FEDERAL TORT LIABILITY AFTER *EGBERT V. BOULE*: THE CASE FOR RESTORING THE OFFICER SUIT AT COMMON LAW

James E. Pfander & Rex N. Alley

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FEDERAL TORT LIABILITY AFTER *EGBERT V. BOULE*: THE CASE FOR RESTORING THE OFFICER SUIT AT COMMON LAW

James E. Pfander[*] *& Rex N. Alley*[**]

Throughout the nineteenth century and much of the twentieth, remedies for federal government misconduct were often predicated on rights to sue conferred by such common law forms as trespass, assumpsit, and ejectment. But Erie*, the law-equity merger, and other factors pushed those common law forms to the side. In 1946, Congress adopted the Federal Tort Claims Act (FTCA), imposing vicarious liability on the federal government for many of the torts of its officers and employees. Then, in the 1970s, the Supreme Court recognized federal common law rights to sue federal officers for certain constitutional torts under the* Bivens *doctrine.*

Yet these expanded remedies, available in theory, often fail in practice. For example, in Hernández v. Mesa *(2020) the Court refused to recognize a right to sue under the* Bivens *doctrine while, at the same time, assuming that the FTCA barred the victim's family from pursuing tort-based redress at common law for a cross-border shooting.* Egbert v. Boule *(2022) confirms that the* Bivens *doctrine, lacking a textual foundation, has no growing power.*

Invoking the history of nineteenth-century tort-based redress and channeling the textualism of Egbert v. Boule*, this Article argues that current law, correctly interpreted, permits victims to pursue a wide range of tort claims against the federal government and its employees at common law. The Article first shows the many ways common law modes of redress can contribute to a remedial system for government wrongdoing that is now crowded with statutes and constitutional remedies. Turning to the text of the FTCA, the Article demonstrates that Congress preserved the right of individuals to sue in tort, either by naming the government in claims within its vicarious liability or by naming the responsible officer for tort-based wrongs to which the FTCA does not extend. A concluding section sketches the many ways tort litigation, brought against the official at common law, can supplement the current system of government accountability as the sun sets on the* Bivens *doctrine.*

INTRODUCTION

For much of the nineteenth century, victims of federal government misconduct pursued common law tort claims against responsible federal

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employees.[1] But the framework for government tort litigation changed dramatically in the twentieth century. Congress adopted the Federal Tort Claims Act[2] (FTCA), imposing vicarious liability on the federal government for some (but not all) torts committed by its officers and employees within the scope of their employment.[3] Notably, the FTCA omitted many intentional tort claims from its coverage, leaving those matters to resolution under state common law.[4] Then, in 1971, the Supreme Court recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[5] a federal judge-made right to seek damages for federal officials' violations of the Fourth Amendment.[6] Legislation adopted in 1974 extended the FTCA's vicarious liability regime to the intentional torts of law enforcement officers.[7] Victims of tortious misconduct can, at least in theory, sue the government under the FTCA for law enforcement torts and wrongdoing officers under the *Bivens* doctrine.[8]

While available in theory, these remedies often go missing in practice, as they did in *Hernández v. Mesa*,[9] the Supreme Court's cross-border

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[1] On the nineteenth-century approach to government accountability, see *infra* Part I, pp. 992–1025; *see also* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–17 (2017) [hereinafter PFANDER, CONSTITUTIONAL TORTS]; James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 748–50, 754–56, 762–66 (2019) [hereinafter Pfander, *Dicey's Nightmare*].

[2] 28 U.S.C. §§ 1346(b), 2671–2680.

[3] Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 2 and 33 U.S.C.) (original Public Law enacting the FTCA). Early federal decisions recognized that one purpose of the FTCA was to eliminate the burden on Congress associated with the processing of petitions for relief by private bill. *See* Maryland *ex rel.* Burkhardt v. United States, 165 F.2d 869, 872 (4th Cir. 1947) (FTCA's purpose was to eliminate private bills); United States v. LePatourel, 571 F.2d 405, 408 (8th Cir. 1978) (FTCA was passed with "twin purposes" of compensating tort victims and eliminating the need for private bills); Downs v. United States, 522 F.2d 990, 995 (6th Cir. 1975) (basic purpose of FTCA "was to relieve Congress of the burden of considering" and passing private bills (citing United States v. Muniz, 374 U.S. 150, 153–54 (1963); Dalehite v. United States, 346 U.S. 15, 24–25 (1953); Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 703–04 (1949))).

[4] *See, e.g.*, 28 U.S.C. § 2680(h).

[5] 403 U.S. 388 (1971).

[6] *Id.* at 389. On the origin of the *Bivens* doctrine, see James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 280 (Vicki C. Jackson & Judith Resnik eds., 2010). On the doctrine's application in recent years, see generally Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835 (2021). On the Court's failure to grapple with the common law underpinnings of federal official liability, see generally James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

[7] *See* Pfander & Baltmanis, *supra* note 6, at 131–33 (providing an overview of the 1974 amendments).

[8] On the viability of both FTCA and *Bivens* claims for the same misconduct, see *Carlson v. Green*, 446 U.S. 14, 23 (1980).

[9] 140 S. Ct. 735 (2020).

shooting case from 2020.[10] The latest decision in the *Bivens* line, *Egbert v. Boule*,[11] confirms the Court's reluctance to expand the rights of individuals to pursue constitutional tort claims against federal officials.[12] The *Egbert* Court reiterated that its more recent decisions "instruct that, absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.'"[13] Under this vision of the separation of powers, Congress (rather than the federal courts) must take the lead in authorizing individuals to enforce the federal Constitution, especially in suits against officers of the federal government. *Bivens* may survive in the context of federal policing and imprisonment but has no growing power.[14] For example, the *Egbert* Court rejected (without dissent) a new claim for First Amendment retaliation.[15]

When coupled with gaps in the FTCA, the Court's persistent refusal to expand the *Bivens* remedy has produced a series of notable remedial failures. When federal government officials unlawfully detain and torture individuals outside the United States, they almost invariably enjoy immunity from judicial oversight.[16] Thus, suits to secure compensation for government torture committed during the Bush Administration's war on terror have consistently run afoul of the territorial limits of the FTCA and the reluctance to fashion a *Bivens* remedy.[17] Closer to home,

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[10] *See id.* at 740, 750 (rejecting constitutional tort claim in circumstances in which the Court assumed no other remedy was available to redress the fatal shooting of a fifteen-year-old Mexican national).

[11] 142 S. Ct. 1793 (2022).

[12] *Id.* at 1799 (explaining that, "[o]ver the past 42 years, . . . we have declined 11 times to imply a similar cause of action for other alleged constitutional violations"). In turning away a Fourth Amendment claim for the unreasonable use of force, the Court emphasized that the case involved issues of border security that made the setting different from that in *Bivens*. *See id.* at 1804. Boule operated an inn near the border of Canada; the federal government officials were investigating illegal border crossings when they allegedly entered Boule's property and roughed him up. *Id.* at 1800–01. Bivens, by contrast, lived in an apartment in New York; the federal government officials there were investigating drug trafficking when they entered his property and roughed him up. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). That slight difference in context was sufficient, the Court found, to support its conclusion that *Bivens* did not provide Boule a right to sue. *Egbert*, 142 S. Ct. at 1806.

[13] *Egbert*, 142 S. Ct. at 1803 (alteration in original) (quoting *Hernández*, 140 S. Ct. at 741–42).

[14] One can argue that, at a minimum, the Westfall Act's savings provision for constitutional tort claims, 28 U.S.C. § 2679(b)(2)(A), preserves several contexts for such litigation. *See* Pfander & Baltmanis, *supra* note 6, at 131.

[15] *See Egbert*, 142 S. Ct. at 1807. *But see* Hartman v. Moore, 547 U.S. 250, 252 (2006) (assuming the viability of a First Amendment retaliation claim under *Bivens* and specifying the pleading requirements for such litigation); Harlow v. Fitzgerald, 457 U.S. 800, 805–06 (1982) (assuming the viability of a retaliation claim and erecting a new qualified immunity standard to protect officers named as defendants in such litigation); Butz v. Economou, 438 U.S. 478, 480, 485 (1978) (assuming the viability of a retaliation claim).

[16] *See* Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 435 (2007).

[17] *See, e.g.*, Padilla v. Yoo, 678 F.3d 748, 768 (9th Cir. 2012) (rejecting claim that Department of Justice lawyer had facilitated torture through shabby legal analysis); Lebron v. Rumsfeld, 670 F.3d

scholars have observed that victims of sexual assault and battery in the federal workplace face severe obstacles in securing redress under either *Bivens* or the FTCA.[18] Even a simple assault and battery claim, brought by a low-level employee who had been choked on the job by an aggressive superior, was consigned to the remedial abyss.[19]

Legislation, of course, might help.[20] But in this Article, we argue that current law affords individuals a broad right to pursue tort-based redress, either against the federal government under the FTCA or against federal officers based on state common law. That argument runs headlong into Westfall Act[21] immunity as it is currently understood.[22] Adopted as an amendment to the FTCA in 1988, the Westfall Act provides that remedies available against the *government* under the FTCA shall be "exclusive," thereby foreclosing suit against federal employees

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540, 556, 562 (4th Cir. 2012) (rejecting domestic torture claim under *Bivens*); Vance v. Rumsfeld, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (rejecting overseas torture claim under *Bivens*); Doe v. Rumsfeld, 683 F.3d 390, 396 (D.C. Cir. 2012) (rejecting overseas torture claim under *Bivens*). *See generally* PFANDER, CONSTITUTIONAL TORTS, *supra* note 1, at 31–56.

[18] *See, e.g.*, Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 734–35 (2019) (describing the gaps in federal accountability as "hypocritical" and "intolerable").

[19] *See* Majano v. United States, 545 F. Supp. 2d 136, 137–38, 148 (D.D.C. 2008) (dismissing intentional tort claim against high-ranking official who had assaulted and choked a member of the custodial staff). In most instances, the cases we discuss were resolved on motions instead of a trial on the merits. In describing the facts in such cases, we proceed, as the rules of procedure suggest, in assuming the truth of the plaintiff's allegations, recognizing that a trial might have proven them unfounded. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

[20] *See* Sisk, *supra* note 18, at 740, 792 (proposing amendments to expand the FTCA to more intentional tort claims); Thomas A. Koenig & Christopher D. Moore, Of State Remedies and Federal Rights 5 (Feb. 6, 2024) (unpublished manuscript), https://ssrn.com/abstract=4462807 [https://perma.cc/X26S-8QGA] (discussing that states could adopt rights of action to enforce the Constitution against federal officers); *cf.* Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 298–309 (1980) (evaluating legislative proposals to make the United States government liable under the FTCA for its officials' constitutional torts).

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

[22] In discussing the FTCA's implications for the tort liability of the federal government, this Article uses conventional modes of doctrinal analysis and a text-based approach to statutory interpretation not unlike the approach taken in earlier work on the interaction of the *Bivens* doctrine and the government's tort liability under the FTCA. *See* Pfander & Baltmanis, *supra* note 6, at 122 n.23 (assuming, in keeping with the conventional wisdom, that the Westfall Act largely displaced official liability for torts within the scope of employment); *see also* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 566 (2013) (agreeing with the suggested account). In later work, Pfander and a co-author argued that, on a close reading of the text, the FTCA's judgment bar did not displace the right of individuals to pursue *Bivens* claims. *See* James E. Pfander & Neil Aggarwal, Bivens*, The Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 457 (2011) [hereinafter *Perils*]. In the course of that work, it became clear that the "subject matter" limits of the judgment bar had important and previously unrecognized implications for the meaning of other FTCA provisions, *id.* at 421 (emphasis omitted) (quoting 28 U.S.C. § 2676), as further discussed in Part II, pp. 1026–44. This work follows *Perils* in suggesting that one must understand the FTCA's terms of art in light of the interpretive conventions in place at the time of the statute's adoption in 1946 and subsequent amendments in 1961, 1974, and 1988.

for common law negligence and other torts covered by the FTCA.[23] The federal courts have broadly interpreted the Westfall Act as immunizing federal officers from liability for all tortious conduct committed within the *scope of their employment*.[24] This entrenched reading often denies the aggrieved plaintiff redress against the government under the FTCA and against the responsible federal official at common law.[25]

We make the novel argument that broad Westfall Act immunity rests on a fundamental misreading of the statute. The text of the Westfall Act specifies official immunity only for claims that implicate the government's vicarious liability *under the FTCA*, rather than for claims that arise *within the scope of the official's employment*. Where the claim in question falls outside the scope of the government's vicarious liability under the FTCA, the statute's exclusivity and preclusion provisions do not come into play to bar employee liability. The FTCA thus presumes that state common law will continue to provide a viable right to sue federal officials for tort claims that fail to implicate the subject matter of the FTCA.[26] As a corollary to its text-based reluctance to "[r]ais[e] up" rights to sue through implied rights of action,[27] the Supreme Court should also refrain from recognizing a broad Westfall Act immunity that the statute itself does not confer.

We develop our argument for the current availability of common law redress in three parts. Part I sketches the changing role of tort-based remediation, from a nineteenth-century model of assured redress to a modern regime in which remedial gaps have gained broader acceptance in the law and scholarship. After describing the common law system of the nineteenth century, Part I shows that such redress still has a role to play in addressing positive government wrongs. Tort law furnishes remedies for a range of government misconduct that the *Bivens* doctrine

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[23] Westfall Act, 102 Stat. at 4563. On the statute's origins, see *infra* section II.B, pp. 1028–38.

[24] *See, e.g.*, United States v. Smith, 499 U.S. 160, 166 (1991).

[25] The Westfall Act declares that the remedy against the United States conferred by the FTCA shall be a plaintiff's exclusive remedy for certain claims, by reason of the same subject matter, caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Scholars have long assumed that the Westfall Act immunity broadly immunizes federal employees for wrongful acts committed within the scope of their employment. *See, e.g.*, GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 363, 365 (4th ed. 2006) (noting that the Westfall Act bars claims against employees, even if the government substitutes itself and then avoids liability through an exception or limitation); Pfander & Baltmanis, *supra* note 6, at 134; Vázquez & Vladeck, *supra* note 22, at 566.

[26] *See infra* section II.C, pp. 1039–44.

[27] *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

and the FTCA do not address.[28] Such remedies could, in proper cases, trigger a constitutional test of the government's activities. Engaging with the paradigmatic work of Professors Richard Fallon and Daniel Meltzer, which argues for a system of remedies sufficient to keep the government mostly within the bounds of the law most of the time,[29] Part I argues that assured tort-based remediation can supplement systemic remediation without disrupting the balance of constitutional right and remedy that Fallon and Meltzer would preserve.

Part II argues that current law, correctly read, furthers assured redress by preserving the right of individuals to pursue tort claims against either the federal government or its responsible officers and employees. While the Westfall Act confers some official immunity, the language in question limits the scope of the FTCA's exclusivity, and, by extension, the scope of the officer's statutory immunity, to claims brought against federal officers "by reason of the same subject matter" as an FTCA claim against the United States.[30] These terms of art operate to restrict the Westfall Act immunity to the very matters on which the federal government has accepted vicarious liability; when a tort claim does not implicate the FTCA directly or arise from or relate to an FTCA claim, the statute provides no warrant for its displacement. Federal officers remain personally liable for non-FTCA intentional torts committed within the scope of their employment, despite the present judicial consensus to the contrary.[31]

Part III describes the systemic implications of restoring federal officer liability for intentional torts committed on the job. Common law presumptively subjects federal officers to suits brought in any court with jurisdiction, subject only to any defenses or immunities conferred by federal law.[32] The transitory tort doctrine ensures that many victims of wrongdoing outside the United States can sue for redress inside the United States, in any court where the tortfeasor can be found.[33] Such redress traditionally extended to claims that implicated foreign relations

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[28] *See* 28 U.S.C. § 2680 (exempting various causes of action, including a broad swath of intentional tort claims, from the FTCA's scope); Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–55 (2017) (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); Davis v. Passman, 442 U.S. 228, 248–49 (1979); Carlson v. Green, 446 U.S. 14, 19 (1980)) (noting *Bivens* doctrine's limitation to claims implicating the Fourth, Fifth, and Eighth Amendments).

[29] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1822 (1991) [hereinafter Fallon & Meltzer, *Remedies*]; *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 939–40 (2019) [hereinafter Fallon, *Bidding Farewell*].

[30] 28 U.S.C. § 2679(b)(1).

[31] United States v. Smith, 499 U.S. 160, 166 (1991).

[32] *See infra* notes 415–18 and accompanying text.

[33] *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 116, 118, 137 (1852) (upholding substantial federal court judgment against federal military officer for tortious taking of property during the Mexican-American War). Harmony pursued Mitchell in New York, far from the battlefield in Mexico where the seizure of property occurred. *See id.* at 116, 137, 150.

and national security concerns.[34] Indeed, nineteenth-century jurists made it quite clear that such concerns were matters for the legislative and executive branches to address through indemnification, while the courts focused on issues of legality.[35] Officer suits can also provide authority for adjudication of constitutional challenges to government programs that the *Bivens* doctrine can no longer furnish.[36]

I. RESTORING TORT-BASED REDRESS TO THE SYSTEM OF GOVERNMENT ACCOUNTABILITY

The system of government accountability has changed dramatically in the years since *Marbury v. Madison*[37] promised remedies for government violations of individual rights.[38] For one thing, modern remedial law focuses on prospective, declaratory-style litigation, in which the federal courts proclaim the law and government agencies carry those interpretations into effect.[39] That preference for declaratory adjudication has led to a distrust of retrospective enforcement of law through tort-based suits for damages. Comments by Chief Justice Roberts, expressing a clear preference for prospectivity, find a reflection in *Egbert v. Boule* and the various immunity doctrines that the Court has erected to shield the government and its officers from tort-based liability in damages.[40]

This Part begins with a summary of the gaps that now appear in the system of remedies, highlighting the Court's decision in *Hernández v. Mesa* to deny *Bivens* relief in a setting in which all agreed that no other

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[34] *See infra* section III.A.3, pp. 1047–50.

[35] *See infra* section I.B, pp. 998–1005.

[36] *See* Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) (making clear the Court's view that *Bivens* has fallen out of favor and that the judiciary should generally defer to Congress when it comes to the recognition of new damages actions).

[37] 5 U.S. (1 Cranch) 137 (1803).

[38] *See id.* at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Fallon and Meltzer argue that *Marbury* represents only one of the principles central to the system of constitutional remedies. *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1777–79; Fallon, *Bidding Farewell*, *supra* note 29, at 970–71. Chief Justice Marshall did not describe Marbury's claim as one to enforce a specific constitutional right. *See Marbury*, 5 U.S. (1 Cranch) at 154.

[39] Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 672–73 (2012) (discussing the growing acceptance of a law-declaration model of adjudication and contrasting that model with the dispute-resolution approach of the nineteenth century).

[40] *See* Transcript of Oral Argument at 28, 30–31, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (No. 15-1358) (statement of Roberts, C.J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1358_7648.pdf [https://perma.cc/GT5S-6EHV] (expressing reluctance to entertain challenges to "national policy through damages actions"); *see also* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125 (2014) (noting the Court's reluctance to authorize suits for damages in national security litigation); *cf. Ziglar*, 137 S. Ct. at 1862–63 (suggesting that the legality of federal policies was better addressed through suits for injunctive or habeas relief). For a summary of government and official immunity doctrines, see *infra* section I.B, pp. 998–1005.

FTCA or common law remedies were available. In a striking contrast with the modern acceptance of remedial failure, the Part next describes a nineteenth-century model of remediation that relied on tort law to provide assured redress for positive government wrongs. Nineteenth-century thinkers viewed this model as essential to the rule of law and as compatible with the military and national security needs of the country and the protection of officials from undue personal liability.[41] In the nineteenth century, the Court refused to recognize doctrines of sovereign and official immunity that would impede individual remediation for positive government wrongs.[42] What's more, the Court treated the problem of shielding individual officers from personal liability as a matter for Congress to address through the practice of indemnification.[43]

Having introduced the nineteenth-century model, the Part turns to the place of tort-based redress in the modern law of government accountability. Here, we take up the important work of Fallon and Meltzer on the role of assured redress in a system of constitutional remedies. For Fallon and Meltzer, the "existence of constitutional rights without individually effective remedies is a fact of our legal tradition, with which any theory having descriptive pretensions must come to terms."[44] Emphasizing the connection between remedies and the formulation of constitutional rights, Fallon argues that Congress should no longer rely "on state law as a measure of federal official lawbreaking" and should instead rely directly on "recognized constitutional violations."[45] We show, in a suggested friendly amendment, that tort-based relief for positive government wrongs can add much to government compliance with law without unsettling the balance of constitutional right and remedy that Fallon and Meltzer seek to preserve.

A. Tort-Based Redress in the Modern Remedial System

Before discussing *Hernández v. Mesa* and its refusal to recognize an individual right to sue under the *Bivens* doctrine, this section provides a brief primer on the system of government accountability law. As noted above, much remedial law now takes the form of injunctive and declaratory relief, often in the form of suits against federal government officials. Thus, under the doctrine of *Ex parte Young*,[46] individuals can seek declaratory and injunctive relief against pending or threatened

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[41] *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 16 (1972) (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY §§ 319–320 (5th ed. 1857)).

[42] *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1822 (citing Engdahl, *supra* note 41, at 47).

[43] *See* The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824).

[44] Fallon & Meltzer, *Remedies*, *supra* note 29, at 1786.

[45] Fallon, *Bidding Farewell*, *supra* note 29, at 981 (describing reliance on state law in the FTCA as bordering on "the archaic").

[46] 209 U.S. 123 (1908).

violations of their constitutional rights.[47] Under the law of habeas corpus, individuals can test the legality of their detention.[48] Both these forms of redress proceed against the responsible federal official as a stand-in for the government on the assumption that the government will comply with any resulting decree.[49]

Administrative law provides additional remedies for wrongful government conduct. Agencies operate under the strictures of their organic statutes, most of which provide some mechanism for judicial review of agency action. Where those remedies go missing, the Administrative Procedure Act's[50] presumption in favor of judicial review provides a gap-filling backstop.[51] What administrative law scholars call "nonstatutory" review may be available as an additional safeguard, providing authority for injunctive relief against agency action in violation of individual rights.[52] Suits for money, based either on the taking of property or the breach of government contracts, proceed before the U.S. Court of Federal Claims.[53] Suits for tort-based redress may be brought against the United States in federal district courts under the FTCA.[54] Finally, some suits for money damages may be brought against federal officials themselves under the *Bivens* doctrine.[55]

Yet despite this apparently comprehensive range of remedies, the Supreme Court's decision in *Hernández v. Mesa* reveals that limitations in the FTCA and the *Bivens* doctrine have virtually immunized the government and its officers from liability for a broad range of tortious wrongdoing. The *Hernández* litigation began in Texas, where a federal border patrol agent shot and killed a teenager who was standing on the Mexican side of the border culvert that separates the two countries.[56]

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47 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 490–91 (2010) (authorizing suit in a federal district court to challenge the structure of a federal agency); Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 897 (2023) (same).

48 *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (upholding the right of individuals to seek habeas relief from unlawful detention, notwithstanding legislation sharply limiting such review).

49 *See Young*, 209 U.S. at 161 (authorizing suit for injunctive relief against state official); Rumsfeld v. Padilla, 542 U.S. 426, 434–35 (2004) (identifying the plaintiff's custodian as the proper respondent in a habeas proceeding).

50 5 U.S.C. § 702.

51 The Administrative Procedure Act presumes the availability of judicial review of agency action, *id.*; such review may be precluded by statute, if Congress has made other arrangements for review or has committed the issue to agency discretion. *See, e.g.*, Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) (citing 5 U.S.C. § 701(a)).

52 *See* 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3655 (4th ed. 2024) ("The Supreme Court has recognized that a federal court with subject matter jurisdiction may review Government wrongdoing in a lawsuit seeking injunctive or declaratory relief against a federal officer, even when a statute does not authorize such review.").

53 *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 897–99 (7th ed. 2015) (discussing the Court of Claims).

54 28 U.S.C. § 1346.

55 On the evolution of the *Bivens* doctrine, see FALLON ET AL., *supra* note 53, at 769–77.

56 Hernández v. Mesa, 140 S. Ct. 735, 740 (2020).

The young man's family sued the officer in federal district court on a *Bivens* theory, claiming tort damages for violations of the Fourth and Fifth Amendments.[57] Lacking any obvious alternative remedy, counsel for the family urged the Court to incorporate common law norms into the *Bivens* doctrine to avoid a complete remedial failure.[58]

In rejecting the family's claim, a narrowly divided Court found that the case arose in a new and sensitive national security context and thus required the federal courts to defer to congressional primacy in managing the availability of a right to sue.[59] Congress had not authorized the suit, and the Court (as it later did in *Egbert v. Boule*) declined to supply the missing right of action through the recognition of a judge-made right to sue under the *Bivens* doctrine.[60] The Court also rejected counsel's argument that the *Bivens* doctrine should take account of nineteenth-century common law norms.[61]

The *Hernández* Court discussed these common law norms:

> As petitioners and their *amici* stress, the traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for common-law torts. For many years, such claims could be raised in state or federal court, and this Court occasionally considered tort suits against federal officers for extraterritorial injuries. After *Erie*, federal common-law claims were out, but we recognized the continuing viability of state-law tort suits against federal officials as recently as *Westfall v. Erwin*.[62]

Yet, according to the Court, passage of the Westfall Act in 1988 made the FTCA "the exclusive remedy for most claims against Government employees arising out of their official conduct."[63] In effect, then, *Erie*[64] and the Westfall Act were thought to foreclose common law officer suits. The Court showed no inclination to revive such liability through the *Bivens* doctrine.

Lower court decisions, anticipating the result in *Hernández*, have used similar techniques in rejecting *Bivens* claims for a wide range of government misconduct. For starters, federal courts in Washington,

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[57] *Id.*

[58] *Id.* at 742 ("[P]etitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available.").

[59] *Id.* at 743, 750.

[60] *Id.* at 750.

[61] *Id.* at 742.

[62] *Id.* at 748 (footnote omitted) (citations omitted) (citing Brief for the Petitioners at 10–17, *Hernández*, 140 S. Ct. 735 (No. 17-1678); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Westfall v. Erwin, 484 U.S. 292 (1988)). For a searching criticism of the Court's claim that *Erie* eliminated any authority for the recognition of the judge-made right to sue in *Bivens*, see Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1358–61 (2023). We do not address that issue here.

[63] *Hernández*, 140 S. Ct. at 748 (quoting Hui v. Castaneda, 559 U.S. 799, 806 (2010)). We explain in detail below why this interpretation of the Westfall Act as barring all claims against federal officials for wrongs perpetrated in the scope of their employment is incorrect. *See infra* Part II, pp. 1026–44.

[64] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

D.C., have broadly declined to authorize suits seeking redress for detention and torture overseas as part of the Bush Administration's war on terror.[65] What's more, in the settled contexts where *Bivens* remedies remain intact, individuals must overcome the well-known qualified immunity defense articulated in *Harlow v. Fitzgerald*.[66] Under recent restatements of that doctrine, individuals must show that the unlawful character of the conduct in question would have been obvious to every government official.[67] Even assuming the Court had upheld the right of the Hernández family to sue, in short, the *Harlow* standard may have immunized the official from liability.

Apart from curtailing *Bivens* liability, lower courts have declined to allow suits to proceed as common law torts. As contemplated in *Hernández*, the Westfall Act has been said to transform intentional tort claims against the responsible official into claims against the government for which the FTCA provides no remedy.[68] In one striking decision, the D.C. Circuit applied Westfall Act immunity after concluding that the officers in question were acting within the scope of their employment in conducting an alleged program of interrogation, torture, and nonjudicial killing.[69] In another, the Fifth Circuit foreclosed "all lawsuits based on injuries incident to military service," including those based on the laws of the United States and the tort law of the several states.[70] As a result, a female military officer who suffered serious

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[65] *See, e.g.*, Harbury v. Hayden, 522 F.3d 413, 422–23 (D.C. Cir. 2008) (dismissing common law tort claims seeking redress for torture and nonjudicial killing inflicted in Guatemala at the direction of CIA officials); Rasul v. Myers, 512 F.3d 644, 672 (D.C. Cir.) (dismissing claims for torture at Guantanamo Bay), *vacated*, 555 U.S. 1083 (2008); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 106–07, 119 (D.D.C. 2010) (dismissing tort claims for torture at Guantanamo Bay that allegedly led to the suicide of two detainees), *aff'd on other grounds*, 669 F.3d 315, 320 (D.C. Cir. 2012). *But see* Al Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 595, 597, 600–02 (E.D. Va. 2017) (upholding jurisdiction to adjudicate claims under the Alien Tort Statute that a federal government contractor aided and abetted the torture of plaintiffs at Abu Ghraib prison in Iraq). A Virginia jury returned a verdict in favor of the plaintiffs. *See* Mattathias Schwartz, *U.S. Jury Awards $42 Million to Iraqi Men Abused at Abu Ghraib*, N.Y. TIMES (Nov. 12, 2024), https://www.nytimes.com/2024/11/12/us/abu-ghraib-abuse-caci-international.html [https://perma.cc/GA3Q-R462].

[66] 457 U.S. 800 (1982); *see* Butz v. Economou, 438 U.S. 478, 500–01 (1978).

[67] *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (stating that an official violates clearly established law, and therefore loses entitlement to qualified immunity, only if "the law '"was sufficiently clear" that every "reasonable official would understand that what he is doing"' is unlawful" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011))).

[68] *See* Majano v. United States, 469 F.3d 138, 139 (D.C. Cir. 2006).

[69] *See Harbury*, 522 F.3d at 422 n.4 (acknowledging that it seems "counterintuitive" to treat torture as within the scope of an individual's employment but offering a "straightforward" explanation based on state law). Such claims could therefore proceed, if at all, only against the government itself. But the court found that the FTCA excluded government liability for claims arising in a foreign country. *See id.* at 423.

[70] Morris v. Thompson, 852 F.3d 416, 420 (5th Cir. 2017) (citing Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034, 1035–36 (5th Cir. 1986)) (blocking claims under 42 U.S.C. §§ 1983 and 1985(2)); Holdiness v. Stroud, 808 F.2d 417, 424, 426 (5th Cir. 1987) (barring suit under § 1983, § 1985, and state common law).

physical injuries following an assault by a drunken fellow officer was deprived of any remedy.[71]

Various factors contribute to a body of remedial law that, scholars agree, no longer offers effective remedies for many government wrongs.[72] Federal courts no longer see the law of government accountability as an occasion for the enforcement of formal boundaries. Instead, they often balance competing interests and weigh the importance of protecting the government and its officers from liability. In a biting dissent from one such balancing opinion, Justice Scalia rightly characterized the majority as pursuing what he called "a Mr. Fix-it Mentality."[73] Instead of acting "merely to decree the consequences [of illegality], as far as individual rights are concerned," the Court was said to have acted to strike the proper balance between accountability and immunity.[74] Such an approach "steps out of the courts' modest and limited role in a democratic society" and, by doing what the political branches ought to do, "saps the vitality of government by the people."[75]

One sees the impact of such a deferential, all-things-considered approach to government accountability in *Harbury*,[76] where the D.C. Circuit rejected common law claims against government officials for the extrajudicial killing of the plaintiff's husband.[77] Remarkably, the court bolstered its conclusion by declaring that Harbury's complaint presented political questions that fell outside the jurisdiction of the federal courts.[78] In explaining that counterintuitive view,[79] the court argued that analogous lawsuits "sought determinations whether the alleged conduct *should* have occurred," determinations that would call for an assessment of the "wisdom of the underlying policies."[80] Instead of

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[71] *Morris*, 852 F.3d at 418.

[72] *See* Sisk, *supra* note 18, at 735; Vázquez & Vladeck, *supra* note 22, at 569–70; Fallon, *Bidding Farewell*, *supra* note 29, at 937–38.

[73] Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

[74] *Id.*

[75] *Id.* at 577.

[76] Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008).

[77] *Id.* at 422–23.

[78] *Id.* at 421.

[79] The political question doctrine forecloses the exercise of jurisdiction over issues textually and exclusively committed by the Constitution to the political branches of the federal government. Baker v. Carr, 369 U.S. 186, 217 (1962); *see also* Nixon v. United States, 506 U.S. 224, 228 (1993). The doctrine focuses in part on whether federal courts have the necessary "judicially discoverable and manageable standards for resolving" a case. *See Baker*, 369 U.S. at 217. Ordinary litigation before the federal courts, even when it presents a question of constitutional magnitude, does not implicate the political question doctrine. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 194 (2012). The *Harbury* court did not identify any textual commitment or lack of judicially manageable standards. *See Harbury*, 522 F.3d at 418–21.

[80] *Harbury*, 522 F.3d at 420–21 (citing Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005); Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1263–64 (D.C. Cir. 2006); Bancoult v. McNamara, 445 F.3d 427, 436 (D.C. Cir. 2006)). Nineteenth-century jurists rejected such arguments out of hand.

adjudicating the tort claim, the court viewed adjudication as a problematic invitation to second-guess the wisdom of government policies. The *Hernández* Court invoked the same concern, fearing that adjudication could result in government embarrassment if a court or jury ruled the shooting legally improper.[81]

The story of remedial failure in this section presents a paradox. New federal rights of action, conferred by statutes like the FTCA and judicial decisions like that in *Bivens*, were meant to supplement the common law and expand the right of individuals to recover. Yet their addition to the remedial portfolio has been accompanied by a notable decline in remedial effectiveness. Contributing factors include the post-*Erie* loss of remedial authority,[82] the hostility toward judge-made rights of action, the switch to declaratory forms of adjudication, a persisting hostility to money claims against federal officers based on a misunderstanding of indemnity practices and the incidence of liability,[83] effective repeat-player litigation tactics by the federal government, and a judicial tolerance for remedial failure that inheres in the practice of interest balancing. The next section examines one possible solution: restoration of the model of official liability for positive government wrongs that anchored the remedial system of the nineteenth century.

B. Official Liability for Positive Government Wrongs

In explaining the nineteenth-century approach to redress for positive government wrongs, we follow Professor Louis Jaffe in distinguishing between two kinds of government proceedings.[84] In *adjudicatory or*

Instead of viewing the imposition of tort-based liability as a reflection on the wisdom of the government policy (tax collection in *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824), and military engagement in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852)), Justice Story and Chief Justice Taney viewed the cases as presenting narrow questions of legality. *See infra* section I.B, pp. 998–1005. On that view, a judgment imposing official liability for specified misconduct takes no position on whether the larger government initiative "*should* have occurred." *Harbury*, 522 F.3d at 420.

[81] Hernández v. Mesa, 140 S. Ct. 735, 744 (2020).

[82] *See id.* at 742.

[83] *See* Engdahl, *supra* note 41, at 18 ("The officer's plight was improved somewhat by the recognition that, in some of the most difficult cases, he would enjoy a right of indemnity against the state. Of course, this right of indemnity would be small consolation to a public official whose state was unwilling to honor its obligation and refused to consent to being sued for indemnity." (footnote omitted)).

[84] *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 236 (1965). Justice Story explained that officers of the government owed personal liability both for their "omissions" and "negligence" and for their "positive" torts — "affirmative acts, willfully done, which amounted to a trespass or other wrong." Engdahl, *supra* note 41, at 16 (citing STORY, *supra* note 41, §§ 319–320). As Professor David Engdahl explains, officials were liable for any positive wrong which in fact had been authorized by the state, because even though authorized-in-fact, such an act was not authorized in contemplation of law. *Id.* at 17. Law in this conception included the law of the Constitution, as Justice Story explained. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1670, at 539 (1833) (declaring that officials who "wield" unconstitutional powers "are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed").

formal proceedings,[85] the government asserts a claim against an individual by initiating litigation in the regular court system or, perhaps instead, before a government agency. There, the individual has full due process rights to defend the claim and, if successful, to avoid the imposition of any sanction or judgment.[86] If the court rules for the government, any seizure of person or property to enforce the judgment takes place under judicial supervision with full rights of appellate review.[87] In contrast to adjudicatory proceedings, governments also rely on *summary* proceedings to enforce the law.[88] For example, a government wishing to collect disputed taxes might proceed by suing in court to secure a judgment against the taxpayer (adjudicatory) or, after making its own finding of a delinquency, by seizing the taxpayer's property for sale to pay the tax (summary).[89]

As Justice Story explained in *The Apollon*,[90] an 1824 decision largely upholding a substantial award of damages against federal officials whose summary tax enforcement efforts exceeded the bounds of law, individuals subjected to summary proceedings in the nineteenth century had a virtually assured right to contest the seizure of their property or person in satisfaction of a government obligation.[91] Takings of property without prior judicial process were trespasses at common law;[92] parties subject to such trespassory takings could seek tort-based relief after the fact and, in cases such as *Osborn v. Bank of the United States*,[93] injunctive relief from anticipated takings.[94] Similarly, property owners had a right to pursue ejectment proceedings to contest the legality of the

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[85] JAFFE, *supra* note 84, at 236 (suggesting that adjudicatory actions may not give rise to legally redressable rights violations but can nonetheless result in "incidental losses" to the subject's finances or reputation). Agency adjudication of matters of private right may be limited by the jury trial right of individual respondents. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2124–25, 2130 (2024) (holding the Seventh Amendment gave defendants right to Article III jury trial in securities fraud action).

[86] JAFFE, *supra* note 84, at 235.

[87] On the immunity of government officers selling the debtor's property to satisfy a judgment, see *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 342–43 (1865) (explaining that a marshal can be protected from personal liability so long as property seized was lawfully subject to sale in satisfaction of the judgment).

[88] JAFFE, *supra* note 84, at 236. Jaffe's catalog of summary proceedings includes "arrest and prevention of apparently wrongful action," "charges of wrongdoing," "attachments," and "denial of a license or government employment." *Id.* Each of these summary actions may respectively "give rise to detention and bodily touching," "defamation of character," "interfere[nce] with the use of property," and "loss of profits or salary" or even "defamation of character," *id.*, all tortious at common law.

[89] The government often pursued its accountants to recover delinquencies, either by suit or by summary attachment of the accountant's property. For a description of the remedies available when the government took summary action, see James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 515, 518–19 (2021).

[90] 22 U.S. (9 Wheat.) 362 (1824).

[91] *See id.* at 366–67, 380.

[92] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 853 (1824).

[93] 22 U.S. (9 Wheat.) 738 (1824).

[94] *See id.* at 844.

federal government's occupation of their land.[95] Taxpayers in *Poindexter v. Greenhow*[96] and its companion cases pursued a range of common law tort claims — including suits for damages and specific relief — in contesting the state's use of summary proceedings to enforce disputed state tax obligations.[97] Individuals mistakenly subjected to criminal process were entitled both to release from detention and to damages for trespassory or false imprisonment.[98]

The logic of the cases was entirely straightforward. Government proceedings implicating individual rights require some form of judicial process, either on the front end in the government's suit against the individual or on the back end through the individual's suit against the government officer. In a range of situations, executive branch officials could not reasonably await the result of judicial process to approve their contemplated actions and were obliged to proceed summarily. Arrests, searches, seizures — the whole range of street-level law enforcement — often occurred then as now without prior judicial process, although various post-seizure modes of judicial engagement ensured due process of law.[99] But these enforcement proceedings, if wrongful, were viewed as positive government wrongs entitling individuals to tort-based redress.

In implementing a system of assured redress, nineteenth-century jurists in the United States followed English courts in allowing individuals to sue officials at common law to ensure government accountability and the rule of law. One sees the importance of common law redress in the Founding-era debate over the right to trial by jury and in the eventual adoption of the Seventh Amendment,[100] which was predicated on an

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[95] *See* United States v. Lee, 106 U.S. 196, 198, 220–21 (1882).

[96] 114 U.S. 270 (1885).

[97] *See id.* at 273–74 (action in detinue); Chaffin v. Taylor, 114 U.S. 309, 309 (1885) (damages); Marye v. Parsons, 114 U.S. 325, 327 (1885) (specific performance). *See also generally* Virginia Coupon Cases, 114 U.S. 269 (1885).

[98] *See* Merriam v. Mitchell, 13 Me. 439, 439, 457–58 (1836) (upholding award of damages against federal postal official for false imprisonment).

[99] *See* JAFFE, *supra* note 84, at 237 (noting that summary arrest typically leads to post-arrest review by the committing magistrate and eventually the trial of the offender).

[100] The Founding-era debate that spurred proposal and ratification of the Seventh Amendment proceeded on the assumption, as Luther Martin's *The Genuine Information Delivered to the Legislature of the State of Maryland* explained, that common law jury trials were "essential for our liberty . . . in every case, whether civil or criminal, between government and its officers on the one part, and the subject or citizen on the other." Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 19, 70–71 (Herbert J. Storing ed., 1981) (emphases omitted). An "Old Whig" put forth similar views:

> Are there not a thousand civil cases in which the government is a party? — In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet these are all of them civil causes. . . . These modes of har[]assing the subject have perhaps been more effectual than direct criminal prosecutions.

understanding that government conduct was tested in "Suits at common law."[101] One finds Blackstone's affirmation of the centrality of common law redress[102] restated in the well-known nineteenth-century work of Professor A.V. Dicey, who argued that the tort-based accountability of officers was the cornerstone of the unwritten English constitution.[103] Professor John Goldberg combines these elements of history, tradition, and corrective justice theory in a powerful argument that individuals have a right, rooted in due process of law, to a system of remedies for redress of tort-based injuries.[104]

The system of remedies for positive government wrongs that emerged in the United States was founded on the assumption that the federal government was bound to indemnify its officials for any liability imposed on them personally for actions taken within the scope of their official duties. Or, as Jaffe explained, the suit against the official serves as a "conduit" to the treasury.[105] Thus, in the well-known case of *Little v. Barreme*,[106] a naval officer held liable for the wrongful interdiction of a merchant vessel on the high seas[107] secured private legislation from

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Essays of an Old Whig, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 17, 28 (first alteration in original). Civil juries were also essential to redress invasive searches by revenue officials, as the Democratic Federalist explained:

> [S]uppose the excise or revenue officers (as we find in . . . Ward's case) — that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift[] — suppose, I say, that they commit similar, or greater indignities . . . ?

Essay of a Democratic Federalist, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 58, 61 (footnote omitted). For an account, see Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 990 (2016) (reporting the facts of Ward's Case (1636) Clay. 44 (NP), in which the government official "'did pull the clothes from off a woman's Bed' and 'search under her Smock'" (quoting *id.*, *reprinted in* JOHN CLAYTON, REPORTS AND PLEAS OF ASSIZES AT YORK 44 (S. Powell ed., 1741))).

101 U.S. CONST. amend. VII (preserving the right to trial by jury in "Suits at common law").

102 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (declaring it "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded").

103 *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183–205 (10th ed. 1959). On Dicey's place in British constitutional thought, see ANTHONY KING, THE BRITISH CONSTITUTION 19–23 (2007) (locating Dicey among iconic theorists of the British constitution). On Dicey's implications for remedies in the United States, see generally Pfander, *Dicey's Nightmare*, *supra* note 1. *Cf.* Samuel Beswick, *Equality Under Ordinary Law*, 2024 SUP. CT. L. REV. (forthcoming 2025) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4528664 [https://perma.cc/7X4K-N9CK] (contrasting Canada's Diceyan reliance on ordinary law to ensure equal treatment of officers and citizens with the extraordinary law of government immunity in the United States).

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

105 JAFFE, *supra* note 84, at 238.

106 6 U.S. (2 Cranch) 170 (1804).

107 *Id.* at 175–76, 179.

Congress, appropriating money to pay the judgment.[108] Similarly, Congress appropriated funds to pay a judgment of over $100,000,[109] representing the value of property Colonel David Mitchell seized from Manuel Harmony (a U.S. citizen required to accompany the troops) during the Mexican-American War.[110] Citizens of New York, placed in military detention on suspicion of collaboration with the British during the War of 1812, also secured substantial judgments, ultimately paid by act of Congress.[111]

As these decisions underscore, the Court insisted on compliance with law even in circumstances where the wrongful acts occurred outside the United States proper or implicated national security.[112] In *Little*, the maritime tort occurred on the high seas;[113] the litigation proceeded in the District Court of Massachusetts, where Captain George Little had brought the vessel in pursuit of prize money.[114] In *Mitchell v. Harmony*,[115] the seizure occurred in the territory of Mexico, an active war zone.[116] Harmony sued in New York,[117] where Colonel Mitchell was "found."[118] In its decision, upholding liability, the Supreme Court confirmed that the transitory tort doctrine was fully applicable to torts committed by government officials for conduct outside the nation's borders.[119] The property rights at issue were, the Court explained in an opinion by Chief Justice Taney, "not less valued nor less securely guarded" in the United States than in Great Britain.[120]

Common law forms assured compliance with law across a broad range of government activities and did so without saddling officers

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[108] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1877–78 (2010) (describing the indemnification of Captain Little and other naval captains during the Quasi-War with France).

[109] *Id.* app. at 1938 tbl.3.

[110] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 116, 121 (1852).

[111] For an account of the War of 1812 litigation, see Pfander, *Dicey's Nightmare*, *supra* note 1, at 754–55.

[112] On the American acceptance of the English transitory tort doctrine, see *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 247–49 (1843) (citing Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1032; 1 Cowp. 161, 181 (KB)). *McKenna* explained:

> [T]he courts in England have been open in cases of trespass . . . to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. . . . [Courts of the United States] have a like jurisdiction in trespass upon personal property with the courts in England and in the states of this Union . . . .
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> *Id.* at 249.

[113] Little v. Barreme, 6 U.S. (2 Cranch) 170, 170 (1804).

[114] *Id.* at 172, 176.

[115] 54 U.S. (13 How.) 115 (1852).

[116] *Id.* at 128.

[117] *Id.* at 116.

[118] *Id.* at 137; *see id.* at 116, 128 (describing the initiation of the litigation in New York federal court).

[119] *See id.* at 137.

[120] *Id.* at 136.

acting in good faith with massive debts.[121] For those contesting the imposition of a tax, suit was available against the tax collector on an assumpsit theory.[122] But the collector, if found liable for money had and received, could pay the judgment from the accumulated fund of government duties and receive credit from the Treasury for any amounts paid under court order.[123] If military officers were ejected from occupied

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[121] Professor Andrew Kent argues that official liability in damages for maritime seizures was not always quite as automatic as the decision in *Little v. Barreme* might suggest. *See* Andrew Kent, Essay, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1771–77 (2021) (arguing that subsequent decisions, such as The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826), recognize a good faith or probable cause defense that was unavailable in *Little*). In assessing Kent's valuable work, we would distinguish seizures to enforce national commercial regulations from those that occur in the suppression of piracy. In the commercial space, Justice Story summarized the law as follows: "The party who seizes seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must refund in damages for the marine tort, unless he can shelter himself behind the protection of some statute." The Apollon, 22 U.S. (9 Wheat.) 362, 373 (1824). Following the *Little* decision, Congress provided protection to officers who secured a judicial certificate that there was reasonable cause to seize the vessel. *See* Act of Feb. 24, 1807, ch. 19, § 1, 2 Stat. 422, 422–23. Such certificates would issue after the federal court found that the seizure was wrongful and decreed the restoration of the vessel; if the court refused to grant a certificate, the official was exposed to damages liability. *See* Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 320 (1818) (denial of such certificate was "conclusive evidence . . . that the seizure was tortious"); *see also id.* at 314 (officer can be held liable for damages if certificate is denied). In *The Apollon*, the district court decreed restitution of the ship and cargo without issuing a certificate, meaning according to Justice Story that probable cause was "no excuse against damages in this case." 22 U.S. (9 Wheat.) at 374.

Kent views the Court's reversal of an award of marine tort damages to a Portuguese vessel seized by U.S. naval officials on suspicion of piracy, *The Marianna Flora*, 24 U.S. (11 Wheat.) at 2–3, 56, as conferring a similar probable cause protection as a matter of judge-made law. Kent, *supra*, at 1776–77. But suppression of piracy occurred in a different maritime context with different background norms of official liability. Justice Story noted that in the context of a belligerent (jure belli) capture, probable cause to make a seizure was plainly regarded as a defense to official liability. *See The Marianna Flora*, 24 U.S. (11 Wheat.) at 31; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 59 (2018) (describing Justice Story's decision as "tethered" to the conscientious exercise of discretion in admiralty jurisdiction). Restating that view for the Court in a similar case two years later, Justice Story viewed denial of damages for seizures under the piracy act as the "proper rule" "where there is probable cause for the capture." The Palmyra, 25 U.S. (12 Wheat.) 1, 17–18 (1827). Professor Kent rightly observes that *The Marianna Flora* and *The Palmyra* indicate that the Court might recognize a probable cause exception to official liability where either the statute or longstanding practice under the law of nations in cases involving belligerent rights so provides. Kent, *supra*, at 1775–76. But in both instances the moderation of official liability in damages did not foreclose relief; the owner was free to challenge the legality of the seizure and, if successful, secure the return of the vessel. *The Palmyra*, 25 U.S. (12 Wheat) at 18 (affirming "so much of the decree of the Circuit Court as decrees restitution of the brig Palmyra to the claimants").

[122] On the use of assumpsit to contest taxes and other litigation against government collectors, see Pfander & Borrasso, *supra* note 89, at 518–19.

[123] On the restoration of the vessel to its owners, see *The Marianna Flora*, 24 U.S. (11 Wheat.) at 3, 27 (referring to the district court's "sentence of restitution" and restating the counsel's assertion as to the vessel's "having been restored"). On the duty of the government to credit its accountants with money paid under court order, see *Poindexter v. Greenhow*, 114 U.S. 270, 293–94 (1885) (citing Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 853–54 (1824)) (holding failure of state to credit its official with payment under compulsion of court judgment would present a federal question for review in the Supreme Court).

property, as they were in the case of *United States v. Lee*,[124] the government was found to have "taken" the property from its true owners.[125] Congress paid $150,000 to purchase the land that became Arlington National Cemetery; the lower court opinion said nothing to suggest that the plaintiffs sought or recovered damages from the officers for wrongful occupation of the land.[126]

Recognizing the importance of ensuring a remedy, nineteenth-century courts did not excuse federal officials from liability based on a showing that they acted in good faith. That was true in *Little v. Barreme*, where Chief Justice Marshall rejected a good faith defense,[127] and in *The Apollon*, where Justice Story did the same.[128] The government's argument to exempt the officer from liability in recognition of the officer's energetic good faith in pursuing the nation's interests was properly addressed, Justice Story explained, to another department (Congress) through a petition for indemnity.[129] In the opinion of Justice Story and other jurists aligned with his view, courts owe a narrow duty to the law "as [they] find it."[130] The government may choose to exercise "on a sudden emergency" powers that do not comport with the law as written.[131] But the courts cannot immunize the officers who act summarily to address the perceived crisis; they can only apply the law and rely on the legislature to indemnify.[132] On this view, federal officials were sued in tort as nominal defendants, much the way officer suits proceed today in habeas to contest detention and under *Ex parte Young* to challenge threatened enforcement of federal law.[133]

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124 106 U.S. 196 (1882).

125 *See id.* at 198, 218.

126 ROBERT M. POOLE, ON HALLOWED GROUND: THE STORY OF ARLINGTON NATIONAL CEMETERY 92–93 (2009) (recounting the story of the government's purchase of the Lee estate for $150,000 following the Supreme Court's ruling in Lee's favor); *see Lee*, 106 U.S. at 223 (affirming Lee v. Kaufman, 15 F. Cas. 204, 208 (C.C.E.D. Va. 1879) (No. 8,192), which did not award damages against the officers but explained that in a suit brought in ejectment, the "jury on the facts, and the court on the law of the case, have decided that the plaintiff is entitled to recover the land," *id.* at 208).

127 *See* 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J.) ("[T]he instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.").

128 *See* 22 U.S. (9 Wheat.) 362, 366–67 (1824) (Story, J.).

129 *Id.* at 367 ("Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.").

130 Imlay v. Sands, 1 Cai. 566, 573 (N.Y. Sup. Ct. 1804) ("Nothing appears but that the defendant acted in good faith, and although it would seem reasonable, that where the officer acted bona fide, and according to his best judgment, he ought to be protected. Yet, we are bound to pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision.").

131 *The Apollon*, 22 U.S. (9 Wheat.) at 366–67.

132 *See id.*

133 *See supra* notes 32–34 and accompanying text.

Nor did the courts regard the imposition of tort-based liability as an embarrassment to the government or as casting doubt on the bravery or gallantry of the officials involved. In *Mitchell v. Harmony*, the Court upheld a judgment imposing personal liability on an army officer for the taking of private property during a battle in the Mexican-American War.[134] In its opinion, the Court expressed some pride in its disposition, noting that the rights of individuals were no less secure in the United States than in England.[135] As for the officer, the Court understood the defendant to have played an important role in a military operation that was "boldly planned," "gallantly executed," and ultimately successful.[136] But that did not prevent the Court from confirming the officer's tort-based liability as an essential element of the rule of law.[137]

The nineteenth-century model of assured redress thus differed sharply from current law. Rather than balancing government and individual interests, the Court in the nineteenth century applied tort standards to determine legality. Rather than concern itself with the impact of personal liability on officials, the Court viewed officer protection and indemnity as the proper work of the legislative branch. Rather than fret over the potential for government embarrassment, the Court celebrated the nation's interest in upholding the rule of law. As a result, the nineteenth-century commitment to providing assured redress for positive government wrongs may have much to contribute to modern remedial law.

C. Assured Remediation and Governmental Immunity

Yet as Professors Fallon and Meltzer observe, nineteenth-century doctrines of sovereign and official immunity pose a challenge to any claim that the old system provided an airtight guarantee of assured redress.[138] Rather than accept these immunities at face value, though, this section probes their impact on officer suits at common law. It finds that while immunities persisted, they did not impede redress for positive government wrongs. Remedial substitution enabled courts to maintain a

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134 Mitchell v. Harmony, 54 U.S. (13 How.) 115, 130, 137 (1852).

135 *Id.* at 136.

136 *Id.* at 135.

137 *See id.*

138 Fallon & Meltzer, *Remedies*, *supra* note 29, at 1785–86. For Fallon and Meltzer, the inevitability of such remedial gaps undercut arguments for assured remediation that one finds in *Marbury*. *See id.* at 1780. *But see* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 820 (1824) (describing the jurisdiction of the federal courts as "intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals").

web of effective remedies, even while recognizing that immunities foreclosed certain kinds of claims.[139]

1. Sovereign Immunity. — In any catalog of remedial gaps, the doctrine of sovereign immunity looms large, barring "direct suits against the government."[140] As of today, Congress has taken broad steps to moderate the government's immunity from suit, authorizing suits for breach of contract in the U.S. Court of Federal Claims; suits for various torts in the federal district courts under the FTCA; and suits to challenge federal agency action under the Administrative Procedure Act and other statutes.[141] But before these statutory waivers of sovereign immunity appeared, nineteenth-century courts treated such suits as off limits.[142]

Yet however well established, the federal government's sovereign immunity was not understood in the nineteenth century as a barrier to effective remediation for claims sounding in tort. Building on early precedents,[143] the Marshall Court gave voice to the party-of-record rule, under which the government's immunity from suit barred only those suits that formally named the government as a party.[144] Since the common law imposed liability in tort on the officer who engaged in tortious conduct, rather than on the government itself, suits against the official tortfeasors could proceed in state and federal court without implicating

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139 Professor Henry Hart's dialogue teaches that remedial substitution plays a central role in assuring the adequacy of the system of remedies for government wrongs. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–68 (1953). So long as the plaintiff can pursue redress against an alternative defendant, even absolute forms of immunity pose little threat to assured remediation. On the dialogue's influence, both its prescience and its misjudgments, see Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 65–66 (2019).

140 Fallon & Meltzer, *Remedies*, *supra* note 29, at 1781. On the history of sovereign immunity in England and the United States, see generally Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (reviewing the history of sovereign immunity, finding English precedent for relief against the King's officers for actions that did not require the King's consent, and showing how English actions were carried forward in American law), and James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) (analyzing early American statutes to find that many British remedies against the Crown were incorporated into codes of early American states).

141 For a summary of these statutory exceptions to federal sovereign immunity, see FALLON ET AL., *supra* note 53, at 896–904. We take up the FTCA in greater detail in Part II, pp. 1026–44.

142 Liability in contract ran against the government as such, meaning that individuals could not secure redress by suit against the responsible officials. As a result, individual claims for breach of contract were, until Congress set up a court of claims in 1855, considered by a Committee of Claims, which Congress retained control over. These committees conducted proceedings to assess the claims and then recommended congressional payment of claims that they deemed well-founded. *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 644–52 (1985).

143 *See* New York v. Connecticut, 4 U.S. (4 Dall.) 1, 6 (1799); United States v. Peters, 9 U.S. (5 Cranch) 115, 139–40 (1809); *see also* Engdahl, *supra* note 41, at 20 (documenting the party-of-record rule).

144 *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 797 (1824); *Peters*, 9 U.S. (5 Cranch) at 139–40.

the government's sovereign immunity.[145] In perhaps the most famous illustration, the Court upheld the right of individuals to test (by an ejectment suit against responsible federal military officers) the legality of the government's possession of a former estate that became Arlington National Cemetery.[146]

2. Official Immunity. — The nineteenth century's recognition of relatively strict liability for positive government wrongs, moderated through payment of indemnity, appears hard to square with modern doctrines of official immunity. Many scholars argue that forms of official immunity were nonetheless embedded in the nineteenth-century system of remedies. Professor Andrew Kent points to probable cause defenses that that were said to have arisen in the context of maritime torts.[147] Highlighting nineteenth-century treatises on officer litigation, Scott Keller argues that forms of immunity took root in the law.[148] Fallon and Meltzer note a drift toward forms of qualified immunity in decisions in the late nineteenth and early twentieth centuries.[149]

In evaluating the degree to which forms of official immunity took hold in the law, one must keep in mind that much of what the nineteenth century handled through suits against federal officials would today be viewed as the oversight of federal agency action. When Congress lawfully delegates discretion to federal agencies today, the federal courts must defer to agency action taken within the boundaries specified.[150] Similarly, nineteenth-century federal courts would defer to official action taken within zones of discretion specified by Congress.[151] Decisions that appear to modern eyes as recognizing a form of qualified immunity can be better understood as concluding that officers acting within the bounds of delegated authority do not violate the law. Notably, such grants of discretionary authority did not foreclose litigation aimed at holding actors accountable for ministerial positive government wrongs.[152]

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145 *See* Engdahl, *supra* note 41, at 22.

146 United States v. Lee, 106 U.S. 196, 198, 222–23 (1882).

147 For an explanation of Professor Kent's view and our reply, see *supra* note 121.

148 Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344–45 (2021).

149 *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1749.

150 The Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), overturning *Chevron*'s regime of deference to agencies' interpretations of ambiguous provisions in their organic statutes, *see* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), does not rule out judicial deference to agency discretion lawfully conferred by statute. *See Loper Bright*, 144 S. Ct. at 2268 (noting that the Court's decision "is not to say that Congress cannot or does not confer discretionary authority on agencies").

151 *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1782–83; *see also* William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 116 (2022) (distinguishing discretionary authority and qualified immunity); James E. Pfander, Essay, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 157–61 (2021) (same).

152 *See* Engdahl, *supra* note 41, at 44.

Begin with absolute immunity doctrines, which now protect the work of presidents, legislators, and judges and were developed throughout the nineteenth and twentieth centuries.[153] In each case, the opportunity to sue government officials directly remained fully available. Suits to challenge executive branch decisions, even those taken at the highest level, may proceed against cabinet officers instead of presidents (like the suit brought against Secretary Sawyer in the challenge to President Truman's seizure of the steel mills or that brought against Secretary Rumsfeld to challenge President Bush's detention of a citizen as an enemy combatant[154]). Presidential advisor immunity was qualified to preserve some prospect of liability in suits for damages.[155] Much the same was true in the case of absolute legislative immunity; while the victim of a wrongful arrest was barred from suing the members of Congress who authorized his detention, the Court made clear that a suit would lie against the congressional sergeant-at-arms who carried out the arrest (and thereby committed a positive government wrong).[156]

Judicial immunity worked in much the same way. While the judges of superior courts enjoyed absolute immunity from suit for damages for actions taken within their jurisdiction,[157] judicial decisions were subject to various forms of appellate review.[158] When direct review was unavailable, as with decisions by justices of the peace or quasi-judicial commissioners, suit could proceed against the judges or commissioners themselves to secure redress.[159] In addition, judicial immunity did not block supervisory oversight and control by judicial superiors through the issuance of writs of prohibition.[160] Building on the prohibition tradition, the Court and Congress have both recognized that parties may in appropriate situations seek injunctive relief against state judges.[161]

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153 *See* FALLON ET AL., *supra* note 53, at 1043–47.

154 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

155 *See* Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (rejecting absolute immunity for presidential aides but concluding that they were entitled to qualified immunity); Butz v. Economou, 438 U.S. 478, 508 (1978) (contending that cabinet officers are usually entitled to qualified immunity).

156 *See* Kilbourn v. Thompson, 103 U.S. 168, 203–05 (1881) (upholding immunity of House members but approving suit against the sergeant-at-arms).

157 *See* Stump v. Sparkman, 435 U.S. 349, 359–60 (1978).

158 For an account of judicial immunity that emphasizes alternative redress including the right of appeal, see John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 212–13 (2013).

159 *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 727–30 (2004) (collecting examples of suits against judges to facilitate appellate review).

160 On the role of prohibition in oversight of courts and judges, see James E. Pfander, Essay, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 769, 769 (2024).

161 *See* Pulliam v. Allen, 466 U.S. 522, 524–25 (1984) (holding that state magistrate judges did not have immunity from suit for injunctive relief); Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111

Judicial misconduct verging on a positive government wrong was also subject to control through *quo warranto*, mandamus, and successor remedies.[162]

Executive branch officials who committed positive government wrongs enjoyed no claim to absolute or qualified immunity.[163] As Professor William Baude reports, discretionary function immunities would apply only when Congress had made a special commitment of the matter to the officers' own judgment and entitled officers to make their own mistakes.[164] Thus, Bishop's nineteenth-century treatise described the discretionary immunity as arising when "the officer was empowered to follow 'the dictates of [the officer's] own judgment.'"[165] Or as Justice Thomas Cooley explained, the discretionary function concept "implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself."[166] Officers in the nineteenth century often had no claim to these forms of discretionary immunity. Thus, as Baude reports, nineteenth-century decisions imposed liability on:

> A sheriff who improperly sold levied property; a tax assessor whose incorrect return led to a foreclosure; county commissioners who failed to repair a bridge; other county commissioners who failed to levy a tax necessary to pay their bonds; a school superintendent whose licensing decisions were "of a merely administrative character"; a clerk who failed to docket a suit; and

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CALIF. L. REV. 1763, 1796–97 (2023) (describing congressional ratification of the result in *Pulliam*). The Court later narrowed injunctive relief to protect Eleventh Amendment values, concluding that judges with no enforcement authority were not proper defendants in suits under *Ex parte Young*. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021).

162 At common law, the writ of *quo warranto* would lie to oust judges from office who had engaged in willful and malicious misconduct. *See, e.g.*, State *ex rel.* Connett v. Madget, 297 S.W.2d 416, 428, 431 (Mo. 1956) (en banc) (upholding removal of county judges from office). Similarly, writs of mandamus would issue to correct egregious errors of judicial administration. *See* Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991); State *ex rel.* Watkins v. Creuzot, 352 S.W.3d 493, 506–07 (Tex. Crim. App. 2011) (concluding that mandamus relief was warranted where trial court did not have legal authority to hold a hearing and acted beyond the scope of lawful authority). Many states now oversee judicial misconduct through ethics rules enforced by disciplinary bodies with the power to impose sanctions, including removal from office, in effect substituting administrative process for *quo warranto*. *See, e.g.*, *In re* Restaino, 890 N.E.2d 224, 232 (N.Y. 2008) (upholding removal from office of judge who jailed forty-six individuals on suspicion of being responsible for a ringing cellphone in the courtroom).

163 *See, e.g.*, Shanley v. Wells, 71 Ill. 78, 80–81 (1873) (rejecting the relevance of state of mind to the officer's liability for assault, battery, and false imprisonment; "[i]f the plaintiff was assaulted and beaten, or imprisoned, by the defendant, without authority of law, it can not be doubted that he is entitled to recover, whatever may have been the defendant's motives," *id.* at 81).

164 *See* Baude, *supra* note 151, at 117.

165 *Id.* (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 787, at 366 (Chicago, T.H. Flood & Co. 1889)).

166 *Id.* (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT § 396 (Chicago, Callaghan & Co. 1879)).

> even a justice of the peace who had not "filed the appeal papers according to law."[167]

The distinction between liability for positive government wrongs and deference to a federal statute conferring administrative discretion helps to clarify *Spalding v. Vilas*,[168] a late nineteenth-century decision often described as an early precursor to absolute executive immunity.[169] Spalding, a lawyer in the District of Columbia, sought damages from the postmaster general of the United States for implementing a new payment protocol that made it harder for Spalding to collect fees from his clients.[170] In addition, Spalding argued that the postmaster general had acted maliciously when issuing circulars informing employees that they were entitled to backpay without the assistance of counsel.[171] The Court rejected both claims, ruling first that the official actions were neither "unauthorized by law[] nor beyond the scope of his official duties"[172] and then rejecting the claim based on malice.[173] As the Court explained, so long as it has been authorized, official "conduct cannot be made the foundation of a suit against [the officer] personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals."[174]

Two lessons emerge from *Spalding*. First, a party whose business has been regulated by Congress may find the regulations burdensome, expensive, and unwelcome.[175] Yet individuals and firms subject to such regulations have no routine right to compensation for such burdens, either from Congress or from the officials or agencies to whom Congress delegates responsibility for administering such regulations.[176] The Court viewed congressional power as obviously extending to the payment model that the postmaster implemented and viewed any burden imposed on Spalding in the collection of his fees as "an injury from which no cause of action could arise."[177] Second, an allegation that otherwise lawful administrative action was animated by malice does not

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167 *Id.* (footnotes omitted) (quoting Elmore v. Overton, 4 N.E. 197, 199 (Ind. 1886); Peters v. Land, 5 Blackf. 12, 12 (Ind. 1838)).

168 161 U.S. 483 (1896).

169 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing *Spalding*, 161 U.S. 483); Keller, *supra* note 148, at 1361; Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 234 (1963). Yet any immunity extends only to block suits for "maliciously" taking actions that otherwise comport with law. *Spalding*, 161 U.S. at 489.

170 *Spalding*, 161 U.S. at 488–89.

171 *Id.*

172 *Id.* at 493.

173 *Id.* at 494. Note that the Court rejected Spalding's claim of illegality *before* rejecting the malice claim.

174 *Id.* at 499.

175 *See id.* at 489.

176 To be sure, some regulations can so pervasively deprive property owners of the beneficial use of their land as to effect a regulatory taking, necessitating government payment of just compensation. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018–19 (1992).

177 *Spalding*, 161 U.S. at 490.

alter the case. As the Court explained, an "allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into [officers, no less than] judges[,] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."[178]

3. Qualified Immunity. — If we follow the Court in bracketing what officials like Vilas think and say about their work and focus on the legality of what they do, we can see that the decision preserves a test of the legality of the official's administration of federal law.[179] Much the same can be said of the Court's qualified immunity decision in *Harlow v. Fitzgerald*. As *Harlow* famously concluded, "[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[180] Especially as the doctrine has grown more pervasive, and its insistence on clearly established law has grown more exacting,[181] the immunity shield has grown more expansive and controversial.[182] But for a variety of reasons, the decision in *Harlow* itself does not rule out redress for positive government wrongs.

For starters, the *Harlow* decision displays a concern, not unlike that in *Spalding*, with the application of objective legal standards. Its purpose in moving to the clearly established law standard was to focus constitutional tort litigation on objective legal standards rather than on the

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[178] *Id.* at 494 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872)).

[179] The Court broadened the *Spalding* privilege from tort-based liability by foreclosing defamation claims against officers who make reputationally injurious statements about their subordinates in administering a federal program. *See* Barr v. Matteo, 360 U.S. 564, 574 (1959) (plurality opinion) (recognizing agency head's privilege from suit for defamation); *see also* Howard v. Lyons, 360 U.S. 593, 597 (1959) (applying *Barr*). But the Court did so only after concluding that "a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Barr*, 360 U.S. at 574–75. Common law had long recognized an official "privilege for comment by public officials" as part of the law of defamation. *See* Baude, *supra* note 151, at 120.

The *Spalding* Court's desire to shield federal officials from retaliatory litigation brought by deep-pocketed individuals who run afoul of otherwise valid federal regulations seems, if anything, more understandable today, when partisan and expressive forms of government litigation have grown more common.

[180] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[181] *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) ("We do not require a case directly on point [to defeat qualified immunity], but existing precedent must have placed the statutory or constitutional question beyond debate." (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011))).

[182] *See, e.g.*, Horvath v. City of Leander, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (contending that the "clearly established" law element of qualified immunity "lacks any basis in the text or original understanding of § 1983").

officer's state of mind.[183] In addition, the *Harlow* standard applies by its terms only to government officials performing discretionary functions;[184] both Deputy Butterfield and Counselor Harlow were sued in connection with advice that they gave President Nixon about how to respond to Fitzgerald's revelations.[185] One can understand the importance of drawing a clear line between actions taken within the immunized scope of official discretion and actions subjecting the officer to liability outside that boundary.

In contrast to the presidential advisory context in which *Harlow* was decided, positive government wrongs as we have seen do not entail the exercise of discretionary governmental decisionmaking. For much of the nineteenth century, such torts would have been classified as arising from the exercise of ministerial activity.[186] To be sure, courts applying the discretionary-ministerial distinction might have done so in a somewhat conclusory manner.[187] And, to be sure, the line between what was viewed as ministerial and discretionary could shift over time.[188] But the conceptual distinction between the two forms of government activity has remained a part of the law, apparently shaping the qualified immunity standard in *Harlow* and, as we will see later, the discretionary function immunity in *Westfall v. Erwin*.[189] Though not the focus of this Article, the problems with qualified immunity's application to constitutional tort claims challenging police use of excessive force under the Fourth Amendment may stem in part from the Court's inattention to the discretionary-ministerial distinction.[190]

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[183] *See Harlow*, 457 U.S. at 814–16 (justifying the switch from a subjective standard of good faith to an objective standard of clear law in part to simplify litigation and facilitate summary adjudication).

[184] *See id.* at 818 ("We therefore hold that government officials *performing discretionary functions* . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (emphasis added)).

[185] *See id.* at 802–05.

[186] *See* JAFFE, *supra* note 84, at 240.

[187] *See id.* ("The dichotomy between 'ministerial' and 'discretionary' is at least unclear, and one may suspect that it is a way of stating rather than arriving at the result. One may also believe that it has become a convenient device for extending the area of nonliability without making the reasons explicit.").

[188] *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 414–19, 422–30 (1987) (discussing emergence of legality and discretionary models of official liability in the nineteenth century).

[189] 484 U.S. 292 (1988).

[190] On the many ways qualified immunity has run off the rails in the litigation of excessive force claims against police officers, see JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 76 (2023) ("Lower courts appear to have gotten the message, repeatedly citing the Supreme Court's instruction that clearly established law should not be defined 'at a high level of generality' when assessing whether officers are entitled to qualified immunity. Courts have granted officers qualified immunity even when they have engaged in egregious behavior . . . ." (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011))). As we have seen, positive government wrongs including

Summarizing the lessons of this section, immunity and discretionary function doctrines from the nineteenth and twentieth centuries created gaps in the system of remedies but did not foreclose all tort-based redress for positive government wrongs.[191] Instead, the doctrines protect certain categories of governmental decisionmaking from liability on the assumption that alternative tests of legality were preserved. Immunity shielded the President, members of Congress, and federal judges from liability but left individuals free to test legality through other means: by suit against executive officials (instead of the President and members of Congress); by appeal; or through writs of mandamus and prohibition (instead of personal capacity damages suits against judges). Similarly, discretionary function protections for superior officers did not immunize low-level officials who carried out contested government programs.[192] Redress for positive government wrongs remained available to play a backstopping role when other remedies went missing.

D. Assured Redress for Positive Government Wrongs and the Modern Remedial System

This section argues that such a backstopping role continues to make sense today. Despite the statutorification of the law of government accountability,[193] the federal government continues to take summary actions that cannot practicably be tested in suits for prospective relief. Reports indicate that something like one-fifth of federal government employees work in agencies that implement their policies through the use of force.[194] For victims of positive government wrongs, only a suit for damages brought after the invasion occurs can afford redress and a test

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use of force did not entail the exercise of the kind of judgment that common law courts viewed as entitling the defendant to a discretionary function immunity. *See supra* notes 163–67 and accompanying text. While the Court continues to recognize that immunity should not extend to ministerial actions, *e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 51 (1998), it has narrowly defined what counts as ministerial, *see* Davis v. Scherer, 468 U.S. 183, 197 n.14 (1984) (stating that a "law that fails to specify the precise action that the official must take in each instance creates only discretionary authority"). Today, federal courts routinely apply qualified immunity to constitutional tort claims challenging summary government actions. *See, e.g.*, Tolan v. Cotton, 572 U.S. 650, 651 (2014) (per curiam) (applying qualified immunity standard to police use of deadly force without addressing the discretionary-ministerial distinction); Varrone v. Bilotti, 123 F.3d 75, 82 (2d Cir. 1999) (strip search deemed discretionary); Ulrich v. Pope County, 715 F.3d 1054, 1062 (8th Cir. 2013) (arrest deemed discretionary).

191 For an account of the narrowing of the party-of-record rule and its interpretation to expand the scope of governmental immunity in the late nineteenth and twentieth centuries, see Engdahl, *supra* note 41, at 22–28, 38–41.

192 *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) (explaining that "upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior").

193 The term "statutorification" comes from GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

194 *See* Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. 1941, 1941 (2024) (reporting that nearly "one-fifth of federal employees work for . . . agencies that use force to execute the laws").

of legality. That insight remains broadly true for many positive government wrongs, including tortious invasions of person and property that result from the actions of rogue officials and the deliberate implementation of a tortious policy (like torture) adopted at a higher level.[195] Building on these rule-of-law values, this section considers the ways a restored body of tort-based official liability can improve the judicial process and provide a backstop and baseline for individual redress.

1. Assured Redress and the Judicial Process. — Moving to a model of assured redress in tort will improve the way courts address injuries caused by positive government wrongs by focusing the inquiry on issues of legality as an alternative to the multifactored interest balancing that modern courts now perform.[196] Such interest balancing appears to lead over time to remedial curtailment, due in part to the government's considerable advantage as a repeat player in litigation over constitutional violations.[197] Moreover, Justices Scalia and Story both saw interest balancing as contrary to the proper judicial role and would have left that task to legislatures.[198] Courts on their view were to decide on the law and award remedies in appropriate cases, and the political branches were to conduct the balance of interests necessary to ensure proper incentives for officers held accountable for any violation of legal rights. A comparable conception of the proper departmental roles appears to

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195 *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1804.

196 For starters, courts must determine if a *Bivens*-based cause of action has been recognized for the claim in question. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017). That narrows the field to claims arising under the Fourth, Fifth, and Eighth Amendments. *See* Fallon, *Bidding Farewell*, *supra* note 29, at 948–54. But not all such claims qualify; if they arise in a new "context" or seek to impose liability against a new official, or present other concerns not adequately weighed in earlier decisions, then courts will tend to refuse to recognize a right to sue. *See Ziglar*, 137 S. Ct. at 1859–60. Even assuming plaintiffs have a right to sue, moreover, they must overcome the qualified immunity defense by identifying controlling precedent that made the illegality of the official's conduct painfully obvious. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015). That leaves much room to debate the clarity of the precedent and its application to the evolving factual record as the case proceeds through discovery and perhaps to trial.

197 The term "repeat player" is derived from Marc Galanter's famous essay, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974). According to Galanter's theory, repeat players, "who are engaged in many similar litigations over time," *id.* at 97, use their repeated exposure to the courtroom to shape legal precedent in their favor, *id.* at 97–100. *See also* Manning v. United States, 546 F.3d 430, 438 (7th Cir. 2008) (noting its decision to invalidate a jury verdict against FBI officers under the *Bivens* doctrine "may seem harsh, if not Kafka-esque," but explaining that the "[p]laintiffs pursued their claims against the [government] at their own peril" (quoting McCabe v. Macaulay, No. 05-CV-73, 2008 WL 2980013, at *14 (N.D. Iowa Aug. 1, 2008))).

198 *See supra* notes 73–75, 128–32 and accompanying text.

inform the *Egbert* Court's decision to defer to Congress in the creation of new federal rights of action.[199]

Apart from simplifying the judicial task, tort law offers a relatively clear standard with which to assess remedial adequacy.[200] Given the range of imponderables that informs the analysis today, remedial interest balancing under modern constitutional tort doctrine yields few clear answers.[201] In contrast, one of the enduring values of the common law framework lies in its provision of a rough and ready test of remedial adequacy that can resolve cases and shape the development of the law. Common law remedies to address positive government wrongs would come to resemble habeas relief from wrongful detention;[202] individuals could secure a routine test of legality of government action without first showing that the balance of interests tipped in favor of allowing the suit to proceed.

2. Assured Redress and Due Process of Law. — Restoring common law challenges to the legality of federal government activity provides a foundation for both assessing and assuring due process of law. During the nineteenth century, the Court frequently invoked the common law to prevent a remedial failure in decisions that require state courts to entertain claims against state officials.[203] Thus, in *Poindexter v. Greenhow* and related cases, the Court made such remedies as trespass

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[199] *See* Egbert v. Boule, 142 S. Ct. 1793, 1802–03 (2022) ("At bottom, creating a cause of action is a legislative endeavor. . . . Our cases instruct that, absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.'" (second alteration in original) (quoting Hernández v. Mesa, 140 S. Ct. 735, 741 (2020)) (citing *Hernández*, 140 S. Ct. at 742)).

[200] Complexity will of course remain in some cases, notably those in which the government seeks to excuse tortious conduct by pointing to forms of discretionary function immunity or the state secrets privilege. *See infra* Part III, pp. 1044–53.

[201] In rejecting a *Bivens* suit in *Hernández*, 140 S. Ct. at 741, the Court identified a concern with the "embarrassment" of the federal government that might result from judicial disagreement with its conclusion that Agent Mesa had complied with the rules of engagement, *id.* at 744 (quoting Brief for United States as Amicus Curiae Supporting Respondent at 18, *Hernández*, 140 S. Ct. 735 (No. 17-1678), 2019 WL 4858283, at *18). Such embarrassment might be less pronounced in a suit for tort-based redress. The government routinely pays judgments in suits sounding in tort through the Judgment Fund without apparent controversy. The Judgment Fund's annual payouts have grown substantially since the late 1990s, when they approached $300 million in fiscal year 1995 and over $270 million in fiscal year 1996. *See Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 2000: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 106th Cong. 419 (1999) (statement of Donna A. Bucella, Director, Executive Office for United States Attorneys). For fiscal year 2022, the annual payout was approximately $500 million. BUREAU FISCAL SERV., JUDGMENT FUND: ANNUAL REPORT TO CONGRESS (2022–23), https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress#dataset-properties [https://perma.cc/NWT3-85VL]. For an account of the administration of the Judgment Fund, see Paul F. Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 163–64 (2015) (describing the history of the Judgment Fund and noting its provision for payment of tort-based liability under the FTCA).

[202] *See infra* notes 212–13 and accompanying text.

[203] *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997) (collecting examples of remedy forcing).

damages and injunctive relief available as a matter of general law, after invalidating state statutes that purported to foreclose such relief.[204] The Court imposed a similar remedial obligation on state courts; the *Poindexter* Court explained that the state's obligation to provide such remedies was rooted in the Fourteenth Amendment's assurance of due process of law.[205] Later cases similarly link remedy forcing to the states' due process obligations.[206] The common law remedial baseline thus offered both a measure of remedial adequacy and a source of authority for the remedies in question, once the Court had negated any statutes that interfered with due process of law.

In pondering the importance of a remedial baseline and a source of authority, consider the decision of Congress to shield torture at Guantanamo Bay from judicial scrutiny by foreclosing adjudication of all such claims.[207] The Supreme Court invalidated the statute insofar as it curtailed habeas review of detention, operating within a framework of presumed access to the writ.[208] But when the D.C. Circuit evaluated the constitutionality of the legislation as applied to suits for damages, it had little difficulty in upholding the statute.[209] It reasoned that the Supreme Court itself had refused to make *Bivens* relief available to victims of constitutional torts arising in the context of military engagement.[210] With the doctrine's failure to assure remedies for constitutional wrongs

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[204] In the *Virginia Coupon Cases*, 114 U.S. 269 (1885), the Court held that the Virginia legislature violated the Constitution's contract impairment prohibition by disavowing certain coupons that had been affixed to state government bonds and declared legal tender in payment of state taxes. The litigation typically arose as a suit to challenge the summary taking of taxpayer property after a refusal to accept the tender of tax coupons. *See* Poindexter v. Greenhow, 114 U.S. 270, 300, 302–03 (1885) (directing the state court to allow a suit in detinue to recover wrongfully seized property in payment of disputed taxes); White v. Greenhow, 114 U.S. 307, 308 (1885) (allowing suit in trespass against state official to proceed in federal court as a claim arising under federal law); Allen v. Balt. & Ohio R.R. Co., 114 U.S. 311, 316–17 (1885) (approving injunctive relief, issued by lower federal court exercising diversity jurisdiction, to compel state officials to accept tax coupons).

[205] *See Poindexter*, 114 U.S. at 303 (declaring that the state cannot "forbid[] all redress by actions at law for injuries to property . . . for that would be to deprive one of his property without due process of law").

[206] *See* Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 24 (1920) (requiring the state court to provide a remedy for unlawful imposition of tax to prevent the taking of the plaintiffs' property "arbitrarily and without due process of law"); Ettor v. City of Tacoma, 228 U.S. 148, 155–56 (1913) (forcing the state court to remedy a taking of plaintiffs' property).

[207] In October 2006, Congress enacted the Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of the U.S. Code), which prohibited habeas review of detention at Guantanamo Bay. The MCA also deprived all judges and courts of "jurisdiction to hear or consider any" action implicating "the detention, transfer, treatment, trial, or conditions of confinement" at Guantanamo Bay. 28 U.S.C. § 2241(e)(2).

[208] *See* Boumediene v. Bush, 553 U.S. 723, 787–92 (2008).

[209] *See* Al-Zahrani v. Rodriguez, 669 F.3d 315, 319–20 (D.C. Cir. 2012).

[210] *See id.* at 320 (citing United States v. Stanley, 483 U.S. 669, 683 (1987)).

at Guantanamo, legislation that curtailed such suits for damages could hardly be said to violate due process of law.[211]

Note how that analysis would have differed had the D.C. Circuit begun with a presumption that remedies at common law were available for torts committed at Guantanamo Bay. Instead of the sporadic and fitful assurances of the *Bivens* doctrine, where remedies often give way in the military and national security context, the common law furnishes presumed access to remedies in much the same way that the habeas corpus tradition offers the assured test of detention underlying the Court's analysis in *Boumediene v. Bush*.[212] Just as habeas nonsuspension was thought to foreclose dramatic curtailment of the review of detention, due process may well deserve to have been viewed as limiting Congress's power to curtail all remedies for tort-based wrongs, especially for those who lack remedial alternatives.[213]

3. Assured Redress and Constitutional Litigation. — At one time, the availability of common law redress for positive government wrongs was central to constitutional remediation.[214] Under the standard model of nineteenth-century litigation, plaintiffs would sue an official at common law and then invoke the Constitution to challenge any official or statutory justification offered in defense of the official action in question.[215] Such a private-right model of constitutional litigation underlies such well-known nineteenth-century landmarks as *Osborn v. Bank of*

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[211] *Id.* (explaining that "[n]ot every violation of a right yields a remedy, even when the right is constitutional" (quoting Kiyemba v. Obama, 555 F.3d 1022, 1027 (D.C. Cir. 2009), *vacated by* 559 U.S. 131 (2010), *reinstated as amended by* 605 F.3d 1046 (D.C. Cir. 2010) (per curiam))).

[212] 553 U.S. 723 (2008). Notably, the Court had previously ruled that the habeas statute authorized review of detention at Guantanamo Bay, despite arguments that it did not reach beyond the borders of the United States. *See* Rasul v. Bush, 542 U.S. 466, 473, 484 (2004).

[213] *Cf. Boumediene*, 553 U.S. at 779–83 (setting forth the standard for evaluating whether, in curtailing access to the writ of habeas corpus, Congress had furnished an adequate substitute).

[214] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 739–41, 867–68 (1824) (invalidating Ohio state law under which seizure of assets occurred as violation of the federal immunity principle announced in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)); United States v. Lee, 106 U.S. 196, 218–21 (1882) (invalidating summary occupation of plaintiffs' estate as a government taking of private property); Poindexter v. Greenhow, 114 U.S. 270, 303, 306 (1885) (invalidating summary seizure of property to satisfy state tax obligation where state violated the Constitution in rejecting the form of payment tendered). State courts reached the same conclusion. *See* Fisher v. McGirr, 67 Mass. (1 Gray) 1, 47–48 (1854) (allowing damages against an officer for destroying liquor under an unconstitutional law); Shanley v. Wells, 71 Ill. 78, 83 (1873) (allowing damages against an officer for an unauthorized arrest for vagrancy); Campbell v. Sherman, 35 Wis. 103, 103, 110 (1874) (allowing damages against an officer for seizing a steamboat pursuant to an unconstitutional law); Sumner v. Beeler, 50 Ind. 341, 341–42 (1875) (allowing damages for false arrest, imprisonment, and prosecution under an unconstitutional act); Gross v. Rice, 71 Me. 241, 241–42, 252 (1880) (allowing a prisoner's damages action against a warden who held him pursuant to an unconstitutional law). As one court explained, "No question in law is better settled . . . than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void." *Sumner*, 50 Ind. at 342.

[215] *See, e.g.*, *Gross*, 71 Me. at 252 (rejecting statutory authorization for defendant's actions because "[a]n unconstitutional law is not a law").

the United States, *United States v. Lee*, and *Poindexter v. Greenhow*.[216] Restoring the right of individuals to bring common law claims against federal officials could revive this form of constitutional litigation as a supplement to the *Bivens* doctrine. For example, assuming Texas state law furnished the Hernández family with a right to sue, the plaintiffs could argue the officer's action violated the Fourth and Fifth Amendments and thereby exceeded the lawful scope of official authority conferred by federal law.[217]

Use of the common law framework as a vehicle for the vindication of constitutional rights may threaten the systemic balance of right and remedy that Fallon has elaborated and defended in a series of papers that began with a justly celebrated piece co-authored with Meltzer.[218] In that piece, Fallon and Meltzer identify two remedial principles: the individual right to redress (which may sometimes be "unavailable" in practice)[219] and the more unyielding systemic interest in "preserv[ing] separation-of-powers values and a regime of government under law."[220] Working within this "historically defensible yet normatively appealing" framework,[221] Fallon and Meltzer consider a variety of situations in which the Supreme Court had struggled to decide whether to apply new rules of law prospectively or retrospectively.[222] They demonstrate that these seemingly disparate problems of constitutional novelty could be best handled through a remedial calculus that moderated liability for violating new and unpredictable rules but insisted on somewhat stricter remedies for old or settled rules.[223]

Fallon has continued to explore the connections between right and remedy in subsequent work. In offering an equilibration thesis, Fallon recognizes that constitutional rights reflect individual interests in dignity and redress that may come into conflict with social policies and government interests on the other side.[224] The formulation of constitutional

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216 *See* cases cited *supra* note 214.

217 Among the issues the Court avoided in *Hernández* was the degree to which *Bivens* extended extraterritorially to an injury in Mexico. *See* Hernández v. Mesa, 140 S. Ct. 735, 747–48 (2020). Notably, in a tort-based claim against an officer, the applicable constitutional provisions would operate as limits on the officer's discretionary use of lethal force in Texas rather than as a source of rights in Mexico. *See id.* at 757 (Ginsburg, J., dissenting) (describing purpose of constitutional tort as deterring officer misconduct in the United States (quoting RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 cmt. e (AM. L. INST. 1971))).

218 *See* Fallon & Meltzer, *Remedies*, *supra* note 29.

219 *Id.* at 1789.

220 *Id.* at 1790.

221 *Id.* at 1789.

222 *Id.* at 1807–33 (applying the remedial framework to the evaluation of retroactive law application across such fields as criminal procedure, federal habeas, official immunity, and tax refund litigation).

223 *See id.* at 1793, 1829.

224 On the idea of remedial equilibration, see generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999), and Richard H. Fallon, Jr., *Asking*

law, on this view, calls for striking a balance among competing interests. Hence, the Court might recognize a right but qualify the right by protecting officers with doctrines of qualified immunity. Similarly, the Court might afford a remedy limited to the provision of prospective or declaratory relief. Such remedial choices, like choices to recognize rights, "reflect a kind of interest-balancing, aimed at yielding the best overall package."[225] Viewing the task of defining right and remedy as a form of equilibration allows us to see how remedial limits might facilitate the growth of constitutional law by lowering the cost of constitutional change.[226] As Fallon explains in a more recent paper, *Bidding Farewell to Constitutional Torts*, the routine award of money damages for every constitutional violation "would likely result in a shrinking of constitutional rights."[227]

We agree with much that Fallon and Meltzer say in resisting the idea that the nineteenth-century definitions of private right, enforced by common law remedies, should define the modern scope of constitutional right and remedy.[228] After all, constitutional and common law remedies have moved along separate paths since their divergence in *Ex parte Young*.[229] In recognizing that government officials owe a federal duty derived from federal sources and not grounded in common law, the Court set the remedial stage for the suits for injunctive relief that led to the much broader recognition of constitutional rights.[230] Similarly direct

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the Right Questions About Officer Immunity, 80 FORDHAM L. REV. 479 (2011). On the equilibration thesis, see Fallon, *Bidding Farewell*, *supra* note 29, at 963.

225 Fallon, *Bidding Farewell*, *supra* note 29, at 939.

226 *Id.* at 968 (describing relatively thin prospective forms of remediation as having facilitated constitutional change in such familiar cases as *Brown v. Board of Education* and *Miranda v. Arizona*).

227 *Id.* at 938.

228 *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1789–91 (endorsing dual consideration of individual remediation and reinforcement of structural constitutional values as a "normatively attractive," *id.* at 1791, foundation for constitutional remedies).

229 There, the Court indirectly acknowledged that the common law did not impose a tort-based duty on state officials to refrain from enforcing unlawful state regulations. *See Ex parte* Young, 209 U.S. 123, 163 (1908) (identifying no legal avenue for recovering damages incurred by enforcement of an unconstitutional law even after said law is held to be unconstitutional). But the Court deemed a threatened suit to enforce an unconstitutional law "equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer." *Id.* at 158. Over time, the *Ex parte Young* action "became the normal mechanism" to litigate enforcement of such laws. Fallon, *supra* note 62, at 1317; *accord* Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247, 248 (Vicki C. Jackson & Judith Resnik eds., 2010) ("The doctrine [of *Ex parte Young*] has been relied upon, over the course of one hundred years, by plaintiffs of all ideological stripes."). *See generally* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969) (explaining the role of federal equity in facilitating enforcement of constitutional rights).

230 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that equal protection forecloses race-based public school segregation); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding that equal protection forecloses sex-based military benefits); United States v. Virginia, 518 U.S. 515, 519 (1996) (holding that equal protection forecloses sex-based segregation at the Virginia Military Institute).

constitutional enforcement animated the decisions in *Monroe v. Pape*,[231] interpreting 42 U.S.C. § 1983, and in *Bivens*, authorizing a judge-made right to sue, both of which treated the actionable wrong as the constitutional violation, rather than the invasion of private right.[232]

Fallon defends the intertwined character of constitutional right and remedy for persuasive reasons. Constitutional rights reflect a complex range of factors, including normative commitments, empirical facts, and societal needs; the supportive system of remedies should take account of these many considerations.[233] For Fallon, the resulting body of law will better respond to modern needs than reliance on "the principle of a remedy for every rights violation" as an "unyielding imperative."[234] Just as originalism might fail to support the elaboration of some modern constitutional rights, a strict emphasis on nineteenth-century ideas of private right and remedy might fail to strike the socially optimal balance between government interest and constitutional limitation.

We do not aim to contest this vision of interdependent constitutional rights and remedies. Instead, we propose to *expand* the remedial arsenal of the federal courts, restoring remedies that were available in state courts at the time *Ex parte Young* and *Bivens* made direct constitutional claims available against government officials.[235] Both those constitutional developments were layered atop an existing framework of common law remedies. While *Ex parte Young* and *Bivens* both recognized distinctive federal constitutional interests and remedies, neither decision questioned the continuing vitality of the underlying common law framework for positive government wrongs.

Our proposal to restore common law remedies for positive government wrongs thus runs along a track separate from but parallel to the Fallon vision for constitutional remedies. To be sure, in *Bidding Farewell*, Fallon rejects the "private-law tort system as an anchor for thinking about constitutional remedies, including damages and injunctions."[236] But at the same time, Fallon has criticized the Court's reluctance to make constitutional tort remedies available in many cases of government wrong.[237] We agree that the absence of effective remedies for many alleged positive government wrongs — such as the shooting

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231 365 U.S. 167 (1961).

232 *See id.* at 171, 183 (authorizing direct enforcement of Fourth Amendment limits in suit under 42 U.S.C. § 1983 without regard to potentially available remedies grounded in state common law); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (authorizing direct enforcement of the Fourth Amendment through judge-made right to sue).

233 *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1759.

234 *Id.* at 1778; *see id.* at 1777–79.

235 The *Ex parte Young* litigation model, though announced in a suit against state officials, had already been applied to federal officials. *See* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902) (granting injunctive relief against postmaster general to prevent illegal conduct).

236 Fallon, *Bidding Farewell*, *supra* note 29, at 939.

237 *Id.* at 957–59 (arguing that the Rehnquist and Roberts Courts erected several barriers for litigants seeking constitutional remedies).

in *Hernández* — poses a serious challenge to rule of law values. We argue that, whatever happens in the constitutional tort space, the revival of intentional tort litigation at common law can offer the promise of assured remediation for many positive government wrongs and provide a vehicle for *some* constitutional remediation when *Bivens* claims fall short.[238]

We think it unlikely that revived tort liability will disrupt the system of constitutional rights and remedies that Fallon defends. For one thing, much of the tort law applicable to positive government wrongs would qualify as old or settled law in the Fallon-Meltzer framework. As to such settled law, Fallon and Meltzer acknowledge that the systemic interest in preserving a government under law calls for relatively strict remediation.[239] Further, Fallon and Meltzer acknowledge that doctrines of qualified immunity did not protect officers from much private tort liability in the nineteenth century.[240] Yet such liability, through the process of indemnity and cost-internalization, could force government policymakers to reduce the incidence of wrongdoing through "improved training and personnel selection."[241] Such a role for tort law might push in broadly the same direction that Fallon envisions for constitutional litigation.

4. Predictable Concerns with an Assured-Redress Model. — One can predict a variety of concerns with expanded tort liability for positive government wrongs. First, policymakers may worry that such a regime will encourage a vast new collection of tort claimants to come forward asserting demands on the government's officials. Restating ideas that inform the recognition of qualified immunity from constitutional tort liability, critics may view litigation as distracting government employees from their important work and deterring qualified individuals from seeking government positions. Second, critics may be concerned that the imposition of liability on government officials fails to create the

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[238] The revival of officer suits at common law may also encourage Congress to reconsider the balance between official and government liability, perhaps expanding the FTCA to make the government liable as an entity for intentional and constitutional tort claims. Past FTCA amendments have made similar switches to entity liability to forestall the threat of personal liability litigation. *See infra* section II.B, pp. 1028–38 (discussing the Drivers Act and the Westfall Act).

[239] *See* Fallon & Meltzer, *Remedies*, *supra* note 29, at 1822.

[240] *See id.*

[241] *See id.* at 1823. Fallon and Meltzer recognize that the nineteenth-century model of private-law litigation operated "for some if not all practical purposes" as "a regime of governmental liability." *Id.* at 1822. Personal official liability on this view was thought to place pressure on government to indemnify, which would ensure a measure of redress for victims and force the government to internalize the costs of government wrongdoing. *Id.* at 1823. Just as personal liability pressures the government to indemnify, entity-based liability pressures individual employees to comply with law under the directions of their supervisors. On that view, current law places some pressure on federal officers to comply with norms of behavior set forth in the body of state tort law that the FTCA incorporates as the measure of government's vicarious liability. Restoration of some individual official tort liability, based on our proposed interpretation of the Westfall Act, should therefore not be seen as introducing a novel or disruptive form of liability.

proper incentives for government compliance with law. Fallon follows the lead of Professor Peter Schuck in suggesting that entity-based liability may better ensure proper deterrence by assigning liability in a way that fosters more careful supervision of government employees.[242] On reflection, these concerns do not appear to undermine the argument for assured redress of positive government wrongs.

Consider the concern with overclaiming, expanding dockets, and distracted federal officials. As a general matter, that concern does not appear well founded. Studies of medical malpractice litigation provide little support for the claims that tort liability spawns frivolous litigation and exorbitant awards.[243] One might predict that the same would be true in tort suits against the federal government.[244] Critics might respond that, whatever the case with medical malpractice claiming, individual plaintiffs have flooded the federal courts with challenges to their treatment in prison. But two factors moderate the threat of increased claiming in that setting. First, the victims of intentional torts committed by federal prison officials can already proceed against the government under the FTCA; their claims already occupy a place on the federal docket.[245] Second, the Prison Litigation Reform Act,[246] imposing exhaustion requirements and other restrictions on frivolous prison litigation,[247] should lessen these concerns.

In any case, the legal system has an obligation to adjudicate claims on the merits. If plaintiffs like Majano[248] have valid claims for assault and battery, perhaps the assertion of those claims in federal courts should be viewed not as a waste of scarce judicial resources but as a vehicle through which individuals can vindicate a claim of right. Critics

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[242] *See* Fallon, *Bidding Farewell*, *supra* note 29, at 978–79 (citing PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983)).

[243] *See* Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 209–10 (2005) (finding no support in the data for claim that medical malpractice litigation had led to a crisis of overclaiming and unwarranted liability).

[244] *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (contesting the narrative of frivolous constitutional tort litigation by showing that *Bivens* claims succeed at a rate almost comparable to that of "other kinds of challenges to governmental misconduct").

[245] For a decision characterizing prison officials as "law enforcement officers" whose intentional torts within the scope of their employment trigger vicarious liability under the FTCA, see *Dickson v. United States*, 11 F.4th 308, 314 (5th Cir. 2021); and see also *Millbrook v. United States*, 569 U.S. 50, 55 n.3 (2013) (assuming without deciding that prison officials were law enforcement officers within the FTCA).

[246] Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of the U.S. Code).

[247] *See, e.g.*, 42 U.S.C. § 1997e(c) (permitting courts to dismiss "frivolous" or "malicious" claims on their own initiative).

[248] *See generally* Majano v. United States, 545 F. Supp. 2d 136 (D.D.C. 2008) (foreclosing assertion of federal custodial employee's claim for on-the-job assault and battery). In any case, a government concerned about the federal docket might leave on-the-job tort claims to the state courts by declining to remove them.

of expanded claiming may respond that common law claims will trigger a right to trial by jury, thereby necessitating further expense and delay and subjecting federal officers to the vagaries of a jury's assessment of the facts. But the rate at which claims go to trial before a jury has declined substantially, part of the familiar story of the vanishing jury trial.[249] Even on the rare occasions when juries determine the facts and apply the law, moreover, they do not reflexively side with the victim over the official defendant. Professor Joanna Schwartz reports that juries in police misconduct cases return defense verdicts far more often than not.[250]

Consider second the general preference for entity liability to create the proper incentives for compliance with law. As a theoretical matter, entity liability makes a good deal of sense; assigning the liability to the cheapest cost avoider should create incentives for prospective defendants to improve monitoring and reduce the incidence of injurious activity.[251] But one can question the choice of an entity model for government liability in tort, as a matter of both theory and practice. Professor Daryl Levinson notes that government agencies do not always internalize the cost of wrongdoing; often it falls on the taxpayer instead.[252] That seems to be particularly true in the case of the federal government. While the FTCA imposes entity liability on the government, the agency whose activities give rise to the imposition of tort-based liability does not at present pay the judgment. Instead, under the terms of a standing appropriation called the Judgment Fund,[253] such judgments are, with few exceptions, paid by the taxpayer from funds in the Treasury.[254] Agencies have sporadic duties to reimburse the Judgment Fund (and thereby to internalize the cost of their unlawful conduct) but those duties apply only to claims sounding in contract and

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[249] Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020) ("Although civil case filings in federal courts, where the data are most reliable, have increased fourfold since the early 1960s, the percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% by 2013.").

[250] SCHWARTZ, *supra* note 190, at 137 (reporting that plaintiffs in police misconduct cases secured favorable verdicts in only fifteen percent of the cases that went to a jury).

[251] *See* Fallon, *Bidding Farewell*, *supra* note 29, at 979; SCHUCK, *supra* note 242, at 98–106; *see also* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 761 (1999). Some argue that the government's power to tax and spend confounds the incentivizing effects of tort liability. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 278–80 (1988).

[252] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347, 408 (2000).

[253] 31 U.S.C. § 1304.

[254] *See* VIVIAN S. CHU & BRIAN T. YEH, CONG. RSCH. SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 3 (2013).

under a federal employment discrimination statute.[255] Given the absence of any impact on agency budgets, it may be difficult to tell a persuasive deterrence story about the value of entity liability.

Critics of reliance on tort liability may nonetheless worry that a model of assured redress will interfere with the development and calibration of constitutional remedies. Among his concerns with a model of assured redress, Fallon worries that routine damages liability for constitutional wrongs could dampen the Court's willingness to recognize new constitutional rights and could trigger damages liability for wrongs that do not sensibly call for such remedies.[256] In *Ex parte Young*, for example, scholars have argued that the proper remedy was to enjoin enforcement of an unconstitutional statute rather than to impose monetary liability on Young for threatened enforcement.[257] Notably, though, a regime of assured redress for positive government wrongs would not have entailed a money award against Young. The *Young* Court distinguished the "actual and direct trespass upon . . . tangible property" that was threatened "in the *Osborn* case" (that is, positive government wrong or summary action in Jaffe's terms) from the state official's "threatened commencement of suits, civil or criminal, to enforce the act" (that is, the threatened initiation of an adjudicatory or formal proceeding in Jaffe's terms).[258] Earlier decisions were said to have recognized that state officials owe a federal duty to refrain from suit in similar circumstances;[259] following them, the *Young* Court authorized only a suit for injunctive relief (not a suit for damages) for breach of that duty.[260] More generally, by limiting redress to wrongs deemed tortious at common law, the

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[255] *Id.* at 13 (reporting that agencies do not reimburse the Judgment Fund, except pursuant to two statutes relating to contract disputes and employment discrimination that specifically require such reimbursement). For a summary of the exceptions for claims sounding in contract, see Figley, *supra* note 201, at 167–69.

[256] *See* Fallon, *Bidding Farewell*, *supra* note 29, at 975.

[257] *See, e.g.*, Hill, *supra* note 229, at 1137 (observing that an award of damages has never "been seriously suggested" in a case like *Ex parte Young*).

[258] *Ex parte* Young, 209 U.S. 123, 167 (1908). On Jaffe's distinction between summary and adjudicatory government action, see *supra* notes 84–89 and accompanying text.

[259] *Ex parte* Young, 209 U.S. at 152–53 (citing, inter alia, Pennoyer v. McConnaughy, 140 U.S. 1, 9 (1891); Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362 (1894)).

[260] *Id.* at 166 (authorizing relief by injunction in cases "reasonably free from doubt"). In a regime of routine damages liability for constitutional violations, courts may face pressure to fashion a privilege or immunity to ward off damages for conduct that poses no threat to the interests in personal integrity protected by tort law. *See* Hill, *supra* note 229, at 1137–38 (describing the need for judges to consider what the role of privilege should be in circumstances where it is not already available). For one example, see *Davis v. Sherer*, 468 U.S. 183 (1984), where the Court applied qualified immunity to block a damages award sought by an individual who had established that his discharge violated procedural due process. *Id.* at 187, 197. Cases like *Davis* nicely illustrate Fallon's concern with the systemic pressures that could result from the routine award of damages for constitutional violations. *See* Fallon, *Bidding Farewell*, *supra* note 29, at 963. But a regime of assured redress for positive government wrongs makes damages available only for conduct deemed tortious at common law and thereby reduces the likelihood of such remedial mismatches.

proposed restoration of tort liability would pose only a modest threat to the unsettlement of a constitutional balance.[261]

Consider finally the argument that national security concerns necessitate the foreclosure of any inquiry into activities such as torture, extrajudicial killing, and the like. At least some tort claims that are shut down through the refusal to expand *Bivens* litigation implicate such concerns and the perceived importance of shielding activities undertaken in the clandestine defense of national security interests.[262] But the existing state-secrets privilege offers ample protection against the disclosure of state secrets in the context of civil litigation. In *Totten v. United States*,[263] a contract-based claim for compensation brought by a Union spy in the Civil War, the Court held that such a privilege blocks courts in the United States from litigating a case to judgment that would pose an unacceptable risk of disclosing state secrets.[264] More recent decisions confirm that the privilege remains alive and well in the Supreme Court.[265] While common law provides authority for the courts to entertain such claims, it does not override any state-secrets privilege the Court might fashion as a matter of federal common law.

In sum, remedial policy appears to support a model of government accountability in which individuals enjoy an assured right to seek tort-based redress for positive government wrongs. While Fallon and Meltzer have made a persuasive case that constitutional remedies pose different questions, the restoration of tort suits at common law could add much to our system of remedies without undermining the balance of constitutional right and remedy that Fallon and Meltzer seek to preserve. Although new legislation might help, the next Part shows that a right to assured redress for positive government wrongs, rooted in state common law, has been hiding in plain sight in the text of the FTCA.

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[261] Perhaps the gravest threat would be presented in suits to contest positive government wrongs committed by federal law enforcement officers under the last two remaining redoubts of the doctrine: suits under the Fourth Amendment for an unreasonable seizure and under the Eighth Amendment for cruel treatment in prison. Notably, however, the FTCA makes provision for suits against the government for such law enforcement torts and thus displaces common law official liability. 28 U.S.C. § 2680(h). It therefore seems unlikely that individuals could mount assault and battery claims against federal officials under state common law to test the constitutionality of federal law enforcement conduct.

[262] *See, e.g.*, Harbury v. Hayden, 522 F.3d 413, 420–21 (D.C. Cir. 2008); Meshal v. Higgenbotham, 804 F.3d 417, 421–22 (D.C. Cir. 2015).

[263] 92 U.S. 105 (1876).

[264] *Id.* at 105–07.

[265] *See* United States v. Reynolds, 345 U.S. 1, 10–11 (1953) (foreclosing litigation of wrongful death claim from negligent maintenance of a spy plane); *cf.* FBI v. Fazaga, 142 S. Ct. 1051, 1060 (2022) (recognizing the existence of the state secrets privilege). For doubts about the current scope of the privilege, see Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 510 (2007); Rebecca Reeves, F.B.I. v. Fazaga*: The Secret of the State-Secrets Privilege*, 17 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 267, 278–80 (2022); and Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT'L SEC. J., no. 1, 2018, at 1, 16–17.

II. WESTFALL ACT IMMUNITY AND COMMON LAW TORT LITIGATION

In this Part, we show that the FTCA, properly understood as a vicarious liability statute, provides no textual basis for precluding official liability for intentional torts in cases such as *Hernández*, *Harbury*, and *Majano v. United States*.[266] To be sure, the Westfall Act makes remedies against the government exclusive of suits brought against federal officers at common law.[267] But that regime of exclusivity applies *only as to claims on which the government bears vicarious liability* under the FTCA.[268] When, as in *Hernández*, *Harbury*, and *Majano*, the claims in question fall outside the FTCA's imposition of vicarious liability, the statute has no immunizing force.[269] That means as a practical matter that the FTCA adheres to the model of assured redress outlined in Part I. Victims of tortious conduct by officers of the federal government may sue the government under the FTCA for government torts. For other torts, the FTCA leaves in place the right of individuals to sue the responsible official at common law.

This Part explains the limited scope of Westfall Act immunity in three sections. The first section provides an overview of the FTCA as adopted in 1946 and amended in the Federal Drivers Act of 1961[270] and the Westfall Act of 1988. While these provisions displace some common law claims against officials, they apply only to claims within the coverage of the FTCA as to which the government faces vicarious liability. In making the case for narrowing Westfall Act immunity and overruling prior inconsistent decisions, this Part sets the stage for Part III's discussion of how restored common law litigation would proceed.

A. The Preservation of Official Liability in the Original FTCA

The FTCA was adopted as part of the Legislative Reorganization Act of 1946[271] to transfer federal scope-of-employment decisions from Congress to the federal courts, waiving the government's immunity from suit (or more accurately, establishing its legal responsibility for the torts of its employees).[272] Recall that under the nineteenth-century

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266 469 F.3d 138 (D.C. Cir. 2006).

267 Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 2, 102 Stat. 4563, 4563.

268 *Id.* at 4564.

269 Hernández v. Mesa, 140 S. Ct. 735, 759 (2020); Majano v. United States, 545 F. Supp. 2d 136, 147 (D.D.C. 2008) (noting that the assault and battery claims in the case were beyond the scope of the FTCA under 28 U.S.C. § 2680(h)); Harbury v. Hayden, 522 F.3d 413, 421–23 (D.C. Cir. 2008) (holding that the plaintiff's claims arose in a foreign country and were therefore precluded by 28 U.S.C. § 2680(k)).

270 Pub. L. No. 87-258, 75 Stat. 539 (codified as amended at 28 U.S.C. § 2679).

271 Ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 2 and 33 U.S.C.).

272 *See* Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

dispensation, courts made determinations of officer liability in tort and Congress passed on petitions for indemnity, determining case by case whether the officer acted within the line of duty.[273] By the nineteenth century, Congress was overwhelmed by the volume of tort petitions and began to doubt its ability to manage them fairly and efficiently.[274] To address the concern, the FTCA transferred responsibility for determining the government's vicarious liability in tort from the legislative to the judicial branch of the federal government.[275]

One sees this transfer of responsibility in the operative provision of the FTCA, which confers in 28 U.S.C. § 1346 exclusive jurisdiction on the federal courts to entertain suits:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[276]

Like a subsequent provision that imposes liability on the United States "in the same manner and to the same extent as [on] a private individual under like circumstances,"[277] the statute incorporates state law (the "law of the place where the act or omission occurred") as a measure of the government's vicarious liability.[278] It thus transforms what had previously been a legislative decision about indemnity into a judicial decision about the private state tort law of vicarious liability.[279]

In imposing vicarious liability as to a limited set of tort claims, Congress preserved existing remedies at common law against federal employees, including intentional tort claims.[280] As the Supreme Court explained, the original terms of the FTCA "afforded tort victims a

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[273] *See supra* section I.A, pp. 993–98.

[274] *See* Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 417–18 (2012).

[275] *See* Indian Towing Co. v. United States, 350 U.S. 61, 68–69 (1955) ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.").

[276] 28 U.S.C. § 1346(b)(1).

[277] *Id.* § 2674.

[278] *Id.* § 1346(b)(1).

[279] For a discussion of how private law principles of liability are incorporated into the nature of the government's vicarious liability, see *Indian Towing Co.*, 350 U.S. at 66–68.

[280] Before the *Bivens* decision federalized the right to sue, victims of the torts of law enforcement officers brought suit against the responsible officers in state court. Brief for the Respondents at 13, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211, at *13. Acknowledging the prevalence of such litigation, the government adopted a policy of removing such actions to federal court. *See Bivens*, 403 U.S. at 391 n.4 ("[I]t is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment . . . ." (citing Brief for the Respondents, *supra*, at 13)).

remedy against the United States, but did not preclude lawsuits against individual tortfeasors"[281] and did not oblige plaintiffs "to proceed exclusively against the Government."[282] Instead, as the Court explained, victims "could sue as sole or joint defendants federal employees alleged to have acted tortiously in the course of performing their official duties."[283] This preservation of suits against individual tortfeasors was an essential feature of Congress's decision to impose vicarious liability as to a limited set of tortious wrongs. Apart from other exceptions, the FTCA excludes a wide range of intentional tort claims — including "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation," and others — from the statute's regime of vicarious liability.[284] Suits for such intentional wrongs were to proceed at state common law against the responsible employee.[285]

B. Subject Matter Limits on Presumptive Employee Liability at Common Law

Notwithstanding the FTCA's preservation of common law tort suits against federal employees, Congress has enacted three provisions that impose important, but narrow, restrictions on such employee litigation. Although they were adopted at different times, the three provisions rely on a common term of art to clarify their limited effect: Each one limits the displacement of employee litigation to suits that implicate *the same subject matter* as the FTCA's imposition of vicarious liability. This section describes the FTCA's initial use of the "same subject matter" formulation to narrow the judgment bar and then explains how Congress

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281 Levin v. United States, 568 U.S. 503, 507 (2013) (citing Henderson v. Bluemink, 511 F.2d 399, 404 (D.C. Cir. 1974)).

282 *Id.*

283 *Id.*

284 28 U.S.C. § 2680(h).

285 In reconstructing the history of the intentional tort exemption, early judicial decisions understood FTCA exceptions to have been drafted to ward off anomalous vicarious liability and to recognize the presumed adequacy of other existing bodies of law. *See, e.g.*, Panella v. United States, 216 F.2d 622, 625–26 (2d Cir. 1954). As the court explained, quoting the legislative history, the exceptions apply to:

> "*certain Governmental activities* which should be free from the restraint of damage suits, or for which adequate remedies are already available. The exemptions include claims arising out of the loss or miscarriage of postal matter, the assessment or collection of taxes or duties, military or naval activity during wartime, the detention of goods by customs officers, *deliberate torts such as assault and battery*, and some others. The exempted claims for which due provision has already been made by law are admiralty and maritime torts, claims made under the Federal Employees' Compensation Act, and the like." And during the course of the Hearing [the Justice Department spokesman] was questioned as follows: "Mr. Robsion: On that point of deliberate assault that is where *some agent* of the Government gets in a fight with some fellow? Mr. Shea: Yes. Mr. Robsion: And socks him? Mr. Shea: That is right."

Id. at 626 (citation omitted) (quoting *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 28, 33 (1942)).

used the same language to narrow the exclusivity provisions of the Drivers Act of 1961 and the Westfall Act of 1988.

1. The Judgment Bar. — Congress first used subject matter language in 1946 to narrow the displacement of employee litigation in the FTCA's judgment bar, now codified at 28 U.S.C. § 2676. The statute provides that a judgment in a suit brought against the government under § 1346 operates as "a complete bar to any action by the claimant, *by reason of the same subject matter*, against the employee of the government whose act or omission gave rise to the claim."[286] The judgment bar thus incorporates two important limits: It operates only to protect employees after initial government litigation (relying on common law rules of claim preclusion to protect the government after an initial suit against the employee),[287] and it applies narrowly to the specific legal claim asserted under the FTCA instead of blocking all claims against the employee that arise from what we today might describe as the factual "transaction or occurrence."[288]

In defining the scope of preclusion in the judgment bar, Congress's choice of the same subject matter formulation tracked then-current law. According to prominent accounts of claim preclusion in the decades before the First Restatement of Judgments was published and the FTCA was enacted, the "subject matter" of the proceeding referred to the primary legal right asserted by the claimant.[289] The primary legal right was understood to differ from the underlying factual predicate of the dispute. The leading authorities understood that a single set of facts

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[286] 28 U.S.C. § 2676 (emphasis added). The release bar similarly provides that the acceptance of an administrative "award, compromise, or settlement" of a tort claim "shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." *Id.* § 2672.

[287] Under the nonexclusive terms of the FTCA as originally adopted, an individual injured in a crash with a government vehicle (say, a postal truck) might sue the government under the FTCA or the driver at common law. *See Levin*, 568 U.S. at 507; Henderson v. Bluemink, 511 F.2d 399, 404 (D.C. Cir. 1974). But such overlapping liability created a risk that the plaintiff might sue one defendant, lose, and then sue the second defendant. The law of defensive nonmutual claim preclusion, as specified in the 1942 *Restatement of Judgments*, offered only a partial solution. RESTATEMENT (FIRST) OF JUDGMENTS § 96 (AM. L. INST. 1942). It would foreclose the second suit against the government if the plaintiff first pursued a negligence claim against the employee and lost. *See* Pfander & Aggarwal, *supra* note 22, at 430 (citing RESTATEMENT (FIRST) OF JUDGMENTS § 96(1)(a) (AM. L. INST. 1942)). But under the existing state of the doctrine, defensive nonmutual preclusion would not bar a second suit if the plaintiff first sued the government for negligence, lost, and then sued the employee. *See id.* at 431 (citing RESTATEMENT (FIRST) OF JUDGMENTS § 96(2) (AM. L. INST. 1942)).

[288] On the role of the modern "transaction or occurrence" test in focusing preclusion law less on the nature of the legal claim than on the underlying events that gave rise to the claim, see RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. L. INST. 1982) (tying preclusion to a transactional test that takes account of modern joinder rules), and ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 40–67 (2001) (describing the transactional test for preclusion and its connection to similar transactional rules governing joinder of claims and parties in the procedural rules).

[289] Pfander & Aggarwal, *supra* note 22, at 441.

might give rise to a variety of different legal theories or claims[290] — that is, a set of facts might give rise to multiple "subject matters." But preclusion did not apply to all claims arising from the underlying transaction, as it would today, but more narrowly to the subject matter — the primary legal right — adjudicated in the earlier litigation.[291]

Justice Cooley explained these distinctions in *Jacobson v. Miller*,[292] a widely cited account of the way preclusion extended only to the same subject matter of the previous litigation.[293] A defendant sued in respect of the first subject matter would not be precluded from raising certain claims and defenses in a successive action that concerned the second "subject-matter," even though both actions arose "out of the same [factual] transaction"[294]:

> The subject-matter involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon; as, for example, the right in ejectment to have possession of the lands in *assumpsit* to recover a demand; in equity to have a mortgage foreclosed for an amount claimed to be due upon it, or to have specific performance of a contract, and so on.[295]

Justice Cooley's conception of the subject matter as defined by the legal right asserted thus led him to accord limited preclusive effect to prior adjudication.[296] Luminaries such as Professor John Norton Pomeroy and a wide range of legal dictionaries concurred in defining the subject matter of an action as "the *right* which is sought to be enforced in the action."[297] This narrow conception of preclusion explains how a

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[290] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (AM. L. INST. 1982) (explaining that "courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant").

[291] *See* Pfander & Aggarwal, *supra* note 22, at 441 (explaining that preclusion demanded that "[b]oth the relevant facts *and the theory of liability* [be] identical (as required in common law applications of the judgment bar)" (emphasis added)); Brief of Professors Gregory Sisk and James Pfander as Amici Curiae in Support of Respondent at 24, Simmons v. Himmelreich, 578 U.S. 621 (2016) (No. 15-109).

[292] 1 N.W. 1013 (Mich. 1879).

[293] *See id.* at 1015. The dispute in *Jacobson* arose between the parties to a lease. Justice Cooley explained that the "subject-matter of the first suit between these parties was the right to recover certain rents alleged to have accrued upon the lease prior to April, 1877" but that a separate "subject-matter" could well have concerned the validity of the execution and delivery of the lease in question. *Id.* at 1016.

[294] *Id.* at 1017.

[295] *Id.* at 1015.

[296] *Id.* at 1016.

[297] JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE § 775 (Boston, Little, Brown & Co. 1876); *see also Subject-Matter*, BLACK'S LAW DICTIONARY (4th ed. 1968); *Subject Matter*, THE CYCLOPEDIC LAW DICTIONARY 1063 (Walter A. Shumaker & George Foster Longsdorf eds., 3d ed. 1940); *Subject Matter*, 37 CYCLOPEDIA OF LAW AND PROCEDURE, 342 n.75 (William Mack ed., 1911); *Subject-Matter*, WILLIAM C. ANDERSON, A DICTIONARY OF

plaintiff might first sue in trespass and, if the facts revealed only negligence, bring a second action for negligence.

Viewed against the backdrop of then-existing law, the FTCA's "subject matter" limitations moderate the preclusive effect of a government judgment to preserve the viability of intentional tort claims against the individual tortfeasor. To illustrate the statute's operation, consider a two-count complaint under the FTCA for damages resulting from an allegedly botched operation in a government hospital. Count one might seek damages for negligence; count two might seek compensation for medical battery, owing to a lack of informed consent. A judgment for the government on the merits of the negligence claim would bar a subsequent negligence claim against the government doctor who performed the operation. But the government owes no vicarious liability for medical battery, an intentional tort that falls within the FTCA's exception to government liability.[298] A judgment for the government applying that exception would not block a follow-on suit against the doctor for medical battery; the battery claim would present a "subject matter" or primary legal right different from the claim for negligence. The judgment bar would sensibly block the second negligence claim but would (also sensibly) leave the plaintiff free to seek damages from the doctor for lack of informed consent.[299]

2. The Limited Exclusivity Regime in the Drivers Act. — Congress used the judgment bar's "subject matter" limitation to narrow the scope of employee immunity conferred in the Drivers Act,[300] a precursor to the Westfall Act. In broadly providing compensation for the government's negligence, the FTCA covered injuries growing out of the negligent operation of government vehicles by government drivers.[301] But as noted above, the FTCA did not displace the availability of a parallel common law action for negligence against the drivers of those

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LAW 983 (Chicago, T.H. Flood & Co. 1889); *Subject-Matter*, 24 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 141 n.2 (Charles F. Williams & Thomas J. Michie eds., New York, Edward Thompson Co. 1894). It was also sometimes defined as the "cause" or "cause of action." *Subject-Matter*, BLACK'S LAW DICTIONARY, *supra*; *Subject Matter*, THE CYCLOPEDIC LAW DICTIONARY, *supra*, at 1063; *Subject-Matter*, BOUVIER'S LAW DICTIONARY 1141 (William Edward Baldwin ed., Banks-Baldwin L. Publishing Co., Baldwin's Students ed. 1934); *Subject-Matter*, ANDERSON, *supra*, at 983.

298 *See* 28 U.S.C. § 2680(h).

299 To be clear, a claim seeking redress for an intentional tort implicates a "subject matter" different from one seeking redress for negligence, even though both types of claims may ultimately seek compensation for the same personal injury. This distinction explains why government doctors, for many years, were encouraged to purchase their own personal liability insurance to cover medical battery claims; any government liability under the FTCA did not extend to and could not preclude personal liability for such intentional torts. *See* Hui v. Castaneda, 559 U.S. 799, 811–12 (2010) (noting government practice of encouraging personal liability coverage for government doctors).

300 Pub. L. No. 87-258, § 1, 75 Stat. 539, 539 (1961) (codified as amended at 28 U.S.C. § 2679).

301 *See* 28 U.S.C. § 1346(b)(1) (providing federal jurisdiction over suits against the United States arising out of any "negligent or wrongful act or omission" of a government employee).

government vehicles.[302] As time wore on, Congress grew concerned that personal injury claimants (perhaps motivated in part by a desire for trial by jury unavailable under the FTCA[303]) were continuing to seek compensation in suits against government drivers, rather than against the government itself.[304] Inasmuch as the government declined to purchase liability insurance or guarantee indemnity for government drivers,[305] those drivers faced a potential threat of personal liability for common law negligence. And such suits threatened to impose financial demands on the government as drivers sought indemnity.[306]

The Drivers Act addressed these concerns by making the federal government's vicarious liability under the FTCA the exclusive remedy for injuries caused by the negligent operation of government vehicles. Because the Drivers Act provided the framework for the more broadly applicable Westfall Act,[307] which now governs in its place, we describe its provisions in some detail. The Act provided as follows:

> The remedy by suit against the United States as provided by section 1346(b) of [the FTCA] for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding *by reason of the same subject matter* against the employee or his estate whose act or omission gave rise to the claim.[308]

The regime of exclusivity was limited in three respects: It applied only to claims arising out of the operation of a government motor vehicle; it applied only to such operation within the scope of a government driver's employment; and it blocked only common law actions against drivers

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302 *See supra* note 287 and accompanying text.

303 28 U.S.C. § 2402.

304 *See* S. REP. NO. 87-736, at 6 (1961). The Drivers Act was one of "several proposals designed to meet the problem of personal liability in suits for damages to which employees of the Federal Government are subject as a result of their operation of motor vehicles in the performance of [their] official duties." *Id.* at 2.

305 *Id.* at 6.

306 *See id.* at 3 (expressing the view that the Drivers Act's amendment to the FTCA would "afford the needed relief both with greater simplicity in administration and with far less expense to the Government than would be entailed by" a legislative solution providing for indemnification of government drivers).

307 *See* 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 6.01(b) (explaining that the Drivers Act provided the model for and is "directly relevant" to the Westfall Act); *see also* United States v. Castleman, 695 F.3d 582, 586 (6th Cir. 2012) (explaining that courts should give an earlier statute "great weight in resolving any ambiguities and doubts" when interpreting a later statute on which it is modeled (quoting Beckert v. Our Lady of Angels Apartments, Inc., 192 F.3d 601, 606 (6th Cir. 1999))), *rev'd and remanded on other grounds*, 572 U.S. 157 (2014).

308 Pub. L. No. 87-258, § 1, 75 Stat. 539, 539 (1961) (codified as amended at 28 U.S.C. § 2679) (emphasis added). That the Drivers Act served as a model for the later Westfall Act, now codified at 28 U.S.C. §§ 2671, 2674, 2679, becomes clear when one compares the highly similar language the two provisions use. This means that judicial decisions interpreting the Drivers Act should be viewed as having significant persuasive value when interpreting the Westfall Act.

brought "by reason of the same subject matter" as a viable FTCA action.[309] Exclusivity, in short, was limited on the same terms as the judgment bar: to claims for violation of a primary legal right within the ambit of the FTCA's imposition of vicarious liability on the federal government.

To enforce this regime of exclusivity, the Drivers Act included a procedure that called for the removal of state court proceedings to federal court and the substitution of the federal government as the defendant in such litigation.[310] It provided for the Attorney General to take over the defense of any motor vehicle negligence claim if the claim itself arose within the scope of the government driver's employment.[311] Following removal and substitution, the injury claim would then proceed against the government under the FTCA, while the driver was dismissed as a party.[312] If, on the other hand, the claim fell outside the FTCA's provision for exclusive government liability, remand to state court would allow suit to proceed against the employee.[313]

In using the judgment bar's limiting reference to the "same subject matter," the Drivers Act signaled that the regime of exclusivity and the employee's protection extended only to claims as to which the government had accepted vicarious liability under the FTCA. Indeed, a string of cases from the 1960s, 70s, and 80s confirmed the narrow scope of exclusivity. To be sure, the government argued that the Drivers Act barred *all* claims against an employee that arose from a federal vehicle's operation, even claims not cognizable under the FTCA. Yet lower federal courts consistently rejected this expansive reading of the Act.[314] Reasoning that the Drivers Act limited exclusivity to the negligence claims for which the government faced vicarious liability under the FTCA, the courts found that any intentional tort claims against government employees, which were beyond the scope of the FTCA, were

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309 *Id.*

310 *Id.* (including newly added 28 U.S.C. § 2679(d) to the Drivers Act).

311 *Id.* (including newly added 28 U.S.C. § 2679(c) to the Drivers Act).

312 *See id.* (stipulating that under the Act, qualifying injury claim "proceedings [would be] deemed a tort action brought against the United States").

313 *Id.*

314 *See, e.g.*, Nasuti v. Scannell, 792 F.2d 264, 265–66 (1st Cir. 1986) (affirming, for want of appellate jurisdiction, lower court decision remanding to state court intentional tort claims that were outside the scope of defendant's employment); Willson v. Cagle, 694 F. Supp. 713, 717 (N.D. Cal. 1988) (holding that intentional tort claim brought against federal driver was not cognizable under the FTCA and, thus, that claimants could sue drivers in their personal capacities in a diversity action); Smith v. Dicara, 329 F. Supp. 439, 442 (E.D.N.Y. 1971) ("[I]t is obvious that the Drivers Act [(including its exclusivity provision)] is not applicable to a federal driver who intentionally injures a plaintiff with his motor vehicle.").

preserved.[315] The courts thus distinguished intentional tort claims from those for negligence within the coverage of the FTCA.[316]

3. Bivens *and the 1974 Intentional Tort Amendments.* — The Supreme Court and Congress federalized intentional tort litigation to some degree during the 1970s, further complicating the task of coordinating remedies under the FTCA. *Bivens*, of course, recognized a federal right of action for constitutional tort claims against federal law enforcement officers under the Fourth Amendment.[317] Then Congress expanded the remedy by statute, amending the FTCA in 1974 to accept vicarious liability for a limited set of intentional torts committed by investigative and law enforcement officers.[318] Congress recognized that the Supreme Court's decision in *Bivens* only three years earlier had given individuals a right to seek compensation for federal officers' violations of the Fourth Amendment.[319] But much like § 1983 litigation, the *Bivens* regime relied on suits against individual officers, rather than the government, to impose liability for constitutional torts.[320] Supplementing *Bivens*, the amended post-1974 FTCA permits victims to recover damages from the *government* for the intentional torts of its law enforcement employees.[321]

In 1980, addressing the problem of how to coordinate remedies for the intentional misconduct of law enforcement officers in the wake of the law enforcement proviso's enactment, the Supreme Court found that both *Bivens* and FTCA claims were viable.[322] Rejecting the government's argument that the expansion of the FTCA had displaced the

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315 *See Willson*, 694 F. Supp. at 717 n.3; *see also* Dagnan v. Gouger, No. CIV-1-88-452, 1989 WL 81655, at *3 (E.D. Tenn. July 19, 1989) (explaining that application of judgment bar to block suit against employee for intentional misconduct would violate the constitutional guarantee of due process of law).

316 To be sure, some lower federal courts gave voice to a broader conception of employee immunity, opining that the Drivers Act protected government drivers "from all liability." *See, e.g.*, Carr v. United States, 422 F.2d 1007, 1010 (4th Cir. 1970). Other decisions appeared to take the view that the Drivers Act's exclusivity provision protected all actions an employee took within the scope of employment, even if a plaintiff would not be able to sue the government under the FTCA for those actions. *See* Thomason v. Sanchez, 539 F.2d 955, 958 (3d Cir. 1976); Van Houten v. Ralls, 411 F.2d 940, 942–43 (9th Cir. 1969); Gilliam v. United States, 407 F.2d 818, 818–19 (6th Cir. 1969); Vantrease v. United States, 400 F.2d 853, 855 (6th Cir. 1968). Yet these statements were dicta; in every case cited, the claim against the government driver sounded in negligence, not intentional tort, and thus fell within the scope of FTCA exclusivity. None of the cases giving effect to exclusivity was called upon to address an intentional tort claim or to confront the "same subject matter" limits of exclusivity.

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

318 Pfander & Baltmanis, *supra* note 6, at 135, 136 n.104. For an account of the 1974 amendments' adoption, see Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 500–17 (1976).

319 *See* Pfander & Baltmanis, *supra* note 6, at 135 n.100.

320 *See* S. REP. NO. 93-588, at 3 (1973) ("[T]his provision [(the intentional tort proviso for law enforcement officers)] should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* . . . .").

321 Carlson v. Green, 446 U.S. 14, 33 (1980) (Rehnquist, J., dissenting).

322 *Id.* at 20–21 (majority opinion).

Bivens remedy, the Court made much of the distinctive character of constitutional violations and the apparent intent of Congress to supplement, rather than displace, *Bivens*.[323] The Court reasoned that the two schemes varied in terms of available remedies and factfinders. For example, punitive damages and jury trials were available under *Bivens* but not under the FTCA.[324] For any loss, of course, the victim could recover but a single satisfaction.[325] But the result was to leave constitutional torts committed by federal employees outside the FTCA's vicarious-liability regime, even though the underlying transaction or occurrence might also give rise to a common law tort claim for assault or battery under the FTCA. Accordingly, courts treated the two kinds of claims as presenting different subject matters within the meaning of the FTCA.

4. Subject Matter Limits in the Westfall Act. — Congress adopted one final set of important amendments in 1988, rewriting the statute to extend the Drivers Act's exclusivity regime to a broader range of common law tort claims against federal employees.[326] The immediate impetus for the Westfall Act was the Supreme Court's decision in *Westfall v. Erwin*, in which the Court rejected the government's claim that federal employees were entitled to a federal (judge-made) common law immunity from state law tort claims based on negligent conduct within the scope of their employment.[327] The victim's injuries had nothing to do with the operation of a motor vehicle and did not implicate the Drivers Act's exclusivity provision.[328] Without a statutory leg to stand on, the government invoked judge-made immunity doctrines as a defense to common law liability.[329] In a unanimous opinion, building on prior law, the Court held that federal employees' immunity from common law

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[323] *Id.* at 19 ("[The government] point[s] to nothing in the [FTCA] or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations."). According to the Senate Report to the intentional tort proviso, "innocent individuals who are subjected to raids . . . will have a cause of action against the individual Federal agents [under *Bivens* and/or the common law] *and* the Federal Government [under the FTCA]." *Id.* at 20 (quoting S. REP. NO. 93-588, at 3 (1973)).

[324] *Id.* at 21–23.

[325] Pfander & Aggarwal, *supra* note 22, at 465.

[326] *See* 28 U.S.C. § 2679(b)(1) ("The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . .").

[327] *See* 484 U.S. 292, 300 (1988).

[328] *See id.* at 294.

[329] *Id.* at 296 (quoting Brief for Petitioners at 12, *Westfall*, 484 U.S. 292 (No. 86-714)) (citing Gen. Elec. Co. v. United States, 813 F.2d 1273, 1276–77 (4th Cir. 1987); Poolman v. Nelson, 802 F.2d 304, 307 (8th Cir. 1986)) ("[The government] initially ask[s] that we endorse the approach followed by the Fourth and Eighth Circuits . . . that all federal employees are absolutely immune from suits for damages under state tort law 'whenever their conduct falls within the scope of their official duties.'").

claims protected only discretionary acts, which the Court described as official conduct resulting from "independent judgment."[330] Concluding that the government failed to establish that the defendant's negligent supervision involved any such judgment, the Court denied the defendant's claim of absolute immunity.[331]

Responding to the *Westfall* decision,[332] Congress amended the FTCA to make the Drivers Act model of remedial exclusivity more widely applicable to common law claims against federal employees.[333] Instead of limiting the statute to claims arising from the operation of motor vehicles, the present-day 28 U.S.C. § 2679 extends the regime of FTCA exclusivity to claims for "personal injury or death arising or resulting from the negligent or wrongful act or omission" of a federal employee "acting within the scope of his office or employment."[334] Congress coupled this broader exclusivity regime with a broader procedure for the removal and substitution of the government as the proper defendant in such vicarious liability claims.[335] But just as it did in the Drivers Act, Congress limited this exclusivity to suits brought against employees for the same act or omission "*by reason of the same subject matter*."[336] In other words, exclusivity applied only to tort claims for which the government had accepted vicarious liability under the FTCA.[337]

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330 *Id.* at 296–97.

331 *See id.* at 299.

332 The Westfall Act's legislative history indicates that Congress responded to the Supreme Court's decision with alarm. The House Report to the Westfall Act expressed Congress's view that *Westfall* "dramatically" departed from earlier law, under which federal employees "were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment." H.R. REP. NO. 100-700, at 2 (1988). (This characterization of the pre-*Westfall* state of the law seems dubious in light of the discussion provided in Part I of this Article.) In a floor statement in support of the Act, Senator Charles Grassley opined that *Westfall* had created "an immediate crisis of personal liability exposure for the entire Federal work force." 134 CONG. REC. 29414 (1988). But the legislative history indicates that Congress was also concerned with leaving in place existing remediation for deserving claimants. The House Report stressed that the Act would not cause anyone "who previously had the right to initiate a lawsuit" to "lose that right." H.R. REP. NO. 100-700, at 7.

333 Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 16 U.S.C. § 831c-2 and 28 U.S.C. §§ 2671, 2674, 2679). On the legislative focus on common law negligence claims of the kind at issue in *Westfall v. Erwin*, consider the statement of the Act's chief architect, Representative Barney Frank: "This is simply restoring the law under the Federal [T]ort Claims Act, under common cases of negligence and perhaps some unique ones, but we are talking about negligence within the scope of the employment. Other remedies . . . are not affected at all." 134 CONG. REC. 15963; *see also Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the H. Subcomm. on Admin. L. and Gov't Rels.*, 100th Cong. 127 (1988) (statement of Rep. Barney Frank, Chairman, H. Subcomm. on Admin. L. and Gov't Rels.).

334 28 U.S.C. § 2679(b)(1).

335 *See id.* § 2679(d)(1)–(2).

336 *Id.* § 2679(b)(1) (emphasis added).

337 Congress explained its purpose in the findings accompanying the statute: "It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed

In addition to exclusivity (which operated along with removal and substitution provisions to transform suits against federal employees into vicarious FTCA liability claims against the government), the Westfall Act imposed a regime of preclusion to block other related tort claims against federal officials. The relevant language reads as follows: "Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred."[338]

Notably, this preclusion provision bars all claims "arising out of or relating to" the subject matter of the FTCA claim and thus extends beyond those that trigger exclusive government vicarious liability on claims "by reason of the same subject matter."[339] Congress's decision to use specific language to extend preclusion to encompass "relat[ed]" claims confirms what we have already seen: The regime of exclusivity applies, much like in the Drivers Act, only to claims for which the government faces vicarious liability.

The Westfall Act thus creates two tracks. One track of *exclusivity* ensures that claims within the scope of the FTCA's coverage proceed against the United States (that is, claims arising from a "negligent or wrongful act or omission" that implicate the "subject matter" of the government's vicarious liability);[340] a second track of *preclusion* applies to "other" related claims against federal employees.[341] To ensure the "exclusivity" of the first track of claims within the coverage of the FTCA, the Westfall Act adopts the removal-and-substitution model of the Drivers Act.[342] The statute does not bar these claims; it simply routes them to the proper defendant and tribunal by ensuring that the suit will proceed against the government itself in federal court.[343] Preclusion, the second track, works differently. So long as the claim seeks tort-based damages related to the same subject matter as the remedy against the government, the FTCA precludes that claim from going forward against

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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." Federal Employees Liability Reform and Tort Compensation Act § 2(b). Notably, these findings do not assert that the statute protects against "any" or "all" personal liability in tort. Instead, the protections accorded federal employees were linked to the FTCA's provision for appropriate remedies against the United States for acts of government employees within the scope of their employment. Congress took the position that, as with the Drivers Act on which it was modeled, the Westfall Act should exclude suits against employees where the government had accepted vicarious liability under the FTCA. *See id.* § 2(a).

338 28 U.S.C. § 2679(b)(1).

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.* § 2679(d)(1)–(2).

343 *See id.*

the employee.[344] In effect, then, the Westfall Act preserved existing tort-based remedies against the government under the FTCA, made those remedies exclusive of any suit brought against an employee by reason of the same subject matter, and then ruled out federal employees' tort liability as to claims that arose from or related to the same act or omission.[345]

What the Westfall Act emphatically did *not* do was immunize federal employees from *all* claims arising from activities within the scope of their employment. To be sure, viable claims under the FTCA must arise within the scope of employment; that is an element of the liability rule in § 1346.[346] But the Westfall Act does not tie exclusion and preclusion to claims on that basis; as we have seen, § 2679 makes the remedy against the government exclusive only as to claims brought against employees who were acting within the scope of their employment "by reason of the same subject matter" as the remedy provided by the FTCA.[347] It thus takes an act or omission within the scope of employment giving rise to a remedy *that implicates the FTCA's subject matter* to bring exclusivity into play, a conclusion entirely consistent with the idea that the FTCA routes claims within its terms exclusively to the United States as a defendant. Preclusion applies narrowly, too, not to all matters within the scope of employment but only to matters "arising out of or relating to" the subject matter of those claims for which the FTCA affords a remedy.[348] Nothing in the statute provides for exclusion or preclusion *solely* because the claims in question fall within the employee's scope of employment.[349]

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[344] *See id.* § 2679(b)(1). The prospect of such preclusion explains why the *Bivens* proviso was written into the Westfall Act. A freestanding *Bivens* claim, seeking redress for a constitutional tort, does not implicate the FTCA and the government's acceptance of vicarious liability; it does not arise by reason of the same subject matter as an FTCA claim. *See* Pfander & Aggarwal, *supra* note 22, at 453–54. But such a *Bivens* claim might relate to an FTCA claim, triggering Westfall Act preclusion. *See* 28 U.S.C. § 2679(b)(1). To ward off such preclusion, Congress included a specific savings clause for suits for violation of the Constitution, *see id.* § 2679(b)(2)(A), thereby replicating the result in *Carlson v. Green*, 446 U.S. 14, 23 (1980).

[345] The Westfall Act thus ensures preclusion even when the plaintiff might attempt to plead claims against officers that fall outside the ambit of the FTCA. Consider injuries inflicted by a law enforcement officer that might be characterized as assault, battery, and the intentional infliction of emotional distress (IIED). The FTCA imposes vicarious liability for law enforcement assault and battery but not for IIED. A plaintiff wishing to forego the FTCA remedy and pursue a claim against the officer might argue that the IIED claim does not come within the subject matter of the FTCA and thus remains viable. But such a maneuver does not work under the statute, which recognizes an exclusive "remedy" under the FTCA for assault and battery and precludes the related IIED claim.

[346] 28 U.S.C. § 1346(b)(1).

[347] *Id.* § 2679(b)(1).

[348] *Id.*

[349] To be sure, the Supreme Court has suggested that the Westfall Act immunity from common law tort liability extends more broadly than the text would support. *See* United States v. Smith, 499 U.S. 160, 166 (1991). Accepting these assumptions at face value, lower courts have long linked

C. Recovering the Westfall Act's Narrow Regime of Exclusivity

Given the narrow reach of Westfall Act exclusivity and preclusion, one might ask how the federal courts came to accept the broader interpretation that has led to the wholesale displacement of intentional tort claims against federal employees. The answer lies in the Court's decision in *United States v. Smith*,[350] where the Court adopted a misguided account of the statute's purpose contained in the legislative history and virtually ignored the controlling language of the statute.[351] After sketching the *Smith* decision, this section describes the Court's most recent decision, *Simmons v. Himmelreich*,[352] which focused on the text of the FTCA and shrugged off the government's argument for continued reliance on the *Smith* approach.[353] After describing the two decisions, the section concludes with a call for *Smith* to be overruled.

The *Smith* case arrived at the Court only three years after Congress responded to the decision in *Westfall v. Erwin* by adopting the Westfall Act.[354] The plaintiffs, seeking damages for negligent medical care at an Army hospital in Italy, sued the doctor (an employee of the United States government) in California federal court, invoking diversity jurisdiction and the laws of California and Italy.[355] After the government substituted itself as defendant, it moved to dismiss the case on the basis of a provision declaring the FTCA inapplicable to any "injuries sustained abroad."[356] The government argued that the inapplicability of the FTCA to foreign-country claims shielded *both* the government and its

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Westfall Act immunity solely to the federal employee's scope of employment. *See, e.g.*, Sullivan v. United States, 21 F.3d 198, 200 (7th Cir. 1994). (We explain below why *Smith* was incorrectly decided.)

One of us uncritically accepted these assumptions in earlier work. *See* James E. Pfander & David P. Baltmanis, Response, *W(h)ither* Bivens*?*, 161 U. PA. L. REV. ONLINE 231, 233 (2013); Pfander & Baltmanis, *supra* note 6, at 122 n.23. On further reflection, those assumptions strike us as incorrect. Analysis of the FTCA's "same subject matter" language began when one of us took up the meaning of the judgment bar. *See* Pfander & Aggarwal, *supra* note 22, at 421. The broader implications of the same subject matter limitation became clear when the Court reconsidered the *Smith* Court's treatment of exceptions to government liability. *See* Simmons v. Himmelreich, 578 U.S. 621, 628–29 (2016).

350 499 U.S. 160 (1991).

351 *See id.* at 177 (Stevens, J., dissenting).

352 578 U.S. 621 (2016).

353 Accepting that the Court has taken a strong textualist turn in interpreting federal statutes, we adopt a similar mode of interpretation here. *See* William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614–15 (2023). Indeed, *Smith* was primarily based on the majority's mistaken interpretation of legislative history rather than on the text of the statute. *See Smith*, 499 U.S. at 180–81, 185–86 (Stevens, J., dissenting) (quoting 28 U.S.C. § 2679(b)(2)); *infra* section II.C, pp. 1039–44. But we believe that the interpretation of the statute we advance will persuade most careful readers, including strong textualists and unreconstructed purposivists.

354 *See Smith*, 499 U.S. at 163.

355 *Id.* at 162 & n.1.

356 *Id.* at 163 (citing 28 U.S.C. § 2680(k)); *see* 28 U.S.C. § 2680(k) (stating that the government's assumption of vicarious liability under the FTCA "shall not apply" to "[a]ny claim arising in a foreign country").

employees from such liability.[357] The Supreme Court agreed,[358] extending the scope of employee immunity well beyond that specified in the text of the FTCA.[359]

The textually unsupported immunity announced in *Smith* has taken hold in dicta,[360] leading to similarly unreflective assumptions about the FTCA's impact on the viability of common law tort claims against government officials.[361] But the Supreme Court's first considered analysis of the relevant statutory language squarely rejected the approach adopted in *Smith*.[362] In *Simmons v. Himmelreich*, the Court concluded that dismissal of an FTCA action by reason of an exception contained in 28 U.S.C. § 2680 rendered the FTCA's judgment bar inapplicable to a separate claim for damages under the *Bivens* doctrine.[363] Section 2680 declares that "this chapter" (the FTCA) "shall not apply" to claims withdrawn from the scope of the government's vicarious tort liability through a variety of exceptions.[364] Under this language, the exception takes the case outside the FTCA entirely and renders its provisions, *including the judgment bar*, inoperable.[365] As the Court explained: "The 'Exceptions' section reflects the United States' decision not to accept liability for certain types of claims; like other 'personal immunities,' the

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[357] *See Smith*, 499 U.S. at 162–63. "[T]he leading Supreme Court decision interpreting [§ 2680(k), *United States v. Spelar*, 338 U.S. 217 (1949),] make[s] clear that Congress intended the 'foreign country' exception to protect the United States against application of the laws of a foreign power in determining questions of tort liability." JULIE ZATZ, DEP'T OF JUST., FTCA EXCEPTION: CLAIMS ARISING IN A FOREIGN COUNTRY 1 (1988). Under 28 U.S.C. § 1346, "liability is to be determined by the law of the situs of the wrongful act or omission." *Spelar*, 338 U.S. at 221 (quoting *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 35 (1942) (statement of Francis M. Shea, Assistant Att'y Gen., Claims Division, U.S. Department of Justice)); *see* 28 U.S.C § 1346(b)(1). Therefore, members of Congress viewed it as "wise to restrict the [FTCA] to claims arising in this country." *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, *supra*, at 35 (statement of Francis M. Shea, Assistant Att'y Gen., Claims Division, U.S. Department of Justice).

[358] *Smith*, 499 U.S. at 162.

[359] *See id.* at 181 (Stevens, J., dissenting) (quoting 28 U.S.C. § 2679(b)(2)).

[360] *See, e.g.*, Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996) (citing 28 U.S.C § 2679(b)(1); *Smith*, 499 U.S. at 161–67; Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993)).

[361] *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 443–44 (1995) (Souter, J., dissenting) (arguing that judicial review of governmental scope of employment certification goes against the plain meaning of the FTCA and creates perverse outcomes); Osborn v. Haley, 549 U.S. 225, 256–57, 260–61 (2007) (Breyer, J., concurring in part and dissenting in part) (quoting 28 U.S.C. § 2679(d)(2)) (indicating that permitting certification when an incident fell out of the scope of employment contravenes the FTCA's language and purpose); Hernández v. Mesa, 140 S. Ct. 735, 748 (2020) (quoting 28 U.S.C. § 2680(k)) (stating in dicta that the Westfall Act bars all claims within the scope of employment); *see also* Pfander & Baltmanis, *supra* note 6, at 121, 123 (arguing from the presumed absence of common law remedies that the Court should more freely recognize rights to sue under the *Bivens* doctrine); Vázquez & Vladeck, *supra* note 22, at 566 (same).

[362] Simmons v. Himmelreich, 578 U.S. 621, 628–29 (2016) (quoting *Smith*, 499 U.S. at 166).

[363] *See id.* at 631.

[364] *Id.* at 626–27 (quoting 28 U.S.C. § 2680(a)).

[365] *Id.*

'Exceptions' section is only a defense for — and can only be 'taken advantage of' by — the United States."[366]

In understanding the FTCA as a vicarious liability statute that leaves suits against federal employees intact (except where subject to Westfall Act exclusivity), *Simmons* decisively rejects the *Smith* rationale.[367] On the logic of *Simmons*, the declared inapplicability of the FTCA would prevent the statute from affecting the viability of a common law claim against the federal official.[368] Yet the *Smith* Court failed to consider that possibility; it did not consider the "shall not apply" language in § 2680 at all.[369] In evaluating the text, the Court addressed primarily that portion of the Act that declares FTCA remedies exclusive of other proceedings.[370] As the Court explained, the Westfall Act makes the FTCA remedy exclusive and "then reemphasizes that '[a]ny other civil action or proceeding for money damages . . . against the employee . . . is precluded.'"[371] In reaching this conclusion, the Court omitted any discussion of the "subject matter" limits on preclusion,[372] and declined to take seriously the independent operative force of the exclusivity and preclusion provisions.[373] Instead, the Court viewed the language precluding related claims as a mere matter of emphasis with no other role in the statute.[374]

Having failed to address the meaning of the text, the *Smith* Court claimed support in legislative history,[375] treating an isolated comment in

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[366] *Id.* at 630 n.5 (citing RESTATEMENT (FIRST) OF JUDGMENTS § 96 cmt. g (AM. L. INST. 1942)). As the Court explained, its conclusion was consistent with rules of nonmutual preclusion, which generally do not apply to dismissals that recognize a personal immunity. *Id.* (citing RESTATEMENT (FIRST) OF JUDGMENTS § 96 cmt. g (AM. L. INST. 1942); RESTATEMENT (SECOND) OF JUDGMENTS § 51(1)(b) & cmt. c (AM. L. INST. 1980)).

[367] *Id.* at 628–29 (quoting *Smith*, 499 U.S. at 166).

[368] *See id.* at 631.

[369] *Id.* at 628. *See generally Smith*, 499 U.S. 160 (neglecting to cite or reference the "shall not apply" language in § 2680).

[370] *See Smith*, 499 U.S. at 165–66 (quoting 28 U.S.C. § 2679(b)(1)).

[371] *Id.* (alteration in original) (quoting 28 U.S.C. § 2679(b)(1)).

[372] *See generally id.* (failing to consider any subject matter limitations on preclusion).

[373] *Id.* at 165.

[374] *Id.* at 185–86 (Stevens, J., dissenting).

[375] As we explain shortly, the House Report on which the *Smith* Court relied also failed to engage with the text of the statute. Here is the relevant portion of the Report:

> The "exclusive remedy" provision of [the Westfall Act] is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in [§ 2680] also is precluded against an employee in his or her estate.

H.R. REP. NO. 100-700, at 6 (1988). In keeping with our predominantly textualist reading of the FTCA in this Article, we do not feel compelled to follow isolated shreds of legislative history that fundamentally misread the plain language of the statute. *See* Mohamad v. Palestinian Auth., 566 U.S. 449, 458 (2012) (stating that "reliance on legislative history is unnecessary" when statutory language is unambiguous (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 n.3 (2010))).

the House Report as an authoritative account of the statute's operation.[376] But like the *Smith* Court, the Report mistakenly characterized exclusivity as operating on all claims within the scope of employment, without reckoning with the "same subject matter" limits in the statute.[377] Similarly, the Report (and the Court) compounded the error, by failing to see (as *Simmons* later held[378]) that the "exceptions" language in § 2680 operates only for the benefit of the government and does not block non-FTCA suits against employees;[379] in fact, as stated above, § 2680 provides that the Westfall Act's exclusivity provisions do not "apply" to non-FTCA suits.[380]

While the *Simmons* Court commented rather sharply on the *Smith* Court's failure to engage with the text of the statute,[381] it had no occasion to revisit the *Smith* Court's interpretation of the Westfall Act as it applied to the foreign-country exception in § 2680. As *Simmons* explained, "[t]he *Smith* Court held that the [Westfall] Act's reference to 'limitations and exceptions' was most naturally read to refer to the 'Exceptions' section of the FTCA. And by taking note of the 'Exceptions' section, the *Smith* court reasoned, the [Westfall] Act was intended to apply to those 'Exceptions.'"[382] Without approving the decision, the *Simmons* Court thus distinguished *Smith* as based on provisions specific to the Westfall Act rather than those (like the judgment bar) that appeared in the original terms of the FTCA.

Simmons thus leaves open the possibility that the "limitations and exceptions" language of the Westfall Act, in § 2679, might support the

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376 *Smith*, 499 U.S. at 167 n.9 (quoting H.R. REP. NO. 100-700, at 6).

377 H.R. REP. NO. 100-700, at 4–8. The Court also failed to consider the presumption against the extraterritorial application of federal law, *see infra* p. 1049, which would bar the FTCA's application to torts occurring in Italy.

378 Simmons v. Himmelreich, 578 U.S. 621, 630–31 (2016).

379 *See* H.R. REP. NO. 100-700, at 6; *Smith*, 499 U.S. at 167 n.9.

380 28 U.S.C. § 2680. In overstating its claim that FTCA exclusivity might bar suits against an employee even where one of the exceptions in § 2680 applied, the House Report relied on a series of cases that do not support the supposed conclusion. *See* H.R. REP. NO. 100-700, at 6–7. Thus, in *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967), and *Safeway Portland Employees' Federal Credit Union v. Federal Deposit Insurance Corp.*, 506 F.2d 1213 (9th Cir. 1974), federal agencies successfully claimed immunity from suit on claims that fell outside the scope of the FTCA's acceptance of vicarious liability. *Edelman*, 382 F.2d at 596; *Safeway Portland*, 506 F.2d at 1214. In affording federal agencies the immunity of the federal government, those decisions do not address the liability of individual federal employees for actionable conduct at common law. *See Edelman*, 382 F.2d at 595; *Safeway Portland*, 506 F.2d at 1214. In *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968), the Drivers Act exclusion was applied to a suit sounding in negligence that came squarely within the FTCA. *Id.* at 854–56. The court did not recognize any exclusivity that extended beyond the scope of the FTCA's acceptance of vicarious liability. *See id. But cf.* Powers v. Schultz, 821 F.2d 295, 298 (5th Cir. 1987) (anticipating the mistaken interpretation that the Court later adopted in *Smith*).

381 *Simmons*, 578 U.S. at 628 (declining to follow *Smith* in part because that decision "d[id] not even cite, let alone discuss," the effect of § 2680).

382 *Id.* at 629; *see also id.* at 627–30.

Smith Court's interpretation. But that argument cannot be squared with § 2679(d)(4), which provides as follows:

> Upon certification [by the Attorney General that the defendant employee was acting within the scope of his or her employment], any action or proceeding subject to [removal and substitution] shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] and shall be subject to the limitations and exceptions applicable to those actions.[383]

This provision does not define the scope of FTCA exclusivity and preclusion; that, as we have seen, occurs in § 2679(b)(1).[384] Instead, § 2679(d)(4) makes the exceptions in § 2680 operative as a limit on claims against the government *after* it has been properly substituted as the defendant.[385] In assuring the application of government defenses to claims properly transformed into suits against the government, the section does not address the liability of federal employees.

Confirmation of that conclusion appears in the nature of the "limitations and exceptions" referred to in § 2679(d)(4), all of which govern suits to impose vicarious liability on the government.[386] Among "limitations," the FTCA establishes an exhaustion provision that applies to transformed claims; the statute incorporates a set of procedures to govern matters that begin, without federal agency exhaustion, in state court.[387] In addition, Title 28 separately imposes a two-year limitation period for all claims that seek to impose tort-based liability on the federal government.[388] Further, the FTCA forecloses trial by jury and rules out any award of punitive damages.[389] Finally, § 2678 caps the amount of any contingent attorney's fee at twenty-five percent of the recovery.[390] All these "limitations" presumptively apply to actions cognizable under the FTCA, regardless of whether the government appears as an original or substituted defendant, but do not apply to suits against officials.

We therefore argue that the Court should reconsider and overrule the *Smith* decision. The textualist decision in *Simmons* fundamentally unsettled the *Smith* Court's flawed account of the operation of exceptions to the government's FTCA liability. Moreover, new briefing has

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383 28 U.S.C. § 2679(d)(4).

384 *Id.* § 2679(b)(1).

385 *Id.* § 2679(d)(4).

386 *Id.*

387 *Id.* § 2679(d)(5).

388 *Id.* § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."). The Second Circuit, in an opinion by Judge Calabresi, suggested the use of an equitable tolling doctrine to extend the federal two-year limitation period to protect state court plaintiffs who may have understandably relied on a longer state law limitation period. *See* Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F.3d 76, 84 (2d Cir. 2005).

389 28 U.S.C. § 2402 (foreclosing trial by jury); *id.* § 2674 (foreclosing punitive damages).

390 *Id.* § 2678.

undercut the decision in *Hui v. Castaneda*,[391] which ignored the "same subject matter" language in broadly defining the exclusive remedy provision of the Public Health Service Act to foreclose the assertion of a *Bivens* claim for government misconduct.[392] In contrast to *Hui*, the Court's subsequent decision in *Brownback v. King*[393] emphasized the meaning of subject matter language in the judgment bar "as it existed in 1946."[394] Justice Sotomayor, the author of a unanimous decision in *Hui*, joined *Brownback* in full but concurred separately to urge reconsideration of past interpretations. Acknowledging that "courts have largely [accepted the government's expansive] view of the judgment bar," Justice Sotomayor noted that "few have explained how its text or purpose compels that result."[395] Both *Smith* and *Hui* should be overruled or confined as narrowly as possible to their facts.[396]

III. LITIGATING OFFICIAL LIABILITY UNDER A REVIVED COMMON LAW FRAMEWORK

The revival of common law intentional tort litigation against government officials will pose a series of questions, including how to integrate such suits into the system of government accountability. Taking up those questions, the first section of this Part offers an overview of how tort litigation might proceed under the understanding of the Westfall Act defended in this Article. Later sections consider the important systemic contribution of such a revived litigation model and explore the scope of a defendant's qualified or discretionary function immunity from suit.

A. Intentional Tort Litigation After the Westfall Act's Reinterpretation

Before exploring its broader implications, we sketch the practical consequences of our finding that the Westfall Act preserves suit against

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391 559 U.S. 799 (2010).

392 The applicable language of the statute in *Hui* resembles the Drivers Act on which it was based in making the remedy against the United States under the FTCA exclusive of claims against officers and employees of the Public Health Service "while acting within the scope of his office or employment . . . *by reason of the same subject-matter* against the officer or employee (or his estate) whose act or omission gave rise to the claim." 42 U.S.C. § 233(a) (emphasis added).

393 141 S. Ct. 740 (2021).

394 *Id.* at 748. On the meaning of "subject matter" during the period *Brownback* deems relevant, see *supra* Part II.B, pp. 1028–38.

395 *Brownback*, 141 S. Ct. at 752 (Sotomayor, J., concurring).

396 The Court need not fully reconsider its decisions in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), or *Osborn v. Haley*, 549 U.S. 225 (2007), even though they proceed on the assumption that *Smith* was right to treat § 2680 exceptions as barriers to common law tort suits against responsible federal employees. Their narrow holdings that certifications as to the scope of employment were subject to judicial review, *Gutierrez*, 515 U.S. at 434, and were conclusive for purposes of removal to federal court, *Osborn*, 549 U.S. at 230–31, do not disrupt the federal remedial scheme. *Osborn* did suggest that substitution of the government as defendant defeats any right to trial by jury, *id.* at 251, and that statement would remain true, even were the Court to narrow the scope of proper substitution.

federal officials for many common law intentional torts. Individual litigants will face choices about when to pursue the government under the FTCA and when to seek redress from officials at common law. This section provides a précis of the issues that state and federal courts will confront as litigants consult their remedial options.

1. Distinguishing FTCA Claims from State Common Law Claims. — As an initial question, victims of federal official wrongdoing must decide whether to pursue claims under the FTCA or state common law. Begin with the FTCA, which imposes vicarious liability on the government for many wrongful acts but treats intentional torts as a special category. Section 2680(h) declares that the FTCA "shall not apply to"[397]:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.[398]

The exception places many intentional torts outside the statute's coverage, but the proviso restores the FTCA's application to a select list of intentional torts committed by investigative and law enforcement officers. As a practical matter, the provision means that individuals will assert some intentional tort claims against the government under the FTCA (for law enforcement torts) and some against individual officials at common law (for intentional torts committed by non–law enforcement officers).

Consider what this means for the litigation of familiar cases:

- When an official commits a *negligent* act, as in *Westfall v. Erwin*,[399] the government suit under the FTCA now supplies the exclusive remedy and displaces suit against the responsible official.
- When an official's *negligent* act results in an injury outside the territory of the United States, such as in a government hospital overseas, the FTCA would not apply, and the victim would seek redress under common or other applicable nonfederal law (assuming the Court overrules the decision in *United States v. Smith*[400]).[401]
- If an official commits an *intentional* tort, the FTCA does not ordinarily apply and remedies remain available against the officer. That would allow the plaintiff in *Majano*, for example, to pursue

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397 28 U.S.C. § 2680.
398 *Id.* § 2680(h).
399 *See* 484 U.S. 292, 293 (1988).
400 *See supra* section II.C, pp. 1039–44.
401 *See* 28 U.S.C. § 2680(k).

her assault and battery claim against the aggressive Smithsonian official at common law.[402]

- If, by contrast, the intentional tort was committed by law enforcement officers, such as the drug enforcement agents involved in the *Bivens* case,[403] the FTCA now imposes vicarious liability on the government and makes that remedy exclusive of common law claims against the officials. But the FTCA specifically preserves the right of the plaintiff to pursue a *Bivens* claim against the officials for any such constitutional violation.[404]
- When an intentional tort causes injury outside the United States, such as the cross-border shooting in *Hernández v. Mesa*,[405] the FTCA would not apply, thereby leaving in place the official's transitory tort liability at common law.[406]

2. Official Immunity and Converse–Section 1983 Claims. — While the federal courts will formulate federal rules of official immunity,[407] state common law will provide the right of action and many of the substantive rules of decision for tort suits brought against federal officials, just as it does today with suits against the federal government under the FTCA.[408] To the extent federal courts find the state law somewhat underdeveloped and out of date, they may pursue opportunities for federal-state judicial dialogue through the certification of controlling questions to state supreme courts.[409] Similar certifications seek to clarify the common law norms that now govern liability under the FTCA. In one high-profile case, E. Jean Carroll's defamation claim against Donald Trump, the U.S. Court of Appeals for the Second Circuit certified the scope-of-

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402 *See* Majano v. United States, 545 F. Supp. 2d 136, 137–38 (D.D.C. 2008).

403 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

404 *See* 28 U.S.C. § 2679(b)(2)(A).

405 140 S. Ct. 735, 739 (2020).

406 If uncertain about how to proceed, plaintiffs might file claims both under the FTCA (naming the government) and under state common law (naming the official). Such litigation would proceed within the district court's original and exclusive subject matter jurisdiction over FTCA claims and its supplemental jurisdiction over related claims under state law. *See* 28 U.S.C. § 1367(a) (authorizing supplemental jurisdiction over related state-law claims against third parties that bear an appropriate relationship to claims against the government under the FTCA).

407 On the right of officers to remove, see *id.* § 1442. On the limits of removal, see *Mesa v. California*, 489 U.S. 121, 139 (1989), where the court found the statute permits removal of state law claims against federal officers only when the officer avers a federal defense to liability. On the nature of the immunity, see *infra* section III.B, pp. 1051–53.

408 *See, e.g.*, Wollman v. Gross, 637 F.2d 544, 547 (8th Cir. 1980) (applying the Minnesota state standard for scope of employment to an FTCA suit against a federal employee).

409 Virtually every state has on its books a provision that allows federal courts to certify controlling questions of state law to the highest court in the state. *See* FALLON ET AL., *supra* note 53, at 1116.

employment question under the FTCA to the D.C. Court of Appeals, the place where the allegedly defamatory statement was published.[410] Similar certifications would provide the states with an opportunity to develop their common law as it applies to official tort claims arising from federal government activity.

The practice of certification, though not without its detractors,[411] might move the law measurably in the direction of the converse–section 1983 model of federal-official accountability that Professors Akhil and Vikram Amar have championed.[412] Under that model, Amar and Amar argue that state courts can legitimately and productively entertain claims of wrongdoing against federal officials in much the way federal courts oversee state action under § 1983.[413] While some portion of the institutional independence of state court proceedings may be lost following the litigation's predictable removal for trial in federal court, the role of state supreme courts in shaping applicable law through the certification process could provide a useful entry point for state engagement.[414]

3. Positive Government Wrongs and the Transitory Tort Doctrine. — Decisions from the nineteenth and twentieth centuries applying the transitory tort doctrine held federal officials liable in tort for conduct that

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[410] *See* Carroll v. Trump, 49 F.4th 759, 766–67, 770, 781 (2d Cir. 2022) (certifying scope-of-employment question after concluding that former President Trump was a government employee for purposes of the FTCA). Judge Calabresi, author of the court's opinion, frequently certifies controlling questions of state law to the appropriate state court. *See, e.g.*, Adelson v. Harris, 774 F.3d 803, 805 (2d Cir. 2014); Briggs Ave. L.L.C. v. Ins. Corp. of Hannover, 516 F.3d 42, 49 (2d Cir. 2008).

[411] *See* M Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 294–98 (1995); Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK U. L. REV. 677, 681 (1995) (comments from U.S. circuit judge); Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 346 (2004) (comments from state chief justice).

[412] For development of the converse-1983 idea, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–17 (1987); Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369, 1378–98 (2004). *See generally* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159 (1993) [hereinafter Amar, *Using State Law*].

[413] *E.g.*, Amar, *Using State Law*, *supra* note 412, at 160, 163–76.

[414] The government might argue, invoking *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411–12 (1872), and its denial of state court power to grant habeas relief to individuals held in federal detention, that state courts also lack power to entertain common law tort claims against federal officers. *Cf.* FALLON ET AL., *supra* note 53, at 435 (suggesting that *Tarble's Case* might be read to preclude state courts from "issuing remedies . . . in actions challenging the legality of federal official action"). But a long tradition supports the power of state courts to hear money claims against federal officials. *See, e.g.*, Merriam v. Mitchell, 13 Me. 439, 458 (1836) (upholding award of damages against federal postal official for false imprisonment); *see* Pfander, *Dicey's Nightmare*, *supra* note 1, at 754–56 (collecting nineteenth-century state court money claims against federal military officials).

took place outside the United States.[415] Although the Court has had no recent occasion to elaborate the doctrine as it applies to intentional tort claims against federal officers, we find some evidence that the doctrine remains alive and well. For starters, Justice Gorsuch's opinion for the Court in *Mallory v. Norfolk Southern Railway Co.*[416] reaffirmed tag jurisdiction's legitimacy in dicta and recognized its role in the operation of the transitory tort doctrine.[417] In addition, lower court opinions continue to recognize the viability of the doctrine.[418] Some older Supreme Court cases appear to hold that state courts have an obligation, rooted in the Full Faith and Credit Clause, to entertain transitory tort claims, but one might question the continuing force of those decisions.[419] Perhaps most intriguingly, one decision held that the inapplicability of the Torture Victim Protection Act did not displace all possible liability but instead left the transitory tort doctrine available to support common law claims for torture.[420]

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[415] *See supra* section I.B, pp. 998–1005 (discussing Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852)).

[416] 143 S. Ct. 2028 (2023).

[417] *See id.* at 2034 (plurality opinion) (stating that a suit "'for injuries that might have happened any where' was generally considered a '*transitory*' action that followed the individual" and "could be maintained . . . in any place the defendant could be found" (quoting BLACKSTONE, *supra* note 102, at *294) (citing Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS § 538, at 450 (1834))); *see also* Dennick v. R.R. Co., 103 U.S. 11, 18 (1880) (stating that "trespass to the person [was] always held to be transitory"); McKenna v. Fisk, 42 U.S. 241, 247–48 (1843) (deeming a trespass to personalty transitory); *cf.* Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411) (opinion of Marshall, Circuit Justice) (deeming trespass to realty to be local). Note that the transitory tort doctrine does not depend on the exercise of tag jurisdiction, at least for federal official defendants who have their domicile in one of the states. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940) (confirming that "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service").

[418] *See, e.g.*, Ward v. Soo Line R.R. Co., 901 F.3d 868, 879–80 (7th Cir. 2018) (cautiously applying transitory tort doctrine); Mamani v. Berzaín, 309 F. Supp. 3d 1274, 1312 (S.D. Fla. 2018); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1366 (S.D. Fla. 2001).

[419] *See, e.g.*, Hughes v. Fetter, 341 U.S. 609, 613 (1951) (holding that the Wisconsin state court violated the Full Faith and Credit Clause by dismissing a claim for wrongful death based on a right of action grounded in Illinois law); *cf.* Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354, 359–60 (1914) (invalidating Alabama state law that blocked other states from adjudicating a transitory Alabama cause of action). *See generally* Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959) (arguing that Supreme Court precedent creates a conflict between the mandate to grant full faith and credit to other states' laws and the mandate to provide a forum for causes of action of foreign origin).

[420] *See Mamani*, 309 F. Supp. 3d at 1312 ("[W]hile Defendants place great emphasis on the restraint exercised by Congress when it enacted the TVPA, they point to no evidence of a clear and manifest purpose to displace the traditional common-law doctrine permitting State courts to exercise jurisdiction over transitory torts, including torts committed abroad."); *Fernandez-Larios*, 157 F. Supp. 2d at 1366. The Supreme Court has expressed some willingness to uphold, under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611), the extraterritorial application of state law to govern the liability of foreign sovereigns for conduct that occurred outside the United States. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1506, 1509 (2022) (ruling that state choice-of-law

To be sure, some applications of the doctrine will raise choice-of-law issues.[421] For example, government officials may argue that the law of the place where the tort was committed should apply to narrow or foreclose the imposition of tort liability. One government official made such an argument to King's Bench in the eighteenth century, urging that the colony in which he was presiding as governor authorized the summary punishment of the plaintiff by local custom.[422] Rejecting that argument and upholding a substantial award of damages, Lord Mansfield found that the defendant had failed to make the very clear showing of the legalizing force of local law needed to overcome the presumption that common law norms provided the measure of official conduct both at home and abroad.[423] Today, the task of sorting out such conflicts falls well within the workaday portfolio of state and federal courts.

The government may argue that the transitory tort doctrine runs afoul of the presumption against the extraterritorial application of federal statutes. In *RJR Nabisco, Inc. v. European Community*,[424] the Court restated and applied the presumption that, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[425] While that doctrine applies to federal statutes, it does not obviously extend to rights to sue under state common law.[426] The decision of Congress to exclude FTCA liability for torts that cause injuries outside the United States was driven not by a desire to shield officials from such liability but to ward off the possibility that the government's vicarious liability under the FTCA would turn on foreign law.[427] Suits to impose liability on federal officials

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rules would govern the selection of nonfederal private law as the measure of a foreign sovereign's liability in the courts of the United States and considering, but not ordering, the application of California property law as the measure of liability for a painting stolen in Germany and later acquired by a Spanish foundation); *cf.* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 3–4 (1975) (per curiam) (holding that Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), required application of state choice-of-law principles even where the federal court understood Texas state law to require application of the law of a foreign country).

421 Controlling state law will include state choice-of-law rules. Under the FTCA, federal courts typically choose governing state law by applying the choice-of-law rules of the state "where the act or omission occurred." Richards v. United States, 369 U.S. 1, 7 (1962); 28 U.S.C. § 1346(b)(1) (imposing liability under the FTCA "in accordance with the law of the place where the act or omission occurred"). But the FTCA will not govern choice of law for officer suits at common law that fall outside its terms. For a summary of state approaches to the choice-of-law process in tort, see generally SYMEON C. SYMEONIDES, CHOICE OF LAW IN PRACTICE: A TWENTY-YEAR REPORT FROM THE TRENCHES (2020).

422 *See* Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1022–23 (KB).

423 *Id.* at 1022, 1027–28, 1032.

424 136 S. Ct. 2090 (2016).

425 *Id.* at 2100 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

426 *Cf. id.* at 2109 (restating the "traditional" rule that victims of an overseas tort can pursue nonfederal remedies in the courts of the United States, perhaps by invoking diversity jurisdiction, but finding the rule inapplicable to proposed application of a federal statute to an "injury suffered overseas" (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 119 (2013))).

427 *See supra* note 357 and accompanying text.

for violating the law governing their conduct in a foreign country do not present any such anomaly.[428]

4. The Payment of Individual Judgments. — One final wrinkle may deserve consideration. Judgments in common law tort cases will bind federal officers in their personal capacity, posing the same questions of payment and indemnity that such judgments did in the nineteenth century.[429] Many officers sued for conduct within the scope of their employment cannot claim a right to indemnification under current law and practice.[430] Under regulations promulgated by the Department of Justice, federal employees named in personal liability litigation can petition for indemnity in the same way that they can petition for the appointment of an attorney to defend them in litigation.[431] Moreover, officers can petition Congress for the adoption of indemnifying legislation. This austere set of payment options presents a challenge both to plaintiffs seeking to enforce their judgments and to officers threatened with enforcement proceedings that might target their private assets.

The enforcement challenges posed by the personal character of the resulting judgment may be something of a mirage, however.[432] In a study of indemnification practices in connection with the resolution of valid *Bivens* claims against employees of the Federal Bureau of Prisons — claims that produce judgments binding on officials in their personal capacity — three commentators (including one of us) found that the government arranges payment from government assets in over ninety-five percent of the cases and pays well over ninety-nine percent of successful claims.[433] Most of these arranged payments were channeled through the Judgment Fund, a standing appropriation to pay judgments entered against the government.[434] Often, this channeling required creative bookkeeping, as when lawyers repackaged claims against officers under the *Bivens* doctrine as suits under the FTCA against the government.[435]

Yet in some situations, under current law, personal liability may attach.[436] In a case like *Majano*, for example, the government might

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428 In many instances, of course, foreign and domestic law will broadly agree in defining intentionally tortious conduct as unlawful and no choice-of-law problem will arise.

429 *See* James E. Pfander et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 570 (2020).

430 *Id.* at 578–79.

431 *See id.* at 617; 28 C.F.R. § 50.15 (2023).

432 *See* Pfander et al., *supra* note 429, at 566.

433 *Id.* (discussing the study).

434 *Id.* at 567.

435 *See id.* at 586.

436 Two factors may reduce the likelihood of individual liability: insurance policies and union representation. On insurance, see, for example, *Professional Liability Insurance*, U.S. DEPT. OF COM., https://www.commerce.gov/hr/practitioners/employee-relations/professional-liability-insurance [https://perma.cc/5TNS-38XQ]. A study of payment practices revealed that a small

reasonably conclude that the conduct alleged advances no important government interest and does not have a legitimate claim to indemnification. In such a case, the plaintiff would still have a right to proceed to judgment, imposing personal tort liability on the supervisory employee, but ultimate satisfaction of the judgment would necessitate pursuit of the defendant's assets.

B. Defining the Officer's Discretionary Function Immunity

Federal courts will use the discretionary function immunity to integrate tort-based official liability into the system of government accountability law. Such an immunity, as the Supreme Court confirmed in *Westfall v. Erwin*, comes into play only where officials exercise decision-making discretion threatened by potential liability that "may shackle 'the fearless, vigorous, and effective administration of policies of government.'"[437] Adopting a balancing test, the Court explained that it would extend absolute immunity to federal officials "only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'"[438] The Court accordingly rejected two broad forms of immunity proposed by the government, one that would have barred all claims within the scope of employment[439] and one that would have deemed all official conduct discretionary unless the "precise conduct" at issue in the litigation was "mandated by law."[440] Recognizing that "virtually all official acts involve some modicum of choice," the Court rejected the government's test as one that would render the discretionary function requirement "essentially meaningless."[441]

Most tort claims for positive government wrongs fail to implicate the discretionary function immunity set forth in *Westfall*. Consider the assault and battery claims in *Majano*,[442] for example, or the suits brought

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number of *Bivens* claims were satisfied with insurance coverage. *See* Pfander et al., *supra* note 429, at 579–80. In addition, the unions to which many federal employees belong can effectively advocate for the payment of indemnity, both within the relevant agency and in the halls of Congress. *See, e.g.*, *AFGE at a Glance*, AFGE, https://www.afge.org/about-us/afge-at-a-glance [https://perma.cc/K6A5-4KMM]; *see also About Us*, NFFE, https://nffe.org/about [https://perma.cc/F63P-KFYF].

[437] Westfall v. Erwin, 484 U.S. 292, 297 (1988) (quoting Barr v. Matteo, 360 U.S. 564, 571 (1959)) (rejecting the proffered discretionary function defense).

[438] *Id.* at 295–96 (quoting Doe v. McMillan, 412 U.S. 306, 320 (1973)). One can imagine arguments that the Westfall Act overrules the Court's *Westfall* decision, depriving it of controlling authority. But the Westfall Act does not rewrite the discretionary function immunity. Instead, as we have seen, Congress chose to make the FTCA remedy against the government for negligent acts exclusive of any suit against federal officials. *See supra* notes 346–49 and accompanying text. To the extent federal officials face common law liability outside the FTCA framework, the *Westfall* Court's discretionary function analysis remains good law.

[439] *Westfall*, 484 U.S. at 296.

[440] *Id.* at 298.

[441] *Id.*

[442] Majano v. United States, 469 F.3d 138, 140 (D.C. Cir. 2006) (finding the aggressor's actions outside her scope of employment without touching upon a discretionary function test).

against officers in the military for physical assault.[443] None of this conduct on the part of government officials can claim to have been the product of an official "decision-making process." Rather, the officers in question inflicted wanton injuries on individuals due to their inability to control themselves. Given the absence of any justification in the need to protect official discretion in policy formation, the *Westfall* test[444] would ascribe little weight to the interest in protecting officers from harassing litigation. On the other hand, the *Westfall* balance would assign considerable weight to the individual victim's interest in redress for a meritorious claim. One has difficulty arguing with a straight face that the balance of these considerations would favor official immunity.

Consider, by contrast, a suit seeking damages for torture under the Bush Administration's program of detention, rendition, and enhanced interrogation. Here, much may depend on the identity of the officers sued. High-ranking officials in the CIA and Department of Defense participated in the creation of a torture program designed to secure intelligence from detainees.[445] The role of such high-ranking officials in the construction of the program would seem to reflect the exercise of decisionmaking discretion, entitling them to a form of discretionary function immunity (subject of course to an argument that the Constitution forbids even discretionary decisions to implement a torture program). But the officers who carried out the torture program would enjoy no such discretionary immunity. Such officers would simply be the instruments of the government's policy, imposing forms of detention and physical abuse pursuant to the rules of engagement specified by their superiors. As ministerial actors responsible for executing the policy, the government's officials would resemble jailers and wardens who answer in habeas proceedings for the policy-laden decision of the government to detain.

The logical distinction between the policymaking function of high-ranking officials and the ministerial role of those who administer programs of detention and enhanced interrogation explains why officer suits often target lower-ranking officers. In *Little v. Barreme*, the Secretary of the Navy, in formulating enforcement protocols for the Nonintercourse Act, was engaged in discretionary policy formation.[446] But the superior officer's policy choices did not shield the inferior officer, Captain Little, from liability for carrying out the orders in question; the Court held that superior orders do not, in themselves, legalize positive

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443 *See supra* notes 70–71 and accompanying text.

444 *See supra* notes 437–38 and accompanying text.

445 *See, e.g.*, Rasul v. Myers, 512 F.3d 644, 672 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008) (describing Secretary of Defense Donald Rumsfeld's role in approving enhanced interrogation programs); S. REP. NO. 133-288, at xix (chronicling CIA Director George Tenet's issuance of formal guidelines for interrogation and detention).

446 6 U.S. (2 Cranch) 170, 178 (1804).

government wrongs.[447] That's why the Court subjected Little to liability, why the Court may have allowed an officer suit to proceed against the warden responsible for the conditions of post-9/11 detention at a New York detention facility while shielding the architects of the policy from any liability,[448] and why, as a matter of international law, the Convention Against Torture makes every official responsible for his or her own violations of the Convention, foreclosing any defense of superior orders.[449]

Apart from the discretionary function immunity, federal officials might properly escape liability by pointing to the preemptive force of a carefully calibrated set of alternative constitutional or statutory remedies. The Court has long recognized that the careful remedial balance struck in controlling legislation might displace alternative modes of redress.[450] While the precise contours of such preemption cannot be fully defined in the space available here, courts might legitimately recognize the preemptive force of alternative remedies that offer plaintiffs an effective opportunity to test the legality of government activity and secure redress for any summary actions that have caused injury to person or property. Common law would thus play its traditional role as a background source of remedies that gives way in the face of more particular congressional specification.

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[447] *Id.* at 179; *see also* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) (concluding that "the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed").

[448] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1863, 1869 (2017) (allowing suit to proceed against the warden, Dennis Hasty, but refusing to authorize claims against Attorney General John Ashcroft and FBI Director Robert Mueller implicating their formulation of "detention policy"). Writing for the majority, Justice Kennedy added that the "burden and demand" of litigating policy issues would distract officials from the "discharge of their duties," *id.* at 1860 (citing Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 382 (2004)), and raise sensitive national security concerns, *id.* at 1861. Such issues were to be addressed through suits for injunctive relief or perhaps "via a petition for a writ of habeas corpus." *Id.* at 1863 (citing Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 499 (1973)).

[449] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, *opened for signature* Dec. 10, 1984, 108 Stat. 382, 463–464, 1465 U.N.T.S. 114 (entered into force for the United States Nov. 20, 1994).

[450] The Court has formulated implied displacement frameworks of varying rigor. *Compare* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 252 (2009) (holding that displacement of a claim under § 1983 occurs only when "Congress intended a statute's remedial scheme to 'be the exclusive avenue through which a plaintiff may assert [the] claims'" (quoting Smith v. Robinson, 468 U.S. 992, 1009 (1984)) (citing City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120–21 (2005))), *with* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 328–29 (2015) (holding that right to pursue *Ex parte Young* relief was displaced by judicially unadministrable standards to guide rate-setting sought by the plaintiffs and the provision of alternative remedies). *See generally* Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1507–12 (2021) (comparing Supreme Court approaches to interpreting congressionally created remedies in different contexts).

CONCLUSION

Although scholars agree that the system of government accountability in tort has run badly off the rails, views differ about the best solution. Beginning with a recognition that the *Bivens* doctrine can no longer fill gaps in federal remediation, and accepting the expansive view of Westfall Act immunity, scholars have turned to statutory solutions. Some would codify the *Bivens* doctrine;[451] some would amend the FTCA to broaden the government's vicarious liability for intentional torts;[452] still others would encourage state enactment of converse-1983 statutes to take advantage of the Westfall Act's saving provision for suits against federal officers for violation of the Constitution.[453]

We do not necessarily oppose these solutions. But much may be gained in the meantime from the restoration of common law intentional tort claims against individual federal officers. Under the transitory tort doctrine, common law remedies extend to injuries that occur outside the United States, unlike both the FTCA and many constitutional guarantees. Such common law claims allow individuals to test the legality of government action, without first petitioning the courts for leave to proceed under the *Bivens* doctrine. Such claims call for a jury trial, ensuring a popular assessment of government misconduct. Such claims do not obviously implicate immunity defenses, such as those that apply to constitutional tort claims, except to the extent the official's conduct implicates a discretionary or policymaking function. Perhaps most importantly, such claims provide an assured baseline of remedial adequacy that might fundamentally alter the way federal courts approach government accountability and assess the meaning of due process of law.

In the end, though, our argument for the restoration of the common law rests squarely on the text of the FTCA. True, the FTCA provides exclusive remedies against the government and precludes related claims against federal employees. True, the Westfall Act provides for the substitution of the government as a defendant on FTCA claims and for the dismissal of the employee as a defendant on those claims. But when, as happens so frequently, the federal employee's tortious conduct fails to implicate the "subject matter" of the FTCA, the Westfall Act regime of exclusivity and preclusion does not come into play. The promise of text-based interpretation and judicial deference to congressional primacy in *Egbert v. Boule* forecloses the broad scope-of-employment immunity that federal courts have mistakenly attributed to the Westfall Act.

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451 *See, e.g.*, Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1759 (2022); Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1118 (2008); Kevin D. Hughes, Comment, *Hostages' Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity*, 26 COLUM. J.L. & SOC. PROBS. 555, 578 (1993).

452 *See, e.g.*, Sisk, *supra* note 18, at 777.

453 *See, e.g.*, sources cited *supra* note 412.