*, to federal-law status. *Bivens*'s trajectory would likely have been very different had the Court posed the issue that way, as it would have underscored *Bivens*'s continuity with the past. Instead, the Court came to treat the *Bivens* decision, inaccurately, as an exercise of raw judicial lawmaking. As discussed in Section II.B, there were strong reasons for upgrading the status of this remedial regime to federal-law status. In retrospect, *Bivens* should be understood as having belatedly upgraded and updated the *ancien régime* of common-law remedies for constitutional violations to federal-law status.

B. Reasons to Upgrade the Ancien Régime

The literature on the legitimacy of federal common law is legion, and the Court has not been consistent in its approach to the topic. But it is fair to say that two important considerations are (a) whether the matter is of special concern to the federal government and (b) whether there is a special reason not to await federal legislative action.[44] It is clear that both considerations

42 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

43 *See* Vázquez & Vladeck, *supra* note 31, at 541–42, 542 n.165 (noting that, after *Erie*, "the pre-existing common law remedies were assumed to be state law remedies" and citing federal court decisions).

44 *See* Boyle v. United Techs. Corp. 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" (quoting Tex. Indus., Inc. v. Radcliff

supported upgrading the damage remedy against federal officials who violate the federal Constitution to federal-law status.

The special federal interest in the question of damage remedies against federal officials who violate the Constitution is obvious. The job of federal officials is to make sure that federal law is faithfully enforced. The Court has recognized the existence of a special federal interest in this topic by recognizing a federal common-law doctrine *limiting* the availability of damages against such officials. For example, in *Boyle v. United Technologies Corp.*, the Court noted that one of the areas in that it had "found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law."[45] The Court in *Boyle* relied on the existence of this interest in extending the immunity to federal government contractors.

There are two structural arguments against awaiting action by Congress. The first is a broad argument that would apply to any matter of special federal interest that was previously addressed through the general common law. The Founders intentionally made federal legislation difficult. As Professor Clark has explained, the Founders made the federal legislative process especially onerous in order to safeguard the interests of the states.[46] With respect to subjects that do not present special federal interests, the Constitution's tilting of the scales against federal preemption of state law is perhaps justifiable.[47] But, on matters of particular federal interest, the Court's elimination of this in-between category of law should not lead inexorably to a downgrading of the relevant law to state-law status. A special federal interest should suffice to justify an upgrading of the relevant law to federal status. Otherwise, the special federal interests that, before *Erie*, were adequately protected via the general common law would be sacrificed because of the obstacles the Founders established to protect state interests in other contexts.

This argument is particularly compelling where the interests involved were largely protected in the pre-*Erie* era through broad grants of federal jurisdiction. During this period, most cases involving the general common law were adjudicated in the state courts. Federal jurisdiction over such cases depended on the fortuity of diversity. The proportion of common-law cases in the federal courts compared to those in the state courts was undoubtedly very low. Common-law claims *against federal officials*, on the other hand, were adjudicated overwhelmingly in the federal courts, as most federal officials

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Materials, Inc. 451 U.S. 630, 640 (1981))); *id.* (rejecting "[p]etitioner's broadest contention" that the absence of legislation creating the government contractor defense means that the Court cannot recognize the defense under federal common law).

45 *Id.* at 505.

46 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328–29 (2001).

47 *But see* Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1601 (2008).

had the right to remove such cases from state to federal courts.[48] Thus, in most cases against federal officials, the federal court would have interpreted and applied the general common-law remedies without regard to the decisions of the state courts. For the same reason, the fact that state courts were not bound by federal interpretations of the general common law, and that state court decisions based on general common law were not appealable to the Supreme Court, was far less significant, as these suits would mostly have been adjudicated in federal courts to begin with. Thus, the pre-*Erie* regime of common-law remedies for constitutional violations by federal officials was much closer to a post-*Erie* regime that regards such remedies as having a federal-law status than a post-*Erie* regime that regards them as having a state-law status. The broad availability of federal jurisdiction meant that these claims would have been adjudicated by federal courts that did not regard themselves as bound by state-law precedents.[49]

The argument that a special federal interest should suffice to upgrade the general common law to federal-law status is subject to the counterargument that, if the special interest is so strong and so clear, we can expect Congress to overcome the obstacles the Constitution imposes for federal lawmaking.[50] This counterargument has rarely carried the day in the Supreme Court, however.[51] In any event, in the case of damage remedies against federal officials, there is an even more compelling structural argument for upgrading the previously applicable general common law to federal status without awaiting action by Congress: leaving the existence of such remedies to Congress can be expected to underprotect the constitutional limits on federal officials. As noted, the main job of federal officials is to enforce federal law. For the most part, the federal law that federal officials enforce is the law that Congress itself has enacted. To the extent the Constitution places limits on the authority of federal officials, it fetters the ability of these officials to enforce the statutes that Congress has enacted. The Court has recognized that leaving the efficacy of the Constitution's limits on congressional power to Congress's unmonitored discretion would "reduce[ ] [the Constitution] to nothing."[52] It would leave the fox in charge of the henhouse. The same concern tells us that leaving the question of remedies for constitutional viola-

48 Vázquez & Vladeck, *supra* note 31, at 539–40.

49 It is true that, in theory, state legislatures had the power to modify the general common law. But the state legislatures' power to alter the common-law remedies *against federal officials who violated the Constitution* was largely unexercised and in any event, for constitutional reasons, was far more limited than its power to revise the common law in other respects. *See id.* at 536–37.

50 *See Boyle*, 487 U.S. at 515–16 (Brennan, J., dissenting) ("Congress, however, has remained silent—and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense. The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying [plaintiff's] family the compensation that state law assures them." (footnote omitted)).

51 *See, e.g.*, *id.* at 513 (majority opinion).

52 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

tions to Congress is structurally problematic. As Justice Harlan recognized in *Bivens*, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."[53] The Founders did not leave it to Congress to establish damage remedies against federal officials. They understood that such remedies would be available absent congressional action via the general common law, and Congress vested jurisdiction in the federal courts to enforce such remedies. Now that we no longer recognize this in-between category of law, the constitutionally contemplated mechanism for giving efficacy to the Constitution should be upgraded to federal-law status.

Despite *Erie*'s abolition of general common law, the Court has recognized a federal common-law immunity of federal officials from damage suits for violations of the Constitution. Before the Westfall Act, this immunity applied not just to *Bivens* actions but also to claims based on the common law. As noted, the Court has defended this doctrine because of the special federal interest involved.[54] In the context of immunities from liability, unlike in the *Bivens* context, the Court has not deferred to Congress's superior role as the federal legislative branch.[55] The Court's disparate treatment of its role in recognizing federal damage claims against federal officials and its role in recognizing immunity from such claims (including common-law claims)—deferring to Congress as to the first but not as to the second—is not just inconsistent; it gets things backwards. If the Court had not recognized an immunity of federal officials, Congress could be expected to enact such an immunity, if it regarded it as desirable. After all, as noted, the job of federal officials is to enforce the statutes that Congress enacts, and actions to enforce the Constitution against federal officials fetter those officials' ability to enforce those statutes. For precisely the same reason, the constitutional structure tells us that Congress will be disinclined to establish rights of action that will fetter the ability of federal officials to enforce federal statutes. It is no accident that Congress has yet to do so. If the propriety of federal common lawmaking turns on whether it is prudent to await congressional action, the judiciary should defer to Congress regarding the recognition of a federal common law of immunity for federal officials but not regarding the recognition of a federal damage remedy.

C. Problems with the Ancien Régime

The *ancien régime* of common-law damage remedies for constitutional violations was hardly a panacea. The Court in *Bivens* rightly noted that the interests protected by the common law did not entirely overlap with the inter-

53 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in judgment) ("[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . .").

54 *See supra* note 50 and accompanying text.

55 *See, e.g.*, *Boyle*, 487 U.S. at 512.

ests protected by the Constitution.[56] A federal damage remedy not linked to the common law would be superior from this perspective. But, as Professor Woolhandler has demonstrated, the federal courts in the pre-*Erie* era exhibited substantial independence from common-law precedents in molding the damage remedy against government officials who violated the Constitution to advance the federal interests involved.[57] The U.S. government's brief in *Bivens* extolled the common-law remedial regime because of the common law's flexibility. "[G]rowth and improvement ha[ve] always been the great tradition of the common law."[58] The common law itself contained the tools for this evolution.[59] Thus, if the Court had framed the *Bivens* remedy as the post-*Erie* continuation of our long tradition of recognizing common-law damage remedies for violation of the Constitution, albeit as federal common law, the *Bivens* majority's concerns may well have been addressed over time, just as the federal remedy for injunctive relief was gradually extricated from common-law constraints after the *Ex parte Young* decision.[60]

Another potential problem with the *ancien régime*, if *Bivens* had been framed as merely upgrading it to federal-law status for the post-*Erie* era, is that Congress can in theory repeal the remedy, as it can repeal all federal common law. As noted, the *ancien régime* coexisted with *Bivens* for a number of years, but the Westfall Act eventually preempted state remedies against federal officials.[61] As Professor Vladeck and I have explained, the Westfall Act radically altered the nature of the *Bivens* question. Whereas the "special factors" question before the Westfall Act was understood to be whether there was a special reason for wanting the damage remedy to continue to be governed by state law, the "special factors" question after the Westfall Act was posed as whether there should be any damage remedy at all.[62] If the question is posed as federal vs. state law, then the fact that a case implicates national security would be a reason to regard the remedy as federal rather than state law. But if the question is posed as whether there should be any remedy at all, then the prospect of judicial interference with foreign relations

56 *Bivens*, 403 U.S. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.").

57 *See* Woolhandler, *supra* note 27, at 110–11 ("[T]he federal courts in both law and equity showed considerable independence as to procedures . . . and with respect to standing-to-sue and other elements of underlying causes of action.").

58 Brief for Respondents, *supra* note 33, at *18.

59 *See* Vázquez & Vladeck, *supra* note 31, at 538 (discussing the common law "action on the statute" (quoting Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 18 (1968)).

60 *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) ("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." (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956))).

61 *See supra* note 32 and accompanying text.

62 Vázquez & Vladeck, *supra* note 31, at 579.

becomes a reason to deny a federal remedy. Changing the default regime changes the nature of the question entirely.

Congress's principal concern in enacting the Westfall Act was with common-law actions against federal officials that did *not* allege constitutional violations.[63] Before the Westfall Act, individuals could sue federal officials on a common-law theory for run-of-the-mill injuries, such as traffic accidents. The Westfall Act specifically exempted suits "brought for a violation of the Constitution" from preemption.[64] Professor Vladeck and I have argued that this provision could have been construed to exempt common-law actions alleging constitutional violations, thus retaining the *ancien régime* as an alternative to *Bivens*.[65] Instead, the Court has construed the exemption as covering only *Bivens* actions and thus has interpreted the Westfall Act to preclude common-law remedies in contexts in which the Court has not recognized the availability of *Bivens* remedies.[66] If the Court had framed *Bivens* as the post-*Erie* federalization of the *ancien régime*, the remedies previously available under the *ancien régime* would have been exempted from preemption under the Westfall Act.

Even if the Court had construed the so-called *Bivens* exemption to preserve the preexisting common-law remedies for violation of the Constitution, Congress might still have the power to preempt those remedies today. But Congress's decision to exempt *Bivens* actions shows that it is loath to do so, perhaps believing (correctly) that the existence of damages for constitutional violations is a matter to which the Constitution assigns the primary role to the courts. For this reason, scholars have argued that the Westfall Act should be read as legislative approval of the *Bivens* remedy.[67] At a minimum, the Westfall Act should be understood to preserve, as *Bivens* claims, the remedies that were available against federal officials as common-law claims before the Westfall Act. The House Report made clear that the Act was not intended to affect the availability of remedies for constitutional violations.[68] Thus, if the Westfall Act is interpreted to preclude common-law remedies as such, it should also be interpreted to preserve, as *Bivens* actions, whatever remedies were previously available as common-law claims.[69]

63 28 U.S.C. § 2679(b)(2)(A) (2018).

64 *Id.*

65 Vázquez & Vladeck, *supra* note 31, at 571.

66 *See id.* at 571–72.

67 *See id.* at 514; James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–38 (2009).

68 *See* H.R. REP. NO. 100-700, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950 (noting that the Act "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights").

69 For elaboration of this argument, see Vázquez & Vladeck, *supra* note 31, at 571.

D. The Latent Constitutional Questions

If Congress did attempt to eliminate *Bivens* remedies, the courts would have to confront the question whether the availability of damages for constitutional violations is constitutionally required. The fact that the "plan envisaged when the Bill of Rights was passed" was that a person injured by a constitutional violation "may proceed . . . by a suit at common law . . . for damages for the illegal act," as Solicitor General Griswold told the Court in *Bivens*, would support an argument that some level of damage relief is constitutionally required.[70] There are, in addition, several lines of precedent establishing that the Constitution requires damage remedies against government officials at least in certain circumstances.

For example, due process precedents establish that damages are constitutionally required when a government official intentionally deprives an individual of liberty or property in an unlawful manner.[71] The Due Process Clause usually requires a pre-deprivation hearing, but, in certain circumstances, the Due Process Clause is satisfied with a post-deprivation hearing. For example, a post-deprivation hearing satisfies the Due Process Clause with respect to taxes; because of its need for tax revenues, the state is permitted to require taxpayers to pay first and challenge later.[72] A post-deprivation hearing also satisfies the Due Process Clause when a state official has deprived persons of liberty or property in a random and unauthorized way.[73] When the state relegates persons to a post-deprivation hearing, it must afford them a meaningful post-deprivation remedy if the deprivation turns out to have been unlawful—and, of course, one ground on which the deprivation might be unlawful is if it violates the Constitution. There is a line of precedent addressing which sorts of state remedies satisfy the Due Process Clause and which do not. The Court has held that the Due Process Clause does not require punitive damages,[74] but does require monetary relief sufficient to compensate the victim of the deprivation.[75]

Although most of these were suits under § 1983, the post-deprivation remedy these precedents are referring to is based on the Due Process Clause, not § 1983. The Court in these cases has held that the Due Process Clause is satisfied, and thus no damages are available under § 1983, if the state has

70 Brief for Respondents, *supra* note 33, at *10 (quoting Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10 (1817) (second alteration in original)); *see also* Ann Woolhandler & Michael G. Collins, *Was* Bivens *Necessary?*, 96 NOTRE DAME L. REV. 1893 (2021); Martin H. Redish, *Constitutional Remedies as Constitutional Law* 5 (Nw. Univ. Pritzker Sch. of L. Pub. L. & Legal Theory Series, Paper No. 20-23, 2020), https://ssrn.com/abstract=3668518.

71 *Cf.* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999); Zinermon v. Burch, 494 U.S. 113, 127–30 (1990).

72 *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 37 (1990) ("[I]t is well established that a State need not provide predeprivation process for the exaction of taxes.").

73 *See Zinermon*, 494 U.S. at 132.

74 *See* Fallon et al., *supra* note 4, at 1029–30.

75 *Fla. Prepaid*, 527 U.S. at 643.

authorized by statute or otherwise an award of damages in its own courts that meet the requirements of the Due Process Clause. Thus, these precedents establish that the Due Process Clause itself requires the remedy. Of course, post-deprivation remedies satisfy the Due Process Clause only in those limited circumstances in which the Due Process Clause does not require a pre-deprivation remedy. Thus, outside the context of taxes and random and unauthorized deprivations, the Due Process Clause is violated whether or not the state provides post-deprivation remedies.[76] When cases involving such deprivations have been brought under § 1983, the Court has held that a damage remedy is available against state officials under § 1983 without regard to the availability of post-deprivation remedies.[77] Because § 1983 provides a remedy, the Court has not had to consider whether the Due Process Clause requires a post-deprivation remedy against state officials in these circumstances. But the answer to that question is clear: if the Due Process Clause requires states to provide a damage remedy in those limited circumstances in which the Constitution does not require a pre-deprivation hearing (and the deprivation turns out to have been unlawful), then *a fortiori* it requires a damage remedy in cases in which the state was required to provide a pre-deprivation hearing and did not do so.

In addition to the Due Process Clause, damage remedies might also be required by the Supremacy Clause. As discussed above, the traditional mechanism for obtaining damages against federal (and state) officials who violated the Constitution was to bring a common-law action, and the violation of the Constitution served to negate any defense of official authority. In such actions, the Supremacy Clause played a central role: because the Constitution is the "supreme Law of the Land,"[78] it nullifies any state statute that would otherwise have justified the official's action, leaving the official subject in his person to whatever remedies would be available against any private party who caused similar injuries.

> If the [officer's] act . . . be a violation of the Federal Constitution, the officer . . . comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.[79]

This reasoning suggests that the function of the Supremacy Clause, with respect to constitutional violations by government officials, is to place the officer in the position of a private party under like circumstances. So understood, the Supremacy Clause supplies the textual constitutional basis for the Founders' understanding, as advanced by Solicitor General Griswold in *Bivens*, that common-law remedies would be available to safeguard constitutional rights. As I have argued elsewhere, the Supremacy Clause would in some respects be a narrower constitutional basis for a constitutionally required

76 *See Zinermon*, 494 U.S. at 138–39.

77 *See id.* at 138.

78 U.S. CONST. art. VI.

79 *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

damage remedy than the Due Process Clause, as the latter would require a remedy for unlawful deprivations of liberty or property even if they do not violate the Constitution, or even federal law.[80]

These constitutional questions have remained largely dormant because of the recognition of a federal right of action in *Bivens*. They will arise again if the Court declines to recognize a *Bivens* action in a context in which the *ancien régime* would have provided a remedy, and no alternative damage remedy is available, such as under the Federal Tort Claims Act.[81]

CONCLUSION

This Essay has argued that the Court is wrong to claim that the fate of *Bivens* should turn on the fate of the *ancien régime* for implying rights of action under federal statutes. The *nouveau régime* for implied statutory remedies is based on the view that legislation reflects a compromise among competing interests and a statute's omission of certain remedies likely reflects the legislature's belief that such remedies are unnecessary to give the statute efficacy or that the statute's substantive provisions should have only limited efficacy. The Constitution's omission of specific remedies for constitutional violations, however, does not reflect either of these views. Rather, the Founders understood that victims of constitutional violations would have recourse to common-law remedies.

Before *Erie*, this *ancien régime* of common-law remedies for constitutional violations was understood to have the status of general common law, which was neither state law nor federal law, but had an in-between status. After *Erie* eliminated this in-between category, the courts assumed, without discussion, that the common-law remedies had been downgraded to state-law status. There were strong reasons for the Court to upgrade these remedies to federal-law status, but the Court in *Bivens* instead recognized a federal damage remedy to supplement the common-law remedies. Subsequently, Congress in the Westfall Act preempted state-law remedies, preserving only the *Bivens* remedy against federal officials (along with FTCA remedies against the government itself).

The question whether the *ancien régime* of common-law remedies for constitutional violations by federal officials should be regarded as having federal-common-law status remained moot as long as a broader *Bivens* remedy remained available. But now, as the Court is cutting into *Bivens*'s core and Congress has eliminated state-law remedies, the question of the post-*Erie* status of the *ancien régime* should be reconsidered. For a number of structural constitutional reasons, and because the Founders understood this to be the default regime for enforcing the Constitution, the Court should treat *Bivens*

80 *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1777–85 (1997).

81 *Cf.* Weiss v. Lehman, 676 F.2d 1320, 1322 (9th Cir. 1982) (concluding that the federal official's deprivation of plaintiff's property did not violate the Fifth Amendment's Due Process Clause because plaintiff had an adequate remedy under the FTCA).

as the post-*Erie* manifestation of the general common-law regime of remedies for constitutional violations by federal officials. At a minimum, *Bivens* remedies should be available in circumstances in which remedies would have been available, pre-*Bivens*, under a common-law theory. Indeed, this conclusion may be constitutionally required.