

COMMENTS

**A BACKDOOR *BIVENS* REMEDY: STATE CIVIL RIGHTS TORTS AND THE  
FEDERAL TORT CLAIMS ACT**

*Aseem Chipalkatti*\*

TABLE OF CONTENTS

I. IDENTIFYING STATE CIVIL RIGHTS TORTS ..... 1120  
    A. *Remedial Variations in State Civil Rights Schemes*..... 1121  
    B. *Private Rights of Action as State Civil Rights Torts* ..... 1123

II. THE FEDERAL TORT CLAIMS ACT AND ITS AMBIT ..... 1125  
    A. *Background and Legislative History*..... 1125  
    B. *Requirements for Successful FTCA Claims* ..... 1128

III. BACKDOOR *BIVENS*: STATE CIVIL RIGHTS TORTS AS  
    CONSTITUTIONAL VIOLATIONS ..... 1130  
    A. *Mechanics and Applications* ..... 1131  
    B. *Challenges* ..... 1135  
        1. *Textualism* ..... 1135  
        2. *Supremacy Clause* ..... 1137

CONCLUSION ..... 1140

Reports of the death of remedies and redress for the injurious acts of federal tortfeasors have been greatly exaggerated, or at least are premature. While the Supreme Court seems intent on continuing to nail the coffin of the

---

\* Aseem Chipalkatti graduated from the University of Pennsylvania Law School in 2021 and Claremont McKenna College in 2015. He is overwhelmingly appreciative of the guidance and assistance of Professor Seth F. Kreimer in completing this Note. This Note was inspired by work done by the ACLU of Washington and conversations with Jennifer Chung in 2018.

erstwhile *Bivens* remedy shut,<sup>1</sup> a unique and largely unexplored interplay between the Federal Tort Claims Act and state civil rights torts offers an alternate course for plaintiffs seeking monetary relief against federal tortfeasors. Such a remedy may be increasingly useful as the expansion of federal policing efforts in the United States—for immigration and other purposes—gives rise to an increasing number of civil rights violations. By changing the focus of a plaintiff’s claim from the Constitutional violation at hand to the civil rights violations they represent—as defined by state tort law—plaintiffs may still have the opportunity for redress via a “Backdoor *Bivens*” claim.

In general, federal sovereign immunity is an absolute bar to suits against the United States, absent a clear waiver of such immunity.<sup>2</sup> In 1946, Congress provided such a waiver for federal tortfeasors in the form of the Federal Tort Claims Act (“FTCA”). The FTCA provides an opportunity for those claiming injury to sue the United States for injurious acts committed by federal employees in the scope of their employment.<sup>3</sup> Liability is determined based on the “law of the place” where the tortious act or omission occurred.<sup>4</sup> Many states have extensive statutory schemes that protect against discrimination in public accommodation and provide private rights of action as an opportunity for redress against tortfeasors.

This Comment argues that the Federal Tort Claims Act permits suit against the United States based on state law theories of tort that would otherwise be phrased in a *Bivens* action. Plaintiffs seeking redress against the federal government for Constitutional violations should claim focus on their injuries as stated by state prohibitions against discrimination in places of public accommodation. By shifting their focus, plaintiffs can still receive compensation for discriminatory and injurious acts by federal tortfeasors without running afoul of the corpse of the *Bivens* doctrine. Relying on state statutory schemes that were meant to universalize constitutional equality similarly avoids any potential scope issues with the Federal Tort Claims Act. Admittedly, such a remedy is limited to states that allow a private right of action for discrimination in public accommodation and do not require state administrative exhaustion before such a right can be exercised. Similarly,

---

<sup>1</sup> See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). The Court’s ruling in *Hernandez* effectively permanently closed the door on the availability of the so-called *Bivens* remedy to obtain monetary relief for violations of federal constitutional rights, save for extremely rare circumstances.

<sup>2</sup> *Price v. U.S.*, 174 U.S. 373, 375-76 (1899) (“It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto.”).

<sup>3</sup> 28 U.S.C. §§ 1346(b)(1), 2671.

<sup>4</sup> *Id.*

this remedy would not aid claimants whose injuries did not stem from discriminatory acts. Yet as avenues of redress against the federal government are slowly but steadily cut off, this backdoor remedy provides at least one small opportunity for compensation.

Part I first identifies the concept of a state civil rights tort and identifies states where private rights of action for their violation exists through a fifty-state survey. Part II illuminates the background and requirements of the Federal Tort Claims Act with an eye to the idea that it was written to be an expansive, unlimited remedy based on state tort schemes. Part III illustrates the workability of the remedy, with special focus on its mechanics. Part III also addresses two potential concerns with the concept and limits the applicability accordingly.

This is not a universal remedy and is limited to just 24 states and the District of Columbia. It does, however, offer at least some succor and redress to ensure persons injured by federal tortfeasors in an era where doors seem to be slamming shut.

## I. IDENTIFYING STATE CIVIL RIGHTS TORTS

In keeping with their status as laboratories of democracy,<sup>5</sup> it is fitting that the fifty states have vastly different approaches to what civil rights protections they enshrine in their statutory schemes. While the rationales for the various approaches may be disparate, the result is the broad ability for states to experiment with a broad swath of civil rights laws—so long as they fall within the general guidelines created by federal statutes and constitutional rights.<sup>6</sup> Accordingly, states like New York now impose civil liability against persons who summon emergency services against members of protected classes when there is no “reason to suspect a violation of the penal law, any other criminal conduct, or an imminent threat to a person or property.”<sup>7</sup>

Alongside civil and criminal enforcement mechanisms, many states have created private rights of action that allow complainants to independently

---

<sup>5</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>6</sup> Cf. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment required the State of Ohio to recognize a same-sex marriage when the marriage was lawfully licensed and performed out of the state).

<sup>7</sup> N.Y. CIV. RIGHTS LAW § 79-N(2) (McKinney 2020).

vindicate civil rights violations. In the realm of civil rights, such private rights have numerous benefits, including incentivizing private attorneys to litigate more civil rights claims<sup>8</sup> and easing the investigatory and financial burden on enforcement agencies in enforcing civil rights laws.<sup>9</sup>

#### A. Remedial Variations in State Civil Rights Schemes

Most states provide such private rights of action by proscribing discrimination in places of public accommodation and allowing private suit for violations thereof. Regulation of public accommodation has a universality in its scope that ensures that a particular protection applies to as broad a swath of people as possible, rather than being limited to unique situations or niche industries.<sup>10</sup> While Title II of the federal Civil Rights Act of 1964 provides a *de minimis* level of civil rights protections however, state public accommodation statutes provide a more diverse tapestry of protected classes and remedial approaches.

However, states vary greatly in what protections they include in their statutory schemes. Five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—only prohibit discrimination against disabled individuals in public accommodations.<sup>11</sup> While the remaining forty-five prohibit discrimination against race, gender, ancestry, and religion, only nineteen go so far as to include age as a protected class.<sup>12</sup>

Greater state-by-state distinction is found in the remedies offered to victims of discrimination in public accommodations. Some states impose criminal penalties in the form of misdemeanors or potential jail time, for instance, while others impose civil penalties after a mandatory tribunal with

---

<sup>8</sup> See, e.g., Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 12-13 (2009) (stating that, according to Senator Kennedy, there is a study showing that “there are scores of cases, which . . . have some merit, that are not being brought because there are *inadequate incentives*, even with attorneys’ fees.”) (internal quotation marks omitted)).

<sup>9</sup> Brief for the United States as Amicus Curiae at 2, *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, No. 97-1125 (3rd Cir. 1997) (“Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States . . . private suits are critical to ensuring optimal enforcement of [the Civil Rights Act of 1964].”).

<sup>10</sup> See, e.g., Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 HAMLINE J. PUB. L. & POL’Y 1, 18-19 (2015) (describing factors that lead to success of Title II).

<sup>11</sup> State Public Accommodation Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 8, 2019) (available at <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>) [<https://perma.cc/72EJ-6ZY3>].

<sup>12</sup> These states are: Connecticut, Delaware, Illinois, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. *Id.*

a “Human Rights” or “Civil Rights Commission.” In some Commission states, the outcome of the administrative process is the exclusive remedy available to complainants, while others merely require administrative exhaustion before a civil action can be filed. In all, there are eleven different pathways for complainants, which can be broadly summarized into one of three groupings, as below:

Comm'n Exists?	Comm'n Remedy Exclusive?	Exhaustion Prerequisite for Civil Action?	Private Right of Action?	Criminal Penalties Available?	Sum	Broad Statutory Scheme
Y	Y				5	<i>No Private Right of Action (18 states)<sup>13</sup></i>
Y	Y			Y	5	
Y				Y	3	
				Y	4	
					1	
Y		Y	Y		6	<i>Exhaustion Required (8 states)<sup>14</sup></i>
Y		Y	Y	Y	2	
Y			Y		16	<i>Private Right of Action (24 states and D.C.)<sup>15</sup></i>
Y			Y	Y	5	
			Y		3	
			Y	Y	1	

Complainants face one of three statutory schemes: (1) no private right of action exists, if any remedy exists, it must be the result of an administrative process; (2) while private rights of action exist, complainants must first fully exhaust their administrative remedies before bringing a claim; and (3) an independent private right of action exists, regardless of the existence of any administrative process.

The first form, of course, is the most restrictive. Here, complainants have no private right to redress in cases of discrimination in public accommodation, relying instead on state criminal or civil administrative

<sup>13</sup> Alabama, Alaska, Georgia, Idaho, Indiana, Iowa, Kansas, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Wyoming. *See supra* note 11.

<sup>14</sup> Arizona, Delaware, Florida, Illinois, Louisiana, New Mexico, Rhode Island, and West Virginia.

<sup>15</sup> Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Kentucky, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. *See supra* note 11.

processes for any form of redress. When such relief comes, it is frequently limited to nominal damages, or injunctive relief. The other two forms are more expansive, allowing complainants to bring suit in state court to obtain monetary or injunctive relief from complained-of discriminatory acts. However, eight states condition such suit on a mandatory exhaustion of administrative process, placing an additional hurdle in the way of legal redress.

*B. Private Rights of Action as State Civil Rights Torts*

These independent rights of action are statutory torts and thus can be envisioned as “state civil rights torts.” These torts are fundamentally equivalent to common-law torts in their interpretation and application by the courts. Definitionally, a tort is a tort if it describes a civil wrong for which a remedy may be obtained, regardless of its font in statutory or common-law text.<sup>16</sup> Admittedly, common-law tort actions have a deep doctrinal grounding, while statutory tort actions are a more recent innovation.<sup>17</sup> However, statutory torts are not a newly birthed sibling of common-law torts, but rather an outgrowth of the same.

The first century of American history looked to judges as “problem-solvers” for the “dizzying pace of social, economic, and technological change” experienced by the new country, in a world with scant legislative action.<sup>18</sup> Of course, this is not to say that federal and state legislatures were silent; instead, judges and the judiciary were seen as the ideal arbiters of societal change—no one judge could fundamentally change an entire system, instead they acted in part with the hundreds of other judges across the country to make steady, but incremental change to the system.<sup>19</sup> This system, especially as applied to tort law, was hardly an innovation, with deep roots in the ancient “writ” system of medieval England.<sup>20</sup>

Statutory torts emerged less in the wake of this system, and more as a response to the changing nature of our judiciary. First, a rapid increase in law-making tied to the New Deal and other similar administrative programs necessitated a greater focus on statutory interpretation within the court

---

<sup>16</sup> See, e.g., *Tort*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>17</sup> GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 n.1 (1982).

<sup>18</sup> GRANT GILMORE, THE AGES OF AMERICAN LAW 35-36 (1st ed. 1977).

<sup>19</sup> CALABRESI, *supra* note 17, at 4-5.

<sup>20</sup> Cf. O.L. McCaskill, *Actions and Causes of Actions*, 34 YALE L.J. 614, 625 n.1, 638 (1925).

system, rather than matters of equity.<sup>21</sup> These laws were increasingly complex, and intended to be statements of law, rather than codifications of common law as promulgated by the courts.<sup>22</sup> Second and equally important was the turn-of-the-century shift in the role of the federal judiciary. For much of its history, the federal judiciary frequently engaged in the creation of a general common law,<sup>23</sup> which frequently included the field of tort law.<sup>24</sup> In 1938, however, the Supreme Court's decision in *Erie Railroad Co. v. Tompkins* rejected this approach, famously stating that "there is no federal general common law."<sup>25</sup> While, of course, courts retained some ability to create federal common law, *Erie* decisively abrogated the ability of federal courts to promulgate general common law, especially as it pertained to tort actions.<sup>26</sup> Given the definitional roles of the legislature and the judiciary,<sup>27</sup> then, courts' role as interpreters, rather than promulgators became more and more central.<sup>28</sup>

Thus, statutory torts and common law torts are siblings, especially as applied by federal courts. While they are certainly distinct in their origin, they operate conterminously, and in an intermixed fashion. The Supreme Court still considers and promulgates general rules of tort liability,<sup>29</sup> and statutory torts remain reflective of attempts to codify common-law tort actions.<sup>30</sup>

---

21 CALABRESI, *supra* note 17, at 5; Mark A Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 959-60 (2014).

22 Geistfeld, *supra* note 21 at 959-60.

23 See generally *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

24 Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890—1917*, 40 U. TOL. L. REV. 931, 947 (2009) ("[B]y the late nineteenth century the federal courts had stretched the 'general' law to include most common-law fields, including . . . torts.").

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

26 See, e.g., *id.* at 79; Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 586 n.8 (2006).

27 See generally *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

28 CALABRESI, *supra* note 17, at 5.

29 See, e.g., *id.*; John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 441-42 (2016) (discussing the case of *Gertz* where the majority of the Court held, "in the modern world, all torts, including the defamation torts, ought to track the contours of the tort of negligence.").

30 See Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 Tort & Ins. L. J. 1, 8-9 (2000) (discussing history of codification movement in the United States during the early nineteenth century).

## II. THE FEDERAL TORT CLAIMS ACT AND ITS AMBIT

### A. Background and Legislative History

The Federal Tort Claims Act finds its roots in the English doctrine that the King can do no wrong.<sup>31</sup> Paradoxically, perhaps, the same doctrine admits that while the King can do no wrong intentionally, he still can provide opportunities for redress for any incidental “wrongs.”<sup>32</sup> This concept eventually emerged in American jurisprudence in the early 19<sup>th</sup> century as sovereign immunity.<sup>33</sup> Perhaps by virtue of the broader post-colonial enterprise, however, the American doctrine focused more on the government’s inability to be sued, rather than a sacred inability to commit a wrong.<sup>34</sup> Absent a legislative enactment waiving this general immunity, federal tortfeasors were thus broadly immunized in the nation’s early history, even when the common law provided for ample relief against analogous private tortfeasors. During this period, claimants against federal tortfeasors were limited to petitioning Members of Congress for private legislation authorizing specific relief.<sup>35</sup>

By the early twentieth century, this process had ballooned to unsustainability, with the private bills consuming inordinate amount of Congressional time, effort, and resources.<sup>36</sup> Moreover, it became impossible

---

<sup>31</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 715-16 (1999) (“Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437-38 (describing the history of the English doctrine that the King was sovereign and thus not open to suit) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*243, \*253)).

<sup>32</sup> *Marbury*, 5 U.S. (1 Cranch) at 163 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”). See generally Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 532 (2003) (discussing the background of suits against the Crown), Herbert Barry, *The King Can Do No Wrong*, 11 U. VA. L. REV. 349, 355-58 (1925) (describing the historical development of petitions Crown’s sovereign immunity in the context of “certain colonial statutes” permitting the same).

<sup>33</sup> Jackson, *supra* note 32, at 523-24.

<sup>34</sup> *Langford v. U.S.*, 101 U.S. 341, 343 (1879) (“It is not easy to see how the first proposition [that ‘the King can do no wrong’] can have any place in our system of government . . . [w]e do not understand that . . . the English maxim has an existence in this country.”); Barry, *supra* note 32, at 358-64.

<sup>35</sup> See, e.g., Gregory C. Sisk, *Litigation with the Federal Government* § 3.2 (2016); Paul Figley, *Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 348-49 (2011) (citing U.S. CONST. art. I, § 9, cl.7 “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

<sup>36</sup> Figley, *supra* note 35, at 350-51.

for Congressional representatives to adequately devote the time and energy necessary to properly adjudicate the claims presented in each private bill.<sup>37</sup> To remedy the issue, Congress made numerous attempts at instituting early versions of what would eventually become the FTCA. In 1929, for instance, a bill giving the Comptroller General to broadly settle and defend claims passed both houses of Congress, only to be pocket vetoed by President Coolidge.<sup>38</sup> Notably, this first attempt rejected the notion of laying out specific rules of law and equity that would govern potential claims. Three subsequent attempts failed to make it out of committee, all with similar rejections of particularized rules and pre-defined bases for claims.<sup>39</sup>

A penultimate attempt at passage, S. 2221, nearly made it fully through the 77th Congress, passing the Senate, and ultimately dying in the House before the end of session. S. 2221 is remarkable in the context of the FTCA for two reasons. First, it marks the final appearance of a negligence standard in the text of proposed tort claim reform.<sup>40</sup> Second, it demonstrates the importance and necessity of tort claim reform in Congress. S.2221 was introduced in the Senate in late 1941 and passed on March 1942—a historical period marked by the attack on Pearl Harbor and the United States declaring war on Japan and Germany, *inter alia*.<sup>41</sup> To that end, tort claim reform became a part of the “national defense effort,” as private bills of “lesser importance . . . consume[d] considerable time and effort,” preventing attention to other bills more crucial to the impending war.<sup>42</sup>

---

<sup>37</sup> *Id.*

<sup>38</sup> Edwin M. Borchard, *The Federal Tort Claims Bill*, 1 U. CHI. L. REV. 1, 2 (1933).

<sup>39</sup> See Alexander Holtzoff, *Tort Claims against the United States*, 25 A.B.A. J. 828 (1939); Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 535-36 n.10 (1947) (“H. R. 7236 was reported favorably by the House Committee on the Judiciary, H. R. Res. No. 2428, 76th Cong., 3d Sess. (1940), and passed the House; but after hearings, the Senate Judiciary Committee did not report S. 2690, and the measure died.”); Note, *Settlement of Tort Claims Against the Government by Private Acts*, 50 Yale L. J. 328, 332 n. 21 (1940).

<sup>40</sup> 88 Cong. Rec. 3174.

<sup>41</sup> *Id.* at 9504-05 (address of President Franklin D. Roosevelt); United States Cong. *Joint Resolution Declaring that a State of War Exists Between the Imperial Government of Japan and the Government and the People of the United States*, 77th Cong. S.J. Res. 116, 55 Stat. 561 (1941); United States Cong. *Joint Resolution Declaring that a State of War Exists Between the Government of Germany and the Government and the People of the United States*, 77th Cong. S.J. Res. 119, 55 Stat. 564 (1941).

<sup>42</sup> 88 Cong. Rec. 313 (1942) (message from President Franklin D. Roosevelt). President Roosevelt’s message sharply criticized the degree to which the private bill system consumed the process of legislating and advocated for a new system for “dispensing justice simply and effectively to tort claimants against the Government.” *Id.* at 314. Notably, the President’s message framed the importance for sweeping tort claim reform as co-equal with national demands related to World War II. *Id.*

The attention given here to the overwhelming nature of the private bill system indicates a deeper focus on divorcing tort claims from the legislative process entirely, rather than merely excluding certain varieties of torts from the legislative process. Indeed, the universal delegation of tort claims from the legislative to the judicial process was a potential poison pill before the Act's passage. While the bill was being considered on the Senate floor, one Senator rose to oppose the bill based on the "unlimited power of suit [it would provide] against the Federal Government," fearing that allowing all claims against the United States to proceed in court would result in "a great many cases, . . . that the courts would hardly be able to function."<sup>43</sup> The Senator's objection, however, seemed overridden by the general idea that universal adjudication of tort claims in the judiciary would ensure more competent adjudication of such claims.<sup>44</sup> Thus was born the FTCA—a small hole in the government's armor of sovereign immunity, borne out of a simple need for legislative efficiency.

While the act was amended for numerous minor reasons in the decades following its enactment, its most substantive change came in the wake of the Supreme Court's decision in *Westfall v. Erwin* in 1988.<sup>45</sup> In *Westfall*, a federal employee who suffered chemical burns while working in a warehouse filed a state-tort claim against his employers for negligently allowing toxic materials to be placed in the warehouse without informing him.<sup>46</sup> In a decision that focused mainly on the question of the absolute immunity of the federal officers involved,<sup>47</sup> the Court ruled that applying official immunity first required a case-by-case analysis of whether the conduct was "discretionary in nature."<sup>48</sup> The Court, acknowledging that it was ill-placed to formulate a general immunity rule, simultaneously invited Congress to provide guidance on the question of absolute immunity for federal employees.<sup>49</sup>

---

<sup>43</sup> 92 Cong. Rec. 6373 (1946) (statement of Sen. Walter F. George).

<sup>44</sup> 92 Cong. Rec. 10029 (1946) (statement of Rep. Mike Monroney) (1946) ("[I]n this claims section every time we have closed the door of admittance of a claim on the floor of Congress we have opened up another door in the administrative departments or in the courts of the land so that those claims can be adequately adjudicated.")

<sup>45</sup> 484 U.S. 292 (1988), *superseded by statute*, Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2679(b)).

<sup>46</sup> *Westfall*, 484 U.S. at 293-94.

<sup>47</sup> Petitioners framed their question presented as one of the degrees of immunity afforded to federal officers for injuries committed under state tort law for their official acts. Brief for Petitioners at \*1, *Westfall v. Erwin*, 484 U.S. 292 (1988) (No. 86-714).

<sup>48</sup> *Westfall*, 484 U.S. at 298-99.

<sup>49</sup> *Id.* at 300.

Congress heeded the Court's call with the Federal Employee Liability Reform and Tort Compensation Act,<sup>50</sup> passed a scant ten months and five days after the *Westfall* decision. Colloquially known as the Westfall Act, the Act grants federal government employees acting within the scope of their employment immunity from common-law causes of action and directs that state law tort claims against federal defendants substitute the United States as a defendant and be converted to an FTCA suit.<sup>51</sup> The main purpose of the Westfall Act is to immunize federal employees from ordinary state common-law tort suits, and to make the FTCA the exclusive remedy for all tort actions against federal employees.<sup>52</sup> Until the Westfall Act, the FTCA was only the exclusive remedy for tort actions resulting from car accidents—federal employees could still be sued under state tort law provisions.<sup>53</sup> Now, the FTCA is the exclusive remedy for injurious acts committed by federal employees acting in the scope of their employment.<sup>54</sup>

#### B. Requirements for Successful FTCA Claims

Prerequisites for a successful Federal Tort Claims Act are informed both by the statutory text and judicial precedent. FTCA plaintiffs initiate their claim by filing an administrative claim with the agency responsible for the alleged tortious conduct within two years of the act in question.<sup>55</sup> The claim must be fully examined and the administrative process fully exhausted before a suit may commence.<sup>56</sup> Claims must state a specific amount of monetary damages,<sup>57</sup> including an estimation of any contemplated future damages yet to accrue.<sup>58</sup>

Substantive liability is limited to injurious acts resulting in personal injury, death, or property damage caused by federal employees' negligent or wrongful acts or omissions.<sup>59</sup> Broadly speaking, damages cannot include pre-

---

<sup>50</sup> Pub. L. No. 100-694, §§5, 6, 102 Stat. 4564-65 (1988) (codified as 28 U.S.C. § 2679(b)-(d)).

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, Gregory C. Sisk, *Litigation with the Federal Government* § 5.6(c)(1) (2016).

<sup>53</sup> 28 U.S.C. § 2679(b) (amended 1988); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 567 (2013).

<sup>54</sup> *Id.* at 569.

<sup>55</sup> 28 U.S.C. §§ 2401(b), 2675(a) (2012).

<sup>56</sup> *Id.*; *McNeil v. U.S.*, 508 U.S. 106, 111 (1993).

<sup>57</sup> 28 U.S.C. § 2675(b) (2012).

<sup>58</sup> *See, e.g.*, *White-Squire v. U.S. Postal Service*, 592 F.3d 453, 458 (3d Cir. 2010) (holding claimant's duty to present a claim for a sum certain includes the obligation to include ongoing medical expenses in such claim).

<sup>59</sup> 28 U.S.C. § 1346(b)(1) (2012).

judgment interest, punitive damages, or recurring payments to claimants,<sup>60</sup> though there is significant nuance to the definition and mechanics of punitive damages and recurring payments.<sup>61</sup> In all valid FTCA claims, the United States is mandatorily substituted as the defendant, as opposed to the tortious employee or agency themselves.<sup>62</sup> Most important for the purpose of this Comment, however, are the “law of the state” and “private person” requirements.

In drafting the FTCA, Congress sought to avoid narrowly defining what torts were redressable under the act, seeking to completely dissolve their administrative burden.<sup>63</sup> Resultantly, the FTCA claims are governed by the “law of the place where the act or omission occurred.”<sup>64</sup> This is strictly construed as adopting the state law of where the act occurred, with a total bar on the use of federal law as the basis for a claim.<sup>65</sup> In substituting the United States into such claims, the FTCA dictates that it shall be held liable in tort “in the same manner and to the same extent as a private individual” would be.<sup>66</sup>

Major exceptions to FTCA liability include if the allegedly tortious act occurred as an element of a federal employee’s discretionary function, or if they were exercising due care in their actions.<sup>67</sup> The FTCA also excepts liability for certain intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>68</sup> Circuit courts are divided if the intentional tort exception includes intentional infliction of emotional distress (IIED) claims, though success of such claims may depend heavily on the nature of the facts in question.<sup>69</sup> As may be expected, the various amendments and opportunities for judicial interpretation of the FTCA have yielded a myriad other guidelines and

---

<sup>60</sup> 28 U.S.C. § 2674 (2012).

<sup>61</sup> See Gregory C. Sisk, *Litigation with the Federal Government* §§ 3.7(c) *Exclusion of Punitive Damages*, 3.7(d) *Unavailability of Continuing Obligations or Periodic Payments* (2016).

<sup>62</sup> 28 U.S.C. § 2679(d)(3) (2012).

<sup>63</sup> See *supra* Section II.A.

<sup>64</sup> 28 U.S.C. § 1346(b)(1) (2012).

<sup>65</sup> See, e.g., *F.D.I.C. v. Meyer*, 510 U.S. 471, 478 (1994).

<sup>66</sup> 28 U.S.C. § 2674 (2012).

<sup>67</sup> 28 U.S.C. § 2680(a) (2012).

<sup>68</sup> 28 U.S.C. § 2680(h) (2012).

<sup>69</sup> See, e.g., Gregory C. Sisk, *Litigation with the Federal Government* § 3.6(d)(5) (2016). See generally David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 389-97 (2011) (explaining the history and the contemporary applications of IIED claims in the FTCA).

exceptions, though their full treatment has been much more judiciously addressed by other scholars.<sup>70</sup>

### III. BACKDOOR *BIVENS*: STATE CIVIL RIGHTS TORTS AS CONSTITUTIONAL VIOLATIONS

A *Bivens* remedy is a judicial creation that recognizes an implied cause of action for individuals whose Constitutional rights are violated by federal officers.<sup>71</sup> As first created in *Bivens v. Six Unknown Agents*, the Supreme Court recognized an implied cause of action for a private plaintiff who alleged his Fourth Amendment rights were violated when six federal agents burst into his apartment in the early morning, manacled him in front of his family, and removed him to a federal courthouse without a warrant or probable cause.<sup>72</sup> In identifying the propriety of such an implied cause of action, the Court took note that “damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>73</sup> Subsequently, the Court recognized a *Bivens* remedy for a Fifth Amendment violation in *Davis v. Passman*,<sup>74</sup> and for an Eighth Amendment violation in *Carlson v. Green*.<sup>75</sup> Here the expansion ended. Over the next two decades, the Court aggressively contracted the *Bivens*<sup>7677</sup> away from the “*ancien regime*” in which *Bivens* emerged.<sup>78</sup> Following the Court’s decision in *Hernandez v. Mesa*, commentators have noted that the doctrine is all but dead and an unlikely avenue for redress for potential aggrieved plaintiffs.<sup>7980</sup>

---

<sup>70</sup> See Gregory C. Sisk, *Litigation with the Federal Government*, §§ 3.2-3.8 (2016).

<sup>71</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971).

<sup>72</sup> *Id.* at 389-90.

<sup>73</sup> *Id.* at 395.

<sup>74</sup> 442 U.S. 228, 248-49 (1979).

<sup>75</sup> 446 U.S. 14, 20 (1980).

<sup>76</sup> See, e.g., *Minnecci v. Pollard*, 565 U.S. 118 (2012) (denying a *Bivens* action for Eighth Amendment violations because of the existence of alternative state tort law remedies); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (declining to extend a *Bivens* remedy against private prisons); *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994) (rejecting “[a]n extension of *Bivens* to agencies of the Federal Government.”).

<sup>77</sup> *Ziglar v. Abbasi*, 582 U.S. \_\_\_, 137 S. Ct. 1843, 1855 (2017).

<sup>78</sup> *Id.* (quoting *Alexander v. Sandoval*, 432 U.S. 275, 287 (2001)).

<sup>79</sup> See, e.g., Cassandra Robertson, *SCOTUS Sharply Limits Bivens Claims—and Hints at Further Retrenchment*, AMERICAN BAR ASSOCIATION: PRACTICE POINTS (Apr. 14, 2020) <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2020/scotus-sharply-limits-bivens-claims-and-hints-at-further-retrenchment/> [https://perma.cc/CH3D-7F9J].

<sup>80</sup> See, e.g., *Bivens Act of 2020*, H.R. 7213, 116<sup>th</sup> Cong. (2020).

*A. Mechanics and Applications*

Until such a codification occurs, the state civil rights torts identified above, deployed within the scope of the FTCA, offer a sort of “backdoor *Bivens*” for potentially aggrieved plaintiffs. Instead of focusing on the Constitutional violations of federal officers, claimants should focus on their tortious acts, as recognized by anti-discrimination in public accommodation statutes. A claim for unlawful search and seizure might instead transform into a claim of discrimination in a place of public accommodation, especially given increased reports of racial discrimination by federal law enforcement, those responsible for enforcing immigration laws.<sup>81</sup>

The ongoing case of *Zelaya v. Hammer* is particularly demonstrative. In this case, plaintiffs working at a Tennessee meat processing plant allege that they were subjected to exceedingly harsh and unconstitutional treatment at the hands of ICE agents conducting an immigration raid by virtue of their being Latino.<sup>82</sup> During the raid, the plant’s white workers were neither detained nor subjected to the same “intrusive and aggressive treatment” as the Latino workers.<sup>83</sup> In bringing suit, plaintiffs alleged, *inter alia*, a Fourth and Fifth Amendment *Bivens* claim against defendant ICE agents, claiming a clear infringement of their Constitutional rights.<sup>84</sup> However, the federal district court dismissed these claims, citing *Ziglar* and *Hernandez* to conclude that a race-based *Bivens* claim would be a new context requiring the expansion of the *Bivens* doctrine, and that the special factors counseled hesitation in so doing.<sup>85</sup>

Recognizing that even the best-argued *Bivens* claim may be a quixotic effort in current jurisprudence, plaintiffs might instead attempt to bring an FTCA claim using a state civil rights tort as the cause of action. Tennessee’s bar against discrimination in places of public accommodation, for instance, allows complainants a private right of action against alleged tortfeasors.<sup>86</sup> Though the point of whether a meat processing plant is a public accommodation is likely to be litigated, precedent shows the plaintiffs would

---

81 See, e.g., Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania> [<https://perma.cc/UR35-3QJL>] (describing instances of Immigrations and Customs Enforcement officers relying heavily on racial profiling to enforce immigration laws).

82 Complaint at 2, *Zelaya v. Miles*, No. 3:19-CV-00062 (E.D. Tenn., Feb. 21, 2019) (Dkt. No. 1).

83 *Id.* at 3.

84 *Id.* at 25-29.

85 *Zelaya v. Hammer*, No. 3:19-CV-00062, 2021 WL 424434 at \*17-20 (E.D. Tenn., Jan. 31, 2021).

86 TENN. CODE §§ 4-21-501 & 4-21-311(a) (2019); see also *supra* Section I.A.

have a winning argument.<sup>87</sup> A suit against federal tortfeasors, as in *Zelaya*, would rely on this statute as the cause of action under the FTCA as a potential cause of action. While the constitutional right in question may not be addressed, and damages would be limited to those incurred by virtue of the tortious act, as opposed to the punitive and injunctive relief available under *Bivens*, this approach would at least allow some avenue of redress against federal tortfeasors.

This theory has already been tested semi-successfully. In California, Guadalupe Robles Plascencia was detained by her local police department under an immigration detainer<sup>88</sup> when she arrived to retrieve her property after a car accident<sup>89</sup> after which she was arrested and detained by ICE agents.<sup>90</sup> During her detention, ICE agents taunted and physically restrained her; refusing to listen to her pleas that she was a U.S. citizen.<sup>91</sup> At one point, an agent indicated that he could check to see if she was a U.S. citizen, but that “he knew she was lying,” and needn’t do so.<sup>92</sup> After her daughter arrived with her U.S. passport, agents finally released Plascencia after a stream of expletives.<sup>93</sup>

Shortly after her release, Plascencia filed suit in the Central District of California alleging eleven causes of action including two for infliction of emotional distress (IIED) (first intentional, and then negligent in the alternative), and then a violation of California’s laws against discrimination in public accommodation against the ICE agents under the FTCA. In considering a motion to dismiss, the court handily dismissed elements of the claim that were premised in federal constitutional law.<sup>94</sup> However, the court

---

87 TENN. CODE § 4-21-102 (15) (2019) (“[p]laces of public accommodation, resort or amusement’ includes any place, store or other establishment . . . that supplies goods or services to the general public or that solicits or accepts the patronage or trade of the general public. . . .”). The distinction between places that supply goods or services to the general public and those that accept their patronage or trade indicates that a processing plant would fall under the statute’s textual ambit. See, e.g., *Arnett v. Domino’s Pizza I, L.L.C.*, 124 S.W 3d 529, 538-39 (Tenn. Ct. App. 2003).

88 Immigration, or ICE, detainers are “written request[s] that a local jail or other law enforcement agency detain an individual for an additional 48 hours after his or her release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes.” *Immigration Detainers*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> [<https://perma.cc/G95B-R9QL>] (last visited May 14, 2021).

89 *Plascencia v. U.S.*, 2018 WL 6133713 at \*3 (C.D. Cal. May 25, 2018).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.* at 13-14.

denied the motion for the state law claims alleging discrimination, noting that the FTCA's waiver of sovereign immunity delineates between state and federal constitutional torts in allowing federal tort liability.<sup>95</sup> Interestingly, the IIED claim also survived a motion to dismiss, elucidating a potentially broad applicability of state constitutional tort law to vindicate longer-term monetary damages (e.g., trauma-related therapy) against the federal government, rather than just short-term pecuniary damages.<sup>96</sup> Shortly thereafter, the government settled their claims before the theory could be fully tested at trial.<sup>97</sup>

A parallel claim has been at least partially vindicated in the District of Puerto Rico,<sup>98</sup> though a motion to alter the initial judgment denying the United States' motion to dismiss was altered based on a failure to exhaust administrative remedies—a key danger of this proposed solution.<sup>99</sup> Contemporarily, this Comment was inspired by the case of Andres Sosa-Segura in Washington State, who was removed by ICE from a Greyhound bus in Spokane on presumably discriminatory grounds.<sup>100</sup> Mr. Sosa-Segura's case is set for trial in the Eastern District of Washington in June of 2021, and will test if the ICE officers in question were acting in the scope of their duty in a manner to *necessarily* subject them to “Washington law pertaining to an arrest made by a law enforcement officer.”<sup>101</sup> Litigated in the same district (and adjudicated by the same judge) is a similar claim by comedian and political asylee Mohanad Elshieky, who was also pulled off a Greyhound bus in the same Spokane terminal as Mr. Sosa.<sup>102</sup> Mr. Elshieky similarly claims discrimination in a place of public accommodation, as contemplated by the Washington Law Against Discrimination, as he was humiliated by Customs and Border Patrol Agents by virtue of his status as an asylee.<sup>103</sup> Again in Mr. Elshieky's case, the court took a dim view of the United States' sovereign immunity framing, focusing more on its argument

---

<sup>95</sup> *Id.* at 12.

<sup>96</sup> *Id.* *But see* discussion *supra* note 69 and accompanying text.

<sup>97</sup> Notice of Settlement, No. 5:17-CV-02515, *Id.* (C.D. Cal. Dec. 19, 2017) (Dkt. No. 91).

<sup>98</sup> *Bonilla-Olmedo v. United States*, 677 F. Supp. 2d 511, 516 (D.P.R. 2009).

<sup>99</sup> *Opinion and Order*, No. 3:08-CV-01842, *Id.* (D.P.R. Aug. 4, 2008) (Dkt. No. 54; *see* discussion regarding the Supremacy Clause *infra* Section III.B(ii)).

<sup>100</sup> Complaint, *Sosa Segura v. United States*, No. 2:19-CV-00219 (E.D. Wash. June 25, 2019) (Dkt. No. 1).

<sup>101</sup> Order Denying Plaintiff's Motion for Summary Judgment, *Id.* (Dkt. No. 92).

<sup>102</sup> *See* Richard Read, *This Comedian Says Border Patrol Pulled Him Off a Bus. Now He's Suing the Government*, L.A. TIMES (Feb. 21, 2020), <https://www.latimes.com/world-nation/story/2020-02-21/comedian-border-patrol-libya-asylum> [<https://perma.cc/U8VP-TJNZ>] (stating that Mr. Elshieky suffered from “significant humiliation” from the enforcement officers' treatment).

<sup>103</sup> *Id.*

whether the Spokane Intermodal Bus Terminal is a public accommodation.<sup>104</sup>

This unique and novel theory of redress meets the statutory and common-law requirements for a successful FTCA claim, as well as broader theories surrounding suits against the federal government. For one, the presumptive bar on state criminal liability against federal officers<sup>105</sup> is not implicated, as plaintiffs will bring their own private, civil claims, regardless of any potential state prosecutions. Similarly, while the Westfall Act does continue to bar independent state-law constitutional torts against federal officers, as may have occurred pre-*Bivens*, this issue is not implicated here.<sup>106</sup> While the use of civil rights tort schemes here is an intentional shadow for broader federal Constitutional issues, they still are valid state statutory torts that are intended to serve as the basis for FTCA liability. The Westfall Act merely bars direct suits using state civil rights torts as the cause of action, rather than using them as the basis for liability under the FTCA more broadly. As stated, this approach has already been used effectively in California, Puerto Rico, and Washington State.<sup>107</sup>

There are two broad limitations. First, there must be some clear invidious intent to discriminate while acting in an official capacity, as is currently the question in *Sosa Segura*.<sup>108</sup> Importantly, this question will be tested under the usually broader state analyses of intent, rather than Fourth Amendment

---

<sup>104</sup> Compare *Elshieky v. United States*, No. 2:20-CV-00064-SAB, 2020 WL 3440557 at \*4-5 (E.D. Wash., June 23, 2020) with *Segura v. United States*, 418 F. Supp. 3d 605, 610 (E.D. Wash. 2019) (“The United States urges this Court to skip the analogous conduct analysis and instead accept a blanket rule that the United States has not waived its sovereign immunity for state civil rights torts.”).

<sup>105</sup> See, e.g., *Idaho v. Horiuchi*, 253 F.3d 359, 362 (9th Cir. 2001) (“If federal agents are to perform their duties vigorously, however, they cannot be unduly constrained by fear of state prosecutions.”), *vacated as moot*; *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) (“[I]f the prisoner is held in the state court to answer for an act which . . . it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State . . . .”); but see *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906) (holding that federal agents acting unlawfully in the scope of their duties may be tried criminally in state courts).

<sup>106</sup> See, e.g., Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2020 CATO S. CT. REV. 263, 279 (2021).

<sup>107</sup> See, e.g., *Segura v. United States*, 418 F. Supp. 3d 605, 613 (E.D. Wash. 2019); *Plascencia v. United States*, 2018 WL 6133713 at \*13-14 (C.D. Cal. May 25, 2018); *Bonilla-Olmedo v. United States*, 677 F. Supp. 2d 511, 516 (D.P.R. 2009).

<sup>108</sup> See *supra* note 99.

analyses that may be less favorable to plaintiffs.<sup>109</sup> A deeper limit is that states must have some form of civil rights statute that contemplates private action against tortfeasors. This requirement does have a narrowing import on this approach—as identified above, not all states have such a private right of action.<sup>110</sup> Based on this, it might seem that this remedy is only applicable in the 33 states identified above. However, as will be explained below, states that require administrative exhaustion are also barred as potential venues, limiting the ambit to 24 states and the District of Columbia.<sup>111</sup>

### B. Challenges

This approach is hardly unassailable, given that it represents a novel and largely untested backdoor for Constitutional claims more broadly. There are three broad and existential challenges to this proposal. First, it is possible that government attorneys seeking to avoid liability might argue that such a route to redress exceeds the plain meaning of the FTCA. Mechanically, this approach also implicates Constitutional Supremacy concerns, both by virtue of an already extant federal statutory scheme for civil rights violations, and because of difficulties with subjecting the government to a state administrative adjudication. While the textual analysis is dismissible, the Supremacy concerns do limit the scope and applicability of this approach in particular states.

#### 1. Textualism

The Federal Tort Claims Act is an explicit waiver of federal sovereign immunity that does not contemplate an exception for this avenue of redress. In understanding the scope of an explicit waiver of sovereign immunity, courts use two major canons of statutory interpretation to guide their analysis.<sup>112</sup> First, such waivers must be expressed unequivocally in the statutory text.<sup>113</sup> Second, even if these waivers are explicit, their import is to be “construed strictly in favor of the sovereign.”<sup>114</sup> Combined, these provide the general rule that any waiver of sovereign immunity, must be sufficiently

---

<sup>109</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (“[E]ven if it be assumed that such referrals [to secondary screening stations at border checkpoints] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.”).

<sup>110</sup> See *supra* note 13.

<sup>111</sup> See *supra* note 15.

<sup>112</sup> See, e.g., Gregory C. Sisk, *Litigation with the Federal Government* § 2.5, 94 (2016).

<sup>113</sup> *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-37 (1992).

<sup>114</sup> *McMahon v. United States*, 342 U.S. 25, 27 (1951).

grounded in text and legislative purpose to overcome a bias towards immunizing the state from liability.<sup>115</sup>

The FTCA is clear in its unlimited warrant for the use of state tort schemes as the basis of liability. The point and purpose of this waiver is to allow the Act to “build upon the legal relationships formulated and characterized by the States” in a manner “exemplary of the generally interstitial character of federal law.”<sup>116</sup> The FTCA only asks if a private actor would be similarly liable to the plaintiff according to state law, and ignores any cloak of immunity that federal officers may otherwise be garbed in, even if the conduct in question is uniquely governmental in function.<sup>117</sup> In *Indian Towing Co., Inc. v. United States*, one of the first Supreme Court cases to examine and discuss the FTCA, the Supreme Court held that the private person analogy is grounded in the finding that a private person in “like circumstances” would be liable.<sup>118</sup> The Court explicitly rejected the idea that the private person analogy requires the “same” conduct, otherwise “there would be no liability for negligent performance of uniquely governmental functions.”<sup>119</sup> This logic indicates that federal law enforcement officers may still be liable for tortious acts, as evinced by the Act’s statutory scheme.<sup>120</sup>

---

<sup>115</sup> Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1249-50 (2014) (“even if the statutory text is most naturally read to allow recovery by a civil plaintiff against the United States under the circumstances alleged in a complaint, a minimally plausible reading of the statute that instead favors the government is to be preferred.”).

<sup>116</sup> *Richards v. United States*, 369 U.S. 1, 7 (1962).

<sup>117</sup> *Indian Towing Co., Inc. v. U.S.*, 350 U.S. 61, 64 (1955).

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> *Id.* (internal quotation marks omitted). The Court goes on to refer to the idea of requiring exactly parallel private activity to impose liability as “bizarre.” *Id.* at 67.

<sup>120</sup> See, e.g., *Jones v. United States*, 773 F.2d 1002 (9th Cir. 1985) (“[S]tatutory and decisional law governs the determination of the United States’ liability under the FTCA.”); *Coverage Issues under the Indian Self-Determination Act*, 22 Op. O.L.C. 65, 73 n.12 (1998) (“[A]lthough it is often stated that the FTCA covers ‘common law torts,’ courts have held that liability under the FTCA is determined by state statutory as well as common law.”). 28 U.S.C. § 2680 provides exceptions to federal liability under the FTCA, including a carveout for intentional torts committed by federal tortfeasors. See *id.* at § 2680(h). However, the same clause goes on to specifically waive immunity for federal law enforcement officers committing the same torts—indicating contemplation that federal law enforcement officers should be considered in the scope of liability. Cf. *Liranzo v. United States*, 690 F.3d 78, 80, 94-95 (2d Cir. 2012) (concluding that federal immigration officers erroneously detaining a United States citizen was analogous to “a person who . . . places someone under arrest for an alleged violation of the law—a so-called ‘citizen’s arrest.’”); *Bolduc v. United States*, 402 F.3d 50, 57 (1st Cir. 2005) (finding federal agent was not liable for failing to provide exculpatory evidence to federal prosecutors because private persons are not mandated to provide exculpatory evidence).

This characterization comports with the basic precepts of the ordinary meaning rule<sup>121</sup>—that is, classifying a state civil rights tort within the general boundaries of FTCA liability would comport with the commonsense meaning of the statutory text,<sup>122</sup> and does not lead to an absurd result.<sup>123</sup> Accordingly, the FTCA’s clear waiver certainly includes state civil rights torts. While this waiver carries certain conditions,<sup>124</sup> none relate to the type or quality of torts that may form the basis of a cause of action.

## 2. *Supremacy Clause*

To some extent, the Supremacy Clause is implicated by this approach. First, the existence of a parallel civil rights statutory scheme—42 U.S.C. § 1983—may preempt state civil rights statutes. At the same time, subjecting federal officials to state administrative processes may violate the Supremacy Clause. While the former is clearly not a valid limitation, the latter does impose some further restrictions on the applicability of this remedy.

The federal sibling of state public accommodations statutes, 42 U.S.C. § 1983, explicitly prohibits discrimination or segregation “on the ground of race, color, religion, or national origin” in places of public accommodation.<sup>125</sup> This prohibition is accompanied with a federal guaranteed private right of action.<sup>126</sup> Moreover, 42 U.S.C. § 1983 allows for aggrieved plaintiffs to use federal civil rights violations as a basis of action for monetary relief.<sup>127</sup>

Neither the existence of these two programs, nor Supremacy Clause jurisprudence generally, however, cuts against the availability of the proposed remedy. First, private claims are limited in scope to injunctive relief—monetary damages are foreclosed by the statute.<sup>128</sup> Even if a plaintiff

---

<sup>121</sup> WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 41 (2016).

<sup>122</sup> *See, e.g.,* *Smith v. United States*, 507 U.S. 197, 201 (1993) (basing the definition of a “country” on the “commonsense meaning of the term” for the purposes of an FTCA action).

<sup>123</sup> *See, e.g.,* *Republic of Iraq v. Beatty*, 556 U.S. 848, 861 (2009) (avoiding a statutory reading with an “absurd” result).

<sup>124</sup> § 2674’s restrictions (1) keep the United States immunized with regard to interest prior to judgment or for punitive damages, except in cases of death; (2) allow the United States to assert any defense that otherwise would have been available to the employee whose act or omission gave rise to the claim; (3) as well as any others that it is normally entitled to; and (4) allow the Tennessee Valley Authority certain special immunities. *See also supra* Section II.B.

<sup>125</sup> 42 U.S.C. § 2000a(a) (1964).

<sup>126</sup> 42 U.S.C. § 2000a-3 (1964).

<sup>127</sup> 42 U.S.C. § 1983 (1964).

<sup>128</sup> *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

were to attempt to enjoin a federal program through the injunctive relief provided by this statute, they would likely face standing issues.<sup>129</sup> Second, § 1983 suits are limited to those officers acting “under color of state law”—given that this remedy seeks to redefine a damages remedy against federal officers, § 1983 would not be helpful.

Despite parallel federal statutes, the Supremacy Clause and preemption doctrine would not serve as a bar to this sort of action. Preemption only serves as a bar when there is some form of direct conflict between a federal and state statute.<sup>130</sup> Here, no such conflict exists. The FTCA and federal Constitutional protections are judicially-recognized as fully separate parallel spheres.<sup>131</sup> It is long recognized that state schemes that define the right of state citizens that may go beyond the scope of federal civil rights provisions are perfectly acceptable in the Supreme Court’s eyes.<sup>132</sup>

Less clear is if states that require plaintiffs to exhaust their claim in a state administrative process could be venues for this form of redress.<sup>133</sup> As a baseline, it is settled that federal officers may be sued for money damages in state court.<sup>134</sup> However it is less clear if federal officers may be enjoined by a state administrative or judicial proceeding.<sup>135</sup> Accordingly states that

---

<sup>129</sup> *Cf.* *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (“[t]he reasonableness of . . . fear [of reoccurring conduct] is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct” and “subjective apprehensions” are not enough to meet that standard). *But see* *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184-85 (2000) (an “entirely reasonable” proposition that an event will reoccur systematically is proof enough for injury in fact).

<sup>130</sup> *See, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (“[W]e have long recognized that state laws that conflict with federal law are without effect.”) (internal quotation omitted); *Felder v. Casey*, 487 U.S. 131, 153 (1988) (emphasizing that a state law that is “inconsistent in both purpose and effect” with a federal law “must give way to vindication of the federal right . . .”).

<sup>131</sup> *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (“[W]hen Congress amended [the] FTCA in 1974 . . . the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.”).

<sup>132</sup> *Cf. Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] State is free as a matter of its own law to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards.”).

<sup>133</sup> *See* CALABRESI, *supra* note 17.

<sup>134</sup> *See, e.g.*, *Leroux v. Hudson*, 109 U.S. 468 (1883); *Sharpe v. Doyle*, 102 U.S. (12 Otto.) 686 (1881); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1866); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1852). *See also* 17A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4213 (3d ed. 2021 Update), at n.2 (collecting the above cases).

<sup>135</sup> *Cf. Brooks v. Dewar*, 313 U.S. 354, 359 (1941) (questions of state courts enjoining federal officers “have rarely been free from difficulty and it is not an easy matter to reconcile all the decisions of the court in this class of cases.”) (internal quotations omitted). *See also*, Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1394 (1964) (“[T]he Supreme Court has never decided the matter—although it might have done so had it not thought the question so difficult and of such ‘grave consequence.’”) (citing *Brooks* at 360).

require exhaustion of a state administrative process before plaintiffs have a private right of action may not be able to serve as venues for this particular theory.

Similarly, settled—albeit, aged—caselaw firmly states that state courts may not interfere within the actions of the federal government in the execution of federal law, based on principles of supremacy.<sup>136</sup> However, this does not rest on firm enough ground to be directly applicable to a potential state administrative hearing over a claim of discrimination in a public accommodation. First, the theory rests on principles outlined in *Ableman v. Booth* and *In re Tarble*—cases examining the authority of a state court to enforce a writ of *habeas corpus* on the United States military.<sup>137</sup> Not only is the *habeas* writ not implicated in this theory, but also the grounds upon which *Ableman* and *In re Tarble* were decided appear to be historically shaky.<sup>138</sup>

Even notwithstanding *Ableman* and *In re Tarble*, it is not apparent that requiring the federal government to appear in state administrative proceedings would fall afoul of any jurisdictional or Constitutional edict. While a representative of the federal government would be required to appear on behalf of the federal tortfeasor, this is hardly an injunction, such that it may fall afoul of a potential problem with enjoining federal officers. Moreover, to the extent that the end outcome of these administrative proceedings is necessarily money damages,<sup>139</sup> there appears to be clear constitutionally-derived precedent indicating that this approach would be valid.<sup>140</sup> On the other hand, this may be a moot point, as the FTCA requires that federal district courts have *exclusive* jurisdiction over tort claims brought under its ambit.<sup>141</sup> Certainly, a state administrative proceeding runs contrary to that. More broadly, it is possible that a broader reading of the Supremacy Clause<sup>142</sup> and the possibility for annoyance and embarrassment of federal

---

<sup>136</sup> *In re Tarble*, 80 U.S. 397, 407 (1871) (“Whenever, therefore, any conflict arises between the enactments of the two sovereignties [states and the national government], or in the enforcement of their asserted authorities, those of the National government must have supremacy . . . .”); *Ableman v. Booth*, 62 U.S. 506, 524 (1858) (“No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him . . . .”).

<sup>137</sup> See *supra* note 136.

<sup>138</sup> See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 430-37 (7th ed. 2015) (describing numerous issues with the holdings of *Ableman* and *In re Tarble*).

<sup>139</sup> As is the case in the states described *supra* note 14.

<sup>140</sup> See *Richards*, 369 U.S. at 6.

<sup>141</sup> 28 U.S.C. § 1346(b)(1).

<sup>142</sup> See discussion of the Supremacy Clause and state civil rights statutory schemes *supra* Section II.B(ii).

officers in state court would caution against such a procedure.<sup>143</sup> Finally, and most shallowly, it could merely be improper that questions this “important” be left to a state administrative proceeding.<sup>144</sup> Such a topic is ripe for future research and exploration. At minimum, however, states with mandatory administrative exhaustion may be inappropriate venues to test such backdoor *Bivens* claims.

### CONCLUSION

This is a particularly salient moment in which to consider civil rights remedies against federal tortfeasors. The recent increase in federal immigration enforcement, for example, has raised a host of allegations and lawsuits based on federal officers’ violating civil rights.<sup>145</sup> Of course, absent congressional action to codify the *Bivens* doctrine, it is unlikely that discrimination in and of itself will be actionable. Using the FTCA to vindicate civil rights through the lens of state law, therefore, could be an invaluable tool in preventing discrimination by federal officers, especially in places of public accommodation.

Put simply, the use of the FTCA outlined in this Comment provides a fresh path for monetary damages against federal tortfeasors in an era where they continue to narrow or disappear. Persons in the 24 states mentioned above and the District of Columbia have a new path to ensure that when their state civil rights are violated by federal employees or officers, they may at least seek some form of financial redress against the officers involved. Until and unless *Bivens* is codified, this may be limited in scope, but at least allows some redress against the federal government. Such an approach might have paid dividends for Esperanza Bonilla-Olmedo, and likely already has for Guadalupe Plascencia.<sup>146</sup> It may yet pay dividends for Andres Sosa-Segura and Mohanad Elshieky. At the very least its application may allow, as Justice

---

<sup>143</sup> *In re Tarble*, 80 U.S. at 408.

<sup>144</sup> Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officials*, 73 YALE L.J. 1385, 1403 (1964) (“[Federal] officials are just too important to be left to the mercy of state judges.”).

<sup>145</sup> See, e.g., *Hernandez v. Mesa* (examining whether a U.S. Border Patrol agent violated a child’s Fourth and Fifth Amendment rights); cf. Jonathan Levinson, *New Civil Rights Lawsuit Filed Against Federal Law Enforcement for Actions in Portland, OR*, PUB. BROAD. (July 21, 2020), <https://www.opb.org/news/article/federal-police-law-enforcement-portland-oregon-civil-rights-lawsuit/> [https://perma.cc/L3P2-BDP9] (discussing a lawsuit examining whether federal law enforcement officers violated Tenth Amendment rights by using violent measures to control protesters); Caitlin Dickerson, *Migrant Children Are Entitled to Toothbrushes and Soap*, FEDERAL COURT RULES, N.Y. TIMES (Aug. 15, 2019) <https://www.nytimes.com/2019/08/15/us/migrant-children-toothbrushes-court.html> [https://perma.cc/C55B-GWRB].

<sup>146</sup> See *Plascencia v. United States*, 2018 WL 6133713 (C.D. Cal. May 25, 2018).

Brennan put it, for the “protective force of state law”<sup>147</sup> to guarantee us the full realization of our rights by providing at least some small avenue of redress against federal tortfeasors.

---

<sup>147</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).