
In its landmark 1971 decision Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,1 the Supreme Court held that a federal agent who violates the Constitution by infringing upon another’s rights can be held liable for monetary damages.2 This implied private right of action under the Fourth Amendment later became known as a Bivens action.3 Nevertheless, quickly after expressing that such a right of action exists, the Supreme Court limited the reach of Bivens actions by characterizing any extension of the remedy to new facts as disfavored and then closely examining any “special factors counseling hesitation” in the absence of affirmative congressional action before allowing a plaintiff’s case to proceed.4 In Hernandez v. Mesa,5 a splintered Supreme Court held that a Bivens remedy was not available in a cross-border shooting between U.S. and Mexican soil.6 The Court held that an extraterritorial shooting

5. 140 S. Ct. 735 (2020).
6. See id. at 739-40 (stating Court’s holding and outlining facts). The deceased Mexican teenager’s parents brought a Bivens claim alleging that a U.S. Customs and Border Patrol (CBP) agent violated the Fourth and Fifth Amendments when he shot from American soil and killed their son, who stood on Mexican soil. See id. at 740 (stating Hernández family’s claims). Although a five-Justice majority of the Court agreed that the trial court was right to dismiss the claim, Justice Thomas, joined by Justice Gorsuch, wrote separately to advocate for abandoning Bivens actions entirely. Id. at 750 (Thomas, J., concurring) (posing end of all Bivens claims). Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, rejecting the idea that the situation presented a novel context to Bivens jurisprudence. Id. at 753 (Ginsburg, J., dissenting) (advocating for reversal of trial court’s dismissal). As a result, only Chief Justice Roberts and Justices Alito and Kavanaugh joined the majority opinion’s decision and rationale to dismiss the cause of action while still maintaining that Bivens is appropriate in certain narrow circumstances, cross-border shootings not among them. See id. at 739, 750 (limiting remedy in cross-border context).
presented a new context for a Bivens claim that the Court disfavored, and further that “special factors” counseled hesitation in permitting the case to proceed; thus, the Court left creating a remedy applicable to these facts to Congress.\footnote{7}

On June 7, 2010, a fifteen-year-old Mexican national named Sergio Adrián Hernández Güereca was socializing with his friends in a dry cement culvert separating El Paso, Texas from Ciudad Juárez, Mexico.\footnote{8} The international border ran straight down the middle of the culvert.\footnote{9} The complaint alleged that the teenagers were playing a game in which they ran up the United States side of the embankment, touched the border fence, then returned to the Mexican side of the embankment.\footnote{10} CBP Agent Jesus Mesa Jr. (Agent Mesa) eventually arrived at the scene and detained a member of the group on the U.S. side.\footnote{11} After Hernández ran back to Mexican territory, Agent Mesa fired two shots across the border, hitting Hernández once in the face and killing him.\footnote{12}

The shooting sparked an international response and, following a DOJ investigation, Hernández’s parents sued Agent Mesa under Bivens, alleging that his actions violated Hernández’s Fourth and Fifth Amendment rights.\footnote{13} The District

\footnote{7}See id. at 742-44, 749-50 (stating special factors relate to separation of powers balance and Court should not extend remedy). The Court previously heard this case in 2017 after the Fifth Circuit affirmed the district court’s dismissal of the Bivens claim. See Hernandez v. Mesa, 137 S. Ct. 2003, 2005, 2007-08 (2017) (per curiam) (remanding Bivens issue back to Fifth Circuit). The Court vacated the Fifth Circuit’s decision and remanded the case in light of its recent decision in Ziglar v. Abbasi, where it clarified precisely what constitutes a “special factor counselling hesitation.” Id. at 2006-08 (defining standard for special factors counseling hesitation); see Ziglar v. Abbasi, 137 S. Ct. 1843, 1857-58 (2017) (applying narrow approach for Bivens actions).

\footnote{8}See Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (per curiam) (explaining events leading to litigation). In its 2017 decision, the Court reviewed the government’s motion to dismiss, accepting the allegations in the complaint as true. See id.; see also Wood v. Moss, 572 U.S. 744, 757-58 (2014) (explaining pleading standard for review of motion to dismiss). The case never progressed past this procedural posture, so the Court recounted the facts as alleged by the Hernández family. See 140 S. Ct. at 739-40 (explaining factual disagreement between parties).


\footnote{10}See 140 S. Ct. at 740. The parties disputed what Hernández and his friends were doing at the time of the shooting. See id. (stating complaint alleged Hernández and his friends “were simply playing a game”). The U.S. Department of Justice (DOJ) investigated the incident and concluded that the shooting occurred while smugglers were engaging in an illegal border-crossing scheme. See Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (per curiam) (noting DOJ findings). As a result, the DOJ declined to bring its own federal civil rights charges. Id.


Court for the Western District of Texas dismissed the claims and the Fifth Circuit affirmed this dismissal on two occasions. In 2014, the Fifth Circuit affirmed the dismissal, holding that Hernández did not enjoy Fourth Amendment protections as a Mexican citizen without a “‘significant voluntary connection’ to the United States” and that qualified immunity protected Agent Mesa from liability on the Fifth Amendment claim. In 2018, the Fifth Circuit heard the case on remand and again affirmed the dismissal of Hernández’s Bivens claim.

In 2019, nearly ten years after the shooting, the Supreme Court granted certiorari to resolve whether Hernández’s claim arose in a new Bivens context and, if so, to analyze the special factors counseling against extending Bivens. The Supreme Court ultimately affirmed the Fifth Circuit’s decision, holding that the cross-border shooting was a new Bivens context in which several special factors counseled against extending a remedy. These factors included the potential impact on foreign relations between the United States and Mexico; the executive branch’s duty, power, and institutional competence to maintain and regulate border security; and Congress’s failure to confer judicial power to adjudicate such an action.

The Supreme Court first recognized damages as a remedy for a federal official’s unconstitutional conduct in Bivens. In Bivens, federal agents entered and searched Webster Bivens’s home, threatened his family and arrested him in front of them, then transported him to a federal courthouse where he was interrogated.

investigation-death-sergio-Hernández-guereca [https://perma.cc/6MUV-S23L] [hereinafter Federal Officials Close Investigation] (reporting DOJ and U.S. Attorney’s findings regarding incident). The DOJ and U.S. Attorney’s Office for the Western District of Texas concluded there was insufficient evidence to charge Agent Mesa criminally, even after the DOJ partnered with the Federal Bureau of Investigation, Department of Homeland Security, Office of the Inspector General, the DOJ’s Civil Rights Division, and the U.S. Attorney’s Office to interview more than two dozen witnesses. See Federal Officials Close Investigation, supra (documenting DOJ report). The DOJ concluded that due to the incident’s territorial peculiarity, it could not file any federal civil rights charges against Agent Mesa as the court would lack jurisdiction. See id. (stating DOJ’s reasoning). Mexico disagreed, seeking Agent Mesa’s extradition for criminal prosecution, which the United States denied. See 140 S. Ct. at 740 (noting Mexico’s position).

14. See 140 S. Ct. at 740 (recounting procedural history); Hernandez v. United States, 757 F.3d 249, 267 (5th Cir. 2014) (en banc) (affirming motion to dismiss Bivens claim based partially on Hernández’s Mexican citizenship), adhered to in part on reh’g en banc, 785 F.3d 117 (5th Cir. 2015), vacated and remanded per curiam sub nom. Hernandez v Mesa, 137 S. Ct. 2003 (2017).

15. See 140 S. Ct. at 740 (quoting Hernandez v. United States, 785 F.3d 117, 119 (5th Cir. 2015)) (explaining lengthy procedural history).

16. See id. at 741; Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018) (affirming inapplicability of Bivens on remand), aff’d, 140 S. Ct. 735.

17. See 140 S. Ct. at 740-41 (explaining case history); Hernandez v Mesa, 139 S. Ct. 2636 (2019) (mem.) (granting certiorari). Prior appellate decisions in this case had examined substantive Fourth and Fifth Amendment rights and their extension to non-U.S. citizens, the applicability of qualified immunity, and jurisdictional limitations inherent in a cross-border case. See 140 S. Ct. at 740-41 (exploring past legal issues).

18. See 140 S. Ct. at 741, 743-44.

19. See id. at 743-44, 746-47, 750 (stating relevant special factors).

booked, and visually strip searched.21 When deciding whether to allow monetary damages, Justice Brennan emphasized the importance of an individual’s right to protect against invasion of their privacy and declared that when the federal government intrudes upon a person’s Fourth Amendment rights, the judiciary is the only avenue for protection.22 Following Bivens’s victory, from 1971 to 1980, the Supreme Court permitted Bivens actions based on two other Bill of Rights violations, one based on the Fifth Amendment’s guarantee of due process and the other based on the Eighth Amendment’s guarantee of minimally-adequate prison medical care.23 As a result, Bivens actions serve as a tool to both deter individual officers from violating the Constitution and make plaintiffs whole when federal officers harm them and they lack an alternative remedy.24

As Bivens jurisprudence developed, it narrowed, and the Supreme Court eventually concluded that if a Bivens claim differs in any meaningful way from the


22. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394-95 (1971) (noting purpose of Fourth Amendment). The Court reasoned that when federally-protected rights are invaded and a federal statute provides the right to sue, federal courts can use any available remedies to grant the necessary relief—despite the Fourth Amendment not explicitly providing a damages remedy. See id. at 396 (articulating well-settled law on remedies for invasion of legal rights). Bivens was unable to assert and protect his civil liberties, except by suing for damages. See id. at 390, 397 (noting lack of alternative remedies). As Justice Harlan explained, an injunction would not “obviate the harm,” the United States as a country enjoyed immunity from lawsuits, and the exclusionary rule is “irrelevant” for individuals the government chooses not to prosecute. See id. at 409-10 (Harlan, J., concurring).

23. See Michael A. Rosenhouse, Annotation, Bivens Actions—United States Supreme Court Cases, 22 A.L.R. Fed. 2d 159 § 4 (2007) (summarizing Supreme Court Bivens jurisprudence). In Davis v. Passman, Davis brought suit against a congressman for violating the Fifth Amendment by terminating her employment because “it was essential that the understudy to [his] Administrative Assistant be a man.” See 442 U.S. 228, 230-31 (1979) (quoting Passman’s termination letter). The Supreme Court determined that although special factors warranted hesitation, “these concerns are coextensive with the protections afforded [to the congressman] by the Speech or Debate Clause.” Id. at 246 (allowing Bivens claim despite factors counseling hesitation). Further, the Court opined that no person is above the law of the land. See id. (discussing Bivens protections broadly). Because no congressional action explicitly declared that monetary damages were unavailable under the circumstances, the Court allowed Davis to proceed with her lawsuit. See id. at 246-48 (implying new private right of action). In Carlson v. Green, the Court allowed a lawsuit based on the Eighth Amendment, stating that no special factors counseled hesitation because federal prison officials “do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.” 446 U.S. 14, 18-19 (1980) (applying Bivens to Eighth Amendment). Further, the Court concluded that Congress had neither limited Bivens nor precluded plaintiffs who suffered injuries resulting from constitutional violations from obtaining monetary damages. See id. at 19 (deferring to Congress).

three original Bivens cases, the Court must closely and carefully consider any special factors counseling hesitation in allowing a damages remedy, which are usually dispositive of the entire action.\textsuperscript{25} The Court limited the Bivens doctrine for the same reason that it has limited its own power to imply other statutory private rights of action—providing a remedy for a violation of the law is a legislative function, not a judicial function.\textsuperscript{26} Further, the Court has been thoroughly reluctant to adjudicate any claims with possible national security or foreign policy implications.\textsuperscript{27}

\textsuperscript{25} See Ziglar v. Abbasi, 137 S. Ct. 1843, 1857-58 (2017) (defining which types of special factors may counsel hesitation); see also Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68, 74 (2001) (refusing to extend Bivens). The Court generally centered its analysis on the separation of powers, asking “whether the [j]udiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” Ziglar v. Abbasi, 137 S. Ct. 1843, 1847, 1860-61 (2017) (assessing Court’s competency to imply cause of action). Notably, reasonable minds differ as to the degree to which factors actually counsel hesitation. Compare Rodriguez v. Swartz, 899 F.3d 719, 744-48 (9th Cir. 2018) (allowing Bivens remedy in cross-border shooting), vacated and remanded, 140 S. Ct. 1258 (2020) (mem.), with 140 S. Ct. at 744, 749 (denying Bivens remedy in cross-border shooting). Despite its increasingly narrow viewpoint of the Bivens remedy, the Court did not outright overrule the doctrine, as stare decisis demands that the Court weigh “the reason for rejecting any established rule” of law against the following factors: the importance of the law providing a clear guide for individuals to base their conduct upon; the importance of allowing individuals to plan without surprise; the need to provide “fair and expeditious adjudication by removing any need to re litigate every proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.” See 140 S. Ct. at 750 (declining to overrule Bivens); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (providing standard for assessing decision to overrule past decisions); see also Ziglar v. Abbasi, 137 S. Ct. 1843, 1856-57 (2017) (affirming continued importance of Bivens in vindicating Constitution).

\textsuperscript{26} See Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (explaining implied causes of action generally “disfavored”); Susan Bandes, Reinventing Bivens: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 297-98 (1995) (explaining development of Bivens jurisprudence and separation of powers principles). Professor Susan Bandes argues that the Court’s changed conception of a Bivens remedy as a result of separation of powers principles is—in the case of constitutional violations—fundamentally at odds with its continued deference to Congress to create a private right of action. See Bandes, supra, at 291, 303-04 (basing position on separation of powers). She states:

The judicial duty to remedy constitutional violations stems from two overlapping sources: (1) the courts’ adjudicative function, and (2) their structural checking function. The judiciary has a dual role in the scheme of separated powers. Its traditional function is to adjudicate the claims of individuals and, in the constitutional context, to protect individual liberties. Congruent with, or sometimes in tension with, this function is its structural role: its duty to ensure that the political branches do not exceed their constitutionally granted powers.

\textit{Id.}

Some scholars interpret the Supreme Court’s narrowing of *Bivens* as evidence of its increasing hostility towards providing remedies for constitutional violations by state actors and, more broadly, as a procedural barrier to federal courts’ role in protecting against tyranny of the majority. Other scholars articulate that the Court’s declaration that a *Bivens* remedy is a constitutional rule contradicts its insistence that Congress can circumvent the remedy at its discretion, since Congress cannot overrule any portion of the Constitution with ordinary legislation. Whether a *Bivens* action is firmly grounded in modern constitutional principles or is a “relic of the heady days” of judicial activism remains unresolved.

In a five-to-four decision, the Court in *Hernandez v. Mesa* ultimately held that the cross-border nature of Hernández’s claim implicated too grave a breach of separation of powers to allow the case to proceed. The Court first determined that Hernández’s claim arose in a new context because of the shooting’s location, even though it arose under the Fourth and Fifth Amendments, two constitutional

---

28. See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 951 (2019) (explaining hostility toward damages suits against federal and state officials); Rebecca E. Zetlow, *Cooper Supremacy*, 41 U. ARK. LITTLE ROCK L. REV. 285, 309-10 (2019) (describing how *Bivens* limitations became procedural barrier to enforcement of minority rights); *see also* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 228 (Penguin Books 2015) (proposing Supreme Court fails to follow its constitutional duty). “Our rights are meaningless if they cannot be vindicated. . . . [T]he Supreme Court has . . . . far too often, kept those who have been injured by unconstitutional government conduct from having any remedy.” CHEMERINSKY, supra, at 228 (explaining Court’s shortcomings surrounding protection of individual liberties).


31. *See* 140 S. Ct. at 739, 749-50, 753 (emphasizing separation of powers principles). Justice Alito wrote:

To avoid upsetting the delicate web of international relations, we typically presume that even congressionally crafted causes of action do not apply outside our borders. These concerns are only heightened when judges are asked to fashion constitutional remedies. Congress, which has the authority in the field of foreign affairs, has chosen not to create liability in similar statutes, leaving the resolution of extraterritorial claims brought by foreign nationals to executive officials and the diplomatic process.

Id. at 749-50.
provisions to which *Bivens* has historically applied.\(^{32}\) Three related factors counseled hesitation in extending a remedy to Hernández: First, the Court examined the “potential effect on foreign relations” and concluded that judicial intervention would intrude on the executive’s diplomatic functions with Mexico.\(^{33}\) Second, allowing the case to go forward necessarily implicates national border security, and the Court refused to allow any opportunity to undermine the executive’s established border-security policies.\(^{34}\) Lastly, the Court examined several statutory schemes granting monetary damages to victims of government abuses, and ultimately reasoned that Congress never authorized judicial remedies for injuries inflicted by U.S. agents abroad.\(^{35}\)

Justice Thomas, joined by Justice Gorsuch, concurred, but called for abrogating *Bivens* entirely, characterizing the doctrine as unauthorized judicial legislation for which “*tare decisis* provides no ‘veneer of respectability to [the Court’s] continued application of [such] demonstrably incorrect precedents.’”\(^{36}\)
Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented because the majority opinion failed to correctly apply recent Bivens precedent—Hernández’s claim did not arise in a new context because Bivens suits are settled and necessary remedies against rogue law enforcement in the search-and-seizure context, despite Agent Mesa’s bullet landing on Mexican soil. Furthermore, the dissenting Justices disagreed with the majority that recognizing the lawsuit would negatively impact foreign policy, asserting that it would actually support foreign policy because the United States committed to protecting individual liberties in the International Covenant on Civil and Political Rights. The dissenters also justified their willingness to extend Bivens by refuting the majority’s national security concerns as nonspecific and pretextual.

Based on the Supreme Court’s fractured analysis, the future of the Bivens remedy is as grim as it is unclear. Notably, only Chief Justice Roberts and Justices Alito and Kavanaugh agreed on the majority opinion’s rationale that Bivens is still an appropriate remedy in certain narrow circumstances that do not offend separation of powers, but not in cross-border shootings where judicial intervention could “upset the delicate web of international relations.” As a result of Justice Thomas’ concurring opinion calling for an abrogation of the entire

abrogates and denounces. See id. at 750 (chastring periods of judicial activism). As a result, Justice Thomas argues that the Court should similarly abrogate Bivens. See id. (advocating for end of Bivens actions entirely).

37. See id. at 753, 756 (Ginsburg, J., dissenting) (stating holding does not cast doubt on Bivens in law enforcement context); see also Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (stating clearly Bivens’s valid and unaltered position in Fourth Amendment context). Abbasi held that Bivens lawsuits are both deterrents against unconstitutional conduct by officers themselves and difficult to redress without awarding retrospective damages. See Ziglar v. Abbasi, 137 S. Ct. 1843, 1856-57, 1860, 1862 (2017) (highlighting importance of Bivens actions in remedying past wrongs and preventing future ones). Justice Ginsburg did not agree that the claim arose in a new context simply because Agent Mesa shot Hernández while Hernández happened to be on Mexican soil. See 140 S. Ct. at 756-75, 1860, 1862 (2017) (stating clearly Bivens’s valid and unaltered position in Fourth Amendment context).


39. See 140 S. Ct. at 758 (Ginsburg, J., dissenting). Justice Ginsburg acknowledged that the majority failed to explain how an unjustified killing undermines border security. See id. (noting logical flaw in majority’s argument). The dissent reasons that in Abbasi the Court warned against hollowly using national security concerns as a “talisman used to ward off inconvenient claims.” See id.; Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017). As such, the dissent rejected the majority’s argument that the claimed national security concerns were a legitimate reason to foreclose Hernández’s family from bringing a Bivens claim. See 140 S. Ct. at 758 (Ginsburg, J., dissenting) (positing national security not reason to deny Hernández’s parents’ action).

40. Compare supra note 31 and accompanying text (explaining majority opinion’s reasoning based on strict separation of powers), and supra note 36 and accompanying text (detailing Justice Thomas’s call for abrogation of remedy), with supra note 37 (summarizing analysis of four-Justice dissent).

41. See 140 S. Ct. at 739, 749-50 (expressing future of Bivens). Despite the majority’s disapproval of the remedy, it based its decision on the executive and legislative branches’ special roles in national security and foreign policy, not the idea that Bivens was wrongly decided, as the concurrence plainly states. See id. at 749-50, 752-53 (Thomas, J., concurring) (suggesting abrogation).
remedy, more Justices agreed with the dissent’s viewpoint on the future strength and validity of the Bivens doctrine, particularly as it pertains to unconstitutional conduct by rogue federal officials, than the majority opinion.\textsuperscript{42} The dissent’s analysis tracks prior Bivens jurisprudence with more precision and logic than the majority’s sweeping declarations and powerfully declares an obvious truth woven through this case: It simply does not matter (not “one whit,” according to Justice Ginsburg) that Agent Mesa’s bullet landed on the Mexican side of the border.\textsuperscript{43} Despite the fact that the dissent’s analysis of Bivens’s implications for future cases won more votes than the majority and that it more closely and logically aligned with existing Bivens jurisprudence, Hernandez’s ultimate holding is a nefarious and hollow rejection of a litigant’s right to enforce his individual liberties, which will have lasting effect.\textsuperscript{44}

Although the Supreme Court insisted that separation of powers precluded Hernandez from pursuing a Bivens remedy, this steadfast judicial deference to the political branches itself violates separation of powers principles.\textsuperscript{45} The judiciary exists as a check on the political system to protect against tyranny of the majority; the Court’s abdication of power in the sensitive and inviolable arena of individual liberty absent congressional mandate fails that essential purpose, therefore offending the very goal of separation of powers.\textsuperscript{46} Meanwhile, the Court’s choice to depart from its most recent Bivens decision represents a
questionable retreat from stare decisis principles, which threatens public faith in the Court’s commitment to the rule of law.\textsuperscript{47} While the Fourth Amendment explicitly prohibits the government from performing unreasonable searches and seizures, Hernández’s family had no recourse unless they could successfully obtain civil damages, despite the fact that their son suffered deadly force, the most extreme form of unreasonable seizure and abuse of power.\textsuperscript{48} The Court’s decision slammed the courthouse doors shut, continuing a frightening trend of hurling roadblocks in front of litigants seeking redress for abuses of governmental power.\textsuperscript{49} The conservative-leaning Court does not contemplate a judiciary that protects individual liberties in the face of the almighty executive and legislative branches, and this mindset will likely result in the demise of individual’s ability to assert constitutional tort claims to vindicate their individual rights.\textsuperscript{50} The Bill of Rights has never been self-executing for minorities and the disadvantaged and, without the judiciary’s necessary check on the executive and legislative branches, it utterly fails to protect individual liberty.\textsuperscript{51}


And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of \textit{Bivens} in the search-and-seizure context in which it arose. \textit{Bivens} does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of \textit{Bivens} in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

\textsuperscript{48} See id. at 757 (describing “closed courtroom door” dismissal). The Supreme Court’s support of qualified and absolute immunity, which offer expansive protections against official liability; prevailing Eleventh Amendment jurisprudence that precludes individuals from suing the state; the numerous limitations on suing types of state actors that the Court implied while interpreting § 1983; and \textit{Bivens}’ shaky framework all operate together to erode individuals’ ability to enforce their constitutional rights. See Fallon, \textit{supra} note 28, at 957, 994-95 (compiling numerous common law limitations on constitutional tort litigation).

\textsuperscript{49} See id. at 756-57 (Ginsburg, J., dissenting) (acknowledging Fourth Amendment violation and lack of alternative remedies for Hernández’s family).

\textsuperscript{50} See \textit{supra} note 28 and accompanying text (describing increasingly limited availability of constitutional tort litigation).

\textsuperscript{51} See Bandes, \textit{supra} note 26, at 312-13, 319 n.141 (opining Framers intended Supreme Court to enforce Bill of Rights and noting minority rights underprotected); see also Zietlow, \textit{supra} note 28, at 308-09 (noting withdrawal of Court’s commitment to minority rights). Bandes writes that “[i]t seems unlikely that the Framers meant the Bill of Rights to be merely precatory. It also seems unlikely that the Framers intended exclusive
family, but also for any future victims of abuse of power at the border; this is not an isolated incident, but Supreme Court jurisprudence and U.S. tort law continue to shield CBP officers from the legal consequences of their actions.\footnote{52}{See 140 S. Ct. at 759-60 (Ginsburg, J., dissenting) (explaining numerous complaints against CBP agents). Between 2009 and 2012, individuals made over 800 complaints of abuse, but the government took formal disciplinary action in practically none of those cases. \textit{See id.} at 760. Considering this fact, redressing injuries such as this one is either “\textit{Bivens} or nothing.” \textit{Id.}; \textit{see Fallon, supra} note 28, at 957 (discussing interplay of official immunity and \textit{Bivens}).}

As a result of this decision, non-U.S. citizens who suffer constitutional violations by CBP agents directly at the border have no judicial remedy. Although the Court did not officially abrogate \textit{Bivens}, a majority of the Justices no longer adhere to the principles that originally underpinned \textit{Bivens}, continuing a trend of abandonment the Court has traveled since the 1980s. Under the cloak of respect for separation of powers, the Court chipped away at its own ability to safeguard and vindicate the rights guaranteed in the very document the Justices swore to enforce and protect. In refusing to extend \textit{Bivens}, the Court has dangerously departed from the longstanding principle that abuse of the Constitution requires a remedy. Now, citizens and noncitizens alike are left to wonder: What protection does a constitutional right provide without the power to enforce it?

\textit{Elisa Strangie-Brown}