RECOVERING THE LOST MEANING OF THE FEDERAL TORT CLAIMS ACT'S "DISCRETIONARY FUNCTION EXCEPTION"

Since 1946, the Federal Tort Claims Act[1] (FTCA) has waived the government's sovereign immunity for damages claims brought against the United States for the tortious conduct of its employees.[2] This waiver has allowed those wronged by a federal officer to seek recovery through claims predicated on the common law tort of the state in which the wrong occurred.[3] But that waiver is subject to a litany of exceptions.[4] One is 28 U.S.C. § 2680(a), which retains the government's immunity for any claim based on an employee's performance or failure to perform "a discretionary function or duty . . . whether or not the discretion involved be abused."[5] The lower courts have interpreted this "discretionary function exception" capaciously, rendering it remarkably broad and applicable to innumerable acts.[6] In large part because of this, when the government has invoked the exception at the motion to dismiss stage, it has succeeded in dismissing nearly seventy-five percent of claims.[7]

But notable disagreements persist concerning the exception's bounds. One such disagreement has resulted in a split amongst the courts of appeals. It concerns the interplay between the discretionary function exception and the U.S. Constitution. Does the exception immunize the government from tort claims that also constitute constitutional violations — even though the Constitution cannot form the basis of a plaintiff's FTCA tort claim?[8] Or does the Constitution place bounds on the "discretion" that the exception can immunize?

For instance, imagine a case in which a U.S. Park Police Officer arrested a woman for organizing a large prayer service on National Park grounds.[9] Her arrest was not legally authorized and thus could constitute false arrest under the common law. If she brought an FTCA claim against the United States alleging false arrest, the government would, in the ordinary course, move to dismiss on grounds that the discretionary

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[1] 28 U.S.C. §§ 1346(b), 2671–2680.

[2] *Id.* § 1346(b)(1).

[3] *Id.*

[4] *See id.* § 2680.

[5] *Id.* § 2680(a).

[6] *See* Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1819 (2021). Lower courts have consistently found "that decisions of law enforcement officers, although seemingly 'operational' and made in the heat of the moment, fall within the FTCA discretionary function exception." Horta v. Sullivan, 4 F.3d 2, 21 (1st Cir. 1993).

[7] Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 290 (2009) (analyzing 760 FTCA cases between 1946 and 2007).

[8] The Act does not apply to claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

[9] These facts are loosely based on *Galvin v. Hay*, 374 F.3d 739, 743 (9th Cir. 2004).

function exception applies.[10] But could she successfully oppose that motion by arguing that the arrest plausibly violated her First Amendment rights, so the exception cannot apply?

That question has real ramifications. Many claims that could be pleaded as constitutional violations could also be pleaded as violations of state tort law.[11] For instance, many Fourth Amendment violations overlap with torts such as battery and invasion of privacy.[12] So plaintiffs alleging official federal misconduct can pursue two damages claims: (1) an FTCA claim against the federal government for the tort and (2) a claim against the officer in their personal capacity for the constitutional violation.[13] But today, plaintiffs will have trouble succeeding on the latter claim — commonly referred to as a *Bivens* action for the 1971 case, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[14] which implied a private right to damages relief for constitutional violations.[15] Over the last few decades, the Court has appreciably cut back the availability of *Bivens* remedies.[16] Judicially created causes of action, in its eyes, impermissibly blur the constitutional lines between legislative and judicial power.[17] With *Bivens* largely gutted, the FTCA provides virtually the only path to damages relief for individuals harmed by a federal officer's unconstitutional conduct. And whether that path is a feasible one turns on whether the discretionary function exception applies to unconstitutional conduct.

For almost fifty years, nearly every court of appeals to consider the issue reached the same conclusion. The government could not invoke the discretionary function exception in response to an FTCA claim if the

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[10] *See, e.g.*, *id.* at 744.

[11] John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1021 (2008) ("The Fourth and Eighth Amendments . . . are among the Constitution's closest analogs to the law of tort."); Olivia Goldberg, Note, *(Extra)ordinary Tort Law: Evaluating the Federal Tort Claims Act as a Constitutional Remedy*, 76 STAN. L. REV. 481, 507–10 (2024) (analyzing the overlap between Fourth and Eighth Amendment violations and common law torts).

[12] Goldberg, *supra* note 11, at 507–08. Because the FTCA makes the federal government liable for the intentional torts of law enforcement officers, many FTCA tort claims against law enforcement, such as claims for false arrest or battery, will coincide with constitutional violations. *See* 28 U.S.C. § 2680(h).

[13] *See, e.g.*, Xi v. Haugen, 68 F.4th 824, 831 & n.4 (3d Cir. 2023) (considering a Fourth Amendment claim and FTCA claim against a federal officer for malicious prosecution and related actions); Shivers v. United States, 1 F.4th 924, 926–27 (11th Cir. 2021), *cert denied*, 142 S. Ct. 1361 (2022) (considering an Eighth Amendment and FTCA claim by a federal prisoner against federal prison officials); *Galvin*, 374 F.3d at 744 (considering a First Amendment claim and an FTCA claim against federal officers who arrested protestors).

[14] 403 U.S. 388 (1971).

[15] *See id.* at 392.

[16] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

[17] Under the Court's most recent *Bivens* pronouncements, "in all but the most unusual circumstances," providing a damages remedy for constitutional violations "is a job for Congress, not the courts." Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

tort alleged also constituted a constitutional violation.[18] These courts generally reasoned that "[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally."[19] This proposition was considered so "elementary" that these courts adopted this stance with little justification or interpretation of the FTCA itself.[20]

But in 2019, some circuits began challenging this entrenched conclusion. With Judge Easterbrook writing for a majority, the Seventh Circuit declared: "[T]he theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act . . . ."[21] The Eleventh Circuit followed, describing the dominant view as writing in an "extra-textual 'constitutional-claims exclusion'" into the statute.[22] The Seventh and Eleventh Circuits largely rooted their arguments in the text. Section 2680(a) applies "whether or not the discretion involved be abused," so the statute is "unambiguous and categorical" in its scope, they argued.[23] It does not "carve[] out certain behavior," even unconstitutional behavior, from the exception.[24] This makes sense, they said, because "Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of *state tort law*."[25] And Congress made that explicit when it amended the FTCA in 1988, clarifying its inapplicability to claims "brought for a violation of the Constitution."[26] That amendment, both courts argued, proved that FTCA claims must be considered "without regard to constitutional theories."[27]

The resulting split has spurred myriad commentators to side with the majority view, but largely with defenses that double down on that view's original axiom — that any other reading of the exception is

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[18] *See* Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009); Huntress v. United States, 810 F. App'x 74, 76–77 (2d Cir. 2020); *Xi*, 68 F.4th at 838; Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003); Nieves Martinez v. United States, 997 F.3d 867, 878–79 (9th Cir. 2021); Loumiet v. United States, 828 F.3d 935, 943–44 (D.C. Cir. 2016). *But see* Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972). The Fifth, Sixth, and Tenth Circuits have yet to pass on this issue. *See* Spotts v. United States, 613 F.3d 559, 569 (5th Cir. 2010); Mynatt v. United States, 45 F.4th 889, 897 & n.4 (6th Cir. 2022); Martinez v. United States, 822 F. App'x 671, 678 (10th Cir. 2020).

[19] Myers & Myers, Inc. v. USPS, 527 F.2d 1252, 1261 (2d Cir. 1975).

[20] *Limone*, 579 F.3d at 101.

[21] Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

[22] Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021) (citing Millbrook v. United States, 569 U.S. 50, 56–57 (2013)).

[23] *Id.* (emphasis omitted) (quoting 28 U.S.C. § 2680(a)); *see Linder*, 937 F.3d at 1091 (citing *Kiiskila*, 466 F.2d at 628).

[24] *Shivers*, 1 F.4th at 930.

[25] *Id.*; *see Linder*, 937 F.3d at 1090.

[26] 28 U.S.C. § 2679(b)(2)(A).

[27] *Shivers*, 1 F.4th at 933 (quoting *Linder*, 937 F.3d at 1090).

simply incompatible with the Constitution.[28] This Note offers a different tack that places the majority view on firmer footing. It argues that Congress transplanted the common law term "discretion," which governed officer suits at common law, into the discretionary function exception. And it demonstrates how that exception, when properly interpreted against this common law backdrop, retains the government's immunity only for "constitutionally permissible" discretionary functions.[29] Part I explains the doctrine of "discretion" that governed officer suits at common law. This Part argues the predominant view at common law was that the Constitution placed boundaries on the "discretion" that could be conferred on officers. Part II discusses the upshot for interpreting the discretionary function exception. And it shows how interpreting "discretion" as referring to "constitutionally permissible discretion" fits within the larger mechanics of the FTCA's scheme and Supreme Court doctrine implementing it. Part III concludes by discussing the implications of this interpretation for how plaintiffs looking to vindicate constitutional rights through tort suits under the FTCA should plead their FTCA claims.

I. THE DISCRETIONARY FUNCTION EXCEPTION'S COMMON LAW BACKDROP

When the FTCA was enacted in 1946, it did not emerge *ex nihilo*. Rather, it built upon a long tradition of official accountability rooted in tort law that prevailed since the early republic. Prior to the FTCA's passage, individuals could not receive damages directly from the United States for the tortious conduct of its officers.[30] Sovereign immunity barred any suit for money damages brought directly against the United States.[31] But it did not bar suit against the officers who committed the wrongs.[32] Throughout the nineteenth century, individuals wronged by official misconduct sought redress against individual officers by suing

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[28] *See, e.g.*, Daniel Raddenbach, Note, *Unconstitutional but Authorized: The Federal Tort Claims Act Should Not Immunize the United States When Federal Officers Violate the Constitution*, 106 MINN. L. REV. 1121, 1156–59 (2021); Sisk, *supra* note 6, at 1828–31; Goldberg, *supra* note 11, at 503–06.

[29] This Note borrows from Sina Kian's phraseology "constitutionally permissible discretion." Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 154 (2012).

[30] James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1872 (2010).

[31] *Id.* at 1872, 1876; *see also* Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4–6 (1924) (describing how the doctrine of sovereign immunity developed in the United States).

[32] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1781 (1991); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. CHI. L. REV. 435, 435 (1962); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963).

them in tort.[33] And if the officer was found liable, the officer could in turn seek indemnification from the government in the form of a private bill from Congress.[34] In the era prior to the Civil War, about sixty percent of officers who sought indemnity received it.[35] But by the early twentieth century, this practice had become arduous and distracting for Congress.[36] And so in 1946, Congress enacted the FTCA to replace the antiquated scheme.

Given this history, one cannot understand the modern regime without first grasping its common law foundations. This Part begins by examining the common law roots of "discretion" — a doctrinal fixture in officer suits at common law that dictated the extent to which an individual executive official could be held liable for misconduct. It then draws upon examples of individual officer suits at common law to explain how the common law viewed the Constitution as imposing constraints on discretion.

A. "Discretion" at Common Law

As early as *Marbury v. Madison*,[37] the Supreme Court — apparently motivated by separation of powers concerns — articulated the principle that courts should not "enquire" into how officers "perform duties in which they have . . . discretion."[38] By the mid-nineteenth century, courts captured this immunity principle through a distinction between "ministerial" and "discretionary" functions.[39] Officials had discretionary

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[33] *See* Pfander & Hunt, *supra* note 30, at 1874–75; *see, e.g.*, Imlay v. Sands, 1 Cai. 566, 566–68, 573 (N.Y. Sup. Ct. 1804) (holding a federal customs collector liable for accidentally seizing a vessel without justification and stating that a court's duty is "to pronounce the law as we find it" and to "leave cases of hardship, where any exist, to legislative provision," *id.* at 573); The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) (Story, J.) (finding a federal officer liable for a tort and observing that the "Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress" and "under justifiable circumstances, the Legislature will doubtless apply a proper indemnity").

[34] Pfander & Hunt, *supra* note 30, at 1868.

[35] *Id.* at 1867.

[36] *See* Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 725–26 (1947); Feres v. United States, 340 U.S. 135, 139–40 (1950) (describing the issues Congress faced tackling these claims in the decades leading up to the FTCA's passage).

[37] 5 U.S. (1 Cranch) 137 (1803).

[38] *Id.* at 170. To be sure, there is some scholarly disagreement over whether the "discretion" to which *Marbury* referred was consistent with later understandings of "discretion" that shielded officers from liability. *Compare* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 417 (1987) (arguing that the Court was referring to decisions that were "political" in nature and did not affect "individual rights" (quoting *Marbury*, 5 U.S. (1 Cranch) at 166)), *with* James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 150 (2021) (characterizing *Marbury* as articulating a broader principle that "where an official's lawful discretion ended and legal boundaries were transgressed, the common law was available (indeed obliged . . .) to supply a remedy").

[39] *See, e.g.*, Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845) (holding that an officer was not liable in damages "where the act to be done is not merely a ministerial one, but is one in relation to

rather than ministerial duties when the law gave them the authority to use their own judgment to decide how to best carry out their obligations.[40] Because this latitude of judgment was similar to that granted to judges,[41] discretionary authority for executive officials was sometimes referred to as "quasi-judicial."[42] Courts used this distinction to determine the individual damages liability of an officer for carrying out his duties improperly.[43]

To be sure, the line between ministerial and discretionary functions was not always clear. Courts did not always agree about whether a particular duty constituted a ministerial or a discretionary one.[44] For example, when the FTCA was enacted, state courts were divided over whether a warden's duty to preserve the health and safety of jails and their occupants was ministerial or discretionary in nature.[45] And as the distinction developed throughout the early twentieth century, some criticized it as being largely indeterminate and unhelpful for deciding the proper scope of an officer's liability.[46] Professor Louis Jaffe described it as "a way of stating rather than arriving at the result," merely a

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which it is his duty to exercise judgment and discretion"); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 396 (Chicago, Callaghan & Co. 1879); MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 712, at 672–73 (New York, The J.Y. Johnston Co. 1892).

[40] *See* Woolhandler, *supra* note 38, at 423; THROOP, *supra* note 39, § 713, at 673–74.

[41] *See* COOLEY, *supra* note 39, at 396 ("Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself."); Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 403–04 (1852) (characterizing a military officer empowered by law with the "right to determine" whether to discharge Marines as having authority to exercise "discretion and judgment . . . in the nature of judicial discretion"); Elmore v. Overton, 4 N.E. 197, 199 (Ind. 1886) (describing "discretion" given to a local official as "analogous to a judicial discretion").

[42] *See, e.g.*, Edward G. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 277 (1937); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849) (referring to "a public officer, invested with certain discretionary powers," as "quasi judicial").

[43] *See* THROOP, *supra* note 39, § 712, at 672 (noting that ministerial officers could be held "liable to private actions for misconduct in the discharge of [those] duties confined to them"); *see, e.g.*, Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138 (1871) ("The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages . . . . There is an unbroken current of authorities to this effect."); Daniels v. Hathaway, 26 A. 970, 973 (Vt. 1893) (holding damages action against official for failing to maintain road conditions was barred because exercise of official's powers was discretionary); *Wilkes*, 48 U.S. (7 How.) at 130 (holding damages action for false imprisonment barred because officer was carrying out duties within his discretion); *Kendall*, 44 U.S. (3 How.) at 98 (holding officer not liable in damages "where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion").

[44] For example, Professor Ann Woolhandler describes the distinctions courts used between discretionary and ministerial acts as "murky and often illogical." Woolhandler, *supra* note 38, at 411.

[45] *See* M.L. Schellenger, Annotation, *Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner*, 14 A.L.R.2d 353, § 3[a]–[c] (1950).

[46] *See, e.g.*, Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963); Gellhorn & Schenck, *supra* note 36, at 729 (noting the dichotomy had not "produced a notably clear body of doctrine"); Edwin W. Patterson, *Ministerial and Discretionary Official Acts*, 20 MICH. L. REV. 848, 854–55, 858–59 (1922).

"convenient device for extending the area of nonliability without making the reasons explicit."[47] And Dean William Prosser's 1941 *Handbook of the Law of Torts* labeled it a "rather unworkable distinction."[48] But regardless of the academic disdain for the distinction, it remained alive and well in the courts. Through the early twentieth century, courts consistently employed the distinction to determine whether an officer could be held liable in damages for his misdeeds.[49]

B. The Boundaries of Common Law Discretion

Nonetheless, "discretion" at common law was not a blank permission slip. As this Part describes, even if a court found that an officer was delegated "discretionary" authority, it could still find the officer liable for his misdeeds. This is because a separate principle generally embraced at common law stated that "discretionary" officers were shielded from liability only if they did not "act wholly outside of their jurisdiction or official authority."[50]

As Professor James Pfander helpfully describes it, this "discretion" was a "zone."[51] As long as "discretionary" officers operated within that zone, they "were free to exercise their best judgment without judicial oversight."[52] But if a court determined that an officer "act[ed] beyond his jurisdiction," as the Supreme Court put it in the 1849 case *Wilkes v.*

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[47] Jaffe, *supra* note 46, at 218.

[48] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 108, at 1076 (1st ed. 1941).

[49] *See id.* at 1076–77; *see also, e.g.*, Bd. of Educ. v. Short, 213 P. 857, 861 (Okla. 1923) (holding that an act is ministerial when "the law prescribes and defines the duty to be performed with such precision as to leave nothing to the exercise of discretion or judgment" and that the Attorney General does not act ministerially as a bond commissioner because those responsibilities include "the exercise of discretion or judgment"); State v. Wade, 40 A. 104, 106 (Md. 1898) (determining whether to hold a sheriff liable in damages for negligence in permitting mob lynching of prisoner by considering whether his duties were ministerial or discretionary).

[50] PROSSER, *supra* note 48, § 108, at 1078; *accord* THROOP, *supra* note 39, § 717, at 679; JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 773, at 360 (Chicago, T.H. Flood & Co. 1889); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 26.05 (1958); Woolhandler, *supra* note 38, at 430 & n.180; Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 130 (1849) ("Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction . . . he can claim no exemption.").

Scott Keller argues that the common law articulated a further refinement, namely that "officers exercising discretionary duties lacked immunity under this exception only when there was a *clear absence* — not just when they acted in excess — of authority." Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1350 (2021). But this was likely a distinction without much of a difference. As Professor William Baude argues, in practice, courts applied the standard harshly, finding a "clear absence" of authority even in circumstances involving "good faith dispute[s]" or tricky legal determinations about whether there was jurisdiction. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 122 (2022).

[51] Pfander, *supra* note 38, at 165; *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 48 (1972) ("[I]f an officer were in fact given certain discretion, the discretion could provide no defense if his act had exceeded its bounds.").

[52] Pfander, *supra* note 38, at 157.

Dinsman,[53] that court would treat the officer "as not acting in the capacity of an officer at all"[54] but rather as merely a private citizen, stripped of any official defenses from suit.[55]

How would a court determine when an officer had stepped outside these boundaries? One cannot and should not pretend that courts were always consistent. But the common law tended to embrace the principle that an officer could exceed these bounds by contravening the Constitution.[56] That is, "discretion," no matter how broadly conferred, could not dissolve constitutional limits. This Part explores the two types of paradigmatic common law cases that illustrate this principle.

1. Suits Against Officers for Tortious Conduct. — When an individual was harmed by official misconduct at common law, they "could normally seek redress by invoking forms of action available at common law and in equity that included suits against governmental officials under ordinary tort law."[57] The claim was not pled as a constitutional violation. But the Constitution still played a role in these suits if the federal officer attempted to respond by raising defenses that were available to him by virtue of his federal official status.[58] For example, an officer might claim in defense that he was acting in his official capacity pursuant to a lawful order.[59] But if his actions nonetheless violated the Constitution, the plaintiff could argue in reply that the officer's claimed

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[53] 48 U.S. (7 How.) 89, 130 (1849).

[54] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 109, at 783 (2d ed. 1955); Engdahl, *supra* note 51, at 48; *see also* Phila. Co. v. Stimson, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded . . . . [This is] applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.").

[55] *See* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1313 (2023); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987).

[56] Pfander, *supra* note 38, at 151 ("[C]onstitutional limits played [a role] in judicial assessments of the legality of official conduct. Such limits . . . confine[d] the exercise of lawful discretion."); Engdahl, *supra* note 51, at 47 (summarizing survey of suits at common law and concluding "even for acts [an officer] was authorized-in-fact to do," he could be held personally liable "if, because of constitutional provisions . . . his authority to do those acts was legally insufficient"); Kian, *supra* note 29, at 154–55 (arguing that the common law distinguished "between unauthorized acts and discretionary acts," *id.* at 154, and that constitutional violations resulted in strict liability, *id.* at 155).

[57] Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942–43 (2019); *see also* Woolhandler, *supra* note 38, at 399.

[58] *See* Fallon, *supra* note 55, at 1313; Amar, *supra* note 55, at 1506–07.

[59] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (officer sued in trespass for accidentally seizing wrong ship raised as defense that he was acting pursuant to President's orders); Bates v. Clark, 95 U.S. 204, 204–05 (1877) (officer sued for trespass for taking wrong property "pleaded [his] official character," *id.* at 204, and that he was following orders in defense, *id.* at 205); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 116 (1852) (officer sued in trespass for seizing property "justifie[d] the taking" on grounds that he was acting pursuant to a commander's orders and also was a federal official); *see also* Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 452 (1883) ("Another class of cases is where an individual is sued in tort . . . to which his defence is that he has acted under the orders of the government. In these cases he is . . . [sued] as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.").

authority to act violated the Constitution.[60] That the officer relied on an official order in good faith was no defense; "what mattered was legality."[61] As the Supreme Court explained in the officer suit case of *Mitchell v. Harmony*,[62] a person who executes an "order to do an illegal act," such as one that violates the Constitution, has still committed an illegal act.[63] In these contexts, the constitutional violation would effectively "strip" the officer "of his official character," rendering him liable in damages for his misconduct like any ordinary citizen.[64] Many officers held liable under this scheme successfully turned to Congress, ultimately shifting the liability of judgment onto the public fisc.[65]

These principles would have done the same work in the context of officers who violated the Constitution acting pursuant to "discretionary" authority.[66] After all, an individual stripped of his official character would not have been able to invoke *any* official justification for his behavior, including that he was acting with latitude of discretion conferred to him under federal law.

2. Suits Against Officers for Enforcing Unconstitutional Statutes. — Another type of officer suit that commonly recurred at common law illustrates how the common law would have treated "discretion" as being constrained by constitutional limits. At common law, plaintiffs could bring damages suits against officers who carried out duties pursuant to unconstitutional statutes.[67] And when they did so, even officers acting in a discretionary capacity were denied the ability to invoke the unconstitutional statute in defense to such claims.[68] In such contexts, as the Supreme Court expounded in 1949, "the power has been conferred in

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60 Fallon, *supra* note 55, at 1313; *see, e.g.*, *Mitchell*, 54 U.S. (13 How.) at 137 (holding liable an officer who seized property pursuant to an order to do so because "the order given was an order to do an illegal act; to commit a trespass upon the property of another").

61 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 56 (2018).

62 54 U.S. (13 How.) 115 (1851).

63 *Id.* at 137.

64 Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1122–23 (1969); *see Mitchell*, 54 U.S. (13 How.) at 137; Amar, *supra* note 55, at 1507 ("If, but only if, plaintiff could in fact prove that the [Constitution] had been violated, defendant's shield of federal power would dissolve, and he would stand as a naked tortfeasor."); *In re* Ayers, 123 U.S. 443, 507 (1887) ("If . . . an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct.").

65 *See* Pfander & Hunt, *supra* note 30, at 1868–69.

66 *See, e.g.*, Sailly v. Smith, 11 Johns. 500, 503 (N.Y. Sup. Ct. 1814) (observing that if a federal officer authorized to act with discretion under a statute "act[ed] unwarrantably, by proceeding without probable cause, to break open a dwelling-house," "[h]is conduct . . . would make him liable, notwithstanding the law, to remunerate in damages to the owner of the house"); Imlay v. Sands, 1 Cai. 566, 573 (N.Y. Sup. Ct. 1804) (finding federal customs officer who was acting with statutorily authorized "discretion" to seize certain vessels was liable for tortious trespass for seizing the wrong ship even though he acted "according to his best judgment" because "there was no real ground for the seizure").

67 Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927).

68 *Id.* (noting this rule reflected "the great weight of authority").

form but the grant is lacking in substance because of its constitutional invalidity."[69] Scores of precedents from state courts[70] and the federal Supreme Court[71] invoked this rule. It was rooted in a basic principle: if the government enacted a statute that was unconstitutional, the government exceeded its lawful powers, and the statute would not shield the officer who acted as the government's agent from suit.[72] This practice accorded with the long-accepted premise that an unconstitutional statute is no law at all.[73]

The same principles would have applied had a statute conferred discretion on an official to act, and the official did so in a manner that contravened the Constitution. After all, a legislature that lacks the authority to *directly* authorize its agents to carry out unconstitutional acts likewise lacks the authority to do so *indirectly*. Consequently, a statute authorizing officers discretion to carry out certain acts could not have shielded those who committed unconstitutional acts in the exercise of that discretion from liability simply because the statute granted the officers latitude of judgment.[74]

The 1880 case of *Gross v. Rice*[75] is illustrative of the point. Gross sued Rice, his prison warden, for damages for false imprisonment when Rice kept him imprisoned beyond his initial sentence.[76] Rice responded by arguing that his actions were authorized by a statute allowing

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[69] Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 690 (1949).

[70] *See, e.g.*, Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 76 (1820) ("[A] judicial officer can not be punished for errors in judgment, on subjects within the scope of his authority . . . . But this does not hold good when he attempts to exercise authority when he has none, and assumes jurisdiction without any power. . . . If this doctrine be correct . . . how much more so ought it to be in a case where the constitution is violated? It is an instrument that every officer of government is bound to know and preserve, at his peril, whether his office be judicial or ministerial . . . ."); Kelly v. Bemis, 70 Mass. (4 Gray) 83, 84 (1855) (finding that magistrate judge "could derive no power or jurisdiction" from an unconstitutional statute and thus "upon familiar and well settled principles" was liable in damages); Gross v. Rice, 71 Me. 241, 252 (1880) (finding liability for prison warden who had discretion to punish under a statute that was unconstitutional).

[71] *See, e.g.*, Phila. Co. v. Stimson, 223 U.S. 605, 619–20 (1912) (observing that officers "seeking to enforce unconstitutional enactments," or "acting in excess of his authority or under an authority not validly conferred" can be held liable, *id.* at 620); Hopkins v. Clemson Agric. Coll., 221 U.S. 636, 643 (1911) (noting that officers who "proceeded under an unconstitutional statute" could be held liable, and "their justification [would] fail[], and their claim of immunity [would] disappear[]"); *see also* Scott v. Donald, 165 U.S. 58, 101 (1897) (holding personally liable in damages state constable who seized liquor under statute that was unconstitutional).

[72] Borchard, *supra* note 31, at 19–20.

[73] Norton v. Shelby County, 118 U.S. 425, 442 (1886); *see also* Pennoyer v. McConnaughy, 140 U.S. 1, 14 (1891); 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *188 (1871) ("When a statute is adjudged to be unconstitutional, it is as if it had never been.").

[74] Kian, *supra* note 29, at 155 n.100 ("[T]here is no legislative authority to authorize unconstitutional actions by immunizing those who commit them."); *cf.* Milligan v. Hovey, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605) (holding a federal statute prohibiting damages for acts done in connection with the Civil War unconstitutional as applied to claims based on unconstitutional acts).

[75] 71 Me. 241 (1880).

[76] *Id.* at 241–42.

wardens to hold prisoners beyond their sentence by the amount of time they had spent in solitary confinement for contravening prison rules.[77] The Supreme Judicial Court of Maine nonetheless found Rice liable because it held that the statute was unconstitutional.[78] It empowered Rice to deprive Gross of his liberty "without any new accusation, trial and sentence," thereby violating his right to due process of law.[79] The court conceded that "the punishment of refractory convicts is a matter within the discretion of the warden."[80] But as the court put it, "[i]t does not follow that because a warden may inflict some punishment, he may inflict any."[81] Rather, his "discretion" was subject to "limits," of which the Constitution was one.[82]

The court in *Rice* bolstered its reasoning by considering what would have occurred had the warden held Gross beyond his sentence *without* a statute authorizing him to do so.[83] The court had little difficulty concluding the result would have been the same. The warden still would have "deprive[d] the prisoner of his liberty without any process of law and without any legal excuse or justification whatever."[84] Because legislatures do not have the power to transform acts that would be unconstitutional into constitutional ones, the statute clearly could not shield the warden from liability by merely granting him "discretion."

Neither *Rice* nor its reasoning was an anomaly. As Professor Edwin Borchard summarized the existing law in 1924, "the Supreme Court has never hesitated to enjoin or otherwise control the instrument or agent of the State acting under an unconstitutional statute or, of course, acting unconstitutionally in the execution of a valid statute."[85]

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[77] *Id.* at 246.

[78] *Id.* at 252.

[79] *Id.* at 246–47.

[80] *Id.* at 248.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 247 ("Suppose the statute was not in existence, and never had been passed. Would it be pretended that the warden would be justified in detaining a convict for a single day over his sentence?").

[84] *Id.*

[85] Borchard, *supra* note 31, at 20; *see also* PROSSER, *supra* note 48, § 25, at 153–54; Larson v. Domestic & Foreign Comm. Corp., 337 U.S. 682, 690–91 (1949) (noting that the Court has "frequently" applied this principle); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944) (noting that a sovereign was constrained to carry out "its policies within the limits of the Constitution"); Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940) (applying this doctrine in the context of an officer suit for damages). To be sure, by the mid-twentieth century, courts were beginning to shed this strict liability principle. PROSSER, *supra* note 48, § 25, at 154. And when Congress enacted the FTCA, it affirmatively chose not to make the government liable in damages for tort suits predicated on an officer's execution of an invalid statute or regulation. 28 U.S.C. § 2680(a); Welch v. United States, 409 F.3d 646, 652–53 (4th Cir. 2005) (interpreting this provision as applying to unconstitutional statutes). But the point still remains. That the common law would have held officers carrying out discretionary duties pursuant to an unconstitutional statute strictly liable sheds valuable light on how the common law understood the interplay between the Constitution and discretion.

* * *

By the end of the nineteenth century, the Supreme Court began developing immunity doctrines that broke with the common law's strict liability regime, as many scholars have documented.[86] But even then, the Court did not abandon the fundamental principle that "discretion" does not transcend constitutional limits, as exemplified by the two patterns of cases described above.[87] This is why, for instance, the Supreme Court has reiterated that "[o]f course, a prosecutor's discretion is 'subject to constitutional constraints.'"[88] So when the FTCA was enacted, it codified "discretion" against a well-developed background principle that "discretion" referred only to the "discretion contemplated by law."[89]

II. THE FTCA UPSHOT

Whether the discretionary function exception applies to tortious conduct that is also a constitutional violation is one of many contested questions about the exception's meaning. The FTCA does not include a definition of the phrase "discretionary function or duty."[90] As a result, courts have long struggled to determine the exception's bounds.[91] The Supreme Court's test for determining whether the exception applies offers little additional guidance.[92] Under that test, if the conduct "involves an element of judgment or choice" "grounded in social, economic, and political policy" considerations, the exception applies.[93] But, as one treatise puts it, "the exact boundaries of the exception remain unclear."[94]

This Part argues that the common law helps to illuminate those boundaries, particularly those drawn by the Constitution. The common

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[86] *See, e.g.*, Baude, *supra* note 61, at 55–60.

[87] As Professor Richard Fallon has noted, even as the Court embraced a more expansive notion of executive official immunity in *Spalding v. Vilas*, 161 U.S. 483 (1896), it did not extend that immunity "to unconstitutional actions that would lie beyond the power of Congress or the Executive Branch to authorize." Fallon, *supra* note 57, at 946 n.46.

[88] United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).

[89] Kian, *supra* note 29, at 154.

[90] Payton v. United States, 679 F.2d 475, 479 (5th Cir. Unit B 1982) (en banc); Gray v. Bell, 712 F.2d 490, 508 (D.C. Cir. 1983) ("Literal adherence to the phrase 'discretionary function' leads to blind alleys.").

[91] 2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 12.04[1] (2021) ("Probably no other provision of the Federal Tort Claims Act has been regarded as more difficult to understand or to apply."); *see also* Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999) (noting the "disarray" of discretionary function exception jurisprudence).

[92] *See* United States v. Gaubert, 499 U.S. 315, 335 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[L]ower courts have had difficulty in applying this test."); Xi v. Haugen, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring) ("[L]ongstanding confusion shows the need for more guidance on how to apply the exception.").

[93] *Gaubert*, 499 U.S. at 322–23 (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)); United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)).

[94] 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3658.1 (4th ed.) (Westlaw) (last visited Sept. 14, 2024).

law often plays a "gap-filling role in statutory interpretation."[95] As Justice Thomas once explained, the Supreme Court "presume[s] that Congress legislates against the backdrop of the common law."[96] So when a statute uses a "term[] of art" that took on a particular meaning at common law,[97] the Court often relies on the common law as "an authoritative external source of [the statute's] meaning," just as it would a dictionary or a semantic canon.[98] The FTCA is particularly well-suited to this mode of construction. As the Supreme Court contended in 1962, "[i]t is *evident* that the Act was not patterned to operate with complete independence from . . . the common law."[99] Instead, the FTCA was devised to "build upon the legal relationships formulated and characterized by the States."[100]

A. Incorporating Common Law "Discretion" into the FTCA

"Discretion," as understood and applied at common law, would have been a familiar concept to the FTCA-enacting Congress.[101] In the decades preceding the FTCA's enactment, Congress evaluated thousands of private claims for indemnification based on tort judgments rendered against officers under the common law.[102] When Congress enacted the FTCA to replace this scheme, its primary aim was to get the legislature out of the business of considering each damages claim individually.[103] It was *not* to entirely restructure the substance of these suits — something the Supreme Court has recognized since the FTCA's

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95 Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 609 (2022).

96 Voisine v. United States, 579 U.S. 686, 706 (2016) (Thomas, J., dissenting) (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).

97 Morissette v. United States, 342 U.S. 246, 263 (1952).

98 Krishnakumar, *supra* note 95, at 612; *see, e.g.*, United States v. Hansen, 143 S. Ct. 1932, 1944 (2023) ("When Congress transplants a common-law term, the 'old soil' comes with it." (quoting Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019))). For instance, the Roberts Court has "employed the common law to construe statutory meaning at rates comparable to the rates at which [it] invoked language and grammar canons *combined*." Krishnakumar, *supra* note 95, at 639.

99 Richards v. United States, 369 U.S. 1, 6–7 (1962) (emphasis added).

100 *Id.*

101 *See* 2 JAYSON & LONGSTRETH, *supra* note 91, § 12.04 ("The discretionary function concept was a familiar one to the Congress and presumably must be construed in its familiar sense."); *cf.* Gellhorn & Schenck, *supra* note 36, at 729 ("[T]he courts have had considerable experience in determining what sorts of official conduct involve discretion of a type which may be exercised boldly without fear of later tort actions; and the present exemption is obviously intended to be of that same character." (footnote omitted)).

102 *See* Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 81 (1968) (citing 86 CONG. REC. 12018 (1940)).

103 *See* S. REP. NO. 79-1400, at 7 (1946) (clarifying Congress's goal to reduce the amount of time spent adjudicating "many local and private matters which divert its attention from national policy making and which it ought not to have to consider"); Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1, 4 (1946). The original Act was titled "More Efficient Use of Congressional Time." Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 MICH. L. REV. 341, 346 (1949).

infancy.[104] This is apparent from the way that claims under the Act piggyback off existing state tort regimes. As one treatise puts it, "the Act does not create new causes of action . . . in the sense of inventing new types of torts."[105] Rather, it simply waives sovereign immunity for tort claims available to plaintiffs suing a "private person" in the state where the act or omission occurred.[106] The Supreme Court has described the Act as "merely substitut[ing] the District Courts for Congress as the agency to determine the validity and amount of the claims" that were previously considered by private bills.[107]

Because the FTCA was written against this rich common law backdrop and "discretion" had a recognizable meaning at common law, early commentators concluded that Congress must have intentionally invoked the phrase to codify the common law doctrine of nonliability for officers exercising acts requiring discretion.[108] The Supreme Court recognized the common law doctrine's relevance when it considered the exception for the first time in *Dalehite v. United States*.[109] But the analogy did not catch hold. Struggling to define the exception's vague contours in practice, the Supreme Court began to craft various tests to liquidate the exception's meaning.[110] The result is that modern discretionary function jurisprudence is rooted in a judicially constructed test that is largely disconnected from the original meaning of the statutory text.[111] It is possible that the Court opted not to adopt the analogy this Note is propounding because many scholars and courts at the time were critical of the ministerial/discretionary model, in large part because they believed the dichotomy between the two was muddled.[112] But those criticisms, however accurate they may be, should not be a barrier to using the analogy in this context. After all, the relevant question is whether Congress incorporated the common law definition of "discretion" into the FTCA

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[104] *See* United States v. Yellow Cab Co., 340 U.S. 543, 548–49 (1951) ("[The] Act does not subject the Government to a previously unrecognized type of obligation. . . . [E]ach Congress for many years has recognized the Government's obligation to pay claims on account of [official misconduct].").

[105] 2 JAYSON & LONGSTRETH, *supra* note 91, § 9.08[1].

[106] 28 U.S.C. § 1346(b)(1); *see also id.* § 2674 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . .).

[107] *Yellow Cab*, 340 U.S. at 549.

[108] Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 545 (1947); *see, e.g.*, Gellhorn & Schenck, *supra* note 36, at 729; Glenn G. Davis, Recent Decision, *The Federal Tort Claims Act Excludes Suits Against the Government Where the Agent Is Acting in a Discretionary Capacity.*, 37 GEO. L.J. 646, 647 (1949); Coates v. United States, 181 F.2d 816, 818 (8th Cir. 1950); Cornelius J. Peck, *The Federal Tort Claims Act — A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. & STATE BAR J. 207, 209 (1956).

[109] 346 U.S. 15, 34 (1953) ("[T]he discretion of [executive officials] to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Spalding v. Vilas, 161 U.S. 483 (1986); Alzua v. Johnson, 231 U.S. 106 (1913))).

[110] *See* Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 368–72 (1995).

[111] *See* Xi v. Haugen, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring).

[112] *See supra* pp. 659–60.

at all, not whether the specific contours of the ministerial/discretionary distinction were well defined.

And there is strong evidence Congress intended the analogy. As the Supreme Court noted in *Dalehite*, Congress added the exception later on in the drafting process "as a clarifying amendment" to ensure that courts adjudicating FTCA claims would continue to employ the common law doctrine governing liability for discretionary officials.[113] The House Committee on the Judiciary was advised that, even without such clarification, "[i]t [wa]s not probable that the courts would extend a [T]ort [C]laims [A]ct into the realm of the validity of . . . discretionary administrative action," as then–Assistant Attorney General Shea explained in a House hearing.[114] Instead, the FTCA's drafters thought such cases would have been "exempted" already by "judicial construction."[115] The bill was modified only to "make [this] explicit."[116]

To be sure, the entire purpose of the discretionary function exception is to demarcate a category of cases in which the FTCA's general waiver of the *government*'s immunity from suit "shall not apply."[117] By contrast, "discretion" at common law was used to determine an *officer*'s immunity from suit. And at common law, the scope of an officer's immunity was not coterminous with the government's. When an individual officer exceeded his authority by offending the Constitution, he could be sued even though the government could not.[118] Indeed, officer suits in these cases were in effect a means of getting around the sovereign immunity of the state.[119] Sovereign immunity would not bar such a claim against the officer precisely because the officer's actions in such a situation were not "attributed to the sovereign."[120] Consequently, interpreting a waiver of sovereign immunity via an analogy to officer immunity may seem inapt.

But the analogy has a strong doctrinal basis. First, recall that Congress enacted the FTCA to contend with the relationship between sovereign immunity and officer liability at common law, as this Part has described. Because the FTCA was designed to replace the pre-FTCA

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113 *Dalehite*, 346 U.S. at 26–27 (citing *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 1, 4 (1942)); *see* Peck, *supra* note 108, at 209–10; Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 877 (1991); Gray v. Bell, 712 F.2d 490, 509 (D.C. Cir. 1983) (arguing that Congress included the exception to ensure that courts would "continue to apply preexisting common law doctrine barring claims against discretionary governmental acts").

114 *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 29, 35 (1942) (statement of Francis M. Shea, U.S. Assistant Att'y Gen.).

115 *Id.*

116 *Id.*

117 28 U.S.C. § 2680.

118 *See supra* notes 31–32 and accompanying text.

119 *See* Davis, *supra* note 32, at 435.

120 Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 457 (2005).

regime — formally transferring the liability of government officers to the government itself — it makes sense that Congress would draw on the mechanics of officer liability in crafting this regime.

Second, consider that the rationales underlying official immunity are largely the same as those justifying sovereign immunity in the modern era. Courts and commentators have long rationalized official immunity as necessary to address two distinct but interrelated concerns. The first is that without immunity, public officers would be "unduly hampered" in the execution of their duties by the threat of liability,[121] thus impeding the "effective administration of public affairs."[122] The second is that without immunity, courts would be forced to scrutinize the propriety of policymaking decisions, thereby threatening separation of powers.[123] Though sovereign immunity was originally introduced in the United States as a vestige of the English common law axiom "the King can do no wrong,"[124] it is sustained today on largely similar public policy grounds.[125] Courts have long rationalized that without sovereign immunity, the government's focus and resources would be unduly tied up in litigation, jeopardizing its ability to effectively govern.[126] Likewise, scholars have argued that sovereign immunity prevents the kind of judicial second-guessing of a coordinate branch's functions that undermines separation of powers.[127] In light of these parallels, it makes sense to draw upon the common law principles of officer immunity to interpret a statute governing the government's immunity from suit.

B. Operationalizing the FTCA's Common Law Backdrop

If we accept the premise that the FTCA's text points us toward the common law of officer immunity as a window into the meaning of the

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[121] PROSSER, *supra* note 48, § 25, at 150; *see* DAVIS, *supra* note 50, § 26.01, at 508 (explaining that the rationale for the law "conferring immunity upon administrative officers exercising discretionary powers" ensures that an officer is "free to act upon his own convictions").

[122] Barr v. Matteo, 360 U.S. 564, 570 (1959) (plurality opinion) (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)).

[123] *See* Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1312 (2002); *cf.* Owen v. City of Independence, 445 U.S. 622, 648 (1980) (describing sovereign immunity for discretionary activities as ensuring "that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government" (quoting Johnson v. State, 447 P.2d 352, 361 n.8 (Cal. 1968))).

[124] Borchard, *supra* note 31, at 2.

[125] *See* Guar. Tr. Co. v. United States, 304 U.S. 126, 132 (1938).

[126] *See id.* ("The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss . . . ." (quoting United States v. Hoar, 26 F. Cas. 329, 330 (Story, Circuit Justice, C.C.D. Mass. 1821) (No. 15,373))); Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946); Abner J. Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 828.

[127] Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 905–06 (2010) (citing Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530–31 (1992)).

discretionary function exception, where does that take us?[128] The history articulated in Part I suggests we should reject Judge Easterbrook's conclusion that "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act."[129] After all, if "discretion" at common law was understood to refer only to "constitutionally permissible discretion,"[130] one cannot disregard "constitutional theories" in determining the scope of the exception.[131] Doing so would contravene the very text of the statute.

Text-based arguments to the contrary fail upon closer inspection. First, courts have emphasized that the exception applies to all acts of discretion "whether or not the discretion involved be abused."[132] And because an officer who acts unconstitutionally has abused their discretion, the argument goes, the exception applies to such conduct.[133] Indeed, even the federal government has taken this position recently, embracing the litigating position that "application of the exception does not turn on whether the official has exercised the discretion in a permissible manner."[134] It has marshaled some dicta from the Supreme Court in support of this view.[135] But unconstitutional conduct does not "abuse" discretion; it exceeds discretion. As Part I describes, acts that violated the Constitution at common law were treated as acts taken outside the realm of the officer's discretionary authority. Acts that abuse discretion, by contrast, are merely errors in judgment, even if "monumental" and of "inexcusable proportions."[136] This is so because discretion vests officers with the power to use their authority "according to [their] own view of what is necessary and proper," creating a zone that

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[128] *Cf.* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1351 (2023) ("We need unwritten law because our legal texts sometimes point us toward it. We need to know how to accept the invitation.").

[129] Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

[130] Kian, *supra* note 29, at 154.

[131] *Linder*, 937 F.3d at 1090.

[132] 28 U.S.C. § 2680(a); *see, e.g.*, Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

[133] *See Shivers*, 1 F.4th at 930 ("[T]he language Congress chose in § 2680(a) is unqualified . . . . Congress could have adopted language that carved out certain behavior from this exception — for example . . . behavior that rises to the level of a constitutional violation. But Congress did not do so . . . ."); Ramirez v. Reddish, No. 18-cv-00176, 2020 WL 1955366, at *29 (D. Utah Apr. 23, 2020) (holding that application of the exception does not hinge on whether an officer "abused his or her discretion (by acting unconstitutionally or otherwise)").

[134] Brief for the Respondent in Opposition at 5, Shivers v. United States, 142 S. Ct. 1361 (2022) (mem.) (No. 21-682).

[135] *See id.* at 7 (citing Butz v. Economou, 438 U.S. 478, 505 (1978)). In dicta in *Butz*, the Supreme Court suggested that people could not bring FTCA claims for damages based on constitutional violations because the Act "prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused." 438 U.S. at 505.

[136] Relf v. United States, 433 F. Supp. 423, 428 (D.D.C. 1977), *aff'd*, 593 F.2d 1371 (D.C. Cir. 1979).

insulates officers who get that calculation wrong.[137] Officers step outside that zone only by engaging in conduct that removes their discretion wholesale — such as acts that violate the Constitution.

The second and third contentions can be grouped together because they rely on the same category error. The FTCA applies only to state tort claims for which a "private person" could be liable.[138] That "[t]he Constitution governs the conduct of public officials, not private ones" seems to be in tension with this premise.[139] Indeed, in *Federal Deposit Insurance Corp. v. Meyer*,[140] the Supreme Court explicitly held that a "constitutional tort claim is not 'cognizable'" under the FTCA, relying largely on the "private person" language.[141] Moreover, in 1988 Congress passed the Westfall Act, amending the FTCA to ensure it would not cover claims "brought for a violation of the Constitution."[142] But both the "private person" proviso and the Westfall Act limitation clarify the type of *claim* that can be brought under the FTCA. They say nothing about the types of arguments one can raise to defeat the government's invocation of the discretionary function exception in response to their claims.[143] A tort claim "brought for" tortious conduct is not "brought for a violation of the Constitution" just because the tortious conduct also could have been pled as a constitutional violation.[144] Rather, a tort claim is brought for a violation of rights secured by common law. In this context, then, the Constitution enters into the equation to serve not as a *basis* for the plaintiff's claim but only as a *response* to the government's attempt to rely on the exception to defeat that claim.

III. PLEADING THE "CONSTITUTIONALLY PERMISSIBLE" INTERPRETATION

If the Constitution is relevant to whether the discretionary function exception applies, what must a plaintiff plead to prevent the exception from defeating her claim?[145] The federal government has recently taken

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137 THROOP, *supra* note 39, § 713, at 674 (quoting Wilson v. Mayor of N.Y., 1 Denio 595 (N.Y. 1845)); Dalehite v. United States, 346 U.S. 15, 34 (1953). A policymaker might abuse his discretion, for instance, when he uses his discretion to issue permits to preferred parties while refusing permits to similarly situated parties. *See* United States v. Morell, 331 F.2d 498, 502 (10th Cir. 1964).

138 28 U.S.C. § 1346(b)(1).

139 Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

140 510 U.S. 471 (1994).

141 *Id.* at 477–78 (quoting Loeffler v. Frank, 486 U.S. 549, 562 (1988) (referring to 28 U.S.C. § 2679)).

142 28 U.S.C. § 2679(b)(2)(A); *see* Shivers v. United States, 1 F.4th 924, 932–33 (11th Cir. 2021) (quoting *Linder*, 937 F.3d at 1090–91) (raising this point about the Westfall Act).

143 *See* Sisk, *supra* note 6, at 1830 (making a similar argument).

144 28 U.S.C. § 2679 (b)(2)(A); Sisk, *supra* note 6, at 1800.

145 Some courts that have embraced the dominant view have saved "for another day" whether the exception applies to "violation[s] of constitutional constraints that are not already clear." Loumiet v. United States, 828 F.3d 935, 946 (D.C. Cir. 2016); *see also* C.M. v. United States, 672 F.

the position that a constitutional violation might foreclose the exception, but only if the plaintiff could show that the officer violated "a specific, clearly established constitutional directive."[146] The government derives this rule from the doctrine of qualified immunity, the modern standard of officer immunity applicable to *Bivens* claims brought against federal officers and claims brought against state officers for violations of federal law under 42 U.S.C. § 1983.[147] Under that doctrine, an officer cannot be held liable for violating the Constitution unless the constitutional violation was "clearly established."[148] Constitutional violations are clearly established only when "existing precedent" has placed the "constitutional question beyond debate."[149] The upshot of that standard is that courts can decide an officer did violate the Constitution yet still not grant the plaintiff relief if the violation was not already articulated by existing case law at the time the officer acted.[150] Ironically, the government justifies importing that standard into the discretionary function exception by arguing that "the common-law doctrine of official immunity . . . formed the backdrop to the FTCA's discretionary function exception."[151]

Supp. 3d 288, 350 (W.D. Tex. 2023) (reserving the question of whether a "clearly established" standard should apply); Nurse v. United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to" negate the exception). *But see* McElroy v. United States, 861 F. Supp. 585, 593 (W.D. Tex. 1994) (deciding that the constitutional violation "must be specific and intelligible so that the officer[] knows or should know he loses discretion when the particular circumstances arise"). Some have failed to even address this issue at all. Brief for the Respondent in Opposition, *supra* note 134, at 9 ("The First, Ninth, and D.C. Circuits . . . did not resolve the question . . . .").

146 *C.M.*, 672 F. Supp. 3d at 330; *see also* Brief for the Respondent in Opposition, *supra* note 134, at 5–6 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Brief for Appellees at 48, Xi v. Haugen, 68 F.4th 824 (3d Cir. 2023) (No. 21-2798).

147 *See* Brief for Appellees, *supra* note 146, at 48 (contending that "recognized principles of official immunity" should apply in the FTCA context (citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810 (1984); *Harlow*, 457 U.S. at 818)); *C.M.*, 672 F. Supp. 3d at 349.

148 *Harlow*, 457 U.S. at 818.

149 Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

150 *See, e.g.*, Brennan v. Dawson, 752 F. App'x 276, 278 (6th Cir. 2018) ("We hold that Dawson violated Brennan's Fourth Amendment rights . . . . Nevertheless, qualified immunity applies here because [that right] was not clearly established when the constitutional violation occurred.").

151 Brief for the Respondent in Opposition, *supra* note 134, at 5–6. The Third Circuit recently considered and rejected this proposition. *See Xi*, 68 F.4th at 840. It held instead that, "[a]t the motion-to-dismiss stage, all a plaintiff must do to negate the discretionary function exception is plausibly allege a constitutional violation." *Id.* But it did so because it found the policy reasons underlying qualified immunity inapplicable in the context of suits against the United States. *See id.* at 839–40.

Courts would be wrong to embrace the clearly established law standard in this context. Plenty of scholars[152] and even some Justices[153] have explained how the modern doctrine of qualified immunity masquerades as rooted in the common law of our early republic while being entirely inconsistent with the actual immunity regimes that predominated at common law. And as this Note has shown, officers performing "discretionary functions" at common law did not get judicial grace for tortious wrongs that violated the Constitution whenever the constitutional right was not already clearly established by law. Instead, the common law treated an officer who committed a constitutional violation despite having "discretion" as having acted beyond the limits of his discretion and thus relinquished his official status and defenses the moment he committed the unconstitutional act. That the officer acted in good faith, believing his actions were lawful, was no defense.[154]

A clearly established law requirement would also be inconsistent with how courts apply the discretionary function exception to conduct that violates federal statutes, regulations, or policies. Under modern Supreme Court precedent, "if a 'federal statute, regulation, or policy specifically prescribes a course of action'" for an officer to adhere to, the exception is inapplicable.[155] This makes sense. In such instances, the officer "has no rightful option but to adhere to the directive."[156] In other words, they lack discretion to act. But courts don't apply a clearly established law requirement when deciding whether a statute contains a specific directive that constrains an officer's authority. In fact, they are frequently forced to interpret federal statutes, policies, and regulations anew when contending with claims that the officer's conduct violated them.[157] And they don't withhold relief if there is no "existing

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[152] *See, e.g.*, Engdahl, *supra* note 51, at 14–21; Woolhandler, *supra* note 38, at 414–22; *see also* Baude, *supra* note 61, at 52–61.

[153] *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials . . . we have diverged to a substantial degree from the historical standards."); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("[S]ome evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. . . . [O]ur analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act . . . ."); *see also* Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari) (expressing a similar view).

[154] Baude, *supra* note 61, at 56.

[155] United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

[156] *Id.*

[157] *See, e.g.*, Faber v. United States, 56 F.3d 1122, 1126 (9th Cir. 1995) (finding that the government could not invoke discretionary function because the Forest Service failed to follow site management plan requiring specific actions to be taken, and interpreting that policy without citing

precedent" from other courts considering the question and thus placing the issue "beyond debate" like the clearly established law standard requires.[158] Instead, they grant relief if they determine that the official conduct was prescribed by statute or regulation — whether they are the first court to reach that conclusion or not. The same standard should apply equally to FTCA claims involving constitutional violations.

To be sure, plaintiffs should not be able to render the exception inapplicable by merely pleading that the officer's conduct implicated abstract constitutional principles. After all, that would transform the exception from a "steel" shield to a "paper" one, as one district court put it[159] — taking an exception that has been rendered overly broad by courts and turning it into one that will be overly narrow. But existing doctrines can guard against that. The discretionary function exception is jurisdictional, so the burden is on plaintiffs to prove that it does not apply.[160] This most commonly occurs at the motion to dismiss stage, when the government invokes the exception to argue that the court does not have jurisdiction over the complaint because the complained of conduct implicates a discretionary function or duty.[161] To survive this motion, plaintiffs will need to be able to make a colorable claim that is "plausible on its face" that a constitutional violation occurred.[162] Courts evaluating this argument will frequently look to existing case law and constitutional principles to determine whether such a claim is plausible.[163]

At least one court has argued that it "would make no sense whatsoever" for the FTCA to require courts to engage in such a detailed analysis from the outset to determine whether the United States is subject to suit.[164] But courts already do just that when determining whether the exception applies in any context.[165] They routinely leaf through

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existing case law interpreting the specific policy at issue); Washington v. Dep't of the Navy, 446 F. Supp. 3d 20, 26–29 (E.D.N.C. 2020) (finding that the government could not invoke the discretionary function exception because the military violated Navy Bureau of Medicine and Surgery regulations providing clear instruction about what to do with contaminated drinking water, and interpreting those regulations without citing existing controlling case law interpreting the policy).

158 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

159 McElroy v. United States, 861 F. Supp. 585, 593 (W.D. Tex. 1994).

160 *See* Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1220 (10th Cir. 2016). And if successfully pleaded, the constitutional claim would be relevant for jurisdictional purposes only. *See McElroy*, 861 F. Supp. at 593 n.16.

161 *See* Nelson, *supra* note 7, at 290.

162 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); *see also* Xi v. Haugen, 68 F.4th 824, 840 (3d Cir. 2023).

163 *See, e.g.*, C.M. v. United States, 672 F. Supp. 3d 288, 339 (W.D. Tex. 2023) (looking to circuit case law to determine whether plaintiff plausibly pleaded constitutional claim at motion to dismiss stage); S.E.B.M. *ex rel.* Felipe v. United States, 659 F. Supp. 3d 1249, 1270 (D.N.M. 2023) (same).

164 Ramirez v. Reddish, No. 18-cv-00176, 2020 WL 1955366, at *29 (D. Utah Apr. 23, 2020).

165 *See, e.g.*, *Xi*, 68 F.4th at 844 (Bibas, J., concurring) (noting that the current discretionary function exception jurisprudence requires courts to engage in a highly fact-specific determination about whether the exception applies, resulting in a "mini-trial").

National Park Service manuals and site management plans, for instance, when plaintiffs bring tort claims for accidents that occurred at national parks, looking to determine whether Park Service policies vested park officials with broad discretion.[166] Plus, district courts have long been tasked with assessing the merits of alleged constitutional violations at the pleadings stage in other contexts, such as 42 U.S.C. § 1983 suits, when the government moves to dismiss by arguing qualified immunity applies.[167] Properly interpreted, the FTCA demands no different.

CONCLUSION

Today, *Bivens* is a largely nonexistent form of relief. But the FTCA does not need to be interpreted in a way that nullifies its remedial potential as well. Congress meant something specific when it wrote the discretionary function exception into the Act. One just needs to know where to look to discern its meaning. The Supreme Court has long instructed that the FTCA was "designed to build upon" the common law that developed in the context of tort suits for officer wrongs.[168] That common law backdrop serves as a critical guide to understanding the meaning of this enigmatic exception. Once one understands that "discretion," properly constructed in light of its common law meaning, refers to "constitutionally permissible discretion," the exact boundaries of the exception become clearer. Though the discretionary function exception has been interpreted to retain the government's immunity in a breathtaking swath of cases, the proper interpretation suggests its reach should not extend to a potentially large category of cases — those in which plaintiffs can successfully plead that a constitutional violation preserves the court's jurisdiction to hear their FTCA case.

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166 *See, e.g.*, Terbush v. United States, 516 F.3d 1125, 1137 (9th Cir. 2008); S.R.P. *ex rel.* Abunabba v. United States, 676 F.3d 329, 334 (3d Cir. 2012); Faber v. United States, 56 F.3d 1122, 1126 (9th Cir. 1995).

167 To be sure, following *Pearson v. Callahan*, 555 U.S. 223, 227 (2009), courts can decide the "clearly established" question and dismiss the case on those grounds without reaching the constitutional question. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 5 (2015). Nonetheless, many courts still reach the constitutional question after *Pearson*. *See id.* at 33–34 (finding appellate courts reach the constitutional question about forty-five percent of the time); *see also, e.g.*, Shane v. County of San Diego, 677 F. Supp. 3d 1127, 1134–35 (S.D. Cal. 2023) (observing it is permissible to reach constitutional issue at motion to dismiss stage).

168 Richards v. United States, 369 U.S. 1, 6–7 (1962).