The Constitutional Tort Action as Individual Remedy

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Introduction

Constitutional tort actions,[1] like their common law counterparts, are generally thought of in terms of their function as monetary remedies. Ideally, awarding damages to individuals who are harmed by a federal or state official's violation of the Constitution compensates for some of the individual's past injury and deters future rights deprivations.

Recently, a number of commentators have challenged this prevailing view, voicing doubts about whether monetary awards for constitutional rights violations can be justified on compensation and deterrence grounds. In an article published in the *University of Chicago Law Review*,[2] Professor Daryl J. Levinson argues that, since governments do not respond to monetary liability in the same ways as private actors, the deterrence effects of constitutional tort actions are limited. After examining the various rationales for constitutional tort actions, Professor Levinson concludes that "none of the prevailing justifications for . . . constitutional torts [are] adequate, or even very promising."[3] In a recent essay published in the *Yale Law Journal*,[4] Dean John Jeffries contends that fully compen-

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[1] As used in this Article, the term "constitutional tort action" encompasses all claims for damages brought against government officials for violating an individual's federal constitutional rights. Constitutional tort actions against state officials are generally brought pursuant to 42 U.S.C. § 1983 ("§ 1983"). Constitutional tort actions against federal officials are generally brought pursuant to the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See, e.g.*, Theodore Eisenberg & Steward Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 643 (1987).

States could also theoretically enact statutes allowing individuals to bring actions in state court against government officials for violating their federal constitutional rights. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1512–17 (1987).

[2] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) [hereinafter *Making Government Pay*].

[3] *Id.* at 348.

[4] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale

sating all victims of constitutional violations for their past harm may discourage courts from innovating in the area of constitutional rights. He hypothesizes that courts may actually narrow the scope of constitutional rights in order to reduce the potential costs inflicted by money damages. Dean Jeffries thus concludes that structural injunctions hold more promise for enforcing constitutional rights than constitutional tort actions because they focus on reform that may benefit future generations rather than focusing on past injury.

To some extent, these concerns require us to re-evaluate why we need constitutional tort actions. We can imagine a world where the Constitution is enforced not via a federal damages action, but only through other remedies such as structural injunctions, declaratory judgments, judicial review, the exclusionary rule, and the writ of habeas corpus. We could relegate damages actions against government officials to the realm of state common law as they were for the first 150 years of our nation. Moreover, if the critiques remain unanswered, they may reinforce the perception that constitutional tort actions are an unnecessary burden on the federal court system. If constitutional tort actions do not deter constitutional rights violations and if compensation for constitutional rights violations is too costly, courts may be more willing to expand governmental immunities or dismiss such cases before they go to the jury. Alternatively, the legislature may restrict the rights of certain litigants to bring such actions.[5] Further, plaintiffs asserting these actions may not get the support or consideration that they deserve from the legal community.

This Article responds to these concerns by re-orienting the discussion. As stated earlier, the literature has narrowly viewed the constitutional tort remedy in terms of the external effects of awarding monetary damages. As a result, the current discourse assesses the remedy's value largely by the perceived societal consequences of requiring the payment of damages for constitutional rights violations. Defenders of constitutional tort actions argue that damages have a deterrent effect that generally outweighs the costs to society.[6] Critics respond that damages do not have a deterrent effect and may even have the detrimental effect of keeping courts from expanding individual rights.[7]

While the deterrent effect of awarding damages is a strong justification for having a constitutional tort action, conceptualizing that remedy solely in monetary terms is too narrow an approach. It leaves the remedy vulnerable to recent attacks questioning the cost-effectiveness of damage

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L.J. 87, 89–90 (1999).

[5] For example, the Prison Litigation Reform Act of 1995 has already limited prisoners' rights to bring civil suits. *See* 18 U.S.C. § 3626 (2000); 28 U.S.C. § 1346 (2000); 28 U.S.C. § 1915 (2000); 42 U.S.C. § 1997e (2000).

[6] *See generally* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001).

[7] *See, e.g.*, Jeffries, *supra* note 4; Levinson, *supra* note 2.

awards, and it limits our understanding of the constitutional tort action and its function.

The current unidimensional focus on the compensation and deterrence effects of constitutional tort actions leaves at least three types of issues unaddressed. First, what sorts of rights are being enforced? The notion that remedies simply enforce constitutional rights does not capture the reality that the Constitution protects different types of interests. Constitutional remedies, in turn, differ in scope and are often directed at speci-fic areas of concern. To understand the unique remedial role of the constitutional tort action, one must understand the type of rights it protects.

Second, how has the constitutional tort remedy affected the shape of constitutional rights? In another article,[8] Professor Levinson challenges the convention that remedies passively enforce pre-existing constitutional rights. Specifically, he argues that, in the structural injunction context, remedial concerns influence the shape of constitutional rights. Similarly, I argue that constitutional tort actions shape constitutional rights in a distinct way. Rather than solely awarding money for damages caused by actionable misconduct, constitutional tort actions have defined what misconduct is actionable.

Third, what sorts of structural norms are advanced by the constitutional tort action? Since damage awards may impose substantial costs on social institutions, constitutional tort actions are seen as selfishly advancing individual interests. The literature downplays the influence of constitutional tort actions on promulgating certain structural rules and standards that regulate the discretion of government officials to inflict injury.

Answers to these three questions require examining not only the monetary effects of awarding damages, but also how the constitutional tort action forces courts to focus on and assess the circumstances of regular individuals and their interactions with the government. Put another way, the constitutional tort action is an individual remedy, not just a monetary remedy. The typical constitutional tort action involves an individual who has been injured by the action or inaction of a government official. The individual plaintiff will argue that the government should be liable for the injury because its conduct violates some constitutional provision. When courts adjudicate a constitutional tort action, they do not simply determine the value of an individual injury to calculate a damage award. They also assess whether the government's infliction of injury upon the individual is constitutionally appropriate under the circumstances. This endeavor has a value that is distinct from the utilitarian effect of the damage award itself.

Constitutional tort actions are an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon. Be-

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[8] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibriation*, 99 COLUM. L. REV. 857 (1999).

fore the twentieth century, the Constitution primarily served a structural function, with litigation focused on the limits of government power.[9] Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to state common law. It was not until the Supreme Court decisions in *Monroe v. Pape*[10] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[11] that individuals began arguing that the Constitution entitled them to damages for wrongful injury.

When examined as an individual remedy, it becomes clear that the constitutional tort action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, constitutional tort actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the constitutional tort remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries.

Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the constitutional tort action serves a unique role in the range of remedies courts use to enforce the Constitution. The constitutional tort action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.

This Article presents these ideas in four Parts. Part I describes the prevailing focus on the constitutional tort action as a monetary remedy and outlines the major critiques of awarding damages for constitutional violations. Part II traces the origins of the constitutional tort action with the purpose of understanding how the action is an individual remedy. Part III examines how the individualized nature of the constitutional tort action has impacted the shape of constitutional rights. It documents the ways in which the action has established rights that protect individuals from the infliction of certain injuries and regulates the government's discretion to inflict injury upon individuals. Part IV argues that the constitutional tort action, understood as an individual remedy, serves a unique and important structural role in the range of remedies used to enforce the Constitution.

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[9] *See* discussion *infra* Part II.B.
[10] 365 U.S. 167 (1961).
[11] 403 U.S. 388 (1971).

I. The Constitutional Tort Action as a Monetary Remedy: Justifications and Critiques

A substantial portion of the legal community views constitutional tort actions as an unnecessary burden. They often involve difficult individuals, a significant portion of whom are prisoners. Many of these plaintiffs proceed *pro se* and bring frivolous claims. The defendants in such suits—often government officials performing difficult jobs—must spend taxpayer time and money in defending themselves against claims that may be meritless. Federal judges and juries expend significant amounts of time and energy in adjudicating these actions. Some may wonder why the limited resources of the federal courts should be spent on cases that could conceivably be brought as state tort law actions.[12]

The conventional response to these concerns argues that constitutional tort actions compensate and deter constitutional rights violations. That is, remedying an individual's injury with a damage award enforces the Constitution and sets adequate monetary disincentives to unconstitutional action. This argument has intuitive appeal, but has been difficult to conclusively establish. Especially in the last several years, commentators have advanced a number of sophisticated arguments challenging the effectiveness of constitutional tort actions. These critiques focus largely on the monetary aspect of constitutional tort actions.

This Part describes the justifications and critiques of constitutional tort actions as monetary remedies. Section A explains that the predominance of monetary justifications for the constitutional tort action—that they compensate and deter—originates in the overlapping nature of constitutional and common law torts. Section B sets forth the major critiques of constitutional tort actions, which focus on whether one can justify awarding damages for constitutional violations on compensation and deterrence grounds, and whether state tort actions could fulfill the same goals.

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[12] The perception that constitutional tort actions unduly burden the federal courts has existed since their inception, *see, e.g.*, Paul Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352 (1970) (responding to the argument that jurisdiction over constitutional tort actions should be shifted to state courts because of the burden on federal courts), and has persisted, *see, e.g.*, Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 2 (1985) ("There appears to be a growing belief that § 1983 actions are likely to be frivolous complaints by litigants who seek to use the statute to convert or bootstrap garden-variety state-law torts into federal cases.").

However, empirical data suggest that this perception does not correspond to reality. *See, e.g.*, Eisenberg & Schwab, *supra* note 1; Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988).

A. Compensation and Deterrence: Parallels Between Common Law and Constitutional Torts

The typical constitutional tort action involves an individual who has suffered injury because of a government official's alleged wrongdoing. An innocent homeowner may have been subject to an unreasonable search by a police officer. A prisoner may have been raped after being placed with an inmate with a reputation of raping other prisoners. The government may have taken an individual's property interest without providing adequate compensation.

Because of their similarities, it can be difficult to determine precisely the difference between constitutional and common law torts. While there may not be a corresponding common law tort for every constitutional tort, the two actions share fundamental characteristics. From the inception of the constitutional tort in *Monroe v. Pape*, the Supreme Court has made it clear that such actions "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[13] Moreover, because the common law tort was established first, there is a tendency to view the constitutional tort as merely a hybrid derivative of the common law tort. One commentator has described the constitutional tort as an action that "is not quite a private tort, yet contains tort elements; it is not quite 'constitutional law,' but employs a constitutional test."[14]

Under one formulation, a common law tort is simply "a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[15] More concretely, common law torts typically involve four elements: (1) a common law duty from one individual to others; (2) that is breached through action or inaction; (3) that causes; (4) injury to another individual.[16] Constitutional torts track the same four elements except that the duty originates from the Constitution instead of the common law. Rather than running between two private individuals, a constitutional duty runs between a government official or municipality and the private individual. While the defendant in a common law tort action may happen to be a government official or municipality, the defendant in a constitutional tort action is always a government official.

Because of the general similarities between constitutional and common law torts, it is natural to conceive of the function of the constitu-

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[13] Monroe v. Pape, 365 U.S. 167, 187 (1961); *see generally* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1721–25 (1989) (describing the origins of tort rhetoric in constitutional tort actions).

[14] Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. REV. 277, 324 (1965).

[15] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984).

[16] *See id.* § 30, at 164–65.

tional tort action in common law terms. This prevailing view is noted by one commentator, who observes that both constitutional and common law torts "share an instrumental concern to inhibit undesirable conduct and a noninstrumental desire to compensate injured persons."[17] By awarding damages, common law tort actions serve to compensate victims for injuries suffered because of wrongdoing and also serve to deter such wrongdoing in the future.[18] Similarly, awarding damages for constitutional violations serves to compensate those who are injured when government officials violate the Constitution and also serves to deter deprivations of constitutional rights in the future.[19]

B. Critiques of the Constitutional Tort Action as Monetary Remedy

Just as some have questioned whether awarding damages for common law torts is an effective way of compensating and deterring injuries,[20] a number of commentators have expressed similar doubts in the context of constitutional torts. Specifically, commentators challenge the assumption that such actions actually change behavior by government officials or deter constitutional violations. They argue that the costs of awarding damages to victims may reduce courts' willingness to innovate in expanding rights. Finally, they argue that the similarity between constitutional and common law torts requires us to continually re-examine why federal rather than state courts primarily adjudicate cases where individuals seek damages for injury by government officials who violate the Constitution.

This Section describes some of the major critiques of the constitutional tort action as a monetary remedy.[21] While I briefly respond to the critiques, the primary purpose of this Section is to set forth the arguments rather than resolve them. Ultimately, I will claim that, regardless of how

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[17] John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1462 (1989).

[18] *See* KEETON ET AL., *supra* note 15, at 5–11.

[19] *See* Carlson v. Green, 446 U.S. 14, 21 (1980) ("[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose."); Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

[20] *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997) (describing critiques of the common law tort system).

[21] This discussion is not meant to be exhaustive. Largely due to space constraints, I am unable to offer a comprehensive survey of the critiques. For example, I do not describe Professor Levinson's rebuttal of the view that compensation for constitutional tort actions cannot be justified on corrective or distributive justice principles. *See* Levinson, *supra* note 2, at 387–414. For a response to this argument, see Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903 (2001).

the constitutional tort action performs as a monetary remedy, it fulfills an additional function that has been overlooked by commentators.

1. Failure To Deter Violations of the Constitution

Theoretically, constitutional tort actions should deter constitutional violations by raising their cost. If government officials commit constitutional torts, they will be subject to suits and forced to pay damage awards. By making conduct that violates the Constitution more costly, damage awards should increase the incentive of government officials to avoid such conduct. As a result, fewer individuals should be subject to constitutional rights deprivations.

In reality, achieving deterrence is more uncertain for a variety of reasons. It is difficult to predict the actual effect of individual damage awards.[22] Constitutional tort actions are left to the control of individual victims. Some victims may choose not to bring suit or may not be willing to invest the time to pursue their claims vigorously. Further, many individual victims do not have the resources to hire a lawyer who can marshal the relevant facts and law in the convincing way needed to obtain a favorable judgment. Finally, the various immunities the courts have conferred on government officials may bar some suits. As one commentator has observed, "[j]udgments arising from suits brought by individual victims are inevitably ad hoc and sporadic."[23]

In his recent article, *Making Government Pay*, Professor Levinson sets forth a detailed argument questioning whether constitutional tort actions fulfill their deterrence function. He observes that governments do not respond to costs and benefits in the same way as a private firm.[24] While private companies are geared primarily towards maximizing their financial returns and will presumptively adjust their behavior in response to monetary

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[22] *See, e.g.*, Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–87 (1994) (describing objections to the assumption that tort law deters).

[23] Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 48 (1980); *see also* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 98 (1983) ("[T]he systemic costs of administering the remedy appear to be high, especially in view of the relative infrequency of recoveries.").

Moreover, damages actions against individual officials may be limited in their ability to spur meaningful change. In his seminal book *Suing Government*, Professor Peter H. Schuck argued that the current system, where liability is imposed on individual officials rather than government entities, is flawed. Damage awards against individual officials may chill vigorous decision-making by officials who do not have the power to initiate change in the system. *See* SCHUCK, *supra*, at 98. Plaintiffs may also find it difficult to identify the individuals who are responsible for their injury. According to Professor Schuck, making governmental entities liable for torts by individual officials would offer a more readily identifiable defendant and would be more likely to result in change because government agencies rather than street-level officials have more power to implement reform. *See id.* at 100–07.

[24] Levinson, *supra* note 2, at 355–57.

costs, governments strive for political ends and thus respond primarily to political costs. According to Professor Levinson, one must translate the financial costs of damage awards into their political costs in order to understand how constitutional tort actions will affect government behavior.[25] He concludes that while damage awards exert some influence on government behavior, it is difficult to make clear predictions as to whether constitutional tort actions have a deterrent effect.[26]

Professor Levinson analyzes the constitutional tort action in the context of two types of political influences—majoritarian concerns and special interest groups.[27] Under a majoritarian paradigm, government responds to the majority of the populace's concerns. Under a special interests paradigm, government responds to highly organized interest groups that aggressively pursue interests from which they disproportionately benefit. Professor Levinson examines constitutional tort actions in response to aggressive police searches, some of which may violate the Fourth Amendment, to show the difficulty of establishing that damages liability will significantly reduce constitutional violations.

From a majoritarian perspective, determining the ultimate political effect of a damage award requires evaluating the overall effect of such awards on the majority's interests. In the Fourth Amendment context, the majority may benefit from aggressive police searches that violate the rights of a few individuals and give rise to some constitutional tort damage awards.[28] The reduction in crime from such searches may outweigh the costs of compensating the harmed individuals who are subject to unreasonable searches and seizures. A government that responds to majoritarian concerns might continue such searches so long as the benefits to the majority outweigh these costs. Thus, from a majoritarian perspective, when the benefits of unconstitutional searches outweigh the costs of constitutional violations, constitutional tort actions can have only a marginal deterrent effect on constitutional rights violations.

From a special interest group perspective, a damage award's ultimate political effect will depend on which special interest groups mobilize in response to the award. While aggressive policing may disproportionately benefit a high crime community, it also means that—absent a constitutional tort remedy—the same community will disproportionately bear the costs in the form of rights violations. With a constitutional tort remedy, damage awards will compensate victims in the community for some of

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[25] *See id.* at 359.

[26] *Id.* at 373, 379–80.

[27] *See id.* at 363–64, 373–74. Professor Levinson also notes that these majoritarian influences are filtered through bureaucrats who are not politically accountable and who may have different interests than the decision-makers who are subject to these political influences. *Id.* at 380. Thus, it becomes even harder to predict the impact of constitutional tort actions on the decision-making processes of government.

[28] *Id.* at 369–70.

these costs. The costs of those damage awards may be shared by the general taxpaying public in other communities. As a result, the benefits of aggressive policing will become greater relative to the costs borne by the community. Thus, the high crime community may have a greater incentive to mobilize the government to continue or even increase aggressive policing, resulting in more rights violations.[29]

Of course, as Professor Levinson acknowledges, there are a number of plausible scenarios where the political costs of damage awards will outweigh the political benefits of aggressive searches. I am inclined to believe that the costs of constitutional violations will outweigh the benefits in most cases.[30] Both of Professor Levinson's examples assume that the conduct leading to constitutional violations will be clearly preferred either by the majority or a special interest group, resulting in unambiguous political benefits. But it is unlikely that the political benefits of aggressive policing will be commensurate to the costs imposed on government by a damage award for a rights violation. In reality, it is likely that the benefits of aggressive policing are difficult for the majority or special interest groups to quantify because they are intangible. It may be impossible for the police—or the public—to conclusively link reductions in crime to policies that cause significant rights violations. In contrast, a significant damage award can have a substantial impact on a municipality with a limited budget. Budgetary shortfalls resulting from monetary judgments, which Professor Levinson does not incorporate into his model, may also have political implications and may even reduce the ability of the police to perform the aggressive searches that provide political benefits. Moreover, a single unjust search or brutal beating by police officers can erase the benefits of months of careful policing. The emotional impact of civil rights violations can lead to unpredictably high political costs for the government officials who failed to prevent the violation. Thus, it is unlikely that the benefits of questionable police tactics will be so clear that majority or special interest groups will tolerate—much less encourage—violations of constitutional rights, which have visible and unacceptable costs.

Professor Levinson's arguments do demonstrate that context matters in assessing how governments will respond to constitutional tort liability. There are a large number of ways in which advocates and opponents of constitutional tort actions can manipulate the assumptions behind different hypotheticals to support their theories with respect to the deterrent effects of constitutional tort actions. In terms of the constitutional tort

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[29] *Id*. at 378–79.

[30] For a more direct response to Professor Levinson's argument, see Gilles, *supra* note 6. Professor Gilles argues that constitutional tort remedies deter the most egregious forms of intentional government misconduct, conduct which would not be beneficial to the majority of any special interest group in any political framework. *Id*. at 849–58. Professor Gilles also argues that municipalities may respond to damages liability. *Id*. at 858–67.

action's deterrence function, the schism between the ideal and reality may be larger than we would like. At the very least, Professor Levinson shows that we must be careful in making the blanket assertion that constitutional tort actions always deter constitutional rights deprivations.

2. The Costs of Compensation

Recently, in a thoughtful and important essay, Dean John Jeffries examined the non-monetary costs of compensating individuals for injuries caused by constitutional rights violations. In *The Right-Remedy Gap*,[31] Dean Jeffries defends immunities that shield some government officials for causing constitutional tort injuries on the ground that such immunities may encourage innovation in constitutional rights. According to Dean Jeffries, if courts were required to award damages for all injuries caused by constitutional rights violations, they might be less willing to experiment with and expand those rights.[32] *The Right-Remedy Gap* challenges the assumption that the remedial system necessarily fails by not awarding damages to compensate victims for constitutional injury.

Dean Jeffries begins by observing that the doctrine of qualified immunity, which shields government officials from constitutional tort liability in certain circumstances,[33] can preclude a remedy for some individuals who are injured by what is arguably a constitutional rights violation.[34] Where qualified immunity applies, a constitutional right that promises that government will not behave in a certain way is unenforceable, creating a "right-remedy" gap. While commentators have uniformly criticized this gap, Dean Jeffries claims the gap has one benefit in that "limiting money damages for constitutional violations fosters the development of constitutional law."[35] If courts were required to award damages in all cases, they would be less willing to experiment with the expansion of rights for fear of subjecting the government to excessive costs.[36] Thus, "doctrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law."[37] And in a changing world, "the capacity of constitutional doctrine to adapt to evolving economic, political, and social conditions is a great

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[31] Jeffries, *supra* note 4.

[32] *Id.* at 98–105.

[33] The basic standard for qualified immunity mandates that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[34] Jeffries, *supra* note 4, at 92–95.

[35] *Id.* at 90.

[36] *See id.* at 98 ("If constitutional tort doctrine were reformed to assure full remediation, the costs of compensation would constrict the future of constitutional law.").

[37] *Id.* at 98.

strength."[38] Dean Jeffries therefore concludes that curtailing damage awards for past deprivations will allow courts to focus constitutional resources more productively on expanding constitutional rights directed at benefiting future generations.[39]

Dean Jeffries uses the example of *Brown v. Board of Education*[40] to illustrate his theory.[41] Because the constitutional tort action was not firmly established at the time, the *Brown* plaintiffs sued only for equitable relief and did not bring a damage claim for being placed in a segregated school system. Had they asked for damages, Dean Jeffries notes that the costs of integrating the school system would have been much higher. In addition to the costs of desegregation, school systems might have had to compensate all those who were injured by the policy of segregation. These costs could have influenced the *Brown* Court to be more cautious in ordering integration.[42]

Dean Jeffries also illustrates his point by showing how the doctrine of qualified immunity is structured in a way that fosters constitutional innovation.[43] Qualified immunity shields government officials from liability when they violate a constitutional right that has not been clearly established. As Dean Jeffries explains, this liability shield makes it less costly to declare a new innovation in constitutional rights. When a right is clearly established for the first time in a case, the defendant in that case cannot be liable for damages, even if his conduct violated the newly established right. Only government officials who violate the right in future cases can be liable for damages. With the doctrine of qualified immunity, a court can establish a new right without fear that imposing liability for past conduct will impose costs on government officials who did not know that their conduct was wrong. In the future, government officials could theoretically adjust their conduct to avoid damages liability so it does not violate the now clearly established right. Without such an opportunity for government to adjust its conduct, courts might be less willing to declare new rights for fear of imposing retroactive costs that the government did not have the opportunity to avoid. Thus, a limitation on remedies may make courts more willing to expand rights.

At first glance, Dean Jeffries' argument appears only to be directed at immunities that limit the workings of the constitutional tort action. However, in some ways, his argument in defense of the right-remedy gap also broadly questions the inherent value of a monetary remedy that compensates victims of constitutional torts. For example, Dean Jeffries unfavorably contrasts the remedy of damages with the remedy of injunc-

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[38] *Id*. at 97.
[39] *See id*. at 105.
[40] 347 U.S. 483 (1954).
[41] Jeffries, *supra* note 4, at 100–03.
[42] *Id.*
[43] *Id*. at 108–09.

tive relief. According to Dean Jeffries, while awarding damages can remedy past harm for a particular violation of a constitutional right, structural injunctions remedy future harm and are not limited to fixing an individual violation of rights.[44] Thus, according to Dean Jeffries, rights may be better protected through structural injunctions, which implement structural reform of the system, than through individual damage awards, which focus on injuries that have already occurred. The implication is that structural injunctions, which focus on the future, are a more productive and worthwhile strategy to enforce rights than individual constitutional tort actions, which focus on the past.[45]

3. Redundancy with State Common Law Actions for Damages

A more fundamental criticism of constitutional tort actions is that they are redundant with common law tort actions against government officials. Some have argued that state courts could just as easily adjudicate such damages claims and accomplish the same goals of compensation and deterrence. Others have argued that the expansion of federal rights may crowd out state protection of individual rights.

As noted earlier, in constitutional tort actions courts apply constitutional rather than common law norms in determining the duty that the government official owes to the individual. In some areas, though, the duties may overlap. For example, a police officer's use of excessive force may be actionable not only under the Fourth Amendment but under the state law tort of assault. In fact, plaintiffs often add state tort claims to complaints alleging federal constitutional tort violations.

Moreover, when common law and constitutional duties overlap, there is no distinction in the sort of injury for which the plaintiff is allowed to recover. Even in constitutional tort actions, a plaintiff may only recover damages for common law injuries such as physical harm, emotional distress, humiliation, and monetary loss.[46] Absent such a common law harm, the only distinct injury suffered by a plaintiff in a constitutional tort action is the abstract harm of a rights violation. But under Supreme Court precedent, the fact that a constitutional right has been violated in itself only entitles the plaintiff to a nominal damage award of one dollar.[47] As the Supreme Court has held, "the abstract value of a constitutional right may not form the basis for § 1983 damages."[48]

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[44] *Id*. at 111–13.

[45] For a critique of Professor Jeffries' argument, see Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101–02 (2000) (making the point that qualified immunity reduces the incentives for plaintiffs to seek the expansion of constitutional rights).

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

[47] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266–67 (1978).

[48] *Stachura*, 477 U.S at 309.

If constitutional tort actions only allow recovery for the exact same type of injury that is recoverable through a common law action, there will be some redundancy in allowing both forms of actions. This is especially the case where the substance of the constitutional right and common law standard are similar and state courts enforce the common law standard as vigorously as the federal courts enforce the constitutional standard. A state common law action that imposes a damage award against a government official should have substantially the same deterrent and compensatory effect as a federal constitutional tort action.[49] Indeed, one commentator speculates that the Supreme Court has restricted constitutional tort actions to avoid redundancy between federal and state actions.[50] The Supreme Court has specifically warned against making the "Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[51] The overlap between state tort law and federal constitutional law raises questions about whether constitutional tort actions serve a unique purpose.

Additionally, some have argued that federal constitutional tort law may reduce the overall protection of individual rights by displacing state authority.[52] By funneling actions against government officials into federal court, constitutional tort actions arguably reduce the opportunity for state courts that have experience in adjudicating common law tort actions to expand and develop such rights.[53] Justice Frankfurter, in opposing the creation of a constitutional tort remedy, argued that

> [f]ederal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from state lawmakers, who hold the power of providing a far more comprehensive scope of protection.[54]

In order to justify constitutional tort actions, it is therefore important to articulate a purpose for a federal remedy that is distinct from common law tort actions.

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[49] *See, e.g.*, Whitman, *supra* note 23, at 21 ("[W]here a section 1983 plaintiff has an 'adequate' state tort action, that remedy will, by definition, satisfy compensation and deterrence goals.").

[50] *Id.* at 8 ("One of the explanations used to support the Supreme Court's retrenchment on section 1983 claims has even been the redundancy of section 1983 actions and state tort law.").

[51] Paul v. Davis, 424 U.S. 693, 701 (1976).

[52] *See, e.g.*, Whitman, *supra* note 23, at 30 ("[D]isplacement occurs simply because, when an interest is granted constitutional protection, the existence or nonexistence of state law becomes, in large measure, irrelevant.").

[53] *See, e.g.*, *id.* at 35–37.

[54] Monroe v. Pape, 365 U.S. 167, 243 (1961) (Frankfurter, J., dissenting).

II. The Origins of an Individual Remedy

The debate over the merits of the constitutional tort action has implicitly assumed that all constitutional remedies uniformly enforce the same kinds of constitutional rights. As a result of the focus on the monetary effects of constitutional tort actions, commentators have paid little attention to the nature of the rights created by the constitutional tort remedy. This approach is inadequate because remedies are not identical. The function of a remedy cannot be separated from the types of interests that it advances. The first step in moving beyond the monetary effects paradigm is to understand the type of rights asserted in constitutional tort actions. In doing so, it becomes evident that the constitutional tort action is primarily an individual remedy. Again, when I refer to the action as an individual remedy, I mean that the constitutional tort action requires courts to focus on and assess the circumstances of regular individuals and their interactions with the government.

Understanding the constitutional tort action as an individual remedy requires examination of its origins and a comparison with earlier regimes in which such a remedy was not available. In the present day, the constitutional tort action allows individual plaintiffs to assert claims against government officials based on the Constitution. In this era where civil rights lawsuits are a pervasive part of federal court dockets, it is easy to forget that the constitutional tort action is a relatively new remedy. Until the 1960s, individual damage suits against government officials were brought almost exclusively as state tort actions.[55] State courts and state laws were the primary protectors of individual rights. In contrast to the modern era, the Constitution almost exclusively served a structural purpose, defining the boundaries between the different branches of the federal government and limiting the federal government's reach in relation to state governments. This system was based on the assumption that state tort actions adequately regulated the government's interactions with individuals.

Beginning in the middle of the twentieth century, the federal courts became more assertive in directly enforcing the Constitution through federal judicial remedies. One of those remedies was the constitutional tort action, established by the Supreme Court's seminal decisions in *Monroe v. Pape*[56] and *Bivens*.[57] These decisions rejected the argument that state tort actions are a sufficient way of regulating government wrongdoing against individuals. They recognized that government officials act in ways that are different from private individuals and that constitutional principles may be a better way of regulating these officials than state common law. As a result of these decisions, the constitutional tort action provided in-

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[55] *See* discussion *infra* Part II.A.
[56] 365 U.S. 167.
[57] 403 U.S. 388 (1971).

dividuals with a way to assert constitutional claims directly against government officials.

A. The Early Constitutional Focus on Structure

Initially, constitutional law was concerned with defining the powers of the federal government in relation to the states and the branches of the federal government in relation to each other. According to Professor Laurence Tribe's treatise on constitutional law, "[t]he first century of government under the Constitution was understandably characterized by a preoccupation with structural issues."[58] Professor Akhil Amar has demonstrated that even the Bill of Rights, today considered to be the basic source of individual and minority rights, is pervaded by structural themes.[59]

The prevalence of individuals bringing federal suits to assert their federal constitutional rights is a largely modern phenomenon. First, prior to the twentieth century, suits against government officials were generally not brought in federal court. Because there was no general federal question statute until 1875, the Supreme Court protected federal constitutional rights through direct review of state court decisions.[60] As Justice Blackmun has documented, "Almost without exception, the Supreme Court's most significant constitutional holdings in the years before the Civil War were reached in cases that came up through the state-court systems."[61] Second, when plaintiffs did bring suits against government officials, they were actions seeking damages for violations of state law rather than actions seeking to enforce federal constitutional rights directly.[62] On its face, the Constitution says nothing about granting plaintiffs the right to bring suit for its violation.[63] Thus, it was natural for plaintiffs to conceive of a government official's wrongdoing in state com-

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[58] 1 Laurence H. Tribe, American Constitutional Law § 7-1, at 1293 (3d ed. 2000).

[59] Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). As Professor Amar describes:

> Originally a set of largely structural guarantees applying only against the federal government, the Bill [of Rights] has become a body of rights against all government conduct. Originally centered on protecting a majority of the people from a possibly unrepresentative government, the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities.

Id. at 1136.

[60] *See, e.g.*, *Monroe*, 365 U.S. at 252 (Frankfurter, J., dissenting) ("[T]he ordinary mode of protection of federal constitutional rights was Supreme Court review.").

[61] Blackmun, *supra* note 12, at 4.

[62] It appears that there were some limited exceptions, including some Contract Clause cases brought directly against municipalities. *See* Owen v. City of Independence, 445 U.S. 622, 639 n.19 (1980).

[63] *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 312 (1995) ("The guarantees of the Bill of Rights and the Civil War Amendments are virtually silent about the consequences of transgression.").

mon law terms like trespass or assault rather than appealing directly to a constitutional provision.

That is not to say that the Constitution was irrelevant to the relationship between government and society; it indirectly protected the rights of private citizens by limiting the reach of government power. One such example was in the criminal context. As Professor Ann Woolhandler notes, "in the nineteenth century, judicial enforcement of the Constitution largely occurred through the nullification of statutes. In state court actions brought by state officials to enforce state laws, such nullification might be occasioned by the defendant's defense that the statute under which he was prosecuted was unconstitutional."[64]

The Constitution was also a background presence in state court damages actions brought by individuals against government officials. For example, a plaintiff would bring a trespass suit in state court against a government official for injury caused by a law enforcement officer's search of his home. In response, the defendant officer would argue that he was immune from suit because he was acting pursuant to valid government authority. The plaintiff would respond that the defendant officer had gone beyond his authority because the search was "unreasonable" and violated the Fourth Amendment.[65] Because the issue of constitutionality only arose with respect to whether a government official had exceeded his lawful authority, the state court's adjudication did not focus on whether the plaintiff had an individual right originating from the Constitution.[66] The Constitution instead functioned as a limit on the defendant's authority as a government official to act in ways that would ordinarily violate state common law. It was not the direct source of the individual's cause of action against the government official. Thus, the federal courts and federal law operated in the background, rather than the forefront, in defining individual rights.

B. The Civil War and § 1983

The Civil War established the supremacy of the national government over the states. It led to a major realignment in the relationship between the federal and state governments that gradually led the federal courts to

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[64] Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 99 (1997).

[65] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–91 (1971); Amar, *supra* note 59, at 1178–79; Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510–11 (1989).

[66] *See, e.g.*, Blackmun, *supra* note 12, at 3–4 ("[I]n the first 70 years of the Republic, many of the Supreme Court's important constitutional decisions came in suits in which defendants sought, on constitutional grounds, to avoid liability, rather than in suits in which plaintiffs sought to obtain damages or injunctive relief for alleged constitutional violations.").

play a more direct role in protecting individual rights. According to Professor Tribe, "[t]he Civil War, and the [Thirteenth, Fourteenth, and Fifteenth] amendments that were its fairly immediate legacy . . . place[ed] the issue of personal rights—and the necessity of their direct protection against state interference—squarely within the cognizance of the federal Constitution and the federal judiciary."[67] The federal government's power to enforce individual rights was established and asserted, first through the Thirteenth Amendment's abolition of slavery,[68] then through the Fourteenth and Fifteenth Amendments' extension of national citizenship and the right to vote to African Americans.[69] Rather than ceding the enforcement of personal rights to the states, the federal government began to play a role in defining such rights.[70] This realignment planted the seeds for the subsequent creation of an individual remedy.

Of the statutes passed after the Civil War, the most relevant for the constitutional tort action was section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, which has been codified at 42 U.S.C. § 1983 and is now commonly known as § 1983.[71] It provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[72]

Section 1983 constituted part of a range of remedies designed to protect individuals in the South where state authorities refused to enforce the law against members of the Ku Klux Klan.[73] It drastically rethought the rela-

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[67] 1 TRIBE, *supra* note 58, § 7-1, at 1295; *see also* Blackmun, *supra* note 12, at 6 ("Taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and these new jurisdictional statutes, all emerging from the cauldron of the War Between the States, marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government.").

[68] U.S. CONST. amend. XIII.

[69] U.S. CONST. amends. XIV, XV.

[70] *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238–39 (1972) ("As a result of the new structure of law that emerged in the post–Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.").

[71] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)); *see also* Kalina v. Fletcher, 522 U.S. 118, 123 (1997).

[72] 42 U.S.C. § 1983 (2000).

[73] *See generally* Monroe v. Pape, 365 U.S. 165, 174–79 (1961).

tionship between federal and state governments with respect to the enforcement of rights. As the Supreme Court summarized, in passing § 1983

> Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.[74]

At least in theory, § 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[75] One proponent of the bill noted that the statute was the only way to ensure that constitutional rights had meaning for individual citizens.[76] Section 1983 was a significant move away from a paradigm where individual rights were primarily protected by the state courts. As one of the opponents of the bill protested:

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.[77]

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[74] *Mitchum*, 407 U.S. at 242.

[75] *Id.* at 239.

[76] As Senator Butler of Massachusetts testified:

> If the Federal Government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States, why were guarantees of those fundamental rights put in the Constitution at all, and especially by acts of amendment?
>
> All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative?

CONG. GLOBE, 42d Cong., 1st Sess. 448 (1871).

[77] *Monroe*, 365 U.S. at 179–80 (citing CONG. GLOBE, 42d Cong., 1st Sess. 216 (1871) (testimony of Senator Thurman)).

Senator Trumbull continued this theme, arguing that "[t]he States were and are now, the depositaries of the rights of the individual,"[78] and that at the Founding "the general rights of person and property were left to be protected by the States . . . ."[79] The shift to a system where "the Federal Government takes to itself the entire protection of the individual in his rights of person and property" would "be a change in our form of government . . . ."[80]

Senator Trumbull was ultimately correct though his prediction did not come true until many years later. Despite its ambitious ideals and broad wording, § 1983 was inexplicably almost never utilized for more then seventy years.[81] Beginning in 1939, a few cases were brought pursuant to § 1983 against state officials challenging unconstitutional voting restrictions.[82] These actions all involved individuals who acted pursuant to official authority, implementing state policy rather than committing independent wrongdoing.[83] But these cases did not cause a significant number of individuals to turn to the federal courts for vindication of their constitutional rights. Thus, even with the passage of § 1983, Walter Dellinger could accurately observe as late as 1972 that "[t]he positive law of the Constitution has largely been created and applied in cases in which the citizen seeks to invoke a constitutional guarantee as a shield to ward off actions taken by the government."[84] While the Civil War fundamentally realigned the relationship between the federal government and the states, it took some time before it became common for individuals to appeal directly to the Constitution as a source of individual rights.

C. Opening the Door for the Individual: The Establishment of the Constitutional Tort Action

Beginning in the middle of the twentieth century, courts expanded the range of remedies available for constitutional violations. For example, after the Supreme Court held that segregated school systems violate the Equal Protection Clause in *Brown v. Board of Education*,[85] the federal

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[78] CONG. GLOBE, 42d Cong., 1st Sess. 577 (1871).

[79] *Id*. at 578.

[80] *Id*. at 579.

[81] *See, e.g.*, SCHUCK, *supra* note 23, at 199 ("Only nineteen decisions were rendered under § 1983 in the first sixty-five years after its adoption in 1871."); Blackmun, *supra* note 12, at 12 ("[F]rom the 1890's to the 1940's, the Civil Rights Acts lay virtually dormant."); Shapo, *supra* note 14, at 282 ("The post-Reconstruction judicial history of the civil-damage section of the Ku Klux Act is relatively skimpy up to 1939.").

[82] SCHUCK, *supra* note 23, at 48–49 ("[Section 1983] was seldom invoked prior to 1939, and even then was largely confined to challenges of unconstitutional voting restrictions.").

[83] Shapo, *supra* note 14, at 283–84.

[84] Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972).

[85] 347 U.S. 483 (1954).

courts began the task of implementing systemic changes in the nation's public school systems through structural injunctions.[86] In the realm of criminal procedure, the Supreme Court began applying the various clauses of the Bill of Rights against the states.[87]

Also around this time, the constitutional tort action emerged from two Supreme Court decisions, *Monroe v. Pape*[88] and *Bivens*,[89] which were decided in 1961 and 1971 respectively.[90] In these cases, the Supreme Court rejected the prior system where individuals primarily brought actions against government officials in state court pursuant to state law.[91] Instead, the Court acknowledged that the common law could not adequately regulate the government's unique powers to inflict injury upon individuals. *Monroe v. Pape* established that § 1983 extends to a state official's acts that exceed his authority. Ten years after *Monroe v. Pape*, the Supreme Court in *Bivens* created a similar remedy against federal officials by acknowledging an implied right of action for damages arising directly from certain constitutional provisions. With the creation of the constitutional tort remedy, the Court established a system where the Constitution rather than state common law governs the prerogative of federal and state officials to inflict injury upon individuals.

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[86] *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[87] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (right to criminal jury); Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against compelled self-incrimination and right to counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained through unreasonable search and seizure).

[88] 365 U.S. 167 (1961).

[89] 403 U.S. 388 (1971).

[90] It is difficult to isolate precisely why courts became more willing to expand individual rights at this junction in history. One explanation was a shift in thinking from a laissez-faire to a more activist vision of government. As Justice Jackson eloquently wrote:

> True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639–40 (1943).

[91] *See infra* notes 92–117 and accompanying text.

1. Monroe v. Pape

In *Monroe v. Pape*, "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[92] The police officers allegedly acted without search or arrest warrants.[93] Monroe brought § 1983 claims against the individual officers and the City of Chicago. All of the defendants moved to dismiss the complaint.[94]

Recall that § 1983 requires that the defendant act "under color of" law in order for a plaintiff to bring suit for injury caused by the defendant's violation of his rights.[95] The issue in *Monroe* was whether the unauthorized acts of police officers acting without warrants could be considered "under color of" law. The defendants argued that the phrase "under color of" "excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did."[96] They also noted that Illinois common law would offer a full remedy to Monroe for any injuries caused by their conduct.[97]

While technically plausible, this interpretation would have significantly limited the use of § 1983 to bring constitutional tort actions because it would have removed the worst forms of government misconduct from § 1983 oversight. The worst forms of government misconduct—acts that are clearly unreasonable, malicious or reckless—are beyond the scope of a state official's authority because no state would ever explicitly authorize such behavior. Under a narrow interpretation of "under color of" law, state tort actions rather than constitutional tort actions would have been the primary vehicle for bringing suits against government officials.

This state of affairs may be acceptable if one adopts the premise that state officials are no different from private individuals in the way they interact with others. If that is true, then state tort law should be sufficient to regulate those officials. The federal remedy could be limited to the extraordinary circumstances in which the state authorizes officials to act in an unconstitutional way. On the other hand, if state officials are different from private individuals, a narrow interpretation of "under color of" law is troubling. Such a scheme would automatically leave much of the worst conduct of state officials unregulated by the Constitution. Under a narrow interpretation, individuals could not bring a federal lawsuit against a

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[92] 365 U.S. 165, 169 (1961).

[93] *Id.*

[94] In addition, the Court granted the City of Chicago's motion to dismiss, holding that a municipality was not a "person" who could be a defendant in a § 1983 action. This holding was reversed in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978).

[95] *See* 42 U.S.C. § 1983 (2000).

[96] *Monroe*, 365 U.S. at 172.

[97] *See id.*

state official whose unauthorized conduct causes injury. That is not to say that a broad interpretation would automatically mean that the Constitution would govern state officials. A broad interpretation would only mean that a plaintiff would have the opportunity to argue that the state official's conduct violates the Constitution. Then, the court would have to decide on the merits whether the state official's acts are unconstitutional.

The Supreme Court rejected the argument of the *Monroe* defendants and concluded that state officials are different from private individuals.[98] The Court adopted the broad definition of "under color of" law that it promulgated in earlier cases involving criminal statutes, thereby making § 1983 a viable vehicle for challenging government conduct.[99] This

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[98] *See id.*

[99] The Supreme Court first confronted the "under color of" law issue in *United States v. Classic*, 313 U.S. 299 (1941). In that case, the defendants, state commissioners of elections, altered and falsely counted ballots in a primary election in Louisiana. They were indicted under section 20 of the federal criminal code, part of the same act as § 1983, that made "it a penal offense for anyone who, acting 'under color of any law' willfully subjects, or causes to be subjected, any inhabitant of any State . . . to the deprivation of any rights, privileges, and immunities secured and protected by the Constitution and laws of the United States." *Id*. at 309–10. In the course of explaining that the actions of the defendants had violated the constitutional right of voters to have their votes counted, the Court generally noted that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id*. at 326. This statement was a first step towards establishing a broad reading of the phrase "under color of" law. However, it did not resolve the issue because it was clearly dicta.

Four years later, in *Screws v. United States*, 325 U.S. 91 (1945), the Supreme Court directly addressed the meaning of the phrase "under color of" law in a case involving the same criminal statute. In *Screws*, a sheriff arrested a young black man and brutally beat him to death, allegedly because of a grudge. The sheriff was prosecuted under section 20 of the federal criminal code based on the theory that he had allegedly deprived the victim of due process of law. After a jury trial, the sheriff was convicted and the Fifth Circuit Court of Appeals affirmed his conviction. On appeal to the Supreme Court, the sheriff argued that he had not acted "under color of any law." Citing *Classic*, the Supreme Court rejected this analysis. In doing so, it provided additional reasoning for an expansive definition of "under color of" law. It explained:

> Here the state officers were authorized to make an arrest and to take such steps as necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Id. at 111.

Screws was significant because, unlike *Classic*, it squarely presented the issue of whether a defendant who acted beyond his authority acts "under color of" law. Technically, one could argue that *Screws* was a criminal case while § 1983 is a civil statute. However, this is a distinction that is hard to maintain. Criminal conduct is generally more severe and motivated by more culpable states of mind than civil conduct. Thus, criminal acts would be more likely to be beyond a government official's authority. If criminal acts are "under color

definition provided that: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'"[100]

This misuse of power theory implicitly acknowledges that state officials who are granted authority pursuant to state law cannot be treated as mere private citizens. The dynamics of the relationship between a state official and a private individual are different from the dynamics between private individuals. For one thing, state officials have the power to commit acts against individuals that would otherwise be torts if committed by private individuals. Determining whether the infliction of force by a state official is appropriate requires balancing various non-private interests. As will be discussed more fully below, state law may not have the range to regulate such actions. The Court acknowledged this point when it dismissed the relevance of the fact that the plaintiff could have brought a state action. It reasoned that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one invoked."[101]

The Court's broad interpretation of "under color of" law created an avenue by which individuals could argue that the Constitution regulated government officials' acts that caused individual injuries. Plaintiffs were no longer restricted to bringing actions under state law for the worst forms of misconduct by state officials. After *Monroe v. Pape*, the number of § 1983 cases brought by plaintiffs in federal court exploded.[102] Many of these cases involved police brutality, unlawful arrests, and prisoners' rights claims.[103] As one commentator declared soon after the Supreme Court decided *Monroe v. Pape*: "It thus appears that what is developing is a kind of 'constitutional tort.'"[104]

2. Bivens

While *Monroe v. Pape* was a decision with expansive implications, a significant remedial gap remained for individuals wishing to bring suit in response to injuries caused by the misconduct of federal officials. Section 1983 encompasses official authority conferred by "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

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of" law, then less severe civil acts must also be "under color of" law. After *Screws*, "several federal courts threw open their doors to allegations of police brutality . . . [and even] upheld complaints for damages in ordinary police brutality situations without racial overtones." Shapo, *supra* note 14, at 288–89.

[100] *Monroe*, 365 U.S. at 184 (quoting *Classic*, 313 U.S. at 325).

[101] *Id.* at 183.

[102] Shapo, *supra* note 14, at 278 ("Since the court's ruling in *Monroe*, there has been an explosion of actions in the lower federal courts, brought under this newly spread statutory umbrella.").

[103] *Id.* at 297–305.

[104] *Id.* at 323–24.

Columbia."[105] This language only explicitly authorizes suit against state and local officials. There is no parallel statute authorizing constitutional tort actions against federal officials. Thus, for some time, the availability of the constitutional tort remedy was contingent upon whether an individual was injured by a state versus federal official.[106] As late as 1963, the Supreme Court observed that "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law."[107]

One could defend a scheme where the Constitution governs state officials while state common law governs federal officials only if there was a real difference between federal and state officials in their ability to inflict injury. Such a distinction was especially irrational given the expanding role of the federal government in national law enforcement,[108] making the case for federal regulation of federal officials more compelling than state regulation. The situation was also ironic because while the Bill of Rights was originally intended to limit the power of the federal government, the remedial gap meant that only state officials were subject to constitutional tort actions for violations of the Bill of Rights.

In 1971, the Supreme Court filled the remedial gap with its decision in *Bivens*.[109] Mr. Bivens's complaint alleged that federal officials, without a warrant or probable cause, arrested him for alleged narcotics violations and "manacled [him] in front of his wife and children and threatened to arrest the entire family."[110] Mr. Bivens claimed that he had a remedy against these officials that could be inferred directly from the Fourth Amendment. The defendants argued that Mr. Bivens's only recourse was a common law tort action for damages in state court.[111] The defendants urged the Court to sanction a system where

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[105] 42 U.S.C. § 1983 (2000).

[106] While it took ten years after *Monroe v. Pape* for the Supreme Court to extend constitutional tort actions to federal officials, the issue had arisen as early as 1946. In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court considered the narrow question of whether federal courts have subject matter jurisdiction to consider a plaintiff's damages claims for injuries caused by the defendant's alleged violation of the Fourth and Fifth Amendments. While the Court concluded that there was such jurisdiction, it left unresolved the issue of "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments." *Id.* at 684. The Court remanded the case to the district court to consider the merits of the claim. On remand, the district court dismissed the case, primarily on the basis that, because the federal official had acted outside the scope of his federal authority, he was not acting as a state actor whose conduct would be regulated by the Constitution. *Bell v. Hood*, 71 F. Supp. 813, 817 (S.D. Cal. 1947). In other words, the district court relied upon the narrow interpretation of the phrase "under color of" law in the § 1983 context.

[107] Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

[108] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 261–76 (1993).

[109] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[110] *Id.* at 389.

[111] *Id.* at 390.

> the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals.[112]

In essence, the defendants asked the Supreme Court to retain the system that had prevailed for almost the first 200 years after the passage of the Constitution.

In rejecting the defendants' argument, the *Bivens* Court reasoned that the Fourth Amendment protects interests greater than those interests protected from private abuse by state law.[113] The Court noted that it had often defined the reach of the Fourth Amendment without regard to local laws.[114] Moreover, the Court rejected the argument that state common law could provide the plaintiff with an adequate remedy. Mr. Bivens may not have had a remedy under state tort law because he had granted the defendants admission to his house.[115] Also, state tort law may fail to take into account the fact that federal officers with federal authority have a greater degree of access to a home than do private individuals.[116] Finally, while there is no statute comparable to § 1983 that confers upon plaintiffs the right to bring an action for damages against federal officials, the Court reasoned that because damages are the ordinary remedy for injuries caused by the violation of rights, an implied action for damages could be inferred directly from the Fourth Amendment.[117]

In *Bivens*, the Supreme Court rejected a scheme whereby state law would largely govern misconduct by federal officials against individuals. It did so by allowing plaintiffs injured by a federal official's unconstitutional conduct to draw upon the Constitution in holding the federal official liable for their injuries.

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[112] *Id*. at 390–91; *see also* Dellinger, *supra* note 84, at 1538 (noting that, under the defendant's view, "[T]he amendment's sole function would be to insure that common law actions for trespass brought in the state courts could not be successfully defended by claims of official justification if the officer's search was unreasonable or if the warrant relied upon had been issued without probable cause.").

[113] *Bivens*, 403 U.S. at 392–93.

[114] *Id.* at 392.

[115] *Id*. at 394.

[116] *Id*. at 394–95.

[117] *Id*. at 396–97. In later years, the Supreme Court implied a *Bivens* cause of action from the Due Process Clause of the Fifth Amendment for sex discrimination claims. Davis v. Passman, 442 U.S. 228 (1979). Also, in *Carlson v. Green*, 446 U.S. 14, 19–20 (1980), the Supreme Court allowed a *Bivens* action based on the Eighth Amendment for a claim that the plaintiff could have brought an action under the Federal Tort Claims Act. *Carlson* established that plaintiffs have a right to bring claims against federal officials for violations of constitutional provisions even when they have a non-constitutional federal remedy. *See id.*

III. The Constitutional Tort Action's Influence on Constitutional Rights

The current paradigm's focus on the monetary effects of constitutional tort actions has obscured the ways in which this relatively new constitutional remedy has shaped constitutional rights. As noted in Part I, if one views constitutional tort actions solely in their capacity as an avenue for money damages, one might conclude that the availability of such a remedy would primarily serve as a disincentive for courts to expand rights.[118] Damage awards can impose significant costs to society and the government. Federal courts may be sensitive to the costs of constitutional tort liability and therefore restrict rights in order to lessen the remedy's potential costs to the government.

But far from having a uniformly negative influence on courts' willingness to expand rights, constitutional tort actions have shifted courts' attention to the injury suffered by individuals. In doing so, they have influenced courts to establish constitutional rights that protect individuals from governmental injury and regulate the government's power to inflict harm. The current concept of individual harm is an integral part of many constitutional rights. Rather than having a wholly negative effect on the reach of constitutional rights, the constitutional tort remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to the injuries of individuals.

A. The Influence of Remedies on Rights

For the most part, the literature on constitutional tort remedies implicitly assumes that constitutional tort actions passively enforce preexisting rights. There is little discussion of how the constitutional tort remedy's unique characteristics may have influenced the way that courts have defined constitutional rights. This reflects the pervasive view, recently identified by Professor Levinson, that remedies operate to enforce rights that exist *a priori*, defined by deduction from general principles.[119] In his article *Rights Essentialism and Remedial Equilibriation*, Professor Levinson describes the predominance of a paradigm he calls rights essentialism, which "assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value."[120] Under this view, remedies are subordinate to rights in that they only implement standards that have been defined in accordance with higher principles.[121]

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[118] *See* discussion *supra* Part I.
[119] Levinson, *supra* note 8.
[120] *Id.* at 858.
[121] *Id.* at 870–71.

In a broad sense, it is true that rights are generally established prior to remedies. For example, the Constitution pre-existed the remedies that now enforce it. But in a more particular sense, rights are shaped, defined, and given real meaning through the remedies used to enforce such rights. Because of its role as the supreme law of the land, the Constitution is not characterized by "the prolixity of a legal code,"[122] but instead "unavoidably deals in general language."[123] Thus, the Constitution and Bill of Rights are filled with open-ended phrases such as "probable cause," "cruel and unusual punishments," "unreasonable searches and seizures," "due process," "equal protection," and "just compensation." While the Constitution establishes general ideals, these norms do not have any concrete meaning until they are actually applied and enforced by judges in particular cases. The process of constitutional definition is an important one. As Professor Owen Fiss explains:

> The values that we find in our Constitution—liberty, equality, due process, freedom of speech, no establishment of religion, property, no impairments of the obligation of contract, security of the person, no cruel and unusual punishment—are ambiguous. They are capable of a great number of different meanings. They often conflict. There is a need—a constitutional need—to give them specific meaning, to give them operational content, and, where there is a conflict, to set priorities.[124]

Courts are unique institutions in that they exclusively make decisions in the context of resolving particular disputes. In doing so, they often shape rights in response to pragmatic considerations. Remedies have a significant impact on this process. Professor Levinson has offered an alternative paradigm to rights essentialism called remedial equilibriation, which theorizes that "constitutional rights are inevitably shaped by, and incorporate, remedial concerns."[125] According to Professor Levinson's theory of remedial equilibriation, while rights set general parameters for the courts to follow, courts adapt the particular shape of these rights in response to real world concerns raised by their enforcement.[126] Similarly, in his essay *Disaggregating Constitutional Torts*,[127] Dean Jeffries notes that "[r]ights cannot sensibly be crafted apart from remedies, or vice versa. Each depends on, interacts with, and helps define the other."[128]

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[122] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
[123] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).
[124] Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1 (1979).
[125] Levinson, *supra* note 8 at 874.
[126] *See, e.g.*, *id.* at 884 ("Once rights are defined and ends therefore established, rights are defined instrumentally to achieve those ends.").
[127] John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000).
[128] *Id.* at 281.

In *Rights Essentialism*, Professor Levinson identifies three ways in which remedies, specifically structural injunctions, have influenced rights. First, courts may constrict rights to avoid the undesirable consequences of implementing a remedy.[129] For example, in the context of school desegregation, over time the courts defined equal protection rights more narrowly in response to the resistance and difficulty of implementing desegregation remedies.[130] Second, the definition of a right may incorporate a remedy.[131] Professor Levinson uses the example of structural injunctions in the prison context to illustrate this point.[132] Courts have ordered certain remedies such as training and implementation of risk avoidance regulations in response to inhumane conditions in prisons. As some of these measures have demonstrated their effectiveness, the Eighth Amendment standard has required the use of such measures. Prisons that fail to implement such basic standards are guilty of inflicting cruel and unusual punishment.[133] Thus, the remedy may help set a baseline for rights. Finally, courts can expand or constrict rights by increasing or decreasing the availability of a remedy.[134] As has been observed many times, a right has little power without a remedy to enforce it.

Professor Levinson's analysis in *Rights Equilibrium* primarily focuses on the structural injunction. Professor Levinson's only discussion of constitutional tort actions is on the subject of *Paul v. Davis*,[135] where the Supreme Court held that an individual's reputation is not a liberty interest protected under the Fourteenth Amendment's Due Process Clause. Professor Levinson argues that the Court defined the liberty interest narrowly in this case in order to avoid imposing massive damage liability on government officials.[136] Thus, for Professor Levinson, constitutional tort actions appear to fall exclusively in the first category of remedial equilibriation where courts restrict rights to avoid undesirable consequences. Dean Jeffries comes to a similar conclusion. He posits that in cases where immunities are not available, the Supreme Court "sometimes avoids unwanted civil liability not by limiting the damages remedy, but by narrowing the underlying right."[137]

I would add a fourth way that remedies influence rights to Professor Levinson's list. Remedies determine the types of cases that courts hear.

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[129] Levinson, *supra* note 8, at 884–87.
[130] *Id*. at 874–78.
[131] *Id*. at 885.
[132] *Id*. at 880–81.
[133] *See* discussion *supra* Part III.B.3.
[134] *See id*. at 887–88.
[135] 424 U.S. 693 (1976).
[136] Levinson, *supra* note 8, at 892.
[137] Jeffries, *supra* note 127, at 275. Other commentators have made the same point. *See, e.g.*, Jack M. Beerman, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 736 (1997) ("Over the past couple of decades it has seemed clear that the Court has been motivated to narrowly define certain constitutional rights by the fear that they might otherwise give rise to a flood of litigation as constitutional tort suits.").

Without a remedy for a particular type of grievance, courts would have no opportunity to determine whether such claims implicate certain rights. For example, without the structural injunction remedy, courts would have less occasion to assess what rights require of institutions. Similarly, without constitutional tort actions and other remedies that allow individuals to bring claims based on constitutional rights, courts would be significantly limited in their ability to apply constitutional rights to individuals' situations. In resolving constitutional tort actions, courts often define and reinforce the form of constitutional rights in a way that is relevant to the individual.

B. Establishing Rights That Protect the Individual from Certain Injuries and Regulate the Government's Power To Inflict Injury

The constitutional tort remedy is unique because it requires courts to focus on how constitutional provisions apply to injuries suffered by individuals. As a result, it has pushed the courts to understand constitutional provisions as (1) providing rights that protect individuals from certain governmental inflictions of harm; and (2) regulating the discretion of government officials to harm or allow harm to befall individuals.

In most constitutional tort actions, individuals claim that they have been harmed by either government action or the failure of the government to act despite an established obligation to intervene.[138] Individuals bring such actions not just to make a general point about how the world should be ordered but because they have been injured. Damages, provided for in constitutional tort actions, are a natural remedy for such harm. As the Supreme Court has observed, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[139] The availability of a damage action for constitutional harms gives individuals an incentive to press claims based on constitutional provisions.[140] As one commentator has noted, the constitutional tort action "gave lawyers an incentive to conceive of past, tort-like harms in constitutional terms."[141]

The assertion of claims based on personal harm has influenced the shape of constitutional rights. As the Supreme Court has observed, con-

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[138] A plaintiff can also bring a constitutional tort action when he has not been physically harmed by a rights violation, but the Supreme Court has held, "the abstract value of a constitutional right may not form the basis for § 1983 damages." *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986).

[139] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971).

[140] *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980) ("[W]ithout a meaningful remedy aggrieved individuals will have little incentive to seek vindication of . . . constitutional deprivations.").

[141] Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 621 (1997).

stitutional rights "do not exist in a vacuum," and instead "are shaped by the interests they protect."[142] Once plaintiffs began bringing individual constitutional claims based on harm they suffered, there was pressure to interpret constitutional provisions to address such harm.[143] In constitutional tort actions, an individual will typically argue that a government official has improperly infringed upon his interests by causing or allowing physical harm, emotional distress, or monetary loss.[144] By focusing courts' attention on such concrete injuries, individuals bringing constitutional tort actions ask courts to decide whether the Constitution protects them against the infliction of such injury by the government.

The type and extent of the harm that an individual plaintiff suffers is not just relevant to the calculation of the appropriate compensatory damage award. Instead, it is often relevant to the substantive question of whether the infliction of harm upon the plaintiff was constitutionally permissible. There are some cases in which the government is constitutionally entitled to harm individuals. It is beyond dispute that a police officer may use reasonable force to apprehend a fleeing suspect. But there are obviously limits to such power that citizens of a democracy will accept. A court that is confronted by a plaintiff who is nearly beaten to death for a minor altercation may conclude that the Constitution prohibits the infliction of excessive injury in such cases. The determination of whether an individual's constitutional right has been violated often turns on whether the government official's infliction of harm is in accordance with a substantive norm.

Constitutional tort actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action. According to the Hohfeldian formulation, in concluding that an individual plaintiff has a legal right, a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right.[145] Thus, a protective right in a sense imposes a correlative duty on the government.[146] As one commentator observes, "[r]equests for damages relief

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[142] Carey v. Piphus, 435 U.S. 247, 254 (1978).

[143] *See, e.g.*, Shapo, *supra* note 14, at 321 ("[U]nderlying [the decision in *Monroe*] is a judicial impatience in the search for individual justice, for *effective* remedies to salve individual injustices.").

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

[145] *See* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 35-38 (Walter W. Cook ed., Greenwood Press 1978) (1919); *see also* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1011 (1990) ("'The plaintiff's [constitutional] right to be free of wrongful [unconstitutional] interferences with his person and property is correlative to the [constitutional] duty on the defendant to abstain from such [unconstitutional] interferences.'") (quoting Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 430 (1987)) (alterations in original).

[146] Recently, the Supreme Court used a three part test in determining whether a plaintiff has an individual right under a constitutional provision:

raise unique issues concerning the link between the plaintiff's injury and the defendant's wrongdoing . . . [that] require the courts to ask, perhaps using language of causation and duty or obligation, whether the defendant is the appropriate source of funds to compensate the plaintiff."[147] Thus, constitutional tort actions have forced courts to determine both whether the Constitution protects individuals from certain inflictions of harm and whether the Constitution regulates the ways in which the government may harm individuals.

In a number of cases, constitutional tort actions have helped define rights that protect individuals from injury while regulating the government's power to inflict injury. In analyzing some examples of such cases, we find that the constitutional tort action has influenced the shape of constitutional rights in three overlapping ways: (1) by prompting courts to translate broadly worded constitutional provisions into particular individual rights; (2) by defining certain constitutional rights in a different way than state common law; and (3) by incorporating the extent and magnitude of individual injury into the substance of constitutional rights.

1. The Just Compensation Clause

Of all the constitutional provisions, the Just Compensation Clause, which requires the government to compensate individuals when they take their property interests for public use, most clearly has an individual as opposed to a structural focus.[148] One reason may be that, since individuals typically own property interests, a taking of a property interest is often an individual injury in our economic system. The government's obligation when it inflicts such economic injury is clearly addressed within the text of the Clause, which instructs: "nor shall private property be taken for public use, without just compensation."[149] In other words, if the government inflicts a taking on an individual, it is required to provide that individual with the remedy of "just compensation."

The concept of "just compensation" is the only explicit textual reference in the Constitution to a remedy directed at an individual injury.

> [1] Whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff.

Dennis v. Higgins, 498 U.S. 439, 448–49 (1991) (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)) (internal citations omitted).

[147] Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 667 (1997).

[148] *See* Amar, *supra* note 59, at 1181–82.

[149] U.S. CONST. amend. V.

Thus, even before § 1983 and *Bivens* actions became firmly established, the Supreme Court noted that the Just Compensation Clause guaranteed individuals the right to an action for the economic injury of a taking arising directly under the Constitution.[150] In its current form, this is an inherently self-executing constitutional provision that entitles an individual to "'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'"[151] By requiring government to provide an individual with just compensation, the Clause regulates the way in which government may inflict economic injury. At the same time, the Clause protects against the infliction of economic injury by providing the individual with a right to just compensation that can be affirmatively asserted against the government in court.

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[152] the Supreme Court confirmed that the Just Compensation Clause guarantees an individual remedy for economic injury in cases where the government denies the individual all use of his property even when that denial is temporary.[153] This defined the individual's constitutional right in a way that went beyond what state law had offered.

In *First English*, a church brought an inverse condemnation action seeking just compensation in California state court after a flooding ordinance prevented it from enlarging buildings that it owned.[154] A California appeals court upheld the lower court's dismissal of the case, explaining that under California law, the proper remedy for such a regulatory taking was not an action for damages but an action for declaratory relief against the ordinance.[155] In effect, California law only allowed the plaintiff to bring an action invalidating the ordinance. It did not allow the plaintiff to recover compensation for the economic injury that it suffered prior to the invalidation of the regulation. Thus, if the ordinance was repealed prior to the termination of the suit, the plaintiff could not recover any damages for the temporary loss of the use of his property. The plaintiff appealed to the United States Supreme Court and won a reversal.

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[150] *See* Jacobs v. United States, 290 U.S. 13, 16 (1933).

[151] United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)) (emphasis omitted).

[152] 482 U.S. 304, 318–19 (1987).

[153] *See id.*

[154] An inverse condemnation proceeding is typically brought seeking just compensation when the state has diminished the value of an individual's property without instituting formal proceedings to take the property. *See, e.g.*, *id.* at 316 ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Clarke*, 445 U.S. at 257.

[155] *See First English*, 482 U.S. at 309.

The Supreme Court noted that the plaintiff's right to just compensation was not derived solely from California state law but was grounded directly in the Fifth Amendment.[156] The Court rejected the California court's conclusion that the state law remedy of a declaratory action was sufficient under the Fifth Amendment.[157] In doing so, the Court focused on the nature of the economic injury suffered from a temporary taking. The Court reasoned that even if the ordinance was subsequently invalidated pursuant to state law, it still exercised a complete taking of the individual's property interest and required just compensation.[158] Even if temporary, like all takings, a subsequently invalidated ordinance may "deny a landowner all use of his property . . . ."[159] The economic injury suffered by a temporary taking is just as cognizable under the Just Compensation Clause as the injury suffered by a permanent taking. As the Court explained, the Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[160] A temporary taking may impose similar burdens as a permanent taking. If it does, invalidation of the ordinance is not a sufficient remedy because it requires the individual to bear the entire loss of the land's use for the period during which the ordinance was in place.[161]

Thus, the Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[162] This holding provided individuals with a right not previously recognized under California law, protecting them from uncompensated temporary takings. It also established that the Just Compensation Clause regulates the government's power to inflict temporary takings.

2. The Fourth Amendment's Regulation of the Use of Deadly Force by Police Officers

In *Tennessee v. Garner*,[163] the Supreme Court examined how the Fourth Amendment, which prohibits "unreasonable searches and seizures," regulates government officials' use of deadly force to arrest suspects. The Court rejected the state common law rule giving police officers infinite power to inflict injury in effectuating an arrest.[164] In doing so, it established a

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[156] *Id.* at 315.
[157] *Id.* at 319.
[158] *Id.* at 318.
[159] *Id.*
[160] *Id.* at 318–19 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
[161] *See id.*
[162] *Id.* at 321.
[163] 471 U.S. 1 (1985).
[164] *Id.* at 13–14.

Fourth Amendment right protecting individuals against the use of deadly force by police officers in certain situations.

In *Garner*, a police officer, convinced that an unarmed burglar was about to elude capture, shot the burglar in the head as he jumped over a fence.[165] The burglar later died from the injuries, and his relative brought a § 1983 action against the police officer for damages.[166] Under the common law rule, which still governed in many states, police officers were permitted to use any force necessary to effectuate an arrest.[167] Thus, individuals in the burglar's situation would not have had an action against the police officer under state law.

The Supreme Court held that the Fourth Amendment guarantees rights with respect to the use of deadly force that extend beyond the common law. Initially, the Court held that the apprehension of a fleeing suspect by the use of deadly force is a "seizure" regulated by the Fourth Amendment.[168] In assessing the burglar's Fourth Amendment rights in the context of the infliction of death, the Court noted that the individual's fundamental interest in life must be balanced against the governmental (and societal) interest in effective law enforcement.[169] Based on this balancing, it was clear that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[170] The Court thus held that a fleeing suspect has a Fourth Amendment right against the use of deadly force unless he poses a threat of serious physical harm against the officer or others.[171] In the Court's words, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[172]

In *Garner*, the Supreme Court extended the Fourth Amendment to regulate the government's power to inflict death upon fleeing suspects. This extension granted constitutional protections beyond what was required by the common law.

3. The Eighth Amendment Deliberate Indifference Standard

While prisoner lawsuits are quite common today, they were not a large presence in federal court until the latter part of the twentieth century. Before then, most courts utilized a "hands-off" doctrine to decline jurisdiction over prisoner claims.[173] Moreover, in some states, prison offi-

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[165] *Id.* at 4.
[166] *Id*. at 4–5.
[167] *Id*. at 12–18.
[168] *Id*. at 7.
[169] *Id*. at 9.
[170] *Id*. at 11.
[171] *Id.*
[172] *Id*.
[173] *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to*

cials could not be liable to prisoners under state law.[174] The Eighth Amendment, which vaguely forbids the infliction of "cruel and unusual punishments,"[175] was not the source of individual rights for prisoners that it is today. This began to change gradually through the work of innovative lower court judges who reacted to the prevailing inhumane prison by applying the Eighth Amendment to change those conditions. This willingness to utilize the Eighth Amendment soon went beyond a focus on the structural reform of institutions to the situations of individual prisoners.

In 1976, in response to a constitutional tort action by a prisoner alleging that prison officials failed to treat a medical injury, the Supreme Court established that the Eighth Amendment requires government officials to affirmatively address certain injuries suffered by prisoners. In *Estelle v. Gamble*,[176] a prisoner brought a *pro se* § 1983 claim alleging that he suffered injury when prison officials failed to adequately treat his severe backpain and refused to allow him to see a doctor for chest pains.[177] In reviewing the claim, the Court noted that while the Eighth Amendment was originally drafted to prohibit "'torture[s]' and other 'barbar[ous]' methods of punishment,"[178] the Court nevertheless had recently adapted the Amendment to suit modern standards, expanding its ambit to more generally prohibit the "'unnecessary and wanton infliction of pain.'"[179] The Court read this general prohibition as "establish[ing] the government's obligation to provide medical care for those whom it is punishing by incarceration."[180] One practical reason for this duty was that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."[181]

Thus, in *Estelle*, a constitutional tort action led the Supreme Court to translate a general prohibition against "cruel and unusual punishments," which had been read to prohibit "unnecessary and wanton infliction of pain," into a specific obligation to provide medical care to injured prisoners. For the first time in the Eighth Amendment context, the Court established that the Amendment provided individual prisoners with an affirmative right entitling them to protection from a certain type of injury. In doing so, *Estelle* also makes it impermissible for the government to deliberately allow injury to befall prisoners. Instead, government has an affirmative obligation to address certain prisoner injuries in an adequate way.

Review the Complaints of Convicts, 72 YALE L.J. 506 (1963).

[174] *See* United States v. Muniz, 374 U.S. 150, 164 (1963).

[175] U.S. CONST. amend. VIII.

[176] 429 U.S. 97 (1976).

[177] *Id*. at 99–101.

[178] *Id*. at 102 (quoting Anthony F. Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 942 (1969)).

[179] *Id*. at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[180] *Id*.

[181] *Id*.

This obligation is not rooted in the common law but originated from constitutional norms. The *Estelle* Court deliberately noted that the Eighth Amendment constitutional right to medical care was not co-extensive with state medical malpractice law.[182] According to the *Estelle* court, tort law and not the Constitution regulates accidents.[183] The Court attempted to draw a distinction between accidents—governed by state law—and the government's failure to fulfill an affirmative constitutional obligation. It did so by setting a higher standard for constitutional claims. While a plaintiff can generally establish a medical malpractice claim through a showing of lack of due care, in order to have an Eighth Amendment claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[184]

This liability standard defines the relationship between the government and the prisoner's injury. To determine whether the Eighth Amendment right is triggered, the individual must establish that he has "serious medical needs." To make the government liable for that injury, the government must exhibit "deliberate indifference" to those needs. As such, the standard incorporated concepts of individual injury—and the government's relationship to that injury—into Eighth Amendment doctrine.

By setting a higher standard for Eighth Amendment claims, the *Estelle* Court recognized the potential burden to government that could result by simply adopting a medical malpractice standard to prisons. Because government and prisoners must co-exist in a continuous relationship, there is a need to distinguish everyday concerns from serious abuses of power. Moreover, in prisoner cases, the Court must balance the individual's interest in protection from injury with the societal concern of ensuring that prison officials can effectively manage prisons. Because of other pressing concerns, there may be cases where prison officials will be genuinely unaware that an inmate has a medical problem. In contrast, doctors and patients in the outside world typically engage in discrete, voluntary transactions that usually only have tangential relevance to other individuals. The potential for liability is more definable in the context of such private interactions than it is in the prison setting. Thus, in *Estelle*, the Court recognized that a different standard was appropriate for governing the government's interactions with individuals than the tort law standard governing the interactions of individuals with each other.

These concerns are in the background of other constitutional tort actions in which the Supreme Court has defined Eighth Amendment rights. Over the years, the Supreme Court has expanded the Eighth Amendment individual right to adequate medical care to a more general requirement

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[182] *Id*. at 105–06.
[183] *Id*.
[184] *Id*. at 106.

that the government provide prisoners with basic needs.[185] At the same time, the Court has balanced these rights by defining the potential liability of prison officials narrowly through a restrictive reading of the phrase introduced in *Estelle*, "deliberate indifference." It did so primarily in *Farmer v. Brennan*,[186] a case where a transsexual prisoner with effeminate features, proceeding *pro se*, brought a *Bivens* action for damages against prison officials after he was raped while roomed in a high-security prison with another inmate.[187] The district court dismissed the claim and the Seventh Circuit Court of Appeals affirmed.[188] Although the Supreme Court reversed and remanded, it significantly narrowed the individual's right to bring constitutional tort actions for injuries suffered while in prison.

The *Farmer* Court began its discussion of the prisoner's claim by explicitly noting that "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'"[189] This was both a reaffirmation and expansion of the right protecting individuals against certain deprivations established in *Estelle*. This language requires the government to prevent and address certain injuries that could be inflicted upon individual prisoners. The Court's exposure to the brutal injury of a prisoner's rape in *Farmer* reinforced the need for a right protecting prisoners from certain types of harm.

The *Farmer* Court then proceeded, however, to qualify these affirmative duties by narrowly defining the prison official's duty. The Court rejected a liability standard of constructive knowledge where a prison official would be constitutionally liable if that prison official knew or should have known that an inmate faced a substantial risk of serious harm.[190] Instead, it defined the *Estelle* standard of deliberate indifference as a state of mind where a prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[191] In other words, even if the prisoner's affirmative right to basic necessities is unfulfilled, the prison official can avoid liability if he establishes that he did not know that the prisoner faced a substantial risk of serious harm.

In the area of prisoner assaults, the *Farmer* standard, which requires actual knowledge for liability, is narrower than the common law standard, which only requires constructive knowledge for liability. Under the common law, prison officials have a

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[185] For example, individuals have a right to protection against future harms such as second hand cigarette smoke in addition to present harms such as the deprivation of medical care. *See* Helling v. McKinney, 509 U.S. 25 (1993).

[186] 511 U.S. 825 (1994).

[187] *Id*. at 829–30.

[188] *Id.* at 831–32.

[189] *Id*. at 832–33 (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

[190] *Id.* at 837.

[191] *Id*. at 847.

> duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.[192]

In contrast, the *Farmer* standard of deliberate indifference is taken from the context of recklessness in criminal law. Thus, the *Farmer* Court defined a right more narrowly than the common law in resolving a constitutional tort action, perhaps because of societal concerns regarding modern prison management that were not present in early common law cases.

The *Farmer* standard further particularizes the Eighth Amendment concepts of injury and the government's relationship to such injury that were promulgated in *Estelle*. To reiterate, *Farmer* requires the plaintiff to show that the prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[193] While the *Estelle* standard conceptualized injury in the immediate terms of existing medical conditions, the *Farmer* standard conceptualizes injury in the more distant terms of substantial risks of serious harm. In doing so, the *Farmer* standard subtly re-aligns the Eighth Amendment norm in a way favorable to prison officials. Instead of focusing on the existence and severity of a prisoner's injury, the *Farmer* standard focuses on the various risks of injury that exist in the prison setting. The fact that a prisoner is subjected to a serious injury is insufficient to raise that injury to constitutional status. Instead, the risk of that injury must have been substantial enough that prison officials were obligated to intervene. Moreover, it is not enough that the risk of injury is substantial. The prison official must have knowledge of that substantial risk. Thus, *Farmer* narrowed the Eighth Amendment right requiring prison officials to protect inmates from harm.

Ultimately, while the Eighth Amendment right has been narrowed, it is now well-established that the Eighth Amendment regulates the government's responsibility for injury suffered by individual prisoners. By focusing the courts' attention on the injuries suffered by prisoners, constitutional tort actions have spurred courts to develop the general prohibition against cruel and unusual punishments into an affirmative obligation on the part of the government to prevent certain injuries to prisoners.

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[192] RESTATEMENT (SECOND) OF TORTS § 320 (1965).
[193] *Farmer*, 511 U.S. at 847.

4. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment, which guarantees persons who face deprivations of "life, liberty, or property," the protections of "due process of law,"[194] has been described as "the least specific and most comprehensive protection of liberties."[195] According to one of its broadest formulations, "The touchstone of due process is protection of the individual against arbitrary action of government."[196] The Due Process Clause has both a procedural and substantive component. The Clause not only guarantees fairness in governmental procedures but also sets forth a substantive norm that prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[197] In constitutional tort actions, the courts have applied this general prohibition against the abuse of government power to a variety of contexts where individuals have been injured by government wrongdoing. Primarily, the courts have used substantive due process in the context of constitutional torts to fill gaps in the Constitution's explicit textual protections.[198]

The Supreme Court has described the substantive due process right as prohibiting "the most egregious official conduct,"[199] that is, "conduct that shocks the conscience."[200] These amorphous concepts could conceivably apply to a vast range of government conduct. The perceived danger of applying the right to substantive due process is that there is no principled way of marking off a boundary to the right. In the words of the Supreme Court, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[201]

The constitutional tort action may be the remedy most conducive to new substantive due process rights. Many individuals bring constitutional tort actions for injuries that are caused by the misuse of government

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[194] U.S. CONST. amend. XIV, § 1.

[195] Rochin v. California, 342 U.S. 165, 170 (1952).

[196] County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

[197] *Id.* at 845–46 (citation omitted); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting that the Due Process Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . . .").

[198] The right to substantive due process could be read as encompassing many if not all of the rights guaranteed by the Bill of Rights. Thus, when a constitutional tort action involves an issue germane to a specific amendment, the Court has analyzed the issue with respect to specific amendments rather than under the general rubric of substantive due process. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) (analyzing an excessive force claim against a police officer under the Fourth Amendment rather than the Due Process Clause); Whitley v. Albers, 475 U.S. 312, 327 (1986) (analyzing an excessive force claim by a prisoner under the Eighth Amendment rather than the Due Process Clause).

[199] *Lewis*, 523 U.S. at 846.

[200] *Rochin*, 342 U.S. at 172.

[201] Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

power, which is the paradigmatic harm that substantive due process protects against. These cases concretely illustrate what it means for the government to abuse its power, providing the courts with material to define the amorphous boundaries of substantive due process. Moreover, because it is an individual remedy, constitutional tort actions are less likely to require courts to reach broad conclusions that could lead to unintended consequences. While in the structural injunction context, courts might be reluctant to find a substantive due process violation requiring the restructuring of an entire institution, courts may be more willing to apply substantive due process in a case where a particular person is seeking individualized relief for a specific type of misconduct.

In defining the right to substantive due process, courts have paid careful attention to the facts of each case in order to limit the reach of their decisions.[202] In doing so, they generally weigh the individual's interest in receiving redress for harm against the reality that many government officials will inevitably cause some harm in the course of their work. These are concerns that relate uniquely to the relationship between the government and individual. As the Supreme Court has explained, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and the 'demands of an organized society.'"[203] Because of a society's compelling interest in a government that can operate effectively, the courts have generally limited the substantive due process right to prohibiting the most egregious forms of governmental misconduct.[204] As a result, the right to substantive due process does not mirror the common law, which only regulates the interactions among private parties.[205]

For example, the Supreme Court has held that government officials' liability for the common law tort of negligence does not amount to a substantive due process violation. In *Daniels v. Williams*,[206] the Court dismissed a slip and fall case brought by a prisoner against prison officials. The Court reasoned that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[207] The allegedly negligent behavior by the defendant prison officials was not an exercise of government power but an accident that could have happened in any non-

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[202] *See Lewis*, 523 U.S. at 850.

[203] Youngsberg v. Romeo, 457 U.S. 307, 320 (1982) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961)); *see also* Rochin v. California, 342 U.S. 165, 171 (1952) ("interests of society pushing in opposite directions").

[204] *See Lewis*, 523 U.S. at 846.

[205] *See, e.g.*, *id.* at 848 ("It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability.").

[206] 474 U.S. 327 (1986).

[207] *Id*. at 332.

governmental setting. The Court thus concluded that the Due Process Clause is not "triggered by lack of due care by prison officials."[208]

While the right to substantive due process is narrow, it has been significantly expanded and defined through constitutional tort actions. Some substantive due process rights can be described as negative in character because they primarily prohibit government officials from acting in certain ways. For example, the Supreme Court has held that individuals are protected against extreme conduct by officers in high-speed automobile chases. In *County of Sacramento v. Lewis*,[209] an individual brought a constitutional tort action against officers who allegedly caused him to crash during a high-speed automobile chase.

During such a chase, because the suspect had not been apprehended, there had not been a "seizure" to trigger Fourth Amendment protection.[210] Since the chase was pursuant to a legitimate arrest, the Court dismissed the plaintiff's claim. But the Court noted that "a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[211] Thus, substantive due process protects the individual against extreme abuses of a police officer's power that causes injuries motivated by non-official purposes even though the Fourth Amendment would not provide protection.

Other substantive due process rights can be described as affirmative in nature. In other words, they obligate the government to fulfill certain duties to certain individuals. Many of these cases involve involuntary confinement outside the prison setting. The Eighth Amendment only applies to "punishments" and does not apply to situations in which the legal system does not assess formal punishment. Because courts have defined the Eighth Amendment in a way that guarantees a substantial range of affirmative individual rights, situations arise where the Eighth Amendment does not protect individuals facing prison-like settings against injury to the same degree as those with a conviction. Thus, absent a right protecting non-convicted detainees, a person convicted of a crime could be in a better position with respect to constitutional rights than a person who has not been convicted. Such a regime makes little sense when there is no difference in the types of injuries suffered in pre-trial as opposed to post-conviction settings. The courts have used substantive due process to respond to this inequity and to extend affirmative rights of protection to involuntarily confined non-prisoners.

For example, the courts have held that substantive due process protects individual pre-trial detainees in similar ways as the Eighth Amend-

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[208] *Id.* at 333; *see also* Davidson v. Cannon, 474 U.S. 344, 348 (1986).
[209] 523 U.S. 833 (1998).
[210] *Id.* at 843–44.
[211] *Id.* at 836.

ment protects convicted prisoners.[212] Responding to a constitutional tort action brought by a plaintiff who had not been provided basic care in a mental institution, the Supreme Court extended substantive due process to protect individuals involuntarily committed in mental institutions from unsafe conditions.[213] In another constitutional tort action, the Court declared that substantive due process requires the government "to provide medical care to persons . . . who have been injured while being apprehended by the police."[214]

At the same time, the Court has declined to interpret substantive due process to require the state to generally ensure minimal levels of safety. The Court has held that substantive due process does not protect a child in the social services system from harm by his parents.[215] The distinguishing factor that triggers the substantive due process right of minimal protection is involuntary confinement. Perhaps this reflects the continuous government relationship in such settings. In other settings, government and individual may tend to interact in contexts that are more similar to private transactions. Alternatively, this limitation may stem from a concern regarding the unmanageability of a duty extending to all government interactions with individuals. The Court may have believed that promulgating such a standard could have resulted in potentially overwhelming liability that would impede the government's ability to function. It therefore restricted the individual's entitlement to protection to certain limited contexts.

Constitutional tort actions have thus led the Supreme Court to derive certain limited rights from the Due Process Clause that protect individuals from injuries caused by governmental abuse of power.

5. Commerce Clause

The Commerce Clause is a more obscure example of a setting where the Court has applied a broadly worded constitutional provision to the situation of an individual. In *Dennis v. Higgins*,[216] the plaintiff brought a § 1983 action seeking a refund of taxes imposed by Nebraska on vehicles registered in another state but operated in Nebraska. The plaintiff claimed that the tax was an unlawful burden on interstate commerce.[217] The defendants argued that the plaintiff could not bring an action for a violation of the Commerce Clause because the Commerce Clause "was not de-

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[212] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 n.10 (1989); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973).

[213] *See* Youngsberg v. Romeo, 457 U.S. 307, 315–16 (1982).

[214] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

[215] *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989).

[216] 498 U.S. 439 (1991).

[217] *Id.* at 441.

signed to benefit individuals, but rather was designed to promote national economic and political union."[218] The Supreme Court rejected this argument, holding that "the Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations."[219] Thus, *Dennis v. Higgins* established the liability of a state government for individual injury caused when it violates the Commerce Clause.

Dennis v. Higgins is an interesting case because at first glance the Commerce Clause seems to clearly serve structural concerns. Perhaps the fact that the plaintiff suffered concrete economic injury influenced the Court to determine that the Commerce Clause had relevance to individuals. *Dennis v. Higgins* may signal recognition that primarily structural clauses can also serve individual purposes as well. Without the avenue of a constitutional tort action, it may have been less likely that the injured plaintiff would have brought the non-structural functions of the Commerce Clause to the Supreme Court's attention.

6. Structural Provisions

In deciding other constitutional tort actions, however, courts have held that some constitutional clauses do not create individual rights and are exclusively structural in nature. It is telling, however, that in some of these cases no individual injury was clearly alleged.

In *Golden State Transit Corp. v. City of Los Angeles*,[220] the Supreme Court held "that the Supremacy Clause, of its own force, does not create rights enforceable under § 1983."[221] Instead, it serves the structural function of prioritizing federal rights when they conflict with state authority.[222] In *Golden State*, a city violated federal labor law when it conditioned renewal of the petitioner's taxicab franchise on the settlement of a labor dispute.[223] The Court may have viewed the injury in this case as potential rather than actual.[224] The record may not have been clear with respect to whether the taxicab franchise had actually been cancelled. It may have been possible for the petitioner to prevent the injury by invoking federal labor law. Thus, there was no need for an independent right originating from the Supremacy Clause to protect that individual interest. As other cases make clear, however, the existence of a non-constitutional

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[218] *Id.* at 449.
[219] *Id.* at 450.
[220] 493 U.S. 103 (1989).
[221] *Id.* at 107.
[222] *See id.*
[223] *See id.* at 104.
[224] *See id.* at 109.

remedy for actual injury suffered by an individual in itself does not preclude the creation of a constitutional remedy.[225]

In another constitutional tort action, the Fourth Circuit refused to interpret the Second Amendment through an individual rights lens—perhaps because there was no concrete injury alleged in that case. In *Love v. Pepersack*,[226] the Fourth Circuit reviewed the dismissal of a plaintiff's § 1983 lawsuit brought after the state denied her application to buy a gun based on her arrest record. The court held that the Second Amendment deals only with the collective right to bear arms.[227] Thus, it held that the Second Amendment is only implicated when the claim asserted has a "reasonable relationship to the preservation or efficiency of a well regulated militia."[228] Perhaps one reason for this decision is that it is a rare case in which an individual can link a concrete injury to the denial of an application to possess a firearm. Moreover, in such a case, it would be incredibly difficult to establish causation given the likely multitude of intervening causes for such an injury. Therefore, it is difficult to conclude that the Second Amendment protects an individual interest absent the allegation of a concrete injury.

7. Adapting Individual Rights: The Special Case of Excessive Force Claims

In adjudicating constitutional tort actions, courts must often adapt rights to different contexts. Narrower rights are appropriate in some settings while more expansive rights are appropriate in others. To focus solely on the cases where courts have narrowed rights misses the big picture. One cannot conclude that constitutional tort actions have uniformly led courts to restrict the scope of constitutional rights by isolating these cases. In other settings, courts have found that broader constitutional rights are appropriate. In adjudicating constitutional tort actions, courts balance individual and societal interests in applying constitutional provisions to different settings. The appropriateness of inflicting individual injury may vary depending upon the context.

Claims for injuries arising from a government official's alleged application of excessive force are illustrative. Excessive force claims are the quintessential constitutional area where the substantive content of the right is linked to the extent of the injury or the way in which the injury has been inflicted. The constitutional prohibition against the use of excessive force is also an area where the liability standard differs depending on the context. It may be more appropriate for the government to

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[225] *See supra* text accompanying note 117.
[226] 47 F.3d 120 (4th Cir. 1995).
[227] *See id.* at 124.
[228] *Id.*

inflict substantial injury in certain situations. The Supreme Court has applied the prohibition against excessive force in different settings and struck a balance between individual and society in different ways depending on the context of the individual's surroundings.

In the prison context, which is governed by the Eighth Amendment, the Court has defined the individual's right against excessive force narrowly. In *Whitley v. Albers*,[229] the plaintiff brought a § 1983 claim for money damages after he was shot in the leg during a prison riot.[230] The Ninth Circuit held that the plaintiff could establish an Eighth Amendment claim if he established that the guard had acted recklessly.[231] In other words, the guard could be liable even if he had not acted with the specific intention of causing the plaintiff harm but with knowledge that there was a high risk that he could cause unnecessary harm. The Supreme Court reversed, holding that the plaintiff's rights were only violated if "force was applied . . . maliciously and sadistically for the very purpose of causing harm."[232] The Court noted that factors such as "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," should be weighed in determining the government official's intent to use force against the prisoner.[233] Thus, we again see an area of the law where the extent of the plaintiff's injury is relevant to the determination of whether the Constitution has been violated.[234] In the prison setting, only injuries that support an inference of malice rise to constitutional levels.

The *Whitley* standard is a narrower standard than common law recklessness because it ultimately requires proof of a specific and culpable state of mind. It restricts the Eighth Amendment's regulation of the use of excessive force to cases involving malicious uses of force. The Court reasoned that such a high standard was necessary because of the difficulty of maintaining order in the prison setting and the need for prison officials to make split second decisions.[235] Over-regulation of officials' decisions might hinder the ability of prison officials to protect themselves and other prisoners from harm. Thus, in *Whitley*, the Court prioritized the societal interest in prison management over the individual's right against injuries caused by excessive force.

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[229] 475 U.S. 312 (1986).
[230] *Id*. at 316–17.
[231] *Id.* at 318.
[232] *Id*. at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
[233] *Id*. at 321.
[234] Later, in *Hudson v. McMillian*, 503 U.S. 1 (1992), the Supreme Court held that the prohibition against excessive force is not limited to cases where the injury is significant. In *Hudson*, the prisoner suffered blows causing "bruises, swelling, loosened teeth, and a cracked dental plate . . . ." *Id*. at 10. The Court disagreed with the Fifth Circuit's determination that these injuries were de minimus and could not support an allegation of excessive force as a matter of law. *Id.*
[235] *Whitley*, 475 U.S. at 321–22.

In contrast, the Court has defined the individual's right against excessive force more broadly in the context of police brutality claims, which are typically governed by the Fourth Amendment. In *Graham v. Connor*,[236] an individual who was diabetic suffered "a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder," after he was stopped and thrown headfirst into a police car when he passed out while being arrested.[237] Prior to passing out, the plaintiff had tried to inform police officers that he was suffering from an insulin reaction.[238] After a jury trial, the defendants moved for a directed verdict. The district court applied a standard requiring the plaintiff to establish a malicious and sadistic use of force and granted the defendants' motion.[239] The Supreme Court reversed.

The Court held that the objective reasonableness standard governing all Fourth Amendment claims also governs excessive force in an arrest, investigatory stop, or other "seizure" by the police.[240] This is a highly fact-specific inquiry, requiring the jury to weigh the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[241] The reasonableness of the use of force must be evaluated from the perspective of a "reasonable officer on the scene,"[242] taking into account "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . . ."[243] Put another way, a police officer's use of force can be deemed excessive if it exceeds an objective norm, even if the police officer did not act with a specific intent to unlawfully harm the suspect.

The Court reasoned that a broader standard was justified than in the prison setting because unlike prisoner rights claims, police brutality claims involve individuals who have not been convicted of a crime.[244] It is presumptively less appropriate to use force that could lead to injury in a non-prison setting. Because individuals who have been arrested have not been convicted of crimes and are a diverse range of people, there are fewer cases where it will be necessary for the police to apply force. Moreover, the relationship between suspects and police is not as continuous as the relationship between prisoner and prison guard. As a result, the social concerns invoked by prison management are not as strong in the context of police stops.[245] Finally, the compelling nature of the petitioner's case

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[236] 490 U.S. 386 (1989).
[237] *Id.* at 390.
[238] *Id*. at 388–90.
[239] *Id.* at 390.
[240] *Id*. at 388.
[241] *Id.* at 396.
[242] *Id*.
[243] *Id*. at 397.
[244] *Id*. at 398–99.
[245] *See id.*

and the serious and unjustified injuries that he suffered may also have influenced the Court to set the bar at a lower level in the Fourth Amendment context. In the case of police brutality, the Court found that the individual's interest against the use of excessive force weighed greater than a generalized societal interest in subduing uncooperative but unconvicted suspects.

In sum, the constitutional tort action has not served solely to passively compensate and deter rights violations. Instead, it has contributed to the definition of individual rights in a wide range of settings.

IV. The Unique Structural Role of the Constitutional Tort Action

The current paradigm's exclusive focus on the constitutional tort action's compensation and deterrence functions obscures its influence on the shape of structural norms that regulate the government's prerogative to inflict injury on individuals. While the remedy primarily protects individual interests, it has also motivated courts to construct norms that regulate the government's discretion to allow the infliction of individual injury. Of the various remedies, courts have used the constitutional tort action as the primary mechanism to articulate such norms.

A. Defining the Structure of Governmental Discretion: Individual Rights and Qualified Immunity

At first glance, it appears that constitutional tort actions propagate an individualistic conception of constitutional rights. The rights established in constitutional tort actions are generally applied in discrete transactions between individual plaintiffs and individual government officials. As with the common law tort, liability in such a case runs only between the defendants and plaintiff who happened to file the action. Thus, the rights created and applied in constitutional tort actions seem to be simply individual entitlements that do little to define the structure of government institutions.

Although constitutional tort actions may not always reshape government institutions, they play an important structural role. That role focuses not on any one particular institution, but on the basic organizational structure of modern government itself. Government is not some unified, monolithic entity. Instead, it is an amalgamation of countless individuals. Government is premised on the assumption that these individual government officials need a certain amount of discretion to function. And much of that discretion relates to the authority to cause individual injury when appropriate. As Professor Peter Schuck has explained, "street-level" officers

frequently encounter situations that require a great deal of judgment to navigate.[246] The police officer must assess whether a suspect is a potential threat based on his or her demeanor or body language. A corrections officer in a prison with limited space must determine whether an inmate poses a danger to others based on her past behavior. Citizens delegate to government a certain amount of authority to make such important decisions.

The Supreme Court has recognized the need for such discretion through the doctrine of qualified immunity. Qualified immunity mandates that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[247] Qualified immunity provides a safe haven for government officials who are exercising their discretion. Without qualified immunity, the authority of government officials to make certain decisions would always be subject to second guessing, possibly preventing such officials from the vigorous decision-making that society needs.[248]

But at the same time, in a free society the discretion of government officials is not limitless, especially their discretion to cause individual injury. And that is where constitutional tort actions and the rights they establish and enforce come into play. We would not give government officials the authority or discretion to use excessive force, take property without just compensation, or knowingly allow prisoners to assault one another. Individual constitutional rights provide structural limits on the governmental use of discretion. In addition, because much of this discretion is delegated to individual officials who interact with individual members of society, it is necessary to regulate discretion at an individual level. Without the particular limits that are defined in constitutional tort actions, a government organized around the principle of discretion would be unworkable.

Of course, constitutional tort actions are not always successful in regulating the discretion of government officials. Some who are injured may not bring suit. Even those who file an action may not have the resources to put together a successful case. But while some suits will fail, there will be many that succeed in various degrees by setting precedents that future litigants can rely upon, enforcing the constitutional limits of discretion in individual cases, or obtaining justice for individual plaintiffs.

Though the rights that constitutional tort actions create and enforce operate at an individual level, they nevertheless serve a structural purpose. Government is organized around individual government officials exercising their discretion. By limiting that discretion, especially in the

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[246] SCHUCK, *supra* note 23, at 59–81.
[247] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[248] *See* SCHUCK, *supra* note 23, at 98.

area of government-inflicted individual injury, individual constitutional rights advance norms that regulate the structure of government.

B. Comparing the Constitutional Tort Action to Other Remedies

There are a wide array of constitutional remedies but few attempts to compare their different functions. Instead, there has been a tendency to examine particular remedies in isolation rather than understand how the whole system of remedies enforces the Constitution and develops constitutional norms. This Section attempts to establish the uniqueness of the constitutional tort action through comparison with other constitutional remedies. More so than any other remedy, the constitutional tort action focuses the attention of the courts on individual injury caused by the government. As a result, it helps define the structural limits of government discretion to inflict injury.

1. State Common Law Remedies

A question raised earlier concerned why a federal constitutional tort action is needed when individuals could recover against government officials through state tort actions.[249] As I noted in Part II of this Article, if one conceives of constitutional tort actions solely in terms of their role as a monetary remedy, the answer is not so obvious. Assuming similar enforcement, damage awards in state tort actions generally would have the same deterrent and compensatory effects as damage awards in federal constitutional tort actions.

But the function of the constitutional tort action as individual remedy has been broader than simply fixing and reducing the incidence of government-caused individual injuries. By requiring courts to adapt constitutional provisions to cases involving such individual injuries, constitutional tort actions have contributed to a process of defining norms that regulate the government's discretion to inflict harm on individuals.[250]

State common law is inherently limited in its ability to perform such a function. The common law primarily defines rights between private individuals rather than the rights of individuals against the government. Unlike the Constitution, the common law was not promulgated with the specific intention of regulating government authority. Instead, it was developed case-by-case in response to private lawsuits. That is not to say that no plaintiffs bring common law suits against government officials. But the common law is usually not specifically adapted to regulate government officials. While state tort actions could address some of the government-inflicted injuries suffered by individuals when they are similar

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[249] *See* discussion *supra* Part II.
[250] *See* discussion *supra* Part III.

to injuries inflicted by private individuals, the dynamic between government officials and an individual is at times different from the dynamic between two private individuals.

The biggest difference between the infliction of injury by the government and infliction of injury by another private individual is the government's unambiguous discretion to inflict injury in certain circumstances. As the Supreme Court recognized in *Bivens*, the people have collectively conferred authority on government officials to act in ways that private citizens are not permitted.[251] Police may use force to apprehend a fleeing suspect. Prison officials can shoot prisoners in quelling a prison riot. Of course, there are some limited cases where private individuals are permitted to inflict injury, but the presumption that certain government officials are allowed to inflict injury is much greater. The recognized need to allow government officials to inflict injury must be balanced by the interests of the injured individuals. We expect more from government officials than we do from private individuals,[252] and some of our expectations are at odds with each other. We require government officials to protect us from harm in certain situations, to consider our interests as citizens in a democracy, and to exercise power with restraint for the common good. Constitutional tort actions thus raise balancing questions between governmental and individual interests that are not present in a typical state common law suit.

In an article continuing his substantial body of work on rights and remedies, Professor Levinson demonstrates the dangers of simply conceptualizing constitutional cases as interactions between equal individuals.[253] According to Professor Levinson, common law suits differ from suits brought by individuals against the government because of the continuous nature of the interaction between individual and government.[254] In Professor Levinson's words:

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[251] In the words of the Court:

> Respondents seek 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 v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971).

[252] *See, e.g.*, SCHUCK, *supra* note 23, at 66 ("Private tort law expects little of individuals.").

[253] *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

[254] *Id*. at 1318–32.

> Unlike the paradigmatic private parties in common-law cases, whose lives intersect only at the point of some discontinuous interaction, government and citizens are not strangers to one another. Quite the contrary, government and citizens, individually and collectively, are engaged in a continuous relationship—one that plays out over a historical time frame and over a scope as broad as the public sphere.[255]

Professor Levinson argues that because of this continuous relationship, courts deciding constitutional cases often encounter a problem he refers to as framing the transaction.[256] Because common law suits only look at a discrete interaction between the parties involved, they may not capture the full relationship between individual and government. If one were to broaden the frame of the transaction to take into account a greater range of interactions between government and individual, one might come to a different conclusion than by conceptualizing the relationship as an interaction between two strangers. Professor Levinson argues that rather than defining the scope of a constitutional transaction in the common law terms of a discrete interaction, it should be examined in light of broader structural principles.[257]

While constitutional tort victims may not continually interact with the defendants who have harmed them, the structural issue of the proper limits of government discretion to inflict injury is pervasive in everyday life. We, as individuals in a society, interact with police officers and other government officials every day. While we also interact with other private individuals daily, at least in theory, the presumption is that a private individual has no right to inflict or allow injury upon another private individual. When torts occur between private individuals, it is a deviation from a norm. State common law has developed principles to address those deviations. However, when a government official causes injury, it is not always the case that he or she has deviated from societal norms. That determination will hinge upon whether the government official has exceeded his or her discretion.

Constitutional tort actions thus go beyond the common law framing of discrete transactions. They require delving into structural issues such as the limits of a government official's authority. The argument that a federal remedy hinders the development of individual rights under state law assumes that state law is capable of performing the same functions as federal constitutional law. State common law simply does not have the range or authority to deal with the structural issues adjudicated in constitutional tort actions.

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[255] *Id*. at 1313.
[256] *Id*. at 1313–14.
[257] *Id*. at 1375–90.

A counter-argument might suggest that it would be sufficient for constitutional law to enter litigation in response to a government official's defense that he was acting within the scope of his authority. In such a mixed system, like the one that prevailed before the constitutional tort action was established, state law would provide the cause of action while constitutional law would define the limits of a government official's discretion. But such a system would be unwieldy compared with our constitutional tort scheme where the entitlement to bring an action and the determination of whether an official acted within his authority are governed by one body of law. In a mixed scheme, state law would govern the action while federal law would govern the limits of the official's discretion. State common law might not provide litigants with the same causes of action provided for by the Constitution. As a result, limitations that varied from location to location would govern the discretion of government officials.

Traditionally, state liability standards have not been specially adapted to deal with the unique contexts within which government officials operate. Thus they do not have the same weight as a suit based on the Constitution. A common law suit may seem like an intrusion into a government official's discretionary authority and be more easily dismissed. In contrast, because constitutional norms have historically been fashioned with government actors in mind and because of the supreme status of the Constitution, an act that violates a clearly established constitutional norm will be more readily understood as an abuse of discretion than a violation of state common law. Given the way the system has evolved, the constitutional tort action is now clearly the superior way to regulate the discretion of government officials to cause injury.

2. Injunctions

a. Structural

In contrast to state common law actions, structural injunctions involve more than private interests. Unlike the constitutional tort action's focus on whether individual government officials have exceeded their discretion and violated constitutional rights, structural injunctions focus primarily on whether government institutions are meeting constitutional norms. While structural injunctions often enforce norms regulating the government's power to inflict injury, they regulate high-level institutional choices rather than government officials' individual choices to inflict injury. Instead of focusing on particular injuries, structural injunctions look at the system as a whole and thus rarely deal with discretionary limits of government officials to inflict individual injuries.

Structural injunctions generally require courts to apply constitutional provisions to systemic problems caused by government institutions.[258] Without such a remedy, the federal courts and the Constitution would have little to say about the shape of institutions and government policy. In structural injunction cases, the main remedial concern is the extent to which courts will require institutions to conform to broadly defined constitutional norms. The remedial challenge in the context of structural injunctions is defining the constitutional baseline for minimally acceptable conduct. Thus, a structural injunction instituting reform in a prison system will seek to establish a basic level of safety that will not violate the norm against cruel and unusual punishment. A structural injunction directed at segregated schools will attempt to achieve a magnitude of integration that will meet the requirements of the Equal Protection Clause.

Some limits on the discretion of government officials should be defined at the institutional level through policies and training. When institutions fail to adequately define such limits, structural injunction suits can be brought against those institutions. But an inherent characteristic of the discretion conferred on street-level officials is that it cannot always be precisely defined. Moreover, it is difficult to define such limits in the abstract. For the most part, the bounds of government discretion are worked out day-to-day in individual interactions between government officials and the public.

While some structural injunction litigation may involve examples of individual wrongdoing, it only does so to the extent that there is an institutional cause for such wrongdoing. For example, when assaults of individual prisoners occur rampantly in a prison due to a severe lack of prison guards training, a court may relate the individual assaults to the institution's broader failure to train its guards.[259] But there are many times when a court cannot link an assault to an institutional policy because it is caused solely by an individual's choice to abuse his or her discretion. For example, if a prisoner is killed in the cafeteria because the prison guard in charge of monitoring the cafeteria violated prison regulations and decided to take a coffee break, that injury cannot be linked to and thereby addressed by an institutional choice. The injury was caused by an abuse of discretion at the level of the individual. Thus, a structural injunction would not be an appropriate forum for addressing such an injury.

It is therefore not surprising that most of the rights regulating a government official's discretion to inflict injury upon individuals have been established in constitutional tort actions. Most of the seminal rights regulating government officials in the prison setting were introduced in

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[258] *See, e.g.*, U.S. v. Yonkers, 837 F.2d 1181 (2d Cir. 1987) (allowing injunction directed at government caused segregation in schools), *cert. denied*, 486 U.S. 1055 (1988).

[259] *See generally* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

constitutional tort actions such as *Estelle v. Gamble*.[260] While constitutional tort actions and structural injunctions are motivated by the need to regulate government's power to inflict injury, structural injunctions are less likely to develop particular norms that implement these norms in a way that protects individuals from government officials who abuse their discretion.

b. Individual

In addition to structural injunctions, individuals may seek injunctions against individual government officials. These are a more likely vehicle for addressing abuses of discretion by government officials than structural injunctions because individual injunctions can focus attention on interactions between individuals and government officials. To obtain individual injunctive relief, however, an individual must demonstrate the "'likelihood of substantial and immediate irreparable injury.'"[261] Yet most of the injuries inflicted by street-level government officials occur without any warning. A victim of a police beating has no time to bring suit for an injunction to enjoin the beating. Thus, as a practical matter, most injury caused by unconstitutional conduct will be addressed in retrospective rather than prospective actions.

Since the injury alleged in an individual injunction case is hypothetical rather than real, individual injunctions are limited in their ability to establish new rights. In most cases, the right protecting the individual from certain forms of government injury is first established in a constitutional tort action. It is only after the establishment of such a right that individuals seek injunctions to enforce that right to prevent a particular injury. For example, in the prison context, the right protecting individual prisoners from the failure to treat serious medical needs was established in *Estelle v. Gamble*.[262] In *Helling v. McKinney*,[263] the Supreme Court invoked *Estelle* in holding that a prisoner could seek injunctive relief to enjoin exposure to second hand cigarette smoke that could lead to injury in the future. It reasoned that it could not draw a distinction between the current serious health problems that were already protected by *Estelle* and the future serious health problems at issue in *Helling*.[264] In *Helling*, the Supreme Court extended a right that was initially established in a constitutional tort action to find a basis for future relief.

It would be less likely for a right to develop the other way around: from a right protecting individuals against potential harm to a right pro-

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[260] 429 U.S. 97 (1976).

[261] Lyons v. City of Los Angeles, 461 U.S. 95, 111 (1983) (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

[262] 429 U.S. at 104–05.

[263] 509 U.S. 25 (1993).

[264] *Id.* at 32–34.

tecting the individual against an actual harm. Courts are probably less willing to apply constitutional provisions to establish a right limiting the discretion of government officials when the injury is theoretical rather than real. Cases where injuries have already occurred because of a government official's abuse of discretion provide a clearer context of facts to which courts can apply constitutional provisions.

3. Declaratory Judgments

Unlike the individual injunction, declaratory judgments are not limited to cases involving hypothetical injury. And like constitutional tort actions, declaratory judgments are a way by which individuals can ask courts to address retrospective wrongdoing. A court adjudicating such a declaratory judgment action would evaluate whether the infliction of individual injury exceeded the official's discretion by violating a constitutional right. In doing so, it could establish or enforce norms limiting that discretion.

Though a declaratory judgment could theoretically serve the same structural purpose as the constitutional tort action, in practice, it is unlikely that it would be as effective in developing norms that regulate the discretion of government officials. As the name implies, a declaratory judgment is simply a declaration of rights, no more, no less. Litigation is not only costly for the courts and society but for the individual. While some individuals injured by government wrongdoing might proceed without the prospect of a monetary award, many others will not have the time or resources to pursue a claim based on principle.[265] If individuals could only pursue claims for government caused injury through declaratory judgment actions, many potential plaintiffs would simply drop their claims. As a result, the abuse of discretion that leads to their injury would remain unaddressed.

4. Judicial Review

Judicial review is a remedy that individuals can invoke, but it focuses on whether the legislature has exceeded its power in passing a statute, rather than on whether individual government officials have improperly inflicted an injury upon an individual. Judicial review is usually invoked prior to the infliction of an injury. For example, a regulatory statute might arguably violate the Commerce Clause. A company could conceivably suffer an economic injury if the statute is actually applied, but would likely challenge the statute before it suffered the injury.

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[265] *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980) ("[W]ithout a meaningful remedy aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations.").

The court's inquiry in such a case would likely focus on whether the legislature passed a statute without the requisite nexus to interstate commerce thereby exceeding its power.[266] Judicial review is primarily about the limits on legislative power. It focuses not on whether the government infliction of injury upon an individual is appropriate after the fact, but whether the government has the structural power to pass a law. If for some reason the statute was passed and an injury was suffered, in addition to asking for judicial review, the individual could bring a constitutional tort action for that injury in a subsequent suit.[267] While statutes might cause injury to individuals in some cases, it would be likely that the constitutional tort action rather than judicial review would be the proper vehicle to address whether the Constitution prohibits such injury.

5. Criminal Process Remedies

A final category of constitutional remedies are those related to the criminal process such as the exclusionary rule and the writ of habeas corpus. Individuals invoke criminal process remedies to defend against the government's power to investigate, prosecute and incarcerate. They focus on whether the government has satisfied the constitutional procedural norms that regulate these functions. In doing so, they address the government's behavior in invoking its criminal powers rather than the secondary effects that might result from the unjust exercise of such power.

While criminal process remedies can prevent the improper uses of government power, they do not affirmatively protect individuals from the potential range of injuries that the criminal process can inflict. Without a constitutional tort remedy, an individual subject to a prosecution that destroys his reputation based on doctored evidence would have no recourse. While a habeas petition may secure the release of someone unjustly accused and incarcerated, it cannot restore that individual to his original, pre-imprisonment position. Moreover, criminal process remedies are only effective when the government chooses to invoke its criminal powers against an individual. An innocent person who is subject to an unreasonable search and seizure that does not lead to a prosecution would not have any remedy to invoke without a constitutional tort action.

Constitutional tort actions are needed to supplement criminal process remedies by allowing individuals to bring suits for injury inflicted during that process. For example, a person who was prosecuted based on fabricated evidence can bring a constitutional tort action alleging malicious prosecution after winning release through a habeas petition.[268] A

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[266] *See, e.g.*, U.S. v. Lopez, 514 U.S. 549 (1995).

[267] *See, e.g.*, Dennis v. Higgins, 498 U.S. 439 (1991) (allowing a § 1983 action based on an injury caused by a violation of the Commerce Clause).

[268] *See* Heck v. Humphrey, 512 U.S. 477 (1994).

person who suffered injury from an unlawful search can assert the exclusionary rule to defend against prosecution while bringing a Fourth Amendment constitutional tort action for the injury suffered from the search.[269]

Criminal process remedies aim to ensure that the government meets certain norms in exercising its powers to investigate, prosecute, and incarcerate. In turn, constitutional tort remedies address the injuries individuals can suffer when the government abuses those powers and violates those norms.

C. The Value of the Constitutional Tort Action

The prevailing assumption that constitutional tort actions are only valuable to the extent that they compensate and deter rights violations is incomplete. By focusing solely on the monetary effects of the damage award, the dominant paradigm overlooks that the action is an individualized remedy establishing limits on government officials' discretion to inflict injury. In this Section, I address how this structural role answers the most recent critiques of the constitutional tort action.

Recall that Dean Jeffries has argued that damage awards may lead courts to narrow constitutional rights and that structural injunctions might serve as a more effective way of enforcing constitutional rights.[270] While I agree with the need to deny remediation when government officials act within their discretion and do not violate clearly established norms, I disagree with his thesis insofar as it implies that constitutional tort actions have narrowed constitutional rights and that the structural injunction is a better way of enforcing constitutional rights.

In some cases, the prospect of significant damage liability can influence courts to narrow rights. But without an individual remedy many such rights would not have been established in the first place. The constitutional tort remedy gives litigants an avenue to present factual material that allows courts to apply constitutional provisions in different ways. Of course, some actions that abuse the system may lead courts to restrict such avenues. But courts may be just as likely to establish new rights when they are confronted with unjust inflictions of injuries upon individuals as they would be to narrow rights when deciding a case that frivolously asks for damages.

As this Article has shown, the constitutional tort action has helped shape norms that establish limits on the government's discretion to inflict injury upon individuals.[271] After the establishment of the constitutional tort action, a framework of rights that protects individuals from certain

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[269] Professor Amar argues that the constitutional tort action can be a more effective and just remedy than the exclusionary rule**.** *See* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 27–31, 155–60 (1997).

[270] *See* discussion *supra* Part I.B.2.

[271] *See* discussion *supra* Part III.

injuries and limits the prerogative of government to inflict injury has arisen. Now it is well-established that there are constitutional limits on law enforcement's ability to inflict harm on suspects.[272] Prisoners are protected by constitutional rights that guarantee minimal levels of safety from threats of serious harm.[273] Similar constitutional rights protect pretrial detainees and individuals involuntarily confined in mental institutions.[274] All of these rights can be traced to constitutional tort actions where individuals asserted that the government was constitutionally liable for some injury.

Dean Jeffries argues that structural injunctions channel the constitutional energy of the courts to focus on the future instead of the past.[275] Initially, as a descriptive point, this claim is questionable. While there is a right-remedy gap, constitutional tort actions remain a vibrant part of federal practice. In contrast, society may be less willing to tolerate the intrusion of structural injunctions.[276] In fact, courts have limited the use of structural injunctions to "extraordinary circumstances."[277]

Though it is true that structural injunctions prevent future misconduct while constitutional tort actions focus on remedying injuries that have already occurred, that is not to say that the effects of constitutional tort actions are limited to the past. In some cases, they establish rights that can be applied to regulate the government's discretion to inflict injury in future cases. Even when they do not establish rights, every successful constitutional tort action affirms that there are constitutional norms that prevent government from indiscriminately inflicting injury upon individuals. By keeping these norms vibrant, constitutional tort actions help ensure that future plaintiffs will have an avenue to assert their rights when government has unjustly inflicted injury. The structural injunction is an important remedy that should be applied to address institutional problems prospectively, yet in many cases it is not an adequate substitute for the constitutional tort remedy. Not all constitutional injury has institutional causes. Without a constitutional tort action, there would be no effective remedy to deal with cases where individual government officials abuse their discretion and cause individual injuries. If we were to rely solely upon the structural injunction, there would be a gaping hole in the system of constitutional remedies.

Without an individual remedy, it is likely that the interests of many people, some of whom society marginalizes, will be lost in the shuffle. In a world without a constitutional tort action, a greater separation would

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[272] *See* discussion *supra* Part III.B.7.
[273] *See* discussion *supra* Part III.B.3.
[274] *See* discussion *supra* Part III.B.4.
[275] *See* discussion *supra* Part I.B.2.
[276] Again, this has especially been the case with structural injunctions in the prison setting. *See* 18 U.S.C. § 3626 (2000).
[277] Rizzo v. Goode, 423 U.S. 362, 379–80 (1976).

exist between the Constitution and regular individuals. Constitutional remedies would be primarily limited to more "significant" issues such as wide ranging structural injunctions or striking down legislative acts. Some might argue that such a state of affairs would be preferable to one where individuals invoke the Constitution in federal court virtually every day. Through such a choice, we would ascribe to a system that ignores those on the fringes of society. While well-organized minority groups may be able to utilize structural remedies to protect their interests, there are many individuals whose rights may not be represented by any powerful interest group. It would be easy for such a society to simply reject the claims of individuals such as prisoners, suspected criminals, and stubborn landowners that assert rights that oppose society's interests. Such a scheme would not actualize a Constitution that purports to value the rights of individuals.

Individual remedies may also help spur structural solutions. Although no single constitutional tort action may lead to structural change, each case educates federal courts about the ways that government officials can unlawfully inflict injury. In doing so, constitutional tort actions may help judges assess whether problems are isolated or truly systemic. For example, if a judge hears only one case every several years involving a rogue police officer that used excessive force, she may be less likely to conclude there is a structural problem with the police force than if he hears several such cases every year. At the very least constitutional tort actions educate judges about different government institutions and how they function without requiring them to retool those institutions. The judicial opinions that decide these cases could transfer much of this knowledge to other judges. A judge with a personal background in adjudicating individual constitutional tort actions against a particular agency or who can draw on the experiences of other judges may be in a better position to decide cases challenging the structure of that agency.

Conclusion

Because they are now such a pervasive part of the federal docket, it is easy to forget that constitutional tort actions have so recently changed the way that we view the Constitution. The recent attacks on constitutional tort actions are motivated by the notion that individual litigation is an unnecessary burden on society. The argument seems to be that damage awards against government officials rarely change anything and retard progress in constitutional development. This view of the constitutional tort action as solely a monetary remedy is too narrow. It does not recognize the rich interplay between the constitutional tort action as an individual remedy and the development of important constitutional norms.

This Article has argued for a more holistic approach to understanding the constitutional tort action. First, we must recognize that the con-

stitutional tort action protects a particular interest, the right of the individual to be free from certain forms of governmentally caused injury. Second, far from passively compensating and deterring violations of preexisting rights, constitutional tort actions have had a dynamic role in constitutional norm development. The constitutional tort action has helped spur the courts to translate general constitutional provisions into rights that protect individuals from the infliction of certain governmental injuries. Finally, while constitutional tort actions are primarily about the individual, they also uniquely contribute to articulating structural norms that regulate the discretion of individual government officials to inflict injury.

Hopefully, through a greater understanding of the importance of constitutional tort actions, society will be less quick to judge those who bring such actions. Constitutional tort actions are an avenue by which we can challenge the government's infliction of injury upon individuals. History has shown that even individuals in a free country must maintain such channels to limit the power of the government to inflict injury.