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NOTE

(Extra)ordinary Tort Law: Evaluating the Federal Tort Claims Act as a Constitutional Remedy

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Abstract. Shortly after the *Bivens* remedy was born, the Federal Tort Claims Act nearly killed it. In *Carlson v. Green*, the United States argued that an implied constitutional remedy was no longer necessary because Congress had amended the FTCA to cover intentional torts. The Supreme Court disagreed, and *Bivens* survived.

Today, *Bivens* is alive but showing its age. The Supreme Court has repudiated its rationale and refused to extend it to any new rights or fact patterns. Scholars fear that there is no longer a remedy for many of the constitutional violations of federal officers. But perhaps these concerns are overstated: As the United States argued in *Carlson*, the FTCA has the potential to serve as a constitutional remedy.

This Note assesses just how great that potential is. First, it discusses the doctrinal viability of using the FTCA as a constitutional remedy. As it turns out, a growing circuit split over the FTCA's discretionary function exception now threatens the FTCA's ability to serve as a constitutional remedy just when it is most needed. After considering that threat, this Note evaluates the FTCA's effectiveness as a constitutional remedy. It considers the kinds of constitutional violations that the FTCA can redress and the defenses available to the United States. Finally, this Note examines the theoretical implications of relying on state tort law to vindicate federal constitutional rights.

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Introduction

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court recognized an implied cause of action for federal officers' Fourth Amendment violations.[2] Over the decade that followed, the Court expanded *Bivens* to certain violations of the Due Process Clause and Eighth Amendment.[3] Then, the Court began to backtrack. It repudiated *Bivens*'s rationale and refused to extend the remedy to any new contexts.[4] With *Bivens* now confined to a few rights and fact patterns, scholars warn that there is often no remedy for the constitutional violations of federal officers.[5] Many have called on Congress to act.[6]

But perhaps it already has. In 1946, Congress passed the Federal Tort Claims Act (FTCA),[7] authorizing suits against the United States for the negligent and

1. 403 U.S. 388 (1971).
2. *See id.* at 397 (holding that the complaint "state[d] a cause of action under the Fourth Amendment").
3. *See* Davis v. Passman, 442 U.S. 228, 231, 248-49 (1979) (holding that there is an implied cause of action under the Fifth Amendment for a claim of sex discrimination); Carlson v. Green, 446 U.S. 14, 18-20 (1980) (holding that there is an implied cause of action under the Eighth Amendment).
4. *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 951-54 (2019) (explaining that following *Davis* and *Carlson*, the Court has "rejected *Bivens* claims in every context in which it has ruled on them"); Hernandez v. Mesa, 140 S. Ct. 735, 752-53 (2020) (Thomas, J., concurring) (observing that the Court has "undermined [*Bivens*'s] foundation").
5. *See, e.g.*, Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006-2007 CATO SUP. CT. REV. 23, 76 (2007) (predicting a "bleak future for the core premise of *Bivens* . . . and for the meaningful enforcement of the Bill of Rights against renegade government officials"); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019-2020 CATO SUP. CT. REV. 263, 283 (2020) (explaining that the Supreme Court "has effectively bestowed a form of absolute immunity on federal law enforcement officers").
6. *See, e.g.*, Fallon, *supra* note 4, at 980-81 (arguing that Congress should enact statutes to make the federal government liable for officers' constitutional violations); Henry Rose, *The Demise of the* Bivens *Remedy Is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 230 (2022) (arguing that "Congress should enact legislation that allows persons whose federal constitutional rights have been violated by federal actors to sue them for damages"); Joanna Schwartz, James Pfander & Alexander Reinert, Opinion, *The Simple Way Congress Can Stop Federal Officials from Abusing Protesters*, POLITICO (June 10, 2020, 11:58 AM EDT), https://perma.cc/Z2FN-8MFK (arguing that "Congress should provide the statutory framework that would secure the Bivens action and ensure constitutional accountability at the federal level").
7. Federal Tort Claims Act, ch. 753, §§ 401-424, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 and 31 U.S.C.).

wrongful acts of its employees.[8] Though FTCA claims must be brought under state tort law,[9] the overlap between state torts and federal constitutional violations has allowed the FTCA to moonlight as a constitutional remedy. Fourth Amendment violations, for instance, have been repackaged and redressed under the FTCA as claims for trespass and false arrest.[10]

A growing split among the courts of appeals, however, threatens to end this practice just when it is most needed. The FTCA is riddled with exceptions, the "most significant" of which is the discretionary function exception.[11] That exception excludes from the FTCA's coverage any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[12] Because even the most mundane task involves some amount of discretion,[13] courts have struggled to confine the exception's reach.[14] As a result, it has gobbled up a significant number of otherwise-viable FTCA claims, leaving many of those injured by the tortious conduct of federal officers empty-handed.[15] Still, for decades courts agreed that the exception does not cover claims involving unconstitutional conduct.[16]

That consensus has recently shattered. There is now a five-to-two circuit split on whether claims involving unconstitutional conduct escape the discretionary function exception.[17] In 2019, the Seventh Circuit held that

8. Cornelius J. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. & STATE BAR J. 207, 207 & n.1 (1956).

9. 2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 9.05 (2023) ("[T]he FTCA . . . does not create new causes of action; rather, it makes the United States liable in accordance with applicable state tort law.").

10. *See, e.g.*, Gill v. United States, 516 F. Supp. 3d 64, 81 (D. Mass. 2021) (trespass); Hornof v. Waller, No. 19-cv-00198, 2020 U.S. Dist. LEXIS 198578, at *33-34, *39 (D. Me. Oct. 20, 2020) (false arrest).

11. Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 448 (1997); *see* 28 U.S.C. § 2680 (listing exceptions).

12. 28 U.S.C. § 2680(a).

13. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 782 (2d ed. 1955) [hereinafter PROSSER (1955)]; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1077-78 (1st ed. 1941) [hereinafter PROSSER (1941)].

14. *See* Amy M. Hackman, Note, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much Is Enough?*, 19 CAMPBELL L. REV. 411, 412 (1997).

15. *See, e.g.*, Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) ("[T]he discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act.").

16. *See infra* Part II.B.

17. *See infra* Part II; *see also* Xi v. Haugen, 68 F.4th 824, 838 & n.10 (3d Cir. 2023).

FTCA claims do not fall outside of the exception simply because they involve unconstitutional conduct.[18] In 2021, the Eleventh Circuit held the same.[19]

A few scholars—including, most notably, Gregory Sisk—have recognized the FTCA's potential to serve as a constitutional remedy.[20] In his recent work, *Recovering the Tort Remedy for Federal Official Wrongdoing*, Professor Sisk argues that "[a]s the Supreme Court weakens the *Bivens* constitutional tort cause of action . . . , we should recollect the merit of the common-law tort remedy for holding the federal government accountable for official wrongdoing."[21] I share Professor Sisk's overarching view that the FTCA holds promise as a constitutional remedy, and this Note builds on Professor Sisk's scholarship. But Professor Sisk's work preceded the Eleventh Circuit's decision in *Shivers*. Accordingly, he did not have the opportunity to fully consider the growing circuit split that threatens to severely diminish, if not altogether destroy, the FTCA's capacity to serve as a constitutional remedy.[22] In addition, Professor Sisk focuses on legislative revisions to the FTCA.[23] This Note focuses instead on assessing how the FTCA, as it currently stands, shapes up as a means of constitutional redress. With *Bivens* cut to the bone, understanding whether and

18. Linder v. United States, 937 F.3d 1087, 1090-91 (7th Cir. 2019).

19. Shivers v. United States, 1 F.4th 924, 930-34 (11th Cir. 2021).

20. *See, e.g.*, Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1791 (2021); 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, 572-73 (2020) (explaining that *Bivens* and the FTCA are "parallel and to some degree overlapping remedies for intentional and constitutional torts"); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 73 n.39 (1999) (explaining that the FTCA can be used to redress constitutional claims because of the partial overlap between constitutional rights and common-law torts); *see also* Carlson v. Green, 446 U.S. 14, 10-20 (1980) (recognizing that victims of certain "intentional wrongdoing . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights").

21. Sisk, *supra* note 20, at 1791.

22. Because Professor Sisk's article followed the Seventh Circuit's decision in *Linder* but preceded the Eleventh Circuit's decision in *Shivers*, it addresses the argument that unconstitutional conduct does not necessarily escape the discretionary function exception but does so only briefly. *See* Sisk, *supra* note 20, at 1829-31. At that time, the Seventh Circuit's decision seemed to be an aberration rather than a harbinger of broader disagreement, and Professor Sisk accordingly characterizes the disagreement as implicating "[a] few judges" rather than a full-blown circuit split. *See id.* at 1829. In light of the Eleventh Circuit's decision, an in-depth consideration of the question is warranted—especially because the Eleventh Circuit's treatment of the question was more robust than the Seventh Circuit's. Still, my analysis of the question is informed by Professor Sisk's treatment, and I note where my argument builds upon or is similar to his.

23. Sisk, *supra* note 20, at 1791 ("The FTCA should be reformed to put claims for intentional wrongdoing by any federal employee on a secure footing.").

how the FTCA can be used to redress constitutional violations is more important than ever. For many injured by the unconstitutional acts of federal officers, it is now the FTCA or nothing.[24]

Necessity is not the only reason for my focus on the FTCA. If *Bivens* "broke new ground" in recognizing a cause of action under the Constitution,[25] reliance on the FTCA to remedy constitutional violations returns to well-trodden ground, as Professor Sisk has argued.[26] During the Founding era, ordinary tort law was the medium through which constitutional rights were vindicated.[27] The structure of a suit for constitutional redress under the FTCA parallels Founding-era practice: The substance of the claim lies in tort law, but the Constitution enters to defeat the defense that the officer's actions were authorized by federal law.[28] In light of these parallels, a regime for constitutional redress that relies on the FTCA reflects a theory of both constitutional rights and federalism that is more aligned with constitutional text and original public meaning than *Bivens*.[29]

This Note proceeds in four parts. Part I provides a history of the remedies available for federal officers' constitutional violations and shows that ordinary tort law, once the customary constitutional remedy, is poised for a comeback—a comeback made possible by the FTCA and critical by the cutting back of *Bivens*. Part II addresses the discretionary function exception and the growing disagreement over its interpretation that now threatens the FTCA's ability to serve as a constitutional remedy. Putting aside the split over statutory interpretation, Part III evaluates how effective the FTCA can be as a constitutional remedy. Drawing on cases in which plaintiffs have brought FTCA claims to redress constitutional violations, Part III considers the violations that can be redressed under the FTCA, as well as the various defenses that courts have read into its text. Finally, Part IV discusses the theoretical implications of relying on the FTCA to redress the constitutional violations of federal officers.

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24. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) ("For people in Bivens' shoes, it is damages or nothing.").

25. Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020).

26. *See* Sisk, *supra* note 20, at 1791 (explaining that the FTCA "roughly replicates the original regime for official wrongdoing by imposing liability directly on the government through the traditional medium of tort").

27. *See infra* notes 31-43.

28. *See infra* notes 31-36.

29. *Cf.* Sisk, *supra* note 20, at 1808 ("[T]he FTCA more closely resembles the common-law trespass remedy to curb governmental wrongdoing than does the judicially devised *Bivens* constitutional tort cause of action.").

I. A Brief History of Federal Constitutional Accountability

Tort law typically brings to mind car crashes and medical mishaps—not constitutional rights. Yet for much of American history, constitutional violations were redressed not directly under the Constitution but rather under the common law of torts. In this Part, I provide a short history of the remedies available for the unconstitutional acts of federal officers. Situating the FTCA within this broader context shows that its use in vindicating constitutional rights proves less an innovation than a restoration of the original system of constitutional accountability.[30]

A. The Era of Officer Suits

During the Founding era, constitutional violations were treated like any other tortious conduct.[31] Sovereign immunity protected the United States itself from being sued.[32] But those injured still had two paths to redress.

First, they could bring a common-law tort claim against the individual officer whose conduct gave rise to the injury.[33] In defense, the officer could respond that his conduct was authorized by the federal government.[34] Here, the Constitution would come into play: The plaintiff could counter that the authorization was void because the conduct was unconstitutional.[35] If the court agreed with the plaintiff, the officer would be personally liable for damages.[36]

The harshness of personal liability was tempered by congressional indemnification.[37] Officers found liable for torts could petition Congress to pass a private bill reimbursing them, which meant that the United States

30. *Cf.* Sisk, *supra* note 20, at 1806-08 (arguing that "[t]he modern statutory approach of a common-law tort remedy directly against the United States roughly replicates the early historical approach by which tort claims could be maintained against a federal officer who then was indemnified for liability by Congress").

31. *See* Fallon, *supra* note 4, at 936.

32. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001).

33. *See* Fallon, *supra* note 4, at 936, 942-46; Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531 (2013) ("From the beginning of the nation's history, federal . . . officials have been subject to common law suits as if they were private individuals . . . ."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987) (describing how a constitutional claim would be brought under a state tort law cause of action like trespass).

34. *See* Amar, *supra* note 33, at 1506.

35. *See id.* at 1506-07.

36. *See* 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, 1876 (2010).

37. *Id.*

would ultimately shoulder the loss.[38] Indemnification was not guaranteed; Congress would decide "whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss."[39] But a recent study shows that, in the period prior to the Civil War, roughly 60% of indemnification petitions were eventually granted.[40] The "great majority" of those petitions were filed by military officers who had been found liable for the wrongful seizure of persons or property.[41]

The second option was to bypass the courts altogether. Those harmed by the unconstitutional or otherwise tortious conduct of federal officers could petition Congress to pass a private bill reimbursing them for their losses.[42] Because no court had ruled on these claims, congressional committees would reconstitute themselves as courts—albeit crude ones—weighing evidence, determining liability, and calculating damages.[43]

Before long, Congress became overwhelmed by its role in adjudicating and reimbursing claims of officer negligence and misconduct.[44] A federal marshal petitioned, seeking indemnification after he was held liable for seizing flour to satisfy a judgment only to learn the flour did not belong to the debtor.[45] So too did a postmaster after he was held liable for filing a complaint against his assistant for stealing mail that turned out to have been lost, not stolen.[46] So too did a woman after her husband was allegedly imprisoned by the Department of War without probable cause.[47] And so on.

By the mid-1800s, Congress was spending half its time considering petitions for private bills—and yet, given their volume, disposing of only a small portion of them.[48] Meritorious claims lay in wait for years; justice was "cheated by long delay."[49] Sovereign immunity, a doctrine derived from the

38. *See id.*

39. *Id.* at 1868.

40. *Id.* at 1904-05.

41. *Id.* at 1904.

42. *See* 1 JAYSON & LONGSTRETH, *supra* note 9, § 2.02.

43. *See id.*

44. *Id.* ("Because the claimants could only seek relief through private legislation, it was not long before petitions for relief became so numerous that Congress found itself under an intense and time-consuming burden of attempting to adjudicate . . . .").

45. Pfander & Hunt, *supra* note 36, at 1904.

46. *Id.* at 1908-09.

47. *See* S. REP. NO. 45-655, at 1-3 (1879) (petition of Lucia M. Peck).

48. *See* 1 JAYSON & LONGSTRETH, *supra* note 9, § 2.02.

49. *Id.* § 2.02 n.4 (quoting *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. app. II at 49 (1942) (statement of Sen. Richard Brodhead)).

notion that "the King can do no wrong," was proving quite cumbersome in a country that thought the "King" could, in fact, do wrong and was responsible for remedying it.[50]

As the federal government ballooned, the burden on Congress did too.[51] More activity meant more opportunity for mistakes and malfeasance. The growing popularity of cars further exacerbated the burden on Congress.[52] Every car crash caused by a federal employee became an occasion for legislation.[53] By the late 1930s, Congress was receiving around 2,300 petitions for redress a year but granting only about 15% of them.[54] As one congressman put it, the Committee on Claims "could sit for a century and would still be behind in its work."[55] Tired of refereeing fender benders and the like, Congress finally passed the Federal Tort Claims Act (FTCA) in 1946.[56]

B. The Enactment of the FTCA

The FTCA authorizes plaintiffs to sue the United States for damages in federal court for the negligent and wrongful acts of its employees.[57] It does not create a cause of action. Instead, it waives sovereign immunity, making the United States liable under state tort law "in the same manner and to the same extent as a private individual under like circumstances."[58] In other words, for claims within its scope, the FTCA demotes the United States from king to commoner.[59]

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50. *See id.* § 3.01 (explaining that "the political theory that the King could do no wrong was repudiated in America" (quoting Feres v. United States, 340 U.S. 135, 139 (1950))).

51. *See id.* § 2.08 (explaining that the twenty years leading up to the enactment of the FTCA was a period in which the federal government expanded).

52. *Id.*

53. *See id.*

54. *See id.* § 2.08 n.1.

55. *See id.* (quoting H.R. REP. NO. 69-667, at 13 (1926) (statement of Rep. Emanuel Celler)).

56. The "Federal Negligent Operation of Motor Vehicles Act" was suggested as a "possibly more accurate title" for the FTCA. Walter Gellhorn & Louis Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1326 (1954).

57. 28 U.S.C. § 1346(b)(1).

58. 28 U.S.C. § 2674; *see also* Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1299 (2002) ("The [FTCA] did not create any new basis for liability for the government that did not already apply to private parties, but merely removed the defense of sovereign immunity . . . .").

59. *Cf.* United States v. Kwai Fun Wong, 575 U.S. 402, 419 (2015) ("[T]he FTCA treats the United States more like a commoner than like the Crown.").

There are several exceptions to the FTCA's coverage.[60] The "most significant" is the discretionary function exception.[61] This exception excludes any claim based upon a "discretionary function or duty."[62] Today, the FTCA's ability to serve as a constitutional remedy turns largely on the scope of this exception, and Part II explores the exception in depth. But when the FTCA was enacted, another exception altogether barred many of the claims necessary to vindicate constitutional rights.

The intentional tort exception excludes claims arising out of certain intentional torts from the FTCA's coverage.[63] These torts include "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contractual rights"[64]—that is, many of the torts that correspond to the kinds of constitutional violations committed by federal officers. Thus, the intentional tort exception largely precluded the FTCA, as originally enacted, from being used to vindicate constitutional rights. But this was of little practical consequence because those harmed by federal officers' unconstitutional conduct could still sue the individual officer under state tort law. Initially, the FTCA preempted only claims within its scope.[65]

C. The Expansion of Remedies

The next major development in federal constitutional accountability came not from Congress but from the Supreme Court. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court recognized an implied damages remedy for the constitutional violations of federal officers.[66] The traditional remedy—an officer suit under state tort law—was, in the Court's view, inadequate.[67] Constitutional violations do not always have a counterpart in state tort law, the Court reasoned.[68] And even when they do, reliance on tort

60. *See* 28 U.S.C. § 2680 (listing exceptions).

61. Peterson & Van Der Weide, *supra* note 11, at 448.

62. 28 U.S.C. § 2680(a).

63. 28 U.S.C. § 2680(h).

64. *Id.*

65. *See* Brownback v. King, 141 S. Ct. 740, 745 (2021) ("The [FTCA] allows a plaintiff to bring certain state-law tort suits against the Federal Government." (citing 28 U.S.C. § 2674)); Vázquez & Vladeck, *supra* note 33, at 567-68 (explaining that the FTCA, as originally enacted, did not "purport[] to affect the availability of state tort remedies against individual federal officers").

66. 403 U.S. 388, 389 (1971).

67. *See id.* at 391-92.

68. *Id.* at 392-94 (giving examples of constitutional violations that would not be unlawful under state law).

law creates a false equivalency between the actions of private individuals and those of federal officers.[69] The Court explained that "power, once granted, does not disappear like a magical gift when it is wrongfully used."[70] Constitutional violations are different in kind from ordinary torts and therefore require a different remedy, the Court concluded.[71]

A few years after *Bivens* was decided, Congress also acted, unleashing the FTCA's potential to be used as a remedy for constitutional violations. In 1973, a string of "abusive, illegal and unconstitutional 'no-knock' raids" by federal agents sparked public outrage.[72] During the raids, federal agents ransacked private homes without required warrants.[73] In the process, multiple individuals were handcuffed, assaulted, and jailed.[74]

The following year, Congress amended the intentional tort exception to allow suits for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"—so long as the claim arose from the conduct of federal investigative or law enforcement officers.[75] By sweeping in these intentional torts, the so-called law enforcement proviso expanded the FTCA from a tool for addressing government negligence, like car accidents, to one for addressing constitutional violations as well.[76]

But enactment of the proviso also created doubt as to the continued viability of an implied constitutional remedy. In recognizing such a remedy, the *Bivens* Court had emphasized Congress's lack of "affirmative action."[77] Now that Congress had acted, the court-created remedy seemed unnecessary.[78]

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69. *See id.* at 391-92.

70. *Id.* at 392.

71. *See id.* at 394 (rejecting the argument that "the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power").

72. 2 JAYSON & LONGSTRETH, *supra* note 9, § 13.06 (quoting S. REP. NO. 93-588, at 2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2790, 1973 WL 12539).

73. *See* Walter Rugaber, *12 Law Officers Indicted for Mistaken Drug Raids*, N.Y. TIMES, Aug. 25, 1973, at 1, https://perma.cc/HG3A-SG83.

74. *See id.*

75. 28 U.S.C. § 2680(h); *see* 2 JAYSON & LONGSTRETH, *supra* note 9, § 13.06.

76. *See* Carlson v. Green, 446 U.S. 14, 33 (1980) (Rehnquist, J., dissenting) (noting that Congress amended the FTCA in 1974 "to permit private damages recoveries for intentional torts committed by federal law enforcement officers, thereby enabling persons injured by such officers' violations of their federal constitutional rights in many cases to obtain redress").

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

78. *See* Brief for the Petitioners at 10-12, *Carlson*, 446 U.S. 14 (1980) (No. 78-1261), 1979 WL 199269 (arguing that after the law enforcement proviso was enacted, an implied cause of action under the Constitution was no longer necessary).

The Supreme Court confronted whether the *Bivens* remedy survived enactment of the law enforcement proviso in *Carlson v. Green*.[79] In *Carlson*, a mother whose son had died in prison asked the Court to extend *Bivens* to an Eighth Amendment claim.[80] The United States replied that no extension was necessary; the FTCA provided an adequate alternative remedy.[81] But the Court disagreed, relying on the legislative history of the law enforcement proviso. In enacting the proviso, the Court explained, Congress did not intend for the FTCA to preempt a *Bivens* claim.[82] Instead, according to the Court, Congress sought to provide a "complementary" remedy,[83] "so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*."[84]

The Court also concluded that, congressional intent aside, the "FTCA is not a sufficient protector of the citizens' constitutional rights."[85] By allowing the United States to be sued directly, the FTCA made reimbursement for constitutional violations more likely. No longer would reimbursement depend on congressional action or the size of an individual officer's bank account.[86] But the FTCA did not fix the issues with the traditional officer suit that *Bivens* had identified. Constitutional claims still needed to be reframed as torts under state law. And the United States was still no more liable for a constitutional violation than a private individual was for the corresponding tort.[87]

In his concurring opinion in *Carlson*, Justice Powell noted that the FTCA contained several exceptions, including an exception for claims based upon the exercise of a discretionary function.[88] Though the law enforcement proviso

79. 446 U.S. 14, 16-17 (1980).

80. *Id.*

81. Brief for the Petitioners, *supra* note 78, at 11-12 ("We submit that the comprehensive administrative and judicial procedures provided by the [FTCA] constitute an adequate federal remedy for the kind of constitutional violation that was alleged to have occurred in this case.").

82. *See Carlson*, 446 U.S. at 19 (explaining that "[p]etitioners point to nothing in the [FTCA] or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy").

83. *Id.* at 20.

84. S. REP. NO. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791, 1973 WL 12539; *see id.* at 19-20.

85. *Id.* at 23.

86. 1 JAYSON & LONGSTRETH, *supra* note 9, § 2.01 (describing "the dismal choice of a suit against the employee personally—a defendant of doubtful financial resources—or a petition to Congress to grant a private relief measure").

87. *See Carlson*, 446 U.S. at 23 ("[A]n action under [the] FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.").

88. *See id.* at 28 n.1 (Powell, J., concurring in the judgment) (noting that "recovery may be barred altogether" under the discretionary function exception).

permits claims corresponding to common constitutional violations, such claims must still, in most circuits, overcome the hurdle created by the discretionary function exception.[89] For example, even if a claim for excessive force could be brought under the FTCA as a battery pursuant to the proviso, the suit would nonetheless be dismissed if the claim were based upon the exercise of a discretionary function.

With the enactment of the law enforcement proviso, the discretionary function exception gained new importance in the realm of constitutional redress. As Justice Powell recognized in *Carlson*, the exception threatened to bar the constitutional claims that the law enforcement proviso had made possible.[90] But because plaintiffs could still bring claims barred by the exception via an officer suit or *Bivens*, the threat it posed was, for the time being, suppressed. This was an era of relative abundance when it came to constitutional redress. The FTCA was just one of three possible remedies: Those injured by the unconstitutional acts of federal officers could sue (1) the officers under *Bivens*, (2) the officers under state tort law, or (3) the United States under the FTCA.[91]

D. Retrenchment

This period of abundance did not last long. Soon, both Congress and the Supreme Court cut back the remedies for constitutional violations. In 1988, Congress passed the Westfall Act,[92] which eliminated the centuries-old practice of state-law officer suits.[93] As a result, if a claim falls under one of the FTCA's exceptions, like the discretionary function exception, it can no longer be brought against the individual officer under state tort law.[94]

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89. *See* Hornof v. Waller, No. 19-cv-00198, 2020 U.S. Dist. LEXIS 198578, at *23-24 (D. Me. Oct. 20, 2020) (explaining that all but one of the circuits to consider the issue have held that "the law enforcement proviso 'does not negate the discretionary function exception'" (quoting Joiner v. United States, 955 F.3d 399, 406 (5th Cir. 2020))); Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 698 (2019) ("To date, the Eleventh Circuit is the only appellate court to hold that claims made under the law enforcement proviso cannot be categorically barred by the discretionary function exception.").

90. *Carlson*, 446 U.S. at 28 n.1 (Powell, J., concurring in the judgment).

91. *See* Vázquez & Vladeck, *supra* note 33, at 568-69 (explaining the "three paths" to redress for constitutional violations between 1974 and 1988).

92. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 16 and 28 U.S.C.).

93. 28 U.S.C. § 2679; *see* Vázquez & Vladeck, *supra* note 33, at 566.

94. *See* United States v. Smith, 499 U.S. 160, 165 (1991) (holding that "the [Westfall Act] immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government"); *see also* 1 JAYSON & LONGSTRETH, *supra* note 9, § 6.01 ("In *United States v. Smith*, the Supreme Court . . . held that the Westfall Act

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And though the Westfall Act did not bar *Bivens* claims,[95] the Supreme Court has sharply restricted them. After expanding *Bivens* to sex-discrimination claims in 1979 and Eighth Amendment claims in 1980, the Court has refused to expand *Bivens* each time it has been asked to do so.[96] In recent refusals, the Court has criticized the notion of court-created causes of action.[97] The Court has effectively confined "*Bivens* and its progeny . . . 'to the precise circumstances that they involved.'"[98]

These developments have promoted the FTCA from a supporting to a starring role in the vindication of constitutional rights. But mounting disagreement over the scope of the discretionary function exception threatens to sharply diminish the FTCA's capacity to remedy constitutional violations, leaving many injured by the unconstitutional acts of federal officers without any remedy whatsoever. In the next Part, I explore this disagreement in order to evaluate the doctrinal viability of using the FTCA as a constitutional remedy.

II. Doctrinal Viability

After enactment of the law enforcement proviso, courts faced the question of whether conduct could escape the discretionary function exception by virtue of being unconstitutional. For decades, every circuit court to address the

precludes actions against individual federal employees even in cases where the FTCA's limitations and exclusions preclude any FTCA recovery against the United States." (footnote omitted)).

95. *See* 28 U.S.C. § 2679(b)(2)(A); 1 JAYSON & LONGSTRETH, *supra* note 9, § 6.01 ("The exclusive remedy provisions of the Westfall Act cover only common law torts committed by federal employees; under Section 2679(b)(2), they expressly do not extend to so-called constitutional torts . . . ." (footnote omitted)).

96. *See* Fallon, *supra* note 4, at 951 ("In the years following *Davis v. Passman* and *Carlson v. Green*, the Supreme Court has rejected *Bivens* claims in every context in which it has ruled on them.").

97. *See* Egbert v. Boule, 142 S. Ct. 1793, 1802-03 (2022) (noting tension between *Bivens* and the Constitution's separation of powers); Hernandez v. Mesa, 140 S. Ct. 735, 741-42 (2020) (same).

98. *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (Scalia, J., concurring) (2001)); *see* Fallon, *supra* note 4, at 952-53 ("As a practical matter . . . it is not clear that much space exists between the Court's *Ziglar* ruling and the earlier demand of Justices Scalia and Thomas that *Bivens*, *Davis*, and *Carlson* should be limited 'to the precise circumstances that they involved.'" (quoting *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring))); Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020) ("Today, *Bivens* claims generally are limited to the circumstances of the Supreme Court's trilogy of cases in this area . . . .").

question had held that it could.[99] But the Seventh and Eleventh Circuits recently said otherwise, creating a circuit split.[100]

In Part II.A, I provide an overview of the discretionary function exception. I then lay out the majority's position on the issue in Part II.B and the minority's position in Part II.C. As will be shown, the disagreement centers on the level of generality with which to define the relevant government conduct and the level of specificity required to remove that conduct from the realm of choice. Finally, in Part II.D, I consider the merits of the minority's position on these two points, concluding that the majority has the stronger argument: Under current Supreme Court precedent, claims arising from constitutional violations should necessarily fall outside of the discretionary function exception.

A. The Discretionary Function Exception

The discretionary function exception excludes from the FTCA's coverage any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[101]

From the FTCA's inception, this exception has confounded courts and scholars.[102] Those writing at the time of the FTCA's enactment recognized that the exception was intended to preserve the immunity to which officers were entitled when sued under state tort law.[103] That the exception would preserve

99. Five courts of appeals have directly held that unconstitutional conduct falls outside of the discretionary function exception. *See* Nurse v. United States, 226 F.3d 996, 1002 & n.2 (9th Cir. 2000); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003); Limone v. United States, 579 F.3d 79, 101-02 (1st Cir. 2009); Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016); Xi v. Haugen, 68 F.4th 824, 829 (3d Cir. 2023). Others have stated the same in dicta. *See* Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975); Medina v. United States, 259 F.3d 220, 225-26 (4th Cir. 2001).

100. *See infra* Part II.C.

101. 28 U.S.C. § 2680(a).

102. *See* Osborne M. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) (observing that "[the discretionary function] exception has caused most of the difficulty which now surrounds application of the Act"); Peck, *supra* note 8, at 208 (noting that "the discretionary function exception . . . appears to have given rise to considerable confusion and litigation"); Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 829, 900 (1957) (describing "the difficulties experienced by courts under the [FTCA] in distinguishing between 'discretionary' and 'nondiscretionary' functions").

103. *See, e.g.*, Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 545 (1947) (explaining that the immunity "retained" by the discretionary function exception "is in accord with the generally accepted doctrine of the non-liability of public officers for acts involving the exercise of judgment and discretion"); Note, *supra* note 102, at 892 ("The concept of discretionary function seems historically to derive from the considerable body of case law which gives to federal officials an immunity from suits arising out of certain kinds of official acts."); *see also* Niles, *supra* note 58, at 1280 (explaining that the discretionary

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the immunity officers enjoyed when sued directly makes sense because the FTCA was passed as a partial replacement for the officer-suit system.[104] Unfortunately, this insight does little to aid in the application of the exception because courts at the time of the FTCA's enactment were also perplexed as to how to define "discretionary" for purposes of officer immunity.[105] As a leading treatise explained, courts had created a "rather unworkable distinction" between acts that are "ministerial," for which officers are liable, and those that are "discretionary," for which officers are immune.[106] The distinction, the treatise quipped, "if it exists, can be at most one of degree."[107] In light of this confusion, courts have largely abandoned attempts to retrieve the original meaning of the discretionary function exception.[108]

Instead, the Supreme Court has developed a two-pronged test for determining when the exception applies. First, the challenged conduct must involve "an element of judgment or choice."[109] The exception does not apply if a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[110] Second, the judgment involved must be of the kind that the exception was intended to shield.[111] Congress devised the exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[112] The exception applies only if the challenged conduct involves the "exercise of policy judgment."[113] In summary, then, "the discretionary

function exception "was founded on the traditional restrictions . . . which were developed by American courts in response to common law claims filed against government officers in the course of their official duties").

104. *See supra* Part I.A.

105. *See, e.g.*, Eugene J. Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130, 134 (1943) ("[I]t is difficult to foretell from decided cases whether a court will hold a particular function ministerial or discretionary under certain situations.").

106. PROSSER (1955), *supra* note 13, at 781-82; PROSSER (1941), *supra* note 13, at 1076-77.

107. PROSSER (1955), *supra* note 13, at 782; *see also* PROSSER (1941), *supra* note 13, at 1077; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 411 (1987) (discussing the "murky and often illogical distinctions between discretionary and ministerial behavior, i.e., areas where judgment is legitimately exercised and where it is not" (footnote omitted)).

108. *See* Niles, *supra* note 58, at 1281 (explaining that the Supreme Court has "sever[ed] the analysis of the discretionary function exception from what Congress wisely chose as its defining foundation—the traditional common law limitations on the liability of government officials with discretionary authority").

109. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

110. *Id.*

111. *Id.*

112. *Id.* at 536-37 (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984)).

113. *Id.* at 537.

function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."[114]

Although the Supreme Court refined this test over decades, it is commonly referred to as the *Gaubert* analysis.[115] Decided in 1991, *United States v. Gaubert* is the most recent case in which the Supreme Court interpreted the discretionary function exception.[116] *Gaubert* reaffirmed the two-pronged test, with one clarification: The employee's subjective intent is irrelevant.[117] The focus is on "whether [the actions taken] are *susceptible* to policy analysis," not whether the employee actually exercised policy judgment.[118] This clarification made it easier for the United States to win FTCA cases, and to do so cheaply and quickly.[119] No discovery is needed.[120] The United States just needs to conjure up some hypothetical policy rationale for the challenged conduct.[121] In a world of resource constraints, doing so is not difficult: Even extreme negligence can be recast as financial prudence.[122]

The discretionary function exception thus creates difficulties for using the FTCA to redress constitutional violations. The kinds of violations that can be reframed as torts under the FTCA typically occur when officers otherwise have a great deal of choice.[123] For example, there are no laws or regulations

114. *Id.*

115. *See, e.g.*, Shivers v. United States, 1 F.4th 924, 929 (11th Cir. 2021) (applying "*Gaubert*'s two-prong test").

116. 499 U.S. 315 (1991); *see* 2 JAYSON & LONGSTRETH, *supra* note 9, § 12.04 (citing *Gaubert* as the most recent Supreme Court case dealing with the discretionary function exception); *see also Shivers*, 1 F.4th at 928 (explaining that "*Gaubert* and its two-prong test govern the application of the FTCA's discretionary function exception").

117. *Gaubert*, 499 U.S. at 325.

118. *Id.* (emphasis added).

119. *See* Peterson & Van Der Weide, *supra* note 11, at 448 ("Since *Gaubert*, the government has been winning far more discretionary function exception cases, and it has been winning them more often without going to trial.").

120. *See id.* at 473 ("Hypothesizing about what government decisionmakers might have done has largely replaced the presentation of evidence about what they actually did.").

121. *See id.* at 465 (discussing "the shift of emphasis" post-*Gaubert* "from actual to hypothetical policy considerations").

122. *See id.* at 498 (pointing out that "budgetary constraints are a factor in almost all government decisionmaking").

123. *See, e.g.*, Mesa v. United States, 837 F. Supp. 1210, 1213 (S.D. Fla. 1993) ("The overwhelming consensus of federal case law establishes that criminal law enforcement decisions—investigative and prosecutorial alike—are discretionary in nature and, therefore, by Congressional mandate, immune from judicial review."); Clemmons v. United States, No. 16-cv-01305, 2018 WL 6984946, at *6 (D.S.C. Dec. 13, 2018) ("[P]rison administrators are given discretion regarding the provision of medical care for inmates."); Williams v. United States, 314 F. App'x 253, 257 (11th Cir. 2009) ("No fixed standard or statute exists to mandate precisely how to prevent escape of a fleeing suspect or how to carry out an arrest . . . .").

prescribing the exact amount of force an FBI agent should use in making an arrest.[124] The agent must make decisions in light of the circumstances, and such decisions can easily be framed in terms of public safety or resource constraints.[125] As a result, the FTCA's ability to vindicate constitutional rights often turns on whether the constitutional violation itself removes the claim from the sweep of the discretionary function exception.[126]

B. The Majority Position

The First, Third, Eighth, Ninth, and D.C. Circuits have held that unconstitutional conduct can remove an FTCA claim from the discretionary function exception.[127] The Second and Fourth Circuits have suggested as much in dicta.[128] But all these courts have offered little in the way of explanation, instead relying on either the "tautology" that no one has discretion to violate the Constitution[129] or the conclusions of other courts.[130]

The D.C. Circuit's opinion in *Loumiet v. United States* provides the most robust account of the majority view. Carlos Loumiet sued the United States under the FTCA, alleging that a government agency brought an enforcement action against him in retaliation for reporting racism among its staff.[131] His

124. *See, e.g.*, *Williams*, 314 F. App'x at 257-58.

125. *See id.* at 258 (explaining the policy factors an FBI agent had to balance when making an arrest, including suspect safety, public safety, and resources).

126. To be clear, this is not always the case. Unconstitutional acts can fall outside of the discretionary function exception for other reasons. For example, some courts have accepted the so-called "negligent guard theory," under which a prison official's carelessness is not shielded by the discretionary function exception. *See, e.g.*, Estate of Smith v. Shartle, No. 18-cv-00323, 2020 WL 1158552, at *5-6 (D. Ariz. Mar. 10, 2020). Under this theory, an Eighth Amendment violation resulting from an official's carelessness would not be shielded by the discretionary function exception. In these cases, however, the constitutional question is never litigated.

127. *See* Limone v. United States, 579 F.3d 79, 101-02 (1st Cir. 2009); Xi v. Haugen, 68 F.4th 824, 829 (3d Cir. 2023); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003); Nurse v. United States, 226 F.3d 996, 1002 & n.2 (9th Cir. 2000); Galvin v. Hay, 374 F.3d 739, 758 (9th Cir. 2004) (holding that the discretionary function exception did not apply because "[f]ederal officials do not possess discretion to violate constitutional rights" (alteration in original) (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1998))); Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016) (holding that "[t]he discretionary-function exception . . . does not shield decisions that exceed constitutional bounds").

128. *See* Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975); Medina v. United States, 259 F.3d 220, 225-26 (4th Cir. 2001).

129. *See, e.g.*, *Myers & Myers*, 527 F.2d at 1261.

130. *See, e.g.*, *Limone*, 579 F.3d at 101 (citing two appellate court decisions collecting cases in support of the proposition that the discretionary function exception does not immunize conduct that "transgresses the Constitution").

131. *See Loumiet*, 828 F.3d at 939-40.

claims included intentional infliction of emotional distress, abuse of process, and malicious prosecution, among others.[132] The district court dismissed Loumiet's claims for abuse of process and malicious prosecution "pursuant to the discretionary function exception."[133]

The D.C. Circuit reversed, holding that claims involving unconstitutional conduct necessarily fall outside of the discretionary function exception.[134] Because Loumiet alleged that the enforcement action was not just tortious but also a violation of his First and Fifth Amendment rights, his claims could go forward.[135] In explaining its holding, the D.C. Circuit acknowledged that the decision to bring an enforcement action is typically a matter of discretion, as it "involves judgment and requires balancing policy goals and finite agency resources."[136] There is nevertheless a limit to that discretion: Government agencies "lack[] discretion to make unconstitutional policy choices."[137]

In the D.C. Circuit's view, unconstitutional conduct necessarily fails the first prong of the *Gaubert* analysis because acting unconstitutionally is not a matter of choice.[138] In *Berkovitz*, a case decided a few years prior to *Gaubert*, the Supreme Court explained that the discretionary function exception excludes conduct violating a federal statute, regulation, or policy that "specifically prescribes a course of action for an employee to follow" because employees have no choice but to abide by mandatory directives.[139] It would be "illogical," the D.C. Circuit reasoned in *Loumiet*, if the FTCA "authorize[d] tort claims against the government for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution."[140] The discretionary function exception protects only the "*permissible* exercise of policy judgment."[141]

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132. *Id.*

133. *See* Loumiet v. United States, 106 F. Supp. 3d 219, 222 (D.D.C. 2015), *rev'd*, 828 F.3d 935 (D.C. Cir. 2016).

134. *Loumiet*, 828 F.3d at 944 ("The discretionary-function exception . . . does not shield decisions that exceed constitutional bounds, even if such decisions are imbued with policy considerations.").

135. *Id.* at 942-43.

136. *Id.* at 942.

137. *Id.* at 944.

138. *See id.* at 941-42 (outlining first prong of *Gaubert* test); *id.* at 944 (explaining that unconstitutional conduct fails this prong because "the government lacks discretion to make unconstitutional policy choices").

139. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

140. *Loumiet*, 828 F.3d at 944-45.

141. *Id.* at 942 (emphasis added) (quoting *Berkovitz*, 486 U.S. at 537).

For decades, the majority view went unquestioned. Most appellate courts treated the issue in a cursory manner, explaining that federal officers lack discretion to violate the Constitution and leaving it at that.[142] This argument is seductively simple, almost self-evident. But recent decisions by the Seventh and Eleventh Circuits have exposed its shortcomings.

C. The Minority Position

In 2019, the Seventh Circuit became the first appellate court to take the position that conduct does not escape the discretionary function exception simply because it violates the Constitution.[143] Two years later, the Eleventh Circuit came to the same conclusion in *Shivers v. United States*.[144] *Shivers* builds on the Seventh Circuit's decision and therefore provides a more comprehensive view of the minority position.

Shivers arose out of a brutal attack in federal prison.[145] In August of 2015, prison officials assigned Mackie Shivers a new cellmate, Marvin Dodson.[146] Dodson was mentally unstable and had a history of assaulting his cellmates.[147] Months into living with Shivers, Dodson stabbed Shivers in the eye while Shivers was sleeping.[148] Shivers is now permanently blind in that eye.[149]

Shivers brought a claim under the FTCA for negligence, alleging that prison officials knew or should have known that Dodson had a history of attacking his cellmates.[150] Shivers also alleged that he had told prison officials that he was concerned for his safety just a few days before the attack but that

142. *See, e.g.*, Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009) ("Nor does [the discretionary function exception] shield conduct that transgresses the Constitution.").

143. *See* Linder v. United States, 937 F.3d 1087, 1090-91 (7th Cir. 2019). In 1970, the Seventh Circuit issued a decision holding that FTCA claims arising from unconstitutional conduct do not escape the discretionary function exception. *See* Kiiskila v. United States, 466 F.2d 626, 628 (7th Cir. 1972). I disregard that decision here because it was decided before the current formulation of the discretionary function exception analysis and before the law enforcement proviso was enacted. *See id.* at 628 (citing Dalehite v. United States, 346 U.S. 15, 33-34 (1953)); *supra* notes 75-76, 109-14 and accompanying text.

144. Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021) (holding that the discretionary function exception shields the United States from liability regardless of whether an "employee's exercise of his or her discretion is appropriate, slightly abusive, or so abusive that it is unconstitutional").

145. *Id.* at 926-27.

146. *Id.*

147. *Id.* at 927.

148. *Id.*

149. *Id.*

150. *Id.* at 926-27.

they had done nothing.[151] While acknowledging that inmate housing decisions are ordinarily a matter of discretion, Shivers argued that these specific decisions violated his Eighth Amendment rights and were therefore outside the scope of the discretionary function exception.[152]

The Eleventh Circuit disagreed, holding that even conduct that violates constitutional rights falls within the exception.[153] Instead of examining the prison officials' actions, as Shivers had urged, the Eleventh Circuit considered the "category or type of challenged government activity."[154] Defining the category of activity as inmate housing decisions, the Eleventh Circuit found the first prong of the *Gaubert* analysis satisfied.[155] No directive defines with precision how inmates are to be housed, the court reasoned.[156] Federal law leaves those decisions to prison officials.[157] And the judgment implicated is a policy judgment; "maintaining order and preserving security within our nation's prisons" is an "inherently policy-laden endeavor."[158] Both prongs of the *Gaubert* test were therefore met, and Shivers's FTCA claim was barred, even if prison officials violated his constitutional rights.[159]

The Eleventh Circuit acknowledged that its holding conflicted with those of the majority of circuits to confront the issue.[160] It failed to explain, however,

151. *See* Additional Brief of Appellant Mackie L. Shivers, Jr. at 2-4, *Shivers*, 1 F.4th 924 (11th Cir. 2021) (No. 17-12493).

152. *See Shivers*, 1 F.4th at 929 ("Shivers nonetheless argues that the discretionary function exception does not apply here because the prison officials' decision to house Dodson in his cell violated the Eighth Amendment.").

153. *See id.* at 930.

154. *Id.* ("The critical inquiry in an FTCA case like this one, therefore, is whether the category or type of challenged government activity is discretionary under *Gaubert*.").

155. *See id.* at 931.

156. *Id.* ("Shivers points to no federal statute, regulation, or policy that specifically prescribes a course of action that the prison employees here failed to follow.").

157. *See id.* at 929 (explaining that while federal law imposes on prison officials the general duty to safeguard inmates, it leaves officials discretion as to how this duty is to be fulfilled through "inmate-classification and housing-placement decisions").

158. *See id.* (quoting Cohen v. United States, 151 F.3d 1338, 1344 (11th Cir. 1998)).

159. *See id.* at 933 (holding that "a prisoner's *FTCA tort claim* based on the government's tortious abuse of [a discretionary] function—even unconstitutional tortious abuse—is barred by the statutory discretionary function exception"). The consequences of the Eleventh Circuit's opinion are somewhat muted by the fact that the Eleventh Circuit is the only court of appeals to hold that when an FTCA claim falls within the law enforcement proviso, the discretionary function exception "is of no effect." Nguyen v. United States, 556 F.3d 1244, 1260 (11th Cir. 2009); *see supra* note 89. As such, claims involving unconstitutional conduct will still be redressable in the Eleventh Circuit if they fall within the law enforcement proviso.

160. *See* Shivers, 1 F.4th at 933 n.5 ("We acknowledge that there is a circuit split on this same discretionary function issue. . . . While the Seventh Circuit is in the minority, we find its reasoning and analysis to be more persuasive." (citations omitted)).

where those circuits had gone awry. It wrote only that the Seventh Circuit's "reasoning and analysis [were] more persuasive."[161] Ultimately, the majority-minority divergence can be traced to disagreement on two related aspects of the *Gaubert* analysis: (1) the level of generality with which to define the relevant conduct and (2) the level of specificity required to remove that conduct from the realm of choice.

To start, the Eleventh Circuit defined the relevant conduct at a much higher level of generality than did the courts taking the majority approach. In *Loumiet*, for example, the D.C. Circuit defined the relevant conduct as "a retaliatory enforcement action," rather than as enforcement actions more generally.[162] Shivers had asked the Eleventh Circuit to do the same—that is, to define the relevant conduct as housing him with someone violent and ignoring his safety concerns, rather than as inmate housing decisions more generally.[163]

The Eleventh Circuit refused, arguing that the discretionary function exception's text mandates a higher level of generality. The exception, it observed, applies to "'[a]ny claim' that arises from 'a discretionary function or duty.'"[164] The language is "unambiguous and categorical," suggesting that the specifics of a given claim are irrelevant so long as "the underlying function or duty" is discretionary.[165] The Eleventh Circuit drew further support from the concluding phrase of the exception, which specifies that the exception applies "whether or not the discretion involved be abused."[166] In the Eleventh Circuit's view, this means that so long as the type of government activity generally involves discretion, it is irrelevant whether, in any given case, the exercise of that discretion is "appropriate, slightly abusive, or so abusive that it is unconstitutional."[167] The United States is immune regardless.[168]

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161. *Id.* Judge Wilson dissented from the Eleventh Circuit's opinion on the FTCA claims, arguing that a constitutional violation is sufficient to remove a claim from the discretionary function exception. *See id.* at 936 (Wilson, J., concurring in part and dissenting in part). But I think Judge Wilson is wrong about what lies at the root of the disagreement between the Eleventh Circuit and the courts in the majority. In his view, the Eleventh Circuit correctly applies the first prong of the *Gaubert* analysis but fails to apply the second prong of the analysis. *Id.* at 937. In my view, the Eleventh Circuit incorrectly applies the first prong. *See infra* Part II.D.

162. *See* Loumiet v. United States, 828 F.3d 935, 942 (D.C. Cir. 2016).

163. *See Shivers*, 1 F.4th at 929; Additional Brief of Appellant Mackie L. Shivers, Jr. at 17-20, *Shivers*, 1 F.4th 924 (No. 17-12493).

164. *Shivers*, 1 F.4th at 930 (alteration in original) (emphasis omitted) (quoting 28 U.S.C. § 2680(a)).

165. *Id.* at 930-31.

166. *Id.* at 930 (emphasis omitted) (quoting 28 U.S.C. § 2680(a)).

167. *Id.*

168. There is additional textual support for the Eleventh Circuit's approach of defining conduct at a higher level of generality. References to "act or omission" litter the FTCA. *See*

footnote continued on next page

Having defined the relevant government conduct at a high level of generality, the Eleventh Circuit proceeded to the first prong of the *Gaubert* analysis, asking whether the type of government activity involves choice.[169] Here, the Eleventh Circuit required specificity: A government activity involves choice so long as there is no directive delineating exactly how it is to be carried out.[170] According to the Eleventh Circuit, "[t]he Supreme Court has repeatedly said that the discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct."[171] Because the Constitution does not contain specific prescriptions, it cannot save a claim from the discretionary function exception.[172]

D. Evaluation

The Eleventh Circuit's opinion casts doubt as to whether unconstitutional conduct falls outside the discretionary function exception. But its arguments are assailable. Both the level of generality at which the Eleventh Circuit defined the relevant conduct and the level of specificity the Eleventh Circuit required to remove that conduct from the realm of choice are in tension with Supreme Court precedent.

1. Defining the relevant conduct

When it comes to defining the relevant conduct, the Eleventh Circuit's chosen level of generality clashes with precedent. The Supreme Court has consistently looked at the "specific acts" alleged to be negligent or wrongful, not the general category of government activity.[173] For example, in *Berkovitz*,

generally Federal Tort Claims Act, ch. 753, §§ 401-424, 60 Stat. 842 (1946) (codified as amended in scattered sections of the U.S. Code). The clause immediately preceding the discretionary function exception, for example, speaks of "[a]ny claim based upon an *act or omission*." 28 U.S.C. § 2680(a) (emphasis added)*; see also* 28 U.S.C. § 2675 (referencing a "negligent or wrongful *act or omission*" (emphasis added)). That the discretionary function exception speaks, by contrast, of any claim based upon a "discretionary *function or duty*" suggests a higher level of generality is indeed appropriate. 28 U.S.C. § 2680(a) (emphasis added). When Congress uses different words, we typically assume it means different things. *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170-73 (2012) (explaining the presumption of consistent usage).

169. *Shivers*, 1 F.4th at 931.

170. *See id.*

171. *Id.* (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

172. *See id.* (writing that "of course, the Eighth Amendment itself contains no such specific directives").

173. Dalehite v. United States, 346 U.S. 15, 38 (1953); *see, e.g.*, *Berkovitz*, 486 U.S. at 540 (explaining that the Court will review the "specific allegations of agency wrongdoing"); United States v. Gaubert, 499 U.S. 315, 334 (1991) (Scalia, J., concurring in part and concurring in the judgment) (writing separately because of his

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the plaintiff, who contracted polio from a vaccine, sued the government for licensing the vaccine and approving the particular batch that he received.[174] Instead of analyzing whether licensing vaccines is in general a discretionary activity, the Court analyzed whether each of the government's specific acts—for instance, licensing the vaccine without having received certain test data—was discretionary.[175]

In *Gaubert*, the Supreme Court also looked at the specific actions taken by the government. There, the plaintiff challenged decisions that a government agency had made in supervising a thrift institution.[176] Instead of analyzing whether such supervision is in general discretionary, the Court analyzed each of the "seven instances or kinds of objectionable official involvement" set out in the complaint.[177]

2. Removing conduct from the realm of choice

The second point of disagreement among the courts of appeals concerns whether a "specific" directive is required to remove a decision from the realm of choice. The Supreme Court has consistently said that conduct is not a matter of choice when it violates a "specific" statute, regulation, or policy.[178] In citing the relevant precedent, the D.C. Circuit glossed over the word "specific."[179] But the Eleventh Circuit also misconstrued precedent. The Supreme Court has not

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disagreement with the Court's decision "to analyze individually each of the particular actions challenged by Gaubert"); Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009) ("Viewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue.").

174. *Berkovitz*, 486 U.S. at 533.

175. *See id.* at 542-43 (concluding that the government agency had "no discretion to issue a license without first receiving the required test data").

176. *Gaubert*, 499 U.S. at 318.

177. *Id.* at 327-28 (outlining the seven allegations made in the complaint); *see id.* at 332 ("We are . . . convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield.").

178. *See, e.g.*, *id.* at 322; *Berkovitz*, 486 U.S. at 544 ("When a suit charges an agency with failing to act in accord with a *specific* mandatory directive, the discretionary function exception does not apply." (emphasis added)); *id.* at 536 ("[T]he discretionary function exception will not apply when a federal statute, regulation, or policy *specifically* prescribes a course of action for an employee to follow." (emphasis added)).

179. *See* Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016) ("By the same token that the government has no policymaking discretion to violate 'a federal statute, regulation, or policy specifically prescrib[ing] a course of action for [its] employee to follow,' . . . the government lacks discretion to make unconstitutional policy choices." (alterations in original) (quoting *Berkovitz*, 486 U.S. at 536)). The D.C. Circuit instead left the question of specificity "for another day." *See id.* at 946.

held that "only" a specific directive removes a decision from the realm of choice, as the Eleventh Circuit suggested.[180]

To be sure, the Supreme Court has indicated that "the general provisions" of a statute, regulation, or policy do not remove a decision from the realm of choice for purposes of the first prong of the *Gaubert* analysis.[181] The Supreme Court's rationale for why this is so, however, suggests a different result when the relevant provision is constitutional.[182] In *Gaubert*, the Court explained that a statute, policy, or regulation that delegates to federal employees some general duty, without specifying how that duty is to be carried out, implicitly authorizes employees to exercise discretion.[183] A statutory command to "safeguard inmates," for example, implicitly authorizes prison officials to exercise discretion in carrying out that duty—to balance inmate safety with officer safety and resource constraints.[184] When prison officials exercise that discretion "erroneously, so as to frustrate the relevant policy" of safeguarding inmates,[185] the United States is still protected from liability because the officials were authorized to exercise discretion, and the discretionary function exception applies "whether or not the discretion involved be abused."[186]

By contrast, when a federal officer violates a constitutional right, the officer is not abusing the "discretion involved" in an act but exceeding the bounds of discretion altogether.[187] Whereas lack of specificity in a statute, regulation, or policy can be conceived of as an affirmative delegation of discretion, the same is not true of lack of specificity in a constitutional right.[188]

180. *See* Shivers v. United States, 1 F.4th 924, 931 (11th Cir. 2021).

181. *See Gaubert*, 499 U.S. at 323-24.

182. *Cf.* Sisk, *supra* note 20, at 1828-29 (explaining that the analysis of the discretionary function exception differs when a constitutional bar, rather than a statutory or regulatory directive, is at issue).

183. *See id.* at 324 ("When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.").

184. *See supra* notes 155-58 and accompanying text.

185. *Gaubert*, 499 U.S. at 338 (Scalia, J., concurring in part and concurring in the judgment).

186. 28 U.S.C. § 2680(a).

187. *See id.* (specifying that the discretionary function exception applies "whether or not the *discretion involved* be abused" (emphasis added)).

188. Gregory Sisk makes a similar, although not identical, argument in a recent article. *See* Sisk, *supra* note 20, at 1828-31. Sisk reasons that "[w]hen a statute or regulation does not specifically set out the precise parameters, the federal employee continues to possess residual authority as an executive branch officer." *Id.* at 1828. On the other hand, "when the Constitution precludes the action, . . . the discretion is removed entirely, and no remnant of general executive authority remains." *Id.* at 1828-29.

Constitutional rights are limitations on the government's authority.[189] They do not delegate discretion but remove it.[190]

It is, of course, impossible to predict how the Supreme Court will rule if it chooses to resolve the circuit split, especially because it has not addressed the discretionary function exception in over thirty years.[191] Given that lower courts have struggled to apply the *Gaubert* analysis, the Court could scrap it and start again.[192] Within the existing framework, however, there is a strong case to be made that unconstitutional conduct categorically escapes the discretionary function exception.

III. Effectiveness as a Constitutional Remedy

Even if unconstitutional conduct categorically escapes the discretionary function exception, the question remains as to how effective the FTCA can be as a constitutional remedy. In *Carlson*, the Supreme Court concluded that the FTCA

189. *See, e.g.*, 1 ANNALS OF CONG. 455-56 (1789) (Joseph Gales ed., 1834).

190. In fact, the desire to limit the federal government's discretion was the impetus for the inclusion of a bill of rights in our Constitution. Originally, a bill of rights was thought unnecessary because the federal government was given only enumerated powers. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet, as James Madison explained during the First Congress, the federal government did have some "discretionary powers" with respect to the means by which it carried out its enumerated powers. 1 ANNALS OF CONG., *supra* note 189, at 448, 455. Here, Madison cited the necessary and proper clause. *Id.* at 455-56. It was concern over these "discretionary powers" that made a bill of rights advisable, according to Madison. *See id.* Given that the Bill of Rights was enacted to limit the government's discretion, it would be odd to hold that abiding by its limitations is itself a matter of discretion. *Cf.* Owen v. City of Independence, 445 U.S. 622, 649 (1980) (explaining that "a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative").

191. *See* United States v. Gaubert, 499 U.S. 315 (1991); 2 JAYSON & LONGSTRETH, *supra* note 9, § 12.04 (citing *Gaubert* as the most recent Supreme Court case dealing with the discretionary function exception).

192. Although the distinction between discretionary and ministerial functions was far from clear at the time the FTCA was enacted, *see supra* note 107 and accompanying text, there was a consensus among courts as to the classification of a few governmental functions, *see* PROSSER (1941), *supra* note 13, at 1077. Importantly, courts at the time agreed that the execution of warrants and the caretaking of prisoners were ministerial functions. *See id.* at 154, 1077-78. A return to the ordinary public meaning of "discretionary function" would therefore preserve the FTCA's capacity to vindicate many Fourth and Eighth Amendment violations because such violations are likely to arise in the execution of warrants and the caretaking of prisoners. It would, however, change the structure of FTCA suits for constitutional redress in an important way: Courts would no longer need to decide whether the challenged conduct violated the Constitution. Instead, the resulting FTCA claim would fall outside of the discretionary function exception not because it violated the Constitution but because it arose in the course of a ministerial function.

was an inadequate protector of constitutional rights.[193] That conclusion was grounded in several aspects of the FTCA, including its requirement that claims be brought under state tort law and its prohibition on punitive damages.[194]

But forty years have passed since *Carlson*. During that time, federal courts have adjudicated FTCA claims premised on unconstitutional conduct. Reconsideration of the FTCA's adequacy as a protector of constitutional rights is thus warranted.

My analysis is broken into three parts: Part III.A evaluates the kinds of constitutional violations that can be repackaged as tort claims and thus remedied under the FTCA. Part III.B addresses the defenses available to the United States, many of which have little basis in the FTCA's text. Finally, Part III.C considers the FTCA's effectiveness as a deterrent of unconstitutional conduct.

A. Claims

Only those constitutional violations that can be reframed as torts are redressable under the FTCA.[195] That requirement may not be quite as onerous as it sounds. Some constitutional violations have direct tort analogues.[196] And others sometimes correspond to torts.[197] Though the FTCA cannot redress every constitutional violation,[198] it can redress far more than *Bivens* now can.[199]

1. Constitutional violations with direct tort analogues

Fourth and Eighth Amendment violations find a ready foothold in tort.[200] As to Fourth Amendment violations, an arrest without probable cause can be

193. *See* Carlson v. Green, 446 U.S. 14, 23 (1980) ("[The] FTCA is not a sufficient protector of the citizens' constitutional rights . . . .").

194. *See id.* at 20-23 (listing four factors "suggesting that the *Bivens* remedy is more effective than the FTCA remedy" and concluding that "[the] FTCA is not a sufficient protector" of constitutional rights).

195. *See* 2 JAYSON & LONGSTRETH, *supra* note 9, § 9.05 ("[I]t is important to note that the constitutional violation must constitute a tort under state law . . . .").

196. *See infra* Part III.A.1.

197. *See infra* Part III.A.2.

198. *See infra* note 217 (discussing Fourth and Eighth Amendment violations that cannot be redressed under the FTCA); *infra* Part III.A.2 (explaining that not all First and Fifth Amendment violations can be redressed under the FTCA).

199. *See supra* notes 96-98 and accompanying text (explaining that *Bivens* claims are now limited to the exact factual circumstances in *Bivens*, *Carlson*, and *Davis*).

200. *See* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1021 (2008) ("The Fourth and Eighth Amendments . . . are among the Constitution's closest analogs to the law of tort. They protect quite directly the basic rights of person and property that the private law protects." (footnote omitted)).

repackaged as a false arrest.[201] An unreasonable search can be framed as a trespass.[202] A claim for excessive force can be brought as an assault or a battery.[203] And malicious prosecution is not only a constitutional violation—it is also a tort.[204] Plaintiffs have brought FTCA claims for many of these Fourth Amendment violations.[205]

Eighth Amendment violations can likewise be repackaged as torts and redressed under the FTCA.[206] As with Fourth Amendment excessive force claims, those under the Eighth Amendment can be restated as an assault or a battery.[207] Meanwhile, deliberate indifference claims can be repackaged as negligence.[208] Deliberate indifference, the Supreme Court has said, "entails something more than mere negligence," suggesting that successful deliberate indifference claims will necessarily satisfy the lower negligence standard.[209] Indeed, plaintiffs have used the FTCA to redress claims of deliberate indifference for both a failure to intervene[210] and a failure to provide medical

201. *See Municipal Liability Under 42 U.S.C. 1983: Hearings Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 97th Cong. 412 (1981) (statement of Leon Friedman, Professor, Hofstra University School of Law) ("For example, a bad arrest or search by a federal agent may be a fourth amendment violation as well as a false arrest and trespass under local law, cognizable under the FTCA.").

202. *See id.*; Gill v. United States, 516 F. Supp. 3d 64, 81 (D. Mass. 2021) (holding that "an unreasonable search is violative of the Fourth Amendment, unprotected by the discretionary function exception of the FTCA and plausibly constitutes a trespass" (footnote omitted) (citation omitted)).

203. *See* Pillard, *supra* note 20, at 73 n.39.

204. *See* 2 JAYSON & LONGSTRETH, *supra* note 9, § 9.05.

205. *See, e.g.*, Plascencia v. United States, No. 17-cv-02515, 2018 WL 6133713, at *1, *8 (C.D. Cal. May 25, 2018) (arrest without probable cause); Quinonez v. United States, No. 22-cv-03195, 2023 WL 4303648, at *5 (N.D. Cal. June 29, 2023) (unreasonable search); *Gill*, 516 F. Supp. 3d at 71-72, 81 (unreasonable search); Xi v. Haugen, 68 F.4th 824, 841-43 (3d Cir. 2023) (malicious prosecution and unreasonable search and seizure).

206. *See* Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) ("[M]any violations of the Eighth Amendment by prison officials likely also constitute negligence under state law.").

207. *See supra* text accompanying note 203.

208. *See, e.g.*, Hill v. Le, No. 17-cv-00250, 2021 WL 4391706, at *7-9 (D. Or. Sept. 24, 2021).

209. Farmer v. Brennan, 511 U.S. 825, 835 (1994).

210. In *Woodruff v. United States*, No. 16-cv-01884, 2020 WL 3297233 (D.D.C. June 18, 2020), the court denied in part the United States' motion to dismiss Tyrell Woodruff's FTCA claim for negligence. *Id.* at *1-3. Mr. Woodruff was attacked by another inmate with a knife while incarcerated in a federal prison, leading to multiple puncture wounds on his scalp and a substantial loss of blood, among other injuries. *Id.* at *1. The court partially denied the United States' motion to dismiss Mr. Woodruff's negligence claim, finding that the claim was not barred by the discretionary function exception because Mr. Woodruff had plausibly alleged that prison officials' failure to intervene amounted to an Eighth Amendment violation. *See id.* at *2, *8-9. The United States ultimately

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care.[211] So when it comes to Fourth and Eighth Amendment violations, the requirement that the claim be brought under state tort law poses little difficulty.

And unlike *Bivens* claims, which are now restricted to a few rights and fact patterns, the FTCA can be used to redress a range of Fourth and Eighth Amendment rights in a variety of circumstances. For example, the following FTCA claims have all survived the motion to dismiss stage: (1) Bureau of Prisons officers' failure to intervene in a knife attack;[212] (2) a detention aboard a foreign ship by Customs and Border Protection;[213] and (3) an arrest of a U.S. citizen of Mexican descent without probable cause by Immigration and Customs Enforcement (ICE) agents.[214] None of those constitutional violations would be redressable under *Bivens*; courts have repeatedly refused to extend *Bivens* to failure-to-intervene claims[215] and claims implicating foreign

settled the claim for an undisclosed amount. *See* Stipulation of Dismissal at 1, No. 16-cv-01884, Woodruff v. United States (D.D.C. Aug. 11, 2021), ECF No. 89.

211. *See* Hill v. Le, No. 17-cv-00250, 2022 WL 453479, at *1, *3-4 (D. Or. Feb. 14, 2022) (denying the United States' motion for summary judgment with respect to an FTCA claim premised on a failure to provide adequate medical attention to an inmate in violation of the Eighth Amendment).

212. *Woodruff*, 2020 WL 3297233, at *1-2. As discussed above, the United States ultimately settled this claim for an undisclosed amount. *See supra* note 210.

213. Hornof v. Waller, No. 19-cv-00198, 2020 U.S. Dist. LEXIS 198578, at *5, *32 (D. Me. Oct. 20, 2020). The court later granted summary judgment for the government after finding, among other things, that the government had the authority to detain plaintiffs and that the detention was not unreasonable under the Fourth Amendment. Hornof v. United States, No. 19-cv-00198, 2023 U.S. Dist. LEXIS 153898, at *50-51, *97 (D. Me. Aug. 31, 2023). Still, the fact that plaintiffs survived the motion-to-dismiss stage reflects the FTCA's potential to redress claims for such a detention if plaintiffs can establish the constitutional violation and elements of the state tort.

214. In *Plascencia v. United States*, No. 17-cv-02515, 2018 WL 6133713 (C.D. Cal. May 25, 2018), the court denied the United States' motion to dismiss Guadalupe Robles Plascencia's FTCA claim for false arrest. *Id.* at *9. The court held that the claim was not barred by the discretionary function exception because Ms. Plascencia, a sixty-year-old U.S. citizen of Mexican descent, plausibly alleged that she was detained by ICE agents "based on her race, ethnicity, language ability, and/or national origin." *Id.* at *2, *9. After prevailing on the motion to dismiss, Ms. Plascencia settled for $55,000. *See* Christine Hauser, *U.S. Citizen Detained by ICE Is Awarded $55,000 Settlement*, N.Y. TIMES (Oct. 29, 2018), https://perma.cc/V4QN-38DW.

215. *See, e.g.*, Bulger v. Hurwitz, 62 F.4th 127, 137-42 (4th Cir. 2023) (refusing to extend *Bivens* to a claim alleging prison officials failed to intervene in an inmate-on-inmate attack); Hower v. Damron, No. 21-5996, 2022 WL 16578864, at *3-4 (6th Cir. Aug. 31, 2022) (determining that an Eighth Amendment claim presented a new context because it involved a "failure to protect [a prisoner]"). *But see* Bistrian v. Levi, 912 F.3d 79, 93-94 (3d Cir. 2018) (allowing a failure-to-protect claim to be brought under *Bivens*).

policy.[216] So the FTCA can redress a broader range of Fourth and Eighth Amendment violations than *Bivens* now can.[217]

2. Constitutional violations without direct tort analogues

Outside of the Fourth and Eighth Amendment contexts, things get tricky. Many constitutional rights have no twin in tort; overlap between the two is circumstantial.[218] In this Part, I examine when and how the FTCA can redress First and Fifth Amendment violations. Though the FTCA cannot address all such violations, it can redress more than *Bivens* can. The Supreme Court has refused to extend *Bivens* to First Amendment violations.[219] And though it recognized a *Bivens* remedy for gender discrimination in *Davis*, it has since refused to apply that remedy to any other Fifth Amendment violation—even ones involving circumstances analogous to those in *Davis*.[220]

As we have already seen in the context of *Loumiet*, First Amendment retaliation claims can sometimes be redressed under the FTCA.[221] To state a claim for retaliation, plaintiffs must show that the officer took an adverse action in response to the exercise of First Amendment rights.[222] The action might take the form of a tort that is redressable under the FTCA. In an Eighth Circuit case, for example, a plaintiff claimed that he was surveilled by the FBI for fifteen years because he had expressed unpopular views about the Israeli-Palestinian conflict.[223] The court held that these surveillance activities fell outside the discretionary function exception because the plaintiff alleged that

216. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1805 (2022) (reaffirming that "a *Bivens* cause of action may not lie where . . . national security is at issue"); Hernandez v. Mesa, 140 S. Ct. 735, 749-50 (2020) (refusing to extend *Bivens* to situations affecting international relations).

217. Still, the FTCA cannot redress the full panoply of Fourth and Eighth Amendment violations. For example, the cross-border shooting at issue in *Hernandez* would be barred from redress under the FTCA because of another exception, which excludes claims arising from injuries that occur outside of the United States. *See Hernandez*, 140 S. Ct. at 748 (citing 28 U.S.C. § 2680(k)) (recognizing that the claim at issue could not be brought under the FTCA).

218. *See* Pillard, *supra* note 20, at 73 n.39 (writing that reliance on tort law "does not give effect to constitutional standards, but depends on their coincidental and incomplete overlap with common-law standards").

219. *See Egbert*, 142 S. Ct. at 1807-09 (refusing to extend *Bivens* to a First Amendment claim).

220. *See* Ziglar v. Abbasi, 582 U.S. 120, 135, 139 (2017) (pointing out that, although *Davis* had allowed a *Bivens* claim for gender discrimination, the Supreme Court had later refused to extend *Bivens* to "a similar discrimination suit" involving racial discrimination).

221. *See supra* Part II.B.

222. *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019) (explaining the requirements for a First Amendment retaliation claim).

223. *See* Raz v. United States, 343 F.3d 945, 947 (8th Cir. 2003).

they violated his First Amendment rights.[224] The court also found that the retaliatory surveillance was cognizable under state tort law as invasion of privacy and intentional infliction of emotional distress.[225]

To the extent that the retaliatory action consists solely of a tort excluded by the intentional tort exception, an FTCA claim can be brought only if it falls within the law enforcement proviso.[226] Plaintiffs therefore have a route to redress when FBI agents, ICE officers, prison officials, and the like retaliate for the exercise of First Amendment rights by means of a false arrest or battery. On the other hand, retaliation that takes the form of libel, defamation, or slander can never be redressed under the FTCA. The intentional tort exception altogether excludes from the FTCA's coverage claims arising from such torts, no matter the perpetrator.[227]

The Fifth Amendment is the fount of an array of rights, including substantive due process and equal protection rights. I address both, starting with substantive due process. To state a claim for a violation of substantive due process rights, plaintiffs must show that a government officer deprived them of constitutionally protected rights in a manner that "shocks the conscience."[228] Conscience-shocking conduct requires an intent to harm; conduct that unintentionally causes harm is generally not enough.[229]

Substantive due process violations "usually entail[] physical or psychological abuse, or significant interference with a protected relationship, such as the parent-child relationship."[230] When the violation involves physical abuse, it will likely be cognizable as an assault or battery claim—but only if the perpetrator is a law enforcement or investigative officer.[231] Because of the

224. *See id.* at 948 ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [the plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."). The plaintiff also alleged that the activities violated his Fourth Amendment rights. *See id.*

225. *See id.* at 947-48.

226. *See supra* Part I.C.

227. The intentional tort exception excludes from the FTCA's coverage claims for libel, slander, misrepresentation, and deceit. 28 U.S.C. § 2680(h).

228. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").

229. *See id.* at 854. Deliberate indifference is sufficient to state a substantive due process claim in the custodial context. *See id.* at 850. But "[n]o case in the Supreme Court . . . has held that recklessness or deliberate indifference is a sufficient level of culpability to state a claim of violation of substantive due process rights in a non-custodial context." Waldron v. Spicher, 954 F.3d 1297, 1310 (11th Cir. 2020).

230. *See, e.g.*, McConkie v. Nichols, 446 F.3d 258, 261 (1st Cir. 2006) (citations omitted).

231. *See* 28 U.S.C. § 2680(h) (allowing certain intentional tort claims when they involve "investigative or law enforcement officers").

intentional tort exception, due process violations amounting to assault or battery by other federal officers are not redressable under the FTCA.[232]

When the substantive due process violation involves psychological abuse, it will often be cognizable as a claim for intentional infliction of emotional distress. Intentional infliction of emotional distress generally involves (1) "extreme and outrageous" conduct that is (2) intended to inflict distress and (3) leads to distress that is "severe."[233] Conscience-shocking conduct is likely to fit the bill. Finally, when the violation involves interference with a protected relationship, like that between parent and child, it will likely be cognizable as a claim for loss of consortium.[234]

A flurry of recent cases confirms the possibility of redressing substantive due process violations via the FTCA. Families who were separated at the U.S.-Mexico border during the Trump administration sued the United States under the FTCA.[235] For purposes of the discretionary function exception, the families argued that the separations violated their Fifth Amendment substantive due process rights.[236] However, their substantive claims were for intentional infliction of emotional distress and loss of consortium, as well as negligence.[237] These cases survived the government's motions to dismiss.[238]

232. *See id.* (carving out intentional torts from the FTCA's waiver of sovereign immunity).

233. *See* 1 DAMAGES IN TORT ACTIONS § 6.02 (2023).

234. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 392 (2d ed. 2023) (discussing loss of consortium).

235. *See* Fuentes-Ortega v. United States, 640 F. Supp. 3d 878, 880-81 (D. Ariz. 2022); E.S.M. v. United States, No. 21-cv-00029, 2022 WL 11729644, at *1 (D. Ariz. Oct. 20, 2022); B.A.D.J. v. United States, No. 21-cv-00215, 2022 WL 11631016, at *1 (D. Ariz. Sept. 30, 2022); D.J.C.V. v. United States, 605 F. Supp. 3d 571, 578 (S.D.N.Y. 2022); A.I.I.L. v. Sessions, No. 19-cv-00481, 2022 WL 992543, at *1-2 (D. Ariz. Mar. 31, 2022); A.P.F. v. United States, 492 F. Supp. 3d 989, 992-93 (D. Ariz. 2020); Nunez Euceda v. United States, No. 20-cv-10793, 2021 WL 4895748, at *1 (C.D. Cal. Apr. 27, 2021); C.M. v. United States, No. 19-cv-05217, 2020 WL 1698191, at *1 (D. Ariz. Mar. 30, 2020).

236. *See infra* Part III.B.1.

237. *See, e.g.*, *A.I.I.L.*, 2022 WL 992543, at *2 (asserting claims for intentional infliction of emotional distress, loss of child's consortium, and negligence); *A.P.F.*, 492 F. Supp. 3d at 993 (same); *Nunez Euceda*, 2021 WL 4895748, at *1 (asserting claims for intentional and negligent infliction of emotional distress and negligence); *C.M.*, 2020 WL 1698191, at *1 (asserting claims for intentional infliction of emotional distress and negligence).

238. *See, e.g.*, *A.I.I.L.*, 2022 WL 992543, at *6-8, *11 (denying government's motion to dismiss plaintiffs' FTCA claims); *A.P.F.*, 492 F. Supp. 3d at 999 (same); *C.M.*, 2020 WL 1698191, at *5 (same). The families entered settlement talks with the United States. *See* Ben Fox, *US Pulls Out of Settlement Talks in Family Separation Suits*, AP NEWS (Dec. 16, 2021, 6:46 PM EDT), https://perma.cc/627D-43HF. But these settlement talks eventually broke down, presumably due to public backlash after the Wall Street Journal reported that the Department of Justice was considering paying each person affected $450,000. *See id*; Michelle Hackman, Aruna Viswanatha & Sadie Gurman, *U.S. in Talks to Pay Hundreds of Millions to Families Separated at Border*, WALL ST. J. (Oct. 28, 2021, 6:03 PM ET), https://perma.cc/J3V8-8Q7Q.

Like substantive due process claims, Fifth Amendment equal protection claims will sometimes amount to the tort of intentional infliction of emotional distress. However, there will be less overlap here. The requirements for equal protection claims are less stringent than those for intentional infliction of emotional distress. To state a claim for a denial of equal protection, plaintiffs must prove that the government acted "for the purpose of discriminating on account of [a constitutionally protected characteristic]."[239] Meanwhile, as explained above, a claim for intentional infliction of emotional distress requires "extreme and outrageous conduct" that is intended to inflict distress and in fact leads to "severe" distress.[240] Although plaintiffs will sometimes be able to prove the elements of both the constitutional violation and the tort claim, this appears to be the exception rather than the rule. In contexts outside of the FTCA, courts have routinely dismissed claims for intentional infliction of emotional distress while permitting equal protection claims premised on the same conduct to go forward.[241]

Few FTCA cases deal directly with equal protection.[242] A recent decision suggests that such cases are feasible, albeit difficult to win. After being detained and interrogated at the U.S. border on suspicion of transporting drugs, a Mexican family brought several FTCA claims against the United States.[243] On a motion for summary judgment, the court determined that the agents had probable cause to detain the family and dismissed most of the family's FTCA claims.[244]

The court allowed one claim, however, to go to trial: a claim for intentional infliction of emotional distress arising from the father's

239. Ashcroft v. Iqbal, 556 U.S. 662, 676-77, 683 (2009).

240. *See supra* note 233 and accompanying text.

241. *See, e.g.*, Geddes v. County of Kane, 121 F. Supp. 2d 662, 664-67 (N.D. Ill. 2000) (finding that plaintiff stated a claim for equal protection but not intentional infliction of emotional distress); Duronslet v. County of Los Angeles, 266 F. Supp. 3d 1213, 1219-20, 1223 (C.D. Cal. 2017) (same); Doe v. Town of Greenwich, 422 F. Supp. 3d 528, 538, 544-45 (D. Conn. 2019) (same); Creese v. District of Columbia, 281 F. Supp. 3d 46, 54-56 (D.D.C. 2017) (same). *But see* Kade v. Workie, 238 F. Supp. 3d 625, 634-36 (D. Del. 2017) (finding that plaintiff stated a claim for both equal protection and intentional infliction of emotional distress).

242. *But see, e.g.*, D.A. v. United States, No. 22-cv-00295, 2023 WL 2619167, at *7-8 (W.D. Tex. Mar. 23, 2023) (holding that plaintiffs had plausibly alleged an equal protection violation for the arrest and separation of a family at the border such that the discretionary function exception would not apply).

243. *See* Martinez v. United States, No. 13-cv-00955, 2017 WL 4536177, at *1-4 (D. Ariz. Oct. 11, 2017).

244. *See* Martinez v. United States, No. 13-cv-00955, 2018 WL 3359562, at *6-10, *12 (D. Ariz. July 10, 2018) (finding that the discretionary function exception applies because the Border Patrol agents had probable cause).

interrogation.[245] During the interrogation, the Border Patrol agent allegedly made "racially-motivated comments."[246] According to the court, this raised a genuine issue of material fact, both as to whether the discretionary function exception applied and whether the conduct constituted intentional infliction of emotional distress.[247] As to the application of the discretionary function exception, the court reasoned that if the interrogation was, among other things, "motivated by discriminatory animus," it violated the Constitution and was therefore not protected by the exception.[248] As to whether the conduct amounted to intentional infliction of emotional distress, the court reasoned that "racially-motivated comments are intolerable in our society . . . and could be perceived by a fact-finder as extreme and outrageous."[249]

At trial, the judge found no evidence of racial animus and dismissed the claim of intentional infliction of emotional distress as barred by the discretionary function exception.[250] Nevertheless, this case suggests that a violation of equal protection rights could plausibly give rise to a successful FTCA claim for intentional infliction of emotional distress.[251]

B. Defenses

Identifying a counterpart in tort law is not the only obstacle plaintiffs face in using the FTCA to redress constitutional violations. A number of defenses have crept into the FTCA, despite having little basis in its text. The most significant threat to the FTCA's effectiveness is the incorporation into the FTCA of qualified immunity's "clearly established" standard, which I discuss in Part III.B.1. In addition, as I discuss in Part III.B.2, some courts have accorded the United States the privileges and immunities of state officers, further circumscribing the United States' liability.

245. *See id.* at *12 ("Plaintiffs' claim of intentional infliction of emotional distress presents a genuine issue of material fact, precluding summary judgment.").

246. *Id.* at *11.

247. *See id.* at *12.

248. *See id.*

249. *Id.* at *11.

250. *See* Nieves Martinez v. United States, 997 F.3d 867, 875, 882 (9th Cir. 2021) (affirming the dismissal of the intentional infliction of emotional distress claim because the court did not clearly err in finding that the interrogation "was not motivated by racial animus and therefore did not constitute a constitutional violation").

251. *See Martinez*, 2018 WL 3359562, at *11.

1. Qualified immunity

The "clearly established" standard for qualified immunity has crippled *Bivens* and Section 1983 as tools of constitutional accountability.[252] It threatens to do the same to the FTCA. In applying the discretionary function exception, courts have often asked not whether the officer's conduct violated a constitutional right but whether it violated a constitutional right that was clearly established.[253] This practice appears to be the offspring of convenience rather than conviction: FTCA claims are frequently litigated in tandem with *Bivens* claims.[254] Because courts must analyze the challenged conduct under the "clearly established" standard for purposes of qualified immunity for *Bivens*,[255] they can readily recycle this analysis for purposes of the FTCA.

The United States has offered several different arguments for incorporating the "clearly established" standard. At times, it has argued that the FTCA's discretionary function exception and qualified immunity serve a similar purpose: Both doctrines limit liability arising from public officers' performance of discretionary functions.[256] Indeed, scholars have long recognized that the discretionary function exception was intended to preserve the immunity to which individual officers were entitled when sued directly.[257] But the "clearly established" standard is the modern standard for officer immunity, not the

252. *See, e.g.*, Alexander J. Lindvall, *Gutting* Bivens*: How the Supreme Court Shielded Federal Officials from Constitutional Litigation*, 85 MO. L. REV. 1013, 1060 (2020) (writing that qualified immunity "has morphed into impenetrable armor, where officers are overwhelmingly protected and plaintiffs are routinely left out to dry"); Lindsey v. City of Sarasota, No. 10-cv-01910, 2011 WL 13302500, at *1 (M.D. Fla. Feb. 2, 2011) ("Qualified immunity represents an almost insurmountable hurdle to a Section 1983 plaintiff except in the most egregious instance of government misconduct.").

253. *See, e.g.*, Bryan v. United States, 913 F.3d 356, 364 (3d Cir. 2019) (citing qualified immunity analysis to conclude that discretionary function exception applies); Xiaoxing Xi v. Haugen, No. 17-cv-02132, 2021 WL 1224164, at *29 & n.29 (E.D. Pa. Apr. 1, 2021) (same), *aff'd in part, rev'd in part sub nom.* Xi v. Haugen, 68 F.4th 824 (3d Cir. 2023); Myles v. United States, No. 19-cv-02036, 2020 WL 5172643, at *4 (C.D. Cal. July 15, 2020) (same).

254. *See, e.g.*, *Xiaoxing Xi*, 2021 WL 1224164, at *1 (considering both *Bivens* and FTCA claims); *Myles*, 2020 WL 5172643, at *3-4, *6 (same); Hornof v. Waller, No. 19-cv-00198, 2020 U.S. Dist. LEXIS 198578, at *16 (D. Me. Oct. 20, 2020) (same); Linder v. McPherson, No. 14-cv-2714, 2015 WL 739633, at *1 (N.D. Ill. Jan. 29, 2015) (same), *aff'd sub nom.* Linder v. United States, 937 F.3d 1087 (7th Cir. 2019).

255. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

256. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (footnote omitted) (citations omitted) (holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); 28 U.S.C. § 2680(a).

257. *See supra* note 103 and accompanying text.

standard for officer immunity that existed when the FTCA was enacted.[258] The United States has not explained why the discretionary function exception should be interpreted in light of modern practice,[259] which would reflect a departure from ordinary methods of statutory interpretation.[260]

The United States has sometimes insisted instead that incorporation of the "clearly established" standard is mandated by the two-pronged *Gaubert* analysis.[261] As discussed, the first prong asks whether the challenged conduct was a matter of choice.[262] The United States has argued that only a "clearly established" constitutional right can deprive an officer of choice.[263] But unlike the analysis for qualified immunity, which focuses on what a reasonable officer should have known when acting,[264] the *Gaubert* analysis focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis."[265] As the Court has emphasized, the discretionary function exception protects only the "permissible exercise of policy judgment."[266] It takes no account of whether the officer knew or should have known that the exercise of policy judgment was permissible.[267]

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258. The Supreme Court first articulated the "clearly established" standard in 1982, nearly forty years after Congress enacted the discretionary function exception. *See* Federal Tort Claims Act, ch. 753, § 421(a), 60 Stat. 842, 845 (1946) (codified as amended at 28 U.S.C. § 2680(a)); Mitchell v. Forsyth, 472 U.S. 511, 517 (1985).

259. *See, e.g.*, Brief for Appellees at 48, Xi v. Haugen, 68 F.4th 824 (3d Cir. 2023) (No. 21-2798), 2022 WL 1117912, at *48 (arguing that "[i]n enacting the FTCA, Congress did not set aside recognized principles of official immunity" but failing to explain why the modern standard of immunity should apply, rather than the standard of immunity which existed at the time of the FTCA's enactment).

260. *See, e.g.*, Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); SCALIA & GARNER, *supra* note 168, at 15-16 (discussing the "oldest and most commonsensical interpretive principle" that "words mean what they conveyed to reasonable people at the time they were written").

261. *See* Brief for the Appellees, Loumiet v. United States, 828 F.3d 935 (D.C. Cir. 2016) (No. 15-5208), 2016 WL 98150, at *19 ("[O]nly a 'clearly established' constitutional directive that removes all choice as to a course of conduct could, consistent with *Gaubert* and *Berkowitz*, render the discretionary function exception inapplicable.").

262. *See supra* Part II.A.

263. *See* Brief for the Appellees, *Loumiet*, 828 F.3d 935 (No. 15-5208), 2016 WL 98150, at *19.

264. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

265. United States v. Gaubert, 499 U.S. 315, 325 (1991).

266. Berkovitz v. United States, 486 U.S. 531, 537 (1988).

267. *See id.* at 545 (stating the relevant inquiry as "whether agency officials *appropriately* exercise policy judgment," not whether they knew or had reason to know that they can exercise policy judgment (emphasis added)); *id.* at 547 (explaining that "if the [agency]'s policy did not allow the official who took the challenged action to [take the action] on the basis of policy considerations," then "the discretionary function

footnote continued on next page

Recently, however, the tide has begun to turn. Both the First and Third Circuits have held that qualified immunity's "clearly established" standard has no role in analyzing whether the discretionary function exception applies.[268] Assuming other courts follow suit, the FTCA will offer redress for constitutional violations free from the constraint qualified immunity has imposed on *Bivens* and Section 1983 claims.

2. State law privileges and immunities

State law privileges and immunities pose an additional threat to the FTCA's effectiveness as a constitutional remedy. Although the FTCA ties the United States' liability to that of a "*private* individual under like circumstances,"[269] some courts have accorded the United States the privileges available to public officers under state law.[270] Such privileges provide affirmative defenses that protect public officers from liability in circumstances under which a private individual would be liable.[271] For example, law enforcement officers in some states can assert probable cause as a defense to a false arrest claim, whereas private individuals are liable for false arrest any time the arrestee turns out to be innocent.[272]

In FTCA cases involving false arrest, courts have allowed the United States to assert the privileges of state law enforcement officers as a defense.[273] The FTCA's text provides some basis for doing so. After all, the United States'

exception does not bar the claim"); *see also* Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (concluding that the discretionary function exception did not apply to a claim arising from the Coast Guard's failure to operate a lighthouse under its care, without considering whether that duty was clearly established).

268. *See* Torres-Estrada v. Cases, 88 F.4th 14, 22 (1st Cir. 2023) (declining to "import the 'clearly established' requirement into the discretionary function exception analysis"); Xi v. Haugen, 68 F.4th 824, 839 (3d Cir. 2023) (explaining that the "clearly established" requirement "has no place" in the "discretionary function analysis").

269. *See* 28 U.S.C. § 2674 (emphasis added).

270. *See, e.g.*, Arnsberg v. United States, 757 F.2d 971, 979 (9th Cir. 1985) (applying "the law governing arrests pursuant to warrants" rather than the law governing citizens' arrests); Villafranca v. United States, 587 F.3d 257, 264 (5th Cir. 2009) (allowing federal officers to claim the civil privilege defense available to peace officers under Texas law).

271. *See* Garza v. United States, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995).

272. *See, e.g.*, *Arnsberg*, 757 F.2d at 978-79 (discussing Oregon law on false arrest); *cf.* Caban v. United States, 728 F.2d 68, 74 (2d Cir. 1984) (discussing New York law on false imprisonment).

273. *See, e.g.*, *Arnsberg*, 757 F.2d at 979 (concluding that "[t]he proper source for determining the government's liability is . . . the law governing arrests pursuant to warrants"); Galvin v. Hay, 374 F.3d 739, 758 (9th Cir. 2004) (explaining that California protects police officers from false arrest liability when the officer "has reasonable cause to believe the arrest is lawful" (quoting Cervantes v. United States, 330 F.3d 1186, 1188 (9th Cir. 2003))).

liability is that of a private individual "under like circumstances."[274] An FBI agent tasked with carrying out a warrant is not acting under circumstances similar to those present when a private individual makes a citizens' arrest. The proper comparison is to a state officer with responsibilities analogous to those of an FBI agent.[275] To make the United States liable "under like circumstances" would therefore be to allow it to invoke the privileges of state law enforcement officers.[276]

This analysis, while compelling, is not conclusive. Elsewhere, the FTCA enumerates defenses available to the United States, noticeably excluding defenses premised on the privileges of public officers. Specifically, the FTCA states that the United States is entitled to invoke "any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim."[277] An immunity is different than a privilege: "An immunity insulates an individual from liability for public policy reasons," whereas "a privilege protects the actor from a finding of tortious conduct."[278] That the FTCA explicitly permits the United States to assert any defense based on judicial or legislative immunities—but says nothing of defenses based on the privileges of executive officers—raises the negative implication that such defenses are impermissible.[279]

In the end, the incorporation of state law privileges in cases involving false arrest is unlikely to have much of an effect on the FTCA's ability to serve as a constitutional remedy. For there to be a Fourth Amendment violation, the plaintiff must show that the officer lacked probable cause for the arrest.[280] Where the plaintiff can do so successfully, the state law defense will be of no consequence.

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274. 28 U.S.C. § 2674.

275. *See, e.g.*, *Arnsberg*, 757 F.2d at 979-80.

276. *See, e.g.*, *id.*

277. 28 U.S.C. § 2674.

278. *See* Garza v. United States, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995); *see also* Villafranca v. United States, 587 F.3d 257, 263 (5th Cir. 2009) (citing *Garza* to endorse this view of the distinction between privileges and immunities).

279. *See* SCALIA & GARNER, *supra* note 168, at 107-11 (explaining the negative-implication canon). Gregory Sisk makes this argument with regard to the incorporation of executive immunities. *See* Sisk, *supra* note 20, at 1827 ("By the omission of parallel protection in the FTCA for official immunities for executive branch officials, the FTCA plainly directs that arose 'other defenses to which the United States is entitled' must be evaluated under the applicable state law for private persons." (quoting 28 U.S.C. § 2674)).

280. *See, e.g.*, Bailey v. United States, 568 U.S. 186, 192 (2013) ("[T]he general rule [is] that Fourth Amendment seizures are 'reasonable' only if based on probable cause" (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979))).

But a few courts have gone further, letting the United States assert state law immunities. This does endanger the FTCA's effectiveness as a constitutional remedy. Some states provide public officers significant protection from liability. In Illinois, for instance, public officers are "not liable" for acts or omissions "in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct."[281] And in some states, public employees are entitled to qualified immunity under state law.[282] The incorporation of state law immunities thus creates another avenue through which the "clearly established" standard can worm its way into the FTCA.

As Gregory Sisk has recently pointed out, the textual argument for the incorporation of state law immunities is weak.[283] The FTCA specifies that the United States is entitled to any defense based upon "judicial or legislative immunit[ies]."[284] As explained earlier, this creates the strong inference under the negative-implication canon that defenses based on *executive* immunities are unavailable.[285] Qualified immunity is an executive immunity, as are the other state law immunities mentioned above. Thus, they have no place in determining the United States' liability under the FTCA.

C. Deterrence

In addition to compensating the injured, an ideal remedy would deter unconstitutional conduct.[286] The *Carlson* Court concluded that the FTCA fell far short on this front.[287] Because damages under the FTCA are paid by the United States and punitive damages are prohibited, the FTCA is "much less effective than a *Bivens* action as a deterrent," the Court wrote.[288]

Recent research casts doubt on this conclusion. A study of successful *Bivens* lawsuits against Bureau of Prisons officials found that in over 95% of cases, the officers paid nothing.[289] Nor did agency budgets take a hit.[290] Instead, *Bivens* claims were paid by the United States through the Judgment Fund—the same

281. 745 ILL. COMP. STAT. ANN. 10/2-202 (West 2023); *see* Anderson v. Cornejo, 284 F. Supp. 2d 1008, 1034-35 (N.D. Ill. 2003).

282. *See, e.g.*, McElroy v. United States, 861 F. Supp. 585, 594-95 (W.D. Tex. 1994) (explaining that police officers in Texas are entitled to qualified immunity when applicable).

283. *See* Sisk, *supra* note 20, at 1827.

284. 28 U.S.C. § 2674.

285. *See supra* note 279 and accompanying text.

286. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 21 (1980) ("[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose").

287. *See id.* at 21-22.

288. *Id.* at 22.

289. Pfander et al., *supra* note 20, at 579-80.

290. *Id.* at 579.

unlimited fund out of which FTCA claims are paid.[291] And though punitive damages are available in *Bivens* cases, the threat of such damages is unlikely to increase deterrence because neither the individual officer nor his agency is likely to have to pay them. In practice, then, *Bivens* may not be much more effective than the FTCA in deterring unconstitutional conduct.

This does not mean that the FTCA is effective as an absolute matter. A few scholars initially expressed high hopes for the FTCA's capacity to curb misconduct.[292] They speculated that by holding the United States liable, the FTCA would incentivize the careful selection and supervision of employees.[293] Over the years, however, the FTCA has been amended.[294] As it now stands, FTCA damage awards are unlikely to have much impact on government conduct. Most FTCA judgments and settlements are paid out of the "unlimited" Judgment Fund instead of agency budgets or specific agency appropriations.[295] Agencies thus have little financial incentive to change their policies and practices.[296]

* * *

The FTCA can redress the majority of Fourth and Eighth Amendment claims and a subset of First and Fifth Amendment claims. While there are also serious threats to the FTCA's effectiveness as a constitutional remedy—most significantly, the importation of qualified immunity—these threats have little basis in the FTCA's text or Supreme Court precedent. Assuming unconstitutional conduct necessarily escapes the discretionary function exception, the FTCA can provide an effective route to redress for a much broader range of constitutional violations than *Bivens*.

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291. *Id.* at 572 & n.40, 579.

292. *See, e.g.*, Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 739 (1947).

293. *Id.*

294. *See* Paul F. Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 159-67 (2015) (tracing changes to how FTCA awards and settlements are paid).

295. *See* VIVIAN S. CHU & BRIAN T. YEH, CONG. RSCH. SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 5-6 (2013); Figley, *supra* note 294, at 164 ("In 1977, Congress further extended the Judgment Fund to cover . . . FTCA judgments regardless of amount, and all FTCA settlements for more than $2,500.").

296. *See* Stern, *supra* note 89, at 720 ("Agencies have no incentive to modify past practices in order to mitigate future damages because they are not forced to dispense judgment awards directly from their own budgets.").

IV. Theoretical Implications

Whether we can depend on the FTCA for constitutional redress is, of course, a different question from whether we should. Scholars like Richard Fallon argue that "[e]ven if we could return to a common law regime in which government officials were subject to the same liability rules as ordinary citizens, we should not."[297] Cloaked with federal authority, federal officers "pose distinctive threats to individual rights and the rule of law."[298] A nosy neighbor who trespasses on your lawn is a nuisance, no doubt, but you can always call the police. Your options are more limited when the trespasser is the police. "Ordinary tort law," Professor Fallon concludes, is "imperfectly structured" to serve as a constitutional remedy.[299]

Imperfect as tort law may be, there is some logic to using it as a constitutional remedy. When used in this manner, the FTCA reflects a particular theory of both constitutional rights and the distribution of power in the United States. In this last Part, I briefly consider the theoretical implications of relying on the FTCA to vindicate constitutional rights.

It is helpful to first recap the mechanics of an FTCA claim for constitutional redress. Consider a claim for excessive force in connection with an arrest: The plaintiff would bring an FTCA claim for battery. In defense, the United States would argue that the claim is barred by the discretionary function exception because deciding how much force to use in making an arrest involves discretion. The plaintiff would rebut this argument by showing that the force used was excessive in violation of the Fourth Amendment. If successful, the plaintiff would then need to prove that the claim satisfies the requirements for battery under the law of the state in which the arrest occurred. Damages, too, would be calculated under state law.

This scheme for redress carries with it two important theoretical implications. First, it implies that constitutional rights are merely limitations on the federal government's authority. In an FTCA suit, the constitutional violation does not form the substance of the claim or determine the remedy. It comes in to negate the defense that the federal officer was acting within the scope of his or her discretion.[300] The constitutional violation is thus relevant, but only to whether the federal agent exceeded his or her authority.

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297. Fallon, *supra* note 4, at 939.

298. *Id.*

299. *Id.* at 944. *But see* Sisk, *supra* note 20, at 1808-09 (discussing some "advantages" of using ordinary tort law to redress constitutional violations).

300. *See supra* Part II; Shivers v. United States, 1 F.4th 924, 939 (11th Cir. 2021) (Wilson, J., concurring in part and dissenting in part) (explaining the role of the constitutional violation in FTCA cases).

Today, we tend to think that the existence of a constitutional right implies the existence of a constitutional remedy. *Marbury v. Madison* meshed right with remedy,[301] and we now have trouble teasing them apart.[302] But the theory of constitutional rights implied by the FTCA may accord more with constitutional text and original public meaning than a theory that combines right with remedy.

Starting with the text, "[t]he Constitution says almost nothing about remedies for constitutional violations."[303] The only amendment to discuss remedies is the Fifth, which declares that property should not be taken for public use "without just compensation."[304] That the Takings Clause specifies a remedy, while other constitutional rights do not, suggests that—contrary to Chief Justice Marshall's famous declaration—where there is a right, there is *not* necessarily a remedy.[305]

Practice at the time of the Founding confirms this view. Constitutional violations during the Founding era (and for much of American history) were not litigated directly under the Constitution but under the common law of torts.[306] "The Constitution . . . enter[ed] the lawsuit as a reply to a defense of official authority, not as the foundation for a right to redress."[307] This suggests that constitutional rights were originally understood as declaring the bounds of official authority but not as creating a remedy for when those bounds were transgressed.

Instead, any remedy for a constitutional violation came from state tort law. Tort law is the law of "private wrongs."[308] It redresses conduct that is wrong in itself[309]—not conduct that is wrong solely because it is committed by a government actor. A regime that relies on the FTCA for constitutional redress

301. *See* 5 U.S. 137, 163 (1803).

302. *See* Fallon, *supra* note 4, at 935 (explaining that "multitudinous commentators" commonly invoke *Marbury*'s statement of right and remedy).

303. *Id.* at 941; *see also* Ann Woolhandler & Michael G. Collins, *Was* Bivens *Necessary?*, 96 NOTRE DAME L. REV. 1893, 1897 (2021) ("The constitutional text generally does not specify remedies or create causes of action.").

304. U.S. CONST. amend. V.

305. *See* SCALIA & GARNER, *supra* note 168, at 107-11 (explaining the negative-implication canon).

306. *See supra* Part I.A; Fallon, *supra* note 4, at 936 ("[T]he Founding and immediately subsequent generations relied on a preexisting background system of common law rights and remedies to ensure that public officials, as much as ordinary citizens, remained subject to law.").

307. Fallon, *supra* note 4, at 936.

308. *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, 599 (2005).

309. *See id.*

will therefore remedy the subset of constitutional wrongs that correspond to what we might conceive of as natural wrongs.[310] In other words, it will redress violations of those duties that we owe to others by virtue of their humanity.

The content of those duties will evolve over time as our understanding of what we owe others changes. The emergence of the tort of intentional infliction of emotional distress is instructive. For a long time, the law had been "reluctant . . . to accept the interest in peace of mind as entitled to independent legal protection."[311] But in 1939, William Prosser announced that it was "time to recognize that the courts have created a new tort," consisting of "the intentional, outrageous infliction of mental suffering in an extreme form."[312] The emergence of this tort has, in turn, widened the swath of constitutional violations that can be redressed under the FTCA. As we saw in Part III, substantive due process and equal protection violations might be redressed under the FTCA through claims for intentional infliction of emotional distress.[313] Though the flexibility of tort law does not expand the scope of constitutional rights, it does expand the subset of rights that is redressable.[314]

Because the FTCA ties the federal government's liability to state tort law, there will also be differences across state lines in terms of the violations that can be redressed, the standard for determining liability, and the amount of damages. This brings us to the second theoretical implication of relying on the FTCA to protect constitutional rights. Such reliance reinforces the role of states as protectors of persons and property.[315]

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310. When Madison introduced his proposal for a bill of rights during the First Congress, he explained that there are several types of rights. Some are "rights which are retained when particular powers are given up" or "natural right[s]." *See* 1 ANNALS OF CONG., *supra* note 189, at 454. Others are "positive rights." *Id.* Still others are "rights which are exercised by the people in forming and establishing a plan of Government." *Id.* It is only the first category, the so-called natural rights, that would be protected in a regime that relied upon the FTCA as a constitutional remedy. *See* Vázquez & Vladeck, *supra* note 33, 572-73 (explaining that "constitutional provisions such as the Fourth Amendment were designed, at least in part, to protect interests also protected by the common law"); Sisk, *supra* note 20, at 1824 (explaining that constitutional norms will be "upheld" by "adjudicating official wrongdoing through the means of a tort cause of action" because "the Bill of Rights was designed to preserve the preexisting natural rights that had been recognized in the common law").

311. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939).

312. *Id.*

313. *See supra* Part III.A.2.

314. *See* Vázquez & Vladeck, *supra* note 33, at 537-38 (discussing the "flexibility" of the common law and the "evolution" of tort law).

315. *See* FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

In *Bivens*, the Supreme Court criticized a system in which constitutional redress depends on the "niceties" of state law.[316] Certainly, there is something odd about the remedy for a federal constitutional violation varying across state lines. But such a system also has its advantages. Foremost among them, it respects that determinations of right and remedy involve moral judgments about which states can disagree.[317] The tort of intentional infliction of emotional distress is again instructive. States have different standards for how severe a plaintiff's emotional distress must be in order to recover.[318] Some states, for example, require that a plaintiff's emotional distress manifest in physical symptoms; others do not.[319] Tying the United States' liability to state tort law respects the power of states to make their own moral judgments.

This is not to say that the FTCA reflects an entirely coherent theory of either constitutional rights or the distribution of power in the United States. There are elements of the FTCA that cut against both theories. For example, although the FTCA generally respects the role of states in defining and remedying wrongs, it also precludes punitive damages, regardless of whether states permit them. In constructing the FTCA, Congress had to balance its willingness to defer to states with its concern for the country's financial liabilities.[320] And so at times, theoretical coherence yields to practical considerations. Still, because it originated in the Founding-era system for constitutional redress, the FTCA has more coherence than the typical congressional compromise and arguably more coherence than the court-created *Bivens* doctrine.

Conclusion

As it currently stands, the FTCA is a potent tool for remedying constitutional violations. Despite the Seventh and Eleventh Circuits' decisions to the contrary, claims arising from unconstitutional conduct necessarily fall outside of the discretionary function exception and thus within the FTCA's coverage. Many constitutional violations have direct tort analogues. Others will sometimes amount to torts. And while various defenses, like qualified

316. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393-94 (1971).

317. *See, e.g.*, John C.P. Goldberg, *Tort Law at the Founding*, 39 FLA. ST. U. L. REV. 85, 86 (2011) (explaining that "tort law identifies duties that individuals owe to others" (emphasis omitted)); Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1324 (2017) (arguing that "morality and efficiency are . . . complementary manifestations of tort law's broader community-constructing purpose").

318. *See* 1 DAMAGES IN TORT ACTIONS § 6.06 (2023).

319. *Id.*

320. *See* Comment, *supra* note 103, at 546, 553.

immunity, have slipped into some courts' analyses of FTCA claims, these defenses have little basis in the FTCA's text. Indeed, two courts of appeals have recently clarified that qualified immunity is inapplicable to FTCA claims. As courts continue to clear the way for the FTCA to redress unconstitutional conduct, ordinary tort law may prove extraordinary.