Egbert v. Boule: Federal Officer Suits by Common Law

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Smugglers, informants, border crossings, and drugs. In one of the more factually colorful cases of this term, the U.S. Supreme Court all but nailed the door shut on one of the modern era's last remaining vehicles for monetary damages to heap accountability on bad-acting federal officials. In a 5-1-3 decision in *Egbert v. Boule* during the final weeks of the term, the Court reversed the Ninth Circuit's approval of *Bivens* monetary damages against an officer for assault and retaliation stemming from a border confrontation at the location known as Smuggler's Inn.

This may trouble individuals concerned with history. Founding-era evidence suggests that damages suits against federal officers provided an important complement to impeachment as an accountability mechanism outside the hierarchical structure of executive branch direction and command.[1]

But while this case may superficially present as a dispute over whether federal officers should face accountability, the Court instead wrestled with a more fundamental core constitutional and structural question. The Court assessed which governmental institution can authorize federal officer damages suits. It concluded that Congress and not the courts must authorize such actions in the federal system.[2]

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[1] See Jennifer L. Mascott, The Ratifiers' Theory of Officer Accountability (manuscript), https://bit.ly/3bFIwrs (reviewed by the Legal Theory Blog at https://bit.ly/3Q5qRsa).

[2] Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022); Br. of Prof. Jennifer L. Mascott as Amicus Curiae in Support of Petitioner at 20–28, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147), https://tinyurl.com/2w5z3fn2 (hereinafter, "Mascott Brief"); Br. for the United States as Amicus Curiae Supporting Petitioner at 19–33, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147), https://tinyurl.com/2t29f39u (hereinafter, "DOJ Brief").

This holding, speaking to the role of Article III courts versus policymakers within federal institutions, applies whether the Constitution requires liability for federal misdeeds and whether such liability remains available under state law.[3]

For many decades after the ratification of the U.S. Constitution, federal officers faced lawsuits for damages under state common law when they allegedly engaged in unlawful acts, as multiple scholars have explained.[4] A not-uncommon fact pattern included an individual suing a federal officer for trespass connected with a search, seizure, or arrest, to which the officer would plead the defense of lawful federal authority connected with a federally authorized act. Constitutional questions sometimes arose because the contours of the federal officer's defense were subject to the constraint that the federal officer carrying out a search could not do so unreasonably under the Constitution's Fourth Amendment.[5] These common-law suits existed long before Congress established statutory general federal-question jurisdiction for federal courts in 1875. Congress did not analogously authorize any specific cause of action for monetary damages for the commission of federal officer constitutional violations. And whereas Congress had authorized suits against those acting under color of state law under 42 U.S.C. § 1983, Congress had enacted no companion act for federal officers. Nonetheless, common-law suits remained available against federal officers.

The Court attempted to bring its pragmatic vision of equity to this state/federal asymmetry in 1971 when it held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that the text of the Constitution itself contained an implicit right to monetary damages in the event of a federal violation of individual rights. The pressure on this form of relief intensified in 1988 when Congress enacted the Westfall Act, removing the availability of state common-law remedies

[3] See Egbert, 142 S. Ct. at 1804; Mascott Brief, *supra* note 2, at 28–29; DOJ Brief, *supra* note 2, at 26; Br. of Project for Privacy & Surveillance Accountability & Protect the First Foundation as Amici Curiae Supporting Respondent at 18–26, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147), https://tinyurl.com/ymny4t78; Stephen I. Vladeck, The Disingenuous Demise and Death of Bivens, 2019–2020 Cato Sup. Ct. Rev. 263, 283–84 (2020).

[4] See, e.g., Jerry Mashaw, Creating the Administrative Constitution 26–27 (2012); William Baude, Is Qualified Immunity Unlawful?, 106 Cal. L. Rev. 45, 51–52 (2018); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1506 (1987).

[5] See Baude, *supra* note 4, at 51–60.

for actions by federal officials other than claims alleging constitutional violations.[6] But in the years following *Bivens*, the Court has repeatedly reconsidered its contours, granting *Bivens* relief on three occasions between 1971 and 1980 in the context of Fourth, Fifth, and Eighth Amendment violations, and then uniformly rejecting *Bivens* claims 12 times in the 42 years since.[7]

Therefore, after *Egbert*, policymakers and theorists who believe that there is either a constitutional or good-governance mandate to ensure that federal officers violating rights face individual monetary liability must turn to Congress (or the courts, perhaps less ideally) to revisit the severity of the Westfall Act and its comprehensive bar on such individualized suits, or they must look for other state-law or statutory-driven solutions. The Court did not remove *Bivens* from the realm of governing precedents in the U.S. Reports. Neither did it show any proclivity for permitting *Bivens* suits in any but the precise factual contexts of that case and the several that nearly immediately followed.

This article delves into the historical role of monetary suits against federal officers, explains how such suits differed structurally in a constitutionally meaningful way from the suits that *Bivens* authorized, and unpacks the separation-of-powers implications of the Supreme Court's subsequent rejection of federal judicial creation of damages relief. The Court's decision in *Egbert* stands as a retrenchment of 20th-century claims of judicial authority to apply the law as the Court sees fit. As such, the ruling in *Egbert* ties into the central theme of the 2021–2022 Supreme Court term: which actor has the power to decide?[8] The Supreme Court in *Egbert* reaffirmed the scope of congressional authority to decide the contours of federal liability and recovery in federal courts. *Egbert* thus puts squarely on Congress the future question of the extent to which monetary damages recovery must be available against individual federal officials for unconstitutional acts not directly governed by *Bivens* and its several follow-on cases.

[6] See 28 U.S.C. § 2679(b)(1)–(2).

[7] See Egbert, 142 S. Ct. at 1799.

[8] See, e.g., Nat'l Fed'n of Ind. Bus. (NFIB) v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022) ("It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes.").

I. Officer Suits within the Constitutional Scheme

The Supreme Court's October 2021 term highlighted a critical and recurring theme—the question of who, or which governmental actor, has authority to exercise power on behalf of the American electorate when reaching significant decisions. Federal judge and former Justice Antonin Scalia clerk Jeffrey Sutton poignantly framed this inquiry as "Who Decides" in his 2021 volume exploring the relationship between power exercised by states and power exercised by the federal government.[9] The Court this term explored that question, both with respect to that vertical breakdown of power as well as in the context of the horizontal breakdown of power between the three distinct federal branches.

The Court repeatedly considered which federal branch had authority to resolve the question in the particular case at hand or whether decisions in the matter remained with private, nongovernmental actors. This question often was more pressing in the Court's resolution of a case than the substantive question of whether the challenged governmental action was right, wise, or just.

Perhaps most prominently in one of the Court's more atypical oral argument sessions, in an emergency-docket case, the Court evaluated which, if any, governmental actor had the power to decide whether every U.S. employer of a particular size must mandate covid-19 vaccination or testing for employees to return to in-person work. There, in *NFIB v. Department of Labor*, the Court concluded that Congress held the policymaking power within the federal government to decide whether to imbue any federal agency with that level of authority.[10] The Court found that Congress had not done so, and that the Occupational Safety and Health Administration's (OSHA) general emergency workplace safety jurisdiction did not extend to authorize individual worker (personal) vaccine requirements on a nationwide scale across all industries within businesses of a certain size. In contrast, that same day the Court reached the opposite pro-regulatory determination in *Biden v. Missouri*. There, it held that Congress had authorized the Centers for Medicare and Medicaid Services to impose a covid-19 vaccine mandate on staff members of

[9] See Jeffrey S. Sutton, Who Decides? (2021).

[10] NFIB, 142 S. Ct. at 665–66.

health care facilities participating in Medicare and Medicaid, including those owned and operated by the states.[11]

Similar evaluations of the degree to which Congress versus a federal agency must dominate a particular federal policymaking decision grounded numerous other key 2021–2022 decisions as well, including *West Virginia v. EPA* (carbon dioxide emissions and "major questions")[12] and *Alabama Association of Realtors v. Department of Health & Human Services* (federal eviction moratorium and federalism).[13] Perhaps most prominently, albeit in the distinct vertical context of federalism, the theme also provided the setting of the Court's monumental overruling of *Roe* and *Casey* in *Dobbs*, where the Court released its grasp of the power to define the contours of proper abortion regulations.[14]

Egbert continued the interbranch theme but with a different flavor, examining the axis of power between Congress and federal courts. On the surface, the specific question before the Court seemed to begin and end with analysis about the degree to which courts can, and should, hold executive branch actors accountable. But really the core structural constitutional principles underlying the case hinged on the proper allocation of decisional authority between the federal legislature and the courts under Articles I and III of the federal Constitution.

The question is complex and perhaps tricky because Founding-era evidence suggests that the understanding, and even the practice within the states, was that federal officers very much were to remain accountable through the potential for common-law liability if they exceeded the proper bounds of their lawful authority.[15] But over the years, with legislative developments like the Westfall Act, Congress has so severely limited liability for federal officers that they no longer face potential personal liability for actions taken outside their lawful authority in the manner that they did when the Constitution was ratified. The U.S. Supreme Court had jerry-rigged a process to attempt

[11] Biden v. Missouri, 142 S. Ct. 647, 652 (2022).

[12] West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022).

[13] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021).

[14] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022).

[15] See, e.g., Mashaw, *supra* note 4, at 26–27; Mascott, *supra* note 1, at 28–30.

to replicate historic common-law liability for officer misdeeds by inferring a constitutional right to monetary recovery for federal officer violations of the Constitution. The doctrine was first created in a 1971 case called *Bivens* in support of a claim brought under the Fourth Amendment providing protection against "unreasonable" searches and seizures. But since the 1980s the Court has exhibited significant uneasiness with its judge-made solution and seems to be returning to the pre-*Bivens* judicial understanding that courts generally should not manufacture causes of action in the federal system.

II. Background: *Bivens* and *Egbert*

The Court in *Egbert* ultimately had to evaluate whether Congress or the judiciary holds responsibility for creating the contours of federal causes of action and accompanying relief within the federal constitutional system. In *Bivens*, 50 years earlier, the Court had concluded that circumstances called for judicial creation of monetary damages in constitutional cases, reversing the Second Circuit's determination to the contrary on the basis of longstanding history and earlier Supreme Court precedent. *Egbert* continued a 40-year trend of reversing what the Court now apparently considers to be the *Bivens* Court's mistake.

A. The History of Bivens*, Early Progenitor of "Who Decides?"*

In *Bivens*, the Court held 6-3 that it could create a Fourth Amendment cause of action in a case involving a federal agent who allegedly threatened an arrestee's family and bound him during a criminal arrest.[16] The claim included allegations that the agents lacked probable cause, improperly carried out a search and arrest without a warrant, and used unreasonable force.[17] Bivens claimed harm from humiliation and mental suffering and sued for $15,000 in damages from each individual agent.[18]

The federal district court had dismissed the complaint, filed pro se, for failure to state a legal cause of action.[19] It rejected out of hand Bivens's claim to relief under 42 U.S.C. § 1983, which establishes

[16] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[17] *Id.*

[18] *Id.* at 389–90.

[19] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969).

federal jurisdiction for suits based on alleged constitutional violations only under a state source of law or custom.[20] The district court gave closer consideration to Bivens's alleged cause of action under 28 U.S.C. § 1331, the general federal-question jurisdiction statute, for civil actions "aris[ing] under the Constitution, laws, or treaties of the United States."[21] The district court relied on Second Circuit precedent by Judge Learned Hand and others to reject the claim on the ground that "the right to be free from unreasonable searches and seizures is a common-law right." It concluded that the limited purpose of the Bill of Rights was to secure such rights against "invasion by the Federal Government."[22] A cause of action was not inherent in the Fourth Amendment text, so there was no federal recovery mechanism over which section 1331 could establish jurisdiction.[23]

The Second Circuit affirmed, agreeing that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure." [24] The court traced the Fourth Amendment's prohibition of unreasonable searches to English trespass actions for damages from the mid-18th century.[25] Relying on an 1886 Supreme Court opinion, the Second Circuit observed that the common law underlying those British cases was well known when the ratifiers adopted the Fourth Amendment.[26]

Although Bivens claimed the common law as support for his counsel's argument that courts could grant monetary relief for unlawful searches and seizures, the Second Circuit found the common law distinct. Nothing about the private damages actions in state court necessarily translated into an understanding that there would be a "wholly new federal cause of action founded directly on the Fourth Amendment."[27] More likely, in the Second Circuit's estimation, the Fourth Amendment ratifiers envisioned that Fourth

[20] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12, 13–14 (E.D.N.Y. 1971) (discussing and quoting 42 U.S.C. § 1983).

[21] *Id.*; see also 28 U.S.C. § 1331(a) (1958) (providing general federal jurisdiction over civil actions arising under federal law so long as the matter in controversy, at the time, was more than $10,000).

[22] Bivens, 276 F. Supp. at 15 (internal quotation omitted).

[23] *Id.*

[24] Bivens, 409 F.2d at 718–19.

[25] *Id.* at 721.

[26] *Id.*

[27] *Id.*

Amendment limitations would be administered through the state courts via the common law, as trespass claims had been handled prior to the Constitution's ratification. The great development of the Fourth Amendment was to "increase the efficacy of the trespass remedy by preventing federal law enforcement officers from justifying a trespass" that was otherwise unreasonable as permissible just because the federal government had greenlighted it.[28] The liability work shouldered by the enforcement of the federal constitutional provision via state courts, under state law remedies, would not be at all unusual according to the Second Circuit, as longstanding constitutional doctrine held that state courts "'are the primary guarantor of constitutional rights, and in many cases they may be the ultimate ones.'"[29] Federal courts, after all, received jurisdiction over general cases arising under the Constitution only in 1875.[30]

And the Second Circuit cleanly concluded that the federal question statute alone did not implicitly contain a federal common-law remedy of monetary damages for violation of a federal right.[31] Such rights of action previously had been inferred from explicit statutory condemnation of particular conduct and a concomitant general statutory authority to enforce liabilities that the act had created where existing remedies were utterly ineffectual. Such a right to recovery could also be derived "from a condemnation in the Constitution itself,"[32] but it was only when the absence of the suggested implied remedy would leave a "clearly declared right" entirely "wanting of remedies" and not a substantive right at all.[33]

The Second Circuit concluded that federal rights did include "an implied injunctive remedy for threatened or continuing constitutional

[28] *Id.*

[29] *Id.* (quoting Hart & Wechsler, The Federal Courts and the Federal System 339 (1953)).

[30] *Id.* at 721–22.

[31] Cf. *id.* at 722 (discussing Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), among others).

[32] *Id.*

[33] See *id.* at 722–23 (citing sources like Mapp v. Ohio, 367 U.S. 543 (1961), and Hart & Wechsler).

violations."[34] Therefore, courts could keep federal officers accountable by enjoining their unlawful or unconstitutional acts when a right was violated, even if no federal statute had explicitly authorized the granting of injunctive relief.[35] The additional step of permitting a monetary damages award, however, would be an entirely separate thing. It was not "essential to the effective vindication of the right to be free from unreasonable search and seizure" as it was not necessary to prevent continuing violations or government benefit derived from a constitutional violation.[36] Plus, Congress had addressed officer wrongdoing in plenty of other statutes and could have provided monetary damages for constitutional violations if it had thought such a remedy was warranted.[37]

The Supreme Court disagreed. In a majority opinion written by liberal lion Justice William Brennan, the majority concluded that violation of the Fourth Amendment protection from unreasonable searches and seizures "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[38]

The respondent officers had continued to contend that Bivens had only a state common-law right to recovery. They did not claim *no* right to recover, but rather that Bivens's asserted rights properly fell under state law rather than federal law.[39] Therefore, the proper way to acquire relief would be to seek redress through a state tort action against which federal agents could defend themselves by contending that they had lawfully acted within the proper scope of their federal authority.[40] The government respondents had also suggested that the equitable relief of an injunction might be implicit within the

[34] *Id.* at 723.

[35] See *id.* (citing Marbury v. Madison on judicial review and rights and remedies and opining that a federal system of "limited governmental power" could not imaginably have "the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it").

[36] *Id.* at 724.

[37] See *id.* at 724–26.

[38] Bivens, 403 U.S. at 389.

[39] *Id.* at 390.

[40] Cf. H.L.A. Hart, The Relations between State and Federal Law, 54 Colum. L. Rev. 489, 523–24 (1954) (explaining that an official "could be enjoined from taking action which in the absence of official justification would amount to a trespass" and noting that as of the 1950s, the "normal remedy for abuse of state authority, as of federal, [was] the last-ditch remedy of defense").

Constitution if required to provide a remedy, but did not go so far as to provide for monetary remedies.[41] The government brief, signed by current D.C. Circuit Judge Ray Randolph (when he was an assistant to the solicitor general) and Solicitor General Erwin Griswold, among others, had attempted to lay out the history of the Fourth Amendment to make their point. They detailed that the Fourth Amendment had originated in the English common law of trespass against officers who had offered the defense of a general warrant. The Fourth Amendment's purpose was to make that general defense unavailable to American officers. In the view of the government lawyers, the absence of general federal-question jurisdiction at that time and in much of early practice confirmed that the Fourth Amendment impacted only defenses to state common-law suits; the amendment did not create a new federal tort action.[42] Had it done so, federal courts would have been given jurisdiction to hear those claims.

Justice Brennan countered these points, and others, with the *In re Neagle* principle from 1890 that state law cannot limit a federal officer's authority. The idea was that after *Neagle*, state common-law schemes could no longer provide a check on federal power.[43] But Justice Brennan did not fully explain why state common-law actions would have limited lawful federal authority, either before or after *Neagle*. Rather, the existence of lawful federal authority to conduct a search or seizure thwarted the establishment of the relevant state-law tort claim.[44]

Finally, Justice Brennan argued that the awarding of damages for Fourth Amendment injuries should hardly be "surprising" and suggested that because the remedial mechanism of monetary damages was "normally available in the federal courts" such relief surely must be available for Fourth Amendment violations.[45] This pragmatic

[41] See Br. for the Respondents at 4–5, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211.

[42] See *id.* at 4.

[43] Bivens, 403 U.S. at 395.

[44] See Hart, *supra* note 40, at 523–24; Wise v. Withers, 7 U.S. (3 Cranch) 331, 335, 337 (1806); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804). See also Br. for Petitioner at 7–10, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116899 (explaining this system of common-law damages relief although ultimately contending that it was inadequate).

[45] Bivens, 403 U.S. at 395, 397–98.

sense of the need for a certain type of relief coursed throughout the opinion.

Justice John Marshall Harlan II concurred in the *Bivens* judgment, writing separately to clarify his theory of the source of the damages relief. He thought that injunctive relief would be inadequate because the sovereign itself was immune from suit and that relief boiled down to "damages or nothing."[46] In this case of necessity, he agreed that the Court should discern monetary relief derived from the Constitution itself.[47]

Chief Justice Warren Burger, Justice Harry Blackmun, and Justice Hugo Black each dissented separately. The chief justice suggested the best course of action was that Congress provide a statutory remedy.[48] Thus the theme of the 2021–2022 Supreme Court term, of "who decides," was implicit in judicial consideration of core cases back in the 1970s as well.[49] In his decision, the chief justice tied together monetary relief with the exclusionary rule on suppression of evidence in certain cases involving constitutional violations.[50] In the end he did not think that the Court's awarding of damages would work well, and he suggested that perhaps Congress consider an administrative remedy for recovery for constitutional violations rather than a judicial remedy.[51]

Justice Black's dissent likewise framed the issue as one about allocation of power: "[T]he point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."[52] Justice Blackmun's dissent echoed this point: "I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act."[53]

[46] *Id.* at 409–10 (Harlan, J., concurring).

[47] *Id.* at 399.

[48] *Id.* at 414 (Burger, C.J., dissenting).

[49] See also, e.g., Bush v. Lucas, 462 U.S. 367, 380 (1983).

[50] Bivens, 403 U.S. at 412–13 (Burger, C.J., dissenting).

[51] See *id.* at 422.

[52] *Id.* at 428 (Black, J., dissenting).

[53] *Id.* at 430 (Blackmun, J., dissenting).

In the nine years immediately following *Bivens*, the Court extended the *Bivens* cause of action to a claim of sex discrimination under the Fifth Amendment[54] and to an Eighth Amendment cause of action based on a prisoner's claim of cruel and unusual treatment for the receipt of inadequate care.[55] In the subsequent 42 years, however, the Court has consistently denied the application of the *Bivens* framework to create causes of action in new contexts.[56]

B. Egbert *Reconsiders*

Respondent Robert Boule lives right on the U.S.-Canada border. For years he has maintained his property as a bed-and-breakfast titled the "Smuggler's Inn."[57] U.S. border patrol agents have repeatedly observed individuals crossing the northern U.S. border and entering right through the back door of Boule's inn. Federal agents have seized illegal narcotics shipments from the inn. And Boule has alternated between serving as a paid government informant on illegal border crossers and offering unlawful U.S. entrants a drive from his inn into American cities.[58]

Boule filed claims against a border patrol agent for assaulting him. Specifically, Boule contended that Agent Erik Egbert entered Boule's property to check the immigration status of a guest. Egbert then declined to leave the property, throwing Boule against an SUV and then to the ground.[59] Boule lodged a grievance and then filed an administrative claim under the Federal Tort Claims Act (FTCA) for excessive force and injury. He contends that Egbert then retaliated by reporting Boule's vehicle—the license plate of which bears the moniker "SMUGLER"—as being involved in criminal activity, thereby prompting the Internal Revenue Service to audit him.[60] Nothing came of Boule's grievance or administrative claim.

[54] Davis v. Passman, 442 U.S. 228 (1979).

[55] Carlson v. Green, 446 U.S. 14 (1980).

[56] Egbert, 142 S. Ct. at 1802.

[57] *Id.* at 1800–01.

[58] See *id.* at 1801.

[59] *Id.*

[60] *Id.* at 1801–02.

Boule then sued Egbert in federal court, raising a Fourth Amendment excessive force claim and a First Amendment unlawful retaliation claim.[61] Boule requested monetary damages for each violation under *Bivens*, but the district court declined to extend a *Bivens* remedy to those claims.[62] The U.S. Court of Appeals for the Ninth Circuit reversed, reasoning that the Fourth Amendment claim involved an extension of *Bivens* because a different law enforcement agency was involved, but there were no reasons counseling hesitation against extending *Bivens* to cover Boule's claim.[63] In particular, Boule was "a United States citizen . . . bringing a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file border patrol agent on Boule's own property in the United States."[64] As for the First Amendment claim, the panel agreed that recognizing a damages action would extend *Bivens* but again found no factors counseling against extension, as the Ninth Circuit had previously recognized such a claim (albeit in 1986), and "retaliation is a well-established First Amendment claim."[65] The Ninth Circuit subsequently denied rehearing *en banc*, but with 12 judges in dissent.[66]

Egbert petitioned the Supreme Court for consideration of three questions. The first two asked for a simple reversal of the Ninth Circuit's decision and a reaffirmation of the Court's consistent determinations over the past four decades not to extend *Bivens* to new contexts. The third question asked the Court to overrule *Bivens* altogether. The Court denied consideration of that final question but granted the first two.

In June 2022, the Court in *Egbert* delivered a 5-1-3 decision with the majority opinion authored by Justice Clarence Thomas.[67] The split in the vote totals perhaps belied the fairly workaday nature of the decision. Justice Neil Gorsuch went further, choosing to concur only in the judgment and writing separately to contend that *Bivens* should be

[61] *Id.* at 1802.

[62] *Id.*

[63] Boule v. Egbert, 998 F.3d 370, 387 (9th Cir. 2021).

[64] *Id.*

[65] *Id.* at 391.

[66] *Id.* at 373 (Bumatay, J., dissenting); *id.* at 384 (Owens, J., dissenting); *id.* (Bress, J., dissenting).

[67] Egbert, 142 S. Ct. at 1799.

thrown over altogether.[68] A three-justice block consisting of Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor concurred in the judgment in part, agreeing to reverse the lower court's creation of a new First Amendment retaliation *Bivens* claim but dissenting from the Fourth Amendment judgment.

In prior cases over the past several years, the Court had repeatedly explained the separation-of-powers concerns held by a majority of justices that the structure of the federal constitutional scheme does not readily countenance judicial creation of new damages actions.[69] Therefore, the majority decision here in *Egbert* primarily reiterated, and then expanded upon, those same constitutional structural concerns, explaining why they continue to govern here as they have for the past several decades.

Justice Thomas began by noting that in the past 42 years, the Court had declined on 11 occasions to imply *Bivens* causes of actions in relevant cases brought before it.[70] Despite the clear trend from the Supreme Court, the Ninth Circuit had permitted two constitutional damages actions against a federal border patrol agent. The Supreme Court reversed the Ninth Circuit, noting that its cases had "made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts."[71] Judicial creation of a new cause of action arrogated legislative power to the court itself.[72]

The Court had set forth two steps that it would use to determine whether to grant a proposed *Bivens* claim: whether the case was meaningfully different from prior *Bivens* contexts and, if so, whether there were special factors suggesting that the Court would be less equipped than Congress in that case to evaluate the merits of permitting a damages action. In *Egbert*, the Court noted that these two inquiries "often resolve to a single question: whether there is any

[68] *Id.* at 1810 (Gorsuch, J., concurring in the judgment).

[69] See Hernandez v. Mesa, 140 S. Ct. 735 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

[70] Egbert, 142 S. Ct. at 1799 (majority op.).

[71] *Id.* at 1800; see *id.* at 1803 (citing cases like Hernandez, 140 S. Ct. 735; Abbasi, 137 S. Ct. 1843); and Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (arguing in a non-*Bivens* plurality decision that the existence of even one ground on which to defer to Congress is enough to counsel against judicial creation of a remedy).

[72] See Egbert, 142 S. Ct. at 1800.

reason to think that Congress might be better equipped to create a damages remedy."[73] One such context is where a new defendant category is relevant. In such a situation, it would be hard to predict the consequences of permitting a damages cause of action to move forward against those defendants, so the Court has found that it makes sense to stay its hand and that Congress is better situated to determine whether a cause of action is appropriate and permissible. The Court also will not weigh in, under its more modern approach post-*Bivens*, where there are other methods for addressing a wrong.

Egbert consequently makes clear that one threshold requirement for even a modest expansion of *Bivens* is the absence of any alternative recovery mechanism for that new claimed category of cases. Applying those standards, the Court concluded that Boule's two claims clearly should fail.[74] In particular, the Court noted that alternative remedies are available to provide relief to plaintiffs like Egbert.[75] And such remedies are adequate under Supreme Court precedent to preclude the creation of a new *Bivens* cause-of-action context even if those alternative remedial schemes "do not provide complete relief."[76] Remedies such as internal investigations of executive branch officials and administrative grievance processes can be adequate. No right to appeal or direct involvement by the complainant is necessarily required.[77] The question for the court simply is "whether it, rather than the political branches, is better equipped to decide whether existing remedies should be augmented by the creation of a new judicial remedy," and the existence of some form of statutory remedial scheme is sufficient to demonstrate that courts are not better equipped.[78]

In addition to its across-the-board determination not to create new causes of action under *Bivens* unless absolutely essential to provide a bare minimum of potential relief, the Court noted special national security considerations at play here.[79] Those considerations put an even greater thumb on the scale against the judiciary charging itself

[73] *Id.* at 1798.

[74] *Id.* at 1803–04.

[75] *Id.* at 1806–07.

[76] *Id.* at 1804 (quoting Bush, 462 U.S. at 388).

[77] *Id.* at 1806–07.

[78] *Id.* at 1804 (internal quotation omitted).

[79] *Id.* at 1804–06.

with the determination of whether to step in and provide monetary relief for lawsuits against government officials taking security-related action.[80] The national security considerations related to the border-control agent at work here, in the Court's view, were plainly adequate to keep the policymaking determination of what kind of federal cause of action to provide within the congressional domain. National security considerations will counsel against judicial creation of a new cause of action under *Bivens* even where the relevant agent was situated on the U.S. side of the border, the arrestee had most recently traveled from another port of entry within the U.S. instead of from outside of the country, and the relevant investigations had taken place on U.S. soil.[81]

Finally, the Court majority also noted the more practical separation-of-powers consequences of courts readily inferring damages causes of action—significant disruption to governmental functions.[82] Congress is best equipped, and properly equipped, as the federal rule-making body, to determine the proper contours of judicial causes of action to address such concerns. These concerns of harassment and disruption come into even clearer focus in the context of Boule's First Amendment claim. The Court noted that litigants have an incentive to turn any kind of adverse governmental action into a retaliation claim. Such claims would be hard to disprove and could cause significant, unwarranted disruption through discovery and fear of liability that would "unduly inhibit officials in the discharge of their duties."[83]

The Court closed by noting the many justices, both currently serving and in the past, who had criticized *Bivens* despite its place as precedent. They included Chief Justices Burger and William Rehnquist and Justices Black, Blackmun, Gorsuch, Scalia, and Thomas.[84] That disdain is perhaps reminiscent of the disdain that many jurists had held for the reasoning of *Roe*, even by those who had not been calling for the reversal of that decision, which the Court overruled this term in *Dobbs*.

Justice Gorsuch wrote separately and did not join the Court's reasoning, although he joined both aspects of its judgment. He praised the Court majority for recognizing that the two-step assessment of

[80] See *id.* at 1805.

[81] *Id.* at 1806.

[82] *Id.* at 1807–08.

[83] See *id.* at 1807 (internal quotation omitted).

[84] *Id.* at 1809.

which new contextual circumstances call for the extension of *Bivens* relief really boils down to a singular inquiry: whether courts are better equipped than Congress to evaluate the proper creation of a new damages cause of action in a particular case. In Justice Gorsuch's view, the answer to that question is none—to his mind, the power "to create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation."[85] Such an authority is not a proper function for federal tribunals within an electoral, representative democracy, under textually limited federal constitutional power, standing in contrast to English common-law courts. The end of his opinion suggests that he thinks the Court should make it clear that it will never authorize a new *Bivens* context.[86]

Concurring in part and dissenting in part, Justices Sotomayor, Kagan, and Breyer agreed that Boule's First Amendment claim should fail because the potential of "invit[ing] claims in every sphere of legitimate governmental action" gives serious "reason to pause."[87] But the dissenters argued that Boule's Fourth Amendment claim did not "arise in a new context" distinct from *Bivens* itself and, even if it had, there were no special factors counseling against extending *Bivens* because the allegations here involved a "run-of-the-mill" investigation that just happened to take place near a border.[88]

Egbert featured a wide array of amicus briefs on both sides. Notably, the Cato Institute joined a brief by the ACLU arguing that *Bivens* should not be overruled and that there were no special factors counseling against Boule's Fourth and First Amendment claims.[89] And the authors of this article submitted a brief on behalf of the Separation of Powers Clinic at the Antonin Scalia Law School, George Mason University, arguing that there was no widespread historic tradition of courts authorizing damages actions for alleged constitutional claims.[90] Six former U.S. attorneys general urged the Court to clarify in *Egbert* that under the constitutional separation-of-powers

[85] *Id.* at 1810 (Gorsuch, J., concurring in the judgment).

[86] See *id.* at 1809–10.

[87] *Id.* at 1817 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (internal quotation omitted).

[88] *Id.* at 1814–17.

[89] See generally Br. for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147), https://tinyurl.com/mvks9fdr.

[90] See generally Mascott Brief, *supra* note 2.

framework, and the Court's prior precedent, further expansion of *Bivens* in any factual context would be inappropriate.[91]

Although the Court in *Egbert* ultimately denied the petitioner's request to consider overruling *Bivens* in full, the Court's decision clearly showed aversion to approving *Bivens* relief in any context other than that found squarely within the four corners of *Bivens* itself and the several follow-on cases over the subsequent several years. And even that restraint could have been due to the Court's tactical assessment that it did not want to reach out to overrule *Bivens* during a term where it was to consider overruling *Roe* and *Casey* and made clear for the first time that it believed itself to have already overturned the longstanding First Amendment Establishment Clause case *Lemon v. Kurtzman*.[92]

III. Officer Suits without *Bivens*[93]

Individuals concerned with history and tradition may worry about *Egbert* shutting the door on *Bivens* claims for money damages, given that Founding-era evidence suggests that damages suits against federal officers were expected to provide a meaningful mechanism for accountability. But there was no widespread tradition of such cases premised on judicially crafted federal causes of actions, and plaintiffs rarely (if ever) directly alleged constitutional violations as standalone claims. This comports with the discrete assignment of powers in the Constitution, under which the task of creating new federal causes of action would lie with Congress, not with federal courts of limited subject-matter jurisdiction.[94] Thus, when considering "who decides?" in this context, history and text demonstrate that the answer is, and has been, Congress.[95]

[91] See generally Br. of Amici Curiae Former U.S. Attorneys General John D. Ashcroft, William P. Barr, Alberto R. Gonzales, Edwin Meese III, Michael B. Mukasey, and Jefferson B. Sessions III in Support of Petitioner, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147), https://tinyurl.com/p9dw5t2x.

[92] See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

[93] This section draws substantially from the amicus brief written and submitted by the authors at the Supreme Court in *Egbert*. See generally Mascott Brief, *supra* note 2.

[94] See U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 1. Cf. Stephen E. Sachs, The Unlimited Jurisdiction of the Federal Courts, 106 Va. L. Rev. 1703, 1704 (2020) (describing a "federal court's *subject-matter* jurisdiction" as "affirmatively limited by the Constitution" while noting the role of Congress in using enumerated powers to define other aspects of federal jurisdiction).

[95] See *infra* Parts III.B–C.

To be clear, the tradition of accountability for federal officer actions outside the scope of lawful authority is an important one, and it was even discussed during the ratification debates.[96] But it does not translate to the federal judiciary's fashioning of new forms of relief within an Article III system that the Constitution assigned to Congress to constitute and regulate. Accordingly, post-*Egbert*, those who believe that there should be individual liability for federal officers who violate rights could consider revisiting the Westfall Act's preclusion of state common-law tort actions against such officers or pursue other statutory-based solutions.[97]

A. Historically, Officer Damages Suits Pursued Common-Law Claims and Rarely Involved Constitutional Questions.

The tradition in early America as well as 17th- and 18th-century England was for plaintiffs to assert common-law violations, not to allege the violation of federal constitutional rights.

Historically, in England, individuals could claim damages against officers of the Crown acting in their official capacity but assertedly beyond their lawful authority—typically trespass or false-imprisonment claims, for example, to challenge improper arrests or searches.[98] In defense, the law would recognize an officer's contention that his actions had indeed remained within his legal authority.

For example, Matthew Hale described a false-imprisonment claim met with the defense that the officer had acted pursuant to a lawfully

[96] See, e.g., Archibald Maclaine, Convention of North Carolina (July 24, 1788), reprinted in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 46, 47 (Jonathan Elliot ed., 1836); John Marshall, Virginia Ratifying Convention (June 20, 1788), reprinted in 10 The Documentary History of the Ratification of the Constitution 1430, 1432 (John P. Kaminski et al. eds., 1993) (asserting that an individual could apply for redress in a local tribunal were a federal officer to assault him or trespass on his property). See Mascott, *supra* note 1, at 28–30.

[97] See *infra* notes 146–47 and accompanying text.

[98] See James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 Geo. L.J. 117, 134 (2009); Louis L. Jaffe, Suits against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 1–2, 12 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. . . . If the subject was the victim of illegal official action, in many cases he could sue the King's officers for damages. . . . This was the situation in England at the time the American Constitution was drafted.").

valid warrant, but when the court concluded the warrant was void, the defense failed and the officer was liable.[99] Similarly, in the 18th-century matter *Entick v. Carrington*, the plaintiff brought a trespass claim against the King's chief messenger and several others who had broken into Entick's home with "force and arms," ransacked the residence, and departed with hundreds of documents.[100] The officers had acted pursuant to a general warrant issued by Lord Halifax.[101] Because the warrant was deemed illegal, Entick prevailed and recovered substantial sums against Halifax and the officers who had conducted the search.[102]

These English precedents were not premised on a right to sue directly for violating prohibitions against invalid warrants. Rather, the cases brought common-law causes of action against government officials, who then raised the authorization of the warrant as a defense, which failed in cases where the warrant was deemed unlawful.[103]

From the very start of the new federal government in America, similar to those English practices, government officers were subject to generally applicable common-law damages actions just like private parties.[104] Such claims were brought in state and federal courts for many years,[105] and federal officials introduced questions about the legality of government actions as a defense.[106]

[99] See, e.g., II Matthew Hale, History of the Pleas of the Crown 112 (1736) (writing that where a "warrant to apprehend all persons suspected" of a robbery was later determined to be "a void warrant," the official could not raise it as a "sufficient justification" against a common-law claim for "false imprisonment").

[100] Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 807.

[101] *Id.* at 808.

[102] See Boyd v. United States, 116 U.S. 616, 626 (1886) (describing Entick).

[103] See Br. for the Respondents in Bivens, *supra* note 41, at 9–11 (outlining the English tradition).

[104] Mashaw, *supra* note 4, at 26–27 (describing the relatively routine nature of suits against federal officials with relevant statutory authority claimed in defense, such as in suits against customs collectors for improper seizures and the collection of excessive duties). See also Hernandez, 140 S. Ct. at 748.

[105] See, e.g., § 28, Judiciary Act of 1789, 1 Stat. 73, 87–88 (discussing remedies for "the defaults and misfeasances in office" committed by a marshal's deputy and the degree to which marshals are held answerable for fulfilling certain duties).

[106] Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (observing that federal law "supplie[d] the defense, if the conduct complained of was done pursuant to a federally imposed duty"); see also, e.g., An Act to Regulate the Collection of Duties § 36, 1 Stat. 29, 48 (1789) (providing that reasonableness of a seizure of goods would provide the basis for a defense against "liab[ility] to action, judgment or suit, on account of such seizure").

The mechanism of common-law liability to ensure federal officer accountability in lawfully performing their duties arose during the public debates on ratification of the U.S. Constitution, showing that officer suits were understood as an available mechanism for government accountability that would remain available under the constitutional system. During the North Carolina ratification debates, for example, Joseph Taylor expressed concern that impeachment would be impracticable for rank-and-file executive officers dispersed throughout the country. Archibald Maclaine replied that citizens harmed by such officers' behavior "would have redress in the ordinary courts of common law."[107] Future Supreme Court justice James Iredell concurred that it was very clear that "an officer may be tried by a court of common law."[108] In addition, Richard Dobbs Spaight opined that "if any man was injured by an officer of the United States, he could get redress by a suit at law." Spaight expressed strong certainty about this legal observation during the debates.[109]

During the First Congress, it was also clear that members understood the new constitutional system would preserve the ability of litigants to bring common-law claims for asserted wrongdoing by federal officials in carrying out their official responsibilities. Congress enacted several statutory provisions built on the implicit assumption that various principal officials and their deputies would be subject to personal liability for alleged harm related to governmental acts. For example, Congress provided that if a customs collector became unable to perform his duties or died, then those duties would devolve on the collector's deputy "for whose conduct the estate of such disabled or deceased collector shall be liable."[110] Similarly, federal marshals "had to assume personal liability for the misdeeds of their deputies."[111] But these provisions were not interpreted to create newly expansive federal rights implicitly justifying a new federal cause of action for monetary damages. In distinction, they simply

[107] 4 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 45–47 (Jonathan Elliot ed., 2d ed. 1836).

[108] *Id.* at 36–37.

[109] *Id.*

[110] § 8, Ch. 35, Act of Aug. 4, 1790, 1 Stat. 145, 155.

[111] § 27, Judiciary Act of 1789, 1 Stat. at 87.

assumed the continued existence and availability of common-law causes of action.[112]

Bivens and follow-on scholarship contends that this early practice established precedent for judicial creation of federal damages claims based on rights derived from constitutional protections, and thus overruling or even cabining *Bivens* is inconsistent with history.[113] But only two of the cases that *Bivens* claimed for support involved federal claims.[114] And both of those were drawn from a federal *statute* that had required federal marshals to post a bond and authorized suits against that bond for breach of a marshal's duties.[115]

Additional early American cases identified by scholars as involving federal law that are claimed as support for deriving causes of action directly from the Constitution typically invoked common-law causes of action. In these cases, the existence of federal statutory authority to commit the act was raised as a *defense*.[116] Constitutional claims did not arise directly in these matters, and the elements of the plaintiff's claim often did not invoke federal law.[117]

One case often identified as historical precedent for *Bivens* is *Little v. Barreme*.[118] But the claim in *Little* raised common-law trespass, not a violation of federal law. Captain George Little had captured a Danish boat in response to President John Adams's order to seize boats from French ports. The ship's owner sued for trespass to challenge the

[112] Cf. Hernandez, 140 S. Ct. at 742 (distinguishing between inference of authorization for a damages suit from enactment of a statutory prohibition on certain conduct from the actions of "a common-law court, which exercises a degree of lawmaking authority, flesh[ing] out the remedies available for a common-law tort"). See also Jennifer L. Mascott, Who Are Officers of the United States?, 73 Stan. L. Rev. 443, 515–20 (2018) (discussing the statutory provisions).

[113] See Bivens, 403 U.S. at 395–96; e.g., Vladeck, *supra* note 3, at 270 (asserting a historical "pattern of judge-made tort remedies" including "cases in which the plaintiff's underlying claim was that the defendant had violated the Constitution").

[114] See 403 U.S. at 395–96.

[115] See Lammon v. Feusier, 111 U.S. 17, 17–18 (1884); West v. Cabell, 153 U.S. 78, 84–85 (1894).

[116] See, e.g., Vladeck, *supra* note 3, at 267–70.

[117] Cf. Sachs, *supra* note 94, at 1712 ("Jurisdictional questions at the Founding were fundamentally questions of powers, not rights, and nothing has happened since to change that.").

[118] 6 U.S. (2 Cranch) 170 (1804). See, e.g., Richard H. Fallon, Jr., Bidding Farewell to Constitutional Torts, 107 Cal. L. Rev. 933, 943 (2019).

capture and sought damages. Little ultimately was found liable for "plain trespass" on the ground that the seizure was not authorized by federal law. The Court interpreted the underlying federal statute to permit only the seizure of ships on their way *to* French ports.[119] In the absence of a lawful order to form the legal basis for the capture, the ship's seizure was unlawful and Little had committed trespass.[120]

Wise v. Withers[121] has analogously been cited as justification for *Bivens* relief.[122] But here again, this case was based on a common-law claim. The Court found that the plaintiff's trespass action prevailed against the federal officer defendants on the ground that the court-martial authorizing entry to the plaintiff's home to collect a fine was statutorily invalid.[123] Other early cases surveyed in *Bivens*-related scholarship fare no better, as they, too, typically involve common-law claims without the allegation of a constitutional violation. Other cited early cases are similar, as they likewise involved common-law claims with no cause of action alleging that a federal official violated the plaintiff's constitutional rights.[124]

This survey demonstrates a telling absence of historical cases squarely on point. The distinction between these common-law cases

[119] Little, 6 U.S. at 170, 177–78.

[120] *Id.* at 179.

[121] 7 U.S. (3 Cranch) 331 (1806).

[122] See, e.g., Pfander & Baltmanis, Rethinking Bivens, *supra* note 98, at 124 & n.28.

[123] Wise, 7 U.S. at 337.

[124] See Vladeck, *supra* note 3, at 267–70. See also, e.g., Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 2 (1817) (action for "replevin . . . for the restoration of the [plaintiff's] property," and the defense turned on whether the seizure of cargo was proper under the Embargo Act of 1808); The Apollon, 22 U.S. (9 Wheat.) 362, 363–64 (1824) (libel for *in rem* seizure of ship, and the defense turned on whether the Collection Act of 1799 authorized the seizure); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 138 (1836) ("action of assumpsit" for overpaid duties, and the defense turned on whether the goods qualified as wool shawls under the federal import statute); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) ("action of trespass," and the defense turned on whether the defendant could seize property pursuant to a military commander's order during the war with Mexico); Buck v. Colbath, 70 U.S. (3 Wall.) 334, 334–37, 346–47 (1866) (an action for trespass, and the defense turned on whether the property had been properly seized pursuant to a writ of attachment); Bates v. Clark, 95 U.S. 204, 205 (1877) (an action for trespass, and the defense turned on whether "this whiskey was seized in Indian country, within the meaning of the act of 1834 and the amendment of 1864"); Belknap v. Schid, 161 U.S. 10, 18 (1896) (involving a federal suit for patent infringement).

and federal recognition of constitutional claims meriting relief through monetary damages is significant. If pre-*Bivens* challenges to federal officer action had been based on a belief that the Fourth Amendment "created a federal damage remedy," then litigants "would have had no trouble" stating so in their complaints and "would not have relied upon state law."[125] But historical research suggests that litigants at the time did not conceive of their claims as constitutionally derived. Scholars James Pfander and Jonathan Hunt compiled a study on judgments reviewing decades of congressional records where early federal officials had sought indemnification from Congress for liability imposed in their individual capacity stemming from official acts. Nearly all the records involved indemnification requests arising from cases alleging "liability in trespass" in some form.[126]

B. Common-Law Suits Do Not Justify the Bivens *Regime.*

Given these distinctions, it is challenging to contend that longstanding history justifies the judicial fashioning of remedies to address allegations of unconstitutional acts by federal officials. The elements of common-law claims differed substantially from the contours of 20th-century *Bivens* claims. The accountability interests underlying those distinct causes of action differ significantly as well. The early common-law claims were not vehicles for the assertion of constitutional rights. Rather, the plaintiffs in those common-law suits desired recovery for governmental actions taken without lawful authority and relied upon common-law tort theories for redress.

These suits were aimed at providing accountability for federal actors to perform their duties consistent with legal constraints.[127] But, more fundamentally, the suits were not built on assertions of new federal mechanisms for relief beyond federal remedies enacted by Congress acting within its limited, enumerated areas of authority. Rather, the suits were grounded in law that preexisted the Constitution's ratification.

[125] Br. for the Respondents in Bivens, *supra* note 41, at 19.

[126] James E. Pfander & Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. Rev. 1862, 1904–05 (2010).

[127] See, e.g., Br. for the Respondents in Bivens, *supra* note 41, at 10–11 (reporting on the ratification debate discussion about the importance of common-law causes of action for providing government officer accountability).

Moreover, even the "early republic damages liability doctrines" were not themselves "'judge-made'" causes of action. They originated in "statutes, international treaties, and executive practice" that had been around for "centuries" and, thus, were already part of the preexisting legal landscape at the time of the 1788 ratification of the new federal Constitution.[128] Consequently, at the time of ratification, such claims were no longer ongoing federal judicial creations. And the federal Constitution's imposition of separation-of-powers structural constraints would have curbed the ongoing fashioning of expansive implied causes of action in any event. The Article III judiciary's discrete role to resolve cases and controversies is distinct from the preceding role of common-law courts.[129] The new constitutional system assigned to Congress the task of creating lower federal courts and defining the contours of federal jurisdiction.

C. Constitutional Separation of Powers Explains the Lack of Historical Support for Judicially Creating New Federal Damages Actions.

Most fundamentally, the historical practice of federal courts has traditionally avoided creation of new damages actions absent congressional authority due to the exclusive vesting of federal "legislative Powers" in Congress subject to strict, interbranch procedural constraints.[130] Those rigid parameters on legislative authority extend not just to the pronouncement of new substantive binding legal standards but also to the imposition and generation of the methods for enforcing that substantive law.[131] The Supreme Court has expressly relied on those limits when interpreting and applying statutory limits on causes of action. In particular, the Court has warned that

[128] Andrew Kent, Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers, 96 Notre Dame L. Rev. 1755, 1777–78 (2021).

[129] Compare, e.g., U.S. Const. art. I, § 1 (vesting of the legislative power to create binding policies in the federal legislature); *id.* § 8, cl. 9 (power to create inferior tribunals); *id.* art. III, § 1, cl. 1 (reference to congressional creation of inferior tribunals); with *id.* art. III, § 1, cl. 2 (grant to the federal courts of the discrete judicial power to resolve cases and controversies). See also, e.g., Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (addressing the distinct powers and functions of Article III courts versus common-law courts).

[130] See U.S. Const. art. I, § 1 (legislative vesting clause); *id.* art. I, § 7 (bicameralism and presentment requirements).

[131] Alexander, 532 U.S. at 286.

"[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[132]

From its first session, Congress accordingly enacted provisions creating and delineating the authority of lower federal courts. The Judiciary Act of 1789 painstakingly specified and crafted the structure and organization of inferior federal tribunals, and it regulated the causes of action to be heard within those courts.[133] For example, Congress specified venues for the consideration of causes of action including "suits for penalties and forfeitures incurred[] under the laws of the United States," suits against ambassadors, removal jurisdiction from state courts, forfeitures of bonds, "suits at common law where the United States sue," "civil causes of admiralty and maritime jurisdiction," certain "alien su[its] for a tort," and appeals from state court cases that "draw[] in question the validity of a treaty or statute of, or an authority exercised under the United States."[134]

The first Congress also enacted statutory provisions expressly authorizing damages actions for underlying substantive rights granted in the text of the Constitution, suggesting that Congress believed such statutory authorization was necessary to generate monetary damages relief in connection with underlying substantive law. The Patent Act of 1790, for example, established a patent infringement action enabling patent holders to recover "such damages as shall be assessed by a jury." The act also specified the requisite elements and available defenses for infringement claims and addressed forfeiture.[135] These actions previewed the Supreme Court's acknowledgment centuries later that similar to "substantive federal law itself, private rights of action to enforce federal law must be created by Congress."[136] Courts may not create a

[132] *Id.* at 287; see Gamble v. United States, 139 S. Ct. 1960, 1981–82 (2019) (Thomas, J., concurring) (contrasting "a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law" from "our federal system" in which "[t]he Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society").

[133] See generally Judiciary Act of 1789, 1 Stat. 73.

[134] *Id.* §§ 9, 12, 13, 25, 26.

[135] §§ 4 & 6, ch. 7, Act of April 10, 1790, 1 Stat. 109.

[136] Alexander, 532 U.S. at 286–87.

cause of action no matter how desirable one might be on policy grounds.[137]

Creating a damages remedy thus would also violate a second core structural constitutional feature: the limitation of federal judicial authority to the resolution of discrete and concrete "cases" and "controversies."[138] Article III's limits ensure that "federal courts exercise 'their proper function in a limited and separated government.'"[139] Under Article III, federal courts do not have power to "exercise general legal oversight of the Legislative and Executive Branches, or of private entities"[140] but to "decide only matters 'of a Judiciary Nature.'"[141]

This structural reality, combined with the constitutionally ordained role of Congress in the establishment of lower federal tribunals, specification of causes of action, and imposition of jurisdictional requirements courts, suggests that the entire *Bivens* enterprise of squinting to discern a cause of action from bare constitutional text is not only ahistorical but also at odds with the Constitution's limited role for the judiciary.

The structural impropriety of the judiciary manufacturing of damages actions is compounded by the fact that damages relief also implicates core political interests like how best to protect the public fisc.[142] *Bivens* claims, aimed at individual federal actors, often have the capacity for burdening the federal government with "substantial costs, in the form of defense and indemnification."[143] Decisions related to the scope and contours of monetary damages claims for officer wrongdoing therefore are particularly well suited for congressional and presidential resolution through statutory enactments.

As the Court has previously observed, elected federal policymakers bear significant responsibility for assessing the extent to which individual federal officers and employees should be subject

[137] *Id.*

[138] U.S. Const. art. III, § 1.

[139] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

[140] *Id.*

[141] *Id.* (Madison, J.) (quoting 2 Records of the Federal Convention of 1787, at 430 (M. Farrand ed. 1966)).

[142] U.S. Const. art. I, § 7, cl. 1 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[143] Abbasi, 137 S. Ct. at 1856.

to potential monetary and other liabilities.[144] Through its representation spread among districts and states bearing distinct geographical, economic, and cultural interests, Congress has the greatest institutional capacity for acting responsively to the broadest array of varied electoral interests at a granular level.[145] Accordingly, Congress is best equipped, and was intentionally assigned by constitutional design, to resolve these sorts of complex value judgments.

Conclusion

Given *Egbert*'s cabining of *Bivens* and the lack of historical support for judicial creation of federal damages actions in the first place, policymakers and theorists who believe there is either a constitutional or good-governance mandate to ensure the availability of monetary relief against federal officers must look elsewhere for such relief.[146]

Egbert's narrowing of *Bivens*, premised on separation-of-powers principles, is supported by the historical record. Furthermore, the question of "who decides?" seeks to identify which actor in our governmental system has been authorized to take certain action. The Constitution's limited federal system intentionally imposes hurdles for the creation of new policy and new federal rights because of the robust role that state governments and private actors are supposed to play within our constitutional system.[147] *Egbert* and the cases preceding it return the Supreme Court and Congress to their original balance, which primarily seeks to preserve electoral representation

[144] *Id.*

[145] See Jennifer Mascott, Early Customs Laws and Delegation, 87 Geo. Wash. L. Rev. 1388, 1394–96, 1398–99, 1434–43 (2019).

[146] See, e.g., Carlos Manuel Vázquez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question, 161 U. Pa. L. Rev. 509, 575–76 (2013) (due process justification); Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 148–49 (1997) (suggesting the potential constitutional necessity of trespass remedies for unlawful state official actions); but cf. Sachs, *supra* note 94, at 1711–12 (distinguishing due process claims from claims asserting a lack of enumerated authority).

[147] See, e.g., U.S. Const. art. I, § 7 (bicameralism and presentment requirements); Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321 (2001) (explaining the connection between tough statutory enactment procedures, the Supremacy Clause's applicability to only federal law, treaties, and the Constitution, and the safeguards of federalism).

and accountability by empowering appointed judges to resolve only concrete disputes rather than reorienting the substantive contours of the federal legal system.

To the extent that some scope of monetary damages claims against federal officials in their individual capacity are deemed constitutionally necessary, the solution is not for courts to create *Bivens*-like actions, which are in tension with core constitutional requirements. Instead, Congress or the courts could reconsider the constitutionally proper scope of the Westfall Act's limitations on relief and preemption of traditional common-law damages actions against federal officials.[148] Currently, the Westfall Act imposes a significant roadblock to obtaining damages because it is interpreted to generally preempt state common-law claims against federal officials in their individual capacity for their official actions.[149] Congress could address the broad scope of the Westfall Act by enacting a new law to authorize such suits or by concretely narrowing the scope of the present law. Or perhaps courts may conclude through litigation that enforcement of the Westfall Act to bar the availability of constitutionally necessary relief is unlawful and may decline to apply the Westfall Act's preemption provision in such a case.[150]

Regardless of any action (or not) by litigants and Congress to fundamentally reexamine individual officer immunity provisions, the Constitution includes very significant constraints on which actor

[148] Cf. Michael Ramsey, Don't Fear Bivens, The Originalism Blog (Nov. 12, 2019), https://bit.ly/3bLVynx (contending that "absent a *Bivens* remedy the Westfall Act would be unconstitutional, as applied to state law claims" in analysis contending for the constitutionality of *Bivens*).

[149] The Westfall Act includes a carve-out for "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2), although the Supreme Court has stated that this provision neither endorsed nor enshrined *Bivens* but rather "simply left *Bivens* where it found it," Hernandez, 140 S. Ct. at 748 n.9.

[150] Cf, e.g., United States v. Arthrex, Inc., 141 S. Ct. 1970, 1987 (2021) (concluding that it would be unconstitutional to enforce the Patent Trial and Appeals Board's exclusive statutory rehearing power only "to the extent that its requirements prevent the Director from reviewing final decisions rendered by [administrative patent judges]"); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2219–20, 2224 (2020) (Thomas, J., concurring) (concluding that the nonenforcement of a challenged government action is a more appropriate judicial remedy than severance of the constitutionally problematic statutory provision).

may fashion federal jurisdiction to provide judicial relief.[151] Within a federalist system of limited enumerated power, and congressional responsibility for the generation of federal jurisdiction, the federal judiciary generally is not the appropriate entity to fashion new forms of relief. The Court's decision in *Egbert*, and those before it that denied expansion of new *Bivens* actions, have not been rulings on whether accountability for officers is warranted. Rather, those decisions have laid down markers acknowledging the limits of the power of the federal judiciary.

[151] See, e.g., U.S. Const. art. I, § 8 (assigning to Congress the power "[t]o constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (acknowledging the discretion of Congress to determine whether inferior courts are established); *id.* art. III, § 2 (limiting possible federal subject matter jurisdiction to admiralty, maritime jurisdiction, "[c]ases affecting Ambassadors, other public Ministers and Consuls" and to cases that "aris[e] under" the Constitution, federal law, or treaties made under their authority); *id.* art. III, § 2 (authorizing Congress to make exceptions and regulations impacting the Supreme Court's appellate jurisdiction).