STATE CONSTITUTIONAL LAW — CONSTITUTIONAL TORTS — SECOND CIRCUIT RULES STATE CONSTITUTIONAL TORTS NOT COGNIZABLE UNDER THE FEDERAL TORT CLAIMS ACT. — *Hernandez v. United States*, 939 F.3d 191 (2d Cir. 2019).

The United States government is typically protected from lawsuits for money damages by the doctrine of sovereign immunity.[1] Through the Federal Tort Claims Act[2] (FTCA), however, Congress partially waived that immunity by allowing state law tort claims to proceed directly against the United States, rendering it liable "in the same manner and to the same extent as a private individual under like circumstances."[3] Recently, in *Hernandez v. United States*,[4] the Second Circuit held that the FTCA does not allow suits for a federal official's alleged violation of the New York Constitution's due process guarantee.[5] In doing so, the court implied that state constitutional claims are categorically outside the FTCA's scope.[6] However, the statute's plain meaning and Supreme Court precedent both suggest otherwise, enabling such suits when certain necessary conditions are met.

On September 27, 2013, New York City police arrested Luis Hernandez and charged him with public lewdness.[7] During his processing, the United States Department of Homeland Security (DHS) asserted that Hernandez was subject to a removal order and lodged an immigration detainer against him.[8] The detainer requested that he be held for up to forty-eight hours beyond the time at which he would normally have been released so that DHS might take him into custody.[9] Although the prosecutor at Hernandez's arraignment initially recommended three days of community service, she amended that recommendation in light of the detainer to five days in jail and one dollar in bail so that Hernandez could accrue time credit toward any eventual sentence.[10] While detained, "Hernandez told various [city correctional] staff members . . . that he was a U.S. citizen," but they responded that they were unable to help.[11] On October 1, 2013, DHS revoked its detainer — and the City released Hernandez — presumably because DHS

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1 *See* United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

2 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

3 *Id.* § 2674.

4 939 F.3d 191 (2d Cir. 2019).

5 *Id.* at 204–05.

6 *Id.* at 205.

7 Hernandez v. United States, No. 16-CV-6139, 2018 WL 1322187, at *2 (S.D.N.Y. Mar. 13, 2018).

8 *Hernandez*, 939 F.3d at 196.

9 *Id.* at 197.

10 *Id.*; *see* Brief for Plaintiff-Appellant at 23 n.15, *Hernandez*, 939 F.3d 191 (No. 18-1103).

11 *Hernandez*, 939 F.3d at 197.

realized that he had been born in Brooklyn and was not Luis Enrique Hernandez-Martinez, a Honduran for whom the agency had an order of removal.[12]

Hernandez brought an action in the Southern District of New York, asserting claims against the federal government under the FTCA and against the City of New York under 42 U.S.C. § 1983.[13] Under the FTCA, Hernandez sued "for (1) false arrest and false imprisonment, (2) abuse of process, (3) violation of due process under the New York Constitution, and (4) negligence."[14] His § 1983 claims alleged that the City "maintain[ed] a policy of acceding to federal immigration detainers (even when detention [was] not appropriate)," and that the City failed to train its employees to properly handle those detainers.[15] The district court dismissed Hernandez's complaint for failure to state a claim upon which relief could be granted.[16]

The Second Circuit affirmed in part, vacated in part, and remanded.[17] Writing for the panel, Judge Chin[18] reversed the district court as to the false arrest and false imprisonment claim against the federal government and the § 1983 claim stemming from the City's official policy.[19] The court found the remaining claims to be properly dismissed.[20]

First, the court addressed the claims against the federal government. To adjudicate the false arrest and imprisonment claim,[21] Judge Chin looked to the elements of the relevant state law tort and noted that the only elements in dispute were "whether Hernandez sufficiently pleaded the [g]overnment intended to confine him and whether this confinement was not otherwise privileged."[22] The court found the government's intent obvious because DHS had issued a detainer precisely to continue Hernandez's confinement.[23] As to privilege, the court explained that because a detainer results in an individual being retained in custody after the individual would otherwise have been released, it effects a "seizure that must be supported by probable cause."[24] The court found the complaint to plausibly allege that the government lacked probable cause

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[12] *See id.* at 197, 201, 204. The two men may share a birthday. *Id.* at 197, 203 n.9.

[13] *Id.* at 198.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 210.

[18] Judge Chin was joined by Judges Wesley and Kaplan. Judge Kaplan was sitting by designation from the Southern District of New York.

[19] *Hernandez*, 939 F.3d at 198.

[20] *Id.*

[21] "Although false arrest and false imprisonment are sometimes treated as different torts," the parties, the complaint, and the court all treated them as one in this case. *Id.* at 199 n.3.

[22] *Id.* at 199.

[23] *Id.*

[24] *Id.* at 200.

because Hernandez was not Honduran, nor did his middle and last names match those on the detainer,[25] such that "no reasonable officer would have issued [the] detainer . . . without conducting an inquiry."[26] Next, the court scrutinized the abuse of process claim, again relying on New York tort law.[27] The court found the complaint insufficient for its failure to allege that DHS issued the detainer in furtherance of any illegitimate collateral purpose — a necessary element of the tort.[28]

Judge Chin then turned to, and rejected, Hernandez's state constitutional due process claim.[29] First, the court addressed whether state constitutional claims were cognizable under the FTCA at all.[30] The court noted that federal constitutional claims are not cognizable under the FTCA and that Hernandez had not pointed to anything that might distinguish his state constitutional due process claim from that baseline.[31] The court declined to draw any distinctions and categorically found that state constitutional claims were not cognizable under the FTCA.[32] It went on to explain that, even if state constitutional claims *were* generally cognizable, the New York Constitution's due process protections still were not.[33] Because the state constitutional provision requires "[s]tate involvement in the objected to activity," the court found it inapplicable to DHS officials acting under color of federal — not state — law.[34]

The court next ruled that Hernandez's negligence claim failed as a matter of law.[35] New York law prevents plaintiffs from recovering under a traditional negligence theory against law enforcement officers who failed to exercise due care while "effecting an arrest or initiating a prosecution."[36] Finding those limitations to be on point and binding, the panel declined Hernandez's invitation to reconsider that precedent.[37]

The court then turned to Hernandez's claims under 42 U.S.C. § 1983, dealing first with his theory that the City was liable for its official policy requiring employees to honor federal immigration detainers

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[25] *Id.* at 201.

[26] *Id.* at 202.

[27] *See id.* at 204; *see also id.* at 198–99 (discussing state law basis of FTCA claims).

[28] *Id.* at 204.

[29] *See id.* at 204–06.

[30] *Id.* at 205.

[31] *Id.* (citing Castro v. United States, 34 F.3d 106, 110 (2d Cir. 1994)).

[32] *See id.*

[33] *Id.*

[34] *Id.* (alteration in original) (quoting Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1174 (N.Y. 1978)).

[35] *Id.* at 206.

[36] *Id.* (quoting Watson v. United States, 865 F.3d 123, 134 (2d Cir. 2017)).

[37] *See id.* Second Circuit practice allows panels to overrule circuit precedent without full en banc review by obtaining informal consent from the remainder of the circuit's judges. *See, e.g.*, Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 67 & n.9 (2d Cir. 2009).

regardless of their validity.[38] The court found that Hernandez's complaint sufficiently pleaded such a policy, and rejected the City's argument that Hernandez was detained because of his failure to post bail, rather than because of the detainer.[39] It also rejected the argument that municipal law enforcement officers may rely on federal immigration detainers when choosing to detain someone.[40] While the court was unwilling to hold that "every claim of innocence" creates such liability, here, the paperwork's naming discrepancies — and the minimal effort required to verify Hernandez's identity — created an obligation that the City not blindly rely on the federal detainer.[41] Finally, the court dismissed Hernandez's claim that the City was liable for its failure to train corrections staff to properly handle federal immigration detainers, finding that the City's policy of unquestionably complying with those detainers — not any failure in employee training — had caused any constitutional violation.[42]

Although it reached the correct outcome, the Second Circuit's state constitutional analysis took the wrong path to do so. When interpreting the FTCA, the Supreme Court has read its textual requirements literally, and those requirements do not turn on the type of tort alleged. Rather than engage with the Supreme Court's test, the panel rejected Hernandez's state constitutional tort claim on the assumption that constitutional claims are fundamentally special — likely because the court assumed all such claims require state action. Although understandable given the Fourteenth Amendment's prominence in constitutional litigation, this assumption proves too much: some federal and state constitutional provisions do constrain private actors. In addition, categorically lumping state constitutional provisions in with their federal counterparts undervalues both state sovereignty and the instrumental value state constitutional torts might hold. Furthermore, the FTCA's drafters were not unfamiliar with constitutional torts — they simply chose not to distinguish them. The court's broad restriction on state constitutional tort claims under the FTCA therefore reaches too far.

The FTCA sets out the requirements for state law tort claims against the government.[43] Under § 1346(b), the federal government has consented to suits that are:

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the

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[38] *Hernandez*, 939 F.3d at 206.
[39] *Id.* at 207.
[40] *Id.* at 208.
[41] *Id.*
[42] *Id.* at 209–10.
[43] *See* 28 U.S.C. § 1346(b)(1) (2012).

> scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[44]

The Supreme Court has hewed closely to these requirements, holding that "a claim is actionable under § 1346(b) if it alleges the six elements outlined above."[45] In *FDIC v. Meyer*,[46] the Court applied those elements to a federal constitutional tort and found that it failed the sixth requirement in two respects: first, the provision at issue could not render a private person "liable to the claimant," and second, the "law of the place" language refers to the law of the *state* in which the act or omission occurred, which does not include the U.S. Constitution.[47] At no point did the Court draw any doctrinal distinction between common law or statutory torts and constitutional torts, except inasmuch as the latter — when federal — did not satisfy the sixth element of its test.[48]

The important question, then, is not whether a tort is constitutional, statutory, or common law, but whether it can satisfy all six *Meyer* elements. Although many state constitutional provisions require state action before liability will attach,[49] and therefore cannot make a "private person . . . liable to the claimant," that is not always the case.[50] Whether a particular state constitutional claim is cognizable under § 1346(b) is therefore dependent on the substantive law surrounding the relevant provision and the facts of the particular case. To Hernandez's detriment, the New York Constitution's due process provision requires "[s]tate involvement in the objected to activity."[51] His claim thus failed the *Meyer* test at its sixth element, and therefore was not cognizable under the FTCA. It is the state constitution, not the FTCA, that is the source of this misfortune, however, and a different provision might properly provide relief. Consequently, the court's categorical ruling sweeps much too broadly.

Eschewing the *Meyer* analysis, the panel instead seemed to rely on its sense that state and federal constitutional provisions should be

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[44] *Id.*

[45] FDIC v. Meyer, 510 U.S. 471, 477 (1994).

[46] 510 U.S. 471.

[47] *Id.* at 477–78 ("By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Id.* at 478.).

[48] *Id.* at 478. In fact, the Court seemed to imply that federal constitutional torts were fully capable of satisfying the first five elements. *See id.*

[49] *See, e.g.*, Cologne v. Westfarms Assocs., 469 A.2d 1201, 1208–09 (Conn. 1984) ("It is evident that the concern which lead [sic] to the adoption of our Connecticut Declaration of Rights, as well as the bill of rights in our federal constitution, was the protection of individual liberties against infringement by government." *Id.* at 1208.).

[50] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (upholding California Supreme Court's enforcement of state constitutional protections against private property owners).

[51] *Hernandez*, 939 F.3d at 205 (alteration in original) (quoting Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1174 (N.Y. 1978)).

treated identically with regard to the FTCA.[52] The panel did not explicate the grounds on which this assertion was based, but it seems to stem from the idea that there is something special about constitutional torts that makes them inappropriate FTCA claims, and that this something originates with the Federal Constitution.[53] The most obvious "something" is a preconception that constitutions exist to provide broad statements of principle, not regulations of individual behavior.[54] Because New York's due process provision and its federal counterpart both require state action,[55] the panel may have relied on its preconceptions to read that requirement into constitutions writ large — placing them categorically outside the FTCA's scope.[56]

Concededly, there is intuitive appeal to the idea that constitutional torts are different *because* they are derived from a constitution. Chief Justice Marshall famously noted that "we must never forget, that it is *a constitution* we are expounding."[57] The statement is one of interpretive philosophy, but it nevertheless suggests something unique about the laws we choose to codify in constitutions.[58] The nature of the constitution that Chief Justice Marshall envisioned, a statement of broad governmental principles, would seem to preclude its governing private individuals and to support the intuition that all such charters share that basic trait.[59] This approach fails to reckon with several important considerations, however.

If there is something unique about constitutions, it cannot be that they are solely intended to constrain governments. The Fourteenth Amendment's state action requirement is the most well-known example of the phenomenon that seems to be at the heart of the panel's intuition, but that requirement was not preordained at the amendment's inception.[60] The Civil Rights Act of 1875,[61] ostensibly passed pursuant to the Fourteenth Amendment's grant of congressional power, contemplated that private individuals be prosecuted for its violation.[62] The

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[52] *See id.*

[53] *See id.*

[54] *See* Laurence H. Tribe, *Foreword* to IT IS A CONSTITUTION WE ARE EXPOUNDING 7, 7 (2009) ("The framers conceived of the Constitution . . . as a basic charter, marking core principles . . . .").

[55] *See Hernandez*, 939 F.3d at 205.

[56] *See* 28 U.S.C. § 1346(b) (2012); FDIC v. Meyer, 510 U.S. 471, 477–78 (1994). It is also very possible that the panel was inferring a distaste for damages suits against federal officers writ large from the Supreme Court's reluctance to expand the *Bivens* cause of action to new contexts. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[57] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[58] *See* Tribe, *supra* note 54, at 7–8.

[59] *See id.* at 7 (distinguishing the Constitution from detailed regulatory schemes like tax codes and zoning ordinances).

[60] *See generally* ERIC FONER, THE SECOND FOUNDING 55–92, 125–68 (2019).

[61] Ch. 114, 18 Stat. 335, *invalidated in part by* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[62] *See The Civil Rights Cases*, 109 U.S. at 9–10.

Supreme Court invalidated the Act in 1883 for its failure to confine itself to state action,[63] but that decision is regarded by some as a retreat from the amendment's original promise.[64] Consequently, it is difficult to say that state action requirements flow inexorably from the constitutional form, or even from the Fourteenth Amendment.

Indeed, although the Court's interpretation of the Fourteenth Amendment tends to color constitutional assumptions,[65] even the principle-focused Federal Constitution does constrain some private action. The Thirteenth Amendment's prohibition on slavery is complete: it unequivocally prevents not only the passage of laws that enable slavery but also private individuals' enslavement of others.[66] The amendment "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[67] The amendment has force "irrespective of the manner or authority by which [the condition of slavery] is created."[68] The panel's intuition, then — if based on a need for state action — is not consistent with the entirety of the Federal Constitution, let alone the myriad provisions of fifty state constitutions.

Moreover, categorically exempting all constitutional torts from the FTCA simply because the *U.S. Constitution* does not necessarily satisfy the FTCA's statutory test undervalues the states' prerogative to fashion their laws as they see fit. "State constitutions create independent limits" on state, local, and sometimes private power,[69] and, through the FTCA, the United States has consented to liability arising from those limits.[70] This independent legal status also means that state courts that interpret a constitutional provision in lockstep with its federal counterpart should not be assumed to forfeit the provision's salience under the FTCA. Although those protections might rarely prove outcome determinative because they share the U.S. Constitution's focus on state action, a state constitutional provision that provides equivalent protection to — or less protection than — its federal counterpart remains an independent source of law.[71]

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[63] *Id.* at 17, 25.

[64] *See* FONER, *supra* note 60, at 126–29.

[65] *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–08 (1985) (concluding from an analysis of the Fourteenth Amendment that "the Constitution does not prohibit private deprivations of constitutional rights," *id.* at 508).

[66] *See* U.S. CONST. amend. XIII; George Rutherglen, Essay, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367 (2008).

[67] Clyatt v. United States, 197 U.S. 207, 217 (1905).

[68] *Id.* at 216.

[69] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 173 (2018).

[70] *See* 28 U.S.C. § 1346(b)(1) (2012) (allowing some suits "in accordance with" state law).

[71] *See* SUTTON, *supra* note 69, at 183 (arguing that while a state court decision construing its constitution as less protective than its federal counterpart may rarely affect outcomes, it is still important). Under *Meyer*, a state constitutional provision that provided less substantive protection

State constitutional torts can also play a necessary role in securing rights against federal trespass. A *Bivens*[72] action (which furnishes an implied cause of action against federal officials who violate the U.S. Constitution[73]) is often the only way to vindicate federal constitutional rights,[74] but is too highly "disfavored" by the Supreme Court to provide a reliable remedy.[75] FTCA claims arising from state constitutions, then, might be the only way to vindicate equivalent rights against federal officials, giving state constitutional claims significant instrumental value.

Finally, it is difficult to argue that the FTCA's drafters overlooked state constitutions as a source of positive law, or chose to implicitly exclude them from the statute's scope. During hearings to amend the FTCA in 1983, legal experts testified that there was no principled way to distinguish between constitutional and nonconstitutional torts, urging the House Judiciary Committee not to propose legislation that distinguished between the two.[76] The Judiciary Committee seems to have taken this advice: to the extent that the modern FTCA *does* distinguish constitutional torts, it specifies only that it does not provide the *exclusive* remedy for claims brought for "a violation of the Constitution of the United States."[77] This language, which would likely have more explicitly barred constitutional torts were that its drafters' intention, affirms that the issues preventing federal constitutional torts from being cognizable under the FTCA are a particular constitutional provision's inability to regulate private conduct and the Supreme Court's determination that the U.S. Constitution cannot supply the "law of the place."[78]

By substituting intuition for the fact-specific *Meyer* test, the Second Circuit gave short shrift to the New York Constitution as an independent source of law. Moreover, although it reached the correct result under New York's due process provision, the court ruled too broadly, unnecessarily constraining the circuit's FTCA doctrine.

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than its federal counterpart but did regulate private actors would logically allow federal officials to be held to that lower standard of conduct through lawsuits under the FTCA. *Cf.* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) (finding no liability due to state action requirement and lack of state law).

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

[73] *See id.* at 395–97.

[74] *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009).

[75] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)); *see* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23, 76 (arguing that recent Supreme Court precedent "portends a bleak future for" *Bivens* actions).

[76] William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1144–45, 1144 nn.249 & 253 (1996).

[77] 28 U.S.C. § 2679(b)(2)(A) (2012); *see id.* § 2679(b).

[78] *See* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994).