

TORTS STORIES AFTER BIVENS

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In the decade after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ the Supreme Court twice recognized implied causes of action for damages to redress the constitutional torts of federal officials.² In the next four decades, the Court declined a dozen more opportunities to recognize such an implied cause of action.³ Characterizing *Bivens* as an anomaly and perhaps even wrongly decided,⁴ the Court has cast that decision in a broader narrative about statutory interpretation and the separation of powers. The story is that the Court for a time wrongly “assumed common-law powers to create causes of action” — powers that rightfully belong to Congress.⁵

A common counternarrative situates *Bivens* not within the history of developing theories of statutory interpretation but instead within a tradition in which federal courts adjudicated common law claims against federal officers. These common law claims sometimes implicated constitutional issues.⁶ Few dispute that *Bivens* was novel or that common law claims against federal officers were long available; the question is what that past means for today’s law.

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¹ 403 U.S. 388 (1971).

² See *Davis v. Passman*, 442 U.S. 228, 230 (1979) (finding an implied cause of action for violations of the Due Process Clause of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (affirming an implied cause of action for violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment).

³ See *Egbert v. Boule*, 142 S. Ct. 1793, 1799–800 (2022); *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017); *Minnecci v. Pollard*, 565 U.S. 118, 125 (2012); *Hui v. Castaneda*, 559 U.S. 799, 812 (2010); *Wilkie v. Robbins*, 551 U.S. 537, 561–62 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 473 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 419–20 (1988); *United States v. Stanley*, 483 U.S. 669, 684 (1987); *Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

⁴ See, e.g., *Egbert*, 142 S. Ct. at 1802; *Hernández*, 140 S. Ct. at 742–43; *Ziglar*, 137 S. Ct. at 1855.

⁵ *Egbert*, 142 S. Ct. at 1802 (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)); see also, e.g., *Ziglar*, 137 S. Ct. at 1855 (describing this earlier era as an “ancien régime” (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001))).

⁶ See E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 875–79 (2025); Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923, 1932 (2021); Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1870 (2021); Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1759 (2021); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942 (2019).

Professor James Pfander and Rex Alley offer a refreshing variation on the story of official accountability, one not about resuscitating *Bivens* but about the Federal Tort Claims Act⁷ (FTCA).⁸ The FTCA generally makes the federal government liable for the private-law torts of its employees just as those employees would be liable under state law if they were private persons.⁹ But there are several exceptions to liability under the FTCA, including (many) intentional torts and torts committed outside of the United States.¹⁰ The conventional view — which Pfander and Alley challenge — is that the FTCA also precludes all state-law claims against federal employees arising out of conduct within the scope of their employment, even if one of the Act’s limitations bars the vicarious liability claim against the United States.¹¹ Relying on an intricate textualist interpretation of the statute, Pfander and Alley argue that the FTCA displaces state-law torts against federal employees only if the FTCA provides a cause of action against the United States.¹² They make a persuasive textual case that courts have long misconstrued the FTCA, and their argument may warrant attention from the Court — and a response from the United States — in an appropriate case.

Yet Pfander and Alley focus *not* on the textual argument itself but on situating it within a broader narrative about official accountability — a narrative that overlaps with those about *Bivens*. In the nineteenth century, Pfander and Alley argue, the system of official accountability “relied on tort law to provide assured redress for positive government wrongs.”¹³ In the twentieth century, even though the FTCA and *Bivens* were supposed to “supplement the common law and expand the right of individuals to recover,” there has been a “notable decline in remedial effectiveness.”¹⁴ The nineteenth-century model treated “tort-based redress” as “essential to the rule of law”;¹⁵ today, the Supreme Court “balanc[es] government and individual interests” and “fret[s] over the potential for government embarrassment.”¹⁶ What Pfander and Alley’s reinterpretation of the FTCA claims to offer, then, is not just a tweak to the legislative scheme, but a way to restore the nineteenth century’s “assured baseline of remedial adequacy.”¹⁷ Pfander and Alley’s historical narrative thus frames the textual reinterpretation of the FTCA as one part of a broader restorative project.

⁷ 28 U.S.C. §§ 1346(b), 2671–2680.

⁸ See James E. Pfander & Rex Alley, *Federal Tort Liability After Egbert v. Boule: A Textual Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. 985, 989 (2025).

⁹ See 28 U.S.C. § 2674.

¹⁰ See *id.* § 2680(h), (k).

¹¹ See Pfander & Alley, *supra* note 8, at 995–97.

¹² See *id.* at 1054.

¹³ *Id.* at 993.

¹⁴ *Id.* at 998.

¹⁵ *Id.* at 993.

¹⁶ *Id.* at 1005.

¹⁷ *Id.* at 1054.

Yet that historical argument alone cannot justify restoration of the nineteenth-century system. The law of the past becomes the law of the present not just because it is from the past, but because it was made (or becomes) binding or because it is instructive. So *why* should we imitate the lost nineteenth-century model of officer accountability? Which aspects of the nineteenth-century model should we imitate? Which should we ignore?

Those questions require some reason to think that the nineteenth-century system was desirable, some reason to think that it remains desirable today, and some standard by which to evaluate whether departures from the nineteenth-century model improve or deform it. Indeed, the success of any project to reform the regime of federal officer liability turns on the ability to articulate and defend a theory of accountability. That theoretical inquiry might transform the history of suits against officers into a usable past — a past that tells us something about the system of officer liability that ought to be adopted. Without such a theory, by contrast, the history of common law claims against federal officers says little about officer suits today.

To say that Pfander and Alley's textual and historical claims depend on these antecedent questions is not to demand an answer here. The paper's close attention to overlooked statutory text is a real virtue, as is its effort to assess the system of official accountability — a system that includes not just constitutional torts but the FTCA and personal-capacity tort suits against officials — rather than the system's components in isolation.

Even though Pfander and Alley reasonably refrain from answering those antecedent theoretical questions, their analysis nevertheless suggests some possible answers. It might be that the point of these suits is to “keep the government mostly within the bounds of the law most of the time.”¹⁸ Or it might be that there is something essential or unique about “tort-based redress” — that is, claims for damages — for some category of “positive government wrongs.”¹⁹ But each of those arguments complicates the historical narrative. If damages function to ensure official compliance with the law, then damages might be an antiquated accountability mechanism in an age of prospective judicial remedies and bureaucratic control. If damages are necessary to redress “positive government wrongs,” we might wonder which set of wrongs requires redress, why damages are necessary, and whether the modern system might *better* attain redress for governmental wrongs than the nineteenth-century model — even if today's regime falls short of an idealized world of complete redress. Those purposes of official

¹⁸ *Id.* at 991; *see also id.* at 993 (quoting Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786 (1991); Fallon, *supra* note 6, at 981).

¹⁹ *Id.* at 1013; *see also id.* at 988 (referring to “suits to secure compensation”).

accountability, in turn, tell us why the history matters and when it has nothing to say.

This response proceeds as follows. Part I briefly describes the modern framework for federal officer liability and recounts Pfander and Alley's interpretation. Part II isolates the relevant differences between the established interpretation of the FTCA and Pfander and Alley's revisionist one. Identifying the departures from the current regime is necessary to assess the systemic consequences of Pfander and Alley's textual reinterpretation of the FTCA, but attempting to isolate those changes reveals that other atextual rationales for avoiding liability — which judges have relied upon *both* when interpreting the modern FTCA *and* in the nineteenth-century framework — could prevent the textual argument from transforming the modern regime. This Part thus shows that the success of Pfander and Alley's textual reinterpretation is bound up with the broader historical claim.

Part III thus turns from Pfander and Alley's textual argument to that historical narrative. I contrast the likely regime of official accountability under Pfander and Alley's reinterpretation of the FTCA with the idealized nineteenth-century model. That contrast shows that, in many respects, the modern regime is better than the old, though determining whether change is progress or deterioration depends upon the reason the system permits damages actions to be brought against officials. The contrast also shows that comparing the new regime to the old one has normative force because the comparison invokes an idealized form of the nineteenth-century model — an ideal version constructed by inferring the normative aims of the regime from the imperfect actual regime. So just as the assessment of the systemic consequences of their textual argument in Part II demonstrates the limits of that textual argument, comparing the modern regime of official accountability to the nineteenth-century model demonstrates the limits of the historical narrative that Pfander and Alley deploy to bolster the argument from text.

Part IV then shows how the relevance of history depends on the justification for damages suits against federal officers implicit within Pfander and Alley's argument, whether that justification be that damages remedies are one of many mechanisms that keep the government within the bounds of the law or that damages remedies are necessary (or uniquely suited) to redress certain categories of "positive government wrongs."²⁰ I thus show that the use of history, at least in this domain, must be subordinated to a theory of official accountability — regardless of whether the history is supposed to be binding today or whether it is merely instructive in crafting a modern regime of official accountability. A short conclusion comments both on the role of these kinds of tort stories after *Bivens* and on the legitimate uses of history in legal analysis

²⁰ *Id.* at 1015.

when — and *even* when — the use of history is inevitably informed by one’s understanding of the purposes of today’s legal regime.

I. REINTERPRETING THE FTCA

Pfander and Alley target a prevailing misinterpretation of the FTCA. Enacted in 1946, the FTCA statute waives the sovereign immunity of the United States for damages claims for the torts of federal employees acting within the scope of their employment.²¹ The substantive law governing such a claim is the private law of the jurisdiction where the tort occurs.²² The FTCA also precludes liability for the United States in several circumstances. Probably the most important of these is the statute’s protection from liability if a federal employee “perform[s] a discretionary function or duty.”²³ But the FTCA also excludes, among others, claims “arising in a foreign country,” the intentional torts of employees (*unless* the tort was committed by “investigative or law enforcement officers”), and claims based on “combatant activities of the military . . . during time of war.”²⁴ There are currently thirteen subsections listing these “exceptions” to liability under the FTCA.²⁵

Pfander and Alley’s argument concerns that scheme’s effect on preexisting state-law tort claims against federal employees in their personal capacity. Throughout the nineteenth century and beyond, federal employees could be sued under the common law — for example, claims for trespass, ejection, replevin, and so on.²⁶ As originally enacted, the FTCA let plaintiffs choose between a state-law claim against the federal

²¹ 28 U.S.C. § 1346(b)(1) (federal district courts have original jurisdiction over “civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment”).

²² *Id.* The United States is liable “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Id.* The scope-of-employment issue is also determined based on the relevant jurisdiction’s law of respondeat superior. *See, e.g.,* *Taber v. Maine*, 67 F.3d 1029, 1033 (2d Cir. 1995) (collecting cases).

²³ 28 U.S.C. § 2680(a); *see also* James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000).

²⁴ *See* 28 U.S.C. § 2680(h), (j)–(k).

²⁵ *Id.* § 2680(a)–(n).

²⁶ In the nineteenth century, some of these claims might have been considered part of the “general law” rather than what we would think of as state law. *See* Pfander & Alley, *supra* note 8, at 1015–16 (“[T]he Court made such remedies as trespass damages and injunctive relief available as a matter of general law, after invalidating state statutes that purported to foreclose such relief.”); *see also id.* at 1015 n.203 (citing Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997)). *But cf.* Anthony J. Bellia & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 669–77, 697–701 (2013) (explaining the differences between “local” and “general” law, noting when federal courts applied local law (rather than general law) where relevant, and discussing federal efforts to displace local law in the late nineteenth century); Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 242–43 (2023) (discussing application of general law to “tort cases involving interstate commerce” and local law to “cases involving the tort liability of cities and states”).

employee and an FTCA claim against the United States. As Pfander and Alley explain, “Congress preserved existing remedies at common law against federal employees, including intentional tort claims.”²⁷

But then the Supreme Court held in *Westfall v. Erwin*²⁸ that federal employees were not “absolutely immune” under “state tort law” for actions within the scope of their employment.²⁹ Instead, the Court in *Westfall* concluded that employees were immune only if the “challenged conduct” was “within the outer perimeter of an official’s duties” and was “discretionary in nature.”³⁰ Congress’s response, known as the Westfall Act,³¹ made the FTCA’s remedy “exclusive” of other civil actions against the employee “by reason of the same subject matter.”³² It also “precluded” any other action for damages “arising out of or relating to the same subject matter.”³³ Today, the conventional wisdom is that the Westfall Act precludes *all* state-law tort claims against federal officials.³⁴

Pfander and Alley challenge that conventional view with an intricate reinterpretation of the phrase “by reason of the same subject matter.”³⁵ That phrase, they argue, originated in the FTCA’s judgment-bar provision, which broadened the contemporary preclusion rules to ensure that a failed FTCA suit against the *United States* would preclude subsequent

²⁷ Pfander & Alley, *supra* note 8, at 1027. Two caveats to that claim: First, the choice of remedies was available *ex ante* but constrained *after* litigation of the FTCA claim, because a judgment in an FTCA action is a “complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government.” 28 U.S.C. § 2676 (emphasis added); see James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 457 (2011). Second, even before the Westfall Act, Congress had enacted a “series of immunity statutes . . . that were designed to protect certain classes of Government employees from the threat of personal liability.” *United States v. Smith*, 499 U.S. 160, 170 (1991); see also *Levin v. United States*, 568 U.S. 503, 507 (2013).

²⁸ 484 U.S. 292 (1988).

²⁹ *Id.* at 293.

³⁰ *Id.* at 300.

³¹ Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 16 U.S.C. § 831c-2 and 28 U.S.C. §§ 2671, 2674, 2679).

³² 28 U.S.C. § 2679(b)(1) (emphasis added).

³³ *Id.*

³⁴ See, e.g., *Minnecci v. Pollard*, 565 U.S. 118, 126 (2012) (“Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.” (citing 28 U.S.C. §§ 2671, 2679(b)(1); *Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007))); *Hui v. Castaneda*, 559 U.S. 799, 806 (2010) (“The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct.”); *United States v. Smith*, 499 U.S. 160, 166 (1991) (“[T]he FTCA [is] the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability.”). The Westfall Act expressly excludes actions “brought for a violation of the Constitution.” 28 U.S.C. § 2679(b)(2)(A). On the question of whether that language preserves state common law claims alleging some constitutional violation, compare Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 570–77 (2013) (yes), with Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights*, 75 CATH. U. L. REV. (forthcoming) (manuscript at 32 n.263, 46–47), <https://ssrn.com/abstract=4462807> [<https://perma.cc/2S8Z-CDGM>] (no).

³⁵ Pfander & Alley, *supra* note 8, at 1028–29.

suits against the *employee*.³⁶ But the “same subject matter” language also codified a version of claim preclusion narrower than today’s law; it precluded only claims asserting the same “primary legal right,” not all claims “arising from the underlying transaction.”³⁷ That same interpretation, Pfander and Alley continue, carries through to the meaning of the exclusivity and preclusion provisions in the Westfall Act, which preclude lawsuits regarding only matters “‘arising out of or relating to’ the subject matter of those claims for which the FTCA affords a remedy.”³⁸ The result is that state-law claims against federal employees *not* “arising out of or relating to” a claim that might be brought under the FTCA should remain available.

The argument is compelling, at least presented as it is without a rebuttal from the United States, and I am happy to stipulate that it is correct as a matter of text. It reflects Pfander and Alley’s deep familiarity with the text and structure of the FTCA, with the FTCA’s statutory history and judicial implementation, and with the historical development of preclusion principles. Of course, Pfander and Alley’s argument turns on several critical questions of statutory interpretation. Were preclusion principles settled enough in 1946 to inform the interpretation of the FTCA? Did the meaning change enough between 1946 and 1986 that the modern interpretation of claim preclusion should displace it?³⁹ What should courts do with *United States v. Smith*⁴⁰ and *Hui v. Castenada*,⁴¹ which Pfander and Alley argue should be overruled, but which lower courts have no authority to disregard and which the Supreme Court may be inclined to leave alone?⁴²

Indeed, *United States v. Smith* is likely the biggest hurdle for Pfander and Alley’s interpretation. *Smith* squarely held that plaintiffs could not sue a federal employee even though the FTCA’s foreign-

³⁶ *Id.*; see also Pfander & Aggarwal, *supra* note 27, at 419–20.

³⁷ Pfander & Alley, *supra* note 8, at 1029–31.

³⁸ *Id.* at 1038 (quoting 28 U.S.C. § 2679(b)(1)).

³⁹ Indeed, Pfander and Alley identify a series of court of appeals decisions that suggest that the analogous “exclusivity provision” in the Federal Drivers Act of 1961, Pub. L. No. 87-258, 75 Stat. 539 (codified as amended at 28 U.S.C. § 2679), “protected all actions an employee took within the scope of employment, even if a plaintiff would not be able to sue the government under the FTCA for those actions.” See Pfander & Alley, *supra* note 8, at 1034 n.316 (citing decisions from the Third, Fourth, Sixth, and Ninth Circuits).

⁴⁰ 499 U.S. 160 (1991).

⁴¹ 559 U.S. 799 (2010).

⁴² Pfander & Alley, *supra* note 8, at 1044; see *Hui*, 499 U.S. at 805–06 (ignoring similar language, “by reason of the same subject-matter,” *id.* at 805, and holding that analogous exclusivity language in 42 U.S.C. § 233(a) “grants absolute immunity” to certain employees for acts “within the scope of their employment” by “barring all actions against them for such conduct,” *id.* at 806 (quoting 42 U.S.C. § 233(a))); *Smith*, 499 U.S. at 162 (holding that, even when a plaintiff’s claim falls within the FTCA’s “foreign-country exception,” the plaintiff may not “seek damages from the particular Government employee who caused the injury”). *But see* *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 32 (1951) (per curiam) (allowing ordinary tort claim to proceed against the Panama Railroad Company despite the FTCA’s exception for claims against that company).

country exception precluded the claim against the United States.⁴³ That holding is directly contrary to their interpretation of the statute.⁴⁴ So a decision adopting Pfander and Alley's reinterpretation of the Westfall Act would require the Court either to (1) overrule *Smith* or (2) conclude that, while at least *one* of the thirteen exceptions to liability under section 2680 of the FTCA precludes liability (according to *Smith*), some of the remaining thirteen exceptions do not preclude liability (according to Pfander and Alley's theory).⁴⁵ It might be hard to justify overruling a statutory precedent or embracing disuniformity, and the Court might conclude that *Smith* settled the interpretative question, even if it might have been settled wrong.⁴⁶

Regardless, Pfander and Alley's paper is essential reading both for courts assessing whether a plaintiff has a state-law tort claim when the FTCA precludes relief and for attorneys preparing a complaint alleging tortious conduct by federal officials. If a plaintiff has a claim that might be precluded by one of the exceptions in the FTCA (and particularly an exception not covered by *Smith*), she might want to allege a common law claim too.⁴⁷ If lower courts begin to adopt Pfander and Alley's interpretation in cases where *Smith* does not directly control, the conflict might cause the Court to weigh in on *Smith*'s logic — and to give due consideration to the careful textual arguments offered by Pfander and Alley.

II. THE LIMITS OF TEXT

A separate question is whether the reinterpretation, if adopted, would have the systemic effect that Pfander and Alley suggest that it would. The reinterpretation of the FTCA, they argue, matters for the “system of remedies” because it would provide “a right to assured redress for positive government wrongs.”⁴⁸ But some of the state-law claims would fail *even if* they were not barred by the Westfall Act, and for reasons that have nothing to do with the text.

As an initial matter, the set of claims that the reinterpretation could resurrect includes only claims that are both (1) brought against federal

⁴³ 559 U.S. at 162.

⁴⁴ See Pfander & Alley, *supra* note 8, at 1039–44 (arguing that *Smith* should be overruled).

⁴⁵ A third possibility would be some kind of congressional override.

⁴⁶ Here again Pfander and Alley have a strong rebuttal: that the Court's later decision in *Simmons v. Himmelreich*, 578 U.S. 621 (2015), already “fundamentally unsettled the *Smith* Court's flawed account of the operation of exceptions to the government's FTCA liability.” Pfander & Alley, *supra* note 8, at 1043. That is probably true, and the Court's effort to distinguish *Smith* in *Simmons* is cursory and hard to follow. See *Simmons*, 578 U.S. at 627–29. But the Court did seem to think it had distinguished *Smith*, and the distinction would apply equally to the other exceptions to FTCA liability. *Id.*

⁴⁷ See also Pfander & Alley, *supra* note 8, at 1046 n.406 (suggesting that, out of an abundance of caution, plaintiffs may prefer to file claims both under the FTCA and state common law, invoking the district court's supplemental jurisdiction).

⁴⁸ *Id.* at 1025.

employees acting within the scope of their employment and (2) excluded from the FTCA. Pfander and Alley identify just a few categories: torts occurring outside the territory of the United States and domestic intentional torts if the officer is *not* a law enforcement officer.⁴⁹ As examples, Pfander and Alley offer cases involving (1) a negligence claim against a doctor in a foreign hospital,⁵⁰ (2) a claim for assault and battery against an official at the Smithsonian,⁵¹ and (3) claims arising out of a cross-border shooting and an extrajudicial killing in Guatemala.⁵² Notably, the FTCA already allows claims for intentional torts committed by “law enforcement officers,”⁵³ and accordingly Pfander and Alley’s argument does not make a difference for the federal employees who “implement their policies through the use of force.”⁵⁴ But in theory, Pfander and Alley’s argument should apply to all of the other “exceptions” to the FTCA — most prominently, claims based on “execution of a statute or regulation,” “a discretionary function or duty,” and “combatant activities . . . during a time of war,” but including other claims too.⁵⁵ If one of these exceptions applies, the FTCA claim would fail but the (reinterpreted) Westfall Act would not preclude the common law claim.

The net effect of Pfander and Alley’s reinterpretation, however, depends on what happens to the set of common law claims that would survive the Westfall Act. The reinterpretation would expand the scope of remedies only if the common law claims that correspond to the excluded FTCA claims would otherwise succeed. But the risk is that courts would reproduce the *textual* limitations in the FTCA as *atextual* immunities.

⁴⁹ See *id.* at 1045–46 (collecting examples).

⁵⁰ *Id.* at 1045. For that fact pattern, see *United States v. Smith*, 499 U.S. 160, 162 (1991).

⁵¹ Pfander & Alley, *supra* note 8, at 1045–46 (citing *Majano v. United States*, 545 F. Supp. 2d 136, 137–38 (D.D.C. 2008)).

⁵² *Id.* at 1046 (citing *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020)); *id.* at 1026 (citing *Harbury v. Hayden*, 522 F.3d 413, 421–23 (D.C. Cir. 2008) (Kavanaugh, J.)).

⁵³ 28 U.S.C. § 2680(h). Technically, the intentional-tort exclusion precludes FTCA claims for a specific set of intentional torts, and the law enforcement proviso covers a narrower set. See *id.* So some claims against law enforcement — for “libel, slander, misrepresentation, deceit, or interference with contract rights” — could proceed under Pfander and Alley’s interpretation of the FTCA. See *id.* But that category of claims is probably small.

⁵⁴ Pfander & Alley, *supra* note 8, at 1013; *id.* n.194 (citing Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. 1941, 1941 (2024)); Chertoff, *supra*, at 1945 & n.11 (reporting that there are “one hundred and thirty thousand sworn law enforcement officers” in Customs and Border Protection (CBP), Immigration and Customs Enforcement, Federal Bureau of Prisons, FBI, Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, and Firearms); see, e.g., *Millbrook v. United States*, 569 U.S. 50, 55 n.3 (2013) (government concedes that Federal Bureau of Prisons “correctional officers” are law enforcement); *Campos v. United States*, 888 F.3d 724, 737 (5th Cir. 2018) (CBP officers are law enforcement); *Celestine v. United States*, 841 F.2d 851, 853 (8th Cir. 1988) (police officers for Department of Veterans Affairs are law enforcement); *Caban v. United States*, 728 F.2d 68, 72 (2d Cir. 1984) (Immigration and Naturalization Service agents are law enforcement); *Brown v. United States*, 653 F.2d 196, 198 (5th Cir. 1981) (government concedes FBI agent is investigative officer).

⁵⁵ For the complete list of exceptions, see 28 U.S.C. § 2680.

For example, as Pfander and Alley recognize, claims currently barred by the FTCA’s “discretionary function” exception might also fail as common law claims.⁵⁶ In *Westfall*, the Court embraced “absolute immunity for state-law tort actions” if the “conduct is discretionary in nature.”⁵⁷ So even if Pfander and Alley’s textual argument succeeds, these state-law tort claims would survive preclusion by the Westfall Act only to fail under the theory of immunity in *Westfall*. The limitations on liability for the exercise of discretionary functions are also widespread in state tort law, and claims against federal officers might be barred by that *state’s* discretionary function immunity.⁵⁸ More generally, the widespread endorsement of a discretionary function immunity suggests that courts generally credit the justifications for that immunity.⁵⁹ Those justifications for the discretionary function exception — for example, avoiding “judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy”⁶⁰ — will not dissipate once the Westfall Act has been reinterpreted.⁶¹

Similar arguments apply to common law claims excluded from the FTCA because they challenge “execution of a statute or regulation,” involve “combatant activities,” or arise in “foreign countr[ies].”⁶² The exclusion based on the execution of statutes and regulations precludes efforts to use the FTCA to challenge the constitutionality of statutes or the legality of regulations.⁶³ Claims based on “combatant activities” would raise concerns about the application of state tort law to the

⁵⁶ See Pfander & Alley, *supra* note 8, at 1051–53 (discussing immunity for discretionary functions for tort-based claims).

⁵⁷ *Westfall v. Erwin*, 484 U.S. 292, 296–97 (1988).

⁵⁸ See RESTATEMENT (SECOND) OF TORTS § 895D (AM. L. INST. 1979) (recognizing immunity if a “public officer acting within the general scope of his authority” is “engaged in the exercise of a discretionary function”); DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 22.8–.9, at 568–73 (2d ed. 2016) (describing the discretionary function immunity as the “chief immunity or defense” available to state and local entities and stating that sometimes “the same policy is advanced by the separate rule called the public duty doctrine,” *id.* § 22.8, at 568).

⁵⁹ The endorsement of these immunities is common not just across jurisdictions, *see* sources cited *supra* note 58, but also throughout history, *see* Kent, *supra* note 6, at 1772 (noting that the Taney Court “immunized officials . . . in situations in which the Court found that the law had granted discretionary room for judgment” (citing Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 422–29 (1987))); Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 946 & n.413 (2024).

⁶⁰ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

⁶¹ See *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1443 (2019) (rejecting the application of discretionary function immunity to the Tennessee Valley Authority (TVA) but suggesting that “suits challenging the entity’s governmental activity may run into an implied limit on its sue-and-be-sued clause”).

⁶² 28 U.S.C. § 2680(a), (j)–(k).

⁶³ See *Dalehite v. United States*, 346 U.S. 15, 33 (1953) (“[The FTCA] bars tests by tort action of the legality of statutes and regulations.”); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.6(b)(1), at 166 (2d ed. 2023) (noting that the limitation bars challenges to the “enactment of a statute or promulgation of a regulation” that “cannot be characterized as a negligent act”).

conduct of the United States military — similar concerns to those motivating *Feres v. United States*.⁶⁴ Claims based on activity in “foreign countries” implicate the concerns that justify the presumption against the extraterritorial effect of statutes, the risk that foreign law might regulate the activities of foreign employees abroad, or the risk that the state laws might interfere with federal foreign affairs.⁶⁵ The failure of some claims may be overdetermined if they raise multiple reasons to avoid the imposition of liability.⁶⁶

The systemic effect of Pfander and Alley’s reinterpretation of the FTCA thus depends on whether courts replace the FTCA’s textual immunities with similar atextual immunities that preclude recovery under state tort law. An interpretation of the FTCA that invites plaintiffs to bring state common law claims might recreate the same disputes about the immunity of federal officers, under different sources of law, driven by similar concerns about imposing tort-based liability for the operations of government. If judges hesitate to interfere with the discretionary functions of legislators and administrators, to impose tort-based liability on the military, or to apply domestic law abroad (or foreign law to federal employees), then those hesitations might likewise influence their evaluation of state-law claims against federal officials — even without the express textual hooks in the FTCA. If the limitations within the FTCA embed preexisting objections to tort-based liability, then reinterpreting the FTCA to allow state-law claims would not displace that hesitation to extend tort law to federal employees. The interpretation of the FTCA’s text is downstream of these conceptions of the judicial role, and reinterpreting the text cannot eliminate those conceptions.

III. TORTS STORIES

Perhaps because the textual argument alone cannot easily rework the system of official accountability, Pfander and Alley situate the textual argument within a broader historical narrative about government (un)accountability. They describe the nineteenth-century model of

⁶⁴ 340 U.S. 135, 141–45 (1950) (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305–06 (1947)); see also *United States v. Brown*, 348 U.S. 110, 112 (1954) (discussing the effect of litigation on “military discipline”). But see *United States v. Johnson*, 481 U.S. 681, 692–93 (1987) (Scalia, J., dissenting) (questioning the legitimacy of *Feres* given the combatant-activities exception).

⁶⁵ See, e.g., *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335–36 (2016); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003) (citing, inter alia, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964)). States are mixed on whether the presumption against extraterritoriality applies to their laws. See William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1440–41 (2020). For Pfander and Alley’s discussion of these risks, see *supra* note 8, at 1049 (recognizing “choice-of-law issues” for torts committed abroad and risk that the government invokes the “presumption against the extraterritorial application of federal statutes”).

⁶⁶ Cf. *Harbury v. Hayden*, 522 F.3d 413, 415 (D.C. Cir. 2008) (Kavanaugh, J.) (rejecting common law claims against federal employees under both the FTCA’s foreign-country exception and the political question doctrine).

official accountability as an ideal system, and they rely on modern departures from that nineteenth-century model to strengthen the critique of the modern misinterpretation of the FTCA. That history not only plays an integral part in their textual reinterpretation of the FTCA, but also offers a preemptive argument *against* the reproduction of the FTCA's textual immunities as atextual ones. If the ideal model of official accountability demonstrates the defects of the FTCA as interpreted, it would also show the defects of a framework that invokes atextual immunities to replicate the misinterpretation of the FTCA.

But Pfander and Alley's description of the nineteenth-century system of accountability cannot alone identify the features of the nineteenth-century system that make that system ideal. Instead, the efforts to compare that system to today's require a theory about the purposes of official accountability. The theory of accountability defines the imitable features of the nineteenth-century model and grounds the argument that the modern system is defective. To offer some concrete illustrations of the subordination of history to theory, consider three possible purposes of the nineteenth-century model of accountability present in Pfander and Alley's article: It (1) provided assured redress coextensive with the private law, (2) provided such redress for private-law claims and some constitutional claims, and (3) generally kept the government in the bounds of legality.⁶⁷

First, Pfander and Alley defend the nineteenth-century model because it provides assured "redress for positive government wrongs."⁶⁸ The category of "positive government wrongs" is not expressly defined, but the nineteenth-century framework operated in a "private-right model" in which the litigable claims were those already available under the common law.⁶⁹ So the assured redress would be "tort-based redress" using suits "at common law."⁷⁰ Pfander and Alley thus suggest that the system of assured redress requires courts to remedy *private wrongs* — and maybe only such wrongs — by federal officers.⁷¹

But if the nineteenth-century model is desirable because it enforced the private-law baseline against federal officers, the modern regime is in some respects an improvement. Substantively, the FTCA imitates the nineteenth-century framework because it ties liability to the "law of the

⁶⁷ These first two options offer variations of a defense of damages remedies as unique tools to correct certain kinds of wrongs, but they differ on the category of wrongs that require redress. The third possibility defends damages for functional reasons. For a defense of both of these kinds of arguments, see Fallon & Meltzer, *supra* note 18, at 1787–91.

⁶⁸ Pfander & Alley, *supra* note 8, at 1013.

⁶⁹ *Id.* at 1017.

⁷⁰ *Id.* at 1000. The available claims included trespass, false imprisonment, ejectment, and others. See *id.* at 999–1000, 999 n.89 (citing James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 515, 518–19 (2021) (discussing also replevin, trover, and assumpsit)).

⁷¹ See *id.* at 1024–25 (stating that "the proposed restoration of tort liability" would "limit[] redress to wrongs deemed tortious at common law").

place” governing the responsibilities of “a private person.”⁷² To be sure, the FTCA includes various limitations on liability (like the discretionary function exception), but many of those limitations enforce remedial *equality* by ensuring that federal employees are no more liable than private persons to the extent that the employees engage in the unique functions of government.⁷³ Limitations like the discretionary function and combatant-activities exceptions reflect judgments that the private law does not perfectly map onto the actions of federal employees because the government is differently situated than private parties.⁷⁴

Even the nineteenth-century framework tailored liability to the unique functions of government officials. As Pfander and Alley note, the nineteenth-century framework included various limitations on liability for official acts, including immunities for the “discretionary function . . . for superior officers.”⁷⁵ The convergence of modern immunities and the immunities available in the nineteenth-century model suggests that the fundamental problem in each system is similar: How should courts apply private law to government officials? The limitations on the FTCA and the limitations of the nineteenth-century model may not be identical, but the nineteenth-century model and the modern system are not so different if the question is whether government officials are subordinated to the *relevant* private law.

On the other hand, the modern framework offers certain other advantages to victims seeking to recover damages. The FTCA substitutes the United States for the federal employee, replacing a potentially judgment-proof defendant with the deepest possible pocket.⁷⁶ The United States pays final FTCA judgments as a matter of course out of a “permanent, indefinite appropriation” called the Judgment Fund.⁷⁷ Indeed, the United States pays hundreds of millions of dollars to thousands of FTCA claimants out of this fund every year.⁷⁸

⁷² 28 U.S.C. § 1346(b)(1).

⁷³ See *supra* Part I, pp. 93–96.

⁷⁴ E.g., 28 U.S.C. § 2680(a) (no liability for execution of a statute or regulation); *id.* § 2680(i) (no liability for “fiscal operations of the Treasury or . . . the regulation of the monetary system”); *id.* § 2680(j) (no liability for military action in war).

⁷⁵ Pfander & Alley, *supra* note 8, at 1013. For a debate about the scope of damages liability for officers in the maritime-seizure context, compare *id.* at 1003 n.121, with Kent, *supra* note 6, at 1773–74.

⁷⁶ See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 623 (2006) (describing the many mechanisms by which individuals protect assets from tort judgments); 5 U.S.C. § 8437(e)(2) (protecting retirement plans for federal employees from “execution, levy, attachment, garnishment, or other legal process”).

⁷⁷ See Paul F. Figley, *The Judgment Fund: America’s Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 161–62, 166 (2015).

⁷⁸ See, e.g., SISK, *supra* note 63, § 3.2, at 116 (“For 2020–2021, the Judgment Fund annual report to Congress disclosed that 6,183 successful FTCA claims or settlement[s] were paid, averaging \$121,490, and for a total of \$751 million.”); see also Pfander & Alley, *supra* note 8, at 1015 n.201 (noting that the annual payout for fiscal year 2022 was “approximately \$500 million” (citing

Compare the nineteenth-century solution to judgment-proof federal employees. As Pfander and Jonathan Hunt have shown, federal officers in the nineteenth century were regularly indemnified by Congress if found liable by a court.⁷⁹ But seeking a private bill was “cumbersome” and introduced uncertainty into the process.⁸⁰ For example, Pfander and Hunt found “57 cases of officers petitioning for indemnification” between 1789 and 1860,⁸¹ with only a sixty-percent success rate — sometimes after the first petition, but other times after filing “as many as three or four petitions.”⁸² In the modern period, the Supreme Court has noted that Congress enacted the FTCA because the “private bill device was notoriously clumsy.”⁸³ So the private-bill mechanism was surely inferior to the modern system. And though personal liability might generate a market in liability insurance for federal employees that would counter the judgment-proof problem,⁸⁴ it would be the defendant’s insurance policy — instead of the FTCA’s express limitations — that would likely impose a “de facto cap on tort damages.”⁸⁵ Practically, the modern system of payments from the Treasury is likely an improvement for victims.

Stated differently, comparing the nineteenth-century model of official accountability *in toto* to the modern system undermines the argument that the comparison demonstrates a defect in the latter — unless,

BUREAU FISCAL SERV., JUDGMENT FUND: ANNUAL REPORT TO CONGRESS (2022–23), <https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress> [<https://perma.cc/BRB6-MAW3>]).

⁷⁹ 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, 1867–68 (2010).

⁸⁰ See Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1332 (2000).

⁸¹ Pfander & Hunt, *supra* note 79, at 1904.

⁸² *Id.* at 1905 & n.192.

⁸³ *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953); see also *id.* at 25 n.9 (“In the Sixty-Eighth Congress about 2,200 private claim bills were introduced, of which 250 became law.” (quoting H.R. REP. NO. 79-1287, at 2 (1945))). Sometimes officers posted bonds that could provide a source of recovery for the victim. See, e.g., *West v. Cabell*, 153 U.S. 78, 84–85 (1894); *Lammon v. Feusier*, 111 U.S. 17, 18–20 (1884); cf. MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS §§ 235–237, at 251–54 (Chicago, T.H. Flood & Co. 1892). But the reliance on private bills indicates that bonds were never a comprehensive solution. For a brief discussion of the use of bonding at the Founding as a form of bureaucratic control, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1316–18, 1341 (2006).

⁸⁴ Pfander & Alley, *supra* note 8, at 1050 n.436 (noting that one of the authors published prior findings that some *Bivens* claims were covered by liability insurance); see also John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1550 n.41 (2017) (noting that the federal government subsidizes professional liability insurance for some federal agents).

⁸⁵ Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 3 (2005); cf. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275, 281–301 (2001) (presenting results from a qualitative study suggesting that plaintiffs and their attorneys are less likely to seek assets from uninsured defendants and more inclined to pursue recovery from only a defendant’s liability insurance).

that is, the comparison is not to the actual past but to an idealized version of it. What's so bad about a system that makes it substantially easier for a plaintiff to collect damages by substituting the United States as the defendant, even if the system recognizes a different (but maybe not so different) set of immunities? Would a plaintiff be better off trying her luck with the FTCA between 1974 and today, or with a common law claim against a federal official sometime in the nineteenth century? If the answer is that plaintiffs are better off today, then the comparison to the past implies no defect in today's system. If the answer is that plaintiffs are worse off today, then the implicit comparison is probably not to the nineteenth-century model as it was but as it ought to have been. That kind of historical argument, however, abstracts a normative aim from the content of the legal regime, then uses that normative aim to reconstruct the legal regime in an ideal form.

Second, another theory of official accountability would expand the set of wrongs that requires redress beyond the private-law baseline of the nineteenth-century framework and the FTCA. As Pfander and Alley note, "assured redress for positive government wrongs" excludes both wrongs that were not "tortious at common law"⁸⁶ and claims precluded by common law immunities.⁸⁷ But the category of redressable wrongs could still be more capacious than the private-law baseline if it includes some constitutional harms — *for example*, claims brought under the Fourth Amendment or the Eighth Amendment.⁸⁸

If accountability is measured by the availability of tort-based relief for relevant private-law wrongs and constitutional torts, however, then the modern model again offers advantages. Before *Bivens*, there were no implied causes of action for constitutional torts. "Under the standard model of nineteenth-century litigation," Pfander and Alley explain, "plaintiffs would sue an official at common law and then invoke the Constitution to challenge any official or statutory justification offered in defense of the official action in question."⁸⁹ *Bivens* thus offered a new cause of action that did not "merely duplicate common law tort-based liability."⁹⁰ Of course, recent decisions have refused to extend *Bivens* to new contexts,⁹¹ and the Court has even said it likely would have reached

⁸⁶ Pfander & Alley, *supra* note 8, at 1024 ("[A] regime of assured redress for positive government wrongs makes damages available *only for conduct deemed tortious at common law . . .*" *Id.* n.260 (emphasis added)).

⁸⁷ *Id.* at 1005–13.

⁸⁸ *Id.* at 1025 n.261; *see also* Carlson v. Green, 446 U.S. 14, 17–18 (1980) (Eighth Amendment); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (Fourth Amendment).

⁸⁹ Pfander & Alley, *supra* note 8, at 1017; *see also id.* n.215 (noting an instance of a nineteenth-century state court invalidating a statutory defense because the statute was unconstitutional).

⁹⁰ James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 573 (2020).

⁹¹ Pfander & Alley, *supra* note 8, at 988 & n.12.

a different outcome if it “were called to decide *Bivens* today.”⁹² But some *Bivens* claims still result in monetary recovery for some plaintiffs,⁹³ and thus the modern framework is in this respect still superior to the nineteenth-century model.

The analogy to the nineteenth-century model might be used to justify the extension of *Bivens*, but only by recharacterizing the nineteenth-century system. To use that history to extend *Bivens*, the imitable feature of the nineteenth-century model cannot be just that common law damages claims were available, but rather that it offered a system of damages remedies for relational wrongs. In the nineteenth century, the argument would continue, the system of redress comprised the set of relational wrongs defined by the common law.⁹⁴ The argument for *Bivens* would then embrace the *framework* of relational redress, while expanding the set of wrongs that require redress to include not just private-law wrongs but also constitutional torts. The history alone cannot justify that extension, however, because such an extension depends on analogizing from the redressable wrongs of the nineteenth century to a new set of wrongs that were not cognizable under common law. The use of history to justify *Bivens* thus assumes an analogy between the wrongs of the common law and constitutional wrongs. That might be right, but the argument is awkward because *Bivens* depends on the premise that constitutional wrongs are *different*.⁹⁵

Any use of history to justify *Bivens* thus shows the impotence of the brute facts of that past. The nineteenth-century model of official accountability permitted plaintiffs to bring a discrete set of claims. The constitutional tort was not among them. (Indeed, even some private-law torts that should now be compensable under the FTCA would not have been among the set of claims available in the nineteenth century.⁹⁶) As noted just above, an argument that the modern system falls short of the nineteenth-century model also with respect to the set of substantive claims available both now and then has to ignore the practical remedial defects of the nineteenth-century model — in particular, the problem of

⁹² *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022).

⁹³ Pfander, Reinert & Schwartz, *supra* note 90, at 565.

⁹⁴ *E.g.*, Pfander & Alley, *supra* note 8, at 1000.

⁹⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391–92 (1971) (rejecting the view that “the relationship between a citizen and a federal agent unconstitutionally exercising his authority [is] no different from the relationship between two private citizens”).

⁹⁶ *Compare* *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 n.3 (10th Cir. 2005) (noting that circuit courts allow claims of intentional infliction of emotional distress under the FTCA), *with* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 879 (1939) (“The early cases . . . refused all remedy for mental suffering, unless it could be brought within the scope of some already recognized tort.”); *compare* *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978) (tort of invasion of privacy does not fall within the FTCA’s intentional torts exception), *with* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (calling for the recognition of a yet-unrecognized privacy right).

judgment-proof defendants.⁹⁷ Here, and perhaps worse, an argument that the modern system falls short of the nineteenth-century model with respect to claims that were *not* available would ignore the comparative defects in the substance of the law of the past. The argument that today's regime fails to live up to the past thus would require us to abstract from the past a normative aim to redress certain kinds of wrongs, then to analogize constitutional wrongs (that is, *Bivens* and § 1983) to the set of wrongs that ought to be redressed, then to critique the modern system for failing to remediate them.

Third, the nineteenth-century model might be worth imitating because it provided a generally effective system of remedies, rather than because it offered tort-based damages remedies.⁹⁸ As Pfander and Alley note, however, the *twentieth*-century decision in *Ex parte Young*⁹⁹ offered a novel mechanism to challenge the constitutionality or legality of official conduct.¹⁰⁰ That twentieth-century avenue to prospective relief supplemented the nineteenth-century remedial model, and today the "*Ex parte Young* action '[is] the normal mechanism' to litigate enforcement of" an unconstitutional law.¹⁰¹ Likewise, the Administrative Procedure Act makes judicial review of agency action generally available (usually) before agency action ripens into a cognizable common law claim or an enforcement action by the government.¹⁰² We might add the availability of declaratory relief, professionalization of the federal bureaucracy, and general norms of compliance with the law and with judicial orders.¹⁰³

None of these alternatives function as substitutes for damages *after* the injury occurs, but the modern system of accountability may be better for the potential victims of government misconduct *ex ante*.¹⁰⁴ Indeed,

⁹⁷ See *supra* notes 75–85 and accompanying text; see also Rappaport, *supra* note 84, at 1603 (noting that statutory- or market-based indemnification caps "would leave many official defendants judgment-proof").

⁹⁸ See Pfander & Alley, *supra* note 8, at 994 (noting that under the modern system, agency organic statutes often "provide some mechanism for judicial review" of government action and that the APA's "presumption in favor of judicial review provides a gap-filling backstop").

⁹⁹ 209 U.S. 123 (1908).

¹⁰⁰ See Pfander & Alley, *supra* note 8, at 1019 n.229 (noting that the nineteenth-century model "did not impose a tort-based duty on state officials to refrain from enforcing unlawful state regulations").

¹⁰¹ *Id.* (quoting Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1317 (2023)).

¹⁰² *E.g.*, *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 151–53 (1967).

¹⁰³ *E.g.*, Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1169 (2014) (noting the "professionalized federal workforce produced by the growth of the administrative state" in the twentieth century and the availability of APA suits for "injunctive and declaratory remedies" as forms of judicial review); Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018) (noting the "strong norm" that officials "comply with court orders" even when judges generally do not impose sanctions for noncompliance).

¹⁰⁴ Of course, plaintiffs seeking prospective judicial relief may face substantial barriers to pre-enforcement review of governmental misconduct, even when the misconduct is predictable. See, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983).

if the point of a damages remedy is to ensure government compliance with the law, then the unavailability of damages is a failure only if damages would be an effective way to control federal officials. When comparing the nineteenth-century model to the modern framework as regimes that incentivize government officials to follow the law, then, the question should be whether the operative judicial remedies, bureaucratic controls, and norms available in the nineteenth century were more efficacious than today's.

In sum, Pfander and Alley's historical narrative seeks to compensate for their textual claim's limited ability to overcome judicial skepticism about imposing liability on the federal government. Because that skepticism is grounded not in the FTCA's text but in judicial concerns about subjecting certain forms of governmental activity to tort-based liability, the textual claim cannot secure systemic change to the current framework. The historical narrative attempts to bolster the textual argument for reform, but the claim that today's legal regime departs from the (desirable) nineteenth-century model itself assumes a theory about the aims of a system of official accountability and about how tort-based redress contributes to those aims.

IV. AFTER *BIVENS*

Pfander and Alley's historical account thus cannot justify the argument for legal change without a theory of officer accountability. Of course, stories about the law's past are commonly used to shed meaning on what old laws mean today.¹⁰⁵ Where interlocutors share the same assumptions about the relevance of that past, the underlying theoretical questions might recede.¹⁰⁶ But when historical narratives and counter-narratives compete to legitimate a legal regime — as has been occurring with *Bivens* — the underlying theoretical question cannot be avoided by referencing history.¹⁰⁷ The answer to the theoretical question, in turn, determines why history matters and how it should be used to develop the law today. Indeed, the theory of accountability informs not just the descriptive comparison of the nineteenth-century regime and today's regime, but also the reasons that history might be persuasive (or not) in crafting the modern system.

If damages ensure that the government generally acts consistently with the law, then damages must encourage, incentivize, or coerce officials to comply. In this sense, the terms "redress" or "remedy" are misnomers because damages are *not* supposed to rectify, restore, correct,

¹⁰⁵ See, e.g., JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 15–17 (2024).

¹⁰⁶ See *id.* at 23 (explaining that lawyers using historical arguments usually suppress the "theory of argument that justifies the use of history").

¹⁰⁷ Cf. Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 19 (2024) ("Originalist Justices are grappling with the limits of original sources.").

or amend. Once again, this functional argument renders the damages remedy dependent on complicated empirical questions about who pays such damages and how officials respond to the threat of such a remedy.¹⁰⁸ It makes the tort-based damages remedy a substitute for the other tools of control, including (among other things) alternative forms of judicial review and prospective remedies (like injunctions, declaratory relief, and set-aside remedies), criminal sanctions, bureaucratic controls, norms of professional conduct and law-abidingness, and electoral constraints.

Once the damages remedy depends on its function in the broader remedial and bureaucratic system,¹⁰⁹ however, using the history as *binding* authority seems harder to justify.¹¹⁰ Even if we thought the nineteenth-century model of official accountability were binding today — that is, mandated by constitutional text, by statute, or by tradition — it would be hard to state with any precision the content of that tradition, and it would be impossibly difficult to assess whether the modern system of remedies is effective *enough* compared to a historical baseline. To state the point bluntly, could judges possibly answer whether today's entire system of judicial remedies, bureaucratic controls, professional norms, and electoral constraints is "about as effective" at encouraging lawful government behavior as the entire set of such mechanisms in the nineteenth century? That is not to say that the history is irrelevant, but rather that this theory of official accountability renders one potential use of the history implausible.

A functional defense of the damages remedy might instead rely on the history as a repository of potential accountability mechanisms and of data about the efficacy of one remedy. In the nineteenth century, the history tells us, courts used damages to control the bureaucracy. But the nineteenth-century model should be restored only if it improves the incentives of federal officers *today* — and does so better than other forms of judicial review and other forms of bureaucratic control. The nineteenth-century model offers an example of a technology of bureaucratic control; it offers some evidence about how the technology might be expected to operate. But the use of the technology today makes sense

¹⁰⁸ Cf., e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 125 (1983).

¹⁰⁹ See, e.g., Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 574 (2021). Professor Noah Smith-Drelich rightly considers the deterrent effect of constitutional-tort rules as part of a *system* of deterrence, *id.*, but an assessment of the systemic consequences would likewise need to consider other remedies and bureaucratic controls.

¹¹⁰ Sometimes history matters because it informs the meaning of some textual provision, often the Constitution; sometimes it is thought to be binding without such a textual hook, but somehow of its own force. See Girgis, *supra* note 107, at 4. For present purposes, I collapse those categories, even though there are serious methodological disputes about when tradition is binding. Compare *Vidal v. Elster*, 144 S. Ct. 1507, 1518 (2024), *with id.* at 1524–25 (Barrett, J., concurring in part); see also Girgis, *supra* note 107, at 5–6.

on this view only if it would work today, and there is good reason to question the efficacy of nineteenth-century bureaucratic controls for a twenty-first-century federal bureaucracy.

What is more, the functional defense of the system of official accountability reinforces the counternarrative that has severely curtailed *Bivens*. That decision is a separation of powers problem, the argument goes, because it invites courts to “weigh . . . policy considerations” that “Congress is ‘far more competent’” to evaluate.¹¹¹ Whether to recognize a cause of action requires the decisionmaker to consider the “substantial costs” of a damages remedy against the benefits of providing “some redress for injuries” and “instruction and guidance to federal law enforcement officers going forward.”¹¹² To sharpen the argument further, because the damages remedy is on this view a substitute for other bureaucratic controls, judges are particularly ill-suited to the task: They have no special knowledge about the full set of potential controls and no opportunity to consider multiple tweaks to those controls at the same time. If the command of history is to reproduce a generally effective system of remedies that encourages government officials to behave, then judges might reasonably conclude that the history cannot speak with enough precision to bind and that the matter should be left to the political branches.

Understandably, then, Pfander and Alley seem inclined to argue instead that damages perform the unique function of redressing particular kinds of harm; in their words, “assured redress for positive government wrongs.”¹¹³ That argument sidesteps objections about the (dis)advantages of damages remedies compared to other mechanisms of bureaucratic control or the relative institutional (in)capacity of judges to identify and impose the optimal set of legal remedies and bureaucratic controls.

But this second option sidesteps those potentially insurmountable empirical objections only to face additional theoretical ones. If damages offer a unique (and necessary) form of redress irrespective of their efficacy in enforcing governmental conduct, the theory must be that certain kinds of wrongs demand redress in the form of compensation.¹¹⁴ But what set of wrongs require redress? Why do some (but not all?) violations of constitutional or private-law rules by federal employees require this form of redress? Which set of wrongs count as “positive government wrongs” that requires “assured redress”? Does that category include both private law and constitutional torts? How is this theory of required redress compatible with a theory (or set of theories) of constitutional

¹¹¹ *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

¹¹² *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017).

¹¹³ Pfander & Alley, *supra* note 8, at 1005, 1013.

¹¹⁴ See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606–11 (2005).

interpretation? The argument that damages are unique would draw on theories of redress advanced in private law — for example, corrective justice and civil recourse — and modify those theories as needed to fit them to public law.¹¹⁵

If the damages remedy is unique, however, the history might be manageable enough to derive something useful from it. The consistent practice of adjudicating common law claims against federal officials assumes the value of corrective justice for governmental wrongs, articulates the set of harms deemed wrongful by the common law, and reveals considered limitations on tort-based relief.¹¹⁶ So, to take an example from another context, the Supreme Court has explained regarding Article III standing “that ‘history and tradition offer[s] a meaningful guide to’” identifying cognizable harms.¹¹⁷ The set begins with the “obvious . . . tangible harms” of “physical” and “monetary harms,” then expands to “intangible harms” like “reputational” and privacy harms, then expands even to “harms specified by the Constitution itself.”¹¹⁸ The Court used history and tradition to identify a set of traditional wrongs and then abstracted a common feature that makes each cognizable as a wrong.¹¹⁹ Courts might take the same approach in determining the set of wrongs that require a damages remedy within the broader system of official accountability. The embedded normative judgments about the kinds of wrongs that require redress, the argument would proceed, justify some *epistemic deference* to the nineteenth-century model of official accountability, because past practice provides some evidence that redress for governmental wrongs matters.¹²⁰

Or the history might do more than offer evidence about what kinds of damages claims require redress. The judgments of the past might

¹¹⁵ For the classic critique of this line of argument, see Levinson, *supra* note 108, at 348. For some efforts to make the case for a corrective justice theory for constitutional torts, see, for example, Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 917–28 (2001); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1019 (1990); John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 83 (1989); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1464 (1989).

¹¹⁶ *E.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1915) (arguing that a component of the “rule of law” is that officials are “subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals,” and boasting that officials were regularly liable for “the payment of damages” “in their personal capacity . . . for acts done in their official character but in excess of their lawful authority”); James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 744–45 (2019).

¹¹⁷ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (quoting *Sprint Commc’ns Co., v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008)) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

¹¹⁸ *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)).

¹¹⁹ *Id.*

¹²⁰ *Cf.* Girgis, *supra* note 107, at 15 (discussing the epistemic value of tradition in constitutional interpretation).

even *constitute* a presumptively binding regime of assured redress — a regime that becomes binding through consistent practice over time.¹²¹ The argument would be that “history and tradition” directs judges to provide redress for a certain set of wrongs, that the set of wrongs recognized for most of the country’s history included the common law claims protecting against certain kinds of “physical or monetary injury” to the plaintiff, that history and tradition now recognizes common law claims to protect against other “intangible harms,” and that the set of harms likewise must extend to some “specified by the Constitution itself.”¹²² In other words, if damages are unique within the system of official accountability, then perhaps history and tradition embeds that remedy in a way that should not be lightly discarded and that might even be binding. Either way, the theory on which the historical narrative depends does not require abstract philosophical reflection but emerges from close attention to the inherited legal regime.

CONCLUSION

In recent years, lawyers have been telling and retelling stories about *Bivens*, its continuity with traditions of official accountability, and its consistency with the separation of powers. The story on the Court is that *Bivens* erred because it assumed — consistent with the approach to statutory interpretation of the day — the power to recognize causes of actions to enforce substantive law. The counternarrative is that *Bivens* continued a long tradition of allowing common law claims, including claims for damages, against federal officials. Those competing narratives are at a standstill, with *Bivens* at risk of being overruled but still on the books.

Pfander and Alley refreshingly move beyond that standstill, without abandoning the basic framing of the dispute, by integrating the FTCA into the narratives about the nineteenth-century model of official accountability. The pressing inquiry for official accountability, though, requires settling on the *reasons* for accountability. Of course, it would be too much to ask that Pfander and Alley’s textualist and historical paper provide such a theory. But those theoretical disputes are lurking behind any effort to reform the present in the image of the past. If the function of damages remedies against federal employees in the United States is to encourage good behavior, history tells us very little; instead, we need to know more about how governments respond to damages and

¹²¹ For efforts to describe the legal force of tradition, see, for example, *United States v. Rahimi*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 28 (2023).

¹²² *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo*, 578 U.S. at 340).

whether other mechanisms work better.¹²³ If damages remedies correct injustices for some set of wrongs, the history offers a continuous tradition of judicial decisions accepting the framework of damages remedies even while grappling with what kind of misconduct requires redress. Either way, after *Bivens*, stories about official accountability must articulate the values implicit in the system of common law damages claims out of which *Bivens* and the FTCA emerged.

¹²³ For efforts to understand how damages affect a government's incentives, see, for example, Rappaport, *supra* note 84, at 1550 n.41; Pfander, Reinert & Schwartz, *supra* note 90, at 568; Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1145 (2016); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813–14 (2010); Levinson, *supra* note 108, at 348.