

TORT LOGICS FOR STATE CONSTITUTIONAL INJURIES

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When violations of the Federal Constitution cause injury, § 1983 provides plaintiffs with a path to seek redress. But state constitutions usually lack a § 1983 analogue, leaving state courts to decide whether their state constitution contains an implied private right of action. Different courts have reached different conclusions: At last count, sixteen states had upheld an implied right of action for at least some state constitutional violations, while approximately half of the states deny that any such private right of action exists. In coming to their differing conclusions, however, virtually all of these courts agree that the availability of tort law as an alternative source of remedy is an important consideration. From there, some courts insist that common law tort claims are sufficient to vindicate state constitutional rights, and others hold they are not.

This Essay makes two interventions into this debate. First, it argues that common law tort claims capture different concerns than state constitutional claims. Common law tort targets the relationship between private actors, and state constitutional tort targets the relationship between the government and its people. State constitutional torts thus have a decidedly political character. A state constitutional claim marks the wrong as a political one impacting the state-citizen relationship, and this marking serves important public purposes: It alerts the citizenry to political deprivations and it deters governments from perpetuating them. State constitutional torts should thus be understood to occupy a distinct role in any state remedial regime.

Second, this Essay argues that a majority of state tort claims acts already provide a convenient framework for separating wrongs that belong in the realm of common law tort from political wrongs that belong in the state constitutional sphere. State tort claims acts are generally designed to create liability for the government as a private person, and to push all other claims—in which the government acts “governmentally”—out. This Essay argues that these “governmental” claims that fall outside state tort claims acts do not automatically revert to the world of sovereign immunity, as is typically assumed, but instead belong to the realm of state constitutional tort. In other words, rather than having significant overlap, state constitutional tort may begin where state tort claims acts end.

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INTRODUCTION

Although § 1983 provides a path for those injured by federal constitutional violations to seek compensation for their injuries, most states lack an analogous provision to govern state constitutional violations.¹ In these states, courts accept that individuals harmed by state constitutional violations can generally seek injunctive relief,² but disagree

1. Currently, “only eight states have conferred a statutory right analogous to Section 1983 to pursue constitutional tort litigation.” Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 759 (2021). The Indiana Supreme Court, in *Cantrell v. Morris*, detailed some of the history of these analogs, noting that:

The first . . . was enacted in Massachusetts in 1979. It was known as “little 1983” or the “baby civil rights bill.” See MASS. GEN. LAWS ANN. ch. 12, §§ 11H–I (West 1996). At least three other states have enacted civil rights statutes similar in scope to 42 U.S.C. § 1983. See ARK. CODE ANN. § 16–123–101 to 108 (1995); CAL. CIV. CODE § 52.1(b) (West 1997); ME. REV. STAT. ANN. tit. 5, § 4682 (1996). Nebraska has enacted a limited right of action for violations of state constitutional rights. See NEB. REV. STAT. § 20–148(a) (1996).

849 N.E.2d 488, 493 n.3 (2006) (cleaned up). The current list of states with § 1983 analogues is “Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico.” See Reinert, Schwartz & Pfander, *supra*, at 760 & n.93. Of additional note, “in 2021, New York City became the first city to enact legislation that creates a cause of action for excessive force and unlawful searches and seizures and bars assertion of a qualified immunity defense for these claims.” *Id.* at 742.

2. See, e.g., Michael Bowers, *The Implied Cause of Action for Damages Under the Idaho Constitution*, 56 IDAHO L. REV. 339, 339 (2021) (noting that “[i]t is well-established that plaintiffs alleging violation of their federal or state constitutional rights may sue for an injunction to halt continuing unconstitutional government action”); see also *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 869 (Mich. 2022) (noting that “[g]enerally enforcing constitutional rights through injunctive relief is uncontroversial, despite the lack of an explicit constitutional authorization for such a cause of action”).

on whether damages are possible.³ Approximately half of the courts considering the issue decline to find an implied private right of action and hold that damages are not available for state constitutional violations,⁴ while the other half find a right of action and allow damages for at least some state constitutional violations.⁵ Although they reach differing conclusions, nearly all state courts agree that doctrines of common law tort bear importantly on the issue.⁶

This Essay argues that common law tort claims are not first-best stand-ins for state constitutional claims.⁷ Following this Introduction, this

3. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 7.02 (4th ed. 2008) (explaining that “the most frequent uses of state constitutional rights are as defenses to criminal or civil liability or as grounds for injunctive relief, rather than as a basis for recovering damages” (footnote omitted)).

4. As of 2021, there were:

twenty-three states in which courts have explicitly rejected an implied cause of action under their constitutions: Alabama, Alaska, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Washington, and Wyoming. In an additional three states, no cause of action has been recognized, but courts consider it an open question whether it is appropriate to do so: Arizona, Nevada, and South Dakota.

Reinert, Schwartz & Pfander, *supra* note 1, at 759.

5. Of the twenty-four states where the possibility of an implied right of action has not been explicitly rejected, “courts in sixteen have adopted only some form of implied right of action (IROA) to allow constitutional tort claims, at least in some situations, to proceed”:

Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, New York, North Carolina, Oklahoma, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. . . . Other than North Carolina, all these states have significantly limited the reach of the implied cause of action. For example, Rhode Island, Texas, and Utah generally limit any implied cause of action to provisions that are self-executing, which tends to exclude Bill of Rights-type provisions. And Louisiana, Maryland, Michigan, Mississippi, Oklahoma, Virginia, West Virginia, and Wisconsin have recognized implied cause of action solely to enforce due process, excessive force, and/or search and seizure violations.

Id. at 759 & n.91. Although Alabama’s state constitution states that “the State of Alabama shall never be made a defendant in any court of law or equity,” ALA. CONST. art. I, § 14, the Alabama Supreme Court has recognized several types of relief that do not violate the constitutional prohibition against suing the state. These exceptions, which follow, apply only when the litigant names a state employee in his or her official capacity and seeks relief other than money in: “(1) actions brought to compel state officials to perform their legal duties; (2) actions brought to enjoin state officials from enforcing an unconstitutional law; (3) actions to compel state officials to perform ministerial acts; and (4) actions brought under the Declaratory Judgment Act.” *Ross v. Alabama*, 893 F. Supp. 1345, 1555 (M.D. Ala. 1995) (quoting *State Dep’t of Hum. Res. v. Kelly*, 623 So. 2d 738, 740 (Ala. Civ. App. 1993)).

6. See *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996).

7. That said, Nancy Leong points out that:

Essay begins Part I by explaining how the availability of common law torts relates to the question of whether a state constitution contains an implied right of action in the first place. When considering claims that state constitutions contain an implied right of action, under which a complainant can receive a remedy of damages, three points of entry dominate judicial analyses: Courts take either a *Bivens*-style approach, a *Restatement (Second) of Torts* Section 874A approach, a common law precursors approach, or an amalgamation of all three.⁸ All of these approaches, however, require courts to consider the existence of alternative causes of action and remedies, like common law tort, as part of their analyses.⁹

In Part II, this Essay explains why courts should reject the idea that common law torts are an adequate substitute for state constitutional claims. State constitutional injuries are distinctly political in nature, in a way that common law tort does not adequately capture. Common law tort targets the relationship between private actors, and state constitutional tort targets the relationship between the government and its people. A state constitutional claim marks the wrong as a political one impacting this state-citizen relationship, and this marking has important public purposes: It alerts the citizenry to political deprivations and it deters governments from perpetuating them.

Conveniently, as this Essay explains in Part III, most state tort claims acts arguably already separate these “political” claims, which belong in the realm of potential state constitutional tort liability, from those which fairly belong in the world of common law tort. Most state tort claims acts are explicitly curated to create liability for the government as a private person, and push all other claims—in which the government acts “governmentally”—out. This Essay argues that these “governmental” claims belong not in the realm of sovereign immunity, as is typically assumed, but instead in the realm of potential liability for

the fact that state tort law does not provide a complete substitute does not mean that it cannot be of value in enforcing the content of constitutional rights. This is particularly true of attempts to hold municipalities liable, given that other enforcement mechanisms are precluded or severely restricted by features of § 1983 litigation unrelated to the underlying constitutional right. Even if a state tort remedy is available for only a subset of constitutional claims and in only a subset of states, tort law might complement Section 1983 by providing compensation for, and deterrence of, conduct that violates constitutional rights.

Nancy Leong, *Constitutional Accountability Through State Tort Law*, 2023 WIS. L. REV. 1707, 1710.

8. See RESTATEMENT (SECOND) OF TORTS § 874A (A.L.I. 1979); *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996).

9. See Reinert, Schwartz & Pfander, *supra* note 1, at 759–60.

a state constitutional tort. In other words, state constitutional tort liability may begin precisely where state tort claims acts end.¹⁰

I. COMMON LAW TORTS IN THE IMPLIED RIGHT OF ACTION ANALYSIS

Whether a state constitutional provision contains an implied right of action, such that damages are available as a remedy, is an open, contested question in many states.¹¹ Indeed, Iowa has recently flip-flopped on the issue, deciding in *Godfrey v. State*¹² in 2017 that there was an implied right of action, but then overturning that decision six years later, in the 2023 case of *Burnett v. Smith*.¹³

When analyzing the question, state courts tend to turn to three main approaches: (1) a *Bivens*-style approach; (2) a *Restatement (Second) of Torts Section 874A* approach; (3) an approach that focuses on the common-law antecedents of the state constitutional provision at issue, “or a combination of all three.”¹⁴

A. *Bivens*

To determine whether their state constitution contains a private right of action, many courts employ the framework the United States Supreme Court adopted in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.¹⁵ In that decision, the Supreme Court held that an implied right of action existed for a Fourth Amendment search and seizure violation.¹⁶ The court held that “constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort,” and there is a judicial obligation to enforce such rights and ensure an “adequate remedy for violation of a

10. Numerous scholars have explored how state constitutional norms inform the common law and how the common law in turn informs state constitutional norms. See generally, e.g., Judith S. Kaye, *Foreword: Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992) (describing how the common law can incorporate and instantiate state constitutional values). See Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 592 (1986); Helen Hershkoff, *The Private Life of Public Rights: State Constitutions and the Common Law*, 88 N.Y.U. L. REV. ONLINE 1, 12–13 (2013), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReviewOnline-88-1-Hershkoff.pdf> [https://perma.cc/XD8A-LHWW] (describing the “state judicial practice of indirectly enforcing state constitutional norms in private disputes through common law pathways”).

11. See Reinert, Schwartz & Pfander, *supra* note 1, at 759.

12. 898 N.W.2d 844 (Iowa 2017).

13. See *id.* at 879; *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023).

14. See *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996).

15. 403 U.S. 388 (1971).

16. *Id.* at 397.

constitutional duty.”¹⁷ The Court in *Bivens* also held that there are meaningful differences between common law tort and state constitutional tort claims.¹⁸ In response to the United States’ argument that “a state-law trespass suit would suffice to protect the plaintiff’s privacy interests,” the court opined that the Fourth Amendment and common law trespass were not good analogues.¹⁹ Certain actions, like wiretapping, would not constitute a common law trespass, but could constitute a Fourth Amendment violation.²⁰ Further, the court explained that “[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile,” and used the example of the common law defense of consent to illustrate this point.²¹ Under the common law, consent is a viable defense to a trespass claim.²² But consent makes little sense as defense in the constitutional context, since “[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry.”²³

Unfortunately for those injured by governmental actors, in the thirty-odd years since *Bivens* came down, the Supreme Court has dramatically hollowed out this holding and declined to find implied rights of action in numerous circumstances.²⁴ Now, a *Bivens* implied right of action is only available if Congress has not “created a remedial process . . . sufficient to secure an adequate level of deterrence” and there are no “special factors,” nor even a “single reason to pause” before recognizing a *Bivens* action.²⁵ Some state courts have followed this federal pull back and denied implied rights of action under state constitutions, even though federal courts are courts of limited jurisdiction with legitimate constraints on judicial overreach, whereas state courts are plenary courts, with plenary powers, un beholden to any legislative branch, and with vast powers to fashion remedies.²⁶

17. *Brown*, 674 N.E.2d at 1138 (explaining the underlying rationale of *Bivens*).

18. Michael L. Wells, *Compensatory Damages and Dignitary Harm in the Upcoming Restatement of Constitutional Torts*, 62 HOU. L. REV. 115, 142 (2024) (discussing *Bivens*).

19. *Id.*

20. *Id.* at 143.

21. *Id.* (alteration in original) (quoting *Bivens*, 403 U.S. at 394).

22. *Id.*

23. *Id.* (alteration in original) (quoting *Bivens*, 403 U.S. at 394).

24. See John Elwood, *RLUIPA Personal Liability and Bivens on the Brink*, SCOTUSBLOG (June 19, 2025, at 12:43 CT), <https://www.scotusblog.com/2025/06/rliupa-personal-liability-and-bivens-on-the-brink/> [<https://perma.cc/96KY-3CFN>].

25. *Egbert v. Boule*, 142 S. Ct. 1793, 1803–04, 1807 (2022).

26. See Bowers, *supra* note 2, at 349–50.

B. Section 874A of the Restatement (Second) of Torts

In addition to *Bivens*, section 874A of the *Restatement (Second) of Torts* is another highly influential approach to determining whether an implied right of action exists for a state constitutional provision. In fact, “several authorities” describe section 874A as itself “reflected or illustrated in the *Bivens* decision,” despite the lack of any explicit reference to the Restatement in the case.²⁷

Section 874A, entitled “Tort Liability for Violation of Legislative Provision,” states that,

[w]hen a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action.²⁸

The section lists six relevant factors that courts should consider when applying section 874A, including the (1) “nature of the legislative provision,” (2) “adequacy of existing remedies,” (3) “extent to which a tort action will aid or supplement or interfere with, existing remedies and other means of enforcement,” (4) “significance of the purpose” of the provision, (5) “extent of the change in tort law,” and (6) “burden that the new cause of action will place on the judicial machinery.”²⁹

The commentary to section 874A states that although the section refers to “legislative provision[s],” that term should be read inclusively, to also refer to constitutional provisions.³⁰ However, section 874A introduces some confusion into the state constitutional analysis, because legislative provisions and state constitutional provisions are very different beasts.³¹ The prototypical case for section 874A application is actually “one involving a criminal statute that proscribes certain conduct and imposes a criminal penalty but says nothing about civil responsibility,”

27. *Mack v. Williams*, 522 P.3d 434, 445 (Nev. 2022).

28. RESTATEMENT (SECOND) OF TORTS § 874A (A.L.I. 1979).

29. *Id.* § 874A cmt. h.

30. *Id.* § 874A cmt. a; see also *K.J. ex rel. Lowry v. Div. of Youth & Fam. Servs.*, 363 F. Supp. 2d 728, 740–41 (D.N.J. 2005) (stating that “the comments to the Restatement further explain that this rule applies to statutory as well as constitutional provisions”).

31. See, e.g., ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 31–35 (2d ed. 2023) (describing the unique features of state constitutions).

not a state constitutional tort claim.³² None of the comments grapple with the distinct issues raised by *state* constitutions,³³ there is limited engagement with even federal constitutional issues,³⁴ and it is unclear whether the significant difference between the dominant roles of legislatures in the legislative process versus their lesser role in the state constitutional one was taken into account.³⁵

32. RESTATEMENT (SECOND) OF TORTS § 874A cmt. c (A.L.I. 1979). The Commentary suggests that in these circumstances,

it is obvious that the legislative body must have (1) intended that civil liability be imposed, (2) intended that there be no civil liability, or (3) not contemplated the issue at all and therefore have had no specific intent regarding it. If the court determines that the legislative body did actually intend for civil liability to be imposed or not imposed, whether the intent is explicit or implicit, then the court should treat the situation as if it had expressly so provided.

Id.

33. In the federal context, concerns about the limited scope of Article III courts and the limited scope of Congress dominate the question of implied rights of action. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). These concerns are inapt in the state constitutional context. Section 874A does cite multiple cases which decide the issue of constitutional implied rights of action, including: *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339 (Cal. 2002); *Binette v. Sabo*, 710 A.2d 688 (Conn. 1998); *Cantrell v. Morris*, 849 N.E.2d 488 (Ind. 2006); *Lennette v. State*, 975 N.W.2d 380 (Iowa 2022); *Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019); *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855 (Mich. 2022); *Mays v. Governor of Mich.*, 954 N.W.2d 139 (Mich. 2020); *Dorwart v. Caraway*, 2002 MT 240, 58 P.3d 128; *Mack v. Williams*, 522 P.3d 434 (Nev. 2022); *Larabee v. Governor of State*, 54 N.E.3d 61 (N.Y. 2016); *Brown v. State*, 674 N.E.2d 1129 (N.Y. 1996); *City of Beaumont v. Bouillion*, 873 S.W.2d 425 (Tex. App. 1993); *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *Intermountain Sports, Inc. v. Dep’t of Transp.*, 2004 UT App 504, 103 P.3d 176; *In re Town Highway No. 20*, 2012 VT 17, 45 A.3d 54; *Shields v. Gerhart*, 658 A.2d 924 (Vt. 1995); and *Fields v. Mellinger*, 851 S.E.2d 789 (W. Va. 2020) but does not analyze the differences between the state constitutional provisions at issue in these cases and standard legislative provisions. The cases cited for guidance on “violation of a constitutional provision” are predominantly federal constitutional cases (including *Bivens*).

34. RESTATEMENT (SECOND) OF TORTS § 874A cmt. h (A.L.I. 1979). “The nature of the legislative provision” factor suggests that whether legislation is “posed in broad, general terms that will acquire specific meaning only if—and after—the court has determined to supply the tort remedy” is an important consideration in the nature of the legislative provision inquiry. *Id.* The comment notes that “generalized constitutional provisions are less likely to be utilized but may nevertheless be used if a fundamental right is involved.” *Id.*

35. Recent litigation in Oklahoma provides a good example of a conflict over whether the legislature has power to alter implied rights of action under a state constitution. *See* Hayley Stillwell, *Is Barrios the Death Knell of Bosh Claims? The Sovereign Immunity Battle Between the Oklahoma Supreme Court and Legislature Over Constitutional Torts*, 72 OKLA. L. REV. 341, 346–51 (2020). After an Oklahoma court held in *Bosh v. Cherokee County Building Authority* that there could be a private cause of action for officers inflicting a brutal beating on a handcuffed, pre-trial detention

In the state constitutional context, the most important party is not the legislature, but *the people*.³⁶ In the words of the New Jersey Supreme Court, the state constitution is the “voice of the people,”³⁷ and “derives its force, not from the Convention which framed it, but from the people who ratified it: and *the intent to be arrived at is that of the people*.”³⁸ Consistent with this, legislative action is not required for the vindication of constitutional rights, unless such a power is specifically delegated to the legislature in the constitution.³⁹ In other words, unless the state constitution itself delegates specific powers to the legislature, state constitutional “prohibitory” provisions (which typically include all the state constitutional provisions found in state bills of rights) are generally held to be self-executing.⁴⁰ As multiple courts have remarked, self-

plaintiff, the Oklahoma State Legislature amended their definition of “tort” in their state tort immunity statute to include a state constitutional tort. *Id.* (discussing *Bosh v. Cherokee Cnty. Bldg. Auth.*, 2013 OK 9, ¶¶ 1–6, 17–18, 22–23, 305 P.3d 994, 995–97, 1000–01). Under the new definition,

“[t]ort” means a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Oklahoma Constitution, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment

Governmental Tort Claims Act, OKLA. STAT. tit. 51, § 51-152(18) (effective Nov. 1, 2025).

As one commentator explained,

[i]f the constitution itself creates a private right of action based in tort for violations of its provisions, then the Oklahoma Legislature has no authority to limit recovery as it attempted to do via the OGTCa. If, instead, the common law creates such a private right of action, then the Oklahoma Legislature’s expression of sovereign immunity as to torts arising from violations of the Oklahoma Constitution is valid and within its authority.

Stillwell, *supra*, at 351.

36. See WILLIAMS & FRIEDMAN, *supra* note 31, at 44–45.

37. *Id.* at 45 (quoting *Vreeland v. Byrne*, 370 A.2d 825, 830 (N.J. 1977)).

38. *Id.* (emphasis added) (quoting *Vreeland*, 370 A.2d at 830).

39. *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 870–71 (Mich. 2022).

40. “Prohibitory” provisions “‘prohibit certain conduct’ by the government, as opposed to ‘indicating a general principle or line of policy,’ such that it does not depend on or require legislation for the people to enjoy or enforce the rights therein.” *Mack v. Williams*, 522 P.3d 434, 442 (Nev. 2022) (cleaned up) (first quoting *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 59, 250 P.3d 465, 481; and then quoting *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, ¶ 7, 16 P.3d 533, 535). “[C]onstitutional provisions in bills of rights . . . are usually considered self-executing,” as they “specifically prohibit particular conduct” by the government.” *Id.* (citing *Gray v. Va. Sec’y of Transp.*, 662 S.E.2d 66, 71 (Va. 2008)). This may somewhat track the binary that Professor Garrett West draws in *Constitutional Private Law*, 103 WASH. U. L. REV. (forthcoming 2025) (manuscript at 4) (on file with author). In his view, “constitutional private law is for police; constitutional public law [related to the passing of non-constitutional rules] is for legislatures and judges.” *Id.*

executing constitutional rights “must remain enforceable in the absence of some action by the Legislature, or risk that all constitutional rights become all but ‘a mere hope.’”⁴¹

When section 874A frames the legislature as the most important party to consider in a question that is fundamentally one of state constitutional interpretation, this error in approach may lead courts to inappropriately prioritize legislative concerns and misunderstand the relationship between state constitutional provisions and available alternative remedies.⁴²

C. Common Law Precursors

The third approach to determining whether a state constitutional provision contains an implied right of action, such that damages are available as a remedy, brings in common law tort considerations by asking whether historical common law precedents support such a remedy.⁴³ Courts often find additional support for implying rights of action for state constitutional prohibitory provision when “the common-law antecedents” to state constitutional prohibitory provisions allowed for damages.⁴⁴ For example, in *Binette v. Sabo*,⁴⁵ the court listed

41. *Mack*, 522 P.3d at 446 (quoting *Bauserman*, 983 N.W.2d at 869).

42. See, for example, *Spackman ex rel. Spackman v. Bd. of Educ.*, where the court also understood the legislature as central to the analysis, stating that “we urge deference to existing remedies out of respect for separation of powers’ principles. . . . By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature’s important role in our constitutional system of government.” 2000 UT 87, ¶ 24, 16 P.3d 533, 539.

43. See Bowers, *supra* note 2, at 350–51, 351 nn.102–03. In *Godfrey v. State*, the Iowa Supreme Court noted how English common law established that government officials’ unconstitutional actions could lead to damages. *Id.* at 350–51, 351 n.102 (citing *Godfrey v. State*, 898 N.W.2d 844, 866 (Iowa 2017)). Idaho incorporated this principle when it incorporated English law in Idaho Code section 73-116, which was “first enacted as Idaho Terr. Sess. 1864, p. 527, § 1, adopting English common law as common law of Idaho.” *Id.* at 351 n.103 (citing IDAHO CODE § 73-116 (2019)). Idaho’s constitution incorporates laws of the Idaho territory, and thus, English common law, into its state law. IDAHO CONST. art. XXI, § 2 (“All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force”); see also Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMPAR. L. 1, 5–6 (2010) (explaining that states adopted English common law by state constitution, state statute, or judicial decisions). Another example is found in *Brown v. State*, where the court noted that New York’s first constitution, written in 1777, adopted the existing common law of England, as supported by the notion that rights now guaranteed by the equal protection and the search and seizure clauses of the New York Constitution also had common-law antecedents warranting a tort remedy for invasion of these rights. 674 N.E.2d 1129, 1138–39 (N.Y. 1996).

44. *Binette v. Sabo*, 710 A.2d 688, 693 (1998).

45. 710 A.2d 688 (1998).

historical incidents where damages were awarded against public officials for improvidently granting warrants or performing certain actions without authority, like arrests, as support for its holding that it had authority to grant an implied right of action for a state constitutional violation.⁴⁶

* * *

In practice, state courts often use an amalgam of all three frameworks. They borrow from *Bivens*, section 874A, and historical common law antecedents to determine whether an implied right of action exists.⁴⁷ Recently, for example, the Nevada Supreme Court held, in *Mack v. Williams*,⁴⁸ that the Nevada Constitution contained a private right of action for unreasonable searches and seizures.⁴⁹ The court employed a three-part framework that largely tracked that of a previous sister-state court case, *Katzberg v. Regents of the University of California*.⁵⁰ That three-part framework, which applies to state constitutional prohibitory provisions (*i.e.*, Bill of Rights provisions) that are self-executing,⁵¹ asks: (1) “Did the legislature explicitly endorse or disavow a damages remedy?”; (2) “Would the damages remedy be in furtherance of the purpose of the provision? Is it needed to assure the provision’s effectiveness?”; and (3) “Are there additional special factors that should lead a court to hesitate in recognizing a damages remedy?”⁵²

46. *Id.* at 693 (citing “*Grumon v. Raymond*, 1 Conn. 40 (1814) (damages awarded against magistrate for issuance of general warrant); *Palmer v. Allen*, 5 Day (Conn.) 193 (1811) (damages awarded against United States marshal for arresting debtor without sufficient legal authority); *Burlingham v. Wylee*, 2 Root (Conn.) 152 (1794) (damages awarded against public official for issuing warrant without jurisdiction); *Stoddard v. Bird*, 1 Kirby (Conn.) 65 (1786) (damages awarded against officer for executing arrest without lawful authority); see 1 Z. Swift, *A System of the Laws of the State of Connecticut* (1795) p. 181 (“[i]f a man be illegally restrained of his liberty, an action of trespass will lie to recover damages”)).

47. *See supra* note 14 and accompanying text.

48. 522 P.3d 434 (Nev. 2022).

49. *Id.* at 439.

50. *Id.*; 58 P.3d 339 (Cal. 2002).

51. The Nevada Supreme Court acknowledged that the court had previously held that the “prohibitory provisions” in the state constitution were “self-executing,” thus “need[ing] no further legislation to put [them] in force.” *Mack*, 522 P.3d at 441 (quoting *Wren v. Dixon*, 161 P. 722, 729 (Nev. 1916)).

52. *See* Anya Bidwell, *The Nevada Supreme Court Recognizes a Damages Remedy Directly Under Its State Constitution*, FEDERALIST SOC’Y (Jun. 7, 2023), <https://fedsoc.org/scdw/the-nevada-supreme-court-recognizes-a-damages-remedy-directly-under-its-state-constitution>. As one commentator noted, the legislature’s predominant role in this analysis is misplaced. Critiquing the decision in *Mack*, the author wrote:

The second factor in this framework draws from the Restatement section 874A, and, as one commentator noted, is “mostly focus[ed] on the existence of alternative remedies to address the constitutional violation.”⁵³ In *Mack*, the court held that state tort law did not offer “meaningful redress for invasions of the constitutional right at issue here,” noting that “[a] state actor’s legal obligation under a state constitution ‘extends far beyond that of his or her fellow citizens’ under tort law,” as “a state actor is ‘not only . . . required to respect the rights of other citizens’ but [is also] ‘sworn to protect and defend those rights.’”⁵⁴ The court also reiterated that “damages remain a traditional—and indeed, a preferred—remedy for legally recognized wrongs,”⁵⁵ and that there is no “‘specific reason’ to treat enforcement of constitutional rights through monetary relief any differently from cases permitting injunctive relief.”⁵⁶

II. STATE CONSTITUTIONAL INJURY AS POLITICAL INJURY

Common law claims can appear to overlap with state constitutional claims, leading some courts to believe that state constitutional claims for damages are unnecessary. This Part explains why such a view is mistaken. State constitutional claims have a political quality distinct from common law tort claims, and emerge from the state-citizen relationship rather than the citizen-citizen relationship. State constitutional claims are

The U.S. Supreme Court has disavowed *Bivens* remedies as a part of a broader criticism of judicial aggrandizement at the expense of the legislature. But the Nevada Supreme Court appears to have interpreted its state constitution as being concerned with the opposite issue. As the *Mack* court noted, while the Nevada Constitution places specific limits on legislative action, particularly vis-à-vis individual rights, it delegates “interpretation and enforcement of the Nevada Constitution to the judiciary.” Any break from federal doctrine is certainly within Nevada’s prerogatives

See Recent Case, *Constitutional Torts—State Bivens Equivalents—En Banc Nevada Supreme Court Recognizes Implied Right of Action for Damages Under State Constitution*—Mack v. Williams, 522 P.3d 434 (Nev. 2022), 136 HARV. L. REV. 2184, 2190 (2023) (footnotes omitted) (quoting *Mack*, 522 P.3d at 444).

53. Bidwell, *supra* note 52.

54. *Mack*, 522 P.3d at 448 (emphasis omitted) (quoting *Binette v. Sabo*, 710 A.2d 688, 698 (Conn. 1998)). This Essay uses the term “citizen” broadly, to mean any member of a political community or person who has come under the jurisdiction of the laws of that community. It is not meant in the more formal sense of surfacing “the formal distinction delineating citizens and non-citizens under various U.S. legal regimes.” See Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1485 n.1 (2022).

55. *Id.* at 450.

56. *Id.* (citing *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 892 (Mich. 2022)).

thus of deep public concern and reflect a constant negotiation of power between the governed and those currently doing the governing.

A. Cause of Action Overlap

Like the Nevada Supreme Court in *Mack*, courts and commentators have often acknowledged that “ordinary” tort differs from state constitutional tort.⁵⁷ They point out that many constitutional rights have no obvious common law analog at all—for example, actions which violate freedom of speech rights,⁵⁸ or the right to vote,⁵⁹ generally do not pair easily with common law causes of action.⁶⁰

Other courts see little or no distinction between the two arenas and emphasize that other constitutional rights do seem to have parallel, common law versions of themselves. These state courts thus often hold that common law tort actions constitute a viable substitute for state constitutional claims.⁶¹

57. Injunctive relief also applies. See *Cantrell v. Morris*, 849 N.E.2d 488, 499 (Ind. 2006) (“Injunctions, immunity from civil liability, and immunity from prosecution have already been identified as available remedies to vindicate Section 9 rights.” (footnotes omitted)); *Bd. of Cnty. Comm’rs v. Sundheim*, 926 P.2d 545, 553 (Colo. 1996). In *Mack*, the court “refused to permit persons who have been deprived of a state constitutional right to recover damages in a civil action where other adequate remedies are available.” Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 886 (2011).

58. John Hasnas, *Freedom of Speech and the Common Law: A Contrarian Perspective*, 21 GEO. J.L. & PUB. POL’Y 541, 547, 552–53 (2023).

59. In a pending case, a number of Wisconsin voters whose votes were “unprocessed” after being discovered in “sealed courier bag[s]” are suing for damages under the Wisconsin Constitution on an implied right of action theory. See Andrew Bahl & Enjoyiana Nururdin, *Voters Sue After Madison Failed to Count Their Absentee Ballots*, CAP TIMES (Mar. 6, 2025), https://captimes.com/news/voters-sue-after-madison-failed-to-count-their-absentee-ballots/article_4d588e94-fad2-11ef-a816-5f3d96df90a9.html [https://perma.cc/7NRR-55HW].

60. See *supra* Section I.A.

61. FRIESEN, *supra* note 3, at 7–60. An Oregon judge noted that state constitutional torts were covered under their state tort claims act—“[b]reach of such a constitutional duty that injures a specific person would give rise to a protective remedy would therefore be a ‘tort’ and actionable against the public actor pursuant to the Tort Claims Act.” *Id.* Other courts may rely on practice or scope of recovery type of questions to determine that tort is not a viable substitute. In the heyday of the *Bivens* era,

in *Carlson v. Green*, the Court reiterated that Congress could obviate the need for a *Bivens* remedy by providing for alternative recovery, but indicated it would stringently evaluate whether that remedy was “equally effective.” In that case, the Court held that availability of a remedy for wrongful death under the Federal Tort Claims Act (FTCA) could not prevent the mother of a deceased federal prisoner from seeking damages for violation of the prisoner’s Eighth Amendment rights. Because the FTCA remedy would have a lesser deterrent effect on federal officials, did not permit punitive damages,

In their holdings, these courts emphasize the significant overlap between common law tort claims and state constitutional claims.⁶² For example, in *Cantrell v. Morris*,⁶³ the Indiana Supreme Court declared that “[i]f state tort law is generally available even if restricted by the [state tort claims act], it is *unnecessary* to find a state constitutional tort.”⁶⁴ These courts note that plaintiffs often bring both common law tort claims and state constitutional claims together in the same case, which those courts interpret as demonstrating the significant overlap between the claims.⁶⁵ For example, common law battery claims frequently overlap with state constitutional claims of excessive force or a violation of a right to bodily integrity, common law trespass to land claims frequently overlap with state constitutional unreasonable search claims, and common law false imprisonment claims frequently overlap with state constitutional unreasonable seizure claims.⁶⁶

Even here, though, the fit between the common law and state constitutional claims is more complicated than it might initially appear, and “tort law—having evolved for hundreds of years to address the interactions between private persons—is unlikely to contain clear answers when called on to regulate the interactions between the government and

did not allow a jury trial, and was contingent on the availability of a tort cause of action under state law, the Court found it was less effective than a damages remedy directly under the Eighth Amendment.

Bowers, *supra* note 2, at 346 (quoting *Carlson v. Green*, 446 U.S. 14, 19 (1980)).

62. See, e.g., *State, Dep’t of Corr. v. Heisey*, 271 P.3d 1082, 1095 (Alaska 2012). In the court’s words:

Heisey alleged that the correctional officers “performed a ‘take-down’ without provocation” and “slammed plaintiff into a concrete floor, slamming his face and head into the floor and causing serious physical injury and disfigurement.” Based on these facts, Heisey alleged two instances of constitutional violations. First, the correctional officers’ action “constitutes the use of excessive force in violation of article I, section 12 of the Constitution.” Second, the State of Alaska violated its duty to institute “proper training programs that ensure prison employees do not use excessive force and violate the constitutional rights of prisoners,” which violated Heisey’s due process rights and violated his “right to be free from the use of excessive force” under the Alaska Constitution.

Id. at 1095 (cleaned up). The court held that Heisey’s “constitutional claims clearly ar[o]se out of an alleged assault or battery,” and since “the State is immune from assault and battery claims,” the court concluded that “Heisey’s state constitutional claims are barred by the State’s immunity.” *Id.*

63. 849 N.E.2d 488 (Ind. 2006).

64. *Id.* at 506 (emphasis added). The court, however, refused to weigh in broadly on the question of whether a “private right of action for damages” existed under the state constitutional clause protecting freedom of speech, instead narrowing the issue to correspond with the specific facts of the case. *Id.* at 491.

65. See, e.g., *id.* at 497–98.

66. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 744, 749–52, 754 (2008).

private persons.”⁶⁷ The interests underlying common law tort claims “do not always align well with constitutional interests.”⁶⁸ Rather, state constitutional interests are often “different,” “supplementary” or even “at odds” with the common law claims.⁶⁹

When the underlying interests are mismatched with the cause of action, that mischaracterization can muddy the purposes underlying both tort and state constitutional law. Mislabeling an “ordinary” tort as a state constitutional violation unjustifiably elevates torts that lack true state constitutional dimensions, and mislabeling a state constitutional violation as an ordinary tort erases the political dimensions to those claims.⁷⁰

The recent case of water poisoning in Flint, Michigan, provides a good example.⁷¹ In that case, the state and local defendants changed the source of water for the city of Flint to the polluted Flint River, and despite overwhelming evidence immediately showing that this water contained significant concentrations of harmful contaminants, “concealed scientific data,” “made misleading statements about the safety of the Flint River water,” and refused to revert to the previous water source.⁷² This “resulted in a nonconsensual entry of toxic water into plaintiffs’ bodies.”⁷³

As such, the defendants’ actions likely constituted a common law battery. But calling this a battery fails to capture distinct aspects of this harm. As the court observed, the allegations involve “one of the most troublesome breaches of public trust in this state’s history, with catastrophic consequences for Flint citizens’ health, well-being, and property.”⁷⁴ This state-harm aspect is marked appropriately when we call this a state constitutional violation, but not when we call it a common law tort. When it is called a state constitutional violation, it marks the act as undermining the political relationship between the state and the citizenry.

The relevant state constitutional violation in this instance was the right to bodily integrity. Under Michigan state law, a “violation of the right to bodily integrity involves ‘an egregious, nonconsensual entry into

67. Reinert, Schwartz & Pfander, *supra* note 1, at 761 (noting that “[n]ineteenth-century common law did not, for example, bar racially discriminatory practices”).

68. *Cf.* Wells, *supra* note 18, at 143 (stating that the interests protected by the federal Bill of Rights “are not identical to, or even necessarily similar to, common-law interests”).

69. *Cf. id.* (discussing the Federal Bill of Rights).

70. That said, if the only available remedy is through tort law, some remedy is better than no remedy.

71. *See Mays v. Governor of Mich.*, 954 N.W.2d 139, 144 (Mich. 2020) (discussing Flint water crisis).

72. *Id.* at 145–46, 158–59.

73. *Id.* at 158.

74. *Id.* at 162.

the body which was an exercise of power without any legitimate governmental objective” and the “violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”⁷⁵ This high threshold affirms and sets the seriousness of this violation. The higher test marks the conduct as different from a mere tort, and conduct that meets this test confirms the egregiousness of the violation. In the court’s words, the “allegations paint a picture of a public health crisis of the government’s own making, intentionally concealed by state actors despite their knowledge that Flint residents were being harmed so long as the untreated water continued to flow through their pipes. . . . ‘[W]ith protracted failure even to care, indifference is truly shocking.’”⁷⁶

On the other hand, calling a typical car accident a state constitutional violation on the basis that the driver happened to be publicly employed fails to adequately capture the harm as well.⁷⁷ Courts sometimes express concerns that treating every tort committed by a public actor as a state constitutional violation would dilute the meaning and significance of state constitutional violations. As an Idaho court wrote,

[t]he State of Idaho employs more than twenty-five thousand people, and local governments certainly employ many more thousands. If every misstep committed by a public servant in the course of employment—intentional or unintentional, negligent or despite due care—resulted in a constitutional claim whenever it caused a loss of life, liberty, or property, the consequences could be profound.⁷⁸

The concern is that, “[i]n the absence of any principle of limitation . . . all actions of state officials that have any identifiable consequences on a person have had the potential to become both [state constitutional] and [ordinary tort] claims.”⁷⁹

*Parratt v. Taylor*⁸⁰ is another oft-cited example of the sort of “trivialization” of constitutional claims that occurs when torts without

75. *Id.* at 184 (Viviano, J., concurring in part and dissenting in part) (first quoting *Rogers v. Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998); and then quoting *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 513 (8th Cir. 2015)).

76. *Id.* at 159 (quoting *Sacramento Co. v. Lewis*, 523 U.S. 833, 853 (1998)).

77. See William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 516 (1989).

78. Bowers, *supra* note 2, at 358 (footnote omitted).

79. Burnham, *supra* note 77, at 544.

80. 451 U.S. 527 (1981).

constitutional dimensions are labelled as constitutional violations.⁸¹ In *Parratt*, a state prisoner brought a claim under § 1983, alleging that his constitutional right not to be deprived of property without due process of law was violated when a \$23.50 hobby kit he had ordered in the mail, and which was documented as delivered to the prison, was negligently lost before it reached his hands.⁸² Justice Potter Stewart opined as follows:

It seems to me extremely doubtful that the property loss here, even though presumably caused by the negligence of state agents, is the kind of deprivation of property to which the Fourteenth Amendment is addressed. If it is, then so too would be damages to a person's automobile resulting from a collision with a vehicle negligently operated by a state official. To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution.⁸³

81. See *id.* at 544; see also Burnham, *supra* note 77, at 542 (noting the “perception that the quality and quantity of constitutional tort cases have ‘cheapened the currency’ of the Constitution”).

82. *Parratt*, 451 U.S. at 529. The Court also noted that the claimant had chosen to essentially make a federal case out of it “even though the State of Nebraska had a tort claims procedure which provided a remedy to persons who suffered tortious losses at the hands of the State.” *Id.* at 530. In the Court's words, this claim “allege[d] facts that are commonly thought to state a claim for common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation.” *Id.* at 533. Because the issue in the case was whether the claimant was deprived of his property without due process of law, the availability of a state tort claim, which would constitute a process of law, was paramount. The Court understood an important question to be “whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.” *Id.* at 537. The court found that post-deprivation procedures can satisfy the Due Process Clause. *Id.* at 544.

83. Bowers, *supra* note 2, at 359 (quoting *Parratt*, 451 U.S. at 544–45 (Stewart, J., concurring)). Interestingly, although the Federal Tort Claims Act also does not provide relief for negligent damage to the property of a federal prisoner, see generally *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), there is an administrative process for federal prisoners to recover damages for such harms. Under the Small Claims Act, 31 U.S.C. § 3723, federal prisoners can recover up to \$1000 for property negligently lost or damaged by prison staff. See DC PRISONERS PROJECT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, INFORMATION ABOUT THE FEDERAL TORT CLAIMS ACT OR WHAT TO DO IF YOU MIGHT HAVE A TORT CASE AGAINST THE FEDERAL BUREAU OF PRISONS (2023), <https://www.washlaw.org/wp-content/uploads/2024/05/FTCA-Guide.pdf> [<https://perma.cc/64UD-P7B8>].

B. Theorizing the Political Nature of the Harm

But what kind of deprivations or injuries, then, are those to which state constitutions are addressed? In cases and commentary, courts and scholars have suggested several important features that distinguish the kinds of deprivations or injuries that state constitutions encompass from the kinds of harm that more accurately fall to the role of private tort law. First, the two areas are directed at different relationships: “Tort law generally addresses interactions between private individuals and constitutional law addresses interactions between the government and private individuals.”⁸⁴ In a constitutional tort suit, “the government is the inescapable defendant . . . ; only the government can abridge constitutional rights.”⁸⁵ Ordinary tort law, then is “unlikely [to] contain doctrines that can adequately capture behavior understood to be unconstitutional.”⁸⁶

84. Preis, *supra* note 66, at 750. See, for example, *Davis v. State*, 858 N.E.2d 168, 173 (Ind. Ct. App. 2006), where the court noted that Article 1, Section 11 of the Indiana Constitution guarantees Indiana citizens the right to be secure against unreasonable search and seizure. Its purpose is “to protect from unreasonable police activity those areas of life that Hoosiers regard as private.” *Id.* (quoting *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995)). As John Goldberg described, “[p]rivate law defines the rights and duties of individuals and private entities as they relate to one another . . . in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments.” John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

85. Bowers, *supra* note 2, at 356 (cleaned up). There are exceptions to this general rule. For example, in *Lassoff v. New Jersey*, a private security guard who conspired with a police officer and acted in concert with him to deprive the plaintiff of assistance of counsel and assault the plaintiff was held to be potentially liable under § 1983. 414 F. Supp. 2d 483, 486, 494 (D.N.J. 2006). As the court wrote, “[a]lthough not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts ‘under color of state law’ for purposes of § 1983.” Thus, Defendants . . . do not escape potential liability by virtue of being private security guards.” *Id.* at 494 (citations omitted) (quoting *Abbott v. Latshaw*, 164 F.3d 141, 147–48 (3d Cir. 1998)). The state constitutional context also sometimes allows for liability against private actors. In California, for example, a utility company was liable for equal protection harms. See *Gay L. Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 602 (Cal. 1979). See the discussion in FRIESEN, *supra* note 3.

86. Preis, *supra* note 66, at 750. The “bodies of private law are designed primarily to regulate civilians’ conduct,” and “their standards and rules are not calibrated to address the government’s unique power and social role.” Danieli Evans, *A Citizenship Model of the Fourth Amendment*, 58 CONN. L. REV. (forthcoming 2026) (manuscript at 5) (citing Richard Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 321–24 (2016)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5160679. The court in *Clea v. Mayor & City Council of Baltimore* also distinguished between the private purpose of tort law and the public purpose of state constitutional provisions:

[t]he purpose of a negligence or other ordinary tort action is not specifically to protect government officials or to restrain government officials. The

Second, in *Bivens*, the Supreme Court noted that constitutional torts represent a potentially greater harm than those that fall into the ordinary tort context. As the *Bauserman* Court stated: “[C]onstitutional torts hold the potential for greater harm than private torts: ‘An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.’”⁸⁷ Constitutional torts thus constitute “unique and dangerous encroachments.”⁸⁸

purpose of [tort] actions is to protect one individual against another individual. . . . On the other hand, constitutional provisions . . . are specifically designed to protect citizens against certain types of unlawful acts by government officials.

Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence*, 115 PENN. ST. L. REV. 877, 903–04 (2011) (quoting *Clea v. Mayor & City Council of Balt.*, 541 A.2d 1303, 1314 (1988)). The court went on to conclude that “[t]o . . . leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions.” *Id.* at 904 (quoting *Clea*, 541 A.2d at 1314).

87. *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 867 (Mich. 2022) (quoting *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971)). The *Bivens* court noted that:

[I]n the state’s argument, they sought] to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Bivens, 403 U.S. at 391–92.

88. *Bauserman*, 983 N.W.2d at 867; see also *Binette v. Sabo*, 710 A.2d 688, 698 (Conn. 1998) (emphasis omitted):

The difference in the nature of the harm arising from a beating administered by a police officer or from an officer’s unconstitutional invasion of a person’s home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships. A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another’s residence. A police officer’s legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to protect and defend those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen’s rights but affirmatively violates those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.

Third, because the obligations that a state constitution imposes on state actors “extend[] far beyond that of his or her fellow citizens” under tort law, and a state actor is “not only . . . required to respect the rights of other citizens” but must also affirmatively “protect and defend those rights,” a state actor’s violation of the rights they are supposed to be protecting and defending is especially offensive.⁸⁹

Combining these identified factors—that the harm of a state constitutional violation can be greater, that the government is the quintessential defendant here and stands in different posture to the rights, and that the common law and state constitutional violation serve different interests—all point to state constitutional violations creating a distinct form of injury: a *political* injury.⁹⁰ As “private law,” the imagined parties to a tort suit are a non-state actor plaintiff and a non-state actor defendant. In the “public law” of constitutional tort, however, the paradigmatic parties are a non-state actor plaintiff and a state defendant. That state defendant has violated the rules governing the political relationship between citizen and state. The Montana Supreme Court, for example, has acknowledged that “there is a great distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state.”⁹¹ This latter kind of wrong threatens the political status of the plaintiff, and of the general public as well. Thus,

[w]henever an unconstitutional governmental action injures a person (the “victim”) or his property, all citizens of that government may feel injured as well. This feeling flows from several sources. They may perceive that, as electors, they are responsible for, and discredited by, the unconstitutional actions of the government. Further, as citizens, their relationship to the

89. *Binette*, 710 A.2d at 698 (emphasis omitted).

90. *See Wells*, *supra* note 18, at 135 (footnotes omitted).

In *Nixon v. Herndon*, L.A. Nixon, a black man, was stopped from voting and sued the culpable officials for damages. The Court, in an opinion by Justice Holmes, reversed a dismissal of Nixon’s complaint, in which the plaintiff sought \$5,000 in damages for the violation of his Fourteenth Amendment right to equal protection—full stop. In the view of the defendants, there was no basis for monetary relief because the plaintiff’s injury was only “political” in nature. Writing for a unanimous Court, however, Justice Holmes rejected the defendants’ assertion that, for this reason, “the subject matter of the suit was . . . not within the jurisdiction of the Court.” Put simply, the Court authorized a monetary recovery because of the constitutional nature of the plaintiff’s injury, in the face of the defendants’ claim that the constitutional injury was too abstract or indefinite because it was “political.”

Id. (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)).

91. *Dorwart v. Caraway*, 2002 MT 240, ¶ 46, 58 P.3d 128, 137.

government is based on the Constitution, and violation of that document provides a potential threat to every citizen's relationship with his government.⁹²

Indeed, "interactions with [state officials] serve a distinct educative and socializing function, and have broader implications for people's sense of citizenship and political participation."⁹³ These interactions convey important messages "about the subject's belonging and standing within the community."⁹⁴ When those interactions fall below the level required by a state constitution, "key values of democratic citizenship, such as voice, participation, autonomy, [and] anti-subordination" are implicated.⁹⁵ The violation can "communicate a form of expulsion from one's status among 'We the People,' and carry . . . a built-in characterization of the victim as someone who is unworthy of core rights."⁹⁶ Thus, how one is treated during interactions with government agents, and the remedies that flow when mistreatment occurs, implicate the possibility, or lack thereof, of "full and equal" political citizenship.⁹⁷

Here, philosophers of tort law can helpfully illuminate what is at stake. Professor Scott Hershovitz, for example, has written about what tort law specifically does, as an expressive matter, that is distinct from other kinds of injury acknowledgement.⁹⁸ He explains that tort liability sends the seemingly simple yet crucially important message that "[t]he defendant wronged the plaintiff."⁹⁹ He explains that although often dismissed as trivial, this "judgment that the defendant wronged the plaintiff" is in fact the primary purpose of tort law.¹⁰⁰ Hershovitz explains the significance of this relationship in the horizontal relationships that exists between members of civil society: "[I]njuries are also messages—symbolic communications. They are ways a wrongdoer has of saying to us, 'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.'"¹⁰¹

92. David. S. Bogen, *Standing up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, 153 (1978–79).

93. Evans, *supra* note 86 (manuscript at 5).

94. *Id.*

95. *Id.*

96. Wells, *supra* note 18, at 123 (quoting U.S. CONST. pmb.).

97. Evans, *supra* note 86 (manuscript at 30).

98. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 1 (2017).

99. *Id.* at 2 (emphasis omitted).

100. *Id.* at 4.

101. *Id.* at 7 (emphasis omitted) (quoting Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 14, 25 (Jeffrie G. Murphy & Jean Hampton eds., 1st ed. 1990)).

A constitutional tort is also a symbolic communication with a similar message. But here, because the defendant is virtually always a government official—understood by those impacted as, essentially, the government—the message is that that the government counts but you do not, the government can use you for its purposes, and the government is here up high and you are there down below. The message of an unredressed state constitutional violation is that those on the receiving end “are not citizens belonging to the group . . . in charge of governing.”¹⁰² Instead they belong to a group *subjected to the* governors.¹⁰³ A state constitutional tort is a serious and fundamental threat to one’s place within the polis: “[M]ore than a mere allocation of risk and compensation is implicated” here.¹⁰⁴ That “more” is one’s political citizenship or standing. And because state constitutional harms, like most government tortious behaviors, tend to fall most often on members of disadvantaged communities,¹⁰⁵ state constitutional wrongs, unredressed, convey that there exists a “class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily.”¹⁰⁶

State constitutions are premised on an understanding that sovereignty and ultimate power rests in the people.¹⁰⁷ But the messaging of an unredressed and uncompensated state constitutional tort subverts that fundamental relationship. As Hershovitz explains in the context of “ordinary” tort law, it is important that society provide an available means of redress to its members.¹⁰⁸ Even in moments where a tort itself might not appear be a direct offense to the plaintiff’s social standing (as

102. Evans, *supra* note 86 (manuscript at 13) (quoting Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 167 (2014)).

103. *Id.* (quoting AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 111 (2014)).

104. Bowers, *supra* note 2, at 362 (quoting *Godfrey v. State*, 898 N.W.2d 844, 877 (Iowa 2017)).

105. See Delaram Takyar, *The Hidden Price of Government Immunity*, U.C. IRVINE L. REV. (forthcoming 2025) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5110024.

106. Evans, *supra* note 86 (manuscript at 15) (quoting Justice & Meares, *supra* note 102, at 167).

107. Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 270 (2014).

108. See Hershovitz, *supra* note 98, at 11 (first quoting John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606 (2005); and then quoting Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 84 (1998)) (discussing the idea that we have a constitutional right to tort redress for harms that flow to us from other actors in civil society).

when, for example, a surgeon's scalpel accidentally slips), "[t]he way that we respond to a slip of the scalpel says something about the plaintiff's social standing, even if the slip itself did not."¹⁰⁹ Without a recognition of the right of the people to seek damages for the wrongs that implicate their political standing, the messaging that the governors are more powerful than the governed stands, and "the government" becomes more powerful than the people.

In other words, "the way that we respond to wrongdoing is partly constitutive of the basic structure of our social relations,"¹¹⁰ and it is also constitutive of our *political* relations. When tort law "treats wrongs as wrongs," and a system of state constitutional torts treats political wrongs as wrongs, "it vindicates the social [and political] standing of the victims who invoke it."¹¹¹ Invoked against a wrongdoing state, "ordinary" tort law could do some, but not all, of these things. "Ordinary" tort law can mark that a state defendant wronged a plaintiff, and it can order compensation for the injury, but it cannot capture the political nature of the wrong in the same way that a state constitutional violation can, and it cannot *mark* the wrong as a political wrong in the way that a state constitutional violation can. In some circumstances, when the options are tort law or nothing, the former is better than the latter, but where the harm also sounds in the political register, it is best accounted for through state constitutional mechanisms.

This political dimension distinguishes state constitutional tort from other dignitary harms recognized by tort law. Although they resemble each other in some respects, close enough to prompt at least one scholar to argue that a "constitutional harm" is a "distinctive type of dignitary harm,"¹¹² it makes more sense to think of a constitutional harm as a *distinct political harm* rather than as subsumed within the rubric of dignity. Professor Michael Wells, for example, offers the case of *Harris v. Rives*¹¹³ as a good example of one in which "the dignitary injury seems manifest."¹¹⁴ In that case, an inmate "was maced and attached to a 'restraint chair' for several hours, such that he could not defend himself."¹¹⁵ While in this restricted position, an officer at the jail essentially waterboarded the inmate.¹¹⁶ The court returned a verdict of excessive force, but allowed only nominal damages because the plaintiff

109. *Id.* at 36.

110. *Id.* at 40.

111. *Id.* at 41.

112. Wells, *supra* note 18, at 118.

113. Nos. 22-5490/5834/5838, 2023 WL 7538305 (6th Cir. Nov. 9, 2023).

114. Wells, *supra* note 18, at 120.

115. *Id.* (quoting *Harris*, 2023 WL 7538305, at *1).

116. *Id.* (quoting *Harris*, 2023 WL 7538305, at *1).

was “unable to prove physical or emotional harm.”¹¹⁷ Wells offers a charge to a jury that would explain the nature of a dignitary harm and allow a jury to award damages for it:

Dignitary harms are those that interfere with the liberty or personal autonomy of the plaintiff, or that embarrass, humiliate, or show blatant disrespect for the plaintiff. In determining dignitary harm, you should consider the indignity inherent in the violation of the plaintiff’s constitutional right.¹¹⁸

A recognition of the harm to dignity should be part of state constitutional tort law. But a recognition of the *political* nature of the harm is also required. Indeed, the political nature of the harm is arguably the ultimate distinguishing line between state common law tort and state constitutional violations.

III. STATE TORT CLAIMS ACTS END WHERE STATE CONSTITUTIONAL TORTS BEGIN

The question then becomes how to find this distinguishing line. Fortunately, most state tort claims acts arguably already separate these “political” claims, which belong in the realm of potential state constitutional tort liability, from those which belong in the world of common law tort. They do so through frameworks of discretionary/ministerial, planning/operational, or governmental/proprietary dualities.¹¹⁹ All of these tests attempt to distinguish actions that are “governmental” and thus not within state tort claims acts from acts that are more like those a private person might do. State constitutional torts occur when the government acts governmentally,¹²⁰ and each of these tests is designed to identify exactly that: claims where the government may be liable as a private person would be and thus fall under the purview of the state tort claims acts, and claims where the government has instead acted “governmentally.”¹²¹

117. *Id.* at 121.

118. *Id.* at 120. Wells’ charge continues on to say: “You should focus on the violation of the plaintiff’s right and should not consider such general factors as the importance of the constitutional right in our system of government or your perception of the importance of the constitutional right as an abstract matter.” Although this is consistent with some current case law, understanding the injury as a political one should allow for the consideration of these excluded factors.

119. See *Peavler v. Bd. of Comm’rs*, 528 N.E.2d 40, 42–44 (Ind. 1988), for a helpful description of these tests.

120. Burnham, *supra* note 77, at 557.

121. *Peavler*, 528 N.E.2d at 42.

These tests have long been criticized as difficult to administer. And they are: The line between when the government has acted like a private person such that they should be liable under private law principles, and when the government has acted like a government, such that they should be liable for public law wrongs, is often difficult to discern.¹²² Various articulations of what falls on either side of the line have been proposed, but a commonly-adopted definition is that,

[a] duty is discretionary when the officer must determine whether he should perform a certain act, and, if so, in what manner. Performance of a discretionary function requires judgment and choice and involves what is proper and just under the circumstances. A ministerial act is performed in a prescribed manner, in obedience to the mandate of legal authority, without the exercise of judgment upon the propriety of the act.¹²³

Under the planning/operational framework, “the type of discretion” falling outside the state tort claims act is “generally that attributable to the essence of governing.”¹²⁴

These standards are obviously malleable, but one scholar’s suggestion that governmental *power* is of fundamental importance here may help illuminate the content of what is discretionary. Professor William Burnham argues that the state constitution is implicated “when an interaction between a government and its citizens involves an exercise of governmental power.”¹²⁵ An exercise of governmental power, in turn, occurs when a state actor has “the ability,” rooted in governmental authority, “to wield coercive force” over the other party.¹²⁶

122. *Id.* at 43 (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 990 (4th ed. 1971)).

123. *Peavler*, 528 N.E.2d at 43 (citations omitted).

124. *Id.* at 45.

125. Burnham, *supra* note 77, at 557. His proposal was focused on substantive due process claims under state constitutions, but this Essay argues it can usefully be applied more broadly.

126. *Id.*; see also Bowers, *supra* note 2, at 357–58 (“Culpability standards are a frequent feature of constitutional tort law at the federal level and in other states. For example, in Utah plaintiffs must establish they suffered a “flagrant” violation of their state constitutional rights to maintain a private suit for damages” (quoting *Kuchcinski v. Box Elder County*, 2019 UT 21, ¶ 123, 450 P.3d 1056, 1064)). At the federal level,

[i]n *Daniels* and *Davidson*, the Court imposed a culpable state of mind requirement for all violations of the due process clause, which accounts for most constitutional tort actions. According to the Court, conduct of government officials that amounts to “mere negligence” does not violate the due process clause, because a “deprivation” of life, liberty, or property means something more than a “mere lack of due care by a state official.”

Determining whether a state actor has “the ability,” rooted in governmental authority, “to wield coercive force” over the other party, will usually involve “a close examination of interaction between the government action and the injured party.”¹²⁷ But applying the test can help distinguish between state action which belongs in the tort field and state action that belongs in the state constitutional violation field. For example, incidents involving careless drivers who happen to work for the state would typically fall into the state tort claims act field: “The mere fact that the defendant works for the government does not mean that an injury caused by that employee involved an exercise of power. Many government employees engage in conduct that does not involve any significant exercise of power over others.”¹²⁸ A quotidian car accident between one governmental driver and one regular citizen would not amount to constitutional injury because “no governmental power relationship exists between the driver and the plaintiff and thus there is no possibility that an exercise of power is involved,” nor could the driver have “cause[d] the injuries while in the process of exercising any governmental power over the plaintiff.”¹²⁹ But if a police officer accidentally shot a person they were arresting, the state constitution is implicated, rather than a mere battery claim, because “there is a power relationship between the parties and the injury takes place in the course of the defendant police officer exercising or attempting to exercise governmental power over the plaintiff.”¹³⁰ These circumstances place this injury, and those like it, into the state constitutional injury category.

Burnham, *supra* note 77, at 516 (footnote omitted) (quoting *Daniels v. Williams*, 474 U.S. 327, 330–31, 334 (1986)). Bowers proposes that “[w]here plaintiffs can prove violation of a self-executing provision of the state constitution, the state itself should be held strictly liable when the conduct causing injury is fairly attributable to the government.” Bowers, *supra* note 2, at 354.

127. Burnham, *supra* note 77, at 557.

128. *Id.*

129. *Id.* at 563; *cf. id.* at 521 (“[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.” (quoting *Baker v. McCollan*, 443 U.S. 137, 146 (1979))).

130. *Id.* at 563. See also Evans, *supra* note 86 (manuscript at 19–20), describing that:

The Court has also granted police broad discretion to arrest people and subject them to the utterly degrading experience of being booked into jail. *Atwater v. City of Lago Vista* (2001) held that an officer may arrest someone so long as they have probable cause to believe they committed *any* infraction—including a fine-only infraction such as driving without a seatbelt or jaywalking—even if the arrest admittedly serves no purpose but “gratuitous humiliation[.]” Under *Atwater*, courts have upheld the arrests of a seventh-grade student for “fake burping” in class, and a fourteen-year-old for eating a single French fry in the subway.

(second alteration in original) (footnote omitted) (quoting *Atwater v. City of Lago Vista*, 582 U.S. 318, 346 (2001)); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)

As the vast daylight between a vehicle that happens to be driven by a governmental employee and a police officer arresting someone suggests, sometimes it is not so difficult to discern which category a governmental wrong falls into. There are governmental actions which clearly fall in the category of “policy” decisions not covered by state tort claims act, and there are governmental actions which quite obviously resemble those covered by run-of-the-mill torts. As state constitutional law scholar Jennifer Friesen has astutely identified, “[t]ypical exceptions to liability [under tort claims acts] include claims that will frequently form the stuff of state constitutional violations, such as officials’ discretionary acts within the scope of their employment and intentional torts such as false imprisonment, malicious prosecution, and invasion of privacy.”¹³¹

In other words, the “discretionary” acts and intentional torts that fall outside the purview of state tort claims act are the same wrongs that generally fall within the sphere of state constitutional tort. This has been functionally acknowledged in the federal constitutional tort system, where concerns that “the discretionary activity exemption from liability might make it impossible for an injured person to obtain relief” prompted the Supreme Court to find that there must be a path to liability for federal constitutional violations under § 1983.¹³²

In the state constitutional context, consider the facts of *Schreiner v. Hodge*,¹³³ a 2022 decision from the Kansas Supreme Court.¹³⁴ The plaintiff sued the police after officers detained him for twenty-five minutes on suspicion of crimes, on the grounds that he had parked his truck, which had out-of-state plates, in a residential neighborhood and entered a nearby wooded area on foot.¹³⁵ The court held that the officers were entitled to discretionary function immunity.¹³⁶ In the court’s view, “the officers’ reasonable suspicion determination inherently required them to exercise judgment and discretion based largely on experience and

(“a single decision” by a policymaker or governing body “unquestionably constitutes an act of official government policy,” regardless of whether “that body had taken similar action in the past or intended to do so in the future”).

131. Jennifer Friesen, *Recovering Damages For State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1291 (1985).

132. DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, EVAN C. ZOLDAN & CYNTHIA BAKER, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 534 (9th ed. 2021).

133. 504 P.3d 410 (Kan. 2022).

134. *Id.*

135. *Id.* at 417–18.

136. *Id.* at 417.

training,” making their act a discretionary one.¹³⁷ Thus, under the Kansas Tort Claims Act, the officers could not be liable.¹³⁸

This is the space where state constitutional tort claims become viable. Kansans have an inviolate constitutional right “to be secure in their persons and property against unreasonable searches and seizures,”¹³⁹ which the officers likely offended. Common law tort and state tort claims acts, with their focus on wrongs that parallel private wrongs, do not provide a path for plaintiffs to vindicate such rights through a claim for damages. This is one place (among many) where state constitutional tort claims become important.¹⁴⁰

State tort claims acts are designed to apply liability to governments in circumstances where a private person would be liable.¹⁴¹ But when states act in a wrongful manner as public actors or “governmentally,” a circumstance that is explicitly excluded from most state tort claims acts, claims should not automatically fall into a sphere of immunity, but rather into a sphere of potential state constitutional liability. In sum, state constitutional tort liability may begin precisely where state tort claims acts end.

137. *Id.*

138. *Id.* (“While the Fourth Amendment to the United States Constitution and Kansas statute require officers to have reasonable suspicion before they may lawfully detain a person without a warrant, that requirement does not alter the discretionary nature of the officers’ reasonable suspicion determination in the field.”).

139. KAN. CONST. bill of rts., § 15.

140. Indeed, the court in *Schreiner* suggested that the plaintiff could seek relief for a federal constitutional violation under § 1983. 504 P.3d at 430. However, federal constitutional claims may not offer adequate vindication, as state constitutions often offer broader protections to plaintiffs. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (noting that state constitutions can contain “protections often extending beyond those required by the Supreme Court’s interpretation of federal law”). As another example of a state constitutional claim picking up where a state tort claim leaves off, in *Bosh v. Cherokee County Building Authority*, the Oklahoma Supreme Court noted that the Oklahoma Governmental Tort Claims Act extended governmental accountability “to torts for which a private person would be liable, unless they were committed in bad faith or in a malicious manner.” 2013 OK 9 ¶ 15, 305 P.3d 994, 1000. At the same time, the Act immunized “the state and political subdivisions such as counties and municipalities from liability arising out of the operation of prison facilities.” *Id.* ¶ 17. The court held that although the plaintiff, a detainee who had been brutally attacked by jail employees, thus had no common law tort claims, he did have a private cause of action under the state constitutional prohibition against unreasonable searches and seizures. *Id.* ¶ 23. “Subsequent to *Bosh*, the Oklahoma Supreme Court held that the Oklahoma Legislature amended the OGTCOA to make clear that the state and its subdivisions’ immunity from suit extends to torts arising from alleged state constitutional violations.” *Byrd v. Indep. Sch. Dist. No. 8 of Tulsa Cnty.*, No. 23-cv-00404-CDL, 2024 WL 4350800, at *15 (N.D. Okla. Sep. 30, 2024).

141. The Oklahoma Tort Claims Act is an example. See *Bosh*, 2013 OK 9, ¶ 15.

CONCLUSION

In *Dalehite v. United States*,¹⁴² Justice Robert H. Jackson famously wrote that “*it is not a tort for government to govern.*”¹⁴³ At the same time though, it might be a *state constitutional tort* for the government to govern in particularly harmful ways, and state tort claims acts provide a useful line for distinguishing between the two. “Governmental” wrongs involve the use of power and a political dimension not prominent in common law tort claims: Constitutions, at their core, are meant to protect against governmental abuses of power, and they deal “with the large concerns of the governors and the governed,” not with the “injuries that [routinely] attend living together in society.”¹⁴⁴ When the government violates the governor-governed relationship by engaging in a state constitutional tort, the remedy of damages provides vindication, a refutation of the political message inherent in an unremedied wrong, and a reassertion of “those interests that are the subject of [state constitutional] protection and their inherent value.”¹⁴⁵ “Ordinary” tort does not adequately substitute, and when state courts are considering whether a particular state constitutional prohibitory provision contains an implied right of action, the distinction between the two should be honored. Rather than constituting overlapping spheres, state constitutional tort liability may begin precisely where state tort claims acts end.

142. 346 U.S. 15 (1953).

143. *Id.* at 57 (Jackson, J., dissenting).

144. *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

145. Jason N.E. Varuhas, *The Concept of ‘Vindication’ in the Law of Torts: Rights, Interests, and Damages*, 34 OXFORD J. LEGAL STUD. 253, 254 (2014).

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