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*Alexander J. Lindvall**

"No man in this country is so high that he is above the law. . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . [And the] Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government."

—United States v. Lee *(1882)*[1]

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1. United States v. Lee, 106 U.S. 196, 220 (1882).

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I. INTRODUCTION

Bivens has been gutted.[2] In two recent cases, the United States Supreme Court adopted the narrowest possible reading of *Bivens*,[3] and two Justices outright called for its overruling.[4] In real-world terms, these decisions mean that many federal officials will not be held accountable—at least not through the courts—for their disturbing and unconstitutional behavior. In the Court's most recent *Bivens* case, *Hernández v. Mesa*, the Court held that a United States Border Patrol agent could not be sued for shooting an unarmed fifteen-year-old in the back.[5] In another recent case, *Ziglar v. Abbasi*, the Court held that several high-ranking federal officials could not be sued for implementing and administering a policy that systematically rounded-up, jailed, and tortured Muslim immigrants.[6]

The results of these cases are unacceptable. In the United States, there should be consequences for shooting an unarmed child in the back, and there should be consequences for systematically jailing and torturing ethnic minorities without cause. To be clear, the results of these cases were avoidable—but the Court's conservative majority *chose* these results. The *Abbasi* and *Hernández* majorities simply rejected the precedents that would have allowed the plaintiffs to have their day in court and instead chose to limit *Bivens* suits based on their own personal predilections. The Court's dismissive attitude towards these very serious claims is troubling to say the least.

But what is even more troubling is that these decisions are "unsurprising"[7] given the Court's "disturbing campaign" of "using legal technicalities to keep people from getting a fair hearing."[8] As Erwin Chemerinsky has recognized, the Court has been methodically "closing the courthouse door" on plaintiffs for nearly a half-century.[9] The Court's conservative Justices have, on their own accord, placed a series of complicated procedural hurdles in front of plaintiffs, allowing the courts to

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2. *See infra* Section II.A (discussing a brief history of *Bivens* and its progeny).

3. *See* Hernández v. Mesa, 140 S. Ct. 735, 741 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843, 1848 (2017).

4. *Hernández*, 140 S. Ct. at 752–53 (Thomas and Gorsuch, J.J., concurring).

5. *Id.* at 744, 746 (majority opinion).

6. *Abbasi*, 137 S. Ct. at 1860, 1862–63.

7. Shirin Sinnar, *The* Ziglar v. Abbasi *Decision: Unsurprising and Devastating*, STANFORD LAW SCHOOL: SLS BLOGS, (June 20, 2017), https://law.stanford.edu/2017/06/20/the-ziglar-v-abbasi-decision-unsurprising-and-devastating/ [https://perma.cc/H34D-37QP].

8. Editorial Board, *Throwing Out Mr. Iqbal's Case*, N.Y. TIMES, (May 19, 2009), https://www.nytimes.com/2009/05/20/opinion/20weds3.html [https://perma.cc/58DT-PHWM].

9. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE i–xi (2017).

dodge difficult yet important constitutional questions.[10] The Court's justiciability doctrines, governmental immunity requirements, and *Bivens* limitations have made the federal courts inaccessible to many plaintiffs and have made many constitutional rights unenforceable.[11]

This Article makes three primary arguments. First, this Article argues the results of *Abbasi* and *Hernández* are completely unacceptable in "a government of laws, and not of men."[12] These decisions undermine some of our nation's most important values and allow federal officials to remain above the law. Second, this Article argues that the Court's conservative majority *chose* the results of these cases. For the last thirty years or so, conservative jurists and scholars have argued their "originalist" method of deciding cases removes judges' personal views from the equation and produces value-neutral judging.[13] However, given the Constitution's purposely vague language and its broad, ethereal principles, it is "simply wrong to think that Supreme Court judges—liberal or conservative—can decide difficult constitutional cases without making value judgments" or inserting their personal views into the decision-making process.[14] This Article seeks to add to the chorus of scholars who reject the originalism façade. Finally, this Article argues that the *Abbasi* and *Hernández* decisions are two pieces in a much larger and very disturbing puzzle. The Supreme Court has erected a series of unnecessary barricades around the federal courts, preventing plaintiffs from having their day in court, and preventing the courts from deciding important constitutional issues. These judge-made hurdles need to be removed—or at least significantly lowered—to ensure the people retain actual, enforceable rights.

This Article proceeds in four Parts. Part II provides a brief history of *Bivens* suits, beginning with *Bivens* itself and ending with the Court's two most recent (and most troubling) *Bivens* cases: *Ziglar v. Abbasi* and *Hernández v. Mesa*. Part III shows that the Court's conservatives were not duty-bound to reach the results in *Abbasi* and *Hernández*; rather, they *chose* the results of these cases by using flimsy legal precepts to reach their predetermined outcomes. Part IV shows how this narrow reading of *Bivens* is part of the Court's larger effort to close the courthouse door to plaintiffs and to immunize government officials. Part V responds to a pair of additional counterarguments that were not fully addressed in Parts I through III.

A "permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the

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10. *Id.* at x.

11. *Id.*

12. Marbury v. Madison, 5 U.S. 137, 163 (1803).

13. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) (arguing in favor of originalism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (providing an overview of how originalism developed).

14. ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 22 (2018).

Constitution."[15] When James Madison presented the Bill of Rights to Congress in 1789, he cautioned:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[16]

Today, however, the Supreme Court acts less like an "impenetrable bulwark" and more like a passive observer.[17] Although the political branches continue to exceed the bounds of the Constitution, as they always have, the Court's conservative Justices often shrug their collective shoulders and allow unconstitutional activity to go uncorrected. My hope is that this Article will persuade at least some readers that our "independent tribunals of justice" should reclaim their role as impenetrable constitutional bulwarks.

II. A BRIEF HISTORY OF *BIVENS* SUITS

This Part proceeds in two Subparts. Subpart A discusses *Bivens* and its progeny, beginning with *Bivens* itself and ending with the Court's 2007 decision in *Wilkie v. Robbins*.[18] Subpart B discusses and critiques the Court's two most recent *Bivens* cases—*Ziglar v. Abbasi* and *Hernández v. Mesa*—which have effectively gutted *Bivens* beyond recognition.

A. Bivens *and its Progeny*

1. 1971–1980: Creating and Expanding *Bivens*

Since 1871, there has been a federal statute that allows citizens to sue *state* and *local* government officials for violating the Constitution.[19] That statute is now codified at 42 U.S.C. § 1983.[20] But there is no statutory

15. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

16. 1 ANNALS OF CONG. 439 (1789).

17. 1 ANNALS OF CONG. 439 (1789) (speech of James Madison), *reprinted in* 12 W. Hutchinson, W. Rachel and R. Rutland, eds., The Papers of James Madison 206–07 (1991).

18. 551 U.S. 537 (2007).

19. *Abbasi*, 137 S. Ct. at 1854.

20. Section 1983, which was originally part of the Ku Klux Klan Act of 1871, currently provides:

> Every person who, under color of [state law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

counterpart that allows constitutional suits for money damages against *federal* officials.[21] Accordingly, for 100 years, a victim's ability to bring a lawsuit for constitutional violations largely depended on whether the offending officer was a state or federal actor.

In 1971, however, in *Bivens v. Six Unknown Federal Narcotics Agents*, the Supreme Court held that the Fourth Amendment contains an implied cause of action that allows aggrieved citizens to bring money-damages suits against federal officials for their unconstitutional behavior.[22] As the Court later described it: "Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest c[an] invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."[23] Because of this decision, constitutionally-based lawsuits for money damages against the federal government or its agents are commonly called "*Bivens* suits."[24]

Bivens arose from the illegal and humiliating search and seizure of Webster Bivens and his family.[25] On November 26, 1965, several Federal Bureau of Narcotics agents, without a warrant, entered Bivens's apartment and arrested him in front of his wife and children.[26] After searching his apartment from "stem to stern," the agents took Bivens to the local federal courthouse, where he was "interrogated, booked, and subjected to a visual strip search."[27] After this incident, relying exclusively on the Fourth Amendment, Bivens filed a suit for money damages in federal court, alleging that he was unlawfully searched and seized and that he "suffered great humiliation, embarrassment, and mental suffering as a result of the agents'

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law, suit in equity, or other proper proceeding for redress . . . 42 U.S.C. § 1983.

21. *Abbasi*, 137 S. Ct. at 1854; ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.1 at 631 (6th ed. 2012) ("No federal statute authorizes [the] federal courts to hear suits or give relief against federal officers who violate the Constitution of the United States."); *see also* Wheedlin v. Wheeler, 373 U.S. 647, 650 (1963) (holding that 42 U.S.C. § 1983 does not apply to the federal government or its officers).

22. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389, 395–97 (1971); *id.* at 399 (Harlan, J., concurring) ("I am of the opinion that federal courts do have the power to award damages for violation of 'constitutionally protected interests,' and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.").

23. Butz v. Economou, 438 U.S. 478, 504 (1978).

24. *E.g.*, Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010).

25. *Bivens*, 403 U.S. at 389.

26. *Id.*

27. *Id.*

unlawful conduct."[28] The agents sought to dismiss Bivens's suit, arguing there was no federal law allowing suits for money damages against federal officers.[29]

On appeal, the Supreme Court ruled in Bivens's favor, finding the Fourth Amendment itself "gives rise to a cause of action for damages."[30] Justice Brennan, writing for the Court, reasoned that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will . . . adjust their remedies so as to grant the necessary relief."[31] Although the Fourth Amendment "does not in so many words provide for its enforcement by an award of money damages,"[32] in this case, for Bivens, "it is damages or nothing."[33] Accordingly, the Court concluded, Bivens should be entitled to money damages—the "remedial mechanism normally available [to plaintiffs] in the federal courts."[34]

Bivens "broke new ground" in the area of civil rights.[35] Although the courts had long allowed suits against federal officials for injunctive relief,[36] they had never allowed implied constitutional suits for money damages.[37] The core premise underlying *Bivens* was that enforcing constitutional rights is incredibly important—so important that it justified finding an implied cause of action in the Constitution itself.[38] And given the Court's reasoning and broad language used in *Bivens*, it seemed possible that this court-made doctrine might evolve into the federal equivalent of § 1983.[39]

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28. *Id.* at 389–90.

29. *Id.*

30. *Id.* at 389.

31. *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

32. *Id.* at 396.

33. *Id.* at 410 (Harlan, J., concurring).

34. *Id.* at 397.

35. Hernández v. Mesa, 140 S. Ct. 735, 741 (2020).

36. Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What is Special About Special Factors*, 45 IND. L. REV. 719, 725–26 (2012).

37. Correctional Services Corp. v. Malesko, 534 U.S. 61, 66 (2001) (noting that *Bivens* "recognized for the first time an implied private action for damages against federal officers alleged [who] have violated a citizen's constitutional rights").

38. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23, 25 (2007).

39. Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1139–40 (2014); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822 (2010) (noting that it was widely assumed among lower courts and commentators that *Bivens* remedies would eventually be available for all constitutional rights).

In the decade that followed, the Court extended *Bivens* on two occasions. In 1979's *Davis v. Passman*, the Court found the Fifth Amendment's Due Process Clause contained an implied cause of action that allowed federal employees to sue for wrongful, sex-based discrimination.[40] There, Congressman Otto Passman fired his administrative assistant, Shirley Davis, explicitly because of her sex.[41] Passman said it was "essential" that a man fill her position because of the "unusually heavy work load" in his office.[42] Davis sued Passman in federal court, alleging that his explicit sex-based discrimination violated the Fifth Amendment and entitled her to backpay.[43]

The Supreme Court agreed, holding that the Fifth Amendment's Due Process Clause allows causes of action for sex-based discrimination.[44] Justice Brennan, again writing for the Court, maintained that interpreting the Bill of Rights is not like interpreting a statute.[45] He noted that the Constitution does not have the "prolixity of a legal code."[46] Rather, it is the nation's "great outline" that speaks with a "majestic simplicity,"[47] and it is the judiciary's duty to discern the primary means by which these vague rights will be enforced.[48] After finding that the Fifth Amendment contains an implied cause of action for wrongful termination, the Court went on to hold that this cause of action allows for money damages.[49] Because money damages are the "ordinary remedy for an invasion of personal interests in liberty"[50] and because there are "no special factors counseling hesitation" in a suit for

40. Davis v. Passman, 442 U.S. 228, 248–49 (1979).

41. *Id.* at 230.

42. *Id.* at 230 n.3. Congressman Passman terminated Ms. Davis through a letter, which read in part: "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion." *Id.* Needless to say, Ms. Davis did not "agree with this conclusion."

43. *Id.* at 231. Normally, a suit against the government for sex-based discrimination would arise under the Fourteenth Amendment's Equal Protection Clause. But because Davis's suit was against a *federal* official, her suit was brought under the Fifth Amendment's Due Process Clause, which forbids the federal government from denying equal protection of the law. *E.g.*, Vance v. Bradley, 440 U.S. 93, 95 n.1 (1979); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

44. *Davis*, 442 U.S. at 245.

45. *Id.* at 241.

46. *Id.*

47. *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)).

48. *Id.*

49. *Id.* at 245.

50. *Id.* (quoting *Bivens*, 403 U.S. at 395).

wrongful termination, the Court found that money damages are "surely appropriate."[51]

The Court next addressed *Bivens* the following year in *Carlson v. Green*.[52] *Carlson* is a pivotal and peculiar case because it both greatly expanded and greatly limited the availability of *Bivens* suits. The Court expanded *Bivens* by holding that the Eighth Amendment's Cruel and Unusual Punishment Clause gives federal prisoners an implied damages remedy for their prison's failure to provide adequate medical treatment.[53] The Court, however, also placed two significant limitations on *Bivens* suits that had only been hinted at in past cases.[54] These two limitations would serve as the foundation for *Bivens*'s decline.

Carlson arose from the death of federal prison inmate Joseph Jones, Jr.[55] Despite being aware of Jones's serious asthmatic condition, prison officials allegedly kept Jones in an unsafe prison environment against the advice of doctors.[56] After Jones suffered an asthma attack, prison officials "failed to give him competent medical attention for some eight hours" and "administered contraindicated drugs [that] made his attack more severe."[57] Jones died as a result of this asthma attack.[58] Jones's estate, through his mother, sued these officials for money damages, alleging their "deliberate indifference" to Jones's health and safety violated the Eighth Amendment.[59]

The Court, in a seven-to-two opinion, allowed the plaintiff's Eighth Amendment claim for money damages to proceed. But Justice Brennan, yet again writing for the Court, began the opinion in a somewhat curious way—by noting when *Bivens* suits are *not* available.[60] Justice Brennan noted that *Bivens* suits are unavailable in two circumstances: (1) when there are "special factors counseling hesitation"; and (2) when Congress has provided an "equally effective" alternative remedy that was clearly meant to supplant

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51. *Id.* Justice Brennan noted that a sex-based termination claim under the Fifth Amendment is not meaningfully different from a Title VII suit, where the courts routinely award money damages. *Id.* As such, in a case like this, where "it is damages or nothing," the courts are obliged to afford a damages remedy. *Id.*

52. Carlson v. Green, 446 U.S. 14, 18 (1980).

53. *Id.* at 18–19, 25. Prisoner suits make up a considerable portion of the federal courts' dockets, so allowing *federal* prisoners to bring comparable suits had significant consequences. *See, e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 1–5 (4th ed. 2003) (noting that over 14,000 prisoner suits were filed in 1999).

54. *Carlson*, 446 U.S. at 18–19.

55. *Id.* at 17.

56. *Id* at 17 n.1.

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.* at 18–19.

Bivens.[61] The Court had hinted at these limitations in past cases,[62] but it had never explicitly stated that these were hard-and-fast limitations on *Bivens* suits. Although the Court found that these limitations did not apply to the plaintiff's Eighth Amendment suit, its discussion of these two exceptions laid the groundwork for *Bivens*'s decline.

2. 1980–2007: Limiting *Bivens*

After 1980, the Court began to consistently and repeatedly retreat from *Bivens*, using the two exceptions provided in *Carlson*.[63] In *Bush v. Lucas*, for example, the Court found the existence of an alternative administrative remedy foreclosed a *Bivens* suit.[64] In *Bush*, a NASA aerospace engineer alleged he was demoted for making critical statements about the agency.[65] Bush later appealed his demotion to the Civil Service Commission, alleging his demotion violated the First Amendment.[66] While this appeal was pending, however, Bush also filed a *Bivens* suit.[67] The district court dismissed Bush's suit, finding that the Civil Service Commission's appeals process was an adequate alternative remedy, thereby barring Bush's *Bivens* claim.[68]

The Supreme Court agreed. Although the Court assumed that (a) Bush's First Amendment rights were violated, (b) the Civil Service Commission's remedies were not as effective as a *Bivens* money-damages remedy, and (c) Congress had not foreclosed *Bivens* suits in this area,[69] the Court nonetheless found that the existence of a comprehensive, administrative remedial scheme precluded an implied First Amendment cause of action.[70] In *Carlson*, the Court held that an alternative remedial scheme would preclude a *Bivens* suit

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61. *Id.*

62. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 245 (1979) ("[I]n appropriate circumstances, a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress.'"); Butz v. Economou, 438 U.S. 478, 504 (1978) ("In Bivens, the Court…looked for 'special factors counseling hesitation.' Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages.") (internal citations omitted).

63. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–57 (2017); *see also* George Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 275 (1989) (arguing that the Court's 1983 decision in *Bush v. Lucas* represented a significant retreat from *Bivens*).

64. Bush v. Lucas, 462 U.S. 367, 368, 388–90 (1983).

65. *Id.* at 369.

66. *Id.* at 370–71.

67. *Id.* at 371.

68. *Id.*

69. *Id.* at 372–73.

70. *Id.* at 368, 388–90.

only if the scheme was as "equally effective" as a *Bivens* suit.[71] The *Bush* Court, however, seemingly rejected this high standard, noting that Congress could foreclose the possibility of a *Bivens* suit simply by providing any reasonable alternative remedy.[72] The mere existence of an alternate remedial scheme approved by Congress, in other words, is a "special factor counseling hesitation" that precludes a *Bivens* suit.

The Court continued its *Bivens* retreat in *Schweiker v. Chilicky*, where the Court again found that the existence of a congressionally created remedial scheme precluded a *Bivens* cause of action.[73] In the 1980s, the Reagan administration illegally disqualified a large number of citizens from receiving their Social Security benefits.[74] Pursuant to an ill-conceived "continuing disability review" program, the Social Security Administration wrongfully discontinued disability benefits for roughly 200,000 people.[75] In response, Congress passed emergency legislation to stop the disqualifications.[76] James Chilicky was among those whose disability benefits were wrongly denied, causing him to suffer months of financial and medical hardship.[77] Chilicky filed a *Bivens* action under the Fifth Amendment's Due Process Clause, seeking money damages for the "emotional distress" and "loss of food [and] shelter" that resulted from the Social Security Administration's wrongful denial of benefits.[78]

On appeal, the Court prevented Chilicky's claim from proceeding.[79] Writing for the majority, Justice O'Connor noted that, since *Carlson*, the

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71. Carlson v. Green, 446 U.S. 14, 18–19 (1980).

72. *See Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised."); *id.* at 388 ("[W]hether an elaborate remedial system…should be augmented by the creation of a new judicial remedy for the constitutional violation at issue…obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff."). *See also* Jones v. Tenn. Valley Auth., 948 F.2d 258, 264 (6th Cir. 1991) (holding that the Civil Service Reform Act forecloses *Bivens* suits, even if its remedies are not as effective as a *Bivens* suit for money damages).

73. Schweiker v. Chilicky, 487 U.S. 412, 423–25 (1988). For a deeper dive into *Chilicky*, *see* Gene R. Nichol, Bivens*,* Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

74. *Chilicky*, 487 U.S. at 416, 418.

75. *Id.* at 415–16.

76. *Id.* at 415.

77. *Id.* at 417–18.

78. *Id.* at 418–19. Among other things, Chilicky alleged that the higher-ups at the Social Security Administration had "adopted illegal policies that led to the wrongful termination of benefits" and "used an impermissible quota system" that required state agencies to terminate a predetermined number of recipients. *Id.*

79. *Id.* at 423–25.

Court had been hesitant to extend *Bivens* "into new contexts."[80] The Court again noted several "special factors" that weighed against allowing Chilicky's *Bivens* suit to proceed.[81] Most significantly, the *Chilicky* Court found that Congress's *silence* was evidence that it did not want to allow *Bivens* suits in this context: "When the design of a [g]overnment program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies."[82]

This was a striking departure from the reasoning seen in *Bivens*, *Davis*, and *Carlson*. In *Davis* and *Carlson*, the Court found that *Bivens* suits were appropriate because Congress had not expressly disapproved of such causes of action (i.e., Congress's silence suggested that a *Bivens*-like remedy was appropriate).[83] In *Bush* and *Chilicky*, however, the Court found the exact opposite: that *Bivens* suits were inappropriate because Congress had not expressly approved of them (i.e., Congress's silence indicated that a *Bivens*-like remedy was inappropriate).[84] *Bush* and *Chilicky*, thus, show that the existence of any congressionally-created remedial scheme will preclude a related *Bivens* action unless Congress explicitly approves of such suits.[85]

Between the Court's decision in *Chilicky* and its 2017 ruling in *Ziglar v. Abbasi* (discussed below), the Court further limited *Bivens* suits in three significant ways: (1) it barred any *Bivens* suits arising out of military service; (2) it barred *Bivens* suits against private entities that were under contract with the federal government; and (3) it required the courts to determine whether a new type of *Bivens* suit is, on balance, desirable.[86]

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80. *Id.* at 421.

81. *Id.* at 423.

82. *Id.*

83. Carlson v. Green, 446 U.S. 14, 19 (1980) (holding that a *Bivens* suit was allowable because there was "no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents, but [instead] must be remitted to another remedy, equally effective in the view of Congress"); Davis v. Passman, 442 U.S. 228, 246–47 (1979) (holding that a *Bivens* action was allowable because there was "'no explicit congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury" (quoting *Bivens*, 403 U.S. at 397)).

84. *Chilicky*, 487 U.S. at 423; Bush v. Lucas, 462 U.S. 367, 388 (1983).

85. *See, e.g.*, *Chilicky*, 487 U.S. at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.").

86. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1 at 648–51, 653–54 (6th ed. 2012).

The Court has categorically prevented *Bivens* suits arising out of military service.[87] In *United States v. Stanley*, for example, the Court barred a United States service member's lawsuit for the injuries he allegedly suffered as part of the military's forced LSD experiments.[88] The *Stanley* Court blanketly declared that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to [military] service.'"[89] Military service, in other words, is another "special factor counseling hesitation" that prohibits a *Bivens* suit.[90]

The Court also disallowed *Bivens* suits against private entities in the 2001 case, *Correctional Services Corp. v. Malesko*.[91] In *Malesko*, the Federal Bureau of Prisons contracted with a private company to operate a halfway house.[92] John Malesko was an inmate at this halfway house.[93] The halfway house's staff was aware that Malesko suffered from a serious heart condition.[94] On one occasion, however, a halfway house guard refused to let Malesko use the elevator to reach his fifth-floor room.[95] Malesko protested that he was specially permitted to use the elevator because of his heart condition, but the guard was "adamant" that Malesko use the stairs.[96] Malesko suffered a heart attack while climbing the stairs, and he later sued the halfway house for his injuries.[97]

In a five-to-four opinion written by Chief Justice Rehnquist, the Court held that private entities may not be sued under *Bivens*.[98] The primary purpose of *Bivens* remedies, Rehnquist reasoned, was to deter "individual [federal] officers from engaging in unconstitutional wrongdoing."[99] To extend *Bivens* to suits against agencies and private companies, he continued, would not further this underlying purpose.[100] As such, given the Court's "caution toward

87. *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987).

88. *Id.* at 671–72.

89. *Id.* at 684 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).

90. *Id.* at 683 (holding that the "the unique disciplinary structure of the Military Establishment and Congress' activity in the field," is a "special factor[] counseling hesitation" that "require[s] abstention"). Scholars have widely criticized the Court's decision in *Stanley*. *See, e.g.*, Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (1989); Johnathan Tomes, Feres *to* Chappell *to* Stanley*: Three Strikes and Service Members Are Out*, 25 U. RICH. L. REV. 93 (1990).

91. Correctional Services Corp. v. Malesko, 534 U.S. 61, 63 (2001).

92. *Id.*

93. *Id.* at 64.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 63.

99. *Id.* at 74.

100. *Id.*

extending *Bivens* remedies into *any* new context," the Court refused to extend *Bivens* to suits against private companies.[101]

Finally, in 2007's *Wilkie v. Robbins*, the Court added another limitation on *Bivens* suits: when presented with a *Bivens* suit in a new context, the courts must determine whether the suit, on balance, is desirable.[102] *Robbins* arose from a property dispute between a Wyoming rancher and the federal Bureau of Land Management ("BLM").[103] The BLM failed to record an easement on a large piece of private property in Wyoming.[104] Frank Robbins subsequently purchased that property, vitiating the government's easement; and when the BLM realized its mistake, it demanded that Robbins recognize the federal government's unrecorded easement.[105] When Robbins refused, "BLM officials mounted a seven-year campaign of relentless harassment and intimidation to force Robbins to give in."[106] This harassment campaign included "intentionally trespassing on Robbins's land, inciting a neighbor to ram a truck into Robbins while he was on horseback, breaking into his guest lodge, filing trumped-up felony charges against him without probable cause, and pressuring other government agents to impound Robbins's cattle without cause."[107]

In response to this harassment campaign, Robbins eventually filed a *Bivens* action against the BLM officers under the Fourth and Fifth Amendments.[108] The *Robbins* Court seemingly recognized that a *Bivens*-type lawsuit was the only way to meaningfully vindicate Robbins's rights.[109]

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101. *Id.* (emphasis added). Although the *Malesko* Court emphasized that the "core purpose" of *Bivens* is to "deter[] individual [federal] officers from engaging in unconstitutional wrongdoing," the Court later refused to allow *Bivens* suits against individual prison guards at a private prison. *See id.*; *contra* Minneci v. Pollard, 565 U. S. 118, 120 (2012). When these *Bivens* case are viewed holistically, they are infuriating, because the Court is clearly just making it up as it goes. There is no principled reason for these rulings, and the Court consistently talks out of both sides of its mouth. This area of law is a muddled mess to say the least.

102. Wilkie v. Robbins, 551 U.S. 537, 550, 554 (2007).

103. *Id.* at 541–42.

104. *Id.* at 542.

105. *Id.* Because Robbins was a bona fide purchaser—i.e., he was unaware of the federal government's easement when he purchased the land and the easement had not been recorded—the government lost the ability to record its easement once Robbins purchased the property, and Robbins acquired title free and clear of the government's easement. *See* WYO. STAT. ANN. § 34-1-120 (2005).

106. *Robbins*, 551 U.S. at 568 (Ginsburg, J., concurring and dissenting in part).

107. *See* Tribe, *supra* note 38, at 29 (citing multiple pleadings, briefs, and opinions from the *Robbins* case) (footnotes omitted).

108. *Robbins*, 551 U.S. at 547–48.

109. *See id.* at 554 (describing the ''forums of defense and redress open to Robbins'' as ''a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules''). The

However, the Court nonetheless precluded Robbins's suit, reasoning that allowing a *Bivens* suit in this context could lead to a wave of litigation and because of the difficulty of proving whether federal officers were acting with a retaliatory motive.[110] Justice Souter, writing for the Court, held that the courts must weigh the general reasons for and against creating a new type of *Bivens* suit, while "paying particular heed . . . to *any* special factors counseling hesitation before authorizing a new kind of federal litigation."[111] *Robbins*, thus, "transform[ed] the *Bivens* presumption in favor of a federal cause of action into a general, all-things-considered, balancing test."[112]

As Professor Laurence Tribe has recognized, the *Robbins* Court "departed from the core premise of *Bivens*—that the importance of constitutional rights justified implying a cause of action directly from the Constitution."[113] *Robbins* was different from the Court's prior anti-*Bivens* decisions because in those cases the plaintiff had an alternative form of recourse.[114] In *Robbins*, however, the plaintiff had no form of recourse that "would operate to deter that kind of violation or at least redress it when deterrence failed."[115]

B. The Roberts Court Guts Bivens

The Court's post-*Carlson* trend of limiting *Bivens* at every turn came to a head in 2017's *Ziglar v. Abbasi* and 2020's *Hernández v. Mesa*, where the Court essentially limited *Bivens*, *Davis*, and *Carlson* to their facts. The plaintiffs' allegations in *Abbasi* and *Hernández* were truly disturbing—and they touched on some of the most foundational principles underlying our system of limited government. Yet the Court refused to extend *Bivens* in these cases. Because the Court was unwilling to extend *Bivens* to the "new contexts" presented in *Abbasi* and *Hernández*, it seems safe to say that the Roberts Court's conservative majority is unwilling to extend *Bivens* under any circumstances.

1. *Ziglar v. Abbasi* (2017)

After the terrorist attacks of September 11, 2001, the federal government detained hundreds of Muslim-American immigrants who were "of

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Court surely took a large step back from *Bivens* in this case, as the "patchwork" of remedies available to Robbins, were surely available to the plaintiffs in *Bivens*, *Davis*, and *Carlson* as well. *Id.*

110. *Id.* at 556–58, 569.

111. *Id.* at 550 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)) (emphasis added).

112. Tribe, *supra* note 38, at 25.

113. *Id.*

114. *Id.* at 25, 67–68.

115. *Id.* at 25.

interest."[116] Eighty-four of these detainees were held, without bail, at a detention center in Brooklyn, New York, where they were repeatedly strip-searched, verbally abused, tortured, and humiliated.[117] Their bones were broken.[118] They were not allowed to have basic hygiene products, like toothbrushes or soap.[119] They were kept in small cells for over twenty-three hours a day.[120] And their religious beliefs and practices were prohibited and belittled.[121] After eight months of confinement and mistreatment, these detainees were released and deported.[122]

The detainees eventually filed suit, alleging the government "had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions."[123] Among others, these detainees sued three high-ranking federal officials: Attorney General John Ashcroft, Federal Bureau of Investigation Director Robert Mueller, and Naturalization Service Commissioner James Ziglar.[124] The detainees alleged that these officials implemented and oversaw a policy that was designed to imprison and torture Muslims without adequate cause in violation of the Fourth and Fifth Amendments.[125]

The detainees' suit made it to the Supreme Court for the first time in 2009, where the Court, in *Ashcroft v. Iqbal*, completely recalibrated the federal courts' pleading standard to shield these federal officials from civil liability.[126] After amending their complaint to comply with *Iqbal*'s new pleading standard, the detainees' suit again reached the Supreme Court in *Abbasi*.

In a four-to-two decision,[127] the *Abbasi* Court held that the detainees' *Bivens* suit against these high-ranking federal officials could not proceed.[128] Before dismissing the detainees' *Bivens* suit, however, the Court went on a full-blown, anti-*Bivens* tirade.[129] Justice Kennedy, writing for the majority,

116. Ziglar v. Abbasi, 137 S. Ct. 1843, 1851 (2017).

117. *Id.* at 1852–53.

118. *Id.* at 1853.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1853–54.

126. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (holding, contrary to existing precedent, that federal trial courts must disregard all conclusory, implausible allegations in a plaintiff's complaint when addressing a motion to dismiss).

127. Justices Sotomayor, Kagan, and Gorsuch did not participate in *Abbasi*. Per 28 U.S.C. § 1, only six Justices are required to reach a quorum and decide a case.

128. *Abbasi*, 137 S. Ct. at 1862–63.

129. *Cf. id.* at 1855–59.

noted that the Court had previously "followed a different approach to recognizing implied causes of action than it follows now."[130] "During this ancien regime," Justice Kennedy recounted, "the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose."[131] Today, however, the Court uses a "far more cautious course before finding implied causes of action" and views *Bivens* remedies as "a disfavored judicial activity."[132] The four-Justice *Abbasi* majority then articulated an entirely new framework for addressing *Bivens* suits.[133]

When asked to extend Bivens, the Court now engages in a two-step inquiry. First, the Court must determine whether the proposed *Bivens* suit arises in a "new context" (i.e., whether the proposed case is "different in a meaningful way from previous Bivens cases").[134] To make things as confusing as possible, the Court provided a seven-part, non-exhaustive, non-dispositive, disjunctive, multi-factor test to determine whether a case might arise in a new context:

> A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider.[135]

If the context is not new, the case may proceed. But if the case arises in a new context, the Court will go on to step two.

Second, if the context is new, the Court must determine whether "any special factors" advise against extending *Bivens* into the context presented.[136] Although the *Abbasi* Court did not endeavor to "create an exhaustive list" of special factors, it mentioned that the lower courts should look to (a) whether

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130. *Id.* at 1855.

131. *Id.* If anyone reading this footnote can think of a more pretentious and ridiculous phrase than "*ancien regime*" to refer to the 1960's, 70's, and 80's, please email your submissions to alindval@asu.edu.

132. *Id.* at 1855, 1857.

133. For a law-school-outline-style flowchart of the Court's new *Bivens* framework announced in *Abbasi*, *see* Alexander J. Lindvall, *New Contexts and Special Factors: The Court's New* Bivens *Framework*, 43 U. ARK. LITTLE ROCK L. REV. 63, 78–80 (2020).

134. *Abbasi,* 137 S. Ct. at 1859.

135. *Id.* at 1859–60. Given this list, the Court might as well have said, "If the case isn't identical to *Bivens*, *Davis*, or *Carlson*, dismiss the suit."

136. Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (citing *Abbasi*, 137 S. Ct. at 1857).

"there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" and (b) "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[137] If the Court finds any sort of "special factors" weighing against the *Bivens* suit, the suit should be dismissed.

The *Abbasi* Court found the detainees' suit arose in a new context, and that there were special factors counseling against the suit (i.e., the Court found the detainees' *Bivens* suit was inappropriate and not allowed).[138] The context was "new," the Court held, because the detainees were challenging "the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil," which was markedly different than the claims seen in *Bivens*.[139] Additionally, the Court held that four "special factors" counseled against the detainees' *Bivens* suit: (i) the civil litigation in this case (meaning discovery) would require the courts to inappropriately interfere with the sensitive functions of the Executive; (ii) the unprecedented events of September 11th required the courts to defer to the political branches; (iii) Congress is silent on the issue, which should give the courts pause; and (iv) if the plaintiffs were to succeed in this case, it could uproot major Executive policies, and *Bivens* is not the appropriate vehicle for major policy changes.[140] Accordingly, because these "special factors" arose in a new *Bivens* context, the detainees' suit was not allowed.

Scholars have widely panned the Court's decision in *Abbasi*. Professor Benjamin Zipursky, for example, argues Justice Kennedy's reasoning in *Abbasi* "reflects an untenably narrow conception of the place of private rights of action in our legal system."[141] Professor Jules Lobel argues that Justice Kennedy's opinion is "at odds with the basic precepts of the framers' view of the judicial role."[142] But these scholars miss a much larger point: the *Abbasi* decision is completely inconsistent with our nation's most cherished values. This decision is revolting—in the same ballpark as *Korematsu*.[143]

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137. *Abbasi*, 137 S. Ct. at 1858.

138. *Id.* at 1860, 1862–63.

139. *Id.* at 1860.

140. *Id.* at 1860–63.

141. Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2169 (2018).

142. Jules Lobel, Ziglar v. Abbasi *and the Demise of Accountability*, 86 FORDHAM L. REV. 2149, 2160–66 (2018) (arguing that multiple cases from early American history "demonstrate that Justice Kennedy's opinion in *Ziglar* is at odds with the basic precepts of the framers' view of the judicial role in addressing official claims of necessity during serious crises" and the "Jefferson's and Madison's perspective was the exact opposite of Kennedy's" in *Abbasi*).

143. *Cf.* Korematsu v. United States, 323 U.S. 214, 218 (1944) (green-lighting the forced internment of Japanese-Americans due to nondescript and unproven "national defense and safety" concerns).

Take this decision out of the context of the Court's confusing, inconsistent *Bivens* decisions and ask yourself the following question: Should the federal government be able to round-up, jail, and torture religious minorities without any specter of civil liability? Your answer, hopefully, was a resounding "no." But that was the real issue in *Abbasi*. The narrow, esoteric *Bivens* question can be pushed aside; the broad underlying question is what really mattered. *Abbasi*, at a certain level, was about what kind of country we are going to live in. And to the *Abbasi* majority, it is a country where the federal government can jail and torture people because of their religion and national origin without consequences.

At the end of the day, results matter. When dealing with the Court's weird, meandering *Bivens* decisions, it is easy to get lost in the weeds; but it is important to never lose sight of the fact that the Constitution is "intended to preserve practical and substantial rights, not to maintain theories."[144] The *Abbasi* Court seemingly lost sight of this promise and brought the Fourth and Fifth Amendments that much closer to being nothing but "paper rights."[145]

The broad issue presented in *Abbasi* (whether the government should be able to jail and torture people based on their religion) was so integral to our system of government and what it means to be American that the Court could not afford to get it wrong. But it did. And not only did the Court dismiss this meritorious *Bivens* suit, but it provided a framework for barring any future *Bivens* suits as well. *Hernández v. Mesa* illustrates this point.

2. *Hernández v. Mesa* (2020)

Along the United States-Mexico border, there is a large concrete culvert that separates El Paso, Texas, and Juarez, Mexico.[146] On June 7, 2010, Sergio Hernández, a fifteen-year-old Mexican citizen, and several of his friends were playing in this culvert.[147] At one point, a few of the kids, including Hernández, ran up the culvert and crossed into United States territory.[148] Noticing that the boys had crossed into U.S. territory, Border Patrol Officer Jesus Mesa detained one of the boys, at which point the other boys fled back

144. Davis v. Mills, 194 U.S. 451, 457 (1904) (per Holmes, J.).

145. *See* Faitoute Iron & Steel Co. v. City of Ashbury Park, N.J., 316 U.S. 502, 514 (1942) ("The Constitution is intended to preserve practical and substantial rights, not to maintain theories. Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights…" (internal quotations and citations omitted)).

146. Hernández v. Mesa, 140 S. Ct. 735, 740 (2020).

147. *Id.* Officer Mesa disputed that the boys were simply "playing" in the culvert; he apparently believed that the boys were "involved in an illegal border crossing attempt" and that they "pelted him with rocks." *Id.* However, because this case was appealed to the Court on a motion to dismiss, the plaintiffs' factual allegations were required to be accepted as true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 572 (2007).

148. *Hernández*, 140 S. Ct. at 740.

into Mexico.[149] As Hernández ran back across the culvert into Mexico, Officer Mesa, "seemingly taking careful aim," shot Hernández in the back of the head, killing him.[150] Officer Mesa's bullet crossed the U.S.-Mexico border and struck Hernández while he was standing on Mexican soil.[151]

Hernández's parents subsequently brought a *Bivens* suit against Mesa, alleging that Mesa violated their son's Fourth and Fifth Amendment rights.[152] The district court dismissed the plaintiffs' complaint and the Fifth Circuit affirmed.[153] The Supreme Court was originally set to decide this case in 2017 but remanded the case to the Fifth Circuit so it could reevaluate the case in light of the Court's *Abbasi* decision.[154] On remand, the Fifth Circuit dismissed the plaintiffs' case, relying on the Court's *Abbasi* framework.[155]

Following *Abbasi*'s two-step approach, the Supreme Court, in a five-to-four ruling, held that *Bivens* did not extend to a cross-border shooting because of the potential "foreign relations" and "national security" implications that could arise if the suit was allowed to proceed.[156] Justice Alito, writing for the majority, started by noting that *Bivens* remedies are the exception, not the rule.[157] Although the Court used to "routinely infer[] causes of action" that "were not explicit in the text of the provision that was allegedly violated,"[158] the *Hernández* Court made clear that those days were long gone.[159] Over the last forty years, Justice Alito noted, the Court has "c[o]me to appreciate more fully the tension between [inferring causes of action] and the Constitution's separation of legislative and judicial power."[160] By inferring causes of action, Justice Alito argued, the Court had been improperly stepping on Congress's toes. And the Court even went so far as to note that if *Bivens* had been decided today, "it is doubtful that [the Court] would have reached the same result."[161]

The Court, however, again stopped short of overruling *Bivens* and instead made clear that constitutionally-based suits against federal officials may proceed only if the facts of the case are virtually identical to the facts

149. *Id.*

150. *Id.* at 753 (Ginsburg, J., dissenting).

151. *Id.* at 740 (majority opinion).

152. *Id.*

153. *Id.*

154. *Id.* (citing Hernández v. Mesa, 137 S. Ct. 2003, 2006 (2017)).

155. *Id.* at 741.

156. *Id.* at 744, 746.

157. *Id.* at 741–42.

158. *Id.* at 741 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).

159. *See id* at 741–44 (noting that the Court has "c[o]me to appreciate more fully the tension" that *Bivens*, *Davis*, and *Carlson* placed on the Constitution, and that if these three cases had been decided today, "it is doubtful that [the Court] would have reached the same result.").

160. *Id.* at 741.

161. *Id.* at 742–43.

seen in *Bivens*, *Davis*, or *Carlson*.[162] Using new, broader language than that seen in *Abbasi*, the Court held that a plaintiff's *Bivens* suit should be dismissed if the court has any "reason to pause" when determining whether *Bivens* should apply.[163]

Hernández is troubling for many reasons. First and foremost, it is an extreme example of the Court shirking its duty to enforce the Constitution. For many people whose constitutional rights are violated, "it is damages or nothing."[164] Acting under the centuries-old assumption that "for every right, there should be a remedy,"[165] the *Bivens* Court took it upon itself to ensure the Bill of Rights would be more than "mere demarcation on parchment."[166] But to the Court's current conservative majority, whether a suit for money damages is allowed—and, accordingly, whether the Constitution is being properly enforced—is beyond the Court's purview.[167] The Court's current "don't look at me, I just work here" attitude is extremely worrisome to say the least.

It is astonishing to see how far the Court has strayed from its early *Bivens* decisions. In *Carlson*, the plaintiff had an alternative remedy under the Federal Tort Claims Act ("FTCA"), but the Court nonetheless found that this did not preclude a *Bivens* suit because the FTCA, unlike *Bivens*, didn't allow for punitive damages.[168] In stark contrast, in *Hernández*, it was undisputed that the plaintiffs, left with a dead child, had no form of relief other than a *Bivens* suit,[169] yet the Court left them out to dry. As Chief Justice Marshall stated long ago: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[170] The Court's recent *Bivens* decisions seem to lack any "essence of civil liberty."

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162. *See id.* at 743 (holding that the courts should reject a plaintiff's *Bivens* suit whenever it has "reason to pause" about whether *Bivens* should apply).

163. *Id.* If I were a betting man (which I am), I would bet this "reason to pause" language is going to be the most cited phrase from *Hernández* and will be quoted in nearly every motion to dismiss and order of dismissal going forward.

164. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

165. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 599–605 (3d. ed. 2000) (discussing the constitutional presumption that "for every right, there should be a remedy"); *see also* Tex. & Pac. Ry. v. Rigsby, 241 U.S. 33, 39–40 (1916) ("So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law. This is but an application of the maxim, *Ubi jus ibi remedium*." (internal quotes omitted)).

166. THE FEDERALIST NO. 48 (James Madison).

167. *See Hernández*, 140 S. Ct. at 750.

168. Carlson v. Green, 446 U.S. 14, 20–21 (1980).

169. *Hernández*, 140 S. Ct. at 757 (Ginsburg, J., dissenting).

170. Marbury v. Madison, 5 U.S. 137, 163 (1803).

The core assumption underlying *Bivens* was that the "importance of [enforcing] constitutional rights justified implying a cause of action directly from the Constitution."[171] The *Hernández* majority "not in so many words"[172] rejected this assumption. To the *Hernández* majority, it was more important to show extreme deference to Congress and the Executive than to ensure individual rights are meaningfully vindicated. This value judgment is very misguided. Our Constitution is supposed to be "the greatest document ever struck off by the . . . pen of man."[173] The entire point of the Constitution was to create a system of government that would maximize the people's safety and happiness.[174] It promises to confer actual, enforceable rights, not theoretical rights.[175] It promises to establish justice.[176] It promises to promote the people's general welfare.[177] And it promises to secure liberty.[178] *Hernández* fails to fulfill any of these promises.

Second, the Court's reasoning in *Hernández* is incredibly flimsy. According to the *Hernández* majority, the plaintiffs' *Bivens* suit was inappropriate because of its "foreign relations" and "national security" implications.[179] However, as Justice Ginsburg pointed out in her dissenting opinion, the plaintiffs complained of only "the rogue actions of a rank-and-file law enforcement officer," whose conduct had little to no bearing on U.S. foreign policy.[180] "[N]o policies or policymakers [were] challenged,"[181] and the Mexican government explicitly wanted the plaintiffs' suit to proceed.[182] The Mexican government's amicus brief, in fact, warned that *declining* to hear the case "is what has the potential to negatively affect international relations."[183] Phrased slightly differently: allowing the U.S. government to

171. Tribe, *supra* note 38, at 25.

172. *Compare with,* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

173. Thurman W. Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 729, 746 (1935).

174. *See, e.g.*, Gary L. Young, *When Rights Clash: Applying Our Principled and Prudential Constitution*, 7 REGENT U. L. REV. 61, 84 (1996) (arguing that the actual form our government takes is merely "a prudential matter," which is "subservient to the People's interests in safety and happiness") (emphasis altered).

175. *See* Faitoute Iron & Steel Co. v. City of Ashbury Park, N.J., 316 U.S. 502, 514 (1942) ("The Constitution is intended to preserve practical and substantial rights, not to maintain theories." (internal quotations and citations omitted)).

176. U.S. Const. Preamble.

177. *Id.*

178. *Id.*

179. Hernández v. Mesa, 140 S. Ct. 735, 744, 746 (2020).

180. *Id.* at 757 (Ginsburg, J., dissenting).

181. *Id.*

182. *Id.* at 758.

183. *Id.* (Ginsburg, J., dissenting) (quoting Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, Hernández v. Mesa 140 S. Ct. 735 (2020) (2019 WL 3776030)).

kill Mexican citizens without consequences is far more likely to negatively affect U.S.-Mexican relations than allowing the plaintiffs' *Bivens* suit to proceed.

Additionally, the *Hernández* majority stressed that courts should not extend U.S. law to conduct that happened "abroad."[184] But, again, this makes no sense; the plaintiffs were attempting to apply U.S. law in a U.S. court to a U.S. citizen who was employed by the U.S. government for conduct committed on U.S. soil. The majority never persuasively explains how allowing the plaintiffs' suit to proceed would improperly extend U.S. law abroad. The Court instead, as it has seemingly done in the past, played its "national security" trump card, allowing it to reach a heartless and unjustifiable result while acting like its hands were tied.[185]

If *Hernández* is boiled down to its essentials, the Court's conservative majority allowed an agent of the federal government to escape liability for shooting an unarmed child in the back, simply because the agent's bullet happened to land a few feet on the wrong side of an imaginary line. This is not a persuasive reason to limit the reach of the Bill of Rights. In *Bivens* and *Hernández*, the Court faced the same choice: allow the plaintiff to receive "damages," or "nothing."[186] In *Bivens*, the Court chose damages; in *Hernández*, the Court chose nothing. For this reason, *Hernández*, perhaps more than any other decision, raises serious questions about the Court's ability—or at least willingness—to do justice.

Third, the Court seems to be inching toward prohibiting *Bivens* suits entirely. Justice Alito's majority opinion in *Hernández* is an anti-*Bivens* tour de force—where he even went so far as to claim that *Bivens* would have been

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184. *Id.* at 747–49 (majority opinion).

185. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409, 2419–20 (2018) (allowing the Trump administration, with virtually no evidence, to ban Muslim-Americans from traveling to the U.S. because of alleged "national security" risks); Ziglar v. Abbasi, 137 S. Ct. 1843, 1861–62 (2017) (immunizing high-ranking federal officials from a *Bivens* suit because of alleged, but completely unproven, national security concerns); Kerry v. Din, 135 S. Ct. 2128, 2139–41 (2015) (Kennedy, J., concurring) (arguing that the federal government's mere citation to a national-security-related statute, without more, allows the it to deny an immigrant's visa application); Haig v. Agee, 453 U.S. 280, 306–10 (1981) (allowing the Executive Branch to revoke an American citizen's passport because of alleged, but by no means proven, "national security" concerns); Korematsu v. United States, 323 U.S. 214, 218 (1944) (allowing the forced internment of Japanese-Americans due to nondescript and unproven "national defense and safety" concerns); *see also* Al-Aulaqui v. Obama, 727 F. Supp. 2d 1, 46 (D. D.C. 2010) (allowing the Obama administration, without going through the normal channels of due process, to kill a U.S. citizen living abroad because of hazy national security allegations).

186. *Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

decided differently had the Roberts Court heard it.[187] And two Justices—Thomas and Gorsuch—informed all interested attorneys that they are standing at the ready to "abandon the [Bivens] doctrine altogether."[188] The Roberts Court made clear in *Hernández* that it is ready to explicitly overrule *Bivens*, *Davis*, and *Carlson*.

Finally, it is worth mentioning as an aside that Justice Alito's majority opinion in *Hernández* is remarkably condescending. The idea that the Court simply "came to appreciate . . . the tension between [*Bivens*] and the Constitution's separation of legislative and judicial power"[189] is ridiculous. This implies that Justices Brennan, Marshall, White, Douglas, Harlan, Blackmun, Stevens, Souter, Ginsburg, Breyer, Kagan, and Sotomayor—all of whom have voted to allow and extend *Bivens* suits—were incapable of appreciating and balancing "the Constitution's separation of legislative and judicial power."[190] Justice Alito also seems to suggest that *Erie Railroad v. Tompkins*[191] shows that *Bivens* was incorrectly decided.[192] But *Erie* was decided thirty-three years before *Bivens*, and Justice Brennan, *Bivens*'s author, was certainly more than aware of *Erie*'s reach, given the fact that he authored some of the seminal cases on choice-of-law in diversity cases.[193]

"Cases that get distinguished often enough are commonly said to die—or at least to suffer near-death experiences."[194] Between 1980 and 2020,

187. *Hernández*, 140 S. Ct. at 742–43 (majority opinion).

188. *Id.* at 752–53 (Thomas, J., concurring) ("The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether.").

189. *Id.* at 741 (majority opinion).

190. *Cf. id.*

191. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

192. *See Hernández*, 140 S. Ct. at 742 ("[Separation-of-powers] problem[s] do[] not exist when a common-law court, which exercises a degree of lawmaking authority, fleshes out the remedies available for a common-law tort. Analogizing Bivens to the work of a common-law court, petitioners and some of their amici make much of the fact that common-law claims against federal officers for intentional torts were once available. But Erie held that '[t]here is no federal general common law,' and therefore federal courts today cannot fashion new claims in the way that they could before 1938." (internal citations omitted)).

193. *See, e.g.*, Byrd v. Blue Ridge Rural Electric Co-Op., Inc., 356 U.S. 525 (1958) (per Brennan, J.). Justice Alito's *Erie* argument is ridiculous. The *Erie* doctrine is meant to (i) discourage forum shopping and (ii) avoid inequitable administration of the law. Hanna v. Plumer, 380 U.S. 460, 468 (1965). Justice Alito does not explain how *Bivens* suits harm either of these goals. In fact, I would argue that disallowing *Bivens* suits leads to inequitable administration of the law, as a victim's right to redress depends almost entirely on whether the defendant was a *state* or *federal* official.

194. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 101 (2016).

Bivens suffered over a dozen near-death experiences. The Court's newfound reluctance to enforce the Constitution shows that *Bivens*, *Davis*, and *Carlson* have "slowly become mere ghosts of their former selves, barely clinging to existence."[195] *Bivens*'s death, it seems, may be on the horizon.

III. THE COURT CHOSE THE RESULTS IN *ABBASI* AND *HERNÁNDEZ*

This Part makes one large point and three related subpoints. The large point: originalism is a sham. Conservative judges, just like their liberal counterparts, *choose* the outcomes of difficult cases to suit their own predilections. This Part makes this main point by making three subpoints: (A) nearly every constitutional provision is susceptible to multiple, equally plausible interpretations, and judges are forced to make personal value judgments when deciding tough cases; (B) conservative judges use history as a smokescreen to decide cases in a way that matches their personal preferences, picking and choosing from a seemingly unlimited number of historical sources to support their predetermined outcome; and (C) conservative judges often choose heartless and unacceptable results.

A. Nearly Every Constitutional Provision is Susceptible to Multiple Plausible Interpretations

At a gut level, there is clearly something wrong with the Court's *Abbasi* and *Hernández* decisions. The Court, after all, allowed federal officials to imprison, torture, and kill racial and ethnic minorities without any specter of civil liability. And as the dissenting Justices made clear in these cases, the Court surely could have reached the opposite conclusion without disrupting our system of checks and balances or inappropriately interfering with foreign policy.[196]

But defenders of these decisions argue the Court was dutybound to reach these results.[197] The Court's conservatives were simply "enforcing the Constitution as written," the platitude goes. The *Abbasi* and *Hernández* majorities were distilling the "meaning of the [Constitution] as understood at

195. *Constitutional Remedies*—Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV. 313, 317–18 (2017) (quoting WILLIAM O. DOUGLAS, WE THE JUDGES 199 (1956)).

196. *See Hernández*, 140 S. Ct. at 756–59 (Ginsburg, J., dissenting); *Abbasi*, 137 S. Ct. at 1876–85 (Breyer, J., dissenting).

197. *See Hernández*, 140 S. Ct. at 751–53 (Thomas, J., concurring); A. Benjamin Spencer, *Justices Make the Tough—But Right—Call in Cross-Border Shooting Case*, THE HILL, Feb. 28, 2020, https://thehill.com/opinion/criminal-justice/484866-justices-make-the-tough-but-right-call-in-cross-border-shooting-case [https://perma.cc/P353-PZFV] ("At bottom, this case was not about whether Hernández's family deserves an avenue for seeking redress for the alleged violation of their son's Fourth and Fifth Amendment rights. Rather, it is about the power of federal courts to provide a remedy where Congress has provided none.").

the time of [its] ratification," and these rulings were "entirely distinct from [the Justices'] individual preferences."[198]

To quote originalism's patron saint, Justice Scalia, this argument is "pure applesauce."[199] When addressing fuzzy, open-ended constitutional questions, there is no one, objectively correct legal answer. Long ago, Chief Justice John Marshall reminded us that "we must never forget that it is a *constitution* we are expounding," a Constitution "intended to endure for ages to come."[200] "The framers of the Constitution," in other words, "wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live."[201]

The Fourth Amendment, for example, protects the people from "unreasonable" searches and seizures.[202] But deciding whether a police officer's conduct was "unreasonable" requires a judge to make a value judgment and rely on their own understanding of reasonable conduct. Justice Thomas, to be sure, has a different understanding of "reasonable" police behavior than Justice Sotomayor.[203] Is looking through a suspect's cellphone after an arrest reasonable?[204] Is placing a GPS tracker on a suspect's vehicle

198. *Cf.* Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1494 (2012) (reciting originalism's typical mantra); *See also* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) (same); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (providing an overview of how originalism developed).

199. King v. Burwell, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting).

200. McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819) (emphasis in original).

201. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

202. U.S. Const. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…"); *see also* Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (noting that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'").

203. *Compare* Birchfield v. North Dakota, 136 S. Ct. 2160, 2196–98 (2016) (Thomas, J., concurring in part and dissenting in part) (arguing it is reasonable for the police to administer a warrantless blood-draw and a breathalyzer test), *with id.* at 2187–96 (Sotomayor, J., concurring in part and dissenting in part) (arguing it is unreasonable for the police to administer a warrantless blood-draw and a breathalyzer test). *Compare* Utah v. Strieff, 136 S. Ct. 2056, 2059–64 (2016) (Thomas, J., majority opinion) (holding that it is reasonable for an officer to stop a pedestrian without suspicion because the officer later discovered the pedestrian had unpaid parking tickets), *with id.* at 2064–71 (Sotomayor, J., dissenting) (arguing that it is unreasonable for an officer to stop a pedestrian without suspicion, regardless of later-discovered unpaid parking tickets).

204. Riley v. California, 573 U.S. 373, 378 (2014).

reasonable?[205] Is using the data collected from cell-towers to track a suspect's movements reasonable?[206] These questions, obviously, do not have clear-cut answers—and they involve technology the framers could never have imagined, let alone expressed opinions on.

When dealing with constitutional rights, it is usually easy to find the edges. The First Amendment certainly protects the people's right to peacefully criticize the government,[207] but it does "not protect a man in falsely shouting fire in a theatre and causing a panic."[208] The trick is deciding where to draw the line in the in-between, gray-area cases. Can the government, consistent with the First Amendment, limit the amount of money corporations and unions can spend on elections?[209] Can the government prohibit elected judges from speaking on certain political issues during their campaigns to maintain the appearance of impartial courts?[210] Can the courts prevent the press from reporting on high-profile criminal cases to ensure the defendant is afforded a fair trial?[211] Answering these questions necessarily requires value judgments and policy analyses, not the "contrived and opaque veil of historical inquiry" that typically accompanies the originalist school of thought.[212]

Similarly, First Amendment cases often turn on whether the government had a "compelling interest" that justified its restriction on speech,[213] and sex-based discrimination claims under the Fourteenth Amendment often turn on whether the government had an "important interest" that justified its discrimination.[214] Determining whether the government's proffered interest is sufficiently "important" or "compelling" necessarily requires the judge to

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205. United States v. Jones, 565 U.S. 400, 402 (2012).

206. Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018).

207. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (describing the ability to criticize the government as "the central meaning of the First Amendment"); *see also* Alexander J. Lindvall, *Frankly, My Dear, I Don't Give a *Darn*—An Argument Against Censoring Broadcast Media*, 7 ARIZ. ST. SPORTS & ENT. L.J. 153, 157, 160–61 (2017) (noting that criticizing the government and informing the electorate are two of the core purposes underlying the First Amendment).

208. Schenck v. United States, 249 U.S. 47, 52 (1919).

209. Citizens United v. FEC, 558 U.S. 310, 318–19 (2010).

210. Republican Party of Minnesota v. White, 536 U.S. 765, 768 (2002).

211. Nebraska Press Association v. Stuart, 427 U.S. 539, 541 (1976).

212. Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1489 (2012) (noting that originalism often requires judges to rely heavily on historical sources rather than pragmatic policy arguments).

213. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 395–96 (1992); Boos v. Barry, 485 U.S. 312, 321 (1988).

214. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 524 (1996); Miss. Univ. for Women v. Hogan, 458 U. S. 718, 724 (1982).

make a value judgment. These issues cannot be answered simply by looking to the Constitution's text or the framers' beliefs.

This game can be played with virtually any part of the Constitution. If you threw a dart at the Constitution, chances are you would hit an ambiguous phrase that needs more context. Article I, § 3 of the Constitution gives the Senate the "sole power to try all Impeachments."[215] But if the President was impeached, could the Senators get together and have a "coin toss" to decide whether the President should be removed from office?[216] The Eighth Amendment prohibits the government from inflicting "cruel and unusual punishments" on prisoners.[217] Is tying a prisoner to a pole on a hot day cruel and unusual?[218] Even the comically specific parts of the Constitution are open to interpretation. The Seventh Amendment, for example, guarantees a jury trial in all civil cases where the amount at issue "exceed[s] twenty dollars."[219] But should this twenty-dollar threshold be adjusted for inflation?[220]

These are difficult questions, and the answers cannot be found in the text of the Constitution or historical sources. To determine the best answer to truly difficult constitutional questions—like those asked above—a judge needs to utilize all the tools in his or her judicial toolbox. When interpreting and applying fuzzy constitutional language, a judge should look to (i) the provision's text, (ii) the history surrounding the provision, (iii) available judicial precedent, (iv) the provision's purpose, (v) the consequences of a particular interpretation, and (vi) our American tradition as a whole.[221] Conservative judges, however, often use historical sources as their primary—and sometimes only—guide. There is a reason for this, as discussed below.

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215. U.S. Const. art I, § 3, cl. 6.

216. *See* Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring) (arguing that "[i]f the Senate were to act in a manner seriously threatening the integrity of its [impeachment] results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' judicial interference might well be appropriate." (internal citations and quotations omitted)).

217. U.S. Const. amend. VIII.

218. Hope v. Pelzer, 536 U.S. 730, 736–37 (2002).

219. U.S. Const. amend. VII.

220. Note, *The Twenty Dollar Clause*, 118 HARV. L. REV. 1665, 1672–73 (2005).

221. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 74 (2010) (arguing that a judge's interpretational tools are text, history, tradition, precedent, purpose, and consequences); *see also* Hayes v. Cont'l Ins. Co., 872 P.2d 668, 672 (Ariz. 1994) (noting that the courts should look to a provision's "context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose" when interpreting ambiguous language).

B. Conservative Judges Use History as a Smokescreen to Reach Their Desired Outcomes

At its core, originalist theory maintains that "constitutional interpretation should be characterized exclusively by an effort to determine the Constitution's meaning [through] some form of historical inquiry."[222] Because of this, originalist judges often erect a "contrived and opaque veil of historical inquiry" when deciding cases, where they can pick and choose from a seemingly unlimited number of historical sources to support their position.[223] This history-made-me-do-it method of deciding cases provides "an ideal smokescreen behind which judges [can] pursue their personal, moral, political, or economic goals with relative impunity."[224] Given the seemingly unlimited number of available historical sources, judges can easily reverse engineer an opinion to fit their desired outcome.

To illustrate, in *District of Columbia v. Heller*,[225] the Court's 2008 decision that held the Second Amendment bestows an individual right to own handguns for home protection, Justice Scalia and Justice Stevens both relied *heavily* on historical sources in their respective opinions, yet reached opposite conclusions.[226] A rough count shows that Justices Scalia and Stevens each cited about 200 sources authored before 1900 in their respective opinions—including an 1807 book called "Portraiture of Quakerism,"[227] a 1794 book titled "The Distinction Between Words Esteemed Synonymous in the English Language,"[228] and "An Act for the trial of Negroes."[229]

Heller shows that relying on history as an exclusive guide gives rise to an obvious problem: there is essentially an unlimited number of historical sources that can be used to justify a point. If you want to conclude the Second Amendment gives individuals the right to own modern-day weapons, cite the 200 or so historical sources in Justice Scalia's opinion. If you want to conclude the opposite, cite the 200 or so historical sources in Justice Stevens's dissent. Seemingly recognizing this problem, Justice Scalia was forced to chastise Justice Stevens in *Heller* for citing the "wrong" history:

> Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a

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222. Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1487 (2012).

223. *Id.* at 1489.

224. *Id.* at 1522.

225. District of Columbia v. Heller, 554 U.S. 570 (2008).

226. *Compare id.* at 573–636 (Scalia, J., majority opinion), *with id.* at 636–80 (Stevens, J., dissenting).

227. *Id.* at 590 (majority opinion).

228. *Id.* at 647 (Stevens, J., dissenting).

229. *Id.* at 581 (majority opinion).

> text that was widely understood to codify a pre-existing right, rather than to fashion a new one.[230]

To Scalia, the Second Amendment's "drafting history" is "dubious" history, while *his* sources—*his* personally selected newspaper articles, letters, and journals—represent the correct history.[231]

To quote Scalia himself, this whole exercise is just a bunch of "interpretive jiggery-pokery."[232] If this is truly going to be the Court's model for deciding cases, we should stop appointing lawyers and judges to the bench and start appointing historians and linguists (and perhaps psychic mediums). Lawyers tend to be forward-looking, not backward-looking. They are good at solving novel, real-world problems, not poring through dusty historical sources. If the true task is determining what James Madison and his cohorts thought of modern-day legal issues, most lawyers are ill-suited for this job.

In contrast, in his *Heller* dissent, Justice Breyer noted that approximately seventy people are killed by guns each day, which translates to roughly 30,000 gun-related deaths per year, and that an additional 200,000 people suffer from gun-related injuries each year.[233] He also noted that (a) thousands of children die each year due to gun accidents, (b) handguns are involved in the vast majority of gun-related injuries and deaths, and (c) "[f]or every intruder stopped by a homeowner with a firearm, there are four gun-related accidents within the home."[234] These real-world statistics, Justice Breyer argued, should at least be *considered* when determining the extent to which the Second Amendment protects the right to own and carry present-day firearms.[235]

Similarly, in *Brown v. Board of Education*, perhaps the Court's most lauded decision,[236] the Court unanimously rejected the idea of originalism:

> In approaching th[e] problem [of racial segregation in schools], we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[237]

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230. *Id.* at 603.

231. *Id.*

232. King v. Burwell, 576 U.S. 473, 506 (2015) (Scalia, J., dissenting).

233. *Heller*, 554 U.S. at 694 (Breyer, J., dissenting).

234. *Id.* at 694–97.

235. *Id.* at 699–705.

236. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part) (describing *Brown* as "the single most important and greatest decision in th[e] Court's history").

237. Brown v. Board of Educ. of Topeka, Kan., 347 U.S. 483, 492–93 (1954).

Which of the following arguments is more persuasive? (A): The public schools cannot be racially segregated because segregation gives black students a lifelong "feeling of inferiority as to their status in the community," and studies consistently show that racial segregation negatively affects black children's ability and willingness to learn.[238] (B): The public schools can be racially segregated because the Congressmen who adopted the Fourteenth Amendment in 1868 were pro-segregation.[239] Any reader with a heart and a brain likely chose argument (A). When interpreting and applying the Constitution, the framers' opinions, of course, should be considered; but if following the framers would lead to patently unacceptable results, they should be cast aside.

The Court's decision in *Brown* and Justice Breyer's dissent in *Heller* show that one cannot (or at least should not) engage in constitutional interpretation without considering the real-world consequences of a particular interpretation. The Constitution was ratified expressly to "form a more perfect Union, establish Justice, insure domestic Tranquility, [and] promote the general Welfare."[240] If a particular interpretation would clearly harm the country, decrease the people's general welfare, or lead to unjust results, that interpretation must be incorrect, because it goes against the express purpose of the document itself.

The "ultimate question" when dealing with squishy, open-ended constitutional questions should be: "[W]hat do the words of the text mean in our time?"[241] "For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current

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238. *Id.* at 494; *id.* at 494 n.11 (citing multiple studies on the psychological effects of racial segregation).

239. It is well-accepted that the Congress that adopted the Fourteenth Amendment would have widely disagreed with *Brown*. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 132–46 (Liberty Fund 2nd ed. 1997) (concluding that the drafters of the Fourteenth Amendment did not intend for the Amendment to prohibit school segregation); RICHARD KLUGER, SIMPLE JUSTICE 634 (Vintage Books 1st ed. 1977) (same); Alexander M. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 10, 53–59 (1955) (same). The Congress that adopted the Fourteenth Amendment, after all, also voted to segregate the D.C. school system. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 12 (6th ed. 2020). In short, "[v]irtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation," and "[t]o strike down public school segregation in *Brown*…the Justices consciously [chose] to burst asunder the shackles of original intent." Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991).

240. U.S. CONST. Preamble.

241. WILLIAM J. BRENNAN, THE CONSTITUTION OF THE UNITED STATES: CONTEMPORARY RATIFICATION 7 (Oct. 12, 1985) (lecture delivered at Georgetown Law's "Text and Teaching Symposium").

needs."[242] Constitutional interpretation, in other words, should always look to how the law actually affects people's lives; and judges should not reach patently unfair results because they think the ghost of James Madison would have wanted it.

Take the goal of "establish[ing] Justice," for example. In 1215, the Magna Carta declared that "justice" required both fair processes and fair results.[243] Consistent with this theory, the Court has sought to establish justice by requiring both procedural and substantive due process.[244] That is, the government must implement and follow fair procedures when depriving a person of life, liberty, or property,[245] and it must also ensure that these processes do not produce patently unfair results.[246]

In *Skinner v. Oklahoma*, for example, the Court held that individuals have a right of private sexual autonomy that is beyond the government's reach.[247] In 1935, Oklahoma passed the Habitual Crime Sterilization Act, which directed the government to sexually sterilize "habitual criminals" (i.e., criminals who committed two or more felonies involving "moral turpitude").[248] When sterilizing these criminals, men would be subject to a forced vasectomy, and women would be subject to a forced salpingectomy

242. *Id.* *See also* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987) ("[T]he true miracle was not the *birth* of the Constitution, but its *life*.").

243. ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 67 (2018).

244. *Id.* As an aside, *Abbasi* and *Hernández* betray this promise on both counts—the plaintiffs in these cases were not afforded a fair process (they were not even allowed to bring their cases), and the results were clearly unfair (the *Hernández* majority even recognized the case was "tragic"). Hernández v. Mesa, 140 S. Ct. 735, 739 (2020).

245. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

246. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (holding that the Due Process Clause protects unenumerated rights that are "deeply rooted in this Nation's history and tradition"); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (holding that the Due Process Clause prevent the government from breaking up family dwellings without a compelling justification); Rochin v. California, 342 U.S. 165, 172 (1952) (holding that the Due Process Clause prohibits government conduct that "shocks the conscience"); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (holding that the Due Process Clause prevents the government from interfering with rights "implicit in the concept of ordered liberty"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the Due Process Clause protects "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); *see also* Ryan C. William, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411 (2010) (noting that it is widely accepted that the Due Process Clause has a substantive component).

247. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

248. *Id.* at 536–37.

(removal of the fallopian tubes).[249] After Jack Skinner was convicted of "stealing chickens," the state sought to sterilize him.[250]

On appeal, the Supreme Court unanimously struck down this law and prevented the state from performing involuntary, testicular surgery on Skinner.[251] Writing for the Court, Justice Douglas observed that sexual autonomy is "one of the basic civil rights of man."[252] "Marriage and procreation are fundamental to [our] very existence and survival," he noted.[253] And "[t]he power to sterilize, if exercised, may . . . [have] devastating effects" that could "cause races or types which are inimical to the dominant group to wither and disappear."[254] In other words, although the Constitution does not mention eugenics or government-forced sterilizations, this is not a power the government should have.

Similarly, in *Lawrence v. Texas*, the Court held that the government cannot criminalize private sexual relations between consenting adults.[255] In 1998, Houston police arrested and criminally charged John Lawrence and Tyron Garner for having gay sex in a private apartment.[256] As the Court made clear, neither party was coerced, there were no minors involved, and the act was being performed behind closed doors.[257] The case involved "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[258] In overturning Lawrence's and Garner's convictions, the Court made clear that "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[259]

These seem to be perfectly sensible rulings. The Constitution, our nation's "great outline,"[260] does not allow the government to throw people in jail for harmless, private sexual conduct;[261] and the government cannot force people to undergo invasive, life-altering surgeries without justification.[262] The Court's modern conservatives, however, have consistently rejected the doctrine of substantive due process—and have consequently advocated for a

249. *Id.*
250. *Id.* at 537.
251. *Id.* at 541.
252. *Id.*
253. *Id.*
254. *Id.*
255. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
256. *Id.* at 563.
257. *Id.* at 578.
258. *Id.*
259. *Id.*
260. Davis v. Passman, 442 U.S. 228, 241 (1979) (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)).
261. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
262. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 540–41 (1942).

government with greater power to interfere with basic civil rights.[263] Justice Scalia, for example, would like to "vaporize" the Court's substantive due process line of cases.[264]

This makes no sense. Constitutional interpretation should always look to how the law actually affects people's lives.[265] In resolving today's problems, it makes no sense for conservative Justices to demand we resolve them in a way that our slave-owning, long-deceased forefathers would have agreed with. The framers were not clairvoyant or omniscient; their prized document could not ward off a civil war and had to be amended twenty-seven times before it proved to be truly workable. So, while the framers' views—to the extent they can actually be known—should of course be considered, they should never be dispositive.

C. Conservative Judges Often Choose to Reach Heartless and Unacceptable Results

Most Americans know shockingly little about the Constitution and the Supreme Court. A University of Pennsylvania study, for example, found that

263. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 695–71 (2015) (Roberts, C.J., dissenting) (comparing the Court's modern substantive due process cases to the *Dred Scott* and *Lochner* decisions); *id.* at 720 (Scalia, J., dissenting) (arguing that "[substantive due process] stands for nothing whatever, except those freedoms and entitlements that [the] Court *really* likes"); *id.* at 721–22 (Thomas, J., dissenting) (arguing that substantive due process is an indefensible legal doctrine); *id.* at 722 n.1 (Thomas, J., dissenting) (describing substantive due process as "an imaginary constitutional protection" that requires a "revisionist view of our history and tradition"). *See also* Mays v. City of East St. Louis, 123 F.3d 999, 1001 (7th Cir. 1997) (per Easterbrook, J.) (calling substantive due process an "oxymoron"); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494–96 (1997) (arguing that substantive due process is textually unsupportable, and that the Court's long line of substantive due process cases have weak precedential value).

264. *See* McDonald v. Chicago, 561 U.S. 742, 909 (2010) (Stevens, J., dissenting) (summarizing Justice Scalia's position on substantive due process) ("Justice Scalia does not seem troubled by the fact that his method [of deciding cases] is largely inconsistent with the Court's canonical substantive due process decision… To the contrary, he seems to embrace this dissonance. My method seeks to synthesize dozens of cases on which the American people have relied for decades. Justice Scalia's method seeks to vaporize them."). So, given Justice Thomas's and Justice Scalia's dismissive attitude toward fundamental rights and precedent, like Justice Stevens, "I am left to wonder, which of us is more faithful to this Nation's constitutional history? And which of us is more faithful to the values and commitments of the American people, as they stand today?" *Id.*

265. *See, e.g.*, Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 ILL. L. REV. 1129, 1145 (1996) (summarizing Justice Marshall's approach to legal interpretation as a "a practical, commonsense approach" that always looked to the "way in which the law [affected] people's lives").

seventy-four percent of those surveyed could not name all three branches of government, thirty-seven percent could not name any of the rights guaranteed by the First Amendment, and fifty-three percent believe the Constitution affords no protections to undocumented immigrants.[266] When asked about the courts during election season, Republican presidential candidates usually say something along the lines of, "If elected, I will appoint judges who will interpret the Constitution as written and as it was originally understood."[267] Democratic candidates usually say, "I will appoint judges who respect a woman's right to choose and who understand the corrosive effect money has on politics."[268] And that is usually the extent of the discussion.

But outside the halls of American law schools, the actual substantive outcomes of Supreme Court cases are rarely discussed.[269] And it is highly unlikely that voters are following up to see if judges are voting the way they would like. This presents an interesting question: Do Republican-appointed judges reach results that benefit Republican voters or are these people voting against their self-interest? This Article argues that if the Republican base actually examined the Republican-appointed Justices' voting records, they would be largely disappointed.

Conservative Justices often vote in ways that would disappoint conservative voters. For example, Republican-appointed Justices have held that foreign corporations cannot be sued for bankrolling terrorist organizations.[270] School staff members cannot be held liable for strip-searching a thirteen-year-old middle school student to see if she was carrying ibuprofen.[271] A man can be sentenced to life in prison for stealing $150 worth

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266. Michael Rozansky, *Americans Are Poorly Informed About Basic Constitutional Provisions* (Sept. 12, 2017), available at https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/?utm_source=news-release&utm_medium=email&utm_campaign=2017_civics_survey&utm_term=survey&utm_source=Media&utm_campaign=e5f213892a-Civics_survey_2017_2017_09_12&utm_medium=email&utm_term=0_9e3d9bcd8a-e5f213892a-425997897 [https://perma.cc/QY96-4Y9H].

267. These words, I believe, are meaningless. The founders disagreed amongst themselves on almost every issue, and your average voter has absolutely no idea what James Madison—or any other founder—would think on a given topic. The candidate's words are meant to be hollow, allowing the (likely uninformed) voter to fill them with whatever meaning they wish. To some, these words mean "I'll appoint a Justice who's against abortion." To others, it means "I'll appoint a Justice who's pro-gun." And so on.

268. As if these are the only two issues the courts decide.

269. There are, of course, obvious, high-profile exceptions. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Citizens United, 558 U.S. 310 (2010); Bush v. Gore, 531 U.S. 98 (2000); Roe v. Wade, 410 U.S. 113 (1973).

270. Jesner v. Arab Bank, 138 S. Ct. 1386, 1390 (2018) (per Kennedy, J.).

271. Safford v. Redding, 557 U.S. 364, 383–403 (2009) (Thomas, J., concurring in part and dissenting in part).

of videotapes for his children.[272] The government can ban ethnic groups from entering the country, explicitly because of their religion and national origin.[273] A prosecutor's office cannot be held responsible for withholding exonerating evidence in a criminal trial, thereby knowingly placing an innocent man in jail for fourteen years.[274] Police departments cannot be sued for instituting an illegal and dangerous "chokehold policy" during routine traffic stops,[275] even though the policy caused one detainee to spit up blood and urinate and defecate on himself.[276] Unions are free to spend unlimited amounts of money to influence the outcomes of elections.[277] Congress cannot pass laws to prevent the southern states from enacting laws that suppress the black vote.[278] Federal court rules do not allow plaintiffs to bring claims of government-endorsed torture and unlawful detention if the trial judge finds their allegations "implausible."[279] Government officials cannot be sued for unlawfully detaining and physically abusing prisoners because of their religion.[280] The government can track people using their cellphones without a warrant or probable cause.[281] Congress cannot afford women the right to sue their rapists in federal court.[282] Businesses can prevent their employees from collectively suing for systemic wage underpayment.[283] Federal officials can hold illegal aliens indefinitely, without bail or a hearing.[284] State legislatures can redraw congressional districts exclusively to gain a partisan advantage, thereby entrenching incumbents in positions of power.[285] Judges can *never* be sued for their judicial actions, even if the judge knowingly violated the Constitution by ordering a girl to be secretly sterilized during her

272. Lockyer v. Andrade, 538 U.S. 63, 76–77 (2003) (per O'Connor, J.).

273. Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (per Roberts, C.J.).

274. Connick v. Thompson, 563 U.S. 51, 54 (2011) (per Thomas, J.).

275. City of Los Angeles v. Lyons, 461 U.S. 95, 110–13 (1983) (majority opinion of White, Burger, Powell, Rehnquist, and O'Connor, J.J.).

276. *Id.* at 115 (Marshall, J., dissenting) ("When [the detainee] regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was [then] issued a traffic citation and released.").

277. Citizens United v. FEC, 558 U.S. 310. 339–40 (2010) (per Kennedy, J.).

278. Shelby Cty., Ala. v. Holder, 570 U.S. 529, 556–57 (2013) (per Roberts, C.J.).

279. Ashcroft v. Iqbal, 556 U.S. 662, 682–83 (2009) (per Kennedy, J.).

280. Ziglar v. Abbasi, 137 S. Ct. 1843, 1868–69 (2017) (per Kennedy, J.).

281. Carpenter v. United States, 138 S. Ct. 2206, 2223–72 (2018) (Kennedy, Thomas, Alito, JJ., dissenting) (Gorsuch, J., dissenting).

282. United States v. Morrison, 529 U.S. 598, 627 (2000) (per Rehnquist, C.J.).

283. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (per Gorsuch, J.).

284. Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018) (per Alito, J.).

285. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (per Roberts, C.J.).

appendectomy.[286] It is not "unreasonable" for the police to arrest someone and tow their car for committing a minor civil traffic violation for which jail time was not a punishment.[287] Factually innocent prisoners can be put to death so long as their trial was proper.[288]

Once one buys into the premise that all judges—liberal and conservative alike—*choose* the outcomes of truly difficult constitutional cases, these results seem completely unacceptable. Almost all the above-mentioned cases were five-to-four decisions; and in many of these cases, the Supreme Court overruled a lower court to reach these results.[289] It is not as if these five Justices are reaching the only sensible conclusion. In fact, when the lower court decisions are taken into account, the Court's five conservatives are often in the minority.[290] These Justices are not "interpreting the Constitution as written." (As previously shown, that platitude is meaningless.[291]) Rather, these Justices are interpreting the Constitution the way they want it to be interpreted. Originalism is a lie. The sooner we all accept this, the sooner we can begin to discuss difficult cases in meaningful, real-world terms, rather than trying to discern the opinions of ghosts.

IV. THE LARGER PICTURE: IMMUNIZING GOVERNMENT OFFICIALS

The majority opinions in *Abbasi* and *Hernández* show the Roberts Court is more than willing to shield federal officials from civil rights suits.[292] But these decisions are just two pieces in a much larger puzzle. When the Court's

286. Stump v. Sparkman, 435 U.S. 349, 351–53, 364 (1978) (per White, J.).

287. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (per Souter, J.).

288. Herrera v. Collins, 506 U.S. 390, 427–28 (1993) (Scalia, J., concurring).

289. *See, e.g.*, *Rucho*, 139 S. Ct. at 2508 (reversing two 3-0 lower court decisions: Common Cause v. Rucho, 279 F. Supp. 3d 587 (M.D. N.C. 2018), and Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018)); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (reversing a 3-0 lower court decision, Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), and a 2-1 lower court decision, Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)); City of Los Angeles v. Lyons, 461 U.S. 95, 99–100 (1983) (reversing the 3-0 decision of the lower court: Lyons v. City of Los Angeles, 656 F.2d 417 (9th Cir. 1981)); Stump v. Sparkman, 435 U.S. 349, 364 (1978) (reversing the 3-0 decision of the lower court: Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977)).

290. *See, e.g.*, *Rucho*, 139 S. Ct. at 2508 (taking the lower court decisions into account, the Court's conservatives were in a 10-to-5 minority); *Epic Systems*, 138 S. Ct. at 1632 (taking the Circuit Court decisions into account, the Court's conservatives were in a 9-to-6 minority); *Lyons*, 461 U.S. at 99–100 (taking the Circuit Court decision into account, the Court's conservatives were in a 7-to-5 minority); *Sparkman*, 435 U.S. at 364 (taking the Circuit Court decision into account, the Court's conservatives were in a 7-to-5 minority).

291. *See supra* text accompanying note 193.

292. *See* Hernández v. Mesa, 140 S. Ct. 735, 739 (2020); Zigler v. Abbasi, 137 S. Ct. 1843, 1860, 1862–63 (2017).

decisions over the last fifty years or so are viewed holistically, the overall pattern is clear: "the Court's conservative majority almost always finds a way to rule against civil rights plaintiffs and this is usually done by closing the courthouse doors to litigants."[293] The Court has weaponized the doctrines of justiciability, governmental immunity, and *Bivens* limitations to ensure government officials will not be held civilly accountable; and through its narrow reading of the Federal Rules of Civil Procedure, the Court has "mounted impressive barriers to bringing civil cases at all."[294] This Part illustrates this point and argues that these court-made restrictions are neither wise nor legally required.

A. Justiciability

The Supreme Court's most important role is to interpret and enforce the Constitution and federal laws.[295] The Court's self-made justiciability doctrines, however, have made certain provisions of the Constitution unenforceable and have made many constitutional violations unredessable.[296] Most significantly, the Supreme Court has created and used "standing" requirements and the "political question doctrine" to avoid answering important constitutional questions.[297]

1. The Court's Standing Rules Are Unjustifiable

Article III, § 2 of the Constitution lists nine categories of lawsuits the federal courts can hear.[298] Article III repeatedly uses the terms "cases" and "controversies" when describing the types of suits within the federal courts' jurisdiction.[299] The Supreme Court has interpreted the terms "cases" and

293. Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 540 (2003).

294. Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2177 (2018).

295. *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1493 (2017); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 282 (1990).

296. Chemerinsky, *supra* note 295 at 1477–80 .

297. *See, e.g.*, *id.*; Chemerinsky, *supra* note 293 at 539 (arguing that the Burger and Rehnquist Courts created and expanded the doctrines of abstention and justiciability to ensure civil rights plaintiffs lose).

298. U.S. Const. art. III, § 2 cl. 1.

299. *Id.* ("The judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all *cases* affecting ambassadors, other public ministers and consuls;—to all *cases* of admiralty and maritime jurisdiction;—to *controversies* to which the United States shall be a party;—to *controversies* between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens

"controversies" to mean that the federal courts are accessible only to plaintiffs who have suffered a "distinct and palpable injury"[300] that is not too "general" in nature.[301] If a plaintiff's injury is not sufficiently "concrete" and "particularized," the federal courts cannot decide the case.[302]

This concrete-and-individualized-injury requirement is typically referred to as the Court's "standing" requirement.[303] Phrased in legal elements, to avoid dismissal of their case, plaintiffs must show (1) they have suffered a concrete and particularized injury, (2) this injury was caused by the defendant, and (3) the court has the ability to sufficiently redress this injury.[304] These requirements, on their face, seem reasonable enough; but the caselaw makes it clear that this doctrine is primarily (a) an escape hatch the courts can use to avoid deciding difficult cases and (b) a tool that judges can use to dismiss cases that do not align with their ideologies.[305]

"For many, achieving Article III standing is an insurmountable task."[306] Although the Supreme Court has provided a consistently cited test for standing,[307] it seems to manipulate the rules based on its views of the merits of particular cases.[308] As Professor Richard Pierce has observed, the Justices' votes on standing are "as easy to predict as the votes of their ideological counterparts in the legislature."[309] While the liberal Justices tend to find that environmental groups, employees, and prisoners have standing, their conservative counterparts do not.[310] And the conservative Justices tend to find that corporations and banks have standing, while their liberal counterparts do not.[311] These Justices all the while claim they are simply applying an

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of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." (emphasis added)).

300. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978).

301. Lujan v. Defenders of Wildlife, 504 U.S. 555, 575–76 (1992).

302. Spokeo, Inc. v. Robins, 136 S. Ct. 1543, 1548 (2016) (holding that a plaintiff's injury must be both "concrete" *and* "particularized" to have standing).

303. *E.g.*, *Lujan*, 504 U.S. at 560–61.

304. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010) (citing Horne v. Flores, 557 U.S. 433, 445 (2009)).

305. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) (showing that Justices grant and deny standing consistent with their perceived ideologies).

306. Alexander J. Lindvall, *Ending Dark Money in Arizona*, 44 SETON HALL LEGIS. J. 61, 81 (2019).

307. *See Lujan*, 504 U.S. at 573–76 (explaining that to have standing, a plaintiff must have (1) suffered a concrete and particularized injury that was (2) caused by the defendant's conduct and that can (3) be redressed by the court).

308. *See generally* Pierce, Jr., *supra* note 305.

309. Pierce, Jr., *supra* note 305, at 1743.

310. Pierce, Jr., *supra* note 305, at 1743

311. Pierce, Jr., *supra* note 305, at 1743

objective, nonpartisan, and constitutionally-required legal doctrine.[312] This is a lie.

The standing doctrine is unjustifiable. Although the courts and scholars have provided several justifications for this doctrine,[313] none can withstand even minimal scrutiny. First and foremost, proponents of the standing doctrine argue it is mandated by Article III's "case" and "controversy" language.[314] Because the courts can only hear "cases" and "controversies," the argument goes, the defendant must have caused the plaintiff some sort of concrete injury to ensure there is an actual controversy. This is nonsense. Although Article III limits the federal courts' jurisdiction to nine categories of lawsuits, it says nothing of injuries-in-fact, causation, or redressability. These are judicially contrived devices that need to be justified beyond the language of the Constitution.

Take *Allen v. Wright*, for example, where the Court dismissed a nation-wide, class-action lawsuit that challenged the Internal Revenue Service's ("IRS") illegal policy of giving tax-exempt status to racially discriminatory private schools.[315] Although federal law prevents the IRS from giving tax-exempt status to racially discriminatory private schools,[316] during the 1970s and 80s, the IRS refused to abide by this law and awarded tax-exempt status to many whites-only private schools.[317] A group of black parents from across the country sued.[318] By giving these racially discriminatory schools huge tax breaks, the parents argued, the IRS was unlawfully fostering the expansion of these private "white" schools, making desegregation in public schools much more difficult.[319]

Despite acknowledging that the parents' claim was "beyond any doubt . . . one of the most serious injuries recognized by our legal system,"[320] the Court dismissed the parents' case because the five-Justice majority did not believe there was a sufficient link between the IRS's unlawful conduct and

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312. Pierce, Jr., *supra* note 305, at 1743

313. *See, e.g.*, Shane Palmer, *No Legs to Stand On: Article III Injury and Official Proponents of State Voter Initiatives*, 62 UCLA L. REV. 1056, 1059 (2015) (citing multiple sources to show the primary purposes underlying the Court's standing doctrine).

314. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that the Court's standing doctrine is constitutionally required under Article III); Warth v. Seldin, 422 U.S. 490, 498–99 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.").

315. Allen v. Wright, 468 U.S. 737, 752–53 (1984).

316. *Id.* at 740.

317. *Id.* at 744–45.

318. *Id.* at 739.

319. *Id.* at 752–53.

320. *Id.* at 756.

the "white flight" happening around the country.[321] These Justices, in other words, did not believe "there were enough racially discriminatory private schools receiving tax exemptions in [the parents'] communities . . . to make an appreciable difference in public school integration."[322] Thus, the Court concluded that the Constitution did not allow the federal courts to hear the parents' suit.[323]

Similarly, in *Los Angeles v. Lyons*, the Court held that the victim of a police chokehold did not have standing to challenge the police department's "chokehold policy" because there was no evidence that there was a "real and immediate threat of future injury [to] the [victim]."[324] Although the police, pursuant to department policy, placed the victim in a carotid chokehold during a routine traffic stop, causing him to spit up blood and urinate and defecate on himself,[325] the Court found the victim's lawsuit was not allowed because a favorable court ruling could not erase the fact that he had already been choked.[326]

If the standing doctrine comes from Article III, as the Court claims, that means the lawsuits seen in *Allen* and *Lyons* were not "cases."[327] This is ridiculous. Any reasonable person would believe these plaintiffs had legitimate lawsuits that could only be described as "cases." But instead of addressing Article III's text, the *Allen* and *Lyons* majorities went down a meandering path of determining whether the plaintiffs suffered a sufficient injury, whether their injuries were sufficiently linked to the government, and whether the Court could sufficiently redress the injuries by stopping the government's unlawful behavior.[328] Where are these requirements in Article III? I cannot find them. These standing elements are judicially created rules—divorced from the text of the Constitution—that the Court uses to

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321. *Id.* at 757.

322. *Id.* at 758.

323. *Id.* at 766.

324. City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

325. *Id.* at 115 (Marshall, J., dissenting) ("When [the detainee] regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was [then] issued a traffic citation and released.").

326. *See id.* at 111 (holding that a plaintiff could not challenge a police department's chokehold policy, even though he had been horrifically choked by police, because he could not show that he would be choked again).

327. *Compare Allen*, 468 U.S. at 750–51 (holding that the standing doctrine is required by Article III, § 2 of the Constitution), *with* U.S. CONST. art. III, § 2 cl. 1 (providing that "[t]he judicial power…extend[s] to all *cases*…arising under this Constitution [and] the laws of the United States…" (emphasis added)).

328. This seems to be a common judicial tactic in this area of law: the Court makes so many legal inferences, and makes its opinion so meandering, that it is easy for the reader to lose sight of the big picture.

dodge difficult questions.[329] If standing is going to be justified, it needs to rely on more than empty words like "cases" and "controversies."

Second, proponents argue that the standing doctrine is appropriate because it helps lighten the courts' dockets.[330] This is at least partially true—any doctrine that allows the courts to dismiss cases is going to lighten dockets. But this makes a very questionable value judgment that places efficiency over the need for federal courts to interpret and enforce the Constitution. If you accept the assumption that the courts' primary purpose is to enforce and interpret the Constitution, then the argument that "judges are too busy to decide difficult constitutional issues" is nonsensical. What could judges be doing that is more important than deciding constitutional issues? That is the primary purpose for their existence.

Just look at *Allen* and *Lyons*. The *Allen* Court conceded that the plaintiffs' injury (racial segregation) was "one of the most serious injuries recognized by our legal system,"[331] yet the Court refused to rule on the issue.[332] And though the *Lyons* Court recognized that the government's challenged policy had killed at least fifteen people,[333] it still dismissed the plaintiff's case and refused to halt this deadly and likely unconstitutional policy.[334] Are we really supposed to believe that *these* are the cases that needed to be dismissed to lighten the dockets? The Court's docket was too heavy to determine whether the IRS could subsidize whites-only schools? The Court was too swamped to decide whether the police could continue to follow a policy that was killing people? This argument rings especially hollow when it comes from the Supreme Court, which currently hears only seventy to eighty cases per year.[335] Divide that caseload by the nine Justices and each of their four law clerks, and this argument borders on offensive.

Third, proponents argue the standing doctrine ensures the parties will be invested in their case because they have a personal stake in the outcome,

329. *See* Shane Palmer, *No Legs to Stand On: Article III Injury and Official Proponents of State Voter Initiatives*, 62 UCLA L. REV. 1056, 1061 (2015) (arguing that "the ideas behind [the] standing doctrine have [historically] been deployed as a means of avoiding deeply contentious constitutional questions").

330. *Id.* at 1065 (citing Robert J. Pushaw, Jr., Limiting Article III *Standing* to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases, 45 GA. L. REV. 1, 19–22 (2010)).

331. *Allen*, 468 U.S. at 756.

332. *Id.* at 765–66.

333. City of Los Angeles v. Lyons, 461 U.S. 95, 100 (1983).

334. *Id.* at 113.

335. Kenneth W. Moffett et al., *The Supreme Court is Taking Far Fewer Cases than Usual. Here's Why.*, WASH. POST, June 2, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/02/the-supreme-court-is-taking-far-fewer-cases-than-usual-heres-why/ [https://perma.cc/Y7G8-GL7S].

thereby "sharpen[ing] the presentation of [the] issues."[336] In other words, the standing doctrine allows plaintiffs to bring a lawsuit only if they are likely to be fully invested in the suit, which means they will likely write better briefs and take the case seriously, which will help the courts decide the tough issues. This is probably the most persuasive argument in favor of standing. Judges rely heavily on the litigants and their attorneys to flesh out complicated legal questions, and requiring competent and adverse parties makes a lot of sense.

But the Court often ignores this rationale. The Court routinely dismisses cases where the parties are fully invested in the suit and there is no reason to believe their briefs would be inadequate.[337] In *Clapper v. Amnesty International*, for example, several attorneys, journalists, and human rights organizations challenged a federal statute that allows the federal government to spy on foreign citizens, arguing that the provision violates the First and Fourth Amendments.[338] These plaintiffs alleged they regularly needed to communicate with individuals in foreign countries but were inhibited from doing so because they could not ensure their communications were confidential.[339] The plaintiffs (some of whom were attorneys themselves) were represented by nine attorneys from the American Civil Liberties Union and the large New York law firm Proskauer Rose, LLP.[340] The defendants, as government officials, were represented by eleven attorneys from the Solicitor General's Office and the Director of National Intelligence's Office.[341]

It was clear that the parties were fully invested in this lawsuit (they appealed it to the Supreme Court, after all). The Court nonetheless dismissed the plaintiffs' case for lack of standing.[342] Because the plaintiffs could not show (a) that the government had actually spied on them or their clients or (b) that the government planned to spy on them in the immediate future, the Court found the plaintiffs could not show the sort of "actual or imminent" injury necessary to confer standing.[343] *Clapper* clearly cannot be squared with the "we need the parties to be fully invested in the case" rationale. Both parties and their attorneys vigorously litigated the case and were more than competent

336. Baker v. Carr, 369 U.S. 186, 204 (1962) ("[A] personal stake in the outcome of the controversy…assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

337. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 407–08 (2013).

338. *Id.* at 406–07.

339. *Id.*

340. *Id.* at 400.

341. *Id.*

342. *Id.* at 418, 422.

343. *Id.* at 410–14. But of course, the plaintiffs didn't have concrete evidence the government was spying on them—it's classified. Did the Court really think the government is going to say, "Yeah, we've been monitoring your emails and phone calls—here's some exhibits for your complaint"? This is such a disingenuous argument.

to brief and argue the issues presented.[344] There was no reason to believe the parties were not fully invested or that the issues were not sufficiently illuminated.[345] The Court simply wanted to avoid a thorny constitutional issue, and it achieved its desired result (i.e., dismissal) by again relying on this flimsy justiciability rationale.[346]

Clapper shows that the Court's standing doctrine does not further its underlying objectives. If the Court's true goal is to ensure that the issues are fleshed-out and that the parties are truly invested, it should look to the parties' arguments, attorneys, and resources, not to the extent of the plaintiff's injuries. The Arizona courts, for example, which are not bound by Article III,[347] waive the typical standing requirements when (i) the parties are clearly adversarial and (ii) the issues presented are "of great public importance."[348] These courts recognize that, in many instances, the party who was "injured" may have fewer resources or poorer arguments than other potential plaintiffs. If the issue to be litigated concerns the government's environmental regulations, for example, the Sierra Club would be a great litigant to have on one side of the issue.[349] But the Sierra Club is rarely "injured" (at least as the Court has defined it) by the government's environmental policies, and therefore often lacks standing to sue.[350] This doctrine is meant to be an escape hatch for the courts, rather than a well-reasoned limit on their jurisdiction.

Finally, proponents argue the standing doctrine promotes a healthy separation of powers and avoids confrontation with the political branches.[351] The Court has even gone so far as to say that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or

344. *Id.* at 400.

345. *Id.* at 406–07.

346. *Id.* at 422.

347. Dobson v. State *ex rel.* Comm'n on Appellate Court Appointments, 309 P.3d 1289, 1292 (Ariz. 2013) (recognizing that the Arizona courts are not bound by the "case or controversy" requirement of Article III, § 2 of the U.S. Constitution).

348. Sears v. Hull, 961 P.2d 1013, 1019 (Ariz. 1998) (recognizing that the Arizona courts have waived the traditional standing requirements when a case (i) presents "issues of great public importance" and (ii) the parties to that case are "true adversaries" (internal citations omitted)).

349. *See* Sierra Club v. Morton, 405 U.S. 727, 730 (1972) (noting that the Sierra Club is "a membership corporation with a special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country" (internal quotations omitted)).

350. *See id.* at 741.

351. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460–63 (2008) (detailing the Court's separation-of-powers argument when it comes to standing).

controversies."[352] Again, this argument suffers from a fatal flaw: as applied, this inflexible doctrine prevents the courts from deciding important constitutional issues, and thus prevents them from fulfilling their most important role. This separation-of-powers argument makes a faulty assumption about the proper role of the judiciary. It assumes the courts' proper role is almost exclusively to remedy specific injuries to individual plaintiffs. However, if you assume the judiciary's primary purpose is to enforce the Constitution and keep the other branches in check, this separation-of-powers argument loses much of its force.

The standing doctrine is a sham. The doctrine is (i) an escape hatch the courts can use to avoid deciding difficult cases and (ii) a tool the courts can use to dismiss cases that do not align with their political preferences. This doctrine should be discarded—and judges should be honest about why they dismiss cases, rather than camouflaging their rulings with convoluted, disingenuous, the-Constitution-made-me-do-it language.

2. The Political Question Doctrine Is Indefensible

The Court has held that certain constitutional issues amount to "nonjusticiable political questions" that cannot be ruled on by the federal courts.[353] Under this doctrine, the courts will refuse to hear three kinds of issues: (1) issues the Constitution explicitly assigns to Congress or the Executive; (2) issues that require judges to move beyond the areas of judicial expertise; and (3) issues that require dismissal for some other prudential reason.[354] Professor Alexander Bickel argues that this doctrine arose from a sense of judicial anxiety—anxiety that the issue in a case may be too strange, complex, or momentous for the court, and anxiety that the political branches or the people might ignore the Court's ruling.[355]

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352. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)) (internal quotes omitted).

353. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (holding the federal courts cannot resolve issues of political gerrymandering); Nixon v. United States, 506 U.S. 224, 228 (1993) (holding the federal courts cannot address issues related to impeachment trials). Many cases involve issues that touch on hot-button political topics—but that does not necessarily mean the cases involve a "political question." A nonjusticiable political question typically arises when either (1) there is a "textually demonstrable constitutional commitment" of the issue to a coordinate branch of government or (2) there is "a lack of judicially discoverable and manageable standards" for resolving the issue. *Id.* at 228.

354. Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

355. Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 39 (2017) (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986)).

The Court's most recent use of the political question doctrine came in the 2019 decision *Rucho v. Common Cause*, where the Court held that the federal courts cannot resolve disputes over partisan gerrymandering.[356] Despite acknowledging that partisan gerrymandering was a very serious problem that undermined democracy itself,[357] the *Rucho* Court held that the federal courts could not address this problem because there was not a "discernible and manageable standard" for deciding when a gerrymander is so partisan as to be unconstitutional.[358] Because the Court's five-Justice majority was not satisfied with any standard that had been put forward, it completely removed the issue from the federal courts' purview.[359]

Justice Kagan's dissenting opinion, however, completely puts the majority's arguments to bed. Not only are there judicially manageable standards for resolving issues of excessive partisan gerrymandering, she reasoned, but the Court had been handed one on a silver platter:

> But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. … [B]y requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.[360]

Although the Court emphatically declared that there was no judicially manageable standard to evaluate partisan gerrymandering, it conveniently neglected to mention that every lower court to confront the issue has developed a workable standard and that the courts had largely converged on a well-accepted test to address the issue.[361] In my opinion, no reasonable person could conclude the Court reached the right result in *Rucho* after reading Justice Kagan's dissent.

Rucho might be the clearest example of the Court using a "flimsy and untenable justification" to avoid a difficult, yet extremely important, constitutional issue.[362] As Justice Kagan put it:

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356. *Rucho*, 139 S. Ct. at 2506–07.

357. *Id.* at 2506 (noting that partisan gerrymandering can lead to "unjust" results that are "incompatible with democratic principles").

358. *Id.* at 2501.

359. *Id.* at 2484–87.

360. *Id.* at 2516 (Kagan, J., dissenting).

361. *Id.*

362. Lynn Adelman, *The Roberts Court's Assault on Democracy*, 43 HARV. J. L. & PUB. POL'Y 131, 147 (2019).

> [T]he only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation . . . .[363]

Scholars have also widely panned the political question doctrine. Professor Harlan Cohen, for example, argues that the doctrine, as applied, inappropriately shields the government from proper scrutiny.[364] The political question doctrine is currently nothing short of a "trump card that ends debate" on a given issue.[365] Professor Erwin Chemerinsky, similarly, argues that the doctrine is "inconsistent with the federal courts' primary mission of enforcing the Constitution."[366] "No allegation of constitutional violation should exist that federal courts cannot adjudicate," Chemerinsky argues.[367] By labeling some constitutional provisions as "nonjusticiable," the Court is giving the political branches the green light to violate those provisions with impunity.

Professor Martin Redish has even gone so far as to argue that "the political question doctrine should play no role whatsoever in the exercise of the judicial review power."[368] The federal courts have a "virtually unflagging obligation to exercise their jurisdiction,"[369] and the political question doctrine is nothing but a cowardly shirking of this obligation. The Constitution is meant to confer actual, enforceable rights, not to maintain abstract legal theories. The political question doctrine has no place in American legal theory.

B. Governmental Immunity

"A primary function of the federal courts is to provide relief against governments and government officers for their violations of the Constitution and laws of the United States."[370] The Supreme Court, however, requires plaintiffs to meet an "exacting" qualified immunity standard before executive officials—namely police officers—can be held liable for their

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363. *Rucho*, 139 S. Ct. at 2515 (Kagan, J., dissenting).

364. Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 60 (2017).

365. *Id.*

366. Chemerinsky, *supra* note 295 at 1480.

367. Chemerinsky, *supra* note 295 at 1480.

368. Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1033 (1985).

369. Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

370. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.1 at 497–98 (6th ed. 2012).

unconstitutional behavior.[371] Although federal law specifies that state actors "*shall* be liable" for their unconstitutional acts,[372] the Supreme Court has held that plaintiffs must also show that the constitutional right was "clearly established" at the time of the violation, such that any reasonable officer would have understood he was violating it.[373] In other words, the plaintiff must show that the defendant officer was "plainly incompetent" by violating a constitutional right that "existing precedent [had] placed . . . beyond debate."[374]

This doctrine has morphed into impenetrable armor, where officers are overwhelmingly protected and plaintiffs are routinely left out to dry.[375] As Justice Sotomayor recently observed: "Nearly all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials."[376] The Court's current "one-sided approach" to qualified immunity, she continued, has "transform[ed] the doctrine into an absolute shield for law enforcement officers."[377] It tells officers "they can shoot first and think later," and it tells the public that "palpably unreasonable conduct will go unpunished."[378] According to one lower court judge, qualified immunity has become a "[h]eads the government wins, tails the plaintiff loses" doctrine.[379]

Commentators have widely panned the Court's qualified immunity doctrine. Professor William Baude, for example, argues qualified immunity—at least as it's currently implemented—has no basis in law and is a generally unpersuasive doctrine.[380] Professors Joanna Schwartz and John Jeffries, moreover, argue that qualified immunity completely fails to fulfill its

371. City and Cty. of S.F., Cal. v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

372. 42 U.S.C. § 1983 ("Every person who, under color of [state law]…subjects…any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress…" (emphasis added)).

373. *Sheehan*, 135 S. Ct. at 1774.

374. *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

375. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (pointing out that the Court's "one-sided approach" to qualified immunity has "transform[ed] the doctrine into an absolute shield for law enforcement officers").

376. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV..45, 82 (2018); *see also Kisela*, 138 S. Ct. at 1162.

377. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

378. *Id.*

379. Zadeh v. Robinson, 928 F.3d 475, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

380. Baude, *supra* note 376, at 88 (claiming the doctrine "lacks legal justification, and the Court's justifications are unpersuasive").

underlying policy objectives,[381] and that the Court should fundamentally reconfigure the doctrine to "get constitutional tort law back on track."[382] Echoing these sentiments, Justice Thomas has expressly called for the Court to revisit and revise the doctrine, arguing that it is inconsistent with federal law and the role of the courts.[383]

Commentators also persuasively argue that the Court's current qualified immunity formulation has led to "constitutional stagnation."[384] As mentioned above, a qualified-immunity defense presents two issues: (1) whether the facts, as alleged by the plaintiff, show the violation of a constitutional right; and (2) whether that right was "clearly established" at the time of the violation.[385] In *Saucier v. Katz*, the Court required the lower courts to confront the first prong of this analysis before moving on to the second prong (i.e., the courts must *first* decide whether a constitutional violation occurred and, if a violation did occur, *then* decide whether the right was clearly established at the time).[386] In *Pearson v. Callaghan*, however, the Court overruled this portion of *Saucier*, holding that this two-step approach "should not be regarded as mandatory in all cases."[387]

Because *Pearson* allows the lower courts to "punt" on the issue of whether the Constitution was violated—and instead just decide that the law was not "clearly established" at the time—important constitutional questions

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381. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017) (concluding that "the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility").

382. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("Today, the law of qualified immunity is out of balance. … The Supreme Court needs to intervene, not only to reconcile the divergent approaches of the Circuits but also, and more fundamentally, to rethink qualified immunity and get constitutional tort law back on track.").

383. Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring) (arguing that the Court's qualified immunity doctrine should be revisited and likely revised, as the doctrine "represent[s] precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make").

384. Zadeh v. Robinson, 928 F.3d 475, 479 (5th Cir. 2019) (Willett, J., concurring and dissenting in part); *see also* Aaron L. Neilson & Christopher J. Walker*, The New Qualified Immunity,* 89 S. CAL. L. REV. 1, 37–38 (2015) (finding that the lower courts are increasingly unwilling to address constitutional questions in § 1983 cases because of the Court's current qualified immunity doctrine).

385. Saucier v. Katz, 533 U.S. 194, 200–01 (2001).

386. *Id.*

387. Pearson v. Callaghan, 555 U.S. 223, 236 (2009). The *Pearson* Court went on to say: "Our decision does not prevent the lower courts from following the [two-step] *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases." *Id.* at 242.

often go unanswered.[388] This has led to a vicious cycle in which plaintiffs cannot point to factually analogous precedent because the courts are not producing precedent.[389] "Courts then rely on that judicial silence to conclude there's no equivalent case on the books."[390] "No precedent = no clearly established law = no liability."[391]

Qualified immunity is yet another doctrine that prevents the courts from fulfilling its "gravest and most delicate" responsibility: enforcing the Constitution.[392] "This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated."[393] "Wrongs are not righted, and wrongdoers are not reproached."[394] The Court's qualified immunity doctrine should be discarded, and government officials should be held responsible for their unconstitutional behavior, even if the Court's conservative majority would like to see otherwise.

V. COUNTERARGUMENTS CONSIDERED

A. Counterargument: Shouldn't Congress, Not the Judiciary, Be the One to Authorize Suits Against Federal Officials?

Response: Ideally, yes, but in the absence of congressional action, the courts should not sit idly by while federal officials violate constitutional rights. When presented with a constitutional case or controversy, the courts have a "virtually unflagging obligation to exercise their jurisdiction"[395] to ensure the Constitution is properly and meaningfully enforced.[396] When a federal official is sued for violating a constitutional right, the courts often face a familiar choice: Does the Constitution allow the plaintiff to recover *damages*

388. *Zadeh*, 928 F.3d at 479 (Willett, J., concurring and dissenting in part).

389. *Id.*

390. *Id.*

391. *Id.*

392. Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring). *See also* Beal v. Doe, 432 U.S. 438, 462 (1977) (Marshall, J., dissenting) ("When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.").

393. *Zadeh*, 928 F.3d at 479 (Willett, J., concurring and dissenting in part).

394. *Id.*

395. Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

396. *See* Chemerinsky, *supra* note 295 at 1493 (arguing that the courts' most important role is to enforce the Constitution).

or *nothing*?[397] As the ultimate arbiters of the Constitution, this issue is for the courts, not Congress, to decide.[398]

The Constitution is not enforced at the pleasure of Congress. If Congress passed a statute that specifically allowed for suits against federal officials, that would be great.[399] That would be an encouraging example of the branches working together to ensure the Constitution guarantees more than just "paper rights."[400] But Congress's refusal to pass such a statute does not give the courts a hall pass when it comes to performing their judicial duties. "We would like to enforce the Bill of Rights, but Congress has not given us permission yet" is not a coherent thought in a country where the "judiciary is supreme in the exposition of the law of the Constitution."[401]

The *Abbasi* and *Hernández* Courts did get one thing right: at the end of the day, the core issue is "who should decide?"[402] Who should decide how the Constitution is enforced? Who should decide the proper meaning of the Bill of Rights? And who should decide whether plaintiffs get damages, or whether they get nothing? As mentioned in this article's Introduction, James Madison envisioned the courts as "guardians" of the Bill of Rights—"impenetrable bulwark[s] against every assumption of power in the

397. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

398. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437–40, 444 (2000) (constitutionalizing the *Miranda* rule, which had long been described as "prophylactic" and "extraconstitutional"); City of Boerne v. Flores, 521 U.S. 507, 524 (1997) ("The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. … The power to interpret the Constitution in a case or controversy remains in the Judiciary."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[A] permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution."); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

399. Currently, 42 U.S.C. § 1984 is marked as "omitted." 42 U.S.C. § 1984 (repealed June 25, 1948). There is no statute sitting in this section. *Id.* Congress should place a *Bivens*-like statute in this section, in my opinion.

400. *See* Faitoute Iron & Steel Co. v. City of Ashbury Park, N.J., 316 U.S. 502, 514 (1942) ("The Constitution is intended to preserve practical and substantial rights, not to maintain theories. Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights…" (internal quotations and citations omitted)).

401. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

402. Hernández v. Mesa, 140 S. Ct. 735, 750 (2020) (quoting *Abbasi*, 137 S. Ct. at 1857).

Legislative or Executive."[403] To Madison, the answer was clear: the courts should decide.[404]

B. Counterargument: Can't We Rely on Federal Agencies and the Political Process to Discipline Federal Officers and Compensate Their Victims?

Response: Usually not—and when the political process fails to right constitutional wrongs, the courts should remain open for business. Take *Hernández*, for example. As mentioned above, in *Hernández*, a U.S. Border Patrol agent shot an unarmed fifteen-year-old Mexican citizen in the back of the head as he was fleeing back into Mexican territory.[405] This was incredibly serious misconduct—so serious that "[t]he shooting quickly became an international incident."[406] The U.S. government, however, did nothing to remedy this misconduct. Although the government "express[ed] regret over Hernández's death," it "concluded that [the agent] had not violated Customs and Border Patrol policy or training, and it declined to bring charges or take other action against him."[407] The government also denied Mexico's request that the agent stand trial in the Mexican courts.[408]

Is this it? Is this all the process America has to offer? Place yourself in these parents' shoes:

> We regret that one of our agents shot your son in the back of the head. But we looked into it, and we have determined that this agent did not violate any of our internal policies. Therefore, no action will be brought against him. Thank you.
>
> Sincerely,
>
> Uncle Sam

As Justice Ginsburg pointed out in her *Hernández* dissent, this child's death was "not an isolated incident."[409] Hundreds of formal complaints of physical, verbal, and sexual abuse are leveled against the U.S. Border Patrol

403. 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (part of James Madison's statement when he presented the Bill of Rights to Congress).

404. *Id.*

405. *Hernández*, 140 S. Ct. at 740; *id.* at 753 (Ginsburg, J., dissenting).

406. *Id.* at 740 (majority opinion).

407. *Id.*

408. *Id.*

409. *Id.* at 759 (Ginsburg, J., dissenting).

each year;[410] yet the agency takes formal action in only three percent of cases.[411]

If our history has taught us anything, it is that the political process, without any checks or balances, cannot be trusted to secure actual and substantial rights. Because we are not governed by angels, "auxiliary precautions" must always be in place to ensure the government remains subservient to the people.[412] The most important safeguard in our system of government lies with our "independent tribunals of justice,"[413] without whom "all the reservations of particular rights or privileges would amount to nothing."[414]

But in recent years, the Court's conservative majority has increasingly used the political process to justify closing the courthouse doors on civil rights plaintiffs.[415] In *Alden v. Maine*, for example, the Court held that the Constitution broadly prohibits the States from being sued without their consent.[416] Although the U.S. Solicitor General fervently argued that lawsuits against the States were necessary to ensure that the States remain in compliance with federal law,[417] the *Alden* Court dismissed this worry, arguing that the States' "good faith" should be enough to ensure federal supremacy:

> The constitutional privilege of a State to assert its sovereign immunity . . . does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the

410. *See id.* at 760 (showing that at least 800 complaints were made against U.S. Border Patrol between 2009 and 2012).

411. *Id.* (citing DANIEL E. MARTÍNEZ ET AL., NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE, AMERICAN IMMIGRATION COUNCIL 1–8 (2014)).

412. *See* THE FEDERALIST NO. 51 (James Madison).

413. 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed. 1834) (part of James Madison's statement when he presented the Bill of Rights to Congress).

414. THE FEDERALIST NO. 78 (Alexander Hamilton).

415. Chemerinsky, *supra* note 293 at 540–42. *But see* Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013) (striking down a key provision of the Voting Rights Act of 1965 without any sort of constitutional basis because the Court believed Congress's data was probably out of date).

416. Alden v. Maine, 527 U.S. 706, 754 (1999). The Court conceded that there was nothing in the text of the Constitution that compelled this result. *Id.* at 741–43. Rather, the Court held that the Constitution's "silence" on this issue was evidence that the framers wanted the States to be immune from suit. *Id.* at 41. *Alden* is one of the clearest examples that the Court's conservatives are textualists only when it is convenient for them.

417. Transcript of Oral Arguments at 11, Alden v. Maine, 527 U.S. 706 (1999) (No. 98-436).

> binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[418]

If you have never read this portion of *Alden* before, your jaw should be on the floor.[419] This is an astounding dereliction of duty. The Court's argument is roughly this: the States promised us they will not violate the Constitution; therefore, the States cannot be sued for allegedly violating the Constitution. This is ludicrous.

As Professor Erwin Chemerinsky has pointed out: "Is it possible to imagine that 30 or 40 years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law?"[420] Of course not. The government, from time to time, is going to exceed the Constitution's boundaries; it is the federal courts' job to see that these boundaries are meaningfully enforced and not just suggestions written on parchment. By deferring constitutional issues to the political branches, the Court is shirking its most important duty: enforcing the Constitution.

VI. CONCLUSION

Every Supreme Court nerd, this author included, has their list of least favorite cases. Over the last fifty years or so, *Rodriguez*,[421] *Strieff*,[422] *Shelby County*,[423] *Sparkman*,[424] and *Lyons*[425] are among my least favorites. But the Court's recent decisions in *Ziglar v. Abbasi* and *Hernández v. Mesa* belong in

418. *Alden*, 527 U.S. at 754–55.

419. Hey, that rhymed.

420. Chemerinsky, *supra* note 293, at 541.

421. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental right, and that the States' school-funding systems may grossly underfund minority-populated school districts).

422. Utah v. Strieff, 136 S. Ct. 2056 (2016) (holding that it was reasonable for an officer to stop a pedestrian without suspicion because the officer later discovered the pedestrian had unpaid parking tickets).

423. Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013) (striking down a key provision of the Voting Rights Act of 1965 without any sort of constitutional basis).

424. Stump v. Sparkman, 435 U.S. 349 (1978) (holding that judges can *never* be sued for their judicial actions, even if the judge knowingly violated the Constitution by ordering a girl to be secretly sterilized during her appendectomy).

425. City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that the victim of a police chokehold did not have standing to challenge the police department's "chokehold policy" because he could not show that the police were likely to choke him again).

their own category of head-spinningly awful decisions.[426] These cases touch on far more than their narrow, esoteric legal issues; these cases touch on what kind of country we want to live in. Are we going to live in a country where the federal government can round-up, jail, and torture religious minorities without consequences? Are we going to live in a country where federal officers can shoot children in the back without consequences? Shockingly, the Supreme Court answered both these questions "yes."[427] In ruling on these cases—or, more accurately, in *refusing* to rule on these cases—the Court undermined some of our nation's most cherished values and shirked its obligation to enforce the Constitution.

What's worse is that these decisions are just two pieces in a much larger puzzle. Over the last several decades, the Court has embarked on a death-by-a-thousand-cuts-style campaign of closing the courthouse doors to plaintiffs. The Court's justiciability doctrines, governmental immunity requirements, and *Bivens* limitations have shielded government officials from liability and have left many devastated plaintiffs without any sort of remedy.

Long ago, the Court declared:

> No man in this country is so high that he is above the law . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it . . . [And the] Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government.[428]

The Court's conservative majority, however, has completely ignored this promise and has consistently allowed federal officials to avoid responsibility for their blatantly unconstitutional behavior. The time has come for the Court to reverse course, and for scholars to say in a united voice, enough is enough.

426. Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Hernández v. Mesa, 140 S. Ct. 735 (2020).

427. *Ziglar*, 137 S. Ct. at 1869; *Hernández*, 140 S. Ct. at 750.

428. United States v. Lee, 106 U.S. 196, 220 (1882).