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Alternative State Remedies in Constitutional Torts

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Alternative State Remedies in Constitutional Torts

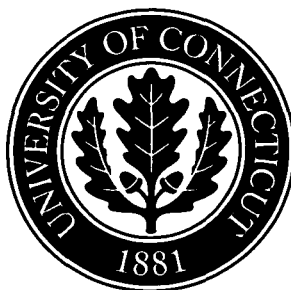
JOHN F. PREIS

In recent years, a subtle shift in constitutional tort doctrine has quietly begun to take root. In Bivens actions, the Supreme Court has recently implied that constitutional tort plaintiffs must seek relief under state law when it is available, rather than invoke their federal constitutional rights. This marks a dramatic change from past practices. For much of the twentieth century, a central premise in the constitutional tort field has been that the federal remedy is “supplementary” to the state remedy; constitutional tort plaintiffs have therefore been permitted to seek a remedy under federal law without regard to the availability of state remedies. Underlying this premise has been the belief that state law—usually tort law—might be “inconsistent with, or even hostile” to federal rights, or that state courts, “by reason of prejudice, passion, neglect, intolerance or otherwise,” would fail to enforce state law.

In this Article, I first demonstrate that these two beliefs are no longer sound or certain. Though I find the beliefs insupportable, I find the traditional rule remains justified. State remedies should be ignored, not because state tort law will be hostile to federal rights, or because state courts will be prejudiced towards litigants, but because state tort law—having developed over centuries to address interactions between private individuals—cannot reliably capture, through doctrine or theory, interactions between private citizens and government officials. Given this inherent nature of tort law, attempts to assess the availability of alternative state remedies will often be confounding and result in incorrect conclusions. Moreover, this problem is likely to be exacerbated by the sparse record available to the court at the moment these issues arise, which is typically during a motion to dismiss. Finally, relying on state remedies in constitutional tort actions is likely to have deleterious effects on state law, effects that are not offset by any federalist benefits. I conclude by considering whether certification—which would allow state courts to resolve the vexing state law questions—would resolve the problems identified. I find certification wanting and thus recommend that state remedies play no role in constitutional tort actions.

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Alternative State Remedies in Constitutional Torts

JOHN F. PREIS*

I. INTRODUCTION

Under federal law, one who suffers a constitutional violation may typically seek damages from the responsible government official.¹ Such suits are known as “constitutional tort actions” because they often involve misbehavior—such as battery or imprisonment—commonly regulated by tort law. Though the law of constitutional torts has periodically borrowed tort principles to fill gaps in constitutional law,² the actual substance of tort law in any particular jurisdiction has always been irrelevant to the merits of the constitutional tort suit. Until lately, that is. In the past couple years, the Supreme Court has begun to hold that, in constitutional tort actions against federal officers (so-called “*Bivens* actions”), plaintiffs may not avail themselves of relief under federal law if state law provides relief.³ Thus, where the state law of battery, for example, provides the *Bivens* plaintiff with relief, he may not seek damages under the federal constitution. In a different line of cases, the Supreme Court has also held that plaintiffs suing state officers (so-called “Section 1983 actions”) for unconstitutional takings must first advance their Fifth Amendment claims in state court.⁴ In 2005, the Court then held that federal courts must grant the state court decision “full faith and credit,” thus effectively barring takings cases from being filed in federal district courts.⁵ Though the Court has not yet extended this rule to cases outside the takings context or

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¹ See 42 U.S.C. § 1983 (2000) (permitting suits against state officers); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (permitting suits against federal officers).

² See, e.g., Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 231 (1986) (describing the Supreme Court’s “adopti[on] [of a] common-law tort paradigm” in constitutional tort cases).

³ See, e.g., *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007) (holding that the decision whether to recognize a *Bivens* remedy first requires the courts to determine if “any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy to damages”).

⁴ See, e.g., *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) (holding that property owners cannot claim violation of the Fifth Amendment’s just taking clause until they seek and are denied relief in a state forum).

⁵ *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 337–38 (2005).

required reliance on state tort remedies (as it has in the *Bivens* cases), such an extension, when considered in light of related doctrine, is quite plausible.

Together, these cases suggest an increasing relevance of state law in the field of constitutional torts. This is a marked change from past practice. With the adoption of the Fourteenth Amendment and related legislation soon after the Civil War, the federal government assumed primary responsibility for the enforcement of civil rights. States were still free to enforce civil rights with their own law, but federal law—and thus federal jurisdiction—would always be available to the plaintiff. This system of civil rights enforcement was based on the implicit, and sometimes explicit, presumption that state courts were often controlled by “prejudice, passion, neglect, [or] intolerance.”⁶ Thus, state law was considered irrelevant since forcing a civil rights plaintiff to rely on it would force her into state court as well. Later, the Supreme Court offered an additional reason to ignore possible relief under state law: state law might be “inconsistent or even hostile” to federal rights.⁷ Under this claim, relief might fail not because of prejudice, but merely because state law lacked the content and force to properly compensate plaintiffs.

Whatever their original truth, these two assumptions—that state courts may be prejudiced and that state law may be hostile to federal rights—no longer ring true. State courts are hardly the bastions of prejudice they once were, and even though prejudice no doubt remains, the prejudice is contingent upon a variety of complex, ever-changing factors, factors that may have equal or greater force in federal court as well. Thus, assumptions of prejudice cannot adequately support doctrine in this field over the long term. Nor does the “hostility” claim fair much better. While it is true that state law will indeed be hostile to federal civil rights in some instances, a close analysis of tort suits against the government reveals that tort law will often provide significantly greater compensation to civil rights plaintiffs than civil rights law itself. In this sense, state tort law is hardly hostile to the civil rights plaintiff.

Despite the weakness of these two assumptions, this Article argues that state remedies should remain irrelevant in the adjudication of constitutional tort actions. The largely neutral operation of state courts and state law nonetheless cannot guarantee that a plaintiff with a facially valid civil rights claim will obtain relief under state tort law. This is due to the inherent incompatibility between tort and constitutional law. While both legal regimes focus on similar goals (they both regulate the imposition of force upon another, for example), the doctrines used to achieve these goals differ in subtle but highly consequential ways. Thus, an unconstitutional

⁶ *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

stop and frisk for example, *may or may not* give rise to the tort of battery. The point is not that relief will necessarily be unavailable, but that it will often be impossible to tell in advance. This difficulty is only heightened by the stage of the proceedings in which judges will be forced to make these decisions. Arguments alleging that the plaintiff has an alternative remedy under state law will typically be advanced in a motion to dismiss, which will be filed long before any discovery occurs. The judge must therefore determine, from only the face of the plaintiff's complaint (which will be drafted with an eye towards federal, and not state, law) whether a state law claim exists. This challenging inquiry will necessarily invite another problem, quite foreign to the field of constitutional torts, but common to cases within the federal courts' diversity jurisdiction. When federal courts apply state law in novel ways (as the arguments advancing alternative state remedy theories will often require), there is a risk, quite familiar since *Erie Railroad Co. v. Tompkins*,⁸ that state law will be unnecessarily muddied or distorted.

In addition to these points, I add two other criticisms of the use of state remedies specific to the *Bivens* context. The use of state remedies in constitutional tort actions has a federalist tinge to it; by allowing disputes to be resolved under state, rather than federal, law, states are granted a zone of autonomy to resolve disputes between their own citizens and government. Yet whatever the merit of this view, it has no application in the *Bivens* context. *Bivens* suits, as explained above, involve violations of federal constitutional law by federal officials and are most often adjudicated in federal court. As such, there are no state interests of which to take account in these cases. Another criticism here involves *Carlson v. Green*, a *Bivens* case that is indispensable to the Court's current *Bivens* jurisprudence. *Carlson* holds that constitutional tort actions should be available to litigants, regardless of whether they may also obtain relief under the Federal Tort Claims Act.⁹ Yet, when a *Bivens* plaintiff is denied a cause of action and forced to rely on state tort law, the plaintiff must proceed under the Federal Tort Claims Act (which incorporates state tort law as the rule of decision in cases against the federal government).¹⁰ The reliance on state remedies cannot stand together with *Carlson*.

Having demonstrated that the use of state remedies in constitutional tort actions is improper, I then consider whether the practice may be rescued through the use of certification. Certification of state law questions to state courts could conceivably ameliorate the uncertainty in knowing whether state tort law does in fact regulate the alleged government misbehavior. Yet I find certification to be a cumbersome

⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹ *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

¹⁰ 28 U.S.C. § 1346(b)(1) (2000).

process, one that will likely frustrate state-federal comity more than it advances it. In sum, therefore, I find that the availability of state remedies should play no role in federal constitutional tort actions.

II. THE NEW RELEVANCE OF ALTERNATIVE STATE REMEDIES

A. *Alternative State Remedies and Bivens*

The use of state remedies in *Bivens* cases, though a recent development, is based on doctrine that has long persisted in the field. Indeed, in *Bivens* itself, although the Court implied a damages remedy directly under the constitution,¹¹ the Court evinced some hesitancy to intrude into an area where Congress clearly had the authority to act.¹² In the end, the Court implied the remedy in part because there was no "affirmative action by Congress" suggesting disapproval of the remedy.¹³ Thus, *Bivens* itself contained the seed of the state remedy rule: the availability of a constitutional damages action depends not simply on the existence of a constitutional right, but on the absence of congressional action in the field.

In *Carlson*, the Court addressed in greater detail the nature of "affirmative action by Congress" that will displace a *Bivens* action. In *Carlson*, the estate of a federal prisoner sued a prison official for damages arising from an alleged Eighth Amendment violation.¹⁴ Because the claim could be recast as an intentional tort, the plaintiff could have sought relief under the Federal Tort Claims Act (FTCA).¹⁵ One could reason that, in passing the FTCA, Congress had "affirmatively" disproved the cause of action *Carlson* was invoking. Yet, the Court held to the contrary. Such affirmative intent only existed where "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."¹⁶

¹¹ See *Bivens*, 403 U.S. at 389 (holding that a "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct").

¹² See 42 U.S.C. § 1983 (2000) (creating a cause of action for damages and other relief against a state actor who deprives an individual of a constitutional right).

¹³ *Bivens*, 403 U.S. at 396. The Court also explained that the action should not be implied if "special factors counsel[] hesitation." *Id.* For an application of this limitation on the action, see *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (holding that a damages action by military officer against his superior should not be implied because "the unique disciplinary structure of the Military Establishment and Congress' [unique] activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type against their superior officers"). The application of the "special factors" prong of the *Bivens* doctrine is beyond the scope of this Article.

¹⁴ *Carlson*, 446 U.S. at 16.

¹⁵ *Id.* at 20; see also 28 U.S.C. § 1346(b)(1) (allowing certain tort claims against the federal government).

¹⁶ *Carlson*, 446 U.S. at 18-19.

The Court held that the FTCA failed this standard. Congress had not “explicitly declared [the FTCA] to be a substitute” and the FTCA was not “viewed as equally effective.”¹⁷ *Carlson* is thus a second step in the development of the state remedy rule: it held that alternative remedies—which in this case, were *federal* in nature—can sometimes displace a *Bivens* action.

Bush v. Lucas came next.¹⁸ In *Bush*, the Court considered whether a *Bivens* action existed for First Amendment claims that “arise out of a [federal government] employment relationship.”¹⁹ Under an act of Congress, disputes arising out of a federal employment relationship were “governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States.”²⁰ Although the meaningful remedies might not “provide complete relief for the plaintiff,”²¹ the Court nonetheless held they were sufficient to displace the *Bivens* action.²² Thus, after *Bush*, federal alternative remedies can displace a *Bivens* action without being “equally effective”; rather, the remedies need only be “meaningful.”

Nearly two decades later, the Court addressed the issue again in *Correctional Services Corp. v. Malesko*.²³ In *Malesko*, a federal prisoner brought a *Bivens* action against a private firm hired by the federal Bureau of Prisons to operate a halfway house. In declining to imply a cause of action for damages, the Court explained that it had “consistently rejected invitations to extend *Bivens*” except “to provide a cause of action for a plaintiff who lacked *any alternative remedy*.”²⁴ Here, in the Court’s opinion, *Malesko* had two alternative remedies: (1) filing a grievance using the Bureau of Prisons Administrative Remedy Program or (2) filing an action under state tort law for negligence.²⁵ Thus, after *Carlson* introduced the concept of alternative remedies, and *Bush* made it clear that those remedies need only be meaningful, *Malesko* appeared to hold that state remedies were meaningful alternatives which could displace a *Bivens* action.

To be sure, the *Malesko* opinion is not entirely clear with respect to whether a *Bivens* action may be displaced by a state remedy *alone*, or if displacement might only be accomplished by state and federal remedies

¹⁷ *Id.*

¹⁸ *Bush v. Lucas*, 462 U.S. 367 (1983).

¹⁹ *Id.* at 368.

²⁰ *Id.*

²¹ *Id.* at 388.

²² *Id.* at 390.

²³ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

²⁴ *Id.* at 70. Because the defendant in this suit was a corporation, rather than an individual, the Court additionally based its decision on the belief that corporate liability would not deter individual misbehavior. *Id.* at 70–71.

²⁵ *Id.* at 74.

acting together. Nonetheless, the statement that the constitutional damages action could be defeated by “any” alternative remedy—state or federal—certainly leaves open the possibility that the tort action alone would have been enough. And indeed, in the past two years, this interpretation has begun to catch on. In a number of cases in 2005 and 2006, federal circuit and district courts have repeatedly held that the existence of a state tort remedy entirely displaces a *Bivens* action.

The most prominent of these cases is *Peoples v. CCA Detention Centers*, decided by the Tenth Circuit Court of Appeals in 2005.²⁶ In *Peoples*, a plaintiff brought a *Bivens* action against a prison guard employed at a privately-run prison.²⁷ After discussing the evolution of the *Bivens* doctrine, the court admitted that it was less than clear whether the case was controlled by *Carlson* or *Malesko*, both of which involved suits by prisoners against those detaining them.²⁸ “[A]t first blush,” the court explained, “*Carlson* may appear to control this case.”²⁹ In that case, the Supreme Court implied a cause of action for damages, even though “there appears to have been a state-law cause of action available [via the FTCA] against the private individual defendants.”³⁰ This “might indicate,” the court explained, “that a state tort cause of action will not preclude a *Bivens* cause of action.”³¹

Yet the Tenth Circuit did not find *Carlson* directly on point. “*Carlson*,” the court explained, “did not address the specific question of whether a potential state law cause of action against [an] individual will preclude an implied *Bivens* claim.”³² Rather, *Carlson* only considered whether a FTCA action—which lies against the United States, not an individual—precluded a *Bivens* claim.³³ Looking to statements in the more recent case of *Malesko*,³⁴ the court concluded that “the sole purpose of

²⁶ *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated en banc*, 449 F.3d 1097 (10th Cir. 2006). After a three judge panel issued its decision in this case, the circuit voted to re-hear the case *en banc*. The full court split evenly (6-6) on the issue and, under Tenth Circuit rules, reinstated the original district court opinion in the case, which held that a *Bivens* action could not be displaced by state remedies. *Peoples v. CCA Det. Ctrs.*, 449 F.3d 1097, 1099 (10th Cir. 2006). Although the Tenth Circuit’s first opinion in this case was subsequently vacated, it nonetheless contains the most comprehensive analysis of the issue yet by a federal court—one that has been relied on several times prior to its vacatur. See, e.g., *Holly v. Scott*, 434 F.3d 287, 296–97 (4th Cir. 2006) (citing the case in declining to grant a *Bivens* remedy to a federal inmate in a privately-run prison). As such, it remains an excellent case to study in detail.

²⁷ *Peoples*, 422 F.3d at 1093.

²⁸ *Id.* at 1096–1101 & n.5.

²⁹ *Id.* at 1101.

³⁰ *Id.*

³¹ *Id.* at 1102.

³² *Id.*

³³ *Id.*

³⁴ While noting both some “tension between *Carlson* and *Malesko*,” and that “[t]he *Malesko* Court’s reading of *Carlson* perhaps is not the only reading of that case,” the Court nonetheless felt it “prudent to follow [*Malesko*,] the Court’s most recent pronouncement on the issue.” *Id.* (citation omitted).

extending *Bivens* in *Carlson* was ‘to provide an otherwise nonexistent cause of action against individual officers.’”³⁵ Summarizing its holding, the Court stated: “a *Bivens* claim should not be implied unless the plaintiff has no other means of redress . . . arising under either state or federal law”³⁶

Since *Peoples*, both the Fourth Circuit and many district courts have followed the Tenth Circuit’s lead.³⁷ And even more recently, the Supreme Court may have endorsed this view, albeit somewhat vaguely. In *Wilkie v. Robbins*, the Court considered whether a *Bivens* action was available to a plaintiff who had suffered a long series of constitutional wrongs at the hands of federal officials.³⁸ For many of the wrongs, the Court considered whether alternative remedies were available, some of which sounded in state tort law.³⁹ In the end, however, the Court was unable to conclude whether alternative remedies—state or otherwise—were indeed available and thus resolved the suit on other grounds.⁴⁰ It appears, therefore, that the state remedy rule, at the very least, has significant traction in the Supreme Court.

³⁵ *Id.* (citation omitted).

³⁶ *Id.* at 1103.

³⁷ See, e.g., *Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006) (holding that an inmate in a privately run federal prison may not bring a *Bivens* action where state law provides an effective remedy); *Longmire v. Carroll*, No. 3-06-CV-1503-P, 2006 WL 3542707, at *2–3 (N.D. Tex. Dec. 8, 2006) (dismissing a *Bivens* action because the plaintiff could seek redress under state law); *Walker v. United States*, No. CV F 02 5801, 2006 WL 2864632, at *3–4 (E.D. Cal. Oct. 5, 2006) (holding that the plaintiff could not bring a *Bivens* action against employees of a privately run prison because he could seek alternative remedies in state court); *Pollard v. Wackenhut Corr. Corp.*, No. CV F 01 6078 OWW WMW P, 2006 WL 2661111, at *3 (E.D. Cal. Sept. 14, 2006) (holding that the plaintiff could not bring a *Bivens* suit against employees of a privately run prison where state court remedies are available); *Powell v. Ellis*, No. CV F 05 0134 AWI WMW P, 2006 WL 2621049, at *2–3 (E.D. Cal. Sept. 12, 2006) (“In light of the existing alternative remedies available to Plaintiff, the court finds that extending *Bivens* would not provide Plaintiff with an otherwise nonexistent cause of action.”); *Godoy-Aguirre v. Gilkey*, No. CV F 03 5295 OWW LJO P, 2006 WL 2585040, at *3, 5 (E.D. Cal. Sept. 7, 2006) (reasoning that *Bivens* should not be extended because the plaintiff “has alternative and superior remedies available to him in state court”); *Brown v. Pugh*, No. CV 306-25, 2006 WL 2439859, at *2–3 (S.D. Ga. Aug. 18, 2006) (holding that *Bivens* actions do not extend to causes of action against private prison employees where the plaintiff may seek alternative remedies); *Kundra v. Johnson*, No. H-06-710, 2006 WL 1061913, at *3 (S.D. Tex. Apr. 21, 2006) (holding that a *Bivens* action is not required against employees of a privately run prison “where state law provides [the plaintiff] with an effective remedy”). But see *Jama v. INS*, 343 F. Supp. 2d 338, 361–63 (D.N.J. 2004) (holding that a *Bivens* action may be asserted against employees of a private corporation under contract with the Immigration and Naturalization Service); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 63–64 (D.R.I. 2003) (applying *Bivens* to a federal prisoner’s claim of alleged constitutional violations by employees at a privately-operated prison).

³⁸ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2593 (2007).

³⁹ *Id.* at 2598–99 & n.7 (considering whether an action for “intrusion upon seclusion” under Wyoming tort law might lie against government employees for allegedly taking pictures of the plaintiff’s guests during their visits to his ranch).

⁴⁰ *Id.* at 2608.

B. *Alternative State Remedies and Section 1983*

Much like the early *Bivens* jurisprudence, Section 1983 suits have historically taken note of alternative remedies provided by Congress but disregarded remedies provided by state law. Thus, where Congress provides a “comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983,” courts typically refuse to recognize Section 1983 actions.⁴¹ But where the alternate remedy emanated from state law, it was considered irrelevant. The Section 1983 suit did not depend on either the existence or prior exhaustion of the available state remedies. Hence, the Court explained in *Monroe v. Pape* that “the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.”⁴² And with regard to exhaustion, the Court in *Steffel v. Thompson* held that “[w]hen federal claims are premised on [§ 1983] . . . , we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.”⁴³

Though this rule remains largely intact, two important cases suggest that it is no longer sacrosanct. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court established a two-part standard for determining whether a takings claim against a state is ripe.⁴⁴ To establish ripeness, the plaintiff must first demonstrate that “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”⁴⁵ Next, the plaintiff must demonstrate that he has sought “compensation through the procedures the State has provided for doing so.”⁴⁶ *Williamson County*’s conflict with Section 1983’s no-exhaustion principle is obvious and has been widely criticized.⁴⁷ Yet criticisms of

⁴¹ *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (holding that federal enforcement regime did not preclude a Section 1983 action); *Smith v. Robinson*, 468 U.S. 992, 1021 (1984) (refusing § 1983 action in light of alternate federal remedies); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Assoc.*, 453 U.S. 1, 20–21 (1981) (same).

⁴² *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

⁴³ *Steffel v. Thompson*, 415 U.S. 452, 472–73 (1974).

⁴⁴ *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

⁴⁵ *Id.* at 186.

⁴⁶ *Id.* at 194.

⁴⁷ J. David Breemer, *Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door To Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 210 & n.5 (2003) (criticizing *Williamson County* and collecting other articles); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986) (“No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.”).

Williamson County have typically been accompanied by proposed doctrinal innovations allowing the plaintiff to ultimately obtain federal review of the claim.⁴⁸

Whatever viability these innovations once had, they are now foreclosed. In 2005, the Supreme Court ruled in *San Remo Hotel v. City of San Francisco* that federal courts hearing takings claims after state court adjudications pursuant to *Williamson County* must grant the state court decision preclusive effect as required by the federal full faith and credit statute.⁴⁹ Although the majority recognized that “a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts,” it claimed that it was simply not “free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.”⁵⁰ Recognizing that the force of the full faith and credit statute could not be ignored, Chief Justice Rehnquist, joined by Justices O’Connor, Kennedy and Thomas, turned his attention to *Williamson County* in a concurring opinion.⁵¹ While Rehnquist admitted to “join[ing] the opinion of the Court in *Williamson County*,” he thought that the “Court should [at a separate time] reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.”⁵² In his view, “the justifications for [the] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic.”⁵³

Thus, the Court’s decisions in *Williamson County* and *San Remo Hotel* suggest that the Section 1983 action is no longer the exclusive province of federal law and jurisdiction. While federal law is still operative in takings cases, it is applied in state, rather than federal, courts. Despite this shift from past practices, the Court has not yet signaled a willingness to shift the doctrine further—such as it has in *Bivens*, where state tort law has begun to supplant federal constitutional law. Nonetheless, this further shift is quite plausible, especially considering the new composition of the Court and existing precedent requiring the adjudication of federal rights occur in state courts. If state courts are considered competent to adjudicate these claims, it may not be long before state law—already considered adequate in *Bivens* suits—is considered adequate for Section 1983 claims as well.

⁴⁸ See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1270 (2004) (arguing that takings plaintiffs can “reserve” their federal claims pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) such that federal courts may re-assert jurisdiction after the state proceedings have concluded); see generally Breemer, *supra* note 47, at 253–57 (addressing alternatives).

⁴⁹ *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 326–27 (2005).

⁵⁰ *Id.* at 346–47.

⁵¹ *Id.* at 348.

⁵² *Id.* at 352.

⁵³ *Id.*

III. THE HISTORICAL IRRELEVANCE OF ALTERNATIVE STATE REMEDIES

Unlike the recent cases discussed above, state remedies have historically been irrelevant to constitutional tort actions. The reason for this owes directly to the Fourteenth Amendment. With the enactment of the Amendment in 1868 the “the federal government . . . [bore] primary responsibility for protecting individuals’ rights from . . . infringement.”⁵⁴ Of course, by granting the federal government such power, state authority had to give way. Yet, “principles of federalism that might otherwise be an obstacle to congressional authority [were] necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’”⁵⁵ In this sense, the Civil War amendments were “specifically designed as an expansion of federal power and an intrusion on state sovereignty.”⁵⁶ Yet the Fourteenth Amendment did not operate alone. Other statutes, which remain with us today, also played an important role. Passed in 1871, the Ku Klux Klan Act (now codified as 42 U.S.C. § 1983) “interpose[d] the federal courts between the States and the people, as guardians of the people’s federal rights”⁵⁷ Similarly, by granting the federal courts habeas jurisdiction in 1867⁵⁸ and general federal question jurisdiction in 1875,⁵⁹ the federal government reiterated its commitment to protecting federal rights. The federal commitment to civil rights did not in any way prohibit states from enacting their own civil rights legislation. Rather, it merely established that federal civil rights would be enforced without regard to state law or courts.

In the ensuing decades, this principle hardened into doctrine. A prominent and early example is *Home Telephone & Telegraph Co. v. City of Los Angeles*.⁶⁰ In *Home Telephone*, a telephone company argued that a

⁵⁴ Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill Of Rights*, 103 COLUM. L. REV. 833, 885 (2003).

⁵⁵ *City of Rome v. United States*, 446 U.S. 156, 179 (1980); see also Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 122 (1998) (“The Fourteenth and other post-Civil War Amendments, on any historical account, changed the relationship of the federal government to the state governments. Congress’ Section 5 enforcement power contemplated direct federal impositions on the states, who are the parties addressed by the major substantive rules of those amendments.”).

⁵⁶ *City of Rome*, 446 U.S. at 179.

⁵⁷ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

⁵⁸ 28 U.S.C. § 2241(a) (2000); 39th Cong. § 28 (1867).

⁵⁹ 28 U.S.C. § 1331; 43d Cong. § 137 (1875). According to Felix Frankfurter and James Landis, once granted general federal question jurisdiction, the federal courts “ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.” FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 65 (1928); see also *Nat’l Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 588 (1995) (stating that before 1875, state courts were often the only forum in which one could vindicate a federal right); *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (relying on Frankfurter & Landis’s view of federal jurisdiction).

⁶⁰ *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 294–95 (1913).

Los Angeles ordinance set local telephone rates “so unreasonably low that their enforcement would bring about the confiscation of [their] property . . . and hence the ordinance was repugnant to the due process clause of the Fourteenth Amendment.”⁶¹ Los Angeles argued in response that a federal court ought not hear the case because the “Constitution of the State of California . . . [also] provides that ‘No person shall be deprived of life, liberty, or property without due process of law’” and that the telephone company “has never invoked the aid or protection” of the state due process clause.⁶² In Los Angeles’ view, a plaintiff must first exhaust all available relief under state law before seeking redress under federal law.

The Supreme Court squarely rejected this argument. First, it found Los Angeles’ argument to be based on “an artificial construction [of] the provisions of the Fourteenth Amendment.”⁶³ “[T]he provisions of the Amendment . . . are generic in their terms, [and] are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of [the] state”⁶⁴ Thus, a Fourteenth Amendment violation is complete and actionable in federal court at the moment a state official transgresses the Amendment, regardless of whether the plaintiff has access to or seeks a state remedy.⁶⁵

Second, and more dramatically, the Court held that Los Angeles’ argument “wholly misconceiv[es] the scope and operation of the Fourteenth Amendment.”⁶⁶ The argument would “remov[e] from the control of that Amendment the great body of rights which it was intended it should safeguard and . . . tak[e] out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.”⁶⁷ In the Court’s view, the Fourteenth Amendment had force of its own and was not merely an alternate source of relief that sprung into existence when local state remedies were impotent. The federal government assumed this responsibility, in part, out of a fear the states would not do so.⁶⁸

⁶¹ *Id.* at 281.

⁶² *Id.*

⁶³ *Id.* at 286.

⁶⁴ *Id.*

⁶⁵ For further explanation of this view, see Michael Wells, “Available State Remedies” and the Fourteenth Amendment: Comments on Florida Prepaid v. College Savings Bank, 33 LOY. L.A. L. REV. 1665, 1667 (2000) (“A central principle of constitutional law, established in *Home Telephone & Telegraph Co. v. City of Los Angeles*, is that the constitutional violation is complete when officials act, even if their conduct is not authorized by state law.”) (footnote omitted) and Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 359 (explaining that “*Home Telephone . . . and . . .* at least four decades of constitutional tort litigation ushered in by the 1961 decision in *Monroe v. Pape*” held that “federal constitutional rights (*Home Telephone*) and federal remedies for violation of those rights (*Monroe*) do not depend on what state law provides”).

⁶⁶ *Home Telephone*, 227 U.S. at 286.

⁶⁷ *Id.*

⁶⁸ For an excellent historical account of the events and ideologies ultimately giving rise to the Fourteenth Amendment, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 26–56 (1986).

Screws v. United States, a 1945 case with a holding similar to *Home Telephone*, nicely illustrates the conflict between state and federal sovereignty in the civil rights field.⁶⁹ Set in Georgia during the Jim Crow era, *Screws* involved “a shocking and revolting episode in law enforcement.”⁷⁰ Claude Screws, the white sheriff of Baker County, Georgia allegedly had a “grudge against [Robert Hall, an African American,] and had threatened to ‘get’ him.”⁷¹ Late one night, after drinking at a local bar, Screws and several other officers arrested Hall for the theft of a tire.⁷² Hall was handcuffed and taken to the courthouse. When Hall arrived at the courthouse and began to exit the car, Screws and the other officers

began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness.⁷³

The officers were charged with a federal crime making it unlawful to “willfully subject[], or cause[] to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.”⁷⁴ A federal court tried and convicted the officers, whereupon they appealed, eventually to the Supreme Court. Their argument was *not* that they did not commit the acts alleged; rather it was that “[b]ecause what they did violated the state’s laws, the nation cannot reach their conduct.”⁷⁵ Put another way, the officers argued that “abuse of state power creates immunity to federal power.”⁷⁶

Just as in *Home Telephone*, the Supreme Court rejected the argument that the federal authority to vindicate constitutional rights (whether under the Fourteenth Amendment or, as in this case, under a federal statute

⁶⁹ *Screws v. United States*, 325 U.S. 91, 108 (1945).

⁷⁰ *Id.* at 92.

⁷¹ *Id.* at 92–93.

⁷² *Id.* at 92.

⁷³ *Id.* at 92–93.

⁷⁴ *Id.* at 93 (citing 18 U.S.C. § 52, now codified at 18 U.S.C. § 242 (2000)).

⁷⁵ *Screws*, 325 U.S. at 114 (Rutledge, J., concurring).

⁷⁶ *Id.*

implementing the amendment) only picks up where state authority ends. As Justice Rutledge explained in his concurrence, “[v]ague ideas of dual federalism . . . do not nullify what four years of civil strife secured and eighty years have verified. For it was abuse of basic civil and political rights, by states and their officials, that the Amendment and the enforcing legislation were adopted to uproot.”⁷⁷ Of course, the federal supremacy implemented by the Fourteenth Amendment did not displace the states’ prerogative to pass and enforce local law. But it did create an unremitting obligation in the states to obey federal law, regardless of state provisions. This conception of federalism embodied in the Amendment is essential because in 1945 there were reasons to doubt that states would enforce civil rights on their own accord. Indeed, this doubt was quite justified in *Screws* itself, as the officers were never charged with any crime by the state of Georgia.⁷⁸

Though both *Home Telephone* and *Screws* held that federal law was to be enforced without regard to the content of state law, it was not until *Monroe v. Pape* that the Court squarely addressed the argument that state tort law was competent to remedy constitutional harms.⁷⁹ In *Monroe*, James Monroe alleged that thirteen Chicago police officers had, without a warrant or other authority, raided his house early in the morning, made his family stand naked in their living room, and later held him at the police station for ten hours without charges or access to an attorney.⁸⁰ If true, these actions would violate Monroe’s federal constitutional rights. Monroe sued the individual officers under 42 U.S.C. § 1983, which provides a cause of action for damages and other relief against those who, acting “under color of state law,” deprive persons of their “rights, privileges, or immunities secured by the Constitution and laws” of the United States.⁸¹

Before the Court was the question of whether the officers, clearly without explicit authority to behave as they did, nonetheless acted “under color of state law.” Finding that the officers acted “under color of state law” because they were “clothed with the authority of state law,” the Court dismissed the argument that Monroe’s real remedy was under state tort law.⁸² Under this view, § 1983 only provides plaintiffs such as Monroe

⁷⁷ *Id.* at 116. To quote Justice Rutledge’s concurrence should not be read to suggest that the majority did not share his view. Indeed, the majority explained: “We hesitate to say that when Congress sought to enforce the Fourteenth Amendment [with the criminal statute at issue in *Screws*,] it did a vain thing. We hesitate to conclude that for 80 years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by the Fourteenth Amendment has been an idle gesture.” *Id.* at 100 (majority opinion).

⁷⁸ *Id.* at 114 n.5 (Rutledge, J., concurring).

⁷⁹ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

⁸⁰ *Id.* at 169.

⁸¹ 42 U.S.C. § 1983 (2000).

⁸² *Monroe*, 365 U.S. at 184, 187 (quoting *United States v. Classic*, 299 U.S. 313, 326 (1941) (internal quotation omitted)).

with a cause of action where an official state policy violates the U.S. Constitution. It does *not* provide a cause of action to plaintiffs injured at the hands of rogue state officers—that is, officers acting in disregard of official state policy. Victims of such behavior are not without a remedy, however. They may resort to state tort law to collect damages. This view did not persuade the Court, however. Writing for the majority, Justice Douglas explained:

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.⁸³

Lurking behind this observation was the view, quite apparent in *Screws*, that states might be less-than-devoted to the civil rights of their citizens. As Justice Douglas explained it:

It is abundantly clear that one reason the legislation [(§ 1983)] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.⁸⁴

Importantly, the *Monroe* Court was not concerned about the weakness of state law; rather it was concerned that legal actors—principally judges, lawyers, and perhaps jurors—would fail to enforce facially neutral state laws.⁸⁵

Ten years after *Monroe*, the Court again addressed the argument that tort law was a competent remedy for constitutional harms. In *Bivens v. Six Unknown Federal Agents*, a plaintiff sought relief for violations of his Fourth Amendment rights.⁸⁶ Unlike *Monroe*, the plaintiff in *Bivens* sought relief from federal officers and thus could not make use of Section 1983.⁸⁷ He therefore asked the Court to imply a cause of action for damages directly from the Fourth Amendment.⁸⁸ In considering his argument, the

⁸³ *Id.* at 183.

⁸⁴ *Id.* at 180.

⁸⁵ *See id.* at 175–83 (reviewing Congressional debate concerning possibility that some legal actors might be “unable or unwilling to enforce a state law”).

⁸⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971).

⁸⁷ *Id.* at 398 n.1 (Harlan, J., concurring).

⁸⁸ *Id.* at 390–91.

Court had to confront the argument, similar to that in *Monroe*, that the plaintiff's remedy was under state tort law. Yet the Court answered the argument differently this time. It did not advert to any "prejudice, passion, neglect, [or] intolerance" in state courts; rather, it opined that tort law might be "inconsistent, or even hostile" to federal civil rights.⁸⁹

This possible "inconsistency" or "hostility" stemmed from the particular allegations in *Bivens*: "agents of the Federal Bureau of Narcotics acting under claim of federal authority" but without a warrant, knocked on the plaintiffs door, requested entry, and were granted such by the plaintiff; the agents thereafter "arrested [the plaintiff] for alleged narcotics violations, . . . manacled petitioner in front of his wife and children, . . . threatened to arrest the entire family . . . [and] searched the apartment from stem to stern."⁹⁰ While such behavior appears trespassory, the Court doubted that a cause of action for trespass would be successful.⁹¹ A common defense to trespass is consent.⁹² Thus, "[a] private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house."⁹³ Here, because the plaintiff consented to the entry of his apartment, it was likely, in the Court's view, that his state trespass action would fail. Of course, this is not a foregone conclusion. A state court might note that "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry" and rule that the consent was obtained through implicit coercion.⁹⁴ Yet the Court had an answer for this as well:

Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised.⁹⁵

Thus, *Monroe* and *Bivens* provide two reasons why alternative state remedies should be irrelevant to federal civil rights actions. *Monroe* evinces doubt that the *processes* of state adjudication will fail to provide the plaintiff with relief under facially neutral laws, and *Bivens* evinces doubt that the *substance* of state law will fail to provide the plaintiff with relief.

⁸⁹ *Id.* at 394.

⁹⁰ *Id.* at 389.

⁹¹ *Id.* at 394.

⁹² W. PROSSER, THE LAW OF TORTS § 8, at 82 (3d ed. 1964).

⁹³ *Bivens*, 403 U.S. at 394 (citing 1 F. HARPER ET AL., THE LAW OF TORTS § 1.11 (1956)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 395 (internal citations omitted).

IV. QUESTIONING THE PRESUMPTIONS IN *MONROE* AND *BIVENS*

Monroe was decided in 1961;⁹⁶ *Bivens* in 1971.⁹⁷ Times have changed. Although it might have been fair at some point to presume state courts and law hostile to federal civil rights, this claim is no longer tenable. This Part explains why.

A. “[P]rejudice, passion, neglect, intolerance or otherwise”

Constitutional tort actions must be available irrespective of state remedies, we are told, because “by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . . by the state agencies.”⁹⁸ This claim is undercut in two principle ways: (1) the claimed lack of parity between state and federal courts has been cast into significant doubt as a tool for case allocation, and (2) common law tort actions against federal officers, though based on state law, will take place in federal court, not state court.

In an influential article, Professor Burt Neuborne claimed that plaintiffs making civil rights claims will typically fair better in federal court.⁹⁹ He offered three reasons for this: federal judges, on the whole, have greater “technical competency” than state judges, have a “psychological set” that favors the enforcement of civil rights, and are insulated from “majoritarian pressures” to which state judges are exposed.¹⁰⁰ To be sure, Neuborne’s focus was on federal civil rights claims, not state tort claims; but his reasoning is partially transferable. Tort claims brought as alternatives to civil rights claims do not demand any special expertise of the state judge, but, in testing the lawfulness of law enforcement activities, do implicate the state judiciary’s willingness to side with politically unpopular minorities.

Since Neuborne propounded his thesis, scholars have endlessly debated it. Some scholars continue to side with Neuborne, claiming that federal superiority is an “inescapable logical inference.”¹⁰¹ Others (including the Supreme Court) have disagreed in principle¹⁰² while still

⁹⁶ *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹⁷ *Bivens*, 403 U.S. at 388.

⁹⁸ *Monroe*, 365 U.S. at 180.

⁹⁹ Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106 (1977).

¹⁰⁰ *Id.* at 1120–21.

¹⁰¹ Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333 (1988); see also RICHARD A. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* 172 (1985) (stating that “systematically different conditions of employment” between state and federal judges permit the inference that federal courts are superior to state courts in enforcing civil rights).

¹⁰² *Stone v. Powell*, 428 U.S. 465, 493 n.35 & 494 (1976) (refusing to recognize federal habeas claims premised on Fourth Amendment violations in part because of an “unwilling[ness] to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States”); *Dombrowski v. Pfister*, 380 U.S. 479, 484–85 (1965) (“It is

others have employed their own logic in refuting Neuborne's claim.¹⁰³ Additionally, a large contingency of scholars have sought to test the claim empirically.¹⁰⁴ An interesting example of empirical work suggests that, among 86 federal and 307 state judicial decisions involving federal constitutional issues implicating gay rights, "state tribunals resolved lesbian and gay rights claims 56.3 [percent] more positively than federal courts."¹⁰⁵ Other scholars have made similar empirical claims with respect to Takings claims,¹⁰⁶ coerced confession cases,¹⁰⁷ and civil rights claims more generally.¹⁰⁸ Of course, the empirical evidence is far from uniform in its refutation of parity.¹⁰⁹ In sum, whether one employs "logical inferences" or empirical methods, there is little agreement among scholars as to the current state of parity between state and federal courts.

Despite this lack of agreement, just about all scholars agree that parity, whatever its nature, is highly contingent. First, it is contingent upon the particular judicial district and legal right involved. Thus, in some judicial districts, federal courts may protect First Amendment rights more faithfully than state courts. In those same districts however, state courts may protect homosexual rights more faithfully than federal courts. Pick a different district, and these claims might be reversed. Second, parity is historically contingent. Thus, even if one could generalize across all claims and all judicial districts to reach a final conclusion as to which judicial system protected individual rights with the greatest frequency, this conclusion

generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 69–70 (1923) ("[T]here is now little danger that the State court will not amply protect persons claiming Federal rights.").

¹⁰³ Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607–08 (1981).

¹⁰⁴ For an overview of the empirical literature on parity, see Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1491–94 (2005).

¹⁰⁵ DANIEL PINELLO, *GAY RIGHTS AND AMERICAN LAW* 110 (2003); see also William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 625 (1999) (concluding, with respect to gay rights, that state courts may be as solicitous (or more) than federal courts).

¹⁰⁶ Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 285 (1999) (concluding that there is "strong evidence of parity in the takings area").

¹⁰⁷ See Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109, 119, 123, 126 (2002) (analyzing 661 state court confession cases and concluding that state courts generally complied with federal supreme court precedent).

¹⁰⁸ MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 34–62 (1999) (examining empirical evidence on parity and arguing that it demonstrates that claims of federal rights are equally likely to be upheld in state court and federal court).

¹⁰⁹ Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1206–07 (1997) (claiming in a study of death penalty cases that judicial "selection procedures [such as elections] systematically influence, in the long term, the overall predispositions of those who occupy the bench").

would no doubt be dated within a few years. This is because courts, being populated by human beings, are not static institutions.¹¹⁰ They change over time and thus any claim today that one court system is inferior or superior to another is a “contingent argument, intimately connected to the political climate of a particular era.”¹¹¹ Building doctrine on such shifting sands is unwise.

Perhaps this is why some federal courts scholars have deserted the parity debate entirely. Erwin Chemerinsky, for example, has expressed fear that “the debate over parity is permanently stalemated because parity is an empirical question—whether one court system is as good as another—for which there never can be any meaningful empirical measure.”¹¹² Instead, he has sought to “define a role for the federal courts without evaluating the comparative abilities of the federal and state courts in constitutional cases.”¹¹³ In his view, federal courts should remain available in all civil rights actions not because they are superior, but simply because their availability maximizes litigant choice.¹¹⁴ Barry Friedman has taken a similar tact. In a recent paper on allocating cases between federal and state courts, he dismisses arguments pertaining to parity because they “will never resolve the either-or problem”—which he describes as “the common assumption . . . that cases must be litigated *either* in federal court *or* in state court” rather than in both courts sequentially.¹¹⁵ Like Chemerinsky, Friedman views parity as frustrating, rather than advancing, the proper allocation of cases between the federal and state courts.

Thus, no matter how accurate it was in 1961 to claim that state courts are systematically possessed by “prejudice, passion, neglect, [or] intolerance,” the claim is subject to significant doubt today—both with regard to specific rights and across the entire spectrum of rights. Moreover, even if the claim could be defended as a current description of state courts, this description is undoubtedly subject to change and therefore is unsuitable as an ongoing presumption.

I now turn to another reason why claims of state court prejudice lack force in situations where constitutional tort claims are recast as state

¹¹⁰ See Solimine, *supra* note 104, at 1487 (“Much discourse on parity is characterized by its static nature. The respective capabilities of federal and state courts are often described as snapshots, taken at the time of the writing. The better view is to examine parity as a fluid and dynamic concept, with changes—for good or ill—in both federal and state courts over time.”).

¹¹¹ Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304–05 (2003).

¹¹² Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988).

¹¹³ *Id.*

¹¹⁴ *Id.* at 300–26.

¹¹⁵ Friedman, *supra* note 48, at 1214, 1221; see also John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 287 (2007) (stating that, “given the current state of knowledge” on parity, “it is impossible at this point to justify a system-wide presumption that federal courts are preferable to state courts for plaintiffs advancing federal claims”).

common law tort claims: Tort claims against federal officers will invariably take place in federal court and at least some tort claims against state officers will take place in federal court as well. First, pursuant to Federal Tort Claims Act, tort actions against the federal government must be litigated in federal court.¹¹⁶ Even if the relied-upon alternative remedy failed to ring in tort, however, federal officers have the independent power to remove state court actions to federal court and almost uniformly do so.¹¹⁷ Second, where the tort suit is against a state officer, such claims can appear in federal court where the plaintiff and defendant are citizens of different states and the amount in controversy is in excess of \$75,000.¹¹⁸ While state law enforcement officers typically reside in the state in which they work and interact with citizens who reside in the same state, at least some interactions will be between persons who reside in different states.¹¹⁹ Although constitutional tort actions against federal officers or state officers from different states are likely a minority of all constitutional tort actions, their numbers are not insignificant.¹²⁰ Thus, in a sizeable number of constitutional tort actions, the claim that state law alternatives are infeasible because of state court prejudice falls flat.

B. “[I]nconsistent or even hostile”

In *Bivens*, the Court offered two reasons why the plaintiff there would have difficulty obtaining relief under state tort law. First, state law will often be “inconsistent or even hostile” to federal constitutional law.¹²¹ Thus, the defendants in *Bivens* could potentially assert the defense of consent. Second, even if the plaintiff could convince the court to find such consent coerced under state law, state courts are prohibited from interpreting “state law to limit the extent to which federal authority can be exercised.”¹²² As explained below, close analysis reveals that both of these claims stand on weak, if not wholly insupportable, footing.

The Court’s statement in *Bivens* that state tort law would have been

¹¹⁶ See 28 U.S.C. § 1346(b)(1) (2000) (stating that “the district courts . . . shall have exclusive jurisdiction of civil actions on [tort] claims against the United States, for money damages”).

¹¹⁷ See 28 U.S.C. § 1442(a)(3) (stating that “[a]ny officer of the courts of the United States” may remove a suit filed in state court to federal court where the allegations involve “any act under color of office or in the performance of his duties”).

¹¹⁸ 28 U.S.C. § 1332.

¹¹⁹ These suits are likely to be more common where large metropolitan areas extend across state boundaries. Examples include side-by-side cities (such as Kansas City, Missouri and Kansas City, Kansas, or Omaha, Nebraska and Council Bluffs, Iowa) and cities that routinely draw visitors from neighboring states (such as New York City, which draws commuters and visitors from New Jersey and Connecticut).

¹²⁰ See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 654 (1987) (finding that *Bivens* suits comprised “relatively few” of the constitutional tort actions sampled in an empirical study).

¹²¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

¹²² *Id.* at 395.

“hostile” to a claim of trespass is no doubt insightful to a certain extent. Depending on the content of state law, consent will certainly pose a barrier to a successful trespass claim. One may reasonably question, however, whether this insight applies universally. There are, no doubt, many instances where state tort law and constitutional law operate in tandem. Both the law of battery and the Fourth Amendment, for example, prohibit an officer from beating a pedestrian without provocation. Similarly, both the tort of false imprisonment and the Fourth Amendment prohibit an officer from stopping a car simply because of the driver’s race. Thus, if the goal of suing a government officer is to obtain compensation for the officer’s wrongful behavior, state law will sometimes work quite well.

Indeed, in many cases, it is not state tort law that is “hostile” to compensation, but just the reverse. Compare common law and constitutional tort actions against federal officers, for example. Where both legal regimes proscribe the same conduct, compensation under tort law is likely to be significantly higher than under federal constitutional law. This is because official immunity—which bars recovery in the great majority of constitutional tort actions—will not bar recovery in common law tort suits against the government. In the typical constitutional tort action, government officers are immune 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.”¹²³ But where the same federal official is sued under tort law, immunity will not stand in the way of recovery.

The reason is the Westfall Act.¹²⁴ To understand its operation, consider a short hypothetical and the ensuing path of litigation likely to result. Suppose a federal law enforcement officer improperly arrests a plaintiff—call her Susan—thereby violating her Fourth Amendment rights. After her release, Susan files suit against the agent in federal court for false imprisonment.¹²⁵ Her suit would not proceed as styled, however. Rather, the suit would be converted into one under the Federal Tort Claims Act against the United States itself, and *not* against the federal agent

¹²³ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see generally Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995) (explaining official immunity analysis in constitutional tort cases).

¹²⁴ Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (amending 28 U.S.C. § 2679(b), (d) (2000)) (commonly referred to as the “Westfall Act”).

¹²⁵ Susan could, of course, file suit in state court instead. For simplicity’s sake, however, I have Susan begin her case in federal court. Even if she filed first in state court, her suit would end up in federal court under either 28 U.S.C. § 1442, which grants federal defendants the right to remove state suits to federal court, or 28 U.S.C. § 1346(b)(1), which requires suits under the Federal Tort Claims Act to be heard only in federal courts. Regardless of these two provisions, Susan can begin her suit in federal court if she is of diverse citizenship from the defendant and seeks more than \$75,000. See 28 U.S.C. § 1332 (2000) (granting original jurisdiction to federal courts in suits that involve both an amount in controversy exceeding \$75,000 and citizens of different states).

individually. This conversion is mandated by the Westfall Act, a 1988 amendment to the FTCA.¹²⁶ Under the Westfall Act, a suit against a federal employee for a “negligent or wrongful act” may not proceed against the employee; rather, the plaintiff’s “exclusive” remedy is against only the United States itself under the FTCA.¹²⁷ And under the FTCA, the federal government will be liable to the plaintiff “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [negligent or wrongful act] occurred.”¹²⁸ Importantly, even if state officers might be immune from a damages penalty under state law for such behavior, federal officers will not be.¹²⁹

To be sure, there are some gaps in the federal government’s waiver of sovereign immunity under the Federal Tort Claims Act. For example, the government is not liable in tort where the claim is based on the “perform[ance] [of] a discretionary function.”¹³⁰ Nor is the government

¹²⁶ The statute, commonly referred to as the Westfall Act, was a response to the Supreme Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Court held that federal officers did not have absolute immunity from tort suits based on conduct committed within the scope of their employment. *Westfall*, 484 U.S. at 294–95. Finding such exposure to liability poor policy, Congress effectively granted federal employees absolute immunity by requiring any tort claim against a federal employee be recast as one against the United States *exclusively*. See Federal Employees Liability Reform and Tort Compensation Act of 1988 § 2(a), (b) (“It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.”). For a discussion of the Westfall Act, see William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L. J. AM. U. 1105, 1172–76 (1996).

¹²⁷ 28 U.S.C. § 2679(b). To be sure, not every putative *Bivens* claim recast under state law would be converted into a FTCA action against the federal government. For example, if a prisoner sued the guard of a private prison under contract with the federal government, the Westfall Act exclusivity rule would not apply because that suit would not be against a federal employee, but rather against an independent contractor. Independent contractors are not covered by the FTCA. See *id.* § 2671 (explicitly excluding contractors); *United States v. Orleans*, 425 U.S. 807, 814–15 (1976) (holding that an entity is an employee rather than an independent contractor only if the federal government has the power to “to control the detailed physical performance of the contractor” on a “day-to-day” basis) (citations omitted).

¹²⁸ 28 U.S.C. § 1346(b)(1).

¹²⁹ See *United States v. Olson*, 546 U.S. 43, 44 (2005) (stating that, because “the United States waives sovereign immunity ‘under circumstances’ where local law would make a ‘private person’ liable in tort,” any official or municipal immunity created by state law are not applicable in FTCA suits against the federal government).

¹³⁰ 28 U.S.C. § 2680(a). Under Supreme Court precedent, a government action is discretionary if it “involves an element of judgment or choice” which is “based on considerations of public policy.” *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (citations omitted). Importantly, if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,” the act is not discretionary because “the employee has no rightful option but to adhere to the directive.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz*, 486 U.S. at 536). Although precedent in the courts of appeal is not uniform, the majority of courts hold that the discretionary function exception cannot be used as a defense if the alleged misbehavior amounts to a constitutional violation. See, e.g., *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (“[F]ederal officials do not possess discretion to violate constitutional rights.”) (quoting *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (“We

liable for “assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights” if such claims are brought against non-law enforcement officers.¹³¹ Importantly, however, if such claims are brought against a law enforcement officer, they are cognizable under the FTCA.¹³² Additionally, punitive damages are not available under the FTCA.¹³³ Despite these limitations, however, official immunity in the field of constitutional torts is such a tremendous burden to overcome that FTCA actions will, on the whole, likely provide greater compensation to the plaintiff than the constitutional tort action.¹³⁴ Thus, contrary to the Court’s claim in *Bivens*, federal law, rather than state law, may be the law hostile to recovery.

Tort suits against state officers, however, are more difficult to summarize. As a general matter, state waivers of immunity are narrower than the federal government’s.¹³⁵ If one focuses on the particular field of torts analogous to constitutional violations, however, one sees that the opportunities for suit are, on the whole, rather plentiful. For example, only

hold only that the Constitution can limit the discretion of federal officials such that the FTCA’s discretionary function exception does not apply.”); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (“[W]e have not hesitated to conclude that [law enforcement activity] does not fall within the discretionary function of [28 U.S.C.] § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.”); *U.S. Fid. & Guar. Co.*, 837 F.2d at 120 (“[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation.”) (dicta). Only the D.C. Circuit has disagreed. See *Moore v. Valder*, 65 F.3d 189, 196–97 (D.C. Cir. 1995) (“[W]here the ‘allegation of improper investigatory conduct is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury,’ the discretionary function applies and preserves governmental immunity.”) (quoting *Gray v. Bell*, 712 F.2d 490, 516 (D.C. Cir. 1983)).

¹³¹ 28 U.S.C. § 2680(h).

¹³² *Id.* A law enforcement officer is defined as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *Id.* Although federal courts have split on whether prison guards are “investigative or law enforcement agents,” the Supreme Court plans to address that issue in its 2007–08 term. See *Abdus-Shahid M.S. Ali v. Federal Bureau of Prisons*, 204 F. App’x 778 (11th Cir. 2006), *cert. granted*, 127 S. Ct. 2875 (U.S. May 29, 2007) (No. 06-9130). Still, even if prison guards are held not to be “law enforcement agents,” a great number of suits may still proceed against federal agents working outside prisons. Moreover, even if a federal prisoner is barred from relying on the FTCA’s intentional tort provision, she can often restyle her claim as one for negligence. Claims of negligence are actionable against all federal employees, not just those who are “investigative or law enforcement officers.” See *Flechsig v. United States*, 991 F.2d 300, 302 n.1, 303–04 (6th Cir. 1993) (considering, under the FTCA, prisoner’s negligent supervision claim flowing from sexual assault by a guard).

¹³³ See 28 U.S.C. § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims . . . but shall not be liable . . . for punitive damages.”); *Smith v. Wade*, 461 U.S. 30, 31 (1983) (holding punitive damages available in § 1983 action); *Carlson v. Green*, 446 U.S. 14, 22 (1980) (stating that “punitive damages may be awarded in a *Bivens* suit”).

¹³⁴ See *Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L. J. 65, 65–66, 80 (1999) (explaining that *Bivens* suits rarely result in an assessment of damages and that “[q]ualified immunity is undoubtedly the most significant bar” to recovery).

¹³⁵ *Lawrence Rosenthal, A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 805–09 (2007) (containing comprehensive summary of state waivers of immunity for tort suits).

“seventeen [states] immunize specified intentional torts of public employees,” and a still smaller number immunize liability for the “institution of judicial or administrative proceedings,” or for the failure to “provide adequate jails or other correctional or penal facilities.”¹³⁶ By implication, many states *do not* immunize themselves from these types of suits, thus suggesting that state tort suits will be successful in numerous instances. This is not to say that, in some cases, the constitutional tort action will not provide greater recovery. That is certainly likely. But on the whole, when one takes into account the often insurmountable barrier of official immunity, state tort suits will quite often provide superior compensation. In short, state tort law may be anything but “hostile” to plaintiffs harmed by the state.

The Court’s related claim in *Bivens*—that state law is impotent to control federal behavior—also stands on weak footing. At the outset, one must recognize that this claim can only apply to constitutional tort actions against the federal government, as states certainly have the authority to subject state officers to state tort law. Thus, the “weakness of state law” claim only has force with respect to alternative state remedies for *Bivens* actions. With respect to these suits, however, it is not at all clear that state law is indeed impotent. Recall that the Court, in proffering this argument, was responding to the claim that state law might be interpreted so as to account for the inherently coercive nature of a consent sought by law enforcement officers. As the court explained:

Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised.¹³⁷

This claim is curious, however. It seems to suggest that state *law*, rather than state *courts*, is impotent to regulate the conduct of federal officials. This certainly can not be true, however, since the Federal Tort Claims Act unequivocally renders the federal government liable “under circumstances where . . . a private person . . . would be liable to the claimant in accordance with the law of the place where the [negligent or wrongful act] occurred.”¹³⁸ Even if one interprets the FTCA as incorporating state law as the standard of care, rather than giving force to state law on its own, it is nonetheless “settled that the state courts may

¹³⁶ *Id.* at 805–09.

¹³⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (internal citations omitted).

¹³⁸ 28 U.S.C. 1346(b).

entertain actions against federal officers for damages” under state law.¹³⁹

Despite the Court’s invocation of “state law” in *Bivens*, it is more likely that the Court’s worry was over the power of state courts. This much is revealed by a footnote in *Davis v. Passman*, a *Bivens* action from 1981. There, the Court stated that:

Respondent does not dispute petitioner’s claim that she “has no cause of action under Louisiana law.” And it is far from clear that a state court would have authority to effect a damages remedy against a United States Congressman for illegal actions in the course of his official conduct, even if a plaintiff’s claim were grounded in the United States Constitution. Deference to state-court adjudication in a case such as this would in any event not serve the purposes of federalism, since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damages remedy be awarded.¹⁴⁰

Whatever the correctness of this statement,¹⁴¹ the Court seems to have ignored that suits for relief against federal officers must be adjudicated in federal court under the FTCA.¹⁴² There can be little doubt, of course, that federal courts have the power to order federal officers to pay damages for their tortious conduct. Thus, by virtue of the FTCA’s liability and jurisdictional commands, federal officers *can* be held liable under state law and be ordered to pay damages.

* * *

In sum, whatever the original force of the Court’s justifications for

¹³⁹ 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4213, at 45 (3d ed. 2007).

¹⁴⁰ *Davis v. Passman*, 442 U.S. 228, 245 n.23 (1979) (citations omitted).

¹⁴¹ State court authority over federal officers is contradictory in some respects. While it has long been clear that state courts may not grant a mandamus against a federal officer, *McLung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821), or grant state habeas relief to a federal prisoner, *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411–12 (1872), damages remedies against federal officers have long been permitted. See *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 344 (1865) (stating a federal officer may be held liable for exceeding his authority); *Teal v. Felton*, 53 U.S. (12 How.) 284, 292 (1851) (holding that a postal employee can be held liable for conversion “in any court having civil jurisdiction”); see also RICHARD H. FALLON, JR. ET AL., *HART & WESCHLER’S FEDERAL COURTS AND THE FEDERAL SYSTEM* 441 (5th ed. 2003) (“The Supreme Court has routinely sustained state court jurisdiction in damages actions against federal officials averring tortious [sic] conduct unsupported by the claimed authority.”).

¹⁴² 28 U.S.C. § 1346(b)(1) (requiring suits under the Federal Tort Claims Act to be heard only in federal courts). Admittedly, it is unclear whether the FTCA, together with state tort law, would apply to the misbehavior in *Davis*, thus placing any tort suit against *Davis* in federal court. *Davis* is an exceptional case, however, and a great many constitutional tort claims will, at least facially, fall within the ambit of the FTCA.

ignoring state remedies in *Monroe* and *Bivens*, those justifications are now quite weak. State courts are no longer possessed by the “prejudice, passion, neglect, [or] intolerance” that they were in 1961, and whatever their level of prejudice as compared to federal courts, it is certainly likely to change over time and with respect to specific types of claims. Nor is state tort law necessarily “hostile” to recovery. In fact, it will often provide greater compensation than federal law, and can be validly enforced by state courts against state officers, or by federal courts against federal officers.

V. NEW REASONS TO IGNORE ALTERNATIVE STATE REMEDIES

In the previous Part, I argued that the justifications for ignoring state remedies stand on weak footing.¹⁴³ That might suggest that courts should begin considering the force of state remedies in constitutional tort adjudication. This Part offers three reasons why that is unwise, followed by two additional reasons applicable only to *Bivens* cases. First, state law, while perhaps not always “hostile” to federal civil rights, will often be unclear such that a federal court has no way of knowing whether it will provide relief. In this sense, state law should be ignored not because it *will not* provide relief, but because it *may not* provide relief. A plaintiff with a valid constitutional claim should not have her suit dismissed in favor of a state law claim that *might* be valid. Second, this difficulty in ascertaining the true effect of state law will only be compounded by the procedural juncture at which such issues are likely to arise. Defendants will likely proffer arguments based on alternative state remedies in motions to dismiss—a stage of litigation far in advance of any factual development that might inform the true availability of state remedies. Third, the mere task of determining whether alternative state remedies exist may have deleterious effects on state law—effects often identified with federal adjudication of state law in the post-*Erie* era. After offering these three points, this Part then offers two further reasons—applicable only to *Bivens* cases—to ignore state remedies. *Bivens* cases, which involve federal law and federal defendants, present no compelling reason to respect state interests or state law, and even if they did, relying on state remedies brings the doctrine into direct conflict with *Carlson v. Green*¹⁴⁴—a case indispensable to the current *Bivens* jurisprudence.

A. *The Inherent Ambiguity of State Law With Regard to Federal Civil Rights*

The state remedy rule proceeds from the presumption that state tort law

¹⁴³ See *supra* Part IV.A, B.

¹⁴⁴ *Carlson v. Green*, 446 U.S. 14, 23–25 (1980).

and federal constitutional law operate in similar, if not identical, fashions. In one sense, this presumption is not entirely unwarranted. Both legal regimes regulate the imposition of force by one individual against another. Police brutality that violates the Fourth Amendment will also likely violate state battery law. But this presumption only goes so far. Many unconstitutional acts only vaguely resemble common law torts. This should not be surprising, since the two regimes have fundamentally different focuses. Tort law generally addresses interactions between private individuals and constitutional law addresses interactions between the government and private individuals. It is thus unlikely that tort law will contain doctrines that can adequately capture behavior understood to be unconstitutional.¹⁴⁵

Consider the following:

A stop-and-frisk. Suppose a police officer, acting without reasonable suspicion or probable cause, stops a pedestrian on the street and pats him down. This is clearly unconstitutional,¹⁴⁶ but is it a tort? It looks quite similar to a battery, which occurs when one intentionally touches another in a harmful or offensive manner.¹⁴⁷ While a non-consensual pat down is clearly “offensive” it is much less clear whether the officer’s behavior was intentional. Certainly it was intentional in the sense that he willed his body to touch the pedestrian’s body, but did he will that the contact be “offensive”? This is a much more difficult question. Some courts hold that a plaintiff advancing a battery claim need prove that the defendant intended the touching only,¹⁴⁸ while other courts hold that the plaintiff must prove that the defendant intended the touching *and* intended it be offensive.¹⁴⁹ Even if a court is able to discern the

¹⁴⁵ Others have noted this in a more general sense. See Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1738–50 (1989) (addressing the deleterious “implications of tort rhetoric”); Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 758 (2006) (“Using tort law to remedy torture [by the U.S. government] is like using nuisance law to handle the generation and disposal of hazardous wastes. In each situation, the problem is simply much bigger and badder than the problems for which the law was designed.”); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 686 (1997) (“It is dangerous to define constitutional claims as a narrow subset of tort law because tort law has been particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the center of constitutional law.”).

¹⁴⁶ See *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) (holding that an arresting officer must be able to point to particular facts, which taken together with inferences from those facts, reasonably warrants stopping and searching a suspect).

¹⁴⁷ DAN B. DOBBS, *THE LAW OF TORTS* § 28, at 52–53 (2000).

¹⁴⁸ See, e.g., *White v. Univ. of Idaho*, 797 P.2d 108, 109 (Idaho 1990) (reasoning that the intent requirement for battery is simply the intent to cause an unpermitted contact).

¹⁴⁹ See, e.g., *Caudle v. Betts*, 512 So. 2d 389, 390 (La. 1987) (“A harmful or offensive contact with a person, resulting from an act intended to cause him to suffer such a contact, is a battery.”). Professor Dan Dobbs suggests that the Restatement (Second) of Torts likely adopts this approach. See DOBBS, *supra* note 147, § 30, at 58–59 (discussing RESTATEMENT (SECOND) OF TORTS § 13 (1965)).

content of state law on this point—which is often much easier said than done¹⁵⁰—it could be quite difficult to apply in a stop-and-frisk context. If state law requires proof that the defendant intended his touching to be offensive, a court must grapple with the difficult and quite odd question of whether a stop-and-frisk was intentionally “offensive”? Put to the side the case where the officer knowingly violates the Fourth Amendment and simply wants to offend someone he dislikes. Consider instead the more difficult—and more common—case where an officer reasonably-but-mistakenly believes there is reasonable suspicion to frisk the plaintiff. On the one hand, it might be argued that the officer could be “substantially certain” that offense would ensue, which courts routinely hold is tantamount to intent.¹⁵¹ On the other hand, this would entail holding that reasonable behavior can simultaneously be “offensive,” clearly a discordant result. Resolving this conundrum will not be an easy task.

Custodial interrogation. A federal law enforcement officer approaches a pedestrian and states, “Could you step into my car to speak with me?” The officer knows that he does not have the authority to order her into the car, and is thus careful to phrase his words as a request rather than an order. The pedestrian complies, but only because she reasonably believes that the officer has ordered her to do so. Once inside the car, a constitutional violation has occurred.¹⁵² But has a tort been committed? Under the common law of most states, a valid claim for false imprisonment typically exists where “the defendant intentionally confined or instigated the confinement of the plaintiff . . . against her will.”¹⁵³ The confinement need not be overtly physical; it is enough if the plaintiff reasonably believes that she is not free to leave.¹⁵⁴ In this case, the facts make clear that the pedestrian reasonably believed

¹⁵⁰ See DOBBS, *supra* note 147, § 30, at 58 (explaining that, on this issue, “the Restatement and some of the cases are ambiguous”).

¹⁵¹ *E.g.*, Garratt v. Dailey, 279 P.2d 1091, 1093 (Wash. 1955) (citation omitted); see also RESTATEMENT (SECOND) OF TORTS, § 8A (1965) (stating that, in this context, an actor demonstrates intent if he acts believing that the consequences of his act are “substantially certain” to result from his act).

¹⁵² Florida v. Bostick, 501 U.S. 429, 435 (1991) (explaining that “[w]hen police attempt to question a person who is walking down the street” courts should ask if “a reasonable person would feel free to continue walking” to determine whether a seizure occurred).

¹⁵³ DOBBS, *supra* note 147, § 36, at 67 (citations omitted).

¹⁵⁴ See, e.g., DeAngelis v. Jamesway Dep’t Store, 501 A.2d 561, 562–63 (N.J. Super. Ct. App. Div. 1985) (holding that a seventeen-year-old subjected to shouting, verbal abuse, and the statement that she was not free to leave or talk to her parents could reasonably believe that she was not free to leave); Black v. Kroger, 527 S.W.2d 794, 796, 800 (Tex. Civ. App. 1975) (holding that an eighteen-year-old employee could reasonably believe she was not free to leave where placed in a windowless room with a single door and interrogated by her superiors).

that she had to comply with the officer's request. But did the officer intend to confine her? Certainly he desired that she get into the car, and desired that she remain there. Perhaps from his experience, he was "substantially certain" that his request would give rise to a feeling of obligation in the pedestrian. Yet it is also quite possible that he did not want her to feel confined, since any evidence he obtained in that fashion might be inadmissible at trial.¹⁵⁵ Thus, determining the existence of a valid false imprisonment claim will be a difficult task.

Undercover surveillance. Suppose a law enforcement officer infiltrates a community group ostensibly dedicated to the advancement of peaceful conflict resolution. The officer provides the group a false name and feigns agreement with the group's cause. Glad to have a new member, no one in the group asks whether the new "member" is actually a police officer or there for some other purpose. This behavior might be a Fourth Amendment violation, but it is unclear whether it would be a tort. Perhaps it could be cast as an intrusion upon seclusion, which involves an invasion into a plaintiff's private sphere, a place where the plaintiff had "reasonable expectation of privacy in the place, the materials involved, or the subject matter."¹⁵⁶ Under this standard, it is clear that the group members certainly had a reasonable expectation that their group would not be placed under surveillance—which is what seemed to occur in this situation. Indeed, courts have held that eavesdropping amounts to an unlawful intrusion.¹⁵⁷ Casting the officer's behavior as eavesdropping, however, is a bit misleading. He was sitting right in front of them during the entire meeting, an act to which the members clearly consented. One might argue that the officer obtained this consent through false pretenses, but this might entail some difficult line-drawing problems. No doubt many people join groups for a variety of reasons, some of which may not clearly align with the stated purpose of the group.¹⁵⁸ Thus, a court considering this case would be faced with difficult and uncommon questions of law not likely addressed in state tort doctrine.¹⁵⁹

¹⁵⁵ See *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (holding that evidence obtained in violation of a defendant's constitutional rights may not be used at trial against the defendant).

¹⁵⁶ DOBBS, *supra* note 147, § 426, at 1200.

¹⁵⁷ See, e.g., *Hamberger v. Eastman*, 206 A.2d 239, 241–42 (N.H. 1964) (holding that listening device implanted in wall of marital bedroom was an invasion of privacy); DOBBS, *supra* note 147, § 426, at 1202 (stating that electronic means of listening amount to "virtual trespass").

¹⁵⁸ As a case in point, the author of this Article once joined a dreadfully boring book group during law school simply because he had a crush on a woman in the group. (Cindy, if you're out there, I'm TOTALLY over you!!!!!!!)

¹⁵⁹ One might alternatively cast the officer's behavior as a trespass, though this would inevitably

Prison conditions. Suppose a prison deprives an inmate of access to a toilet for several days. This is an Eighth Amendment violation but may or may not be a tort.¹⁶⁰ While tort law does not generally impose a duty on individuals to affirmatively care for others, it does impose such a duty on “[o]ne who is required by law to take . . . the custody of another under circumstances such as to deprive the other of his [or her] normal opportunities for protection.”¹⁶¹ Under this duty, the prison must protect the inmate “against unreasonable risk of physical harm.”¹⁶² But a court considering this question would have to discern whether forcing another to forgo normal bodily functions for several days causes “physical harm” as recognized by that tort. Even if it were clear that the prisoner’s severe discomfort did not amount to physical harm, a court must also consider whether the deprivation would amount to an intentional infliction of emotional distress. Plaintiffs may collect for pure emotional distress upon a showing that the defendant intentionally or recklessly caused extreme emotional distress by extreme or outrageous conduct.¹⁶³ Even before delving into the case law (which is no doubt limited on this issue), it is immediately apparent that much of what prisons do—by design—is to cause emotional distress. Solitary confinement, dietary restrictions, and many other measures are routinely implemented to discipline prisoners.¹⁶⁴ While these measures

lead to the same problem, namely whether the group members consented to the officer’s behavior. See DOBBS, *supra* note 147, § 50, at 95 (explaining that consent is a defense to trespass).

¹⁶⁰ See *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (citing numerous cases on the minimum level of hygiene required by the Eighth Amendment).

¹⁶¹ RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965). For cases applying this duty to a prison, see *Delasky v. Village of Hinsdale*, 441 N.E.2d 367, 370–71, 373 (Ill. App. Ct. 1982) (holding that guards who failed to find a belt that an incoming prisoner used to hang himself were not negligent because the guards had no reason to know that the prisoner was suicidal); *Heumphreus v. State*, 334 N.W.2d 757, 760 (Iowa 1983) (finding that the survivors of a deceased prisoner may bring a tort action against the prison for alleged negligent post-heart attack care, if the attack was not work-related); *Lang v. City of Des Moines*, 294 N.W.2d 557, 562 (Iowa 1980) (holding that, in a wrongful death action for the death of a prisoner, while police officers could not force a prisoner to submit to detoxification treatment against her will and owed no duty to return to the treatment center, they did have a duty to give aid upon knowledge that the decedent was injured); *Thornton v. City of Flint*, 197 N.W.2d 485, 491–92 (Mich. Ct. App. 1972) (holding that the duty of care to a prisoner increases when police officer is aware or should be aware of a prisoner’s special condition that places the prisoner at peril); *Shea v. City of Spokane*, 562 P.2d 264, 267–68 (Wash. Ct. App. 1977) (holding that the city owed a nondelegable duty to provide adequate medical care and treatment to its inmates); *Brownelli v. McCaughtry*, 514 N.W.2d 48, 50–51 (Wis. Ct. App. 1994) (holding that prison employees owe a duty to provide prisoners with prompt medical attention).

¹⁶² RESTATEMENT (SECOND) OF TORTS § 314A(1)(a) (1965).

¹⁶³ *Id.* § 46(1).

¹⁶⁴ See *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (noting that “prisoners do not shed all constitutional rights at the prison gate but ‘lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system’”) (internal citations omitted); *Williams v. Coughlin*, 875 F. Supp. 1004, 1011 (W.D.N.Y.

sometimes transgress the Eighth Amendment, it will be quite difficult to determine whether they also amount to an intentional infliction of emotional distress.

A warrantless e-mail interception. Suppose the federal government develops a program to intercept and read all e-mails sent within the United States containing a combination of words often seen in e-mails between known terrorists. Such a program would be unconstitutional,¹⁶⁵ but would it be a tortious intrusion upon seclusion? As noted above, a claim for this tort exists where one “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . [and] the intrusion would be highly offensive to a reasonable person.”¹⁶⁶ “The case law is clear that the offensiveness of the invasion . . . turns on the reasons and intentions of the invader.”¹⁶⁷ Thus, where one invades another’s privacy simply for personal gratification, whether through the use of peep holes,¹⁶⁸ listening devices,¹⁶⁹ or opening of another’s

1995) (noting that “while no court has explicitly held that denial of food is a per se violation of a prisoner’s Eighth Amendment rights, under certain circumstances a substantial deprivation of food may well be recognized as being of constitutional dimension”) (citation omitted).

¹⁶⁵ See *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that the Fourth Amendment protects against unreasonable searches and seizures regardless of whether there is a physical intrusion). Note that a program intercepting emails arriving from abroad may be constitutional. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 308 (1972) (noting that the *Katz* rule may not apply in circumstances where the president exercises his “surveillance power with respect to the activities of foreign powers, within or without this country”). Several other courts have come to similar conclusions. See *United States v. Truong*, 629 F.2d 908, 914 (4th Cir. 1980) (holding that “because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.”); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) (holding that “[f]oreign security wiretaps are a recognized exception to the general warrant requirement and disclosure of wiretaps not involving illegal surveillance is within the trial court’s discretion”); *United States v. Butenko*, 494 F.2d 593, 605–06 (3d Cir. 1974) (en banc) (holding that “a warrant prior to search is not an absolute prerequisite in the foreign intelligence field when the President has authorized surveillance”); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (holding “that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence”).

¹⁶⁶ *Miller v. Nat’l Broad. Co.*, 232 Cal. Rptr. 668, 678 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1976)).

¹⁶⁷ Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 35 (2000); see also *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (“We agree . . . that all the circumstances of an intrusion, including the motives or justification of the intruder are pertinent to the offensiveness element. Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.”).

¹⁶⁸ See, e.g., *Miller v. Brooks*, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996) (holding that the use of a hidden video camera in a bedroom by an estranged wife was a privacy violation); *Geraci v. Conte*, No. 72440, 1998 Ohio App. LEXIS 2727, at **3, 6–8 (Ohio Ct. App. June 18, 1998) (holding installation of one-way mirror an invasion of privacy).

¹⁶⁹ See, e.g., *Hamberger v. Eastman* 206 A.2d 239, 241–42 (N.H. 1964) (holding that listening device implanted in wall of marital bedroom was an invasion of privacy).

mail,¹⁷⁰ a jury can clearly find the intrusion offensive. Alternatively, where one invades the privacy of another for a legitimate purpose, such as the protection of another or the prevention of unlawful behavior, an intrusion may not be offensive. Thus, where a former husband takes pictures of his ex-wife's lesbian lover in the nude in order to document the risk to his daughter who is living with the couple, there is no invasion of privacy.¹⁷¹ Or where a landowner is concerned that his neighbor is improperly disposing of hazardous waste, and he employs a camera, binoculars and a high-powered telescope, there is no offensive intrusion.¹⁷² Under this standard, a federal district court would be at quite a loss trying to determine whether, under state tort law, the government's interest in national security was significant enough to offset the intrusive nature of the e-mail interception. While it is clear that protection of others is a legitimate reason to invade another's privacy, a nationwide e-mail intercept program bears little resemblance to neighbors wielding binoculars and cameras. A federal court can do little more than simply guess how state law would address a case of such national concern.

The point of these examples is not to demonstrate that tort law will fail to sanction misbehavior by government officials. It is certainly possible that state law could render the government official liable in tort in any of the examples above. Rather, the point here is that tort law—having evolved for hundreds of years to address the interactions between private persons—is unlikely to contain clear answers when called on to regulate the interactions between the government and private persons.

It is important here to clarify the scope of this argument against the use of state remedies. I have demonstrated that state remedies should be ignored because a court hearing a constitutional tort action will never be able to know with any certainty whether state law will in fact provide a remedy. One might point out that, because the provision of a remedy will ultimately fall to a jury and its assessment of the evidence, it will always

¹⁷⁰ See, e.g., *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976) (holding that opening of another's mail without permission was an intrusion upon seclusion).

¹⁷¹ *Plaxico v. Michael*, 735 So. 2d 1036, 1039–40 (Miss. 1999) (explaining that the ex-husband's invasion was justified because he sought to secure the "welfare of his daughter").

¹⁷² *N.O.C., Inc. v. Schaefer*, 484 A.2d 729, 730–31 (N.J. Super. Ct. Law Div. 1984); see also *Parish v. Nat'l Bank v. C.E. Lane*, 397 So. 2d 1282, 1286–87 (La. 1981) (holding that bank's intrusion into debtor's property to appraise it was justified considering the bank's financial interest); *Saldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382, 383–84 (Mich. Ct. App. 1989) (holding that use of a 1200 millimeter telephoto lens to record one's movements was not an invasion of privacy because the defendant "had a legitimate right to investigate" whether the plaintiff's claimed injuries were actual); *PETA v. Bobby Berosini, Ltd.* 895 P.2d 1269, 1280–81 (Nev. 1995) (holding that the use of a hidden camera to record animal abuses did not invade any privacy interests).

be impossible—regardless of the applicable legal regime—to determine whether relief will issue. This misses an important distinction, however. I do not argue that a court must ignore state law because it can never know the results of a jury trial applying tort law, but because a court can never adequately know the content of state law itself. A court entertaining a constitutional tort action must always assume that the allegations in the complaint are true. If those allegations state a violation of the U.S. Constitution, a court should not dismiss the suit unless it can be sure that those same allegations also state a violation of state tort law. Because the content of state tort law as applied to alleged unconstitutional behavior will often be vague, a court will rarely know this. As such, it should ignore state remedies in constitutional tort actions.

B. *Procedural Challenges to Ascertaining the Content of State Law*

Even if a particularly talented jurist was up to tackling complicated questions about whether an officer's intentional pat down was intentionally offensive, the task will only be made more difficult (if not impossible) by the stage in the suit at which such questions will most likely arise. In a typical *Bivens* suit, for example, a court will most likely be called on to determine the existence of alternative state remedies when moved by the defendant to dismiss the case.¹⁷³ Motions to dismiss, of course, are filed long before any discovery has taken place. Thus, in assessing whether a remedy is available in practice under state law, courts will be limited to the pleadings.

Of course, these pleadings will be styled with an eye towards a federal, rather than a state, cause of action. They are thus unlikely to contain any allegation that the government officer, for example, intended his touching to be offensive. Although courts have the well-established prerogative to “look behind” the pleadings in resolving motions to dismiss,¹⁷⁴ there is little precedent for the type of searching inquiry necessitated by inquiring into the availability of state remedies. The only option for the court at this point, one presumes, is to solicit affidavits or live testimony from the parties. Of course, the parties have not had any opportunity for discovery

¹⁷³ See, e.g., *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005) (deciding state remedy question upon defendant's motion to dismiss), *rev'd in part*, 449 F.3d 1097 (10th Cir. 2006).

¹⁷⁴ See *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993) (“A plaintiff is under no obligation to attach to her complaint documents upon which her action is based, but a defendant may introduce certain pertinent documents if the plaintiff failed to do so.”); *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988) (stating that “not every document referred to in a complaint may be considered incorporated by reference[,]” although documents may be considered when there is no prejudice to the opposing party); *Field v. Trump*, 850 F.2d 938, 949 (2d Cir. 1988) (stating that the court may consider other information when a failure to submit the material “does not constitute actionable nondisclosure”); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1327, at 438–39 (3d ed. 2004) (stating that the pleader may “attach a copy of the writing on which his claim for relief or defense is based”).

and thus are unlikely to be able to allege facts sufficient to make out a prima facie tort claim. The court could perhaps avoid this by holding the motion to dismiss in abeyance until discovery could be completed. The burdens of this would be excessive, however. The court would be called on to hold a mini trial or resolve de facto summary judgment motions on a purely legal issue—whether a federal cause of action exists. Moreover, this would create perverse incentives for the parties. The plaintiff, to maintain her constitutional tort action, would be called on to marshal evidence that, for example, the officer did not intend his touching to be offensive and the defendant would be called upon to marshal evidence that he intended his touching to be offensive. One doubts whether the parties will be willing to provide such evidence, thus depriving the judge of information sufficient to rule on the existence of alternative state remedies.

To make matters worse, consider the situation where the district court mistakenly concludes that a state remedy exists, and thus inappropriately dismisses the suit. The plaintiff then files a suit under state tort law, only to be informed by the next judge that no such cause of action exists. Having realized only now that the first court erred, the plaintiff is out of time to file an appeal in the first case. This Catch-22 can only be avoided if the first court dismisses the suit without prejudice. Of course, if the court were to do this as a matter of practice, litigants would be free to refile their *Bivens* actions over and over again.¹⁷⁵ While this is not a common practice with most litigants, inmates have been known to pepper the legal system with more than their fair share of lawsuits.¹⁷⁶

Yet, the situation can become even more absurd than this. Take for example the following case:

Freedom of Speech. Suppose the president of an influential company that manufactures mail-sorting technology publicly criticizes the U.S. Postal Service for its poor technology choices. Insulted by the comments, several Postal officers seek to punish the president by accusing him of involvement in an illegal kickback scheme and later instigating criminal charges against him. Although a grand jury indicted the president based on scattered evidence, a federal court, after a six-week trial, acquitted him of all charges. While the actions of postal officers and the federal prosecutor violate the First Amendment speech clause,¹⁷⁷ it

¹⁷⁵ See *Hawkins v. McHugh*, 46 F.3d 10, 12 (5th Cir. 1995) (“A federal court that dismisses without prejudice a suit arising from a federal statutory cause of action has not adjudicated the suit on its merits, and leaves the parties in the same legal position as if no suit had been filed.”).

¹⁷⁶ Indeed, Congress considered this such a problem that it attempted to curtail such suits through the Prison Litigation Reform Act. 28 U.S.C. § 1915 (2000).

¹⁷⁷ See *Hartman v. Moore*, 126 S. Ct. 1695, 1701 (2006) (“[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory

is unclear whether a state tort remedy exists. While many states recognize malicious prosecution suits, plaintiffs must typically demonstrate the absence of probable cause in the underlying action.¹⁷⁸ Thus, to determine whether an alternative state remedy existed, the court must determine whether probable cause existed in this case. That in turn would require the court to reassess the grand jury's decision, a task that can only be completed upon a complete review of the physical and oral evidence.¹⁷⁹

One immediately wonders how a court is to undertake that task. Is the court to call a hearing in which all the witnesses who testified before the grand jury will testify again before the court? Such would result in a mini-trial on the facts—all for the purpose of determining a purely legal issue, whether a cause of action exists. This is a confounding situation for both the judge and parties and is patently unworkable.

C. Deleterious Effects of Attempting to Ascertain State Law

Despite the difficulties determining whether state remedies exist for allegations in the plaintiff's, the mere *attempt* of ascertaining state remedies may have unfortunate consequences for state law. Judges and scholars have long recognized the risk that ensues anytime the courts of one sovereign interpret the laws of another sovereign. The risk has been particularly acute ever since *Erie Railroad Co. v. Tompkins*, which held that federal courts hearing state law claims must apply both the statutory and common law of the state whose law controls the case.¹⁸⁰ After *Erie*, federal courts hearing a state law tort suit, for example, are called on to search state court opinions (rather than just the state statutes) for the applicable law.¹⁸¹ In many instances, the reporters contain clear answers. Landowners have no duty towards unforeseeable trespassers, but do have a duty to warn licensees and invitees of non-obvious dangers.¹⁸² Occasionally, however, a particular case presents an issue that the state supreme court has not yet decided. In those cases, federal courts are called on to engage in a delicate act of prediction. They "must forecast the position the supreme court of the forum would take on the issue."¹⁸³ This

actions, including criminal prosecutions, for speaking out.") (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)).

¹⁷⁸ DOBBS, *supra* note 147, § 430, at 1215.

¹⁷⁹ The facts of this case are adopted from those in *Hartman*, 126 S. Ct. at 1699.

¹⁸⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹⁸¹ *Id.*

¹⁸² See, e.g., *Micromanolis v. Woods Sch., Inc.*, 989 F.2d 696, 698 (3d Cir. 1993) (stating that "[u]nder Pennsylvania law, '[t]he standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering is a trespassor [sic], licensee, or invitee'") (quoting *Carrender v. Fitterer*, 469 A.2d 120, 123 (1983)).

¹⁸³ *Clark v. Modern Group Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993); see also *Travelers Ins. Co. v. 633*

is no easy task and federal courts undoubtedly get it wrong in many instances.¹⁸⁴ Thus, as many scholars have noted, such interjurisdictional interpretations have “the potential to create a variety of problems, from the minor to the chaotic.”¹⁸⁵

Thus, assessing the availability of state remedies in constitutional tort actions, inasmuch as it invites federal rulings in areas of unsettled state law, may have deleterious effects on state law and, more broadly, federal-state relations. While some issues of state law will undoubtedly be clear to federal courts, two factors suggest that federal courts will encounter an uncommon number of unsettled state law questions in this area. First, as recognized in the several examples above, many acts by federal officials will appear wrongful in some general sense but not necessarily fit neatly into a state law cause of action.¹⁸⁶ Federal courts will repeatedly be called on to venture into uncharted waters, searching for a state cause of action

Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994) (“Where the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity.”); *Belline v. K-Mart Corp.*, 940 F.2d 184, 186 (7th Cir. 1991) (noting that federal courts sitting in diversity “must strive to parse state law and, if necessary, forecast its path of evolution”).

¹⁸⁴ Mistakes of this sort are sometimes avoided by using state certification statutes, which roughly mimic the principle (though not procedure) established in *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499–500 (1941). See 17A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248, at 482–483 (3d ed. 2007) (explaining that most states now have certification statutes allowing their courts to answer certified questions). Using this tool, federal courts are permitted to certify novel state law questions to state high courts. Although certification is rather commonplace today, many call for its increased usage. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (chiding lower courts for failing to employ certification often enough). In Part IV, *infra*, I consider whether certification might ameliorate the state remedy rule’s deleterious effect on state law. There, I express doubt as to the usefulness of the procedure.

¹⁸⁵ Friedman, *supra* note 48, at 1238; see also Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 & n.3 (2003) (listing instances where federal courts have erroneously interpreted state law and noting the sometimes long delay before such interpretations are rectified by state courts); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1677–79 (1992) (explaining the effects of diversity jurisdiction on state law). Indeed, one commentator has argued that such “predicative” adjudication is unconstitutional. See generally Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459 (1997).

It is true that some scholars have found interjurisdictional decisions to have salutary effects on state and federal law. See, e.g., Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505–06 n.116 (discussing the usefulness of having multiple interpreters of federal law); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1467 (1999) (noting that “territorial or systemic boundaries need not disqualify a court from making a valuable contribution to the ongoing interpretive exercise”); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 HARV. L. REV. 317, 325 (1977) (performing empirical study of federal diversity cases and noting federal contribution to development of state law). While there is certainly some truth to this, it is doubtful whether the odd questions of law posed by the above hypotheticals are ripe for development by the federal courts. Indeed, if the values of federal interpretation of state law include “reconciling or distinguishing existing precedent, [or] synthesizing and analyzing state law,” it seems doubtful that there will be any relevant precedent to reconcile, distinguish, synthesize or analyze. *Id.* at 325–26.

¹⁸⁶ See *supra* notes 131–65 and accompanying text.

into which they can shoehorn a constitutional claim. Of course, the federal courts might decline to find such a cause of action unless it was clearly established. But there is reason—and this is the second point—to think this may not happen in *Bivens* cases. The Supreme Court has strongly admonished courts to exercise “caution toward extending *Bivens* remedies into any new context.”¹⁸⁷ Indeed, in the *Peoples* case discussed earlier, the Tenth Circuit specifically cited this “caution” as a type of “tie-breaker” suggesting that the *Bivens* action should not be implied.¹⁸⁸ As the court explained, “[w]hile there certainly are points to be made that would favor implying a *Bivens* claim in such a scenario, we are reminded that the ‘caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.’”¹⁸⁹ Thus, under the state remedy rule, lower federal courts will face a significant number of cases having an uncommon risk of disrupting state law and, instead of backing away from such a risk, will feel a duty to convert—and perhaps contort—constitutional claims into state law causes of action.

D. *Bivens*-based Reasons to Ignore State Remedies

Thus far I have presented arguments for ignoring state remedies in both *Bivens* and Section 1983 actions. In this Part, I offer two additional reasons, unique to *Bivens* suits, to ignore state remedies. As explained below, the reliance on state remedies in *Bivens* actions completely misapprehends the reason why “alternative remedies” have sometimes been relevant in *Bivens* actions. Additionally, relying on state remedies, when done in tandem with mandatory provisions of the Federal Tort Claims Act, squarely contradicts *Carlson v. Green*—a case that is indispensable to the Court’s current *Bivens* jurisprudence.

1. *Alternative Remedies*

At the inception of the *Bivens* doctrine, the Supreme Court crafted a rule to accommodate two competing principles. One principle—which has been termed the “very essence of civil liberty,”—recognizes “the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁹⁰ In implying a damages remedy directly under the Constitution, however, the Court necessarily addressed a second, competing principle: separation of powers. Because Congress clearly has

¹⁸⁷ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to extend the holding of *Bivens*).

¹⁸⁸ *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1103 (10th Cir. 2005) (quoting *Malesko*, 534 U.S. at 74).

¹⁸⁹ *Id.*

¹⁹⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1 Cranch 137) (1803)).

the authority to sanction a damages action against federal officers (and has done just that with respect to state officers¹⁹¹), the Supreme Court tread carefully in implying a remedy. Thus, to respect the prerogatives of Congress without unduly withholding remedies from the injured, the Court refused to imply a damages action where, as stated in *Carlson v. Green*, “special factors counsel[] hesitation in the absence of affirmative action by Congress,” or where “Congress has provided an alternative remedy.”¹⁹²

Thus, the alternative remedy rule was born. Since creating the *Bivens* action, the Supreme Court has refused to imply a damages remedy due to alternative remedies only three times. In *Bush v. Lucas*, a federal employee sued his superior for a violation of his First Amendment rights.¹⁹³ The Court refused to imply a damages action, however, because “comprehensive procedural and substantive provisions” passed by Congress gave the plaintiff “meaningful remedies.”¹⁹⁴ Similarly, in *Schweiker v. Chilicky*, the Court barred a plaintiff from pursuing social security benefits in a *Bivens* action because Congress has addressed the problems alleged by the plaintiff through the creation of wide-ranging administrative remedies.¹⁹⁵ Finally, in *Correctional Services Corp. v. Malesko*, the Court again held that *Bivens* actions should only be implied where a “plaintiff . . . lack[s] any alternative remedy.”¹⁹⁶ In the Court’s view, the *Malesko* plaintiff—a prisoner alleging Eighth Amendment violations—could seek relief via the federal Bureau of Prisons’ “Administrative Remedy Program” or bring a tort suit under state law.¹⁹⁷

Looking at these three cases, one can easily see the place where the alternative remedy rule ran off track. While the alternative remedies in *Bush* and *Schweiker* were federal, *Malesko* introduced state remedies as a viable alternative. *Malesko* was authored by Chief Justice Rehnquist, who had long been hostile to *Bivens* in general.¹⁹⁸ Thus, one might read the opinion as an attempt to curtail the overall availability of *Bivens* actions. Whatever one makes of this goal, it is undeniable that the methods employed to accomplish this have no basis within the *Bivens* doctrine. The purpose of inquiring into “alternative remedies” is to pay heed to

¹⁹¹ 42 U.S.C. § 1983 (2000).

¹⁹² *Carlson v. Green*, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396).

¹⁹³ *Bush v. Lucas*, 462 U.S. 367, 368–69 (1983).

¹⁹⁴ *Id.* at 368.

¹⁹⁵ *Schweiker v. Chilicky*, 487 U.S. 412, 424–25, 429 (1988).

¹⁹⁶ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (emphasis omitted).

¹⁹⁷ *Id.* at 73–74.

¹⁹⁸ Interestingly, Chief Justice Rehnquist authored another opinion making an unprecedented, and in the minds of some, unjustified use of state remedies. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643–45 (1999) (holding that the unconstitutionality of patent infringement by a state government turned in part on the “availability of state remedies”); see also Wells, *supra* note 124, at 1667 (arguing that, “in awarding constitutional status to state remedies, *Florida Prepaid* seems to depart significantly from established law, for the rule has been that the Constitution is violated when the state official acts, no matter what state remedies may be available”).

separation of powers principles, which properly recognize that Congress has the authority to create its own remedial schemes. State prerogatives have no place in *Bivens* suits, or the behavior giving rise to them. Such suits measure the actions of *federal* officers against the *federal* constitution, and are almost always litigated in *federal* court.¹⁹⁹

2. *Carlson v. Green*

Even if one could elide those doctrinal considerations, however, it is impossible to ignore the conflict with *Carlson v. Green* created by the reliance on state remedies.²⁰⁰ The conflict arises from the operation of the Westfall Act, addressed earlier.²⁰¹ Recall that, under the Westfall Act, tort actions against federal officers are recast as suits against the federal government itself.²⁰² Thus, if a plaintiff files a *Bivens* action that is dismissed because state remedies exist, and the plaintiff then re-alleges her claims against the federal officer in tort, her suit would be converted into a tort action against the United States under the FTCA. In sum, therefore, the state remedy rule holds that FTCA actions against the federal government are sufficient alternatives displacing the *Bivens* action.

This is problematic because, in *Carlson v. Green*, the Supreme Court held that a FTCA suit was *not* a sufficient alternative to a *Bivens* suit.²⁰³ The Court offered two reasons why it was not an alternative: (1) it was against the United States rather than against the individual federal officer, and (2) it did not provide access to punitive damages and a jury trial.²⁰⁴ To be sure, and as noted earlier,²⁰⁵ the Court has retreated a bit from its language in *Carlson*. A suit in which punitive damages are unavailable or capped, although perhaps not equally effective as *Bivens* remedies, may still provide meaningful relief.²⁰⁶ Meaningful relief from an alternative source makes the *Bivens* action unnecessary.²⁰⁷ Despite the Court's retreat on this issue, however, it has steadfastly held true to its belief that claims against organizations—rather than against individual members of those

¹⁹⁹ Although state courts are obligated to hear federal questions brought before them, see *Testa v. Katt*, 330 U.S. 386, 389 (1947), *Bivens* suits are rarely filed in state courts. Even when they are, federal defendants almost uniformly remove the case to federal court under the federal officer removal statute. See 28 U.S.C. § 1442 (2000) (establishing that a civil action against a federal officer commenced in state court may be removed to federal court).

²⁰⁰ *Carlson v. Green*, 446 U.S. 14, 23–24 (1980).

²⁰¹ See *supra* notes 124–128 and accompanying text.

²⁰² See *supra* notes 117–118 and accompanying text.

²⁰³ *Carlson*, 446 U.S. at 23.

²⁰⁴ *Id.* at 21–22.

²⁰⁵ See *supra* notes 15–22 and accompanying text.

²⁰⁶ See *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (holding that “remedies [that] do not provide complete relief for the plaintiff” may still be alternative remedies that displace the *Bivens* cause of action).

²⁰⁷ See *Davis v. Passman*, 442 U.S. 228, 248 (1979) (“And, of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated.”) (citation omitted).

organizations—do not have a deterrent effect on individual conduct and therefore should not give rise to *Bivens* suits.²⁰⁸

For instance, in *FDIC v. Meyer*, the Court considered whether a *Bivens* action should be implied for claims against federal agencies.²⁰⁹ Declining to imply a cause of action in such cases, the Court explained that if it “impl[ie]d a damages action directly against federal agencies . . . there would be no reason . . . to bring damages actions against individual officers. . . . [T]he deterrent effects of the *Bivens* remedy would be lost.”²¹⁰ In a more recent case, *Correctional Services Corp. v. Malesko*, the Court considered whether a *Bivens* action should be implied for a claim against a private prison corporation hired by the Federal Bureau of Prisons to house federal inmates.²¹¹ Although the alleged harm was committed by an employee of the prison, the plaintiff brought suit against the prison corporation using a respondeat superior theory of liability. Holding closely to *Meyer*, the Supreme Court again declined to imply a *Bivens* action.²¹² “For if a corporate defendant is available for suit,” the Court explained, “claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.”²¹³ Accordingly, because the “threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*,” a cause of action should not be implied.²¹⁴

Thus, the theory first advanced in *Carlson*—that suits against the United States are insufficient alternatives to *Bivens* actions because any deterrent effect would be weak or inoperative—is still alive and strong in Supreme Court jurisprudence. Yet, the emerging reliance on state remedies, when taken together with the Westfall Act, holds that suits against the federal government under the FTCA are sufficient alternative remedies. This position is untenable. A plaintiff would be denied access to a *Bivens* action because she has sufficient alternative remedies, except that the alternative remedies she has are the *exact remedies* the Supreme Court has thrice determined to be insufficient.

Finally, lest it be argued that overruling *Carlson* is a viable way out of this mess, one should bear in mind that *Carlson* played an important role in

²⁰⁸ Some scholars take issue with this conception of deterrence. See Lumen N. Mulligan, *Why Bivens Won't Die: The Legacy of Peoples v. CCA Detention Centers*, 83 DENV. U. L. REV. 685, 692 n.62 (2006) (explaining that the argument “runs contrary to the fundamental tort principle of respondeat superior, as well as common sense”).

²⁰⁹ *FDIC v. Meyer*, 510 U.S. 471, 473 (1994).

²¹⁰ *Id.* at 485.

²¹¹ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001). Correctional Services Corporation qualified as a federal actor because of its contractual relationship with the federal government. *Id.* Thus, while the plaintiff’s suit failed for other reasons, there was no “state action” problem with his claims.

²¹² *Id.* at 71.

²¹³ *Id.* (citation omitted).

²¹⁴ *Id.* at 70 (citation omitted).

other key *Bivens* cases. In both *Meyer* and *Malesko*, the majority relied on *Carlson* to deny the cause of action to plaintiffs suing organizations.²¹⁵ Were *Carlson*'s original holding that individual actors are not deterred by assessing damages against the individual's organization to be overruled, both *Meyer* and *Malesko* would be severely undercut.²¹⁶ If limiting the *Bivens* remedy is a goal of some, then overruling *Carlson* and formally adopting the state remedy rule is a bad idea. It would only expand the *Bivens* remedy. Thus, whether one sides with the majority or minority in *Carlson*, *Meyer*, and *Malesko*, *Carlson* has to stay and the reliance on state remedies has to go.

* * *

In sum, relying on the availability of state remedies in constitutional tort actions is unwise not because state courts or state law will be hostile to federal rights, but because it will rarely be clear whether state law will ever provide relief for alleged unconstitutional behavior. A complaint alleging a facially valid constitutional tort should not be dismissed merely upon the *possibility* that the complaint presents a claim under state law. Since the enactment of the Fourteenth Amendment and related statutes, federal rights have been regarded as primary and not contingent upon whether state law also provides relief. Though the reasons for this may be different today than before, the rule remains justified.

VI. THE PROBLEMS WITH CERTIFICATION

In light of the foregoing problems with the state remedy rule, the way forward is relatively clear; federal courts should not attempt to opine on the merits of state tort law in constitutional tort actions. In this Part, I explain and dismiss one potentially viable alternative: certification.

After *Erie*, federal courts were increasingly presented with unclear or novel questions of state law. In these situations, federal courts did their best to "predict" how the state supreme court would answer the question. Of course, as noted above, this effort at prediction carries the inherent risk that the federal court will answer the question incorrectly.²¹⁷ Within a decade after *Erie*, the prospect of partnering with state courts in diversity actions developed.²¹⁸ Yet it was not until the 1970s that certification statutes spread nationwide.²¹⁹ Now nearly every state in the union currently empowers their highest court to resolve questions of state law

²¹⁵ *Meyer*, 510 U.S. at 485; *Malesko*, 534 U.S. at 67–68.

²¹⁶ *Meyer*, 510 U.S. at 473–74; *Malesko*, 543 U.S. at 70.

²¹⁷ See *supra* notes 170–73 and accompanying text.

²¹⁸ See WRIGHT ET AL., *supra* note 139, § 4248 (providing a history of certification).

²¹⁹ *Id.* § 4248 at 489–90.

before federal courts.²²⁰ The procedure has gained wide acceptance, such that some claim that one solution to the friction between state and federal courts is to “certify, certify, certify.”²²¹

Under the typical certification statute, a state’s highest court may resolve a question of state law presented in a federal suit “if the answer may be determinative of an issue pending in the [federal] litigation . . . and there is no controlling appellate decision, constitutional provision, or statute of this State.”²²² Empowering the high court of a state to resolve these questions is thought to have two main benefits. For one, the procedure is thought to be “uniquely suited to further the principles of judicial federalism underlying the Supreme Court’s decision in *Erie*.”²²³ In this way, it prevents federal courts from “sully[ing] the integrity of state law.”²²⁴ For another, certification is thought to “save time, energy, and resources.”²²⁵ Of course, this benefit seems to accrue mainly to the federal judiciary since certification clearly increases the workload of state high courts. Moreover, the alleged time savings are relative; certification is a speedier process than its more cumbersome cousin, *Pullman* abstention,²²⁶ but it still slows the disposition of a case, sometimes dramatically.²²⁷ This is likely why federal judges, despite their appreciation for federal-state comity,²²⁸ often decline to certify state questions to state courts.²²⁹

At first glance, certification might seem to be a perfect solution to the problem created by relying on state remedies. After all, “[s]tate courts enjoy the benefit of having the final say on matters of state law” and “[f]ederal courts are able to avoid the awkward, tenuous, and difficult chore of attempting to determine how a state high court would rule on a

²²⁰ *Id.* § 4248 at 495 n.30 (listing current certification statutes).

²²¹ Calabresi, *supra* note 111, at 1301; *see also* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–76 (1997) (urging certification in any case involving “unsettled state law issues”).

²²² Unif. Certification of Questions of Law (Act) (Rule) 1995 § 3, 12 U.L.A. 74 (1996).

²²³ Clark, *supra* note 185, at 1550.

²²⁴ Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 683 (1995).

²²⁵ *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974).

²²⁶ *See R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (referring cases to state trial courts for resolution of state law issue where question of state law is antecedent to question of federal constitutional law).

²²⁷ *See Kansallis Fin. Ltd. v. Fern*, 659 N.E.2d 731, 732 (Mass. 1996) (fourteen months before certified question answered); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 61 F.3d 6, 7 (2d Cir. 1995) (fourteen months); *Savona v. Prudential Ins. Co.*, 51 F.3d 241, 241 (11th Cir. 1995) (two years); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 604 (9th Cir. 1993) (seventeen months); *Cuesnongle v. Ramos*, 835 F.2d 1486, 1490–93 (1st Cir. 1987) (between two and three years); *Toner v. Lederle Labs.*, 828 F.2d 510, 511 (9th Cir. 1987) (thirteen months); *Wood v. City of E. Providence*, 811 F.2d 677, 678 (1st Cir. 1987) (six years).

²²⁸ *See JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE* 66 (1995) (stating that, based on a survey by the American Judicature Society and the State Justice Institute, “[a]lmost all of the circuit judges (93%), district judges (86%), and state justices (87%) agree that certification improves federal-state comity”).

²²⁹ *See id.* at 54 (stating that delay is the most common point of federal judge’s dissatisfaction with certification).

matter of state law."²³⁰ While it is true that certification offers these benefits, it is far from certain that the state law questions presented in constitutional tort actions will be amenable to certification. For one, certification is impossible without a well-developed factual record. Indeed, "many receiving courts simply will not answer the questions presented in the absence of resolved or stipulated facts."²³¹ As explained above, however, it is unlikely that the factual record will be developed at the time when a dispute arises as to the content of state law.²³² While the dispute might be put off until the facts can be developed through discovery, the parties will find themselves in an awkward position.

Moreover, even if a question of state law could be supported by a factual predicate sufficient for a state court to answer a certified question, it is dubious that state courts will appreciate the "benefit of having the final say on matters of state law" in such cases.²³³ For example, it is one thing to ask a state court to opine on whether damages for pure emotional distress are available, but it is another to ask that court whether a prison may be held liable for the intentional infliction of emotional distress. Many certified questions are unlikely to have even the slightest precedent in state law because, like the examples offered above, they have long been resolved under constitutional, rather than state, law.²³⁴ These questions are likely to confound state courts and force them to engage in various doctrinal contortions. Indeed, state courts may come to feel that they, rather than the federal government, are being drafted into a civil rights enforcement regime that was previously assumed almost solely by the federal courts. Though the states certainly share a duty to enforce civil rights, shifting this duty to the state courts through certification is hardly the picture of state-federal comity for which certification is touted.

Finally, even if federal courts are able to certify state law questions adequately, and state courts willingly resolve them, one must still question whether the ultimate cost is worth the procedural burden. With regard to *Bivens* actions at least, using certification is merely to throw good federalism after bad. It is good federalism to offer state courts a chance to opine on matters of state law, but the need for such comity only arises because bad federalism is being practiced elsewhere in the doctrinal framework. There is no federalist justification for relying on state remedies in a damages action against a federal officer predicated on a federal constitutional violation. State interests are wholly absent. Only where the state interest is manufactured (by relying on state remedies in the

²³⁰ Nash, *supra* note 185, at 1674.

²³¹ Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 153 (1992).

²³² See text accompanying notes 173-78.

²³³ Nash, *supra* note 185, at 1674.

²³⁴ See text accompanying notes 146-72.

first place) does the need for certification arise. The solution, therefore, is not certification, but rejecting state remedies in the first place. With regard to Section 1983 actions, it is dubious that state interests are significantly furthered through certification in these situations. While the procedure grants state courts a role in regulating the conduct of state officers, it certainly does not relieve states of their preexisting duty to impose federal constitutional constraints on state officers. State courts, through their criminal and habeas dockets, routinely apply federal civil rights laws against their own officers. Similarly, federal courts, through their habeas docket, routinely review state officer behavior for compliance with federal constitutional requirements.²³⁵ Thus, using certification in Section 1983 suits will not insulate states from intrusive federal laws and adjudication. Certification or not, such “intrusions” will persist and the marginal value of certification in thus vanishingly small in Section 1983 suits.

VII. CONCLUSION

In the field of constitutional torts, there has long raged a debate about whether such actions should be seen as *constitutional* torts or constitutional *torts*. While there are arguments to be made in favor of both positions, there is little argument to be made for the use of tort law itself in constitutional tort actions. Ignoring state tort remedies, while perhaps originally justified due to the hostility of state courts and state law, remains justified because, short of entirely separate adjudication, it will never be clear whether tort law will indeed provide relief. Certification cannot likely mollify this problem without simultaneously imposing unnecessary costs. State tort remedies should therefore be irrelevant to constitutional tort actions in the future.

²³⁵ 28 U.S.C. § 2254 (2000).