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ONE STEP AWAY: HOW *HERNÁNDEZ II* SIGNALS THE ELIMINATION OF *BIVENS*

“[T]he liberties of none are safe unless the liberties of all are protected.”¹

In light of the newest decision on the *Bivens* doctrine in *Hernández v. Mesa* (*Hernández II*),² the Supreme Court appears to be on the precipice of eliminating *Bivens* claims altogether. The elimination of *Bivens* claims is even being explicitly called for by two of the Justices.³ *Bivens* claims are damages claims for constitutional violations that are implied; the damages are implied because they have not been created by Congress but are assumed to exist through constitutional interpretation.⁴ The implications of such a move would be shocking to many people.

Bivens claims serve a vital role in protecting the U.S. Constitution. The nature of *Bivens* claims means that Congress has not acted to authorize a remedy and state claims are not generally possible due to preemption, therefore there is no other course of action to remedy a constitutional violation; in Justice Harlan’s words “its damages or nothing.”⁵ Furthermore, *Bivens* claims provide a necessary deterrent to constitutional violations from federal officers.⁶ Without the availability of *Bivens* claims to remedy constitutional violations by federal officers, such officers would have near-limitless ability to violate constitutional rights. Indeed, the earliest *Bivens* cases show just how necessary these claims are. In *Carlson*, an inmate at a federal prison suffered serious injuries and died when the prison officials were deliberately indifferent to a serious medical concern.⁷ In *Bivens* itself, the plaintiff claimed to have “suffered great humiliation, embarrassment, and mental suffering” at the hands of federal

1. WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 64 (1961).

2. See generally *Hernández v. Mesa* (*Hernández II*), 140 S. Ct. 735 (2020).

3. *Id.* at 750–53 (Thomas, J., concurring).

4. *Id.* at 741.

5. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 389, 410 (1971) (Harlan, J., concurring); William Baude, *Bivens Liability and Its Alternatives*, SUMMARY, JUDGMENT.COM (Feb. 27, 2020), <https://www.summarycommajudgment.com/blog/a-few-thoughts-about-bivens-liability> [<https://perma.cc/9HWG-2EPF>] (“What Justice Thomas does not note is that it has become very hard to bring those suits under state law either.”).

6. See *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States”).

7. *Carlson*, 446 U.S. at 16.

officers for an illegal search and seizure.⁸ In both of these cases, it was clear that if state officials had committed the same action, claims would have been viable under § 1983.⁹ Under § 1983 claims, state officials are held responsible for violations of federal constitutional rights.¹⁰ These claims serve as an important deterrent to rampant abuses by federal officials.

Due to prior Supreme Court decisions, citizens are already unable to bring claims against federal officials for policy choices they enact.¹¹ If the Court were to eliminate *Bivens* claims altogether, then there would likely be many scenarios in which individuals would have no legal recourse against a government which oversteps its boundaries. The individual could not sue the officials who created a policy that violates constitutional rights, nor could they sue the federal official who carries out such a policy. To go even further, the individual would also have no protection against a federal official who violates both an official policy as well as an individual's constitutional rights.

For example, if an FBI agent took an action that clearly violated FBI policy and the federal constitution, and a suspect dies, the family of that suspect would have no recourse against that agent. If the actions were not a violation of a criminal statute, the most that could occur would be that the officer would be fired. This is unacceptable. The absurdity of such a system that would allow for violations to be brought against state officials who violate federal constitutional rights but not against federal officials who violate those same rights is astounding. While some of the blame certainly lies with Congress, here, it is important to note that Congress alone is not responsible for protecting constitutional rights.¹² The arbitrariness of such decisions certainly makes no legal sense and the Supreme Court should reverse its current path.

In this Note, I will establish the need for a new test for *Bivens* claims to ensure constitutional rights are protected for all individuals. In Section I, I will outline the current *Bivens* jurisprudence by looking at how the Supreme Court, both the majority and minority, analyzed the facts of the *Hernández* claims. In Section II, I will analyze Justice Thomas's concurring opinion, in which he calls for the elimination of *Bivens* claims altogether. In Section III(a), I examine the dissent written by Justice Ginsburg through the lens provided by Justice Brennan's lecture *In Defense of Dissent* to analyze how the dissent fails to

8. *Bivens*, 403 U.S. at 389–90. (“The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.”).

9. *Carlson*, 446 U.S. at 25 (“[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.”).

10. *Id.*

11. *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017) (holding that *Bivens* claims could not be brought against policy makers).

12. *See infra* Section III(b).

challenge the majority opinion or announce a greater constitutional understanding. As such, in subsection III(b), I offer a dissent that would meet the goals set out by Justice Brennan for quality dissents.

I. UNDERSTANDING *BIVENS* THROUGH *HERNÁNDEZ II*

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, the Supreme Court established the right to bring constitutional claims under the Fourth Amendment against federal officials for search and seizure violations, despite there being no congressionally-established claim.¹³ Congress had not, and still has not, created legislation authorizing the courts to award punitive damages for violations of constitutional rights by federal officers, thus it is an implied claim that the Supreme Court authorized.¹⁴

In creating the cause of action, the Supreme Court noted that exercises of federal authority are unique in that they cannot be overridden by the states in many cases, or even subject to state oversight.¹⁵ Often citizens have nowhere else to go but the court system when federal officers abuse their power.¹⁶ The Court relied, in *Bivens*, on the well-known line from Chief Justice Marshall's decision in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury" to drive home the point that the courts must be a place of refuge for those injured by federal officials' actions.¹⁷ Therefore, the courts must be "alert to adjust their remedies so as to grant the necessary relief."¹⁸ In the case of *Bivens*, where no other form of relief would have protected the individual citizens and there were "no special factors counseling hesitation,"¹⁹ the Supreme Court established the right to sue for damages for implied constitutional violations.²⁰ The Court even noted that its holding should not be surprising, as "[h]istorically, damages have been regarded as the ordinary remedy for the invasion of personal interests in liberty."²¹

With the Court's ruling in *Bivens*, an implied constitutional claim against federal officers, known as the *Bivens* claim, was born. The Court would go on

13. *Bivens*, 403 U.S. at 397.

14. *Id.*

15. *Id.* at 392–94.

16. *Id.* at 394–95.

17. *Id.* at 397 (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

18. *Bivens*, 403 U.S. at 392.

19. *Id.* at 396–97 The "special factors counseling hesitation" the Supreme Court discussed were whether there was a question of federal fiscal policy or cases where constitutional rights were not an issue. The Court dismissed any concerns by noting that in a suit where the U.S. was attempting to recover lost wages of a soldier that Congress is quite adept "where the federal purse was involved," therefore, no cause of action need be carved out in that case, unlike in *Bivens. Id.*

20. *Id.* at 390, 397.

21. *Id.* at 395.

to expand the *Bivens* doctrine to cover the Due Process Clause of the Fifth Amendment in the form of gender discrimination in employment²² and the Eighth Amendment in the form of prison officials' deliberate indifference to a serious medical concern.²³

After the short-lived, initial expansion of the *Bivens* Doctrine the court began to slowly limit *Bivens* without any direct overturning of the doctrine.²⁴ In *Ziglar v. Abbasi*, Justice Kennedy laid out the current state of the *Bivens* Doctrine in great detail.²⁵ The Court in *Hernández II*, however, cut through much of Kennedy's dicta to give a clearer view of the current test that exists for *Bivens* claims.²⁶

A. *Hernández II—Facts*

The facts of the *Hernández* case are, as the Court put it, "tragic."²⁷ Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican boy, and a group of friends were running down the middle of a dried-out culvert that acts as the Mexican-U.S. border and separates El Paso, Texas and Ciudad Juarez, Mexico, on June 7, 2010.²⁸ According to the complaint, the boys were running across the culvert and up the embankment on the U.S. side and touching the border fence before running back to the other side.²⁹ Shortly thereafter, Border Patrol Agent Jesus Mesa, Jr. arrived on his bicycle and detained one of Hernández's friends.³⁰ Hernández ran to the Mexican side of the border and Mesa fired two shots, one

22. *Davis v. Passman*, 442 U.S. 228, 229–31, 234 (1979).

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

24. *See* *Bush v. Lucas*, 462 U.S. 367, 373 (1983) (refusing to extend *Bivens* protections under the First Amendment to federal employees who speak out against their agency in public statements); *Chappell v. Wallace*, 462 U.S. 296, 304–05 (refusing to extend *Bivens* protections for race discrimination claims against military officers); *United States v. Stanley*, 483 U.S. 669, 672–73 (1987) (refusing to extend *Bivens* protections for substantive due process suit against military officials); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (refusing to extend *Bivens* protections for substantive due process suit against Social Security officials); *FDIC v. Meyer*, 510 U.S. 471, 473–74 (1994) (refusing to extend *Bivens* protections for procedural due process suit against a federal agency for wrongful termination); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (refusing to extend *Bivens* protections for Eighth Amendment suit against a private prison operator); *Wilkie v. Robbins*, 551 U.S. 537, 547–48 (2007) (refusing to extend *Bivens* protections for due process suit against officials from the Bureau of Land Management); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (refusing to extend *Bivens* protections for Eighth Amendment suit against prison guards at a private prison).

25. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854–58 (2017).

26. *See generally* *Hernández v. Mesa (Hernández II)*, 140 S. Ct. 735 (2020).

27. *Id.* at 739.

28. *Hernández v. Mesa (Hernández I)*, 137 S. Ct. 2003, 2005 (2017).

29. *Id.*

30. *Id.*

of which hit Hernández in the face and killed the boy.³¹ Hernández's family brought *Bivens* claims against Agent Mesa for violating Hernández's Fourth and Fifth Amendment rights.³² The Supreme Court granted *certiorari* before remanding the case back to the Fifth Circuit to be re-analyzed in light of *Abbasi*, which was being considered at the same time.³³ The Fifth Circuit held that Hernández's claims constitute an improper extension of *Bivens* and dismissed the claims.³⁴ The Supreme Court again granted *certiorari* and released its opinion, referred to here as *Hernández II*.³⁵

B. Current State of *Bivens* Claims

To fully understand the Court's analysis, one must understand how the so-called "conservative wing"³⁶ of the Court views *Bivens* claims. The majority opinion, borrowing from *Abbasi*, noted "that expansion of *Bivens* is disfavored judicial activity."³⁷

The basis of marking the expansion of *Bivens* a "disfavored judicial activity" was best stated in Justice Thomas's *Hernández II* Concurrence:

Our continued adherence to even a limited form of the *Bivens* doctrine appears to "perpetuat[e] a usurpation of the legislative power." Federal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law. We have clearly recognized as much in the statutory context. I see no reason for us to take a different approach if the right asserted to recover damages derives from the Constitution, rather than from a federal statute. Either way, we are exercising legislative power vested in Congress.³⁸

31. *Id.* It should be noted that for the sake of this case, the only story that matters is what is alleged in the complaint. However, the Department of Justice investigation claims that Hernández was engaged in smuggling and threw rocks at Mesa. This version of events is put into doubt by a cellphone video of the shooting that seems to show Hernández running away from Mesa and not throwing any rocks. CNN Wire Staff, *Youth Fatally Shot By Border Agent Had Smuggling Ties, Official Says*, CNN, (June 10, 2010), <http://www.cnn.com/2010/US/06/10/texas.border.patrol.shooting/index.html> [<https://perma.cc/6FZA-A2DC>].

32. *Hernández I*, 137 S. Ct. at 2005.

33. *Id.* at 2008.

34. *Hernández v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018).

35. *See generally* *Hernández v. Mesa* (*Hernández II*), 140 S. Ct. 735 (2020).

36. *See* Taylor K. Brown, *The US Supreme Court: Who are the justices?*, BBC NEWS (Nov. 30, 2018) <https://www.bbc.com/news/magazine-33103973> [<https://perma.cc/U4EZ-XY7L>] (stating that Justices Alito, Kavanaugh, Gorsuch, and Chief Justice Roberts are conservatives and noting that Justice Thomas's "originalism," though I think it is safe to put him in the conservative wing of the Supreme Court.).

37. *Hernández II*, 140 S. Ct. at 742 (internal quotation marks omitted).

38. *Id.* at 752 (Thomas, J., concurring) (internal citations omitted).

In Thomas's opinion, as well as the rest of the conservative majority's view, the act of making a remedy to rectify a constitutional violation where Congress did not do so is a quintessentially legislative act.

The majority believes there is a separation-of-powers issue in creating such a "legislative" remedy, because creating a remedy is a legislative task. In the conservative majority's view, when the Court engages in such activity it is encroaching on the legislature's constitutional duties.³⁹ The Court on several occasions has asked the question, in the *Bivens* context, "who should decide?" and then answered that "most often" it will be for Congress to decide.⁴⁰ The Court notes that lawmaking involves balancing interests and often demands compromise. Therefore, the unwillingness to create a remedy for constitutional violations is a choice that Congress made and one the courts should respect because Congress is "best positioned" to decide "the extent to which[] monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government based upon constitutional torts."⁴¹ Therefore, the Court found that it would be a separation-of-powers violation to step in and create a remedy.

Despite the underlying belief of the Court, a majority did not believe that *Bivens* should be overturned outright, at least not at the moment.⁴² The Court in *Hernández II* was silent on why *Bivens* claims should be preserved, though Thomas hints at *stare decisis* as the reason.⁴³ The Court explained this to a greater degree in *Abbasi*, stating that *Bivens* is "settled law" for the three areas it had been previously approved and noted that reliance on it is a "powerful reason[]" to retain it in that sphere."⁴⁴

Because of these underlying principles of separation-of-powers and *stare decisis*, the Court has fashioned a test designed to maintain *Bivens* claims for the three areas that the Court had previously recognized⁴⁵ but limit the ability of plaintiffs to otherwise bring claims. The test applied to determine the applicability of a *Bivens* claim is: first, determine if there is a constitutional

39. *Id.* at 742 ("The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only 'judicial Power.' Art. III. § 1.").

40. *Id.* at 750; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Bush v. Lucas*, 462 U.S. 367, 380 (1983).

41. *Hernández II*, 140 S. Ct. at 742 (internal quotation marks omitted).

42. See *infra* Section II for greater discussion on this point.

43. *Hernández II*, 140 S. Ct. at 750.

44. *Abbasi*, 137 S. Ct. at 1857.

45. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that *Bivens* applied in Fourth Amendment claims against federal officials for search and seizure violations); *Davis v. Passman*, 442 U.S. 228, 229–31, 234 (1979) (holding that *Bivens* applied in Due Process Clause of the Fifth Amendment claims regarding gender discrimination in employment); *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (holding that *Bivens* applied in Eighth Amendment claims regarding prison officials' deliberate indifference to a serious medical concern).

claim; second, determine if the claim arises in a new context; and third, determine if there are any special factors that counsel hesitation.⁴⁶

a. Step Zero: A Constitutional Claim

First the courts may look at the actual claim and see if there is a constitutional violation.⁴⁷ In *Hernández II*, the court was silent on the question of whether there was a colorable constitutional claim, though it had previously stated that such an analysis “is appropriate in many cases.”⁴⁸ Because of the gatekeeper nature of such an analysis, I refer to it as step zero.⁴⁹ The inherent nature of a *Bivens* claim is that a right given to the plaintiff by the Constitution has been infringed.⁵⁰ The courts, therefore, may determine if a constitutional right exists to determine if a *Bivens* analysis is even required.⁵¹ It is undeniable that a claim of infringed constitutional rights cannot proceed absent a specific constitutional right being infringed.

b. Step One: A New Context

The first step of a *Bivens* analysis (after the Step Zero: Constitutional Claim Step) is determining whether the claim arises in a “new context.”⁵² A claim that does not present a new context may automatically proceed.⁵³

If a claim is “different in a meaningful way from previous *Bivens* cases” decided by the Supreme Court, then a new context is present.⁵⁴ *Hernández II* elaborated on this standard by stating that this analysis must dig deeper than just looking at whether the current claim is brought under the same constitutional provision as a previous claim.⁵⁵ In *Abbasi*, Justice Kennedy laid out some examples for the Court’s meaningful variation test, though the examples were by no means meant to be exhaustive:

46. *Abbasi*, 137 S. Ct. at 1857; *Hernández II*, 140 S. Ct. at 743–44.

47. The Supreme Court noted in *Hernández I* that this test is not required therefore it *may* be utilized. *Hernández I*, 137 S. Ct. at 2007.

48. *Id.*

49. Determining the applicability of a constitutional right is technically a prelude to any *Bivens* analysis. *Id.*

50. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

51. See *Hernández I*, 137 S. Ct. 2003, 2007 (2017).

52. *Hernández II*, 140 S. Ct. at 743.

53. *Abbasi*, 137 S. Ct. at 1857.

54. *Id.* at 1859–60.

55. *Hernández II*, 140 S. Ct. at 743.

A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized. Compare *Carlson* (allowing *Bivens* remedy for an Eighth Amendment claim for failure to provide adequate medical treatment), with *Malesko* (declining to create a *Bivens* remedy in similar circumstances because the suit was against a private prison operator, not federal officials). *Id.* (internal citations omitted).

A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.⁵⁶

When it comes to the “new context” test even a “modest extension” of *Bivens* is still considered an extension.⁵⁷

The majority’s scant analysis of whether the claims arise in a new context in *Hernández II* essentially stated that there is “a world of difference” between the previously accepted claims (an unconstitutional search and seizure in *Bivens* and the unconstitutional sex discrimination in *Davis*) and the cross-border shooting present in *Hernández II*, and left it at that.⁵⁸

The Ginsburg’s dissent accepted the same framework for analyzing *Bivens* claims that the majority used.⁵⁹ However, Ginsburg believed that this case did not arrive in a new context.⁶⁰ The Supreme Court has previously accepted claims for unconstitutional seizures that violate the Fourth Amendment as a way of deterring officers from such violations.⁶¹ Furthermore, in a non-*Bivens* context the Court has found that using more force than is necessary constitutes an unreasonable seizure.⁶² Ginsburg also noted that the offending officer was on U.S. soil when he fired the shot.⁶³ Therefore, in Ginsburg’s view, the only difference between this case and *Bivens* is the place where the bullet landed (i.e. where the harm occurred).⁶⁴ “It scarcely makes sense for a remedy trained on deterring rogue officer conduct to turn upon a happenstance subsequent to the conduct—a bullet landing in one half of a culvert, not the other.”⁶⁵

The difference in the way the majority and the dissent looked at this issue is illuminating. While Ginsburg’s dissent did not need to stretch too far to show the facts of *Hernández II* did not occur in a new context, it was still further than the majority was willing to stretch. When the Court says even a “modest extension” of *Bivens* is an extension, it seems that any new element that could

56. *Abbasi*, 137 S. Ct. at 1860.

57. *Id.* at 1864.

58. *Hernández II*, 140 S. Ct. at 744.

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

60. *Id.* at 756.

61. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

62. *Hernández II*, 140 S. Ct. at 755 (Ginsburg, J., dissenting).

63. *Id.*

64. *Id.*

65. *Id.*

possibly be used to distinguish a claim from any of three contexts the Court recognizes will be an extension into a new context.

c. Step Two: Special Factors Counseling Hesitation

If the claim presents a new context, the court then must determine if any special factors counsel hesitation.⁶⁶ The requirement that there be no special factors counseling hesitation before allowing a claim to proceed comes from the original *Bivens* case and runs through its progeny to the modern *Bivens* analysis.⁶⁷ Despite the Supreme Court's extensive history with *Bivens* jurisprudence,⁶⁸ the Court has never precisely defined what special factors counseling hesitation actually means.⁶⁹ However, the current Supreme Court jurisprudence has articulated the standard that "the inquiry must concentrate on whether the judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."⁷⁰

The limits of the special factors counselling hesitation analysis are unknown.⁷¹ Though the fact that the Court still requires the analysis implies that it must do some work, I am not sure this is the actual case. Since *Abbasi* announced a clearer, anti-extension standard for analyzing *Bivens* claims, the Court has yet to deny a proposed special factor counselling hesitation.⁷² When *Hernández* was in the 5th Circuit, the majority stated that the "newness of the 'new context'" alone should require the claims be dismissed in light of the disfavored status of extending *Bivens* claims into a new context and the "strict limitations arising from the constitutional imperative of the separation of powers."⁷³ While the Supreme Court does not endorse this view, it also does not

66. *Hernández II*, 140 S. Ct. at 744.

67. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

68. Since *Bivens* was originally decided in 1971, there have been 133 Supreme Court cases that cite to it. Citing References to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, WESTLAW (Mar. 13, 2020), <https://1.next.westlaw.com>. (search for "Bivens" and enter case, click Citing References, then limit the Jurisdiction to Federal, and then Supreme Court).

69. *Abbasi*, 137 S. Ct. at 1857.

70. *Id.* 1857–58.

71. Though Anya Bernstein has attempted to tie the "special factors counselling hesitation" in *Bivens* claims to congressional will, I am not convinced that this analysis survived the *Abbasi* and *Hernández II* decisions, which came out after this analysis. Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special About Special Factors?*, 45 IND. L. REV. 719, 720 (2012).

72. See *Abbasi*, 137 S. Ct. at 1860–65; *Hernández II*, 140 S. Ct. 735, 744–45 (2020).

73. *Hernández v. Mesa*, 855 F.3d at 811, 818 (5th Cir. 2018).

repudiate it.⁷⁴ Under the current *Bivens* jurisprudence, there is possibly, even likely, no limit to special factors that counsel hesitation, short of rationality.⁷⁵

In *Hernández II*, the Court began its special factors analysis with foreign relations.⁷⁶ The Court stated that this issue is one between the U.S. and Mexico because “[a] cross-border shooting is by definition an international incident” that asked the court to arbitrate between the United States and Mexico.⁷⁷ The Court went on to discuss the U.S. and Mexico’s views and responses to the incident.⁷⁸ In Justice Ginsberg’s dissent, she argued that the majority had been “led astray . . . by empty labels.”⁷⁹ Ginsburg argued that because there could be no harmful effect on foreign relations by allowing the claim to go forward, as Mexico supported it, the Court was creating the foreign relations issue.⁸⁰ The majority responded to this point directly by stating:

It is no answer to argue, as Mexico does, that refusing to extend *Bivens* “is what [would] negatively affect international relations.” Brief for Government of United Mexican States as Amicus Curiae 12. When a third party intervenes and takes sides in a dispute between two countries, one country is likely to be pleased and the other displeased. But no matter which side the third party supports, it will have injected itself into their relations.⁸¹

Ginsburg seemed to simply disagree, as the dissent said no more on the issue.⁸²

In regard to the foreign relations discussion, both the majority and the dissent seemed to get lost in the weeds. First of all, the majority is wrong to state that allowing a *Bivens* claim would force them to arbitrate between the U.S. and Mexico; they are arbitrating between the family of the slain boy and the federal officer that killed him. Furthermore, the question that the dissent failed to raise, and the majority failed to address was: how does a U.S. court holding a U.S. official responsible for violating the U.S. Constitution on U.S. soil raise a foreign relations issue?⁸³ Certainly the fact that a foreign national is involved could implicate foreign relations, but this is no different than if a foreign national was on U.S. soil when the shooting occurred. It is my contention that a potential

74. See *Hernández II*, 140 S. Ct. at 744–45. Although the scope of the special factors analysis remains an unanswered question, I believe that the conservative majority of Supreme Court will continue to find any factor presented as a factor that counsels hesitation, so long as they maintain the current test. See *infra* Section II for greater discussion on this point.

75. By rationality I mean that the special factor must have some rational basis, denying a claim where the only factual difference was the name of the plaintiff would, for instance, not be rational.

76. *Hernández II*, 140 S. Ct. at 744.

77. *Id.*

78. *Id.*

79. *Id.* at 754 (Ginsburg, J., dissenting).

80. *Id.* at 758.

81. *Hernández II*, 140 S. Ct. at 745 n.3.

82. *Id.* at 758 (Ginsburg, J., dissenting).

83. That the family members of the killed boy are not U.S. citizens would not deny them access to U.S. courts for a federal question. See 28 U.S.C. § 1331 (2020).

foreign relations context should not preclude such a claim precisely because the courts can hold a U.S. citizen responsible under the U.S. Constitution.⁸⁴ The Court simply used an empty call to foreign relations as distraction from the real issue: the U.S. Constitution's reach over federal officers.

The majority opinion next went on to discuss national security issues.⁸⁵ The majority argued that "regulating the conduct of agents at the border unquestionably has national security implications," and therefore, "the risk of undermining border security provides reason to hesitate."⁸⁶ The dissent accused the majority of invoking national security as a "talisman used to ward off inconvenient claims."⁸⁷ The majority failed to respond to the dissent's accusation but did attempt to respond to a point the Petitioner's raised, that there was no national security interest advanced by allowing border patrol agents to shoot people in the back as they walk on the Mexican side of the border.⁸⁸ The majority argued that the courts should not alter the framework established by the political branches (the executive and legislative branches) for addressing the usage of unlawful lethal force.⁸⁹ This invariably leads to the question: even if we are to accept that national security is a valid reason for hesitating in extending *Bivens*,⁹⁰ how would national security be affected by upholding a basic constitutional standard that all officers would have to abide by? It is not uncommon for there to be constitutional limits on police officers, and the public safety is not adversely effected to the point of allowing police unfettered authority. Nor should the border patrol, in this instance, be granted unfettered authority to violate individuals' constitutional rights. Here, the dissent in this instance was spot on that the Court is using national security as a "talisman to ward off inconvenient claims."

Finally, the majority embarked on an analysis of what it considered "analogous statutes" to show that when Congress has established damages remedies, it has "preclude[d] claims for injuries that occurred abroad."⁹¹ The heart of the majority's argument here is analogous with its overall understanding of *Bivens* claims: since Congress doesn't think a protection is necessary here to protect the constitutional rights, the Court does not have a role in creating such a protection. The dissent went on to attempt to distinguish each statute and case

84. Whether the actions of a cross-border shooting are a constitutional violation is a question not addressed in this Note; however, like the Court, I am operating under the assumption that it is a constitutional violation.

85. *Hernández II*, 140 S. Ct. at 746-47.

86. *Id.* at 747.

87. *Id.* at 758 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)) (Ginsburg, J., dissenting) (internal quotation marks omitted).

88. *Id.* at 746 (majority opinion).

89. *Id.*

90. For more on this point, see *infra* Section III.

91. *Hernández II*, 140 S. Ct. at 747.

to show that “[n]one . . . should stand in the plaintiffs’ way.”⁹² Each argument is unable to win over the other side, and I doubt the “analogous statutes” would be enough to convince the Court without the other special factors counselling hesitation. Furthermore, this discussion mirrors the discussion on the role of Congress the majority discussed prior to the “new context/special factors” test.⁹³

Though the Court did not explicitly say so, *Hernández II* seemingly forecloses any extension of *Bivens*. The Court stated that even a “modest extension” of *Bivens* is still considered an extension.⁹⁴ Though the limits of this are not completely known, the Court itself has given the new context analysis a broad reach. Furthermore, it is hard to imagine a scenario where the Court would deny a special factor counseling hesitation. Similar arguments to the national security argument could be transferred to any federal government action and it seems likely the Court would find that it is a special factor counseling hesitation. Therefore, it is unlikely that, under the current conservative majority, any extension of *Bivens* will be permitted.

Although only Justice Gorsuch signed on to Justice Thomas’s concurring opinion, the Court’s broad analysis of “new context” and “special factors counselling hesitation” suggests that the three justices in the majority who did not sign on to Thomas’s concurrence (Alito, Roberts, and Kavanaugh) are not that far away from the concurrence’s position. Section II will address this further.

II. THOMAS’S DYSTOPIAN FUTURE

In Justice Thomas’s concurrence, joined by Justice Gorsuch, Thomas laid out an argument that *Bivens* claims should be eliminated.⁹⁵ The majority expands the reasoning of the current doctrine—that creating a remedy is a legislative function and for the Court to engage in it would encroach on Congress’ constitutional responsibilities—to its breaking point.⁹⁶ Thomas’s opinion pushes past this breaking point by taking this argument to its logical endpoint, that *Bivens* claims should be eliminated.⁹⁷

Thomas succinctly explained how the conservative majority has slowly worn down *Bivens*, so that they could eliminate it. “The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine’s scope, undermined its foundation, and limited its precedential value. It is time to correct this Court’s error and abandon the doctrine altogether.”⁹⁸ This has been a sustained effort

92. *Id.* at 758–59 (Ginsburg, J., dissenting).

93. *See supra* notes 37–46 and accompanying text.

94. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017).

95. *Hernández II*, 140 S. Ct. at 750–53 (Thomas, J., concurring).

96. *Id.*

97. *Id.* at 750.

98. *Id.* at 752–53.

from the Court's conservatives since *Bivens* claims were originally created.⁹⁹ Up until now, the conservatives on the Court have resisted an outright overturning of *Bivens*; however, they have used their own misguided precedent to chip away at it piece by piece.¹⁰⁰ This is not the foundational shift Thomas attempts to show (the Constitution has not been amended nor has Congress created a remedy),¹⁰¹ as much as it is the Court simply moving the goal posts.

While only Gorsuch signed on to Thomas's concurrence, it remains to be seen which of the other three conservative justices¹⁰² will follow. Chief Justice Roberts is well-known for his incremental approach,¹⁰³ which may have led him and the other three conservative justices to only address the extension of *Bivens*. Furthermore, Richard Re has pointed out that Roberts Court has engaged in a pattern he calls "the doctrine of one last chance" in which the Court will "signal its readiness to impose major disruptions before actually doing so."¹⁰⁴ If this theory were to play out here, *Hernández II* would serve as the last warning that *Bivens* claims will be overturned altogether. It is possible Thomas sees this writing on the wall and is, therefore, preparing his colleagues to take the final step. After all, it is such a small step to take.

Additionally, in the wake of Thomas's concurrence, it is more likely that a direct challenge to *Bivens* will be brought as compared to an attempt to extend *Bivens* into a new context. Such a direct challenge to *Bivens* may force the

99. The separation-of-power concerns that the Court bases its decisions on were cited in the earliest dissents that created *Bivens* claims. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 389, 411–12 (1971) (Burger, C.J., dissenting); *Davis v. Passman*, 442 U.S. 228, 249 (1979) (Burger, C.J., dissenting); *Carlson v. Green*, 446 U.S. 14, 53–54 (1980) (Rehnquist, J., dissenting).

100. See *Chappell v. Wallace*, 462 U.S. 296, 304–05 (discussing race discrimination claims against military officers); *United States v. Stanley*, 483 U.S. 669, 672–73 (1987) (discussing substantive due process suit against military officials); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (discussing a substantive due process suit against Social Security officials); *FDIC v. Meyer*, 510 U.S. 471, 473–74 (1994) (discussing a procedural due process suit against a federal agency for wrongful termination); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (discussing an Eighth Amendment suit against a private prison operator); *Wilkie v. Robbins*, 551 U.S. 537, 547–48 (2007) (discussing a due process suit against officials from the Bureau of Land Management); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (discussing an Eighth Amendment suit against prison guards at a private prison).

101. See *Hernández II*, 140 S. Ct. at 750.

102. These three Justices are Chief Justice John Roberts and Justices Samuel Alito and Brett Kavanaugh. See *Brown*, *supra* note 36.

103. See Richard Wolf, *Chief Justice John Roberts Inherits Expanded Role as the Supreme Court's Man in the Middle*, USA TODAY (Jun. 29, 2018 9:57 AM), <https://www.usatoday.com/story/news/politics/2018/06/29/chief-justice-john-roberts-supreme-courts-new-man-middle/743208002/> [<https://perma.cc/96Q8-JPW2>], Lawrence Hurley, *Spotlight Will be on U.S. Chief Justice in Trump Trial and in Major Cases*, REUTERS (Dec. 20, 2019 6:50 AM), <https://www.reuters.com/article/us-usa-trump-impeachment-chiefjustice/spotlight-will-be-on-u-s-chief-justice-in-trump-trial-and-in-major-cases-idUSKBN1YO1GU> [<https://perma.cc/9BY6-K49N>].

104. Richard M. Re, 17 Green Bag 2d 173, (2014).

remaining conservative justices to confront the issue head-on. If the *Hernández II* majority were to address a direct challenge to *Bivens*, they would be able to use the same reasoning displayed in *Hernández II*. In such a scenario, it may be hard to justify the continuance of *Bivens*.

III. AN ALTERNATE VISION

While the majority continued backing away from protecting constitutional rights, the dissent merely accepted the same framework for *Bivens* analysis that the majority did—that of the *Abbasi* court.¹⁰⁵ The dissent failed to give voice to the greater concerns about the protection of constitutional rights that were well articulated in the original set of decisions.¹⁰⁶ In light of the above established conclusion that Thomas’s concurrence was a small step past where the majority opinion landed, the dissent is all the more important to expound upon the failure of the majority’s reasoning.

A. *Grading Ginsburg’s Dissent*

“Writing [a dissent] . . . is not an egoistic act—it is duty. Saying, ‘listen to me, see it my way, change your mind,’ is not self-indulgence—it is very hard work that we cannot shirk.”¹⁰⁷ In Justice Brennan’s magnificent lecture entitled “In Defense of Dissents,” he discussed the reasons for writing dissenting opinions and what the goal of doing so should be.¹⁰⁸ Looking through the lens Justice Brennan offers for dissenting opinions, it is clear that Ginsburg’s dissent failed to meet the lofty goals he set forth. As Justice Brennan stated it, “[d]issent for its own sake has no value.”¹⁰⁹

Brennan noted that “[in] its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority’s legal analysis.”¹¹⁰ This is not done simply to ask the majority to see the dissenters way, but to “safeguard[] the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision.”¹¹¹ This is done through vigorous debate, “forcing the prevailing side to deal with the hardest questions.”¹¹²

105. *See supra* Part I.

106. *See generally* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Davis v. Passman*, 442 U.S. 228, 229–31, 234 (1979); *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

107. *See generally* William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438 (1986).

108. *Id.*

109. *Id.* at 435.

110. *Id.* at 430.

111. *Id.*

112. William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

Ginsburg's dissent in *Hernández II* did not seem to demonstrate any major flaws within the majority's opinion. The dissent failed to acknowledge, in any way, the underlying principles that the majority established as the basis of its analysis.¹¹³ The dissent was quiet on the majority's assertion that creating a remedy is a legislative action best suited to Congress, under a separation-of-powers analysis.¹¹⁴ The failure to rebut this assertion allowed the majority to make the assertion unchallenged and easily deny the extension of *Bivens* through the previously established test. As a result, it failed to demonstrate very real flaws that exist within the majority opinion. The dissent, at best, can be said to simply disagree with the application of *Bivens*, though it did so without seriously challenging the majority's reasoning.

Brennan continued on to list a few more reasons for a judge to dissent:

The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of “damage control” mechanism. Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of distinguishing subsequent cases. It may also hint that the litigant might more fruitfully seek relief in a different forum—such as the state courts.¹¹⁵

Though these are more practical reasons for dissenting, they are important none the less.

Here again the dissent also failed—most notably, in its inability to emphasize any limits on the scope of the majority opinion. Though the majority opinion did not explain the limits of the special factors counselling hesitation analysis, the dissent was ineffective in establishing any possible limitations and completely ignored ways in which future cases could be distinguished from the majority opinion.¹¹⁶ Also, due to the nature of *Bivens* claims, identifying alternate forums is inapplicable. It is clear that the dissent failed to meet any of the goals Brennan listed here.

To Brennan: “[t]he most enduring dissents, however, are the ones in which the authors speak, as the writer Alan Barth expressed it, as ‘Prophets with Honor.’”¹¹⁷ Brennan explained that “[t]hese are the dissents that often reveal the perceived congruence between the Constitution and the ‘evolving standards of decency that mark the progress of a maturing society,’ and that seek to sow seeds for future harvest.”¹¹⁸ An example of such a dissent, given by Brennan, is Justice Harlan's dissent in *Plessy v. Ferguson*, in which Harlan is “at once prophetic and expressive of the Justice's constitutional vision, and, at the same time, a

113. See *supra* Part I.

114. See *supra* Part I.

115. Brennan, *supra* note 107, at 430.

116. See *supra* Part I.

117. Brennan, *supra* note 107, at 430–31.

118. *Id.* at 431.

careful and methodical refutation on the majority's legal analysis in that case."¹¹⁹ Harlan "spoke not only to his peers, but to his society, and, more important, across time to later generations."¹²⁰

The dissent in *Hernández II* failed to meet any of the goals that Brennan set forth. It appears to be nothing more than dissent for dissent's sake and in that it has no value. Certainly not every dissent can reach the heights of Harlan's dissent in *Plessy v. Ferguson*. However, in the face of increasing hostility to the constitutional protections that Brennan so eloquently defended in cases like *Bivens*, it is not unrealistic to hope the liberal minority¹²¹ would engage in some rhetoric that expresses a more hopeful constitutional vision than the Court does here, something that lower courts could grab onto and build on. As Thomas's concurrence noted, this is exactly what the conservatives on the Court have been doing for years and we need look no further than *Hernández II* to see the success of such a strategy.¹²² The minority has an obligation to give voice to the constitutional principles being ignored by the majority; not only to push it to better explain its reasoning, but also to announce new arguments that it hopes courts in the future will run with. Without doing so the minority is at risk of losing *Bivens* claims altogether, as the Thomas concurrence is pushing for.

The minority's failure to set forth a proper dissent, one worthy of Brennan's standard, calls forth the question: what would a proper dissent look like? In the next subsection I have drafted such a dissent.

B. *The Dissent We Deserved*¹²³

BLAIR, J., dissenting.¹²⁴

III

The fundamental objection to extending *Bivens* lies with the thought that creating a remedy for a constitutional protection is a legislative function. *Hernández v. Mesa*, 589 U.S. ___, ___ (2020) (slip op., at 5). The issue is not so simple, however. This Court has long recognized the ability to create remedies to effectuate a statute's purpose as a legitimate judicial activity. *See J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (2001); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens*, 403 U.S. at 396. Even as *Abbasi* seeks to undermine this reasoning, it recognized that there will be times when creating such a remedy is

119. *Id.*

120. *Id.* at 432.

121. This liberal minority is composed of Justices Sonia Sotomayor, Ruth Bader Ginsburg, Elena Kagan, and Stephen Breyer. *See Brown*, *supra* note 36.

122. *See supra* Section II.

123. Because of the novelty of writing a dissent into a journal note, I am suspending the journal format for this subsection and using in-text citations.

124. For the sake of this exercise, I will adopt the Sections I and II of Justice Ginsburg's dissent and not recreate it here. *Hernández II*, 140 S. Ct. at 753–56 (Ginsburg, J., dissenting).

a valid judicial exercise. 582 U.S. at —, 137 S.Ct. at 1857. *Abbasi* asks “who should decide?” and states that the answer “most often will be Congress.” 582 U.S. at —, 137 S.Ct. at 1857. The answer will, therefore, not always be Congress. Accordingly, it is not a purely legislative task to fashion a remedy. The judiciary does have a limited role in fashioning remedies when necessary.

The question becomes then: when is it appropriate for the courts to create an implied remedy for a constitutional violation? This Court in *Abbasi*, erred when it stated that separation-of-powers principles meant that the courts should use caution when extending *Bivens*. *Id.* This is not to say that separation-of-power principles are not important; they most certainly are. Separation-of-power principles are exactly why this Court should extend *Bivens*, not why it should hesitate to do so. The Supreme Court must establish a remedy when the separation-of-powers duties of the courts require protection.

Blindly acquiescing to Congress, while ignoring the courts’ role in the name of separation-of-powers violates the spirit of separation-of-powers principles. In *Abbasi*, this Court stressed the importance of recognizing Congress’s role in the constitutional scheme. However, separation-of-powers at its most basic level gives each branch of government a duty and a role to play, independent of the other branches. *I.N.S. v. Chadha*, 463 U.S. 919, 946 (1983) (“[t]he very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers”). That the courts have a role to play in the separation-of-powers scheme is undeniable.

Further, the Founders recognized that the courts had an equal role to play in protecting constitutional rights. When James Madison presented the Bill of Rights to Congress he stated:

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

1 Annals of Cong. 439 (1789).

Important to this discussion is the fact that the Constitution is the supreme law of the land. *Marbury v. Madison*, 1 Cranch 137, 178 (1803) (“If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”). In *Marbury*, this Court recognized that when a congressional statute gave it authority that contradicted the Constitution, the Court had a duty to strike down the statute and follow the Constitution, thus establishing the concept of judicial review in the courts. *Id.* When the courts play their role in the separation-of-powers scheme they must always remember that the Constitution is supreme.

Thus, the courts have a duty to protect both the separation-of-powers and constitutional supremacy principles in order to protect the Constitution. To protect both principles the Court must recognize implied claims for damages for every constitutional rights violation that otherwise lacks a remedy.

In many cases of constitutional violations, “it is damages or nothing.” *Bivens*, 403 U.S. at 410; *see also Abbasi*, 582 U.S. at —, 137 S.Ct. at 1858 (“if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations”). For those who have been injured by constitutional violations, especially where someone has been killed, it is no relief for the courts to order an injunction stopping the action from happening again. Furthermore, since, as is often the case, the action of government officials violates policies already in place, the injunction provides no measure of deterrence. The only way to truly deter constitutional violations is to allow for a damages remedy.

The Judicial Branch cannot simply leave it to Congress to protect constitutional rights and turn a blind eye if Congress so refuses. It is an odd thing to say that if Congress passes an act that allows constitutional violations, the courts will label it unconstitutional and develop a remedy (most likely invalidating the law), but if Congress does nothing, which in turn, allows constitutional violations, the Court will consider itself bound by the congressional inaction. In reality this is not a respect for the power of Congress but a gross abdication of this Court’s responsibility to protect constitutional rights.

As Chief Justice John Marshall proclaimed, more than two centuries ago, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury*, 1 Cranch at 163. If a constitutional right is dependent upon Congress’s approval, then that right does not exist. The Bill of Rights, by its very nature and existence, stands for the proposition that some rights are so important that they cannot be left up to Congress to approve. They are inherent and exist regardless of what Congress thinks of them. To limit certain rights because Congress has not spoken on them is to altogether deny that those rights exist. The Constitution must be the supreme law of the land and it cannot be supreme if one must seek congressional approval to exercise it. Where the constitutional rights of individuals are at issue, the Judiciary must stand as “the guardians of democracy.”

Therefore, where Congress has failed to protect a constitutional right, either intentionally or not, it is the duty of the courts to protect that right. This Court should order a new expansive test for *Bivens* claims that determines (1) if there is a constitutional violation, (2) if a remedy exists, (3) if existing remedy is sufficient to fully protect the constitutional right. Where Congress or the Executive have not acted or not acted sufficiently to protect constitutional rights, the court must allow claims for damages.

IV

Whether Hernández can meet this new standard is unclear. I would reverse the Fifth Circuit's judgment and remand the case to be decided consistent with the new test set out here.

IV. CONCLUSION

The state of *Bivens* claims has never been in greater peril. If Thomas's *Hernández II* concurrence is any indicator, and I believe it is, then *Bivens* claims are one step away from elimination. There have been calls for Congress to act;¹²⁵ and, certainly, congressional action would be the quickest way to secure these Constitutional rights. However, even if Congress were to pass a statute creating an appropriate remedy for this instance, it is still possible that some rights would not be covered. Therefore, a new test for implied claims for constitutional violations would still be needed. The Court adopting the test presented here is the only way to ensure that all constitutional rights are protected. As the draft dissent showed, the Supreme Court not only has the ability to create an implied remedy to constitutional violations, it has the duty to do so to protect the separation-of-powers and constitutional supremacy principles that make up the foundation of our constitutional scheme.

DANIEL BLAIR*

125. In Meg Green's excellent article, she calls on Congress to "act immediately to address civil liability in the context of extraterritorial excessive force by federal agents at the United States border." Meg Green, *Standing On The Wrong Side: Hernández v Mesa And Bivens Remedies In The Context Of Cross-Border Shootings By Federal Law Enforcement*, 61 B.C. L. REV. E-SUPPLEMENT II.-18, II-33 (2020).

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