THE YALE LAW JOURNAL

E. GARRETT WEST

Refining Constitutional Torts

ABSTRACT. The constitutional tort is one of the most important mechanisms for vindicating constitutional rights. But the doctrine governing such claims is in disarray. A plaintiff suing a state official under § 1983 or a federal officer under *Bivens* faces a series of hurdles to obtain relief. The Supreme Court has crafted absolute- and qualified-immunity rules based on supposed analogies to common-law immunities. It has required plaintiffs alleging *constitutional* violations also to show that they can satisfy certain elements of *common-law* claims. And the Court has limited damages for constitutional torts to the categories available at common law. Together, these doctrines deny or circumscribe remedies for constitutional wrongs.

These downstream doctrinal errors flow from an upstream conceptual confusion about constitutional rights. Since the second half of the twentieth century, the Supreme Court has been stuck between two competing ways of thinking about constitutional rights. The first framework—the "nullification" framework—is one in which the common law or state law imposes duties on officers, and the Constitution operates only to nullify governmental efforts to suspend, modify, or abolish those preexisting rights. The second framework—that of "constitutional duties"—is one in which the Constitution directly imposes duties on officers that are independent of underlying state law and that necessitate distinct remedies.

The tension between those two frameworks recurs throughout constitutional-tort law, including disputes about the best interpretation of § 1983; the enforceability of the dormant Commerce Clause; the meaning of the First and Eighth Amendments; the recognition of absolute- and qualified-immunity doctrines; the elements of constitutional-tort claims; and the calculation of damages. The question is what to do about it. Embracing the framework of constitutional duties would require reconsidering how courts assess the availability of constitutional-tort claims, the elements of those claims, the scope of official immunities, and the calculation of damages. To state the answer in deceptively simple terms: all these questions should turn on the substance of constitutional rights and not on the scope of the common law. Further, there are no coherent alternatives to embracing constitutional duties.

A doctrinal regime that attempts to repudiate constitutional duties and restore the nullification framework would produce a distorted simulacrum of the original system. The Feature concludes by suggesting that unpacking the two competing frameworks of constitutional rights illuminates a series of contested issues throughout constitutional law—including the exclusionary rule, sovereign immunity, and structural constitutional challenges—and raises deeper questions about the normative justifications for constitutional torts, including the unsettling possibility that constitutional torts should not be refined but radically revised and perhaps even repudiated.

AUTHOR. Associate Professor of Law, Yale Law School. Thanks to Joel Alicea, Will Baude, Rishabh Bhandari, Sam Bray, Eric Brooks, Charlie Capps, Bill Eskridge, Sherif Girgis, Joshua Kleinfeld, Richard Fallon, Matteo Godi, John C.P. Goldberg, Tara Leigh Grove, Daryl Levinson, Tyler Lindley, Jim Pfander, Haley Proctor, Sam Lewis, Jack Preis, Claire Priest, Ketan Ramakrishnan, David Schleicher, Yishai Schwartz, and John Witt for perceptive comments on or conversations about early drafts. Thanks also to interlocutors at the Catholic University of America, University of Chicago Law School, Duke University School of Law, University of Florida Levin College of Law, Georgetown University Law Center, Harvard Law School, Marquette University Law School, University of Minnesota Law School, New York University School of Law, University of North Carolina School of Law, Pepperdine Caruso School of Law, and Yale Law School. Thanks also to Jacqueline Huang, Darius Namazi, and the members of the *Yale Law Journal* for their suggestions and meticulous editorial assistance.

FEATURE CONTENTS

INTRODUCTION

One of the most important mechanisms to vindicate constitutional rights today is the constitutional tort. Whether brought under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] a constitutional tort involves a claim that a government official has taken some action that violates a constitutional right held by the plaintiff. If a constitutional tort is established, the court orders the officer to pay money damages—at least if no immunity doctrine precludes relief. If the tort is imminent but not complete, prospective relief may be available in the form of an injunction.[2] For many completed constitutional wrongs, the constitutional tort may be the plaintiff's only mechanism to obtain relief tailored to the wrong.[3]

But the doctrine governing such claims has been criticized for its constellation of legal rules that foreclose or diminish relief. Plaintiffs alleging constitutional violations must sometimes satisfy the elements of common-law claims.[4] Even if a plaintiff establishes a constitutional tort, qualified immunity precludes relief if the defendant-official has not violated clearly established federal law.[5] And after the merits issues, damages awards are limited to what would be available in a common-law action.[6] In addition, with respect to claims against federal officials, limitations on implied causes of action have rendered the rem-

1. 403 U.S. 388 (1971).

2. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

3. With respect to constitutional wrongs by *state* officials, see, for example, Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 758-63 (2021), which explains that "[m]ost states have failed to enact workable and effective state law analogues to Section 1983." With respect to wrongs by *federal* officials, compare Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 160 (1993), which suggests that states should authorize constitutional-tort suits against federal officers, with John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1709-26 (2012), which critiques the efficacy of this approach.

4. *E.g.*, Thompson v. Clark, 596 U.S. 36, 43-47 (2022); Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 GEO. J.L. & PUB. POL'Y 225, 245 (2022); Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 710-14 (1997).

5. For a sample of recent literature on qualified immunity, see generally Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201 (2023); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); and Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

6. Beermann, *supra* note 4, at 706.

edy announced in *Bivens* essentially nonexistent.[7] All of these doctrines eliminate or narrow the remedies available for those who suffer constitutional violations.[8]

These limitations flow from an upstream conceptual confusion about the nature of constitutional rights. Since the second half of the twentieth century, the Supreme Court has failed to distinguish between two competing ways of thinking about constitutional rights: a "nullification" framework and a "constitutional duties" framework.

In the nullification framework, subconstitutional law (meaning common law or state law and potentially federal law)[9] imposes duties on state or federal officers, and the Constitution operates only to nullify certain governmental efforts to suspend, modify, or abolish those duties. The structure of claims under the nullification framework is most evident in the ancestor to the modern constitutional tort: the common-law claim for damages against government officers.[10] These common-law constitutional-tort claims were available at the

---

7. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 298 (1995); Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1123 (1989); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1554-55 (1972). *See generally* Symposium, *Federal Courts, Practice & Procedure: The Fiftieth Anniversary of* Bivens, 96 NOTRE DAME L. REV. 1755 (2021) (featuring a special issue on *Bivens*).

8. For general critiques of constitutional-tort law, see Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 669 (1997); Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 618 (1997); and Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1720 (1989). *See also generally* Symposium, *Section 1983: The Constitution and the Courts*, 77 GEO. L.J. 1437 (1989) (featuring a symposium issue on constitutional-tort law).

9. I use the term "subconstitutional law" to bracket for a moment the source of law—whether state law, federal law, or the "common law" or "general law"—which the nullification rule protects. *See infra* note 32. But as explained later, *see infra* Section III.B, shifting conceptions of the source of legal duties further complicate any efforts to find continuity across these competing conceptual frameworks.

10. For attempts to understand modern doctrine in light of the history of common-law claims against officers, see, for example, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942-50 (2019); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531, 536 (2013); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 138-49, 182-83 (2012); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 154-62 (1997) [hereinafter Woolhandler, *Origins*]; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 451 (1987) [hereinafter Woolhandler, *Patterns*]; and Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1122-28 (1969). *Cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal*

Founding[11] and in theory remain available today.[12] When a plaintiff asserted such a common-law constitutional-tort claim, the constitutional issue entered the analysis three layers deep. Only after the plaintiff demonstrated a prima facie case and the officer responded that the official nature of the acts defeated the common-law claim could the plaintiff reply that the Constitution voided, or "nullified," that official justification.[13] The key point here is not the procedural posture in which the constitutional issue arises. The point is that in this framework, the Constitution operates only to preserve that preexisting subconstitutional right. Therefore, the scope of the constitutional right—and the remedy for its violation—derives from that subconstitutional law.

By contrast, the second framework of constitutional rights—that of constitutional duties—is one in which the Constitution directly imposes duties on officers. Those duties are independent of the underlying subconstitutional law and, accordingly, necessitate independent remedies. This framework is most evident in modern suits under § 1983 against "every person" who causes the "deprivation" of "any rights, privileges, or immunities secured by the Constitution."[14] The Court has interpreted this provision to create a cause of action to vindicate constitutional violations. The same framework is evident in cases brought under *Bivens*. There, the Court reasoned that the Fourth Amendment is "an independent limitation upon the exercise of federal power," not just "a

Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1367-69 (1953) (discussing common-law claims against tax collectors). For a collection of judicial statements, see *Rehberg v. Paulk*, 566 U.S. 356, 362-63 (2012).

11. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 77 (1858); Deshler v. Dodge, 57 U.S. (16 How.) 622, 630 (1854); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 150 (1836); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827); Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11, 16 (1815); Wise v. Withers, 7 U.S. (3 Cranch) 331, 335 (1806); Little v. Barreme, 6 U.S. (2 Cranch) 170, 176 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 115 (1804); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 336 (1856); Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443-44 (1862); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 817 (1824); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225 (1821); *In re* Tyler, 149 U.S. 164, 190 (1893).

12. *See, e.g.*, Chiaverini v. City of Napoleon, 602 U.S. 556, 569-71 (2024) (Gorsuch, J., dissenting) (noting that plaintiffs may bring common-law malicious-prosecution claims along with their modern constitutional-tort claims); Martinez v. California, 444 U.S. 277, 279 (1980) (adjudicating both a common-law constitutional tort and a modern constitutional tort).

13. *See, e.g.*, Fallon, *supra* note 10, at 942; Woolhandler, *Origins*, *supra* note 10, at 122; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987).

14. 42 U.S.C. § 1983 (2018). For a recent discussion of differences between the 1871 version and the version enacted for the Revised Code (and carried through to this day), see Reinert, *supra* note 5, at 234-46.

limitation on federal defenses to a state law claim,"[15] and provides "an independent claim both necessary and sufficient to make out the plaintiff's cause of action."[16]

The critical point is that what is colloquially called a constitutional "right" actually includes two fundamentally different legal interests: (1) a "right" that imposes a corresponding duty on government officials that originates in the Constitution itself and pertains to the conduct of officials, and (2) a "right" that nullifies certain alterations to preexisting subconstitutional law. To be sure, it is well known that common-law constitutional torts differ *procedurally* from those brought under § 1983 or *Bivens*.[17] And some scholars have even recognized the *conceptual* difference between a Constitution that operates through nullification rules and a Constitution that imposes affirmative duties on governmental actors irrespective of subconstitutional law.[18] What has not been explored is how the conflict between these two models of constitutional rights is pervasive in constitutional-tort law, or how the Supreme Court's vacillation between, or ambivalence about, these two models has caused downstream confusion throughout the law.

After identifying and defining the two competing models of constitutional rights (constitutional duties and constitutional nullification rules),[19] I identify seven areas in which competition between the two frameworks shapes the Court's analysis or drives disagreement on the Court.[20] Among other things, disagreement about the structure of constitutional rights is the core dispute in

---

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

16. *Id.* at 395.

17. For examples of works discussing the procedural differences, see generally sources cited *supra* note 10.

18. In the framework of Wesley Newcomb Hohfeld, the shift is from a Constitution of *immunity/disability* rules to a Constitution of *claim-right/duty* rules. *See* Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913). The relevance of the Hohfeldian framework to constitutional law has been lucidly explored by John Harrison in other contexts, but he has only briefly discussed the implications for constitutional torts. *See* John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 508-12, 528-31 (2013) [hereinafter Harrison, *Power*]; John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 337-41 (1998). William Baude has described the transformation of the common-law constitutional tort to the modern constitutional tort in these terms, *see* Baude, *supra* note 5, at 52 ("In Hohfeld's terms, most constitutional rights went from being treated as rules about power to being treated as duties." (footnote omitted)), but that paper does not systematically develop the insight.

19. *See infra* Part I.

20. *See infra* Part II.

Monroe v. Pape.[21] The majority (Justice Douglas) and the dissent (Justice Frankfurter) disagree on whether § 1983 provides a remedy for actions *unauthorized* by state law. Vacillation between the frameworks across the Court's history also explains its conflicting holdings on whether the dormant Commerce Clause is enforceable under § 1983 (or its jurisdictional analogue). The Court's embrace of constitutional duties explains the holding in *Estelle v. Gamble* that the Eighth Amendment constrains prison officials,[22] but skepticism of such duties motivates the major doctrinal critique of *Estelle*. The development of the constitutional-duties framework explains the significant expansion of First Amendment free-speech and free-exercise rights for government employees and students, even as skepticism about constitutional duties in the Establishment Clause drives efforts to pare back certain claims. The Court's failure to embrace one of the two frameworks has transsubstantive implications for the contours of constitutional-tort claims, including the elements of those claims, the availability of official immunities, and the measure of damages.

But there is a coherent doctrinal alternative to the current mishmash.[23] The basic structure of modern constitutional torts assumes constitutional duties, and the flaws within the doctrine flow from the failure to adopt that framework in full. Instead, courts should wholly embrace the framework of constitutional duties—at least if the coherence of this doctrinal regime is worth attaining. If they were to embrace that framework, courts would have to revisit their approach to determining whether § 1983 or *Bivens* supports a claim, what the elements of such a claim should be, whether and which immunity doctrines are available, and how to calculate damages.

A coherent alternative framework would work as follows. At the outset, in determining whether a plaintiff has a constitutional claim, the question would not be simply whether something called a "constitutional right" has been violated, but whether the Constitution imposes a duty on this particular officer to take (or refrain from taking) this particular action against this particular plaintiff. On this view, courts would confront the possibility that some constitutional provisions (for example, the dormant Commerce Clause or the Appointments Clause) might impose nullification rules but not duty rules.[24] And certain clauses might impose duties on some officers but not others—whether because a provision imposes duties on only some kinds of officers (for example,

21. 365 U.S. 167 (1961).

22. 429 U.S. 97, 104-05 (1976).

23. *See infra* Section III.A.

24. *Cf.* Hohfeld, *supra* note 18, at 28 (rejecting the "express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'").

executive but not judicial) or because it imposes duties at one level of government but not another (for example, state but not federal). If a particular officer has no duty, the constitutional-tort claim should fail.

But if the Constitution does impose a duty on the official, then the contours of the claim should depend on constitutional meaning and not on the details of the common law. First, the elements of the claim should flow from the Constitution and not from the most analogous common-law claims. Second, immunities should be tailored to the specific constitutional right at issue and not imposed across the board because of a faulty analogy to common-law immunities as they existed in 1871. And third, the measure of damages should be what is necessary to redress the violation of the constitutional right, not just the damages that would have been available for other common-law torts. Analogies to common-law claims will sometimes make sense, but only to the extent that the constitutional tort is a species of tort—and only so far as both the conceptual assumptions of tort law and the purposes of the particular common-law tort can be transposed into the constitutional context.

But why embrace constitutional duties instead of restoring the nullification framework?[25] Incoherence arising out of competition between two frameworks might be resolved by repudiating either competitor while embracing the other. Restoring the nullification framework, however, would present intractable problems. Even if one sets aside the practical problem that repudiating the constitutional-duty framework would radically rework modern doctrine, restoring the nullification framework would still fail because of other conceptual developments. In particular, the decision in *Erie Railroad Co. v. Tompkins*[26] precludes a return to a nullification framework because nullification rules protecting general-law claims (pre-*Erie*) are quite different from nullification rules protecting state-law claims (post-*Erie*). The post-*Erie* nullification framework would be a distorted simulacrum of the pre-*Erie* nullification framework. There is no going back to the way things were. The question is how things should change.

The argument for fully adopting the constitutional-duties framework has implications beyond constitutional-tort law. The same upstream conceptual confusion about the structure of constitutional rights recurs throughout constitutional litigation more broadly. The development of (and retreat from) the Fourth Amendment exclusionary rule reflects the Court's incomplete embrace of the constitutional-duties framework. The competition between the two frameworks also explains the bizarre structure of modern sovereign-immunity jurisprudence. Further, the expanding availability of injunctive relief for viola-

25. *See infra* Section III.B.

26. 304 U.S. 64 (1938).

tions of structural constitutional provisions, like the Appointments Clause, seems to assume both that structural constitutional provisions impose duties and that the breach of such duties requires a remedy. Those assumptions, however, conflict with the analysis in recent decisions narrowing the implied cause of action in *Bivens*. Uncovering the conceptual structure of constitutional-tort law thus points the way to reexamining whole domains of constitutional law.

A few final notes on methodology. The argument begins with a critical but sympathetic reconstruction of the relevant rules of constitutional law. This approach attempts to understand the basic commitments of modern constitutional-tort law and to determine what those commitments require. To that end, the Feature identifies the concept of the constitutional duty, traces that concept through constitutional-tort doctrine, and teases out the implications of a system that accepts constitutional duties. The implicit assumption of this argument is that the concepts at work in legal doctrine have concrete consequences for the outcomes of cases, and those concepts must be understood to make sense of judicial decisions. The argument then transitions from its descriptive stage of critical reconstruction to a prescriptive stage of internalist reform, suggesting ways to reshape constitutional-tort doctrine to fit the basic principles already present in the doctrine. The implicit methodological commitment is that a coherent doctrinal regime is worth attaining (perhaps) for its own sake and (at least) for the secondary values of predictability, consistency, and fairness.[27]

But attention to the principles of the doctrinal regime raises deeper, potentially unsettling questions about the normative justifications for constitutional torts. Reconstructing the doctrine reveals the principles implicit within it, and the internalist project reconstructs the doctrinal regime to fully implement those animating legal principles. The very process of articulation and implementation, however, subjects those principles to rational reflection, reconsideration, and perhaps even repudiation. To put the point in concrete terms, this Feature eventually raises the question whether the private-law concept of the "tort" belongs in the domain of constitutional law at all, and indeed whether the enterprise of adjudicating constitutional torts should be radically reconsidered—or perhaps even abandoned entirely.

---

27. *Cf.* LON L. FULLER, THE MORALITY OF LAW 38-39 (1969) (suggesting ways that a "system of legal rules may miscarry," including the "failure to make rules understandable," the "enactment of contradictory rules," the "introduc[tion of] frequent changes in the rules," and the "failure of congruence between the rules as announced and their actual administration").

I. COMPETING FRAMEWORKS FOR CONSTITUTIONAL RIGHTS

This Part introduces the two competing models of constitutional rights: the nullification framework and the framework of constitutional duties. To illustrate their conceptual differences, I contrast the structure of the common-law constitutional tort and the modern constitutional tort. First, in some common-law actions against state or federal officials, the Constitution operates to nullify the officer's attempt to suspend or abolish the preexisting state-law or common-law right possessed by the plaintiff, and thus the constitutional right (and the remedy for its violation) derives from that preexisting subconstitutional right. Second, under the framework of constitutional duties, the Constitution directly imposes duties on officers that are independent of the underlying state law and that therefore necessitate remedies distinct from state law.

A. Nullification

This Section introduces the nullification framework through two kinds of proceedings: (1) "common-law constitutional torts," a species of tort characterized by the plaintiff's invocation of a constitutional nullification rule to defeat a defendant's claim of official authorization; and (2) cases involving "defensive nullification," in which a nullification rule defeats a civil or criminal enforcement action brought by the government. Both invoke a constitutional nullification rule. The procedural difference between them is whether the party claiming the constitutional-right violation is seeking some affirmative relief or defending against state enforcement. The Section shows that, despite this procedural difference, the Constitution operates in the same way for each.

1. Common-Law Constitutional Torts

William Prosser lamented that a "really satisfactory definition" for a tort had "yet to be found," but his working definition was "a civil wrong . . . for which the court will provide a remedy in the form of an action for damages" (or other appropriate relief).[28] Prosser's first cut conveys several more specific concepts. That a tort is a "wrong" signifies that it is legally wrongful, not nec-

28. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1, 3 (1941); *see also Tort*, BLACK'S LAW DICTIONARY (4th ed. 1968) (defining "tort" as a "private or civil wrong or injury"); 3 WILLIAM BLACKSTONE, COMMENTARIES *2 (describing "private wrongs"); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3-5 (2020) (describing torts as "redress for wrongs" (emphasis omitted)).

essarily morally so.[29] That a tort is a "civil" wrong, rather than a "criminal" one, means that it involves the breach of a relational duty: a tort occurs when *A* breaches a duty owed to *B*.[30] And the remedy for such a wrong is ordinarily that which is necessary to restore the injured party to the position she would have been in absent the injury (or to prevent the injury from occurring in the first place).[31]

The common-law constitutional tort is a species of tort defined by (1) a duty imposed on the defendant by the common law (or other preexisting state law or general law),[32] (2) a defense of official justification asserted by the official that has this preexisting duty, and (3) an effort by the plaintiff to nullify that justification by invoking the Constitution.

At the Founding and throughout the nineteenth century, a private person seeking to challenge the allegedly unconstitutional action of a state or federal official could bring a common-law claim—trespass, false arrest, replevin, and so on—against the official.[33] The theory would be that the official violated

---

29. On the relationship to morality, it is enough for now to note that tort law imposes duties of a particular kind, whatever the ultimate source or justification of those duties. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 28, at 86-89. Later I sketch some reasons to doubt that one can bracket that normative question, but only vaguely and only in conclusion. *See infra* Conclusion.

30. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 28, at 92-93 (discussing the relationship between "simple" and "relational" duties); ERNEST J. WEINRIB, CORRECTIVE JUSTICE 13-21 (2012) (discussing the concept of "correlativity" in private law).

31. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. L. INST. 1979); Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Milliken v. Bradley, 418 U.S. 717, 746 (1974). *But see* GOLDBERG & ZIPURSKY, *supra* note 28, at 155 ("[C]ompensation in [the context of nonphysical damages] is poorly captured by a notion of restoration."); Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 963-68 (2017) (reviewing ARTHUR RIPSTEIN, PRIVATE WRONGS (2016)) (critiquing the argument that a damages remedy makes it "as if a wrong had never happened" (quoting ARTHUR RIPSTEIN, PRIVATE WRONGS 233 (2016))).

32. For now, we can bracket the source of the preexisting subconstitutional right and duty—in other words, whether it be state law, the common law, general law, or federal law. *Cf.* Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 614 (2023) (introducing the concept of "general citizenship rights"). The point is simply that the constitutional rule operates only to preserve the subconstitutional rule.

33. *See* Fallon, *supra* note 10, at 942-46; Vázquez & Vladeck, *supra* note 10, at 531-37; 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, 1874-75 (2010); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523-27 (2003); Woolhandler, *Origins*, *supra* note 10, at 122-25; Woolhandler, *Patterns*, *supra* note 10, at 410; Amar, *supra* note 13, at 1506-07; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 21-29 (1963); Hart, *supra* note 10, at 1370-71. For antebellum common-law claims against government

some common-law duty he owed; the officer would respond that his actions were justified because of his official position or function; and the plaintiff would reply that the official's justification defense failed because the Constitution prohibited that defense.[34] The relief available in these cases could include damages for retrospective harms or injunctions for prospective harms.[35]

Procedurally, the constitutional issue in a common-law claim would arise in the plaintiff's reply to the officer's official-justification defense. But conceptually, the constitutional issue would be relevant only to determine whether the official could legitimately assert a privilege based on official authority. Because an unconstitutional law is not properly a "law,"[36] any privilege asserted on the basis of that unconstitutional rule must be a "nullity."[37] Under the original Constitution, for example, many constitutional provisions limited state legislatures or Congress alone, as with the Contracts Clause or the First Amendment.[38] In those circumstances, "nullification" would mean that the constitutional provision disabled the legislature from granting a privilege to the officer

officials, see *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 443-44 (1862); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 66, 77 (1858); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 339 (1856); *Deshler v. Dodge*, 57 U.S. (16 How.) 622, 630-31 (1854); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 150 (1836); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 23, 28 (1827); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817 (1824); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225 (1821); *Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11, 12, 16 (1815); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 335 (1806); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176 (1804); and *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 66-67, 115-16 (1804).

34. *See* Amar, *supra* note 13, at 1506-07; Woolhandler, *Patterns*, *supra* note 10, at 410. For antebellum common-law claims in which the officer's defense implicated a constitutional question, see *Dodge*, 59 U.S. (18 How.) at 339; *Jefferson Branch Bank*, 66 U.S. (1 Black) at 443-44; *Osborn*, 22 U.S. (9 Wheat.) at 817; and *Anderson*, 19 U.S. (6 Wheat.) at 225.

35. *See In re* Tyler, 149 U.S. 164, 190 (1893); Woolhandler, *Patterns*, *supra* note 10, at 447-48 (noting that the Virginia Coupon Cases, 114 U.S. 269 (1884), included "a damages action, a detinue action for recovery of property, and an equity action to restrain further seizures" (footnotes omitted)); *infra* text accompanying notes 42-48 (discussing Osborn v. Bank of the United States).

36. *E.g.*, Collins v. Yellen, 594 U.S. 220, 259 (2021); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

37. *See, e.g.*, John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2517-18, 2522-23 (1998) (discussing this theory of nullification); Amar, *supra* note 13, at 1454-55 (explaining this system).

38. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . *pass any* Bill of Attainder, ex post facto *Law*, or *Law impairing* the Obligation of Contracts, or grant any Title of Nobility." (emphases added)); U.S. CONST. amend. I; *see also* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 607-11 (1993) (explaining that constitutional litigation in the nineteenth century emphasized *statutory* unconstitutionality).

in violation of that provision.[39] From the perspective of the official and the plaintiff, nullification would mean that each is immune from the change to their respective legal statuses—the official immune from having the privilege conferred on him, and the plaintiff immune from being stripped of the preexisting subconstitutional right against the official. The upshot is that the plaintiff with a common-law claim would win, notwithstanding the asserted official privilege.[40]

A classic antebellum case—one that would generate a byzantine sovereign-immunity jurisprudence after the Civil War[41]—is *Osborn v. Bank of the United States*.[42] There, the Bank of the United States and its officers sought to enjoin Ralph Osborn, Auditor of the State of Ohio, to repay an allegedly unconstitutional tax levied on and seized from the bank.[43] Chief Justice Marshall, writing for the Court, allowed the suit on the theory that the Eleventh Amendment barred only "suits in which a State is a party on the record."[44] Marshall explained (probably in dicta) that an officer who illegally "seize[d] property for

39. *See* Harrison, *Power*, *supra* note 18, at 512 (noting that judicial review of legislation "operates by treating unconstitutional enactments as legal nullities").

40. Nullification might operate somewhat differently for constitutional provisions governing executive action rather than legislation. Suppose that an executive official seizes property and claims official justification without any statutory authorization. The Due Process Clause normally forbids deprivations without judicial process. *But see* Moyer v. Peabody, 212 U.S. 78, 84 (1908) (suggesting that due process "varies with the subject matter and necessities of the situation" and that "summary proceedings suffice for taxes," while "executive decisions [suffice] for exclusion from the country"). Thus, one might say the Due Process Clause states that the officer has no privilege to take the property, but the jural opposite of a privilege is just a duty, and the duty of the officer should already exist by virtue of the preexisting common law; on this reading, the Due Process Clause has no operative effect against *executive* officers but simply leaves the common law as it finds it. In the case of unauthorized executive action, then, perhaps the way to understand the executive-constraining component of the Due Process Clause is that it *disables* the officer from granting himself or herself the *privilege* by invoking necessity. *See* Harrison, *supra* note 37, at 2518 (using this example).

41. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 353-54 (1985) [hereinafter CURRIE, THE FIRST HUNDRED YEARS] (noting that the Court in the late nineteenth century would "develop highly sophisticated distinctions" regarding suits against state officers acting unconstitutionally); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 50-54, 568-80 (1990) [hereinafter CURRIE, THE SECOND CENTURY].

42. 22 U.S. (9 Wheat.) 738 (1824).

43. *Id.* at 740-42.

44. *Id.* at 857-58; *see also* CURRIE, THE FIRST HUNDRED YEARS, *supra* note 41, at 104-08, 105 n.98 (discussing Chief Justice Marshall's reasoning on the sovereign-immunity question in *Osborn*).

taxes" could be sued for damages as a "trespasser."[45] That same theory, he further explained, would justify suits for an injunction "for [a] specific thing" in an "action of detinue."[46] Though the Court later developed the theory that a trespass action might be a proceeding "against the individual" without violating sovereign immunity,[47] the critical point for now is that trespass was a common-law wrong that a state or federal officer, just as much as any other citizen, might commit.[48] And the Constitution's function in such a claim was to nullify assertions of governmental privilege (e.g., the asserted privilege to seize a tax based on an unconstitutional law).

2. *Defensive Nullification*

The common-law constitutional tort resembles another avenue for constitutional litigation: *defensive nullification*.[49] At the Founding no less than today, a constitutional argument might be asserted as a defense in a civil or criminal proceeding instituted by the state or federal government. For example, a person charged with violating the Sedition Act[50] could argue that Congress "shall make no law . . . abridging the freedom of speech," that "a legislative act contrary to the Constitution is not law," and therefore that she could not be criminally punished under such a statute.[51] The same argument could be made in state criminal proceedings or in noncriminal enforcement actions, and many classic constitutional-law decisions—from early constitutional history to the present day—arise in precisely this posture.[52]

---

45. *Osborn*, 22 U.S. (9 Wheat.) at 853.

46. *Id.* at 853-54.

47. *See infra* Section IV.B.

48. *Osborn*, 22 U.S. (9 Wheat.) at 858-59; *see also* Jaffe, *supra* note 33, at 22 (observing that *Osborn* suggested that "only a trespassory taking would satisfy the requirement that the officer sued has committed a 'wrong'").

49. *See* Harrison, *supra* note 37, at 2516-17 (describing the "system of public law remedies that prevailed in the nineteenth century" as allowing a private person both to (1) "interpose any factual or legal defense, including one based on the Constitution," when "the executive brought an enforcement action" and to (2) sue officials for acts that "would be wrongful if committed without official privilege").

50. Sedition Act of 1798, ch. 74, 1 Stat. 596.

51. U.S. CONST. amend. I; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST NO. 78, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. *See* Woolhandler, *Origins*, *supra* note 10, at 122 ("The most basic judicial remedy for constitutional violations was the ability to raise a defense to a government-initiated enforcement suit."); *see also id.* at 122 n.233 (collecting cases); United States v. Stevens, 559 U.S. 460, 464 (2010) (pertaining to a criminal prosecution for the sale of items depicting animal cruelty);

The assertion of a constitutional defense differs *procedurally* from a common-law constitutional tort, but the conceptual structure is the same. In the enforcement action, the government invokes the power of the court to deprive the person of some preexisting common-law interest such as life, liberty, or property. The government's assertion of the legal power to interfere with those interests is legitimate only if the deprivation occurs with "due process of law."[53] Because any law that contradicts the Constitution is not a "law," any deprivations pursuant to that statute cannot satisfy "due process."[54] In other words, the Constitution disables the government from altering the preexisting common-law or state-law rules, and the private person is immune from changes in the law that alter those preexisting rules. A common-law constitutional tort is the same: the plaintiff invokes a subconstitutional right, the government official invokes a privilege to interfere with it, and the plaintiff replies that the conferral of that privilege is a nullity.

Because a common-law constitutional tort has the same conceptual structure, such a claim might be described as *offensive nullification*. Unlike defensive nullification, the common-law constitutional tort is "offensive" in that the private person initiates the suit. Like defensive nullification, however, the common-law constitutional tort involves "nullification" in that the Constitution disables some previous governmental actor (likely the legislature) from granting the defendant-official a privilege to deprive the person of a subconstitutional right. The result is that the government official is stripped of her official status and must answer to the plaintiff as a private individual.[55] To mix analysis

Wisconsin v. Yoder, 406 U.S. 205, 208-09 (1972) (pertaining to a criminal prosecution); Near v. Minnesota, 283 U.S. 697, 705 (1931) (pertaining to an action by the State to abate a nuisance); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832) (pertaining to an action by the State to regulate trade with Indian tribes); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-01 (1819) (pertaining to a criminal prosecution).

53. U.S. CONST. amend. V.

54. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1907-12, 1907 n.99 (2014); CURRIE, THE FIRST HUNDRED YEARS, *supra* note 41, at 272 (suggesting that "due process of law" is a "safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law"); *In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting).

55. *See, e.g.*, Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 452 (1883) ("Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. *In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer.* To make out his defense he must show that his authority was sufficient in law to protect him." (emphasis added)); *In re* Ayres, 123 U.S. 443, 501 (1887); Poindexter v. Greenhow, 114 U.S. 270, 286 (1885).

and metaphor, in the nullification framework—whether the Constitution is being used as a "shield" or a "sword"[56]—it is wielded only in a contest authorized by the underlying subconstitutional law and only as a nullification rule.

B. Constitutional Duties

This Section introduces the framework of constitutional duties by exploring the basic structure of modern constitutional-tort claims under § 1983 and *Bivens*. These modern constitutional torts differ from the common-law variant (and from defensive nullification) because they assume the Constitution imposes independent limitations on government actors *irrespective* of preexisting subconstitutional law.

1. Modern Constitutional Torts

The term "constitutional tort," in the modern sense, generally refers to two sets of claims against two sets of officers: (1) claims brought against state or local officials (or municipalities) under 42 U.S.C. § 1983, originally enacted in the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act);[57] or (2) claims brought against federal officials pursuant to the nonstatutory federal analogue announced by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[58]

As to § 1983: The provision authorizes lawsuits against state actors (any "person" acting "under color of any statute, ordinance, regulation, custom, or usage, of any State") who cause the "deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws."[59] Section 1983 makes such

---

56. *See* Dellinger, *supra* note 7, at 1532.

57. *See* 42 U.S.C. § 1983 (2018); Civil Rights Act of 1871, ch. 22, 17 Stat. 13; *see also* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1333-36 (1952) (discussing the enactment of this law and related civil-rights statutes); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396-409 (1982) (discussing the same in more detail).

58. 403 U.S. 388 (1971).

59. 42 U.S.C. § 1983 (2018) (emphasis added). The statute reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

persons liable in an "action at law, suit in equity, or other proper proceeding for redress," and the Court has authorized plaintiffs to seek injunctive relief and damages (including nominal and punitive).[60] A major barrier to any § 1983 claim is the set of immunity doctrines the Court has recognized,[61] but § 1983 remains one of the most important mechanisms for enforcing federal constitutional rights.[62]

As to *Bivens*: The Court there held that the "violation" of the Fourth Amendment by a "federal agent . . . gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[63] Section 1983 does not authorize suits against federal officials. *Bivens* eliminated the apparent "remedial gap"[64] that state officers but not federal officials could be sued for damages if they committed constitutional violations. But the remedial gap has since widened again. Plaintiffs in *Bivens* actions must satisfy all the same elements and overcome the same immunities as plaintiffs in § 1983 actions,[65] but they face an additional hurdle: *Bivens* was extended twice[66] but has since been virtually eliminated as the Court has declined to extend it to "new contexts."[67]

Id. For an argument that the original language of § 1983 did not create a cause of action in the modern sense, see Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 923-26 (2024).

60. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 302 (1986) (seeking compensatory and punitive damages); City of Los Angeles v. Lyons, 461 U.S. 95, 97-98 (1983) (seeking injunctive relief); Smith v. Wade, 461 U.S. 30, 33-34 (1983) (challenging an award of punitive damages but not the award of compensatory damages); Carey v. Piphus, 435 U.S. 247, 248 (1978) (permitting nominal damages).

61. *See infra* Section II.F.

62. Wilson v. Garcia, 471 U.S. 261, 273-74 (1985) (listing a "catalog" of available § 1983 claims). The Court has also concluded that § 1983 authorizes suits for deprivation of certain *statutory* rights. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002); Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Maine v. Thiboutot, 448 U.S. 1, 4 (1980). I set aside these claims here, but the analysis in Part III suggests that the dispositive question in determining whether § 1983 provides a cause of action should be whether the statute imposes a duty on the defendant.

63. *Bivens*, 403 U.S. at 389.

64. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 70 (1999).

65. *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1410-11 (2019).

66. *See* Carlson v. Green, 446 U.S. 14, 20-21 (1980) (finding a cause of action for inadequate medical care under the Eighth Amendment); Davis v. Passman, 442 U.S. 228, 229-30 (1979) (finding a cause of action for a sex-discrimination claim under the Fifth Amendment).

67. *See, e.g.*, Egbert v. Boule, 596 U.S. 482, 490-93 (2022); Ziglar v. Abbasi, 582 U.S. 120, 135-36 (2017); Hernandez v. Mesa, 582 U.S. 548, 552-53 (2017). For commentary on that trend, see,

2. The Constitutional-Duty Framework

A modern constitutional tort is one in which the plaintiff asserts that the government official has breached a duty originating in the Constitution itself. Conceptually, the duty is imposed directly by the Constitution, and subconstitutional rights have nothing to do with the alleged violation—at least not necessarily.[68] Thus, the core feature of such a claim is that the plaintiff's constitutional right has been violated, not that there has been breach of a common-law duty.

To modern lawyers, the idea that the Constitution imposes duties on governmental actors is often just assumed, but the issue has not always been settled. Consider *Bivens* itself, which discussed both the nullification and duty frameworks for constitutional litigation.[69] In that case, the Court rejected the argument that the Fourth Amendment operated only as a nullification rule. In particular, *Bivens* rejected the argument that the relevant right asserted by the plaintiff was a "creation[] of state and not of federal law" and that the Fourth Amendment would only "limit the extent to which the agents could defend the state law tort suit."[70] In other words, the Court rejected the defendants' position that the Fourth Amendment operated only to prevent certain alterations of subconstitutional "rights of privacy."[71] Instead, the Court reasoned that the Fourth Amendment is "an independent limitation upon the exercise of federal

for example, Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1509-10 (2018); Vázquez & Vladeck, *supra* note 10, at 531-66. *See also generally* Symposium, *supra* note 7 (providing commentary on that trend throughout a special issue dedicated to exploring the current state of *Bivens* claims).

68. "Not necessarily," though sometimes incidentally, because some constitutional duties draw their content from state law, as with the question about what counts as property for the Takings Clause or the Due Process Clause. *See, e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886-88 (2000). Similarly, a constitutional question may turn on the availability of relief under state law. *E.g.*, Parratt v. Taylor, 451 U.S. 527, 537 (1981) (determining whether plaintiffs can "establish a violation" of the Due Process Clause turns on "whether the tort remedies which the [State] provides as a means of redress for property deprivations satisfy the requirements of procedural due process"). But in that circumstance, the Constitution imposes the baseline that state-law rules must satisfy; in the nullification framework, by contrast, state law is relevant because *it* imposes the baseline which the Constitution preserves.

69. *See also* Harrison, *Power*, *supra* note 18, at 528-30 (discussing the two models of Fourth Amendment litigation).

70. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-91 (1971).

71. *Id.*

power."[72] For that reason, the Court continued, the Amendment provides "an independent claim both necessary and sufficient to make out the plaintiff's cause of action," not just "a possible defense to the state law action."[73] As Justice Harlan put it, the "problem" in *Bivens* was not the "'source' of the 'right'" but whether courts have "power to authorize damages as a judicial remedy for the vindication of a federal constitutional right."[74]

The modern critique of *Bivens* tends to focus on that final leap from the existence of the constitutional duty imposed on the defendant-officer to the plaintiff's power to seek redress—that is, from the right to the damages remedy.[75] But the inference of the remedy from the breach of duty is a natural conclusion in light of the maxim *ubi jus ibi remedium* (where there is a right, there is a remedy).[76] For present purposes, what is interesting about *Bivens* is that its analysis turns on the assumption that the Constitution imposes duties directly on federal officials. The only serious analysis regarding whether the Fourth Amendment or state law was the "source of legal protection for the 'rights' enumerated therein" was a footnote in Justice Harlan's concurrence.[77] Today, as the next Part will establish, the assumption that the Constitution imposes such duties on state and federal officers is an organizing principle of constitutional-tort doctrine, though one that has not been wholly endorsed.

* * *

Summing up: A tort assumes that *A* has a duty to *B* not to interfere with certain cognizable interests, and the breach of the duty by *A* gives *B* the legal power to seek compensation (or some other remedy when appropriate). The common-law constitutional tort and modern constitutional tort are two species of that genus. The common-law constitutional tort adds two qualifications: (1) *A* is a government official who asserts a *privilege* to take the allegedly tortious

72. *Id.* at 394.

73. *Id.* at 395.

74. *Id.* at 401-02 (Harlan, J., concurring in the judgment).

75. Ziglar v. Abbasi, 582 U.S. 120, 131-33 (2017).

76. 3 WILLIAM BLACKSTONE, COMMENTARIES *23; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* GOLDBERG & ZIPURSKY, *supra* note 28, at 39-42 (describing *Bivens* in these terms); Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1155-57 (2014) (describing *Bivens* in similar terms and citing sources reiterating the maxim).

77. *Bivens*, 403 U.S. at 400 & n.3 (Harlan, J., concurring in the judgment) (analyzing the text of the Fourth Amendment, legislative history of the Bill of Rights, and arguments advanced by Professor Henry M. Hart, Jr. in his article *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523-24 (1954), before concluding that the plaintiff's legal interest was "a federally protected interest").

actions because of her official status; and (2) *B* asserts that the Constitution nullifies such a privilege (by, for example, disabling the legislature from conferring that privilege).

The modern constitutional tort differs from the common-law variant in that the origin of *A*'s duty is the Constitution itself rather than the subconstitutional backdrop, and the breach of that duty can generate a power to seek appropriate relief under § 1983 or *Bivens*. Importantly, although the two *frameworks* are conceptual competitors, the two kinds of constitutional *rules* are not mutually exclusive. In the framework of constitutional duties, duty rules supplement—rather than displace—nullification rules. The same constitutional provision might both nullify changes to subconstitutional rights and impose obligations on federal officials—as when, for example, the Eighth Amendment might be asserted either to nullify certain sentences authorized by legislatures or to impose obligations on prison officials vindicable in constitutional-tort claims.[78]

II. COMPETING FRAMEWORKS IN PRACTICE

This Part demonstrates that, despite the general emergence of the constitutional-duties framework, the Court has vacillated between (or displayed ambivalence about) the duties framework and the nullification framework since the second half of the twentieth century. Sometimes the conflict reveals itself in the incompatible approaches of a majority and a dissent; other times the disagreement is between the twentieth-century Court and the modern Court; and other times the conflict is evident within the doctrine itself, when the Court appears to adopt inconsistent premises derived from the two frameworks. In all events, tracing the competing frameworks through the modern doctrine establishes not only that the framework of constitutional duties is dominant, but also that its incorporation into legal doctrine is incomplete.

This Part therefore traces the two competing frameworks through seven doctrinal areas: (1) the disagreement between the majority and dissent in the landmark case *Monroe v. Pape*, in which the Court held that § 1983 authorized suits against government officers acting without the authority of state law;[79] (2) opinions reaching differing conclusions about the enforceability of the dormant Commerce Clause under § 1983 and its jurisdictional component; (3) the development of Eighth Amendment doctrine to forbid certain actions by prison officials, as well as the criticisms of that innovation; (4) the develop-

78. *See infra* notes 147-161 and accompanying text.

79. 365 U.S. 167, 172 (1961).

ment of First Amendment speech and religion protections for employees, students, and observers, as well as efforts to curtail certain Establishment Clause rules that assume constitutional duties; (5) the selection of the elements of constitutional torts under § 1983; (6) the recognition of absolute and qualified immunities for officers committing constitutional torts; and (7) the calculation of damages for constitutional torts. These examples are not exhaustive, and later I will suggest other doctrinal areas in which distinguishing between the competing constitutional frameworks might be illuminating beyond constitutional-tort law.[80] But the examples provided here should suffice both to establish that the competition between these two frameworks is widespread and to prepare the argument for several concrete refinements, discussed in more detail in Section III.A, to constitutional-tort doctrine.

A. "Under Color of" Law

A necessary premise in the seminal § 1983 decision *Monroe v. Pape* is that the Constitution imposes duties on state officers. Disagreement over this premise is a core dispute between, on one hand, the majority (by Justice Douglas) and the concurrence (by Justice Harlan) and, on the other, the dissent (by Justice Frankfurter). Though a version of 42 U.S.C. § 1983 was enacted in 1871, it generated very little litigation for decades.[81] During that period, the infrequent claims brought under the statute mostly involved a few failed attempts to enforce economic liberties; a few slightly more successful challenges to the denial of the right to vote; and then a handful of First Amendment claims.[82] The tre-

---

80. *See infra* Part IV.

81. Baude, *supra* note 5, at 65-66; Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. Rev. 737, 757-58; *see also* Gressman, *supra* note 57, at 1343-57 (arguing that the Supreme Court was generally hostile to the series of civil-rights statutes enacted between 1866 and 1875); Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 986 (7th ed. 2015) (arguing that the language in § 1983 "partly tracks" the Privileges or Immunities Clause, "which the Supreme Court rendered a near constitutional dead letter in The Slaughter-House Cases" (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74-80 (1873))).

82. *See* Marshall S. Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277, 282-87 (1965); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 Harv. L. Rev. 1486, 1486 (1969); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 Ind. L.J. 361, 363-66 (1951); Nixon v. Herndon, 273 U.S. 536, 539-41 (1927); Smith v. Allwright, 321 U.S. 649, 664-65 (1944); Snowden v. Hughes, 321 U.S. 1, 4 (1944); Lane v. Wilson, 307 U.S. 268, 269-71 (1939); Myers v. Anderson, 238 U.S. 368, 377-78 (1915); Douglas v. City of Jeannette, 319 U.S. 157, 160 (1943); Hague v. Comm. Indus. Org., 307 U.S. 496, 504-07 (1939); Moyer v. Peabody, 212 U.S. 78, 83 (1909);

mendous growth in § 1983 claims began after the Supreme Court's decision in *Monroe*—ninety years after the statute's enactment.[83]

In *Monroe*, Chicago police officers searched the plaintiff without a warrant, arrested him, and conducted a ten-hour investigation.[84] When the plaintiff brought suit under § 1983, the officers argued that they could not be sued under the statute because their actions violated state law and were therefore not taken "under color of" state law.[85] The Court rejected that argument, holding that state officials could be liable under § 1983 even if their actions violated state law.[86] *Monroe*'s holding generated the robust set of civil-rights claims more generally available today,[87] and tellingly the familiar term "constitutional tort" was coined in the wake of that decision.[88] Technically, *Monroe* turned on a statutory-interpretation question regarding the meaning of "under color of."[89]

Devine v. City of Los Angeles, 202 U.S. 313, 316 (1906); Giles v. Harris, 189 U.S. 475, 495 (1903); Holt v. Ind. Mfg. Co., 176 U.S. 68, 69 (1900); Bowman v. Chi. & Nw. Ry. Co., 115 U.S. 611, 615 (1885); Carter v. Greenhow, 114 U.S. 317, 320-21 (1885). For a recent effort to collect all early § 1983 cases, see Matteo Godi, *Section 1983: A Strict Liability Statutory Tort*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 18 n.96), https://ssrn.com/abstract=4925020 [https://perma.cc/9CD8-562Q].

83. *See* JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 16 (5th ed. 2022) (noting that in the year of *Monroe*, "fewer than 300 suits were brought in federal court under all civil rights acts" but that from April 2019 to the end of March 2020, that number was nearly 44,000). *But see* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 663-65 (1987) (noting that the number of civil-rights claims overstates the number of constitutional-tort claims).

84. Monroe v. Pape, 365 U.S. 167, 169 (1961).

85. *Id.* at 172.

86. *Id.* ("The question with which we now deal is the narrower one of whether Congress . . . meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by *an official's abuse of his position*. We conclude that it did so intend." (emphasis added) (citations omitted)). For interpretations of this language, see Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 500-03 (1985); and Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 324-28 (1992).

87. *See* Wilson v. Garcia, 471 U.S. 261, 273 (1985).

88. *See* Shapo, *supra* note 82, at 323-24; *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 59 & n.4 (1999) (noting that Professor Marshall S. Shapo coined the term in 1965). The Supreme Court's first use of the term occurred in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978).

89. *See, e.g.*, *Monroe*, 365 U.S. at 202 (Frankfurter, J., dissenting in part) ("Abstractly stated, this case concerns a matter of statutory construction."); *see also supra* note 85 and accompanying text (discussing the officers' argument in *Monroe* about the meaning of "under color of").

But close attention to the opinion reveals that disagreement about whether the Constitution imposes duties drove the splinter among the Justices.

1. *Defining "Adequate Remedies"*

Justice Douglas's majority opinion begins with the premises that a violation of "a right guaranteed by the Fourteenth Amendment" is enforceable under § 1983; that the "guarantee against unreasonable searches and seizures" is "applicable to the States by reason of the Due Process Clause"; and that "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[90]

Working from those premises, the question was whether Congress in fact imposed liability on those who "misuse[d]" their authority.[91] In answering that question, the majority asserted that the legislative history showed that Congress had three aims: (1) to "override certain kinds of state laws," (2) to "provide[] a remedy where state law was inadequate," and (3) to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[92]

The first aim is fully accomplished by a nullification rule. The function of a nullification rule is to "override" any assertions of legal authority contrary to the constitutional provision. But the majority's reliance on the notion of "inadequate" state remedies—and remedies "adequate in theory" but not "practice"—raises the question: *adequate to do what*? Determining adequacy requires a baseline, and the baseline must be defined by the nature of the underlying constitutional interest. After all, if the principle at work is that a violation of a legal right should have an adequate remedy, then the adequacy of the remedy is defined by the underlying right. Thus, the question of adequacy turns on whether the underlying "right" involves a duty imposed by the Constitution or a duty imposed by state law and protected by a nullification rule.

To see that point, consider what remedies would be "adequate" under each of the two frameworks. First, suppose that the Fourth Amendment established a "right" only in the sense of a nullification rule.[93] In that circumstance, the

---

90. *Monroe*, 365 U.S. at 170-72 (majority opinion).

91. *Id.* at 172.

92. *Id.* at 173-74.

93. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 702 & n.442 (1999). *See generally supra* text accompanying notes 28-56 (describing the nullification framework).

constitutional violation would occur only if the state-law remedy were wrongly denied, and the scope of the constitutional remedy would be defined by the state-law remedy. A remedy for such a constitutional violation—that is, the restoration of the state-law remedy wrongly denied by the State—would be available through the Supreme Court's review of state-court judgments, whether by writ of error (in 1871) or writ of certiorari (in 1961).[94] At most, violations of such rights could be remedied with a "jurisdictional" statute under which the "load of federal supervision" to prevent unconstitutional abridgements of state-law rights could be "shift[ed] . . . from the Supreme Court to the lower courts."[95] There would be no basis to conclude that state law was inadequate because the state law would determine the rules protected by the constitutional provision.

Second, suppose instead that the Constitution imposes duties and not simply nullification rules. On this view, because the Constitution itself is the source of the duty, that duty exists independently of—and could be broader than—whatever duties may be imposed by state law. The state-law remedy is inapposite because it corresponds to a breach of the state-law duty. Whether the state-law remedy would precisely fit the constitutional right is a matter of chance, and thus the only "adequate" remedy is a federal-law remedy tailored to the violation of the federal right.[96]

2. The "Jurisdictional" Option

Justice Harlan's concurrence draws the same distinction between constitutional nullification rules and duty rules. It provides a potential counterargument to the majority's analysis of the "adequacy" of state-law remedies, and it sides with the majority after distinctly endorsing the framework of constitutional duties.

Justice Harlan notes that, before Congress enacted § 1983, the Supreme Court could set aside "the denial of a state damage remedy against an official on grounds of state authorization of the unconstitutional action."[97] Said differently, the Court could enforce constitutional nullification rules. It could order

---

94. *See* Benjamin J. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 823-31 (2022).

95. *Monroe*, 365 U.S. at 195 (Harlan, J., concurring).

96. The exception could be for cases in which the constitutional right is itself thought to be derivative of the state-law right, as with state-created property or liberty interests under the Due Process Clause or with respect to the Takings Clause. *E.g.*, Parratt v. Taylor, 451 U.S. 527, 535-37 (1981).

97. *Monroe*, 365 U.S. at 194-95 (Harlan, J., concurring).

the state court to provide the damages remedy to which the plaintiff would have been entitled under state law but for the unconstitutional withdrawal of that remedy. Before § 1983, therefore, there was already a remedy available for cases in which state courts *authorized* the allegedly unconstitutional conduct. In other words, the majority's first function for § 1983—to "override certain kinds of state laws"—was already available. Harlan reasons that, if § 1983 authorized suits only in those cases, then § 1983 would function as a jurisdictional provision allowing *lower* federal courts, not just the Supreme Court, to ensure that state law is constitutionally applied.[98] In such a case, the lower federal court would ask two questions: (1) what remedies does state law (or perhaps the common law or general law) provide to the plaintiff, and (2) does the Constitution nullify any effort to abridge or modify the subconstitutional rights that would otherwise be available to the plaintiff? These two questions would be, at least in theory, the same two that a state court would have asked because of the Supremacy Clause and that the Supreme Court would have asked on direct review of any state-court judgment.

This exclusively jurisdictional function could make sense if Congress's concern was that state courts, practically speaking, were inadequate as fora. As a formal legal issue, under this jurisdictional understanding of § 1983, the question before the state or federal court would be the same: does state law, as appropriately constrained by constitutional nullification rules, authorize relief? But practically speaking, a federal court and a state court asking that same question might reach different results. As Justice Harlan notes, state courts might be "less willing to find a constitutional violation in cases involving 'authorized action,'" might impose a "greater burden" on plaintiffs, or might bind those plaintiffs at the Supreme Court with "unfavorable state court findings."[99] The jurisdictional reading of § 1983 accepts that constitutional provisions operate as nullification rules but anticipates that state courts might not fully enforce them as a practical matter.

Justice Harlan rejects the exclusively jurisdictional function of § 1983 precisely because, in his view, the Constitution imposes duties. He reasons that the "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right."[100] As such, the federal right "deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[101] In other words, the violation of the

98. *Id.* at 195.

99. *Id.*

100. *Id.* at 196.

101. *Id.*

constitutional duty is different in scope than analogous common-law duties, even when those legal rules prohibit similar or even identical misconduct. As Harlan notes in an aside, it "would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."[102]

That last argument is incompatible with the view that the Constitution imposes only nullification rules. Suppose that state law prevents a plaintiff from bringing a trespass action against a police officer by granting a defense to the officer contrary to the Fourth Amendment. The constitutional wrong in that example is not "different from" or "more serious than" a "violation of a state right";[103] the constitutional wrong simply *is* the denial of the state right. Assuming that the state right was erroneously denied by state courts, it could be remedied by the Supreme Court. And if the Supreme Court's review were thought to be inadequate for some reason, that too could be remedied with the "jurisdictional" reading that Justice Harlan considered and then rejected. The constitutional wrong can be different from the state-law wrong only if the Constitution imposes a duty independent of state law.

3. Questioning Constitutional Duties

Justice Frankfurter's dissent argues that the Constitution does not impose duties at all, or at least that it does not do so unless Congress clearly intends it.

At the outset, Justice Frankfurter concedes that the Due Process Clause "forbids the kind of police invasion" at issue,[104] but he concedes only that a constitutional violation would occur if "petitioners had sought damages in the state courts of Illinois and . . . those courts had refused redress on the ground that the *official character* of the respondents clothed them with *civil immunity*."[105] He also notes that the defendant in *Monroe* could "show no such authority at state law as could be successfully interposed *in defense to a state-law action against him*."[106] Though Frankfurter claims that petitioners could have brought a common-law constitutional tort against the officers, he notes that such a claim would not have been successful in petitioners' case.[107] This is because,

102. *Id.* at 196 n.5.

103. *Id.* at 196.

104. *Id.* at 211 (Frankfurter, J., dissenting in part).

105. *Id.* (emphasis added).

106. *Id.* at 224 (emphasis added).

107. *Id.* at 208-11.

although he appears to concede that a constitutional "violation" occurred, in fact he admits only that a constitutional nullification rule would have been "violated" if state law had immunized the officers' conduct in the first place.[108]

He then goes on to explain that duties are creatures of state law and that the Constitution operates only to protect those duties. "As between individuals," he reasons, the "mutual rights and duties . . . remain[] essentially the creature of the legal institutions of the States."[109] The domain of the Constitution is not to impose a "corpus of substantive rights" but to ensure "'due process of law' in the ascertainment and enforcement of rights and equality in the enjoyment of rights and safeguards *that the States afford*."[110] Thus, under the original conception of constitutional rules, the Constitution operated as a limit on the "rights and safeguards" provided by the states. In other words, the Constitution operated through nullification rules.

The dissent confronts the possibility of constitutional *duties* only near the end of the opinion. It notes that the wrongs at issue "were committed not by individuals but by the police as state officials."[111] But there are two senses in which a wrong might be state action.

First, the wrong might be committed "by the police as state officials" in the sense that "the redress which state courts offer them against the respondents is different than that which those courts would offer against other individuals."[112] Again, the plaintiffs in *Monroe* did not make that allegation. But if redress against those officers were denied, then the constitutional violation would be the deprivation of the subconstitutional right otherwise available to the plaintiff. The constitutional violation would occur when the State conferred the privilege on the officer to breach the corresponding subconstitutional duty. The remedy for such a violation would be restoring the preexisting state relief, which would be tailored to protect the underlying state right, not a freestanding constitutional value. The wrong is committed "by the police as state officials" in the sense that conferring the privilege on the officers as state actors contravenes a constitutional nullification rule.

Second, the wrong might instead be considered "official," the dissent continues, because the officers were "clothed with an appearance of official authority," which might be considered "a factor of significance in dealings be-

108. *Id.*

109. *Id.* at 238.

110. *Id.* at 237 (emphasis added).

111. *Id.* at 238.

112. *Id.*

tween individuals."[113] Now Justice Frankfurter is grappling with the core conceptual problem. The opinion's reference to "dealings between individuals," in light of the earlier discussion of "mutual rights and duties," appears to refer to private-law rights. Frankfurter concedes that the "factor of significance" to the question of private-law rights—that is, the "aura of power which a show of authority carries"—is "created by state government."[114] He indicates that Congress *might* "attribute responsibility" for those wrongs to the State, and Congress *might* legislate to recognize such rights and duties between "individuals within a state," and Congress *might* have constitutional authority to do so.[115] But Frankfurter reasons that Congress had not imposed such constitutional duties yet. And he strongly suggests that Congress has no authority to impose such duties under Section 5 of the Fourteenth Amendment.[116] The dissent then punts on the critical questions,[117] but his skepticism about constitutional duties—and his extended elaboration of the nullification framework—is incompatible with the reasoning of the other Justices.

In summary, while the opinions in *Monroe* devote pages of analysis to statutory interpretation of § 1983, below the surface lies a fundamental disagreement about the nature of the rules imposed by the Constitution. The majority and the concurrence assert with limited analysis that the Constitution imposes duties on state officials. The dissent, by contrast, argues that the ordinary mechanism of constitutional law is nullification. In Justice Frankfurter's view, the imposition of constitutional duties is at least suspect and possibly unconstitutional.[118]

What does this disagreement tell us about the two frameworks for constitutional torts? The most important point is that it shows how the differing frameworks of constitutional rights have concrete implications for judicial rea-

---

113. *Id.* Compare this language with the formulation in Justice Harlan's concurrence that Congress may have "regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern." *Id.* at 193 (Harlan, J., concurring).

114. *Id.* at 238 (Frankfurter, J., dissenting in part).

115. *Id.*

116. *Id.* at 211-12 (suggesting that determining whether the Fourteenth Amendment authorized the lawsuit would turn on "the concept of state action as this Court has developed it" and "considerations of the power of Congress . . . to determine what is 'appropriate legislation' to protect the rights which the Fourteenth Amendment secures").

117. *Id.* at 238-39 ("But until Congress has declared its purpose to shift the ordinary distribution of judicial power for the determination of causes between co-citizens of a State, this Court should not make the shift. Congress has not in [§ 1983] manifested that intention.").

118. *See id.* at 241-42.

soning. Whatever the statutory language or legislative history, the majority's key analytical move—that a federal cause of action is necessary to ensure "adequate" remediation of the underlying rights—assumes that the Constitution operates not only through nullification rules but through duty rules. What is more, the fact that the majority's premise was seriously contested by Justice Frankfurter in 1961 but (probably) seems innocuous today suggests that the framework of constitutional duties is embedded in the way modern lawyers think about constitutional rights.

B. Commerce

Consider next a more technical question: is a violation of the dormant Commerce Clause or the Contracts Clause enforceable in an action under § 1983?[119] That question underscores the relevance of the constitutional duty because the Court has asked versions of it twice—once long before *Monroe* and before the constitutional duty fully flourished (in 1885) and once a few decades after *Monroe* (in 1991). Each reached different answers. Importantly, the respective Courts answered "no" and "yes" precisely because the first reasoned that the Commerce Clause establishes a nullification rule only and the second reasoned that it establishes a duty rule.

1. The Commerce and Contracts Clauses as Nullification Rules

In *Bowman v. Chicago & Northwestern Railway Co.*, the plaintiffs sued a railroad company for refusing to carry one thousand kegs of beer into Iowa, which had criminalized transportation of "intoxicating liquors."[120] The formal question presented was whether a suit alleging a violation of the Commerce Clause alleged the deprivation of a right "secured by the Constitution" within the meaning of the jurisdictional counterpart to § 1983.[121] In 1885, the general federal-question statute (enacted in 1875) still had an amount-in-controversy requirement,[122] which the plaintiffs in *Bowman* could not satisfy despite their substantial liquid assets.[123] Accordingly, the Court had jurisdiction over the claim only if it triggered the jurisdictional complement to § 1983, which granted original jurisdiction—without regard to the amount in controversy—over

119. Dennis v. Higgins, 498 U.S. 439, 440 (1991).

120. 115 U.S. 611, 612 (1885).

121. *Id.* at 614-15.

122. *See* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

123. *See Bowman*, 115 U.S. at 612-14.

suits involving the alleged "deprivation of any right, privilege, or immunity secured by the Constitution."[124] That jurisdictional hook mirrored the language in § 1983.[125]

The plaintiffs argued that they had alleged a deprivation of a right "secured by the Constitution" because the Iowa statute violated the dormant Commerce Clause.[126] The Court disagreed, reasoning that the "alleged right" to require transportation by a common carrier was secured "not by the constitution" but by the "general law."[127] Whether the railroad could claim to be "excused from the performance of that duty by the statute," the Court admitted, would "depend on the Constitution" because a determination of unconstitutionality would require the railroad to carry the kegs.[128] But the plaintiffs' success on the constitutional issue would *not* be "because the Constitution requires it," but rather "because the statute does not furnish a sufficient excuse for not carrying [the beer]."[129] Put differently, the Court's reasoning turned on the point that a state statute enacted contrary to the Commerce Clause was a nullity (and could not alter the "general law" duty), but the Clause did not itself impose duties on the common carrier.

The decision in *Bowman* followed another similar case applying similar logic to the Contracts Clause. In *Carter v. Greenhow*, one of the *Virginia Coupon Cases*,[130] the plaintiff filed suit for trespass against a state official.[131] He alleged

---

124. *Id.* at 614-15; *see also* XIII Rev. Stat. § 629(16) (2d ed. 1878) (granting original jurisdiction over "all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States").

125. A modern version of this jurisdictional provision is still on the books, *see* 28 U.S.C. § 1343(a)(3) (2018), but it duplicates the more general federal-question provision now that the latter lacks an amount-in-controversy requirement, 28 U.S.C. § 1331 (2018). For a general discussion of the history and origins of the jurisdictional provision, see *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607-12 (1979).

126. The exact nature of the constitutional objection is not entirely clear from the opinion, but the only claim that would make sense in context would be a dormant Commerce Clause claim. *See* Dennis v. Higgins, 498 U.S. 439, 459 (1991) (Kennedy, J., dissenting) (citing *Bowman*, 115 U.S. at 615-16).

127. *Bowman*, 115 U.S. at 615.

128. *Id.*

129. *Id.*

130. *See* CURRIE, THE FIRST HUNDRED YEARS, *supra* note 41, at 423 ("Virginia had promised not simply to repay the funds invested in her bonds but to accept interest coupons in payment of taxes, yet in accord with later statutes her tax collectors had rejected the tender of

that the official refused to accept coupons issued by the State as payment for taxes, that the official "seized the plaintiff's property and carried the same away to sell the same in payment of plaintiff's taxes," and that the refusal violated the Contracts Clause.[132]

The claim was thus a common-law constitutional tort. But the Court refused to allow the claim to proceed under the predecessor of § 1983. Instead, the Court reasoned that the Contracts Clause "confer[s] upon, or secure[s] to, any person any individual rights" only "indirectly and incidentally," because the "only right secured" by the Clause is "a right to have a judicial determination[] *declaring the nullity*" — that is, a declaration that such a law was "unconstitutional, null, and void."[133] And that nullification remedy, the Court added, could be obtained in a "judicial proceeding necessary to vindicate his rights under a contract affected by such legislation."[134]

In short, *Bowman* and *Carter* stand for the proposition that suits alleging violations of the Commerce Clause and the Contracts Clause do not allege a violation of rights "secured by" the Constitution because those provisions establish nullification rules. Claiming a violation of those constitutional provisions therefore required identifying a preexisting common-law duty that the state official had breached. Thus, the nullification rule might be enforced in actions to "vindicate" those preexisting subconstitutional rights, but the Commerce Clause and the Contracts Clause did not themselves impose independent duties on the railroad in *Bowman* or the officials in *Carter*.

2. *The Commerce Clause as a Duty Rule*

But just over one hundred years later, the Court reached a contrary conclusion without seriously engaging with *Bowman* or *Carter*. In *Dennis v. Higgins*, the Court concluded that the Commerce Clause "confers 'rights, privileges or immunities' within the meaning of § 1983."[135] The Clause not only "confer[s] power on the Federal Government" but also functions as a "substantive 're-

coupons and begun to enforce the tax against bondholders by seizing their assets."); Woolhandler, *Origins*, *supra* note 10, at 118-21, 118 n.213.

131. Carter v. Greenhow, 114 U.S. 317, 318 (1885); *see also* Pleasants v. Greenhow, 114 U.S. 323, 324 (1885) ("This case comes within the decision just rendered in *Carter v. Greenhow* . . . ."); White v. Greenhow, 114 U.S. 307, 308 (1885) (concluding that a similar trespass claim was "a case arising under the Constitution" for the purposes of federal-question jurisdiction).

132. *Carter*, 114 U.S. at 319-20.

133. *Id.* at 322 (emphasis added).

134. *Id.*

135. 498 U.S. 439, 446 (1991).

striction on permissible state regulation.'"[136] The Court then added that it had described the Clause as "conferring a 'right' to engage in interstate trade free from restrictive state regulation."[137] Because the Commerce Clause established a "right" in the form of a "substantive restriction" on state power, the Court continued, the right at issue in the Commerce Clause was also "the source of a right of action in those injured by regulations that exceed such limitations."[138]

The Court's reasoning does not necessarily work. As the holdings in *Carter* and *Bowman* indicate, the "right" created by the Commerce Clause or the Contracts Clause could be one of two kinds of fundamental legal interests colloquially called rights: (1) a "right" to engage in certain kinds of trade that imposes a corresponding *duty* on the defendant not to impose or enforce restrictions on those forms of trade, or (2) a "right" to *nullify* any state legislation that alters the preexisting legal rights to engage in certain kinds of trade. The Court's opinion jumps from the assertion that the Commerce Clause imposes a limitation that can be called a "right" to the conclusion that the Clause imposes a duty rule rather than a nullification rule. And the Court does so without even engaging with the reasoning in *Carter* and *Bowman*, both of which rest on the assertion that the "rights" created by the Commerce Clause and Contracts Clause are *only* nullification rules.[139]

Justice Kennedy, dissenting with Chief Justice Rehnquist, indirectly criticized the Court for just that logical error. The dissent argued that § 1983 distinguished between constitutional provisions that "secure the rights of persons vis-à-vis the States" and those that "allocate power between the Federal and State Governments."[140] Kennedy agreed that the Commerce Clause "gives rise to a legal interest in [a taxpayer] against taxation which violates the dormant Commerce Clause."[141] The interest, though, was that taxpayers could "rely upon the unconstitutionality of the tax in defending a collection action brought

---

136. *Id.* at 447 (quoting Hughes v. Oklahoma, 441 U.S. 322, 326 (1979)).

137. *Id.* at 448.

138. *Id.* at 450.

139. In fact, the Court's erroneous leap from the premise that the Constitution establishes a "right" to the more specific argument that the Constitution imposes a duty (more technically, a "claim-right/duty" rule) rather than only a nullification rule (more technically, an "immunity/disability" rule) is an analytical error similar to one identified by Hohfeld. *See* Hohfeld, *supra* note 18, at 42-43; Pierre Schlag, *How to Do Things with Hohfeld*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 185, 204-05 ("It simply does not follow, according to Hohfeld, that because *A* has or ought to have a legally protectable interest in *X*, that this yields a duty in *B* not [to] interfere.").

140. *Higgins*, 498 U.S. at 452-53 (Kennedy, J., dissenting).

141. *Id.* at 462.

by the State" or "in pursuing state remedies."[142] In other words, the dissent argued that the Clause could be vindicated with a nullification rule (whether offensively or defensively[143]). And the dissent concluded that a constitutional nullification rule does not "secure a right" within the meaning of § 1983.[144]

The majority's response to the dissent included a couple of footnotes critiquing the dissent's reading of the legislative history, a suggestion that the distinction was "formalistic," and an unpersuasive attempt to distinguish *Carter* and *Bowman*.[145] The majority did not engage with the dissent's core reasoning. Instead, the dispute in *Dennis* reads less like reasoned disagreement about a question of statutory interpretation and more like modes of analysis proceeding from incompatible premises to incompatible conclusions. The sense from the majority is that the dissent's reasoning is not so much wrong as out of style. But at bottom, the two opinions split on a fundamental question: does it matter for purposes of § 1983 whether the Commerce Clause imposes a nullification rule or a duty rule?[146]

---

142. *Id.*

143. *See supra* Section I.A.

144. *See Higgins*, 498 U.S. at 452-57 (Kennedy, J., dissenting). The dissent did not make the more aggressive constitutional claim that Congress lacked power to impose a duty rule on state officials when implementing a power in Article I, rather than when "enforcing" the Fourteenth Amendment through Section 5. *Compare* U.S. CONST. art. I, § 8, cls. 3, 18 (providing Congress with the power to regulate commerce), *with* U.S. CONST. amend. XIV, §§ 1, 5 (providing Congress with the power to enact legislation that enforces the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment).

145. *See Higgins*, 498 U.S. at 443 n.4, 451 n.9 (majority opinion). The Court in *Dennis* cited *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 n.29 (1979), which cited Justice Stone's opinion in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). Stone had interpreted the Court's reasoning in *Carter v. Greenhow* to establish that "the particular cause of action set up in the plaintiff's pleading was in contract" and that he had "chosen not to resort" to the Contracts Clause. *Hague*, 307 U.S. at 527. That assertion misreads *Carter*. The Court there did say that the plaintiff had "chosen not to resort" to the "right secured to him by [the Contracts Clause]," but the "right" to which the Court referred was the "right to have a judicial determination declaring the nullity of the attempt to impair its obligation." Carter v. Greenhow, 114 U.S. 317, 323 (1885). The Court did not say that the plaintiff failed to plead a cause of action under the Contracts Clause; rather, the Court said that the plaintiff failed to resort to the Contracts Clause because he failed to invoke a judicial proceeding available under preexisting state law in which he could have asserted the nullification rule of the Contracts Clause.

146. Despite *Carter v. Greenhow*, the federal courts have split on the question whether the Contracts Clause is enforceable through § 1983. *See* Kaminski v. Coulter, 865 F.3d 339, 346-47 (6th Cir. 2017) (noting the split); Heights Apartments, LLC v. Walz, 30 F.4th 720, 727-28 (8th Cir. 2022) (same). Though *Carter* has not been overruled, it is hard to see how its theory will survive *Dennis*.

C. Punishments

The Supreme Court's modern Eighth Amendment jurisprudence is a third doctrinal regime in which embracing a constitutional duty (or not) drives the analysis. In particular, Eighth Amendment claims challenging prison conditions or indifference to medical needs depend on the existence of a constitutional duty. The primary critique of the development of these claims—advanced on the Court by Justice Thomas—assumes that the Eighth Amendment must be limited to nullifying cruel and unusual punishments enacted by legislatures and imposed by judges.

1. Recognizing Duties to Prisoners

The earliest Eighth Amendment cases in federal court involved challenges to statutes or sentences, not to the actions of prison officials.[147] But in the years following *Monroe*, the Court expanded the application of the Eighth Amendment to official misconduct occurring *within* prisons and committed by prison officials.

Estelle v. Gamble is the original case.[148] There, the Court held that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983."[149] *Estelle* assumed without much analysis that the Eighth Amendment can be read to impose a constitutional duty on state officials. First, the opinion noted that the Amendment prohibits at least "'torture[s]' and other 'barbar[ous]' methods of punishment."[150] Additionally, the Justices continued, recent decisions had deemed repugnant to the Amendment any punishments "incompatible with 'the evolving standards of decency that mark the

147. Weems v. United States, 217 U.S. 349, 376 (1910) (suggesting that the Eighth Amendment may be both a "restraint upon legislatures" and "an admonition" to "courts not to abuse the discretion which might be entrusted to them"); O'Neil v. Vermont, 144 U.S. 323, 370-71 (1892) (Harlan, J., dissenting); Wilkerson v. Utah, 99 U.S. 130, 136-37 (1879); Pervear v. Massachusetts, 72 U.S. (9 Wall.) 475, 480 (1867). There were no federal decisions interpreting the Eighth Amendment during the "first half-century after adoption of the Eighth Amendment." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1810 (2008); *see also* Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*," 129 YALE L.J.F. 365, 370-96 (2020) (tracing the historical development of lines of cases imposing judicial limits on modes of punishment).

148. 429 U.S. 97 (1976).

149. *Id.* at 105.

150. *Id.* at 102 (alterations in original) (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 841 (1969)).

progress of a maturing society'" or "which 'involve the unnecessary and wanton infliction of pain.'"[151] The Court then indicated that those principles established "the government's *obligation* to provide medical care for those whom it is punishing by incarceration," and that "obligation" falls upon "prison doctors" and "prison guards."[152]

Even if one concedes the premises, the recognition of a constitutional "obligation" significantly extended those prior holdings. No doubt, it was established by 1976 that the Eighth Amendment imposed *nullification* rules prohibiting the imposition of certain punishments by legislatures and judges.[153] A legislature is disabled from authorizing constitutionally excessive sentences,[154] and a judge is disabled from imposing them.[155] None of the prior decisions cited in *Estelle*, however, had applied the constitutional provision to the actions of prison officials.[156] *Estelle*'s holding requires more than a conclusion that the Eighth Amendment creates some kind of legal interest that could be called a "right" prohibiting certain kinds of punishments.[157] Instead, *Estelle* requires that the Eighth Amendment impose a *duty* on the prison official to treat (or not to treat) prisoners in a certain manner. But just as in *Dennis v. Higgins*,[158] the Court proceeded without analysis from the premise that the Eighth Amendment establishes something colloquially called a "right" to the conclusion that the "right" imposes a constitutional duty.

This conceptual assumption has had significant consequences for Eighth Amendment claims. The constitutionalization of prison conditions, like that of medical treatment, rests on this notion of constitutional duties. It is not a significant leap from the holding that prison doctors or guards must not be deliberately indifferent to medical needs to a holding that, more generally, prison

151. *Id.* at 102-03 (first quoting Trop v. Dulles, 356 U.S. 86, 101 (1958); and then quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

152. *Id.* at 103-04.

153. *See, e.g.*, Weems v. United States, 217 U.S. 349, 376 (1910).

154. *Id.*

155. *See* O'Neil v. Vermont, 144 U.S. 323, 370-71 (1892) (Harlan, J., dissenting).

156. Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 430 (1995) ("[N]one of the cases [*Estelle*] cited held that the Eighth Amendment applied to prison deprivations or even addressed a claim that it did.").

157. *See supra* note 139.

158. *See supra* Section II.B.2.

conditions must not drop below a certain level required by a humane society.[159] Indeed, soon after *Estelle*, the Court recognized without much analysis that the Eighth Amendment applies to prison conditions more generally.[160]

The assumption that the Eighth Amendment imposes duties on prison officials likewise supports claims that a particular method of execution, even if lawfully imposed and lawful in general, would be unconstitutional as implemented by prison officials.[161] In short, Eighth Amendment doctrine as we know it today turns on *Estelle*'s implicit embrace of the constitutional duty.

2. *Questioning Eighth Amendment Duties*

Justice Thomas has identified this gap in *Estelle*'s reasoning. In separate writings in *Hudson v. McMillian* and *Helling v. McKinney*, Thomas argued that the Cruel and Unusual Punishments Clause applies only to deprivations "inflicted as part of the sentence for a crime" and "meted out by statutes or sentencing judges."[162] The ordinary meaning of "punishment," he reasoned in *Helling*, "referred to the penalty imposed for the commission of a crime."[163] He added that there was no "historical evidence indicating that the framers and ratifiers of the Eighth Amendment had anything other than this common understanding of 'punishment' in mind."[164]

Justice Thomas framed his critique in originalist terms, but a variant of the argument is doctrinal. The decision in *Estelle*, the argument would go, fails to support its holding on its own terms because it makes no effort to explain *why* the recognized Eighth Amendment nullification rule, which constrained judges

---

159. *Cf.* Wilson v. Seiter, 501 U.S. 294, 299 n.1 (1991) ("[I]f an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement . . . .").

160. *See* Hutto v. Finney, 437 U.S. 678, 685-87 (1978); Rhodes v. Chapman, 452 U.S. 337, 345-47 (1981); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-82 (1999) (discussing prison-conditions litigation in the 1970s and thereafter).

161. *See* Nelson v. Campbell, 541 U.S. 637, 644-47 (2004).

162. Hudson v. McMillian, 503 U.S. 1, 18, 21 (1992) (Thomas, J., dissenting); *accord* Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting).

163. *Helling*, 509 U.S. at 38 (Thomas, J., dissenting).

164. *Id.* Justice Thomas also noted, tellingly, that the *Estelle* Court's view of the Eighth Amendment emerged only after the lower courts began applying the Eighth Amendment to prison officials in the 1960s. *See id.* at 39-40 (citing Wright v. McMann, 387 F.2d 519, 525-26 (2d Cir. 1967); Bethea v. Crouse, 417 F.2d 504, 507-08 (10th Cir. 1969)). That the development occurred after *Monroe v. Pape*, when the Court implicitly embraced constitutional duties over the dissenting opinion of Justice Frankfurter, provides still more evidence of the generative power of the concept of the constitutional duty.

and legislators, should become a duty rule for prison officials and medics. That question would be answered differently depending on one's method of constitutional interpretation. And there could be good reasons to extend the doctrine: deliberate failure to medicate might be a "punishment" within the meaning of the text;[165] the emergence of bureaucratically managed prisons as a mode of punishment, with substantial discretion vested by state law, might require the parallel development of Eighth Amendment doctrine;[166] the codification by states of minimum standards in prisons might represent a national consensus requiring such standards;[167] or the process of incorporation through the Fourteenth Amendment might have refined the Eighth Amendment's meaning to impose duties on prison officials.[168] Whatever the reasons, *Estelle* should have provided some compelling rationale for the extension of the Eighth Amendment to include a new kind of legal interest (a duty) imposed on a new set of officials (prison medics and other workers).

Now consider Justice Thomas's critique of the reasoning in *Estelle* in light of Justice Frankfurter's critique of constitutional duties in *Monroe*. The critique in *Monroe*'s dissent is both broader and narrower. Frankfurter called into doubt

---

165. In *Wilson v. Seiter*, the Court clarified that the duty imposed by the Eighth Amendment requires an "inquiry into [the] state of mind" of the officer committing the allegedly unconstitutional acts, and it imposed this requirement in part because "an intent requirement" is "implicit" in the notion of a "punishment" under the Eighth Amendment. 501 U.S. 294, 301-02 (1991); *see also* Farmer v. Brennan, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." (citing *Wilson*, 501 U.S. at 303; Estelle v. Gamble, 429 U.S. 97, 104 (1976))). For an effort to determine what constitutes a "cruel" punishment, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 891-92 (2009) (arguing that the state "has an affirmative obligation to protect prisoners" from serious harm because incarceration puts them in "potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection," and "prison conditions may be said to be cruel" when the state fails to meet that obligation).

166. *See* Dolovich, *supra* note 165, at 885 (arguing that "in a society where incarceration is the most common penalty for criminal acts" the Eighth Amendment must "limit what the state can do to prisoners over the course of their incarceration"); *cf.* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 568 (2021) (suggesting, among other things, that "courts know shockingly little about" prisons and that "prison doctrine" could be "much richer" if courts understood the "realities of prison life").

167. *Cf.* Atkins v. Virginia, 536 U.S. 304, 317 (2002) (referencing "national consensus" as a benchmark for evaluating prisoners' claims); Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 132-39 (2012) (discussing the relevance of state practices when implementing the Eighth Amendment).

168. *Cf.* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 279-80 (1998) (suggesting that the process of incorporation gave the Eighth Amendment "more judicially enforceable bite against state legislatures").

the legitimacy of constitutional duties in general, suggesting that "between individuals"—apparently whether between two private persons *or* between a private person and an officer—"mutual rights and duties . . . remain[] essentially the creature of the legal institutions of the States."[169] But Frankfurter focused this critique on an interpretive question regarding § 1983, declining to conclusively resolve the question whether the Constitution imposes duties at all. Thomas's critique of *Estelle*, by contrast, challenges the recognition of a constitutional duty under a particular amendment, based on the text and history of that amendment, but he does not question the general existence of the constitutional duty. I will return to this targeted mode of argumentation in Section III.A.

D. Speech and Religion

A set of cases arising out of the First Amendment again showcases both the generative force of the framework of constitutional duties and the limiting function of the nullification framework. Many uncontroversial First Amendment rights for government employees require the acceptance of constitutional duties, but criticisms of some other First Amendment doctrines—mostly under the Establishment Clause—tend to rest on the view that certain provisions of the First Amendment should operate only through nullification rules.

1. Recognizing First Amendment Duties

In the past half-century, the Court has authorized government employees to bring First Amendment retaliation suits for adverse employment actions taken because of the employee's religious expression, speech, or political affiliation.[170] And such claims may proceed under § 1983 regardless of whether the plaintiff has a contractual, tort, or other state-law right to proceed against the

169. Monroe v. Pape, 365 U.S. 167, 238 (1961) (Frankfurter, J., dissenting in part).

170. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022) (pertaining to religious expression and speech); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977) (pertaining to speech); Branti v. Finkel, 445 U.S. 507, 508-11 (1980) (pertaining to political affiliation); Elrod v. Burns, 427 U.S. 347, 349-50 (1976) (pertaining to political affiliation); Perry v. Sindermann, 408 U.S. 593, 594-96 (1972) (pertaining to speech); *cf.* Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968) (holding that a public schoolteacher's "rights to freedom of speech were violated" when he was fired, and reversing the Illinois Supreme Court).

government employer.[171] Thus, an employee has a right against government employers originating in the Constitution, but employees of private employers have no such right.[172]

Judges and scholars no doubt disagree about how these cases interpret the underlying questions of constitutional law, but few would question the general existence of duties on government officials not to take actions contrary to the First Amendment. The Court has resolved a long list of § 1983 claims in which plaintiffs allege that a state official has violated a constitutional duty owed to an employee or other private person: an employee was fired for religious expression;[173] an official's prayer violated a plaintiff's Establishment Clause right;[174] disciplinary action by a school violated a student's right to speak;[175] and so on. None of these claims attempts to enforce common-law or statutory duties originating in state law, and each depends on the view that the Constitution imposes independent obligations on governmental actors. In other words, each depends on the framework of constitutional duties.

2. *Questioning Establishment Clause Duties*

But sometimes skepticism about constitutional duties drives critiques of these doctrines. Consider two examples: first, the dispute between the majority and the dissent in *Lee v. Weisman*,[176] and second, Justice Gorsuch's argument that Article III forbids courts from allowing "offended observers" to sue to enforce the Establishment Clause.[177]

First, in *Lee v. Weisman*, the Court confronted the question whether a prayer at a school graduation ceremony violated the Establishment Clause.[178] Justice Kennedy's majority opinion began with the premise that "a government

171. *See, e.g.*, *Perry*, 408 U.S. at 597 ("We have applied the principle regardless of the public employee's contractual or other claim to a job.").

172. Of course, some constitutional rights might overlap with statutory employment rights under Title VII or otherwise. *See, e.g.*, 42 U.S.C. § 2000e-2 (2018) (prohibiting discrimination in employment "because of . . . race, color, religion, sex, or national origin").

173. *See, e.g.*, *Kennedy*, 597 U.S. at 512-14.

174. *See* Town of Greece v. Galloway, 572 U.S. 565, 572 (2014); Marsh v. Chambers, 463 U.S. 783, 784 (1983).

175. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 183-85 (2021).

176. 505 U.S. 577 (1992).

177. *See* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 83 (2019) (Gorsuch, J., concurring in the judgment).

178. *See generally* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673 (2002) (discussing this Establishment Clause jurisprudence).

may not *coerce* anyone to support or participate in religion or its exercise."[179] The majority reasoned that the prayer violated the student's rights because of the "subtle coercive pressures" in the "secondary school environment."[180] It noted that there was an Establishment Clause "injury" because the State "in effect required participation in a religious exercise."[181] It concluded that the prayer at issue violated the Establishment Clause.[182]

Justice Scalia's dissent countered that the majority expanded the notion of coercion beyond the "historical establishments" effected "*by force of law and threat of penalty*."[183] For example, in *West Virginia Board of Education v. Barnette*, the students were threatened with "expulsion" and transfer to "a reformatory for criminally inclined juveniles," while the parents were subject to "prosecution (and incarceration) for causing delinquency."[184] That kind of coercion—and only that kind—is what matters, said Scalia.[185]

The disagreement within *Lee* mirrors the disagreement between *Estelle* and its critics. In both cases, the dispute reveals the conflict between the two frameworks for constitutional litigation. The *Lee* majority's understanding of the Establishment Clause is possible only if the Clause imposes obligations on state actors independent of state law. The harm is *not* that some subconstitutional right of the plaintiff was altered or abridged contrary to the Establishment Clause—as when the State attempts to deny a benefit generally offered under state law or deprive a person of life, liberty, or property.[186] The harm is instead that the person has been required, in some undefined practical sense of that term, to participate in religious exercise.

---

179. *Lee*, 505 U.S. at 587 (emphasis added).

180. *Id.* at 588. It repeatedly referred to these "subtle coercive pressures," to "indirect coercion," and to the State's attempt to "enforce a religious orthodoxy." *Id.* at 588, 592.

181. *Id.* at 594.

182. *Id.* at 599.

183. *Id.* at 640 (Scalia, J., dissenting). An analogous issue arises for religious protections of Native American sacred sites under the Religious Freedom Restoration Act. *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1300 (2021) (critiquing a definition of "coercion" that requires the "threat of penalties or denial of benefits 'enjoyed by other citizens'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 438, 449 (1988))). In both cases, assessing what counts as "coercion" is necessary to determine the scope of the underlying constitutional (or statutory) religious interest.

184. *Lee*, 505 U.S. at 642-43 (Scalia, J., dissenting) (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629-30 (1943)).

185. *See id.*

186. *See* Monroe v. Pape, 365 U.S. 167, 238 (1961) (Frankfurter, J., dissenting in part).

The dissent's primary critique of the majority depends on whether the Establishment Clause operates within the nullification framework. If the Clause operates only as a nullification rule, then the reason the Establishment Clause requires coercion by "force of law and threat of penalty" is that the Clause operates only to preclude unconstitutional changes to the preexisting subconstitutional rights of the plaintiff. If the Clause also imposes duties, then the "force of law and threat of penalty" is relevant to the extent that legal sanctions *do in fact* require participation in the religious exercise. On that view, the constitutional harm is the *fact* of unconsented religious participation, and psychological coercion is unconstitutional to the extent that it compels participation as effectively as legal sanctions do (and de minimis legal sanctions that do not in fact compel participation perhaps would *not* count as violations).[187] Limiting actionable "coercion" to legal penalties or the denial of benefits makes sense if, but only if, the Establishment Clause operates only through a nullification rule.

Second, a line of Establishment Clause cases grapples with the question of "symbolic support" for religion, like public displays of the Ten Commandments or a holiday crèche.[188] The test the Court long applied, before abandoning it, was announced in *Lemon v. Kurtzman*.[189] That test required courts to consider the law's secular or religious purpose, its effect on advancing or inhibiting religion, and its entanglement of the government with religion.[190] And some cases asked whether a "reasonable observer" would view the state action as endorsing religion.[191] A constitutional duty rule supports that reasonable-observer theory: the wrong is defined by the message of endorsement communicated from the government official(s) to the observer when that observer confronts the public display of symbolic imagery, irrespective of whether the observer's underlying legal interests have been affected by that symbolism.

---

187. The dissent in *Lee* also challenged the Court's conclusion that there was psychological coercion that "in effect" required religious exercise, *see Lee*, 505 U.S. at 637-40 (Scalia, J., dissenting), but the dissent recognized that the majority's conclusion that extralegal coercion is cognizable under the Establishment Clause is the "deeper" dispute, *id.* at 640.

188. *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 78-81 (2017). For examples of the Court grappling with this question, see *American Legion v. American Humanist Ass'n*, 588 U.S. 29, 36-38 (2019); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); and *Lynch v. Donnelly*, 465 U.S. 668, 670-71 (1984).

189. *See* 403 U.S. 602, 612 (1971); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) (noting that the Court has "abandoned *Lemon*").

190. *Lemon*, 403 U.S. at 612-13.

191. *See* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 869 (2005); Cnty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989).

In *American Legion v. American Humanist Association*, Justice Gorsuch's concurrence questioned the entire enterprise of lawsuits for symbolic support of religion.[192] The concurrence asks: under modern Article III doctrine, which requires each plaintiff to establish "injury in fact," who has been injured by the symbolic endorsement? Most symbolic-support cases do not even address standing,[193] and the concurrence argues that it is insufficient for injury-in-fact purposes to show that the plaintiff was an "offended observer" of the display.[194] That is, it is insufficient that the plaintiff has received a message that she is not an equal member of the political community.[195] Instead, the categories of claims that *could* proceed on Gorsuch's view include: (1) students "compelled to recite a prayer," (2) persons "denied public office," and (3) persons "denied government benefits."[196] All three categories are consistent with the nullification framework.

Again, the development of the reasonable-observer test—and the argument that it cannot be squared with Article III—turns on an underlying disagreement about whether the Establishment Clause imposes a duty on officials not to communicate messages of endorsement. Suppose that (as *Lemon* suggested) the Establishment Clause operates by imposing a duty on governmental officials not to communicate certain messages to nonadherents through the selection of public monuments or other displays. In that case, the person who receives that message has been injured in a constitutionally significant sense by the official, and it would be strange to conclude that "plain violations of a rights-conferring provision of the Constitution" are "beyond the jurisdiction of the federal courts."[197] If, instead, the Establishment Clause operates through a nullification rule alone, then an observer cannot be harmed in a constitutionally significant sense by an out-in-the-world endorsement. Indeed, the observer can be harmed only if some preexisting subconstitutional interest is identified. In that case, the Establishment Clause can be vindicated as Justice Gorsuch suggested: through challenges to legal compulsion and the denial of benefits on unconstitutional bases.

---

192. *See Am. Legion*, 588 U.S. at 79-89 (Gorsuch, J., concurring in the judgment).

193. *See* Fallon, *supra* note 188, at 68-69, 68 n.41, 81.

194. *Am. Legion*, 588 U.S. at 80-84 (Gorsuch, J., concurring in the judgment).

195. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 688 (O'Connor, J., concurring) (suggesting that the harm is a message that "nonadherents" are "not full members of the political community").

196. *Am. Legion*, 588 U.S. at 87 (Gorsuch, J., concurring in the judgment).

197. Fallon, *supra* note 188, at 127.

E. Elements

The rest of this Part moves from the foundational questions about *whether* particular constitutional provisions impose duties enforceable through § 1983 to questions about *how* to implement constitutional-tort claims. The takeaway is that the competition between the models of constitutional torts continues to affect constitutional-tort doctrine even when the existence of the constitutional duty is not in dispute.

Begin with the question of the elements of constitutional-tort claims. In case after case, when confronted with constitutional-tort claims, a basic question for the Court is how to define the elements of that claim. The Court sometimes suggests that the elements of the claim should be derived from the Constitution. *Graham v. Connor*, for example, held that excessive-force claims against law-enforcement or prison officials must be evaluated under the Fourth Amendment or the Eighth Amendment rather than a "single generic standard."[198] *Graham* instructed courts to "identify[] the specific constitutional right allegedly infringed" and then "judge[]" the "validity of the claim" by "reference to the specific constitutional standard which governs that right."[199] The Court added that the same analysis should apply to claims against federal officials under *Bivens*.[200]

In many cases, judging the claim by "the specific constitutional standard" is the entirety of the analysis; the Court simply evaluates the substantive constitutional law without reference to the common law in 1871.[201] That approach operates within the framework of constitutional duties. The premise of such claims is that the Constitution itself imposes standards of conduct on officials to act or to refrain from acting in certain ways, and § 1983 and *Bivens* are mechanisms to enforce that underlying right. As the Court has explained, § 1983 "does not itself create any substantive rights," but it allows enforcement of those rights.[202]

---

198. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

199. *Id.* at 394.

200. *Id.* at 394 n.9.

201. *E.g.*, Houston Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 474-83 (2022) (adjudicating a First Amendment claim for damages (among other remedies) without referencing the common law in 1871); Torres v. Madrid, 592 U.S. 306, 312 (2021) (taking the same approach for a Fourth Amendment claim for damages, even while relying on the common law of the Founding to interpret that Amendment).

202. Wilson v. Garcia, 471 U.S. 261, 278 (1985).

But the Court sometimes asserts that the elements of the constitutional tort depend on an analogy to the common law of 1871.[203] The Court's doctrine does not, unfortunately, explain the point of that analogy or apply it consistently. Sometimes the Court incorporates common-law elements wholesale;[204] sometimes it looks to the common law to "confirm[]" a conclusion reached on other grounds;[205] and other times the common law provides "inspired examples" for the Court's own definition of a § 1983 claim.[206]

That first approach, the wholesale incorporation of common-law elements extant in 1871, departs from the framework of constitutional duties, instead relying on a dubious analogy to common-law constitutional torts.[207] In enacting § 1983, at least on the conventional view of that statute,[208] Congress established something new. It created a cause of action to enforce *constitutional* duties that protect interests different from the duties imposed by the preexisting common law.[209] Of course, sometimes those interests overlap, as when the Fourth Amendment and the tort of false imprisonment both protect the freedom to move. But the Fourth Amendment and the tort of false imprisonment have different purposes—perhaps the most notable difference being that the Constitution constrains state officials alone while the common law imposes duties on

---

203. *See, e.g.*, Thompson v. Clark, 596 U.S. 36, 43 (2022); Nieves v. Bartlett, 587 U.S. 391, 405 (2019); Heck v. Humphrey, 512 U.S. 477, 483-84 (1994); *Wilson*, 471 U.S. at 277. *But see* Rehberg v. Paulk, 566 U.S. 356, 366 (2012) (stating that § 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more"); Hartman v. Moore, 547 U.S. 250, 258 (2006) ("[T]he common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts." (citing Albright v. Oliver, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971); Baker v. McCollan, 443 U.S. 137, 146 (1979))).

204. *E.g.*, *Heck*, 512 U.S. at 483-87 (incorporating requirements of common-law malicious-prosecution claims into the requirements of § 1983 claims for unconstitutional conviction and imprisonment).

205. *Nieves*, 587 U.S. at 405.

206. Manuel v. City of Joliet, 580 U.S. 357, 370 (2017) (quoting *Hartman*, 547 U.S. at 258).

207. *See supra* Parts I-II.

208. *Compare* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 175 (2023) (describing § 1983 as providing a "cause of action"), *with* Lindley, *supra* note 59, at 39-41 (questioning that reading).

209. *See* Briscoe v. LaHue, 460 U.S. 325, 349 (1983) (Marshall, J., dissenting) ("Different considerations surely apply when a suit is based on a federally guaranteed right . . . rather than the common law.").

both officials and private persons.[210] Similar differences would exist for any pairing of a common-law claim with a constitutional claim. The difference does not arise only from the passage of time but from the differing purposes of the two bodies of law, and in particular the specific function of constitutional law to constrain state actors.

Consider first *Nieves v. Bartlett*, in which the Court confronted the question whether a First Amendment retaliatory-arrest claim requires the plaintiff to show that he was arrested without probable cause.[211] The Court noted that "there was no common law tort for retaliatory arrest based on protected speech," but the closest analogues (false imprisonment and malicious prosecution) required plaintiffs to show a lack of probable cause.[212] Justice Gorsuch, writing separately, noted that probable cause is irrelevant to the substantive First Amendment doctrine and could only be justified as an element of a § 1983 claim.[213] But the First Amendment "operates independently of" and "provides different protections" compared to common-law false-arrest or malicious-prosecution claims.[214] Again, with *any* claim based on a constitutional provision rather than a common-law claim, any overlap between the two would be a "coincidence."[215]

Consider also *Thompson v. Clark*, in which the Court recognized a "Fourth Amendment claim under § 1983 for malicious prosecution" and required a plaintiff asserting such a claim to show that there was a "favorable termination" to the underlying proceedings.[216] The dissent explained that this "novel hybrid claim" made no sense because "the Fourth Amendment and malicious prosecu-

---

210. *Cf. id.* at 335 (majority opinion) ("[T]he common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process.").

211. 587 U.S. 391, 397-98 (2019).

212. *Id.* at 405.

213. *Id.* at 412-13 (Gorsuch, J., concurring in part). Justice Sotomayor indicated substantial agreement with the portion of Justice Gorsuch's opinion discussed here. *See id.* at 421-22 (Sotomayor, J., dissenting).

214. *Id.* at 414 (Gorsuch, J., concurring in part).

215. Wilson v. Garcia, 471 U.S. 261, 272 (1985) (quoting Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) ("It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.")); *see also* Whitman, *supra* note 8, at 669 (stating that the analogy to common-law torts "fails to capture the essence of constitutional wrongs, which are defined with reference to the unique power that government has over those subject to its jurisdiction").

216. 596 U.S. 36, 41 (2022).

tion have almost nothing in common."[217] An "unreasonable seizure" requires just that: a seizure that was objectively unreasonable. Accordingly, the dissent reasoned, it makes no sense to require a showing that the judicial proceeding was "instituted without any probable cause," that the motive was "malicious," or that the proceeding instituted was favorably terminated—all the elements of the malicious-prosecution tort.[218] In a case like *Thompson*, the gravamen of the claim is that the plaintiff was unreasonably seized because the "legal process" initiated against her "has done nothing to satisfy the Fourth Amendment's probable-cause requirement."[219] The only question under the framework of constitutional duties would be whether the official-defendant violated a duty imposed by the Fourth Amendment.[220]

In these cases about the elements of constitutional torts, courts attempt to draw analogies from common-law torts (operating in the nullification framework) to the modern constitutional tort (which assumes distinct constitutional duties). The flaw in the analogy is that the elements of common-law torts were articulated to determine whether the defendant breached the common-law duty—a duty formed to protect private-law interests different from the constitutional interests protected from governmental interference.

This conceptual error has concrete practical consequences. Incorporating common-law elements renders constitutional torts duplicative of their common-law analogues but also much more restrictive. A § 1983 claim cannot be established without identifying a constitutional violation, and if common-law elements are added, some claims will fail for reasons unrelated to that constitutional violation. For example, if a retaliatory-arrest claim requires a showing of the elements of a malicious-prosecution claim *and* a First Amendment viola-

---

217. *Id.* at 50 (Alito, J., dissenting).

218. *Id.* at 51.

219. Manuel v. City of Joliet, 580 U.S. 357, 367 (2017).

220. *See* Erin E. McMannon, *The Demise of § 1983 Malicious Prosecution: Separating Tort Law from the Fourth Amendment*, 94 Notre Dame L. Rev. 1479, 1483 (2019). In *Chiaverini v. City of Napoleon*, the Court addressed whether the "presence of probable cause for one charge" necessarily defeats a "Fourth Amendment malicious-prosecution claim alleging the absence of probable cause for another." 602 U.S. 556, 561 (2024). The Court concluded that it did not, reasoning that the result followed from "established Fourth Amendment law," *id.*, and that the conclusion also "follows from the common-law principles governing malicious-prosecution suits when § 1983 was enacted," *id.* at 563. The case illustrates that, in the happy coincidence in which the Constitution and the common-law rule point to the same answer, the framework that applies will not affect the outcome, even if the analysis is complicated by the need to dig through old treatises. *See, e.g.*, *id.* at 563-64 (citing 2 Simon Greenleaf, Law of Evidence (10th ed. 1868); 1 Francis Hilliard, Law of Torts or Private Wrongs (4th ed. 1874)).

tion, then those retaliatory-arrest claims would simply be a more restrictive version of the common-law malicious-prosecution claim.[221] And because the Fourth Amendment malicious-prosecution claim requires the showing of an "unreasonable seizure" along with the elements of the malicious-prosecution tort, then the claim recognized in *Thompson* will be a more restrictive version of malicious prosecution.[222] In those circumstances, § 1983 would not be a vehicle to vindicate constitutional rights but a general federal common law for the vindication of strange hybrid rights—and indeed rights protected by the law in 1871.[223]

F. Immunities

Consider next the doctrines of absolute and qualified immunities, in which the failure to distinguish the two competing frameworks for constitutional rights again confounds the analysis. Much has been written in recent years about the legitimacy (or lack thereof) of the various immunity doctrines—in particular, the doctrine of qualified immunity.[224] For now, the critical point is that the Court's primary theoretical justification for absolute immunity and qualified immunity rests on the historical claims that (1) certain immunities were well established in 1871 when Congress enacted § 1983, and (2) Congress

---

221. Justice Thomas's position, for example, was that probable cause was a necessary element of a retaliatory-arrest claim. *See* Nieves v. Bartlett, 587 U.S. 391, 409-11 (2019) (Thomas, J., concurring in part and concurring in the judgment). He appears to take the position, moreover, that the retaliatory-arrest claim should not be available *at all* because it was not recognized under the common law. *See id.* at 410; Lozman v. City of Riviera Beach, 585 U.S. 87, 103 (2018) (Thomas, J., dissenting).

222. The Court could avoid this result in part by adopting the suggestion that a Fourth Amendment malicious-prosecution claim might not require a showing of "malice," *Thompson*, 596 U.S. at 44 n.3, but then it would be hard to understand why the claim is characterized as malicious prosecution at all. And in any event, the Court still would have engrafted malicious prosecution's favorable-termination element without good reason.

223. It is technically possible that the incorporation of some but not all elements would lead to nonoverlapping categories of successful claims, but succeeding on the constitutional claim would still require satisfaction of an element of some other tort serving some other purpose. What is more, the incorporation of common-law analogues might overcomplicate the analysis for judges in ways that increase uncertainty and litigation costs. *See, e.g.*, Gonzalez v. Trevino, 602 U.S. 653, 672 (2024) (Alito, J., concurring) (noting that one "good reason" that common-law torts should not "dictate every dimension of a § 1983 claim" is that the "specific facts of a given case might align more or less well with the chosen common-law analog," and hewing too closely to the analogues could lead courts to "toggle between different tort analogies within the same class of § 1983 claims").

224. For some examples of works discussing the legitimacy of these doctrines, see generally sources cited *supra* note 5.

would have specifically abolished those remedies had it so wished.[225] The Court has rarely fully articulated the reason that immunities available under common-law claims ought to translate to modern constitutional torts, but the Court has repeatedly applied that logic.[226]

Many have questioned the historical pedigree of the immunities,[227] but a more basic problem with assimilating common-law immunities into constitutional claims is that, in the modern framework, constitutional rights work differently than they do in the nullification framework. Some "immunities" of the common law privileged officers to commit acts that would otherwise have constituted a breach of a preexisting common-law duty, but the function of the Constitution would have been to nullify these immunities—that is, render them inapplicable when a common-law constitutional tort occurred.[228] Because the modern constitutional tort involves the breach of a *constitutional* duty, an immunity to a constitutional tort is at best a violation of the principle that *ubi jus ibi remedium* or at worst a holding that the officer has a privilege to violate the Constitution.[229] Understood in that framework, the transsubstantive immunities the Court has adopted—and particularly qualified immunity—seem difficult to justify.

---

225. *See* Baude, *supra* note 5, at 52-55; Reinert, *supra* note 5, at 208-17.

226. *See, e.g.*, Rehberg v. Paulk, 566 U.S. 356, 366 (2012) (applying this logic to immunity for complaining witness); Briscoe v. LaHue, 460 U.S. 325, 329-36 (1983) (applying this logic to immunity for trial witness); Imbler v. Pachtman, 424 U.S. 409, 418 (1976) (applying this logic to prosecutorial immunity); Pierson v. Ray, 386 U.S. 547, 554 (1967) (applying this logic to judicial immunity); Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951) (applying this logic to legislative immunity).

227. *E.g.*, Baude, *supra* note 5, at 55-62; Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari); Ziglar v. Abbasi, 582 U.S. 120, 156-60 (2017) (Thomas, J., concurring in part and concurring in the judgment).

228. *See supra* Section I.A.1.

229. The practical effect of these two possibilities may be the same in any particular case, but it is nevertheless a matter of significance in constitutional doctrine whether a rule is characterized as a constitutional right or a constitutional remedy. For example, the Fourth Amendment exclusionary rule is subject to "narrow[ing]" because it "is not a constitutionally compelled corollary of the Fourth Amendment itself." United States v. Leon, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring). Similarly, in *Vega v. Tekoh*, the Court held that a violation of *Miranda* is not cognizable under § 1983 because "a violation of *Miranda*" is not "a violation of the Fifth Amendment right against compelled self-incrimination," 597 U.S. 134, 142 (2022); the Court recognized that the decision "would of course be different" if "a *Miranda* violation were tantamount to a violation of the Fifth Amendment," *id.* at 141. So even if the practical value of the right without a remedy is the same as that of a no-right, *see* Levinson, *supra* note 160, at 888, the doctrinal consequences may differ.

Early critics of the immunity doctrines made variations of this argument. In *Tenney v. Brandhove*, a Californian filed suit for damages against members of the Committee on Un-American Activities within the California Legislature, alleging that certain proceedings against him were designed to (among other things) "prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances."[230] The Court held that the suit could not proceed because of legislators' longstanding privilege to be "free from arrest or civil process for what they do or say in legislative proceedings."[231] It assumed for purposes of argument that Congress "has constitutional power to limit the freedom of State legislators acting within their traditional sphere," but it suggested that Congress would have to speak clearly to subject legislators to liability.[232] This reasoning closely parallels Justice Frankfurter's *Monroe* dissent.[233]

Justice Douglas's dissent reasoned that if a committee "departs so far from its domain to deprive a citizen of a right protected by the Constitution," then there is "no reason why it should be immune."[234] The test under the statute is "whether a constitutional right has been impaired," and no "officer of government" should be "higher than the Constitution from which all rights and privileges of an office obtain."[235] Of particular relevance here, Justice Black's concurrence goes out of its way to clarify that the Constitution still imposes *nullification* rules on legislators. He flagged that the majority did not make the "validity of legislative action . . . coextensive with the personal immunity of the legislators."[236] In "any proceeding instituted" to "fine or imprison [the plaintiff] on perjury, contempt or other charges," Black continued, the plaintiff could "defend himself on the ground that the resolutions creating the Committee or the Committee's actions under it were *unconstitutional and void*."[237] In other words, Black's answer to Douglas is that nullification rules continue in full force.

---

230. *Tenney*, 341 U.S. at 370-71; *see also* Reinert, *supra* note 5, at 208-09 (discussing *Tenney* and its relevance to qualified immunity).

231. *Tenney*, 341 U.S. at 372.

232. *Id.* at 376 (describing the "big assumption" that Congress even has the power to limit the freedom of legislators and the "even rasher assumption" that Congress *did* exercise that power).

233. *See supra* Section II.A.

234. *Tenney*, 341 U.S. at 382 (Douglas, J., dissenting).

235. *Id.* at 383.

236. *Id.* at 379 (Black, J., concurring).

237. *Id.* at 380 (emphasis added).

Consider finally *Briscoe v. LaHue*, in which the Court held that police officers "giving perjured testimony" in a criminal trial are "absolutely immune from damages liability based on their testimony."[238] The Court reasoned that the common law immunized both private parties from suits for their testimony at trial *and* prosecutors and judges for their role in the judicial process.[239] Thus, whether regarded as a witness or a governmental participant in the judicial proceeding, the testifying police officer should have immunity analogous to the common-law immunity.[240]

Dissenting, Justice Marshall first identified the difficulty with repurposing common-law immunities: absolute immunity for witnesses "nullifies '*pro tanto* the very remedy it appears Congress sought to create.'"[241] He conceded that the incorporation of "common-law defenses and immunities" might make sense if "Congress had merely sought to federalize state tort law."[242] But § 1983 allows enforcement of a "constitutional right to due process of law" rather than "the common law," and the "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy."[243] Again, that critique assumes the framework of constitutional duties.

G. Damages

A final category of doctrinal implications for constitutional torts is the measure of damages. The leading cases are *Carey v. Piphus*[244] and *Memphis*

---

238. 460 U.S. 325, 326 (1983).

239. *Id.* at 329-30, 334-35.

240. *Id.* at 335-36.

241. *Id.* at 348 (Marshall, J., dissenting) (quoting Imbler v. Pachtman, 424 U.S. 409, 434 (1976) (White, J., concurring)). Notably, that argument works only if the Constitution imposes a duty on some subset of prosecutors, because otherwise there would be no cognizable duty for § 1983 to remedy.

242. *Id.* at 349.

243. *Id.* (quoting Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring)); *see* John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 879-80 (2016) (suggesting that the nullification framework "began to break down" because "federal law afforded protection greater than that afforded by the common law" or "significantly differed from the common law" in many circumstances); *see also* Preis, *supra*, at 880 n.245 (citing Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1532 (1989); Kian, *supra* note 10, at 161).

244. 435 U.S. 247 (1978).

Community School District v. Stachura,[245] which take two different tacks in articulating the measure of damages.

In *Carey*, the Court announced that damages should "compensate persons for injuries that are caused by the deprivation of constitutional rights" because constitutional rights "protect persons from injuries to particular interests," and the rights' "contours are shaped by the *interests they protect*."[246] But principle is one thing and practice another,[247] and the Court noted that the common law should be the "starting point" but not the "complete solution" for damages calculations.[248] *Carey* held that courts should "adapt[] common-law rules" to ensure "fair compensation for injuries."[249] The "delica[te]" task, in the Court's view, was ensuring that "the rules governing compensation for injuries caused by the deprivation of constitutional rights are tailored to the interests protected by the particular rights in question."[250]

In *Stachura*, however, the Court seemed to retreat from the suggestion that damages should be tailored to the constitutional right. It reasoned that the "level of damages" should usually be "determined according to principles derived from the common law of torts," and again reaffirmed that such damages should "provide 'compensation for the injur[ies] caused to plaintiff by defendant's breach of duty.'"[251] The Court noted that compensation includes not just "out-of-pocket loss and other monetary harms" but also "impairment of reputation," "personal humiliation," and "mental anguish and suffering."[252] But the Court rejected the argument that deprivation of the constitutional right itself should be compensable. Any "damages based on the abstract 'value' or 'importance' of constitutional rights," the Court explained, "are not a permissible

245. 477 U.S. 299 (1986).

246. *Carey*, 435 U.S. at 253-54 (emphasis added).

247. *Id.* at 257 ("It is less difficult to conclude that damages awards under § 1983 should be governed by the principle of compensation than it is to apply this principle to concrete cases.").

248. *Id.* at 258.

249. *Id.*

250. *Id.* at 258-59. The Court went on to hold that deprivations of procedural due process could justify damages for "distress" that the government has not "dealt with [the plaintiff] fairly," but that the damages could not be presumed. *Id.* at 262-63.

251. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986) (quoting FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, LAW OF TORTS 490 (2d ed. 1986)). The Court also described deterrence as an "important purpose" of the tort system, but deterrence occurs "through the mechanism of damages that are compensatory—damages grounded in determination of plaintiffs' actual losses." *Id.* at 307.

252. *Id.* at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)); *see also Carey*, 435 U.S. at 264 ("[M]ental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983.").

element of compensatory damages in such cases."[253] The Court reasoned that "[s]uch damages would be too uncertain to be of any great value to plaintiffs" and "would inject caprice into determinations of damages in § 1983 cases."[254] Justice Marshall's concurrence in the judgment harkened back to *Carey*, indicating that violations of certain rights might constitute "compensable injury wholly apart" from the relationship of the harm to categories of compensation available at common law, but this theory seems hard to square with the Court's opinion.[255]

Limiting damages to the categories available at common law once again forces courts to analogize from common-law torts against officers (which operate in the nullification framework) to modern constitutional torts (which assume constitutional duties). That analogy could make sense if the constitutional right operated only through a nullification rule; in that situation, the constitutional rule preserves the underlying subconstitutional right against certain changes, and therefore any "constitutional violation" is coterminous with the wrongly denied underlying subconstitutional right.[256] But if the Constitution does impose duties, then it would "defeat the purpose of § 1983" to hold that "deprivations of constitutional rights can never themselves constitute compensable injuries."[257] The incorporation of the common law thus depends on a failure to distinguish between the two competing frameworks for constitutional rights.

* * *

The concept of the constitutional duty is an organizing principle of constitutional-tort law, but the Court's embrace of that concept has been incomplete. Instead, constitutional-tort law reveals a recurring tension between the framework of constitutional duties and the nullification framework. Particularly for the doctrines articulating the components of constitutional torts (elements, immunities, damages), the result is incoherence, instability, and—from the standpoint of the framework of constitutional duties—the underprotection of constitutional rights.[258]

---

253. *Stachura*, 477 U.S. at 310.

254. *Id.*

255. *Id.* at 315 (Marshall, J., concurring).

256. *See supra* text accompanying notes 90-96.

257. *Stachura*, 477 U.S. at 316 (Marshall, J., concurring).

258. Before moving from descriptive to prescriptive analysis, I should restate a methodological assumption (and its attendant limitation) in responding to a certain kind of objection to the descriptive argument. As explained, my argument assumes that the concepts at work within a legal regime have concrete consequences for the outcomes of cases. One kind of objection

III. TOWARDS COHERENCE IN CONSTITUTIONAL TORTS

If the current doctrinal regime reflects conflicts between two competing conceptual frameworks for constitutional-tort law, the immediate question is what to do about it. Section III.A shows what it would look like to embrace fully the framework of constitutional duties, assuming for a moment that the constitutional duty is the organizing principle of the doctrine and that incompletely embracing the framework is a deficiency.[259] Section III.B addresses whether it would be possible to *repudiate* the framework of constitutional duties and *restore* the nullification framework.[260] It explores the hurdles to restoring the nullification framework and explains why the nullification framework, though once a conceptually coherent system, is no longer available. Finally, Section III.C considers some remaining objections to embracing the framework of constitutional duties, including whether the text of § 1983 or stare decisis precludes recognizing constitutional duties, whether attaining coherence is a good enough reason to revise the doctrine, and whether the entire project of recognizing and redressing constitutional duties should be reevaluated and maybe even abandoned.

---

is that the internalist account of the doctrine fails because some external and usually unspoken consideration better explains the results; for example, perhaps the better explanation for the recognition of (or limitations on) constitutional duties is a policy preference for (or against) those categories of rights. Such accounts of judicial decision-making may be persuasive in some circumstances, but they must grapple with the possibility that the stated justifications provide the actual grounds of the decision—which is why sophisticated efforts to identify alternative explanations for the Court's decisions begin by critiquing the reasons offered. *Cf., e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192 (2008) (reading the opinion in *Heller* in "two steps," first critically evaluating the "*Heller* opinion itself" and then looking "beyond the text of the *Heller* opinion itself to the decades of social movement conflict that preceded the decision"). And even if other considerations *sub rosa* drive judicial decision-making, it matters that the official justifications for decisions reached on other grounds seem to depend on legal doctrine. Unless the result reached for unstated reasons completely explains the result purportedly reached on the official grounds, the concepts at work within the doctrine have in some way channeled and constrained the decision. In this respect, though the internalist account is in one respect a rival to externalist theories of judicial decision-making, it can also coexist with them.

259. *But see infra* Sections III.B, III.C.3 (questioning whether the framework should be embraced).

260. As noted, the two frameworks are competitors even if nullification rules and duty rules are not mutually exclusive. *See supra* text accompanying note 78.

A. Embracing Constitutional Duties

This Section outlines an approach to constitutional torts that would be consistent with the framework of constitutional duties. In particular, this Section offers a framework to determine (1) what *claims* should be available, (2) what their *elements* should be, (3) whether the officer should be *immune* in any way, and (4) how a court should calculate *damages*. The basic argument is that courts should determine whether the officer has a duty to the plaintiff that protects some underlying constitutional interest, articulate the elements of the constitutional tort to determine whether that duty has been breached, and calculate damages such that they compensate the injury to the protected constitutional interest. The answer is thus simple in theory, if less determinate in practice. To illustrate how the framework ought to work (and sometimes currently works), I discuss particular constitutional provisions to illustrate a general approach to constitutional-tort law, but the argument here does not defend any particular interpretations of constitutional provisions.

1. Claims

The threshold question when a plaintiff alleges a constitutional tort should be whether the official has a constitutional duty to the plaintiff.[261] As discussed above, a necessary feature of any tort claim is that the defendant has violated a duty owed to the plaintiff, and a constitutional tort is one in which the Constitution imposes that duty.[262] Thus, it is somewhat imprecise to say, as the Court has said, that the "first step" in evaluating a § 1983 claim is "to identify the specific constitutional right allegedly infringed."[263] The term "constitutional right" covers two very different kinds of legal concepts: a rule that any acts contrary to the provision in question are a *nullity* or a rule that the official has a *duty* to take (or to refrain from taking) certain actions.[264] Instead, the first step should

---

261. For a similar suggestion, see Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 13-16, 22-23 (1974).

262. *See supra* Part I.

263. Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion); *see also* Graham v. Connor, 490 U.S. 386, 394 (1989) ("In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." (citing Baker v. McCollan, 443 U.S. 137, 140 (1979))); *Baker*, 443 U.S. at 140 ("The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'").

264. *See supra* text accompanying notes 139-146.

be to determine that the "constitutional right" imposes a duty on the relevant official.

As the prior discussion of *Estelle* suggests, that analysis requires a clause-by-clause, government-by-government, and official-by-official analysis to determine whether the specific constitutional provision imposes (or permits Congress to impose) a duty on the official.[265] The reason for this layered analysis is that a constitutional tort assumes that the official-defendant has a duty. And an official has a duty only if the constitutional provision applies to a person working at her level of government (whether state or federal) and in her particular function or position (mayor, judge, police, and so on). Thus, a constitutional-tort claim might fail if a constitutional clause (1) imposes only a nullification rule (as in *Carter* and *Bowman*);[266] (2) imposes a duty rule only on certain kinds of officers performing certain kinds of actions (as may be the case if legislators or judges do not tend to have duties under the Constitution);[267] or (3) applies only to the states or only to the federal government.[268]

To take some examples, the language of the Contracts Clause targeting *laws* enacted by *states* ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"[269]) might mean that the clause imposes only a nullification

---

265. *Cf.* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 280 (2000) ("It is my contention that the liability rule for money damages should vary with the constitutional violation at issue.").

266. *See supra* text accompanying notes 120-146 (discussing *Carter*, *Bowman*, and *Dennis*); *see also supra* text accompanying notes 148-162 (discussing this issue for the Eighth Amendment).

267. This could be true for all officials of a particular kind, which would be an alternative justification for absolute immunity for legislators or judges. *See supra* Section II.F; *infra* Section III.A.3. Or it could be true with respect to particular provisions, like the Takings Clause. *See* Sheetz v. County of El Dorado, 601 U.S. 267, 277 (2024) (stating that the Takings Clause "constrains the government without any distinction between legislation and other official acts"). That statement appears to ignore the dispute on the Court about the status of "judicial takings." *Compare* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713-14 (2010) (plurality opinion) ("The Takings Clause (unlike, for instance, the *Ex Post Facto* Clauses) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . ." (citation omitted)), *with id.* at 734-42 (Kennedy, J., concurring) (questioning whether the Takings Clause applies to judicial decisions).

268. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49-54 (2004) (Thomas, J., concurring) (questioning "whether and how the Establishment Clause applies against the States"); United States v. Vaello Madero, 596 U.S. 159, 166 (2022) (Thomas, J., concurring) (questioning whether the Due Process Clause of the Fifth Amendment "contains an equal protection component whose substance is 'precisely the same' as the Equal Protection Clause of the Fourteenth Amendment" (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975)).

269. U.S. CONST. art. I., § 1, cl. 1.

rule on state legislatures. That textual specification—along with historical enforcement in this manner[270]—might counsel against imposing duties on other kinds of state officials. Alternatively, when interpreting the incorporated Bill of Rights, it may be that the Fourteenth Amendment imposes duties broadly and indiscriminately on state officials of all kinds, and its language—states cannot "make *or enforce*" any laws "abridg[ing] the privileges or immunities of citizens" or "deny to any person . . . the equal *protection* of the laws"[271]—might transform certain nullification rules into duty rules.[272] On the other hand, the duties of the Fourteenth Amendment might not be "reverse incorporated" back against the federal government, which in the antebellum period was constrained by nullification rules.[273] The substantive analysis will differ based on one's view about the appropriate method of constitutional interpretation, but duties should not be imposed on the unexplained assumption that everything sometimes described as a "constitutional right" imposes a duty on an official. Instead, the interpretive question is whether there is some affirmative reason that the constitutional rule is, properly speaking, a duty.

The Supreme Court already engages in debates of this kind, though indistinctly. To retread some ground already covered: Justice Thomas's view that the Eighth Amendment applies only to legislatures and judges is an argument that the Amendment only nullifies certain kinds of sentences, and on that view, the background maxim *nulla poena sine lege* ("no punishment without law") preserves the defendant's preexisting rights when the unconstitutional sentence is nullified.[274] Justice Kennedy's opinion in *Dennis* reasons that the dormant

---

270. *See* Woolhandler, *Origins*, *supra* note 10, at 161 & n.434 (noting that the Court "early on drew a line between legislative and judicial impairments of contracts").

271. U.S. CONST. amend. XIV, § 1 (emphasis added).

272. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1053-54 (2011) ("This formulation seems expressly designed to capture *both* legislative action ('[n]o State shall *make* . . . any law') *and* executive/judicial action ('[n]o State shall . . . *enforce* any law')." (alterations in original)). Professor Nicholas Quinn Rosenkranz's important insight is that the Constitution often specifies to *whom* it applies, but it also matters *what kind of rule* applies. *But see* Harrison, *Power*, *supra* note 18, at 508 (suggesting that Rosenkranz at times "moves from duties to powers, and so combines two fundamentally distinct legal conceptions").

273. *See* Rosenkranz, *supra* note 272, at 1061 (arguing that "First Amendment challenges are always challenges to actions of Congress," but that "Fourteenth Amendment challenges—challenges to state action abridging the freedom of speech or the free exercise of religion—might be challenges to state *executive* (or judicial) action"); *cf.* AMAR, *supra* note 168, at 215 (noting that incorporation requires "judicial artisanship" because "the original Bill of Rights and the Fourteenth Amendment feature very different constitutional architectures").

274. *See* Rogers v. Tennessee, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (describing the principle as "one of the most 'widely held value-judgment[s] in the entire history of human

Commerce Clause operates only through nullification rules.[275] And Justice Black's attempt in *Tenney* to reconcile legislative immunity with the text of § 1983 suggests that he viewed the Constitution as operating on legislators at least mostly through nullification rules rather than duty rules.[276]

2. *Elements*

The elements of the claim should likewise derive from the constitutional duty rather than the common law.[277] More specifically, a court should determine that the specific constitutional provision imposes a duty on the official-defendant, articulate the scope of that duty, and then assert whatever elements are necessary to establish a breach of that duty. The elements should follow from the Constitution itself, and indeed the Court has adopted such an approach before.[278] For example, with respect to mental states, the Eighth Amendment requires "deliberate indifference" to medical needs before the failure to provide care becomes "an unnecessary and wanton infliction of pain."[279] By contrast, the Fourth Amendment does not require a court to "probe subjective intent."[280] As to the tools of constitutional interpretation relevant to that question, courts might rely on constitutional text,[281] on functional arguments,[282] or on other accepted indicia of constitutional meaning.

---

thought'" (alteration in original) (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960))); FULLER, *supra* note 27, at 59 (commenting that the principle is "generally respected by civilized nations").

275. *See supra* text accompanying notes 135-146.

276. *See supra* text accompanying notes 236-237.

277. *See* Graham v. Connor, 490 U.S. 386, 394 (1989); *see also* McMannon, *supra* note 220, at 1502 ("[B]ecause the rights at issue are specifically provided by the Constitution, and the remedy for violation of those rights is specifically provided by § 1983, as opposed to common-law rights and remedies, the rule of causation that courts adopt should conform to the constitutional right, not the other way around.").

278. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue."); Parratt v. Taylor, 451 U.S. 527, 535 (1981).

279. Estelle v. Gamble, 429 U.S. 97, 105-06 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

280. Ashcroft v. al-Kidd, 563 U.S. 731, 737 (2011); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) (declining to conclude that the "constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

281. For example, perhaps the Eighth Amendment mental-state requirement is "implicit" in the meaning of "punishment." *See* Wilson v. Seiter, 501 U.S. 294, 301-02 (1991).

282. For example, perhaps the "evenhanded application of the law" requires the Fourth Amendment's objective standard. *See al-Kidd*, 563 U.S. at 740.

Of course, if a constitutional provision underdetermines the precise elements of the claim, the common law may be relevant. Common-law torts could function as "inspired examples"[283] to the extent that they reveal general principles of tort law that inhere in any species of tort. Such general principles include the requirements of a "causal connection" between the defendant's breach of a duty and the injury to the plaintiff,[284] that one person should not be liable for another's wrongdoing,[285] and that damages should compensate for the wrong done.[286] These kinds of analytical moves are relevant *not* because of a direct analogy between a particular constitutional tort and a common-law claim. Instead, the analogy works because constitutional torts are a species of tort, which makes certain assumptions about duty, fault, causation, compensation, and other features.[287] The ultimate focus of the inquiry should be *how* a plaintiff can prove that the constitutional duty has been breached.

3. Immunities

The same kind of argument—that courts should simply ask whether the Constitution imposes a duty on the relevant officer—applies to the consideration of immunities. And that inquiry should depend on both the constitutional provision and the kind of official sued.

First, with respect to the substantive provisions, the immunity available to officers in Fourth Amendment cases might derive from the requirement that official actions be "reasonable" in the circumstances.[288] Officers bound by that Amendment sometimes must make split-second decisions, and the Fourth Amendment might itself build in a form of immunity by granting substantial discretion to the officer who must act reasonably in those circumstances.[289] Likewise, the "immunity" available to prison officials in Eighth Amendment

---

283. Manuel v. City of Joliet, 580 U.S. 357, 370 (2017) (quoting Hartman v. Moore, 547 U.S. 250, 258 (2006)).

284. *Hartman*, 547 U.S. at 259.

285. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691-92 (1978).

286. *See infra* Section III.A.4.

287. Challenging the basis of *that* analogy would call into question the entire enterprise of constitutional torts. *Cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000) (suggesting that neither instrumental nor noninstrumental justifications for private-law remedies make sense as applied to government actors).

288. U.S. CONST. amend. IV.

289. *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989).

cases might differ in that a subjective component is implicit in the notion of the punishment.[290] This mode of analysis would better replicate the structure of the common-law constitutional torts, in which the officer sometimes was immune because the "exercise of discretion within the boundaries legislatively assigned did not violate the law."[291] Under this approach, the question would be whether the officer's exercise of discretion within the boundaries *constitutionally* assigned violated the *Constitution*.

Second, the immunity analysis might also differ based on the function or position of the officer sued. Consider the question of judicial immunity. It may be that the Constitution generally does not impose duty rules on judges but instead operates through nullification rules. One theory would be that the text of the Supremacy Clause imposes a nullification rule: "The Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[292] Another theory would be more functional: what judges do in their judicial capacity is alter legal relations, not take concrete actions out in the world, so there is no reason to impose duty rules on judges. In other words, if a judge violates a constitutional interest by misapplying a nullification rule, the appropriate "remedy" is simply appellate review of the erroneous decision.[293]

---

290. *See* Wilson v. Seiter, 501 U.S. 294, 299 (1991); *see also Graham*, 490 U.S. at 394 (distinguishing Fourth and Eighth Amendment excessive-force standards).

291. James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 158, 165 (2021); *cf.* Turner v. United States, 248 U.S. 354, 358 (1919) (noting that there is no "substantive right to recover the damages resulting from failure of a government or its officers to keep the peace").

292. U.S. CONST. art. VI, cl. 2.

293. That basic insight is similar to the animating principle of Justice Thomas's dissent in *Reed v. Goertz*, 598 U.S. 230 (2023). There, the majority held that the statute of limitations for a "federal 42 U.S.C. § 1983 procedural due process suit challenging the constitutionality of the state process" began to run "at the end of the state-court litigation." *Id.* at 232. Thomas objected that the plaintiff's argument was that the state court "violated his due process rights through its reasoning in his case," and the way to remedy *that* harm—i.e., a judicial judgment in which the Constitution should have supplanted state law—was through the Supreme Court's "appellate jurisdiction," not an original action. *Id.* at 245-46 (Thomas, J., dissenting); *see also supra* text accompanying notes 87-95 (discussing the "remedy" for erroneous state-court judgments in *Monroe v. Pape*). The majority's failure to embrace this basic point caused all sorts of confusion. For example, to distinguish a challenge to "'the adverse' state-court decisions themselves," the majority claimed that the lawsuit challenged "as unconstitutional the Texas statute," but of course there is no such thing as a free-floating challenge to a statute. *See Goertz*, 598 U.S. at 235 (majority opinion) (quoting Skinner v. Switzer, 562 U.S. 521, 532 (2011)). And the claim at issue was a claim against the *district attorney*, who refused to order DNA testing, but the constitutional violation at issue was the deprivation of such an interest without appropriate process afforded by the state court. The fact

Again, the point is not to take a position on right-specific or role-specific immunities. The point is simply that a coherent constitutional-tort framework would limit immunity rules to those that inhere in the nature of the asserted constitutional violation. That analysis would require a clause-by-clause, government-by-government, and official-by-official inquiry to determine whether *this* constitutional provision imposes a duty on *this* officer performing *this* function to avoid (or to take) *this* action.

4. Damages

Here again, the strict analogy to the kinds of compensation available at common law fails to account for the constitutional duty.[294] The measure of damages in any tort case should be determined with reference to the kind of injuries proper to the violated right. The common law's categories of damages are not random but are derived from the structure of the underlying legal interests.[295] By way of example, it would make little sense to recognize an invasion-of-privacy tort but limit it to economic losses, nor to recognize a property tort but limit damages to the impairment of reputation.

By the same token, the impairment of a constitutional right might involve a harm similar to one recognized at common law, but it might also be totally different; it would be a "coincidence" if all forms of relief proper to the constitutional tort had already been developed by the common law.[296] The traditional rule is that the measure of the remedy is to, as far as possible, restore the plaintiff to the position she would have been in before the wrong,[297] but it is not possible to determine what that standard requires without assessing the nature of the impairment.

Doubtless, this approach yields the problems that seemed to concern the Court in *Stachura*. How should a court value the harm to a constitutional right? How does one put a price on the right to vote, to speak one's mind, to pray at

---

that there was a mismatch between the defendant (the prosecutor) and the theory of harm (the absence of sufficient procedures by the state court) suggests an earlier failure to determine *who* has a constitutional duty of this kind in the first place. *See Skinner*, 562 U.S. at 525 (allowing a "postconviction claim for DNA testing" under the procedural Due Process Clause and § 1983).

294. *See* John G. Niles, Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1030-35 (1967).

295. *See* Hershovitz, *supra* note 31, at 957-63.

296. *See* Wilson v. Garcia, 471 U.S. 261, 272 (1985) (Harlan, J., concurring) (quoting Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)).

297. *See supra* text accompanying note 31.

work, or to refuse to pray at school?[298] A first response is that the problem is not unique to the constitutional tort.[299] For example, as the *Restatement (Second) of Torts* explains, "[T]he sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind."[300] And yet the private-law tort regime has mechanisms to quantify what cannot be quantified—including asking jurors to put monetary values on dignitary harms.[301] The key is to define the nature of the harm with reference to the duty breached, just as the elements and immunity should be tailored to that breach. The Due Process Clause, for example, protects the plaintiff from the risk of wrongful deprivations.[302] The right to be free from unreasonable searches and seizures protects bodily integrity, property, and privacy.[303] If the right is appropriately defined, courts are competent to craft rules of law to calculate damages just as well—or perhaps just as poorly—as they put prices on arms, legs, pain, and emotional distress.[304]

---

298. *See also Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring) ("[W]hat is the dollar value of the right to go to unsegregated schools?").

299. *See* Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901, 1903 (2018) ("Deciding how to hold wrongdoers accountable for the emotional harms that their actions inflict on others presents one of the most perplexing challenges in private law.").

300. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979); *see also id.* ("There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering."); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 843-46 (1994) (discussing the relationship between compensation and commensurability); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56-57 (1993) (same).

301. To be sure, the law of torts, like the law of constitutional torts, privileges certain kinds of harm (usually "physical injuries and property damage") over others (like "emotional injuries or relational harms"). Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 468 (1998).

302. *Cf.* Carey v. Piphus, 435 U.S. 247, 262 (1978) ("[A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.").

303. *See, e.g.*, Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 949-50, 994 (2016).

304. The framework of constitutional duties elaborated in this Section might likewise have implications for the application of other procedural rules to § 1983 claims, like the statute of limitations. But for those kinds of implementation questions, constitutional meaning is less likely to require specific rules of law and more likely to be underdeterminate. In those circumstances, the Court could borrow principles from other legal regimes to fill in the gaps. For example, the Court has held that § 1988 prescribes that a state's statute of limitations for personal-injury torts provides the limitations period for § 1983 claims. *See* Wilson v. Garcia,

B. Restoring Nullification

The last Section offered the outline of a coherent regime embracing constitutional duties. Yet perhaps the route to coherence is not to embrace constitutional duties but to repudiate them. If incoherence within the doctrine reflects the incomplete embrace of the constitutional duty, then coherence might follow from either embrace or repudiation. And if the concept emerged without justification, then perhaps the better course is to abandon the constitutional duty altogether and restore the nullification framework.

As an initial matter, the repudiation of the framework of constitutional duties would have quite radical practical implications for constitutional torts. The framework grounds developments in First, Fourth, and Eighth Amendment jurisprudence and drives the Court's modern interpretations of § 1983,[305] and repudiating constitutional duties would destabilize that now-established law. For example, embracing only nullification rules would mean that plaintiffs seeking to vindicate those constitutional rights would have to vindicate them through causes of action available under state law—which would make the scope of constitutional rights differ by state[306] (at least without other adjustments to the framework[307]). Similarly, if the Constitution creates only nullification rules, then the cause of action for violations of constitutional duties under

---

471 U.S. 261, 269-71 (1985); Lindley, *supra* note 59, at 10-11. The Constitution might impose outer limits on what kinds of rules are permissible (depending on one's view of congressional authority in this sphere, *see infra* note 333). Or it might help a court assess the congressional determination of the relevant "federal interests." *Wilson*, 471 U.S. at 275. But in either case, the scope of congressional or judicial discretion is likely to be broad.

305. *See supra* Part II.

306. A recent survey of state-law § 1983 analogues (or substitutes) is instructive. Professors Alexander Reinert, Joanna C. Schwartz, and James E. Pfander report that "states typically allow victims to pursue state law tort claims" against officers, but they "often impose limits on and immunities from such liability to protect official defendants." Reinert, Schwartz, & Pfander, *supra* note 3, at 759. Just over half of the states (twenty-six of them) "make no provision" for "litigation of constitutional tort claims against state and local officials." *Id.* Because of those variations, the scope of the *federal* constitutional protection would differ depending on the availability (or not) of a claim under *state* tort law or constitutional-tort law. The law might not immediately change in the minority of states that have some kind of § 1983 analogue (whether by statute or by some implied cause of action), but the state constitutional-tort laws might be repealed. What would be bizarre, in any event, is that the restoration of the nullification framework would be less radical only because many states embraced constitutional-tort causes of action analogous to § 1983 and *Bivens*, which themselves depend on the concept of the constitutional duty. *See infra* text accompanying notes 323-327.

307. *Compare infra* Section III.B.1 (explaining why nullification would make constitutional torts depend on state law), *with infra* Sections III.B.2-3 (suggesting ways to resolve the dependence on state law).

§ 1983 would likely be unconstitutional because it would exceed Congress's power under Section 5 of the Fourteenth Amendment—a position that Justice Frankfurter entertained in *Monroe v. Pape* but did not endorse.[308] But the descriptive fact that it is hard to imagine courts accepting such outcomes is not a reason that they would be wrong to do so, and some interpreters might think these practical considerations irrelevant to the questions of constitutional interpretation.[309]

A more substantial problem is that conceptual developments associated with *Erie Railroad Co. v. Tompkins* make it impossible to restore the nullification framework as it would have operated, and efforts to accommodate the nullification framework to *Erie* likewise depart from the historical nullification framework.[310] That undermines any argument that courts should eliminate the unexplained and potentially unjustified constitutional duty and instead return to the original or historical constitutional system. Below, I explain (1) why post-*Erie* nullification rules operate fundamentally differently from pre-*Erie* nullification rules, (2) why a regime that makes constitutional torts dependent on the pre-*Erie* general law fails to replicate the nullification framework, and (3) why adopting instead a *modern* variation on the general law would likewise fail to replicate the nullification framework.

1. *Positive-Law Nullification*

The problem created by *Erie* is that the pre-*Erie* nullification rules would have protected "general law" instead of state- or federal-law rights. Before *Erie*, federal courts could sometimes apply a "general law" that was thought to be independent of any particular state's law,[311] and courts could apply these "general law" principles if the plaintiff brought a common-law constitutional tort against a state official.[312] If states' versions of the common law departed too substantially from the norm, federal courts could ignore changes to the state's

308. *See supra* text accompanying notes 114-116.

309. *See, e.g.*, J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 569, 571 (2023).

310. *Cf.* Jack Goldsmith, Erie *and Contemporary Federal Courts Doctrine*, 46 HARV. J.L. & PUB. POL'Y 727, 734 (2023) ("*Erie* is a challenge to originalism and related historically minded constitutional theories of interpretation because so many constitutional and subconstitutional law doctrines at the founding rested on a conception of general law . . . that the Court rejected in *Erie* . . . .").

311. *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1193-96 (2024); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1260-69 (2017).

312. *See, e.g.*, Collins, *supra* note 243, at 1517.

version of the common law, "effectively requiring a general law trespass remedy for constitutional violations."[313] But today, unless federal law applies, "state law must govern because there can be no other law."[314]

A system of nullification rules after *Erie*—call it the positive-law nullification framework[315]—would be quite different from the one that would have existed before *Erie* "overruled a particular way of looking at law."[316] Then, the nullification framework operated against a backdrop in which general law could impose the legal duty protected by the constitutional nullification rule. Today, a nullification framework would mean that constitutional rules protect only those duties imposed by the positive law, meaning that relief for "constitutional violations" would be limited to whatever relief the positive law happened to provide and would differ in each state. True restoration of the nullification framework is therefore unavailable as long as *Erie* remains good law.[317]

2. *(Pre-*Erie*) General-Law Nullification*

But perhaps it would be possible to retain a variant of the nullification framework that has been modified to accommodate *Erie*. The first potential variant would attempt to craft constitutional torts to recreate the specific rules of law in effect when the relevant constitutional provisions (or perhaps § 1983) were enacted. Call this framework "pre-*Erie* general-law nullification." Under this framework, the rules for modern constitutional torts would mimic the common-law constitutional torts that existed before the framework of constitutional duties—in particular, the specific set of common-law constitutional torts that would have been available at that prior point in time. This approach could arguably describe the Court's occasional approach to constitutional torts,

---

313. *See* Woolhandler, *Origins*, *supra* note 10, at 141; *see also id.* at 121 (explaining that the Court indicated that states had to provide "general tort remedies," and that the Court suggested that the "existence of the common law tort action for certain types of official invasions of liberty or property may itself be a constitutional requirement").

314. Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

315. *Cf., e.g.*, William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (arguing that the proscriptions of the Fourth Amendment should hinge on "whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform," or whether "stripped of official authority" the "government actor [has] done something that would be tortious, criminal, or otherwise a violation of some legal duty").

316. Guaranty Tr. Co. v. York, 326 U.S. 99, 101 (1945).

317. *But see* Stephen E. Sachs, Life After *Erie* 3 (Nov. 1, 2023) (unpublished manuscript), https://ssrn.com/abstract=4633575 [https://perma.cc/GS2L-XWX4] (discussing "how the law will operate on the happy and glorious day when *Erie* has been overturned").

in which it embraces immunity doctrines in historical terms;[318] requires plaintiffs to allege the elements of common-law claims as they existed at the enactment of § 1983;[319] and limits damages to those which would be available under the common law (though the focus there is not usually on the time of § 1983's enactment).[320]

That approach would also substantially differ from the pre-*Erie* nullification framework, particularly with respect to the relationship between the operative rules of private law and the Constitution. The basic theory of the common-law constitutional tort in the nullification framework was that an officer acting contrary to constitutional limitations would cease to claim the legitimacy of the office.[321] The officer would then become liable just as a private person would be. Under that system, private law established the baseline set of obligations between persons. Nullification rules limited the possible departures from that baseline, but the liability of officers had to be ultimately grounded in a theory of harm cognizable under the private law.

If pre-*Erie* general-law nullification were adopted today, liability for constitutional wrongs would cease to correspond to today's private-law baseline. If, in a constitutional-tort case, a plaintiff must first identify a common-law claim available in the past (say, in 1789 or 1866 or 1871), the baseline set of obligations between public officials and private persons would still be defined by private law—but the private law of the past instead of today's. And that would mean that the wrong the plaintiff would have to allege might or might not be considered a genuine wrong today.[322] A nullification framework tethered to the private-law wrongs of the past, then, differs from the historical nullification framework because it separates the protections of public law from the background protections of the current private law.

---

318. *E.g.*, Owen v. City of Independence, 445 U.S. 622, 637 (1980) (referring to a "tradition of immunity . . . firmly rooted in the common law").

319. *See* Thompson v. Clark, 596 U.S. 36, 43 (2022); Heck v. Humphrey, 512 U.S. 477, 483 (1994).

320. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

321. *See supra* Section I.A.

322. Related differences involve changes in pleading and procedure. With this modified nullification framework, a claim arises under federal law (rather than general law or common law), and the breach of the Constitution is part of the case-in-chief rather than a defense. For a discussion of a similar development in the law in the years after Congress enacted general federal-question jurisdiction, see Woolhandler, *Origins*, *supra* note 10, at 84-96. In addition, under this modified nullification framework, the question whether the defendant is a "state actor" is, itself, a necessary component to the plaintiff's case, rather than an issue which the defendant officer would raise as a kind of affirmative defense to the claim.

3. (Modern) General-Law Nullification

A final variant of the nullification framework would design modern constitutional torts to follow *today's* general law—and would avoid the pitfalls of both positive-law nullification and the (pre-*Erie*) general-law nullification. This third possibility would construct constitutional torts to provide relief if the plaintiff shows that the officer would be liable under today's general law. For example, courts might ask in a Fourth Amendment case whether the officers had violated modern general law in conducting a search or seizure.[323]

But embracing the modern general law poses challenges of its own. In articulating what this general law should be, courts would have to determine not only which sources of law "count" for the general law but also which sources of law to privilege when there is disagreement among those sources.[324] The approach would also require courts to determine which general-law claims should count as "analogous" to any given constitutional-tort claim, which presents a challenge because "many torts are awkward fits" for certain constitutional claims.[325] After drawing the analogy to the general-law claim, courts may be tempted to selectively drop elements from the general law that fit awkwardly with the underlying constitutional provision.[326] And as courts make all of these judgments—selecting sources of law, adjudicating between majority or minority views, and analogizing to common-law claims (or parts of claims)—they will have to reason from the purposes of the underlying constitutional provision.

The embrace of state-law analogues to § 1983—that is, state positive-law constitutional torts—presents the problem starkly. The states are split almost down the middle on whether state law recognizes constitutional-tort claims.[327] Does the general law include a cause of action for modern constitutional-tort claims? If the answer is "yes," then the modern general-law nullification framework almost collapses into the framework of constitutional duties. Nullification rules operate only to prevent certain changes to duties imposed by the general law, but on this view, the general law has incorporated the concept of

---

323. *See, e.g.*, Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 932-36 (2023). *But see* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1014-15 (2023) (critiquing the general-law approach).

324. *See* Brady, *supra* note 323, at 1016-22.

325. *Id.* at 1035.

326. *Id.* at 1035-36 (noting that when courts "import common-law concepts" in constitutional claims, they will have discretion to selectively drop certain elements of the claim that seem like poor fits for the constitutional claim).

327. At least as of 2021. *See supra* note 306.

the constitutional duty into the analysis. The nullification framework, then, would instruct judges to determine what the general law would say a particular constitutional duty is, what the elements of the constitutional tort would be, what immunities should be available, and what the damages should be. In other words, it would depend on the same kind of analysis required by the framework of constitutional duties, and it would differ only in the limited sense that the question would be one of interjurisdictional general law rather than pure federal law. But if the answer is "no," then this modified general law would refuse to recognize a widely accepted kind of wrong—the breach of a constitutional duty.

In sum, the problem is that the conceptual confusion in the constitutional-tort system cannot be resolved by restoring the nullification framework and eliminating the constitutional duty. First, a pure nullification framework would eliminate constitutional duties, but in making constitutional law dependent on state positive law, it would repudiate the independent general-law baseline that would have been available before *Erie*. Second, a modified nullification framework could instead restore that baseline by protecting the "common law" of the past, but that approach would reject the original framework's tight fit between private-law wrongs and the interests which constitutional nullification rules protect. Finally, a framework in which constitutional nullification rules operate to protect *today*'s "general law," whatever that means, would either fail to protect the entire set of interests now often protected in the states (that is, constitutional-tort claims) or mimic the framework of constitutional duties. The emergence of the constitutional duty thus makes restoration of the nullification framework impossible. The question is not whether to restore the old way or to embrace the new. The question is what will change and what will remain.

C. Objections and Alternatives

But the preceding does not quite complete the argument that courts should embrace the framework of constitutional duties. Even if embracing constitutional duties would offer a coherent doctrinal regime, perhaps the framework of constitutional duties should not be embraced because other authoritative legal judgments require incoherence; because coherence is just one value among others outweighed in these circumstances; or because the concept around which modern constitutional torts are organized—the constitutional duty—should be rejected.

1. Text and Precedent

Courts usually do not have the luxury or obligation to determine the conceptually pure answer to the question presented to them, and often the task is to determine whether an answer has been authoritatively given by an institution that demands deference. The obvious arguments against embracing the framework of constitutional duties would be that Congress's enactment of § 1983 or relevant precedents preclude its complete acceptance.

As to Congress's role: So far I have said very little about the language of § 1983 or how that fits with the theory advanced above. In part that is because references to the text of § 1983 seem to be epiphenomenal. Whatever the text's original meaning, deeper conceptions about the nature of constitutional rights tend to drive the analysis in seminal cases like *Monroe* and *Tenney*; in other cases, standard doctrinal analysis does the work. At the same time, invocations of the text are inconsistent and often an afterthought. Sometimes the Court insists on a "straightforward reading of the 'plain language' of § 1983."[328] Other times the Court openly claims that the language "is not to be taken literally."[329]

Regardless, a doctrinal regime that embraces constitutional duties entirely fits both text and congressional intent at least as well as the current system. Regarding the text, the statute says that "[e]very person who . . . subjects [someone], or causes [someone] to be subjected" to a "deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable . . . in an action at law" or "suit in equity."[330] The approach described in Section III.A imposes liability if and only if the relevant actor violates a constitutional duty owed to the plaintiff, so "every person" is "liable." This approach also precludes constitutional-tort claims if the relevant constitutional provision imposes only a nullification rule. But the text coheres with that limitation too. The text requires that the violated right be "secured by the Constitution." To use the language of *Dennis v. Higgins* from above, nullification rules "secure"

---

328. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 175 (2023) (quoting Maine v. Thiboutot, 448 U.S. 1, 4 (1980)); *see also* Briscoe v. LaHue, 460 U.S. 325, 347 n.2 (1983) (Marshall, J., dissenting) (collecting cases); Lindke v. Freed, 601 U.S. 187, 194 (2024) ("As [§ 1983's] text makes clear, this provision protects against acts attributable to a State, not those of a private person.").

329. *See Briscoe*, 460 U.S. at 330. Meanwhile, some scholars have suggested that § 1983 should be interpreted by courts as a common-law statute or that modern lawyers have completely misunderstood its meaning. For the former, see Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 Calif. L. Rev. Online 40, 43-54 (2018); for the latter, see Lindley, *supra* note 59, at 900-03.

330. 42 U.S.C. § 1983 (2018).

underlying subconstitutional rights "only indirectly and incidentally," not directly.[331] The theory advanced is thus perfectly consistent with statutory language.

Squaring the framework of constitutional duties with congressional intent is somewhat more difficult, but still a better fit than the alternatives. The objection would be that the framework of constitutional duties cannot be consistent with congressional intent in 1871 because the modern constitutional tort did not exist.[332] But once again, replicating the nullification framework of the past would be impossible, so the question becomes what Congress would have intended in light of the conceptual developments that make restoring a nullification framework impossible. For example, suppose that Congress would have intended a claim under § 1983 to proceed only if the plaintiff first articulated a common-law claim that would have been enforceable under the general law. Today, using that general law of 1871 as a necessary prerequisite to a § 1983 claim would assume that Congress would not want to retain the system in which the constitutional protections are coextensive with the private-law baseline in the states, but would rather freeze the protections of § 1983 to the particular common-law claims available in 1871. The alternative view is that Congress announced a new kind of claim—the cause of action for constitutional violations[333]—and would have preferred for that claim to be implemented coherently.[334]

---

331. 498 U.S. 439, 457 (1991) (Kennedy, J., dissenting) (quoting Carter v. Greenhow, 114 U.S. 317, 322 (1885)).

332. *See supra* text accompanying note 87 (discussing the early history of § 1983).

333. Assuming the conventional wisdom that the statute does in fact create a cause of action. *But see* Lindley, *supra* note 59, at 923-26.

334. To be sure, the analysis of the text would be different if Congress had expressly required something like the Court's current approach—by, for example, ratifying qualified immunity or limiting the availability of damages. In that circumstance, the question would be whether relief for the violation of the constitutional duty is (1) necessarily imposed by the Constitution or (2) up to Congress to provide. (An intermediate position might be that Congress has some obligation to provide a remedy but not one that is judicially enforceable.) Regarding the first possibility, some have argued that the repeal of § 1983 might be *unconstitutional* in some respects or circumstances, on the theory that the Constitution requires an adequate system of remedies to enforce certain rights. *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1306, 1308 & n.49 (2023); *see also* Bandes, *supra* note 7, at 325 (claiming that *Bivens* is constitutionally required because the Bill of Rights is "self-executing"). Regarding the second possibility, if the provision of remedies is up to Congress, then the question would be whether there is some kind of "presumption" of a remedy and whether Congress has spoken clearly enough to displace it. But that analysis is unnecessary while § 1983 exists in its current form and seems (for the time being) to be a fixture of the legal landscape.

Nor does precedent entirely foreclose the adoption of the constitutional-duties framework.[335] As an initial matter, how stare decisis applies in this context is subject to debate. Perhaps the super-strong variation of stare decisis applies to § 1983 because it could be repealed by Congress.[336] Alternatively, if § 1983 was written "in the common law tradition,"[337] perhaps courts should accord those decisions *less* precedential weight. Regardless, the framework of constitutional duties might still be relevant despite contrary precedent in a few ways.[338]

First, the Court has recently grappled with a number of unanswered constitutional-tort issues—particularly those involving the elements of constitutional-tort claims.[339] Future cases raising similar problems could be resolved under the correct framework, and developing the conceptual framework is particularly valuable here because—if the recent decisions in *Reed*, *Thompson*, and *Nieves* are any indication—the Court has struggled to decide these cases. Indeed, lower courts might lead the way in articulating a coherent system of constitutional torts (at least where precedent is subject to interpretation).

Second, understanding the correct approach to constitutional torts is necessary to determining when, whether, and how to "narrow"[340] or overrule prior precedent under standard stare decisis analysis. For example, the argument here identifies a serious conceptual problem with the historical analogy grounding qualified immunity, but it also suggests a way to move away from that framework without eliminating immunities entirely.[341]

---

335. *See generally* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (defending qualified immunity in part based on stare decisis).

336. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456-58 (2015).

337. Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695-701 (1978)); *see also* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 51-52 (1989) (discussing ways the Court has related § 1983 to various versions of the "common law").

338. *See* Baude, *supra* note 5, at 80-82.

339. *See* Reed v. Goertz, 598 U.S. 230, 233 (2023); Thompson v. Clark, 596 U.S. 36, 42 (2022); McDonough v. Smith, 588 U.S. 109, 112 (2019); Nieves v. Bartlett, 587 U.S. 391, 405 (2019); Lozman v. City of Riviera Beach, 585 U.S. 87, 103 (2018) (Thomas, J., dissenting); Manuel v. City of Joliet, 580 U.S. 357, 362 (2017).

340. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862-63 (2014).

341. *See supra* Section III.A.3.

2. Embracing Incoherence

Courts might also think that the coherence of the law is just one value among many, and that other justifications outweigh any benefits of adopting an internally consistent doctrinal regime.[342] On this view, the benefits of coherence might be the secondary consequences of such a system—like predictability of results, intelligibility to observers, perceived legitimacy in adjudication, and stability over time.[343] A second potential benefit might be that the domain of constitutional torts would better satisfy the principle of *ubi jus ibi remedium*, which is established as worth attaining in our constitutional system, even if the principle is often breached.[344] In other words, many victims of constitutional harm who today have no remedy, or a meager one, would obtain commensurate relief.

Even if the framework has those benefits, however, it could be better to reject it if neither is a good enough reason in light of other considerations that ought to guide judicial decision-making. That possibility will depend on one's related views about the correctness of substantive constitutional decisions. For example, if a judge or scholar believes that the Court will get (or has gotten) substantive constitutional law *wrong* by recognizing constitutional rights that are too broad, the current limitations on remedies for such violations might look like compensating adjustments to prevent out-of-control liability.[345] Or if a judge or scholar believes that the Court (if it adopted the approach in Section

---

342. *Cf., e.g.*, Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 273-76 (1992) (identifying and critiquing "coherence accounts of law and of judicial reasoning," but defending a form of "local coherence"); Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 LAW & PHIL. 355, 372-73 (1984) ("[G]lobal coherence within a jurisdiction may not be appropriate to consider if decisions and standards of related jurisdictions in the same area of law support one decision better than its alternatives."). *But see* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1012-16 (1988) (defending a stronger form of coherence).

343. *See* Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16, 24-25, 35 (2000); Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, 25 OXFORD J. LEGAL STUD. 369, 385-86 (2005) (discussing the benefits of coherence); *cf.* FULLER, *supra* note 27, at 38-39 (critiquing the "failure to make rules understandable," the "enactment of contradictory rules," "frequent changes in the rules," and the "failure of congruence between the rules as announced and their actual administration").

344. *See* United States v. Loughrey, 172 U.S. 206, 232 (1898); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 624 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-66 (1803).

345. *Cf.* Crocker, *supra* note 65, at 1411 (suggesting, but rejecting, the idea that qualified immunity might be justified as a "compensating adjustment" for previous separation-of-powers errors).

III.A) holds that too many constitutional provisions *do not* impose obligations, then the current system—one of unreflective acceptance that constitutional rights impose duties coupled with arbitrary limits on relief—might be preferable to one in which the Court distinguishes between nullification rules and duty rules.

Answering those questions—about the relative value of coherence, the correctness of broad swaths of constitutional law, and the legitimacy of compensating adjustments—would be well beyond the scope of this argument. But at the very least, it is impossible to appropriately weigh the value of a coherent system without understanding what that system would look like, and the choice to retain the current system should be made with open eyes.

3. Rejecting Constitutional Duties

What if the constitutional duty is nonsense? The framework of constitutional duties assumes both that the Constitution imposes duties on government officials in their capacity as government officials, and that breaches of those duties require some kind of redress to restore the normative equilibrium between the parties. In other words, modern constitutional-tort law turns on an analogy not just to private law, but to the idea that private law is concerned with rectifying (and preventing) discrete wrongs. And that view could be wrong.[346]

Worse, even if private law is about correcting wrongs, the analogy from private law to constitutional law might be a mistake.[347] Maybe constitutional-tort law is about deterrence—that is, about forcing governments to internalize the costs of constitutional violations.[348] Or maybe constitutional torts are about

---

346. *See, e.g.*, Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 574 (2021) (suggesting that constitutional-tort law is designed to "optimiz[e] the effects of constitutional litigation" and "balance[e] constitutional rights and liberties against the state's interest in protection and governance").

347. *See* DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE 173 (2024) ("Anchoring itself on private legality and personal morality, constitutional law and adjudication have likewise focused on localized, self-contained transactional harms, emphasizing negative responsibility and intentional wrongdoing. Constitutional law regulates the behavior of the state as if it were an ordinary person—or a personified Leviathan. Yet Leviathan is conspicuously different from an ordinary person in ways that make the standards and expectations of private legality and personal morality a poor fit.").

348. *E.g.*, Levinson, *supra* note 287, at 350 & n.14 ("Courts and commentators routinely assume that [constitutional-tort damages] will create incentives for government to avoid constitu-

articulating public values and reforming institutions—not so much about redress for particular litigants.[349] Or maybe constitutional torts serve a number of desirable ends—compensating for harm, sure, but also deterrence and norm generation—and judges have to construct the doctrine to balance those aims.[350]

But if rectifying wrongs is not the aim of constitutional torts, then coherence around that ideal is not worth attaining. If constitutional-tort law is not a law of wrongs in the way that tort law is or at least might be, then the constitutional tort should be redesigned to serve the true aims of constitutional law. Indeed, if constitutional-tort law is not a law of wrongs, claims under § 1983 and *Bivens* might be just one of many mechanisms—from elections, to criminal law, to internal bureaucratic processes—designed to give governmental actors the right incentives, and whether to recognize constitutional duties *at all* would be subordinate to questions of their efficacy to that end. In other words, rejecting the analogy to private law on which constitutional-tort doctrine seems to be based would require a radical reconsideration of the entire doctrinal regime.

IV. BEYOND CONSTITUTIONAL TORTS

This Part turns from constitutional torts in particular to broader doctrinal implications. The partial emergence of the framework of constitutional duties explains the development of (and retreat from) the Fourth Amendment exclusionary rule, the development of modern sovereign-immunity doctrine in suits against official-capacity defendants, and the increasing availability of injunctive relief for structural constitutional challenges brought under the Appointments Clause or other separation-of-powers principles.

A. The Exclusionary Rule

Was it pure coincidence that the Court decided *Monroe v. Pape*[351] and *Mapp v. Ohio*, the opinion incorporating the exclusionary rule against the states,[352] in the same Term? Likely not. The conclusion that the Fourth Amendment im-

tional violations much as ordinary tort damages create incentives for private parties to take precautions against accidents.").

349. *E.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51-52 (1978).

350. *E.g.*, Fallon, *supra* note 334, at 1310, 1312 (noting that courts should "craft remedies designed to promote individual redress," to "keep the government and its officials generally within constitutional bounds," and to "ensure effective enforcement of constitutional norms").

351. 365 U.S. 167 (1961).

352. 367 U.S. 643, 656-57 (1961).

poses a duty—and the rejection of the nullification framework articulated by Justice Frankfurter—offers a novel justification for the Fourth Amendment exclusionary rule. In other words, the exclusionary rule makes sense as a doctrine largely because the Fourth Amendment is thought to impose a constitutional duty on officers, and thus the existence of the constitutional duty is a shared premise of both *Monroe* and *Mapp*.[353]

This point requires a brief doctrinal history.[354] The early exclusionary-rule cases rested in part on the Self-Incrimination Clause.[355] In *Boyd v. United States*, the government sought to introduce certain papers that had been unlawfully seized, but the Court reasoned that "the seizure of a man's private books and papers to be used in evidence against him" is not substantially different from "compelling him to be a witness against himself."[356] Right or wrong, the logic was that exclusion of evidence *prevented* a violation of the Self-Incrimination Clause—not that the exclusion of evidence remedied the Fourth Amendment violation.[357]

The Court soon expanded its reasoning beyond the Fifth Amendment context, and in *Weeks v. United States*, it squarely required exclusion under the Fourth Amendment.[358] Before that decision, the Fourth Amendment operated as the "guardian of property at tort."[359] When the Fourth Amendment operated as a nullification rule that could "overcome [an] asserted immunity defense," the Fourth Amendment simply ensured that "federal officials would be treated just like private common law trespassers."[360] *Weeks* reflected a new "conceptual

---

353. *See* Davies, *supra* note 93, at 663 ("The exclusionary rule is premised on the notion that an unconstitutional *government* act is void . . . . Because the only constitutional violation the Framers could have anticipated would have taken the form of a statute purporting to authorize general warrants, the primary 'remedy' would have been for the judiciary to refuse to issue warrants under the void statute." (footnote omitted)).

354. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 787-91 (1994).

355. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

356. 116 U.S. 616, 633 (1886).

357. Amar, *supra* note 354, at 790-91.

358. 232 U.S. 383, 389-92 (1914); *see also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (citing *Weeks* for the claim that allowing the government to use knowledge acquired through an unlawful seizure would "reduce[] the Fourth Amendment to a form of words"); Re, *supra* note 54, at 1922 (discussing *Weeks* as the "first Supreme Court exclusionary-rule decision to rest squarely on the Fourth Amendment").

359. Re, *supra* note 54, at 1920, 1923.

360. *Id.* at 1920.

category for Fourth Amendment investigative process,"[361] one in which the wrong was committed by a government official claiming (unjustified) authority as a government official.[362]

Yet the Court did not immediately shed the idea that the Fourth Amendment should operate as a nullification rule protecting preexisting subconstitutional rights. In *Wolf v. Colorado*, the Court incorporated the Fourth Amendment against the states, but the opinion—by Justice Frankfurter, the dissenter in *Monroe* and the author of *Tenney*—conceived of the Fourth Amendment right as a nullification rule. "[W]ere a State affirmatively to sanction such police incursion into privacy," he reasoned, "it would run counter to the guaranty of the Fourteenth Amendment."[363] But absent affirmative sanction, the "right to privacy" could be protected through "other means"—namely, "common law . . . actions."[364] Presumably, granting an officer an immunity contrary to the Fourth Amendment would be "affirmatively to sanction" the violation, and thus Frankfurter suggests that the operation of the Fourth Amendment with respect to the states should be limited to common-law constitutional torts.

But the exclusionary rule follows more naturally if the Fourth Amendment imposes a *duty* on state and federal officers. The rule functions as a remedy for breach of a Fourth Amendment duty committed by a police officer in that officer's official capacity. The Fourth Amendment "wrong" is defined by its governmental nature, and the harm that results from that wrong is the exposure to adverse governmental action that would not have occurred but for the violation of Fourth Amendment rights. If that is the nature of the wrong, then the remedy for it should be tailored to redress what was done by the officer (as an officer) against a private person (as a victim of adverse governmental action). That is how the Court defended the rule in *Mapp*: "Our decision . . . gives to the individual no more than that which the Constitution guarantees him" and "to the police officer no less than that to which honest law enforcement is entitled."[365]

---

361. *Id.* at 1923.

362. *Id.* at 1923 & nn.193-94.

363. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

364. *Id.* at 30 & n.1.

365. Mapp v. Ohio, 367 U.S. 643, 660 (1961). Some of the limitations on the exclusionary rule might make sense in these terms as well. For example, the inevitable-discovery exception, *see* Nix v. Williams, 467 U.S. 431, 441-44 (1984), prevents the victim of the unreasonable search from obtaining a windfall in the form of exclusion of evidence that would have been lawfully obtained even without the harm.

Understanding the Fourth Amendment violation as a violation of a constitutional duty also suggests why the other remedies fail to redress the wrong.[366] As to damages: the damages awarded in § 1983 suits are tailored to redress common-law wrongs. But because the Fourth Amendment wrong is distinct (if sometimes analogous), damages that compensate for common-law harms may undercompensate.[367] As to prospective relief: injunctions can be tailored to prevent the Fourth Amendment wrong, but practically speaking, injunctions are ineffective if the precise violation cannot be anticipated.[368] And though modern doctrine sometimes describes the exclusionary rule as a "'windfall' remedy to deter future Fourth Amendment violations,"[369] treating the remedy as a windfall assumes that the rule is part of a deterrence regime designed to prevent future violations rather than to remediate the current violation. If the injury is defined as subjection to the coercive power of the state by an officer acting contrary to a duty to refrain from unreasonable searches and seizures, then eliminating the fruit of that search or seizure may be the better-tailored response to the violation.[370]

B. Sovereign Immunity

Another notoriously confusing area of law is the Court's application of sovereign immunity in suits against officers, and here again that confusion flows from competition between the nullification framework and the framework of constitutional duties.

Begin with the well-known "paradox" of *Ex parte Young*.[371] There, the Supreme Court allowed a suit for injunctive relief against a state official threatening to commence an enforcement action that would violate the Due Process Clause. The paradox is that the alleged constitutional violation arose out of the

---

366. *See* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1388 (1983) ("[C]riminal prosecutions, injunctions, and damage actions . . . exhaust the list of alternatives to the exclusionary rule currently available . . . .").

367. *See supra* text accompanying notes 245-257, 294-304.

368. *See* Stewart, *supra* note 366, at 1387 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102-03 (1983)).

369. Davis v. United States, 564 U.S. 229, 248 (2011) (quoting Stone v. Powell, 428 U.S. 465, 486, 490 (1976)).

370. None of this analysis resolves the question whether federal courts have power to craft this kind of remedy. The exclusionary rule was arguably more novel than the remedies recognized in *Ex parte Young* and *Bivens*.

371. FALLON ET AL., *supra* note 81, at 927-28.

defendant's efforts to enforce an unconstitutional state law; as Justice Harlan put it in dissent, the suit was against the defendant "as, and only because he was, Attorney General of Minnesota," and the "object" of the suit was "to tie the hands of the State."[372] So how could that lawsuit *not* be a suit against the State for the sovereign-immunity analysis? The majority answered that the official was "stripped of his official or representative character" because he sought to "enforce a legislative enactment which is void because unconstitutional."[373] So how could that lawsuit be a suit against the State for purposes of the substantive law?

Prior to *Ex parte Young*, that paradox simply did not arise in lawsuits against state or federal officials. The theory of the common-law constitutional-tort cases—which included cases in which the plaintiff sought injunctive relief[374]—was that officers acting contrary to law were stripped of their official status and sued for their actions *as private wrongdoers*.[375] The duty on the official was imposed on the officer by the preexisting common law and in the official's capacity as a private person, not in her capacity as a governmental official. By contrast, with a modern constitutional tort—as in *Ex parte Young*—the duty is imposed on the officer in her capacity as an officer.[376] The way out of the sovereign-immunity/state-action bind is the "fiction[]" that "injunctive relief against state officials acting in their official capacity does not run against the State,"[377] and the reason for the fiction usually given is that it is "accepted as necessary to permit the federal courts to vindicate federal rights."[378]

But the assumed necessity of the fiction originates only from the presence of the constitutional duty. Recall again that in *Monroe v. Pape* the majority reasoned that § 1983 authorized suits for acts taken in excess of state law in part because state remedies were "inadequate," which raised the question: *inadequate*

372. *Ex parte* Young, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting) (emphasis omitted). The discussion in this Section relies in large part on CURRIE, THE FIRST HUNDRED YEARS, *supra* note 41; CURRIE, THE SECOND CENTURY, *supra* note 41; James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269 (2020); and John Harrison, Ex Parte Young, 60 STAN. L. REV. 989 (2008).

373. *Ex parte* Young, 209 U.S. at 159-60 (majority opinion).

374. *See supra* text accompanying notes 41-48 (discussing *Osborn*).

375. *In re* Ayers, 123 U.S. 443, 506 (1887) (allowing suit for "personal trespasses and wrongs").

376. *See* Harrison, *supra* note 372, at 1013 (suggesting that *Ex parte Young* recognizes a "novel and unusual kind of federal rule" in which the Constitution imposes both a "nullification" and "subjects government officers to tort-like rules of individual conduct that result in individual liability").

377. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n.25 (1984).

378. *Id.* at 105.

for what purpose?[379] With *Ex parte Young*, as with *Monroe*, the assumption is that the Constitution imposes duties on officials. If the constitutional provision imposed only nullification rules, these rules could be enforced in state-law proceedings to vindicate the underlying state-law rights. The fiction of *Ex parte Young* becomes "necessary" only because the violation of the constitutional duty is not always remediated by state law, and the argument from adequacy works only if one accepts the framework of constitutional duties.[380]

C. Structural Constitutional Challenges

The Supreme Court has long considered constitutional challenges asserting that actions of (for example) the executive branch violate separation-of-powers principles or provisions.[381] But the Court has recently resolved cases that assume the framework of constitutional duties rather than the nullification framework.[382]

---

379. *See supra* Section II.A.

380. This Section accepts for purposes of analysis the predominant understanding of *Ex parte Young*, by which the Court "recognized a new cause of action founded in the Constitution." Harrison, *supra* note 372, at 989-90. Under the revisionist antisuit theory of *Ex parte Young*, the basis of the suit was the general rule that a court of equity could "interfere with proceedings at law by enjoining parties from bringing legal actions" *Id.* at 997. In that circumstance, the "wrong" that justifies the invocation of equity is not the violation of a constitutional duty, but rather the threat of litigation that would be unduly burdensome. That understanding of *Ex parte Young* would make it analogous to the suit for injunctive relief in *Osborn*, and it would then fit within the nullification framework that allowed offensive nullification through common-law claims. But that understanding of *Ex parte Young* would limit the application of the case to "enforcement proceeding[s] in which the equity plaintiff would be the defendant," *id.* at 1009-10, and it would not justify the broader—and standard—interpretation of the doctrine, in which efforts to "enjoin [officials] from invading constitutional rights are not forbidden by the Eleventh Amendment," *id.* at 1009 n.87 (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 228 (1964)). In short, it is possible to understand the decision in *Ex parte Young* within the nullification rule, but that view of the decision is a revisionist one.

381. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 31-32 (2015); NLRB v. Noel Canning, 573 U.S. 513, 556 (2014); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484-87 (2010); The Pocket Veto Case, 279 U.S. 655, 673, 677 n.4, 691-92 (1929); Myers v. United States, 272 U.S. 52, 116, 161 (1926).

382. For examples in the nullification framework, see *Noel Canning*, 573 U.S. at 520-52; and *Humphrey's Executor v. United States*, 295 U.S. 602, 619, 626 (1935). *See also supra* text accompanying notes 49-56 (discussing offensive and defensive nullification).

1. *Constitutional Duties and Separation-of-Powers Claims*

Consider *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, in which the Court determined that "multilevel protection from removal [was] contrary to Article II's vesting of the executive power in the President."[383] Plaintiffs were an accounting firm and a nonprofit organization, and they sought injunctive and declaratory relief in federal court.[384] In its merits brief, the government noted that petitioners did not identify *any case* in which the Court "recognized an implied right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles."[385] The Court brushed that argument aside, noting the "right to relief as a general matter, without regard to the particular constitutional provisions at issue," citing two decisions involving claims brought under the Fourth and Eighth Amendments.[386] And the Court explained that the government offered "no reason" and "no authority" why "an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim."[387]

A better version of the government's argument would challenge the premise that Article II imposes any constitutional duty on the defendant. The *Free Enterprise Fund* Court relied on *Ex parte Young* for the proposition that equitable relief ought to be available for constitutional violations, but *Ex parte Young* did not go that far. The decision developed from the nineteenth-century decisions allowing suits against officers alleging that the officer committed a "tres-

383. 561 U.S. at 484.

384. *Id.* at 487-88.

385. Brief for the United States at 22-23, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861) (citing Edmond v. United States, 520 U.S. 651, 655 (1997) (concerning an appeal from decisions affirming convictions by court martial); Freytag v. Comm'r, 501 U.S. 868, 871-73 (1991) (concerning an appeal from an adverse decision of the Tax Court); Morrison v. Olson, 487 U.S. 654, 668-69 (1988) (concerning an appeal from an order denying a motion to quash a subpoena); Bowsher v. Synar, 478 U.S. 714, 718-19 (1986) (concerning a special statutory-review procedure); INS v. Chadha, 462 U.S. 919, 928, 937-39 (1983) (concerning a petition for review of a deportation order); Myers v. United States, 272 U.S. 52, 56, 176 (1926) (concerning a suit by a dismissed officer for unpaid salary); United States v. Germaine, 99 U.S. 508, 509 (1879) (concerning an appeal from a criminal conviction involving the defendant's status as "officer" as an element of the crime)).

386. *Free Enter. Fund*, 561 U.S. at 491 n.2 (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001); Bell v. Hood, 327 U.S. 678, 684 (1946); *Ex parte* Young, 209 U.S. 123, 149, 165, 167 (1908)).

387. *Id.*

pass" or some other "personal wrong."[388] In *Ex parte Young*, the Court reasoned that the fact that the "injury complained of is the threatened commencement of suits" rather than "an actual and direct trespass upon or interference with tangible property," as in a common-law constitutional tort like *Osborn*, was "not of a radical nature."[389] Later in the opinion, the Court added that the two kinds of wrongs were "equivalent."[390]

But in fact there is a "radical" difference between a request for injunctive relief to prevent the commission of a common-law tort and a request to prevent a constitutional violation. In the former, the plaintiff enforces a common-law duty; in the latter, the plaintiff enforces a constitutional duty. The decision in *Ex parte Young* thus recognizes a constitutional duty (under the Due Process Clause) not to enforce an unconstitutional statute.[391] Although *Ex parte Young* recognizes such a cause of action to implement the Due Process Clause, that holding does not necessarily entail that *other* constitutional provisions may be enforced in the same way. The question should be whether the particular constitutional provision imposes a duty on the defendant.[392]

And asking that question begins to suggest why structural constitutional rights should be "treated differently" than other constitutional rights: structural constitutional rights may be limited to nullification rules. If that is the case, then the theory of *Ex parte Young*—that the officer commits a "threatened wrong or injury" analogous to a common-law trespass—would make no sense.[393] And there is a case against constitutional duties in this context. Unlike the Fourteenth Amendment or many provisions of the Bill of Rights, the language of (say) the Appointments Clause seems only to confer and limit the power of officials. Or perhaps constitutional provisions governing the *legal* consequences of official action—rather than the conduct of officials—can be fully remedied with nullification rules.[394] Perhaps constitutional duty rules can be inferred from such language contrary to that functional concern, but it is

---

388. *See* CURRIE, THE FIRST HUNDRED YEARS, *supra* note 41, at 416-28.

389. *Ex parte Young*, 209 U.S. at 167.

390. *Id.*; CURRIE, THE SECOND CENTURY, *supra* note 41, at 52-56.

391. *See, e.g.*, Harrison, *supra* note 372, at 1013-14 (suggesting, but declining to accept, a view under which the Fourteenth Amendment imposes "a rule of duty and a cause of action to enforce it").

392. *See supra* Section III.A.

393. *Ex parte Young*, 209 U.S. at 158.

394. *See supra* text accompanying note 293.

wrong to simply assume that a duty rule can be inferred from a provision establishing a power or imposing a limitation on a governmental entity.[395]

2. *Downstream Consequences for Claims*

As with constitutional torts, determining whether the Constitution imposes a duty is necessary to understand not just *whether* a claim exists but also to assess the claim's *contours*. For example, in *Axon Enterprise, Inc. v. Federal Trade Commission*, the Court unanimously agreed that the targets of administrative-enforcement actions could sidestep the statutory review schemes of the Federal Trade Commission and the Securities and Exchange Commission when asserting claims that the administrative-law judges (ALJs) were "insufficiently accountable to the President, in violation of separation-of-powers principles."[396]

To reach that conclusion, the opinion implicitly endorsed the framework of constitutional duties. The Court defined the alleged harm as "'being subjected' to 'unconstitutional agency authority,'" which (the Court reasoned) would be "impossible to remedy once the [administrative] proceeding is over."[397] That definition of the harm assumes a constitutional duty: if the relevant "separation-of-powers principles" established only a nullification rule, then that interest would be fully vindicated in the specialized review proceedings; until one's legal status is finally changed contrary to the nullification rule, the violation has not really occurred. Or put differently, if the separation-of-powers principles only provided a nullification rule, then the harm would be better defined as "being subjected to [the deprivation of a preexisting legal interest by an] unconstitutional agency authority." Accordingly, immediately challenging the constitutionality of an ALJ's appointment is necessary to vindicate the asserted constitutional interest only because the alleged injury is defined more broadly than in a nullification rule.

The footnote in *Free Enterprise Fund*[398]—and the consequences that flow from it—seem unobjectionable today because it is commonly accepted, without much analysis, that a constitutional provision necessarily entails a constitutional duty. But the Court's novel recognition of an "implied right of action" under a structural constitutional provision is an odd development in another sense. The reasoning in *Free Enterprise Fund* has the same basic structure as the reasoning supporting the recognition of an implied damages remedy against fed-

395. *See supra* text accompanying notes 135-146.

396. 598 U.S. 175, 180 (2023).

397. *Id.* at 190 (quoting Brief for Petitioner at 36, *Axon Enter., Inc.*, 598 U.S. 175 (No. 21-86)).

398. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010).

eral officers, the holding in *Bivens* from which the Court has retreated. In both, the Court assumed that the constitutional provision imposed a duty; in both, the Court assumed that the breach of that duty generated a power to seek appropriate redress; and in both, the Court reasoned that the breach of that constitutional duty could be remediated with a longstanding remedy available in federal courts.[399] What is bizarre about the divergence is that, while both *Free Enterprise Fund* and *Bivens* seem to depend on that concept of the constitutional duty, the Fourth Amendment seems a much better fit than Article II for the constitutional *tort*.

* * *

This Part intends to offer a few examples of doctrines that could be clarified by distinguishing nullification rules and constitutional duties. Perhaps the distinction makes sense of the boundaries between § 1983 and the federal habeas statute,[400] or of when § 1983 authorizes suits to enforce statutory rights,[401] or of whether a facial or as-applied constitutional challenge is appropriate.[402] These are simply suggestive. The point is that the failure to distinguish between the kinds of legal interests created by the Constitution is a "great[] hindrance[] to the clear understanding" of a series of problems in constitutional law,[403] and asking the simple question whether the Constitution imposes a duty—and on whom—demystifies a number of puzzling doctrines and developments.

But the brief venture beyond constitutional torts further sharpens the normative questions about the legitimacy of constitutional torts.[404] The constitutional duty—and the idea that the breach of these duties demands a commensurate redress—depends on the view that the law's aim is to correct (or prevent) wrongs. But even if that framework makes sense of private law, and even if the framework serves as a model for constitutional torts, how deep into constitutional law does the model extend? Should the doctrine governing Arti-

---

399. *See* Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1872 (2021) ("[T]he same principles that drive the ability of judges to fashion constitutional remedies for prospective relief ought to drive their ability to fashion such remedies for retrospective relief.").

400. *See* Nance v. Ward, 597 U.S. 159, 162-63 (2022); Hill v. McDonough, 547 U.S. 573, 576 (2006); Nelson v. Campbell, 541 U.S. 637, 639-40 (2004).

401. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002); Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Maine v. Thiboutot, 448 U.S. 1, 4 (1980); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 330-32 (2015).

402. For such an argument, see Harrison, *Power*, *supra* note 18, at 502-03.

403. Hohfeld, *supra* note 18, at 28.

404. *See supra* Section III.C.3; *infra* Conclusion.

cle II or the Eleventh Amendment or criminal procedure be thought of as a law of wrongs—and be assimilated into the conceptual structure of constitutional-tort law? Or is there some other model of constitutional law, and can it coexist with the wrongs-based theory of constitutional torts?

CONCLUSION

The doctrine governing constitutional-tort claims is in disarray, and the confusion stems from the Court's vacillation between, or ambivalence about, two competing models of constitutional rights: (1) a framework in which the Constitution operates through nullification rules and (2) a framework in which the Constitution imposes independent duties on officers. The competition between those two frameworks recurs throughout constitutional-tort law, but understanding those frameworks suggests a better analytical model for recognizing and defining the contours of constitutional torts. Embracing the framework of constitutional duties would make the law more coherent, more predictable, and more protective of constitutional rights. What is more, paying attention to the structure of modern constitutional torts makes sense of a series of other developments in constitutional law, including the exclusionary rule, sovereign-immunity doctrine, and the expanding availability of structural constitutional challenges.

The argument can also illuminate the iterative relationship between rights and remedies in constitutional law.[405] As Part II demonstrated, the constitutional duty has emerged as a (partially) dominant conceptual framework for constitutional-tort doctrine.[406] The emergence of constitutional duties had generative force for constitutional remedies, which is manifest in (1) the Court's expanded interpretation of § 1983 to apply to acts taken contrary to law (*Monroe v. Pape*); (2) the permissibility of suits to enforce the dormant Commerce Clause under § 1983 (*Dennis v. Higgins*); (3) the extension of the Eighth Amendment to prison conditions (*Estelle v. Gamble*); (4) the extension of the Establishment Clause to extralegal forms of coercion (*Lee v. Weisman*); (5) the development of the exclusionary rule and its incorporation against the states (*Mapp v. Ohio*); (6) the exception to sovereign immunity for suits to enjoin unconstitutional actions by government officials (*Ex parte Young*); and (7) the

405. For a recent systematic account of the relationship between rights and remedies, see generally Fallon, *supra* note 334.

406. *Cf.* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1819-54 (2012) (discussing how certain legal principles have legal force without a textual basis in the Constitution because they stem from background law that has been left in place by the Constitution).

easy enforcement of structural constitutional provisions (*Free Enterprise Fund* and *Axon*). In each case or line of cases, the emergence of the constitutional duty brings about novel remedies to effectuate the expanded underlying right.

But the development of such remedies has limits. The Court has repeatedly adopted alternative limitations on the scope of relief based on principles unrelated to the internal logic of this system of constitutional duties. For example, the limiting principles under § 1983 are doctrines plucked from the common law of 1871, but those rules do not easily translate, precisely because they were designed to redress breaches of common-law duties rather than constitutional duties. And in the *Bivens* line of cases, the Court does not dispute that the Constitution imposes duties on federal officers, but rather questions the legitimacy of inferring damages remedies—even though that exact argument should preclude the extension of *Ex parte Young* to structural constitutional challenges.[407] Finally, with the exclusionary rule, the Court has limited its application by characterizing its purpose as "deterrence," which means that evidence is excluded not to remediate the breach of a constitutional duty but to deter future Fourth Amendment violations against other defendants.[408]

This is a pattern of conceptual drift, remedial substantiation, and retrenchment. The change to the conceptual structure of the underlying right leads the Court first to develop novel constitutional remedies, then to fold extraneous organizing principles into the doctrine, and then in turn to limit the availability of remedies that were otherwise tailored to redress the breach of the constitutional duty. As a descriptive matter, conceptual retrenchment is perhaps a natural response to developing legal doctrines. As the underlying conceptual structure of the law changes, innovative alternative limitations on the availability of remedies ensure stability, in a concrete sense, by preventing the underlying conceptual developments from causing radical changes to the law on the ground. Imagine, for example, if the Court followed its decision in *Mon-*

407. *See supra* text accompanying notes 69-77, 399. In fact, questioning duties against federal officials would be a more coherent attempt to limit the *Bivens* doctrine. *See supra* text accompanying note 273.

408. Davis v. United States, 564 U.S. 229, 236-37 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." (citing Herring v. United States, 555 U.S. 135, 141 & n.2 (2009); United States v. Leon, 468 U.S. 897, 909, 921 & n.22 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960))). *But see* Re, *supra* note 54, at 1893-1902 (critiquing this rationale). On the other hand, sometimes these novel conceptual understandings of the right, which might serve to justify retrenchment from one perspective, generate novel ideas about how to put the right to use. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1088-90 (2016) (suggesting another "potential approach to deterrence" in which the "exclusionary rule" should be used to "incentivize extrajudicial and systemic governance").

roe v. Pape with decisions rejecting all common-law immunity doctrines.[409] It would have been a serious shock to the development of the law—even more of a shock than the explosion of constitutional-tort litigation that followed *Monroe* anyway. In other words, the fits and starts in the development of the law may be necessary steps as the law "works itself pure."[410] But the fact that those intermediate steps may be practically inevitable does not mean that a particular doctrinal regime ought to remain indefinitely stuck between two competing ways of understanding constitutional rights. The aim should be coherence, perhaps not immediately, but in due time.

Or maybe the ultimate goal should not be coherence of the current framework but something altogether new. The doctrinal departures from the framework of constitutional duties could be improvements, rather than deviations, if the framework's organizing principles are unsound. The concept of the constitutional duty may be embedded within modern constitutional-tort law, but with the constitutional duty is also embedded not just an analogy to private law but to the idea of private law as a tool to correct (and prevent) *wrongs*. Perhaps the concepts proper to the law of wrongs—duty, breach, redress—were thoughtlessly brought over from their proper domain even though they have no bearing on the problems of constitutional law. If the analogy to private law fails, then there would be no obvious reason to talk about constitutional duties and no obvious reason to treat their breach as requiring redress. And if there is no reason to think of the law of constitutional torts as a law of wrongs, then constitutional-tort doctrine should not be refined but reconsidered—and potentially repudiated.

409. *See* Pierson v. Ray, 386 U.S. 547, 558-59 (1967) (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 381-82 (1951) (Douglas, J., dissenting).

410. RONALD DWORKIN, LAW'S EMPIRE 400 (1986).